Chapter Two

For centuries war had been the standard method for settling disputes between nations and satisfying their ambitions. Once a war was over the motto was the old Roman one: 'veni victis' – woe to the conquered, because the victors could treat them as they saw fit. There were no universally accepted limits to the right of the victors to punish those who had fought against them, nor definitions of war crimes, though there was some sense of the 'laws and customs of war' and a shifting view of what was acceptable practice. The defeated might hope for leniency or even a gentlemanly acknowledgement that nasty things happen in war, but often they feared retribution for having fought at all, let alone for fighting with ferocity or means outside whatever happened to be the contemporary norm.

In the 17th century, Hugo Grotius collected and examined the various laws and customs of war, and considered what principles governed or should govern the behaviour of nations towards each other in a book called De Jure Belli et Pacis (Concerning the Laws of War and Peace). In the view of some, Grotius is the father of International Law. He wrote his book during the Thirty Years War – as savage and destructive a conflict as had ever lacerated Europe. Then, as in 1918 or 1945, actual experience of cruelty and suffering jerked people into thinking how their violence and brutality could be controlled.

Grotius was a scholar and a theorist. From the second half of the 19th century, international opinion began to demand practical action to get agreed limits on methods of fighting and to establish rules of behaviour towards those at the mercy of either side in a war. The Red Cross was founded and its right to look after the wounded was gradually recognized, then extended to such matters as the inspection of prisoner-of-war camps and bringing solace to prisoners in the form of food parcels or extra blankets. A series of Geneva Conventions was widely ratified – beginning in 1864 and developing to that of 1925 on gas and bacteriological warfare, and that of 1929 on wounded and sick prisoners-of-war. Most nations signed the 1899 and 1907 Hague Conventions laying down the rules of war on land and sea, limiting the weapons which belligerents might use, governing the opening of hostilities, and defining the rights of neutrals. By 1914, the international community had decided on definitions of crimes and certain limits on methods of fighting and the treatment of the helpless. But their decisions could not be said to have the full force of law – there were no agreed sanctions to be applied to those who broke the rules, no international courts had been established to try those accused of crimes.

In practice it was accepted that a country where war crimes had been committed could summon, try, and if need be punish those accused of them – whether they were nationals or aliens. Alternatively, the country whose subjects were accused could be left, or put under pressure, to try cases of alleged criminal behaviour.

It became clear to many, however, that these methods for dealing with war criminals were unsatisfactory. They were only applied to little men – individual brutes or subordinates ordered to commit atrocities; the leaders who condoned or encouraged the crimes tended to go scot-free. Furthermore, nations could try the war criminals they caught, but there was no way to compel other states to try their own. The inadequacy of this existing machinery was demonstrated after the First World War, and the experience of its failure and of the attempts to replace it were to influence the thinking of many during the Second World War and to shape the International Military Tribunal at Nuremburg.

From the early days of the First World War the public was fed stories of 'Hunnish atrocities'. A few of these stories contained an element of truth. Most of those about raped Belgian nuns and impaled babies did not. They had sprung from the lurid imaginations of the pressroom. They were believed partly because people wanted to believe them: they wanted a comprehensible reason for hating the Germans and fighting them. But as a result of their acceptance of the tales the public increasingly demanded more than military victory. They called not just for the punishment of German war criminals but the punishment of those in high places whom they considered guilty of formulating criminal plans and issuing criminal orders. To disentangle the facts and to try to determine whether war crimes were directed by German civil and military leaders, the Bryce Committee was set up in France. In December 1914, J.H. Morgan of the Home Office was sent to join it. This committee was dissolved in 1915. But largely on Morgan's insistence, a replacement was organized in October 1918 under Birkenhead to enquire into outrages committed by the German forces and in particular to establish the guilt of the General Staff and 'other highly-placed individuals'.

The British government was undecided about what to do once the facts were gathered, but thought the exercise might have immediate practical benefits. As Lord Milner, the Secretary for War put it, it was doubtful whether a trial should be held but meanwhile 'it would not at all be a bad thing that the offenders should think that we intended to punish them'. The committee had not intended to include the Kaiser in its brief. They regarded him as a mere figurehead and feared that to accuse him of crimes would obscure the responsibility of the real criminals. (1) The politicians, however, thought otherwise. Lloyd George raised the cry of 'Hang the Kaiser'. It was taken up and amplified by the public – hang the Kaiser, hang the
generals, hang the politicians; they caused the war, now let them suffer for it.

It was, however, characteristic of those who were trying to frame an international peace settlement at Versailles and hoping to achieve a measure of international government through a League of Nations, that rather than allow public vengeance, they preferred due legal process and international decisions. They set up a multinational committee of lawyers to draw up charges against German leaders accused of war crimes and of crimes against humanity. This committee considered adding a further charge — that of causing the war itself — but they could not agree whether causing war was actually a crime in international law. Nor could they feel certain that evidence to establish Germany's sole responsibility for the hostilities was conclusive — indeed they feared that a thorough investigation might well implicate the victors to some extent. So the lawyers dropped the idea.

The politicians promptly picked it up. They had no inhibitions about the legal niceties or the historical problems. They confidently wrote German war guilt into the Versailles Treaty and in Article 217 they accused the Kaiser himself of 'a supreme offence against international morality and the sanctity of treaties'.

The politicians ignored the lawyers' advice on another matter too. The legal committee had recommended the establishment of an international court to try the accused. This idea first fell foul of the French and Italians who would not countenance the presence of Germans or neutrals on such a tribunal. It then met dogged opposition from Lansing, the American Secretary of State and chairman of the Versailles political committee considering war crimes. Lansing felt that any trial of Germans would hamper his own pet scheme of restoring good relations with Germany as quickly as possible. After much argument among and between politicians and lawyers it was decided that a special tribunal with judges from Britain, the United States, France, Italy and Japan should be set up to try the Kaiser. In addition Article 218 of the Versailles Treaty called for a series of military tribunals to deal with those German leaders deemed to have ordered and committed acts in violation of the laws and customs of war. The accused were to be given the right to name counsel for their defence.

But even this compromise between lawyers and politicians broke down in practice. For a start it proved impossible to try the Kaiser. He refused to leave Holland where he had fled after revolution in Germany. The Dutch saw international demands to hand him over as bullying and an attempted infringement of their right as a sovereign nation to choose their own guests. In 1920, the Kaiser toyed with the idea of surrendering himself in the hope of winning better peace terms for his people. But he quickly thought better of it and decided that his conscience would not allow a divinely appointed ruler to submit to any mortal judge. He stayed in Holland until his death in 1941.

More seriously, the Allied attempt to try other Germans before military tribunals nearly caused the collapse of the peace settlement. In 1920 the German government, presented with a list of over 900 names ranging from the Crown Prince through civil and especially military chiefs, simply refused to hand them over for trial. They claimed that many in the Reichswehr preferred a renewal of war to such a capitulation. The Allies believed them and were convinced that German public opinion would back the Army. Morgan, now working with the Disarmament Commission in Berlin, was assured by one of its military members that not only was the Commission's work threatened, but so too were the lives of its members, given the ugliness of the public mood. The German press had launched a campaign of intimidation and the appeals of the Defence Minister 'not to do violence to the members of the Commission' seemed more like fanning the flames. (1) In an attempt to salvage something from the mess the Allies finally persuaded the Germans to hold their own trials of those on the Black List and to accept observers appointed by the international community.

These trials eventually opened in Leipzig late in 1922. They were a fiasco. It proved difficult to find the accused or witnesses; it was almost impossible to force them to appear. Eight hundred and eighty eight out of the 901 finally charged were acquitted or summarily dismissed. For the rest derisorily low sentences were passed. When several of the convicted escaped from prison, public congratulations were offered to the warders.

At least the First World War had introduced new thinking about the problem of dealing with war criminals, however ineffective its outcome. The idea had developed that leaders should be punished for policies which resulted in criminal acts. Lawyers had separated two strands in illegal behaviour and drawn a distinction between war crimes against and by the military and crimes against civilian populations; they had even considered the possibility that war itself might be a crime. The politicians had sensed a need for nations to co-operate in deciding what were crimes and who were criminals; some wanted to substitute an international court for the trial of a major criminal rather than leave him to the retribution of the aggrieved. But the fruit of this thinking had been bitter. In 1918 existing law, especially on whether war itself was criminal, had seemed vague and contentious. International co-operation had been invoked but not obtained. The impotence of the international community to compel a nation to try its own leaders had been exposed — even had German courts existed in 1945, it is doubtful whether anyone would have trusted them to try prominent Nazis, not after what had happened at Leipzig. The attempt to find a better way of dealing with war crimes had founded on legal and political rocks. Hopes of preventing aggression by the punitive clauses of the Treaty of Versailles and the establishment of the League of Nations failed too. But the inability to introduce international sanctions to give force to international rules after 1918 did not extinguish the desire to
establish them; lawyers and politicians from time to time gnawed at the theoretical and practical possibilities. And the renewal of war in 1939 gave impetus and urgency to their discussions.

For, undeterred by previous failure and the lack of existing machinery, every Allied nation between 1939 and 1945 demanded punishment for those who committed war crimes. Criminals of all nations were denounced. During the War both German and Allied military authorities held courts martial of their own nationals. From 1942 an Extraordinary State Commission in the USSR was investigating German war crimes in Russia; in 1943, three German officers were tried in Kharkov and shot. Inevitably once the War finished there would be many more trials and executions of individuals who had committed atrocities. Yet, even more strongly than in the First World War, there was the conviction that the enemy’s leaders constituted a criminal regime, that the incidents of atrocity were part of a deliberate policy of crime and that those who were most responsible and deserving of severest punishment were the Nazi leaders themselves. There may have been uncertainty in the Great War about who had caused it; in this one there was no doubt in Allied minds that the Nazis had planned it, then attacked every country in Europe without ultimatum and in spite of treaties and assurances. In the First World War the German General Staff and government may or may not have condoned war crimes; in the Second it was believed that the wholesale nature of such crimes could only be explained by deliberate intention and use of resources – they were way beyond the nature and number to be expected simply from the vicious behaviour of criminal individuals and groups. Furthermore there had been crimes against humanity in Germany itself and in occupied Europe which exceeded anything suffered previously and which again could only be explained as Nazi policy. In the Great War the atrocity stories had been exaggerated; during this war the scale of atrocity was, if anything, underestimated.

Even so, it was shocking enough. No matter if the full horror of the concentration camps was only understood when they were liberated, there was always at the very least an awareness that such camps held people without charge, trial or right of appeal and treated them cruelly. No one might be able yet to calculate the figures for murders, enslavement and pillage by the Nazis but partisans and Resistance workers had given enough indication of the bestial nature of Nazi rule. The Nazis themselves had publicized such outrages as the destruction of the Czech village of Lidice, the murder of its menfolk and deportation to concentration camps of its women and children – all in reprisal for the assassination of Heydrich, the Protector of Bohemia. As a French government memorandum to the European Advisory Commission on War Crimes put it: crimes were taking place on such a scale ‘by an enemy who has sought to annihilate whole nations, who has elevated murder to a political system, that we no longer have the duty of punishing merely those who commit but also those who plan the crime’. (4)

As awareness of these crimes grew throughout the War and public disgust increased, the Allied governments issued threats of punishment, both to express the general sense of revulsion and in the hope of deterring Nazis from criminal acts in the future. For the first time, the punishment of war crimes became not just the automatic result of a war but a declared official policy in fighting it. Even so, the wording of that policy remained vague for several years. There was to be much procrastination, confused thinking, tortuous negotiation, and haphazard decision before it was clarified. It was a long road between the determination to punish and the establishment of an International Military Tribunal to decide who should be punished.

In October 1941, while the United States was still neutral, President Roosevelt drew attention to the wholesale execution by the Germans of hostages in France and he warned that ‘one day a frightful retribution’ would be exacted. Later in the month Churchill joined Roosevelt in a public declaration: ‘The massacres of the French are an example of what Hitler’s Nazis are doing in many other countries under their yoke. The atrocities committed in Poland, Yugoslavia, Norway, Holland, Belgium, and particularly behind the German front in Russia, exceed anything that has been known since the darkest and most bestial ages of humanity. The punishment of these crimes should now be counted among the major goals of the war.’ (5) The governments in exile of the occupied countries of Europe joined in the outcry and threats. Warnings of punishment were also issued in response to specific incidents. The British government, for example, threatened retribution for the killing after recapture of fifty British airmen who had escaped from the prisoner-of-war camp Stalag Luft III at Sagan. During the 1944 Rising in Warsaw, they also warned the Nazis that captured Polish soldiers must be treated as lawful combatants (so entitled to protection under the Geneva convention) or justice would be exacted from them.

But who was to exact justice? Under what conditions? Was it enough after this war to fall back once again on leaving each country to try its own criminals and as many of the enemy’s as could be caught? How scrupulous would those countries be in trying those who had conquered and occupied them? As after 1918, many felt that mere revenge was not enough; that the impulse must be channelled and controlled by international action. In January 1942 the representatives of nine occupied countries in Europe held a conference at St James’s in London to discuss such questions. They issued a declaration on 13 January that: ‘international solidarity is necessary to avoid the repression of these acts of violence simply by acts of vengeance on the part of the general public and in order to satisfy the sense of justice of the civilized world.’ (6) The declaration announced that punishment for war crimes, whoever committed them, was now a principal war aim of the governments at the conference. It also made clear an additional intention: to bring to justice not only those who themselves perpetrated crimes, but
more ambitiously - those who ordered them. After this war at least it seemed that the leaders would not escape punishment. The St James's Declaration was approved by Britain, the United States and the USSR.

It had expressed disgust not only at atrocity but at the idea of mere vengeance. It implied a desire for some form of judicial proceeding to determine guilt and satisfy a sense of justice. It was an unmistakable warning to the Germans that international action was intended against war criminals and that Nazi leaders would bear their full share of responsibility. The declaration, however, was expressed in general terms. It did not come down to the nuts and bolts - no names of alleged criminals were given, no machinery for trial was outlined. The St James's Conference was followed by only one practical step. The United Nations War Crimes Commission was set up in London in 1943 to collect and collate information on war crimes and criminals. It was made up of representatives of seventeen nations - but had no Russian member. Stalin would only join if every Soviet Republic were given separate representation. This was refused.

It was a bad start to an experiment in international co-operation. From then on, things only got worse. A memorandum from Sir Cecil Hurst, the British Chairman of the Commission, sent to the Lord Chancellor's office in March 1944, said that the body was incapable of doing the job it was designed for - collecting evidence. They relied on the assistance of the governments represented and their help was not forthcoming. Hurst complained that after four months of work the Commission had only received seventy cases; half of them were so incomplete as to be useless and most were trivial.

The governments had made a lot of noise about war crimes but did not seem to be making a lot of effort to substantiate their allegations. Hurst was clearly irritated by what he regarded as laziness or incompetence. Perhaps he did not recognize the major problem of the governments he criticized: they were in exile, cut off from the scenes of the alleged crimes and without access to witnesses or documentary evidence. What worried him even more than the paucity and flimsiness of the cases presented to the Commission was the members' sense of frustration that the UNWCC was 'limited by its present terms of reference'. It was limited to investigating war crimes pure and simple. These, he said, were not the incidents which had most outraged public opinion and distressed the governments in exile. The biggest demand was for punishment of those who murdered and terrorized civilian populations (what the legal committee at Versailles had called crimes against humanity) and Hurst himself felt that it was a major priority to investigate charges of acts against Jews.

Many people too had come to believe that Nazi institutions as well as individuals were guilty of crimes. The organization most often accused of crimes against humanity was the Gestapo, and Hurst put forward a radical UNWCC proposal that not only should individuals be arrested and held for trial but that 'all members of a body like the Gestapo should be responsible for the acts of the individual members' and interned until proceedings could be instituted. (7)

Hurst's searching comments fell on deaf ears in the British government - which as host to the governments represented on the Commission could have done most to influence their attitude and its work. No steps were taken to introduce changes in the UNWCC's brief; little was done to encourage allied governments to speed up the flow of information. By the end of the year, Hurst was writing to Lord Simon, the Lord Chancellor, that he was conscious of 'a feeling of doubt in some quarters as to whether HMG really means business in connection with the policy proclaimed by the Allies of bringing war criminals to justice.' He pointed to 'the lack of effective contact between HMG and the Commission'. He blamed one body in particular for the difficulties the UNWCC was experiencing: 'In general the Foreign Office makes no response to the Commission's recommendations.' (8) Schuster, too, was critical of the attitude of the Foreign Office. He wrote to Lord Simon on 24 November 1944: 'I cannot conceal from myself the idea that the Foreign Office are not deeply interested in the subject.' He conceded that they were no doubt busy men who thought other matters more important, 'but the general impression left in my mind is that they regard the whole thing as a nuisance, but perhaps a necessary nuisance.' (9)

The murmurs of discontent at last reached the Foreign Secretary himself. Anthony Eden wrote a long letter to Hurst in December 1944 flatly denying all charges of Foreign Office neglect. He poured out soothing assurances that everything would speed up and ease as Europe was liberated. He even offered the ultimate official balm - the possibility of finding extra staff for the Commission. (10) Eden's letter did not prevent the resignation of Sir Cecil Hurst from the UNWCC in the following month. 'I have had a bit of a breakdown,' he wrote, 'and the doctors have told me that I must give it up.' (11)

The UNWCC continued to collect evidence and names of suspected criminals. It had never been asked to define crimes, consider whether distinction should be made between major and minor criminals, or to decide what form judicial proceedings against them should take.

A significant move to clarify some of these issues had been taken at the Moscow Conference of Foreign Ministers in November 1943. Here, Britain, the United States and the Soviet Union had issued a joint declaration condemning Nazi atrocities in occupied Europe. This stated that at the time of the granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi Party who have been responsible for or who have taken part in the above atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of those liberated countries and of the Free Governments which will be erected therein.'
The Moscow Declaration broke no new ground thus far; the return of criminals to the scenes of their crimes was a standard procedure. But the foreign ministers then tackled the harder questions raised at the St James’s conference – how to deal with those Nazi leaders who had condoned or ordered crimes all over Europe and the need for international solidarity in seeking their punishment. In so doing they began to categorize the war criminals and create a class of criminal leader. They stated that ‘the above declaration is without prejudice to the case of major criminals whose offences have no particular geographical location and who will be punished by a joint declaration of the Governments of the Allies’. (12) So the foreign ministers had created two groups of war criminals and proposed two forms of treatment: national action for localized offences, and international action for those whose criminal orders had applied in several countries. But there was one important omission in the Moscow Declaration – there was no mention of trial before punishment for the major criminals. Indeed talk of punishment by ‘joint declaration’ seems to preclude trial. Why was there no mention of judicial proceedings? Was it the memory of the practical difficulties and the final farce of the Versailles discussions and the Leipzig trials? Or was it that the foreign ministers reckoned that justice was too good for such men?

There is no record that Leipzig was mentioned at the Moscow Conference. There is however evidence that those present did not think the fate of leading Nazi criminals merited much time or trouble. At Moscow the US Secretary of State, Cordell Hull, actually said: ‘If I had my way I would take Hitler and Mussolini and Tojo and their accomplices and bring them before a drumhead court martial, and at sunrise the following morning there would occur an historic incident.’ (13)

At the Tehran Conference at the end of 1943 Roosevelt’s son, Elliott, gained the impression that Stalin was prepared to go even further. In the boozv atmosphere of a banquet the Russian leader gave to the other Allied statesmen, Stalin proposed a toast: ‘to the quickest possible justice for all German war criminals ... I drink to the justice of the firing squad.’ He estimated that the firing squad should rid the world of about 50,000 leading Germans, mainly military. Churchill expressed shock. Roosevelt tried to cool the atmosphere with a jovial suggestion that perhaps the number could be cut to 49,000. Stalin and Molotov then claimed that the whole idea had only been a joke. (14) Perhaps indeed it was. When discussing policy on official occasions Stalin always recommended that war criminals be given a judicial hearing before (inevitably) being shot. Churchill, on the other hand, can only have been shocked by Stalin’s proposal because of the huge number of executions suggested, not the method. For a long time his government would argue against any form of trial and would favour some kind of dressed-up summary execution.

By the end of the war many people would have been content with summary execution, naked and unashamed. The public would have found it easy to draw up lists of ogres who had haunted the imagination in recent years; their deaths would have occasioned little soul-searching. The shock expressed when Mussolini and his mistress, Clara Petacci, were shot by Italian partisans in 1945 came less from the fact that they had been summarily executed than because their bodies was first hung upside down from lamp-posts, then left to lie in the gutter. There are, it seems, a few decencies which ought to be observed even in a lynching. And ‘summary execution’ is really a euphemism for lynching. When in March 1945 Anthony Eden, the British Foreign Secretary, was asked in the House of Commons whether when a British soldier met Hitler it would be his duty to shoot him or take him alive Eden replied: ‘I am quite satisfied to leave the decision to the British soldier concerned.’ (15) This was veiled encouragement to lynch. Eden had implied that he did not mind what the soldier did. Yet the law is categorical – it is any soldier’s duty to take and keep a prisoner-of-war alive, however notorious he may be.

Cordell Hull’s idea of a drumhead court martial only applied a little cosmetic to the procedure of shooting out of hand. This roughest form of justice would allow several minutes to be spent establishing that the prisoner really was the Adolf Hitler or whoever, and the charges to be read to him to explain why he was about to be shot; and would provide the court with the authority to give orders to a firing squad. When the British Foreign Office was considering this method with some enthusiasm in 1944, it reckoned that the whole process from the moment of arrest would be over and done within six hours. (16)

Others considering what to do with major war criminals rejected the solution of short, sharp military action. Eden changed his mind about it from time to time. On one occasion he might suggest lynching Hitler, but he told a meeting of the Prime Ministers of Belgium, Czechoslovakia and Poland, and the Foreign Ministers of Greece, Luxembourg, the Netherlands, Norway, Yugoslavia and France in 1942 that the disposal of Hitler and other principals should ‘be settled as a matter of high policy’. (17) This indicated that at this moment he saw the responsibility for dealing with top criminals as a political rather than a military or indeed legal matter. Those who shared his views argued that since the charge against Hitler and his colleagues was not based on a series of isolated incidents but on the totality of their acts, since the aim in punishing them was to give expression to international condemnation of their entire policy and to cleanse the moral atmosphere of their polluting presence, then what was involved was a political indictment and what was appropriate was political, executive action by the international community. Underlying this argument was the belief that no kind of hearing was required to establish guilt – as the Lord Chancellor put it: ‘Fancy “trying” Hitler!’ (18) Many felt his guilt and that of his leading associates did not need proving. What was left to the international community was to settle punishment. In Lord Simon’s view that was not a question to be left to ‘a posse of jurists”; it was a responsibility for world leaders, and they could look to history for an example of successful international action.
For there was a precedent for executive action by allies against a former enemy whose acts seemed abhorrent: that of Napoleon. His case offered interesting parallels with the problems faced after the Second World War and persuasive arguments for those who favoured joint political decision on the fate of major war criminals.

When Napoleon escaped from Elba, broke the terms of the 1814 Treaty of Fontainebleau, and marched again on Europe, he was declared ‘hors la loi’ by the representatives of all the European states attending the peace negotiations at Vienna (significantly France herself was one). A unanimous condemnation having been passed, the states then had to decide what to do about the man they had outlawed. The Prussian military leader, Blücher, said he would shoot the Emperor if he fell into Prussian hands (lynch him). The Russians pressed for summary execution (drumhead court martial perhaps). Finally, however, the Powers agreed to exile Napoleon permanently on St Helena. Here he would be out of harm’s way and kept at British expense without incurring the embarrassment of executing a sovereign. (All European rulers had condemned the execution of Louis XVI and did not want their subjects to imagine that killing rulers was an acceptable way of expressing their opinion of them.) This was a decision reached by the entire European community (including France) — and it was a purely political decision. No one had seriously considered a trial for Napoleon; it was not deemed necessary since his crimes seemed self-evident, condemnation was universal, and the European statesmen had no qualms about punishing him for them.

However, the idea of a form of trial for major Nazi war criminals was attractive to many even though the form they favoured might seem repugnant to others. There were recognized advantages in more recent precedents than that of Napoleon — show trials. Stalin had punished his opponents and frightened others by the trials he had mounted in the 1930s; Hitler had made a public spectacle out of the trial of those who had plotted against his life in July 1944. Should the nations now decide on a show trial for Nazi war criminals, they could present massive evidence of their guilt to convince any wavering public opinion, to put on record their abhorrence of the crimes and to justify the inevitable punishment. In a show trial it is even possible to allow a little defence — just enough to demonstrate how feeble it is.

There was one final option open for those who were shocked by the roughness of military justice, convinced that executive action is no justice at all, and worried by the practical problems, political repercussions and moral implications of punishing war criminals. It was to do nothing at all. For those whose consciences were too tender to throw the first stone, it was appealing to tell the targets of international loathing to go away and sin no more. Doing nothing could become a high moral stance. Refusal to assess guilt, degrees of responsibility or mitigating circumstances not only spared effort, it could be seen as a sign of greater moral sensitivity than that displayed by people demanding punishment. The chances were, of course, that alleged criminals whose guilt it was apparently immoral to determine would simply be lynched by those who had suffered as a result of their crimes. But then the blood would be on the hands of the lynchers, not on the hands of those who claimed moral courage in avoiding decision lest it prove painful to themselves.

Before the end of the war, each of these different possible ways of dealing with top Nazi war criminals had some vocal support. But what sort of basis did any of them offer for the new and better world which many believed they had been fighting for? How could they be reconciled with the indignation expressed during the War at Nazi ruthlessness and disregard for existing laws and civilized standards? How could those who expressed concern for the rule of law or claimed superior moral sensitivity stomach mob rule and lynching? For lynching is what virtually everyone expected would be the mass instinct once the War finished. It was to stop the people as well as nations taking the law into their own hands that the St James’s Conference had called for international action to avoid mere vengeance and to satisfy a sense of justice. People’s grievance and bitterness were recognized, but lynching is revolting and uncontrollable. If it is accepted as the natural and indeed the justifiable expression of the people’s anger, where should the lines be drawn? Is it justified for a week, a month, a year? Who deserves lynching and for what? Is law and order to be restored after thelynchers have murdered 50,000, or only after every public and private grudge has been settled?

There are objections too against all the other canvassed solutions to the problem of top war criminals. Can military action either by a soldier with a captive in a ditch, or by a drumhead court martial, be seen as much more than institutionalized lynching? Military action certainly carries worrying implications. To kill out of hand German prisoners-of-war for killing Allied prisoners-of-war can be seen as breaking the very Geneva Convention being invoked. Should the military be asked to accept the responsibility for mistaken identity or the possibility that the rumour of a man’s guilt is unfounded?

The politicians might be willing to take the responsibility from the soldiers, but they had had problems enough reaching a common decision on the fate of Napoleon — agreement over a long list of Nazis would multiply the problems. And executive action might create martyrs — arguably the reputations of Napoleon, Louis XVI or Charles I were glamourized by their politically ordained punishment and no one wanted to create myths around the leading Nazis. Carefully worded official briefs explaining and justifying executive punishment might well be dismissed as propaganda, hiding the victors’ spleen against their former opponents. There are better ways of showing the strength of indignation at crimes and the determination of nations to punish those who transgress the rules of the international community than by issuing press handouts after a firing squad.
generals, hang the politicians; they caused the war, now let them suffer for it.

It was, however, characteristic of those who were trying to frame an international peace settlement at Versailles and hoping to achieve a measure of international government through a League of Nations, that rather than allow public vengeance, they preferred due legal process and international decisions. They set up a multinational committee of lawyers to draw up charges against German leaders accused of war crimes and of crimes against humanity. This committee considered adding a further charge—that of causing the war itself—but they could not agree whether causing war was actually a crime in international law. Nor could they feel certain that evidence to establish Germany’s sole responsibility for the hostilities was conclusive—indeed they feared that a thorough investigation might well implicate the victors to some extent. So the lawyers dropped the idea.

The politicians promptly picked it up. They had no inhibitions about the legal niceties or the historical problems. They confidently wrote German war guilt into the Versailles Treaty and in Article 231 they accused the Kaiser himself of ‘a supreme offence against international morality and the sanctity of treaties’.

The politicians ignored the lawyers’ advice on another matter too. The legal committee had recommended the establishment of an international court to try the accused. This idea first fell foul of the French and Italians who would not countenance the presence of Germans or neutrals on such a tribunal. It then met dogged opposition from Lansing, the American Secretary of State and chairman of the Versailles political committee considering war crimes. Lansing felt that any trial of Germans would hamper his own pet scheme of restoring good relations with Germany as quickly as possible. After much argument among and between politicians and lawyers it was decided that a special tribunal with judges from Britain, the United States, France, Italy and Japan should be set up to try the Kaiser. In addition Article 238 of the Versailles Treaty called for a series of military tribunals to deal with those German leaders deemed to have ordered and committed acts in violation of the laws and customs of war. The accused were to be given the right to name counsel for their defence.

But even this compromise between lawyers and politicians broke down in practice. For a start it proved impossible to try the Kaiser. He refused to leave Holland where he had fled after revolution in Germany. The Dutch saw international demands to hand him over as bullying and an attempted infringement of their right as a sovereign nation to choose their own guests. In 1920, the Kaiser toyed with the idea of surrendering himself in the hope of winning better peace terms for his people. But he quickly thought better of it and decided that his conscience would not allow a divinely appointed ruler to submit to any mortal judge. He stayed in Holland until his death in 1941.

More seriously, the Allied attempt to try other Germans before military tribunals nearly caused the collapse of the peace settlement. In 1920 the German government, presented with a list of over 900 names ranging from the Crown Prince through civil and especially military chiefs, simply refused to hand them over for trial. They claimed that many in the Reichswehr preferred a renewal of war to such a capitulation. The Allies believed them and were convinced that German public opinion would back the Army. Morgan, now working with the Disarmament Commission in Berlin, was assured by one of its military members that not only was the Commission’s work threatened, but so too were the lives of its members, given the ugliness of the public mood. The German press had launched a campaign of intimidation and the appeals of the Defence Minister ‘not to do violence to the members of the Commission’ seemed more like fanning the flames. (2) In an attempt to salvage something from the mess the Allies finally persuaded the Germans to hold their own trials of those on the Black List and to accept observers appointed by the international community.

These trials eventually opened in Leipzig late in 1922. They were a fiasco. It proved difficult to find the accused or witnesses; it was almost impossible to force them to appear. Eight hundred and eighty eight out of the 901 finally charged were acquitted or summarily dismissed. For the rest derisorily low sentences were passed. When several of the convicted escaped from prison, public congratulations were offered to the warders. (3)

At least the First World War had introduced new thinking about the problem of dealing with war criminals, however ineffective its outcome. The idea had developed that leaders should be punished for policies which resulted in criminal acts. Lawyers had separated two strands in illegal behaviour and drawn a distinction between war crimes against and by the military and crimes against civilian populations; they had even considered the possibility that war itself might be a crime. The politicians had sensed a need for nations to co-operate in deciding what were crimes and who were criminals; some wanted to substitute an international court for the trial of a major criminal rather than leave him to the retribution of the aggrieved. But the fruit of this thinking had been bitter. In 1918 existing law, especially on whether war itself was criminal, had seemed vague and contentious. International co-operation had been invoked but not obtained. The impotence of the international community to compel a nation to try its own leaders had been exposed—even had German courts existed in 1945, it is doubtful whether anyone would have trusted them to try prominent Nazis, not after what had happened at Leipzig. The attempt to find a better way of dealing with war crimes had fooundered on legal and political rocks. Hopes of preventing aggression by the punitive clauses of the Treaty of Versailles and the establishment of the League of Nations failed too. But the inability to introduce international sanctions to give force to international rules after 1918 did not extinguish the desire to
For there was a precedent for executive action by allies against a former enemy whose acts seemed abhorrent: that of Napoleon. His case offered interesting parallels with the problems faced after the Second World War and persuasive arguments for those who favoured joint political decision on the fate of major war criminals.

When Napoleon escaped from Elba, broke the terms of the 1814 Treaty of Fontainebleau, and marched again on Europe, he was declared ‘bou le loi’ by the representatives of all the European states attending the peace negotiations at Vienna (significantly France herself was one). A unanimous condemnation having been passed, the states then had to decide what to do about the man they had outlawed. The Prussian military leader, Blücher, said he would shoot the Emperor if he fell into Prussian hands (lynch him). The Russians pressed for summary execution (drumhead court martial perhaps). Finally, however, the Powers agreed to exile Napoleon permanently on St Helena. Here he would be out of harm’s way and kept at British expense without incurring the embarrassment of executing a sovereign. (All European rulers had condemned the execution of Louis XVI and did not want their subjects to imagine that killing rulers was an acceptable way of expressing their opinion of them.) This was a decision reached by the entire European community (including France) — and it was a purely political decision. No one had seriously considered a trial for Napoleon; it was not deemed necessary since his crimes seemed evident, condemnation was universal, and the European statesmen had no qualms about punishing him for them.

However, the idea of a form of trial for major Nazi war criminals was attractive to many even though the form they favoured might seem repugnant to others. There were recognized advantages in more recent precedents than that of Napoleon — show trials. Stalin had punished his opponents and frightened others by the trials he had mounted in the 1930s; Hitler had made a public spectacle out of the trial of those who had plotted against his life in July 1944. Should the nations now decide on a show trial for Nazi war criminals, could they present massive evidence of their guilt to convince any wavering public opinion, to put on record their abhorrence of the crimes and to justify the inevitable punishment. In a show trial it is even possible to allow a little defence — just enough to demonstrate how feeble it is.

There was one final option open for those who were shocked by the roughness of military justice, convinced that executive action is no justice at all, and worried by the practical problems, political repercussions and moral implications of punishing war criminals. It was to do nothing at all. For those whose consciences were too tender to throw the first stone, it was appealing to tell the targets of international loathing to go away and sin no more. Doing nothing could become a high moral stance. Refusal to assess guilt, degrees of responsibility or mitigating circumstances not only spared effort, it could be seen as a sign of greater moral sensitivity than that displayed by people demanding punishment. The chances were, of course, that alleged criminals whose guilt it was apparently immoral to determine would simply be lynched by those who had suffered as a result of their crimes. But then the blood would be on the hands of the lynchers, not on the hands of those who claimed moral courage in avoiding decision lest it prove painful to themselves.

Before the end of the war, each of these different possible ways of dealing with top Nazi war criminals had some vocal support. But what sort of basis did any of them offer for the new and better world which many believed they had been fighting for? How could they be reconciled with the indignation expressed during the war at Nazi ruthlessness and disregard for existing laws and civilized standards? How could those who expressed concern for the rule of law or claimed superior moral sensitivity stomach mob rule and lynching? For lynching is what virtually everyone expected would be the mass instinct once the war finished. It was to stop the people as well as nations taking the law into their own hands that the St James’s Conference had called for international action to avoid mere vengeance and to satisfy a sense of justice. People’s grievance and bitterness were recognized, but lynching is revolting and uncontrollable. If it is accepted as the natural and indeed the justifiable expression of the people’s anger, where should the lines be drawn? Is it justified for a week, a month, a year? Who deserves lynching and for what? Is law and order to be restored after the lynchers have murdered 10,000, or only after every public and private grudge has been settled?

There are objections too against all the other canvassed solutions to the problem of top war criminals. Can military action either by a soldier with a captive in a ditch, or by a drumhead court martial, be seen as much more than institutionalized lynching? Military action certainly carries worrying implications. To kill out of hand German prisoners-of-war for killing Allied prisoners-of-war can be seen as breaking the very Geneva Convention being invoked. Should the military be asked to accept the responsibility for mistaken identity or the possibility that the rumour of a man’s guilt is unfounded?

The politicians might be willing to take the responsibility from the soldiers, but they had had problems enough reaching a common decision on the fate of Napoleon — agreement over a long list of Nazis would multiply the problems. And executive action might create martyrs — arguably the reputations of Napoleon, Louis XVI or Charles I were glamourized by their politically ordained punishment and no one wanted to create myths round the leading Nazis. Carefully worded official briefs explaining and justifying executive punishment might well be dismissed as propaganda, hiding the victors’ spleen against their former opponents. There are better ways of showing the strength of indignation at crimes and the determination of nations to punish those who transgress the rules of the international community than by issuing press handouts after a firing squad.
not focus on this unspeakable ghastliness. It may also be that the idea of mass extermination was so far outside the traditional comprehension of most Americans that we instinctively refused to believe in its existence.' (24) (A European might like to add that the idea of mass extermination was way beyond the comprehension of anyone; it is still difficult to grasp.)

America, thanks to geography, had been insulated against the horrors of the War. Only in December 1944 did the American public have its first direct experience of Nazi brutality. Seventy American prisoners-of-war were shot by the First SS Panzer Regiment at Malmedy in Belgium. Before Malmedy such crimes had been committed against other people, not Americans. The question of war crimes could be seen as remote and rather abstract; now it was painfully real. And as the Allied armies advanced through Europe and into Germany the concept of crimes against humanity took on meaning as well. Newsreels showed the squalor and degradation of the slave labour camps and the horror of the gas chambers; newspapers were filled with stories of the conditions suffered by prisoners-of-war, eyewitness accounts of extermination squads, the piles of corpses discovered by the liberating armies in the concentration camps. A telegram from the British ambassador in Washington, Lord Halifax, told the Foreign Office in April that the American Press had been full of such reports for weeks; there had been a call in the House of Representatives to speed up the work of the UNWCC. (25) The public put more pressure on the politicians after a visit to Buchenwald and Dachau concentration camps by sixteen newspaper editors and publishers in May and similar tours by Senators and Congressmen at the same time. The British Embassy reported that their stories had received ‘wide and sustained publicity’, unequalled by any other coverage. Those visitors had all reached the same conclusion - that the Nazis had had ‘a master plan ... based on a policy of calculated and organized brutality’. They all called for speedy action by the United Nations. (26)

So too did the general public. The National Opinion Research Centre of the University of Denver had carried out a small poll at the end of 1944 and in January 1945 to discover how Americans viewed Germans. They found that a large section of the population had friendly feelings towards them (though the more educated tended to be harsher); most people spoke of a need for ‘re-education’, approved of sending relief to the Germans, objected to the country’s dismemberment and hoped the Allies would help to rebuild German peacetime industry. (27) But by the middle of the year many of those friendly feelings had evaporated. In the view of the British Embassy in Washington the newspaper reports and the newsreels had made the American public think again. They were thinking of punishment.

There had been clamour for a clearly defined policy from other quarters too. Once Europe was invaded by the Allies governments in exile feared, rightly, that Hitler would inflict a final programme of death and destruction in their countries as he was forced to withdraw his troops. They called for specific declarations by all the Powers on how such action would be punished. Jewish organizations hoped to save some of the Jews still in Nazi hands. They lobbied governments to issue threats of retribution for any future murders.

The governments of the major powers resisted public outcry and military requests for a long time. Until the invasion of Europe it had been possible to haver and to defer any concrete decisions on the treatment of major war criminals. Indeed, it could be seen as desirable to postpone a decision. They expected German maltreatment of Allied prisoners-of-war if they emphasized at this stage the intention of punishing Nazi war criminals. This was the reason for stopping the war crimes trials in Sicily in 1943 and the Anglo-American decision in 1944 not to segregate suspects in their prisoner-of-war camps.

However, as public opinion grew more bitter, and once the Allied armies crossed into Germany itself and top Nazis began to fall captive, the statesmen could delay no longer. They were aware that their stories had reached the American public and in January 1945 found there had been a large number of those friendly feelings had evaporated. In the view of the British Embassy in Washington the newspaper reports and the newsreels had made the American public think again. They were thinking of punishment.

There had been clamour for a clearly defined policy from other quarters too. Once Europe was invaded by the Allies governments in exile feared, rightly, that Hitler would inflict a final programme of death and destruction in their countries as he was forced to withdraw his troops. They called for specific declarations by all the Powers on how such action would be punished. Jewish organizations hoped to save some of the Jews still in Nazi hands. They lobbied governments to issue threats of retribution for any future murders.

The governments of the major powers resisted public outcry and military requests for a long time. Until the invasion of Europe it had been possible to haver and to defer any concrete decisions on the treatment of major war criminals. Indeed, it could be seen as desirable to postpone a decision. They expected German maltreatment of Allied prisoners-of-war if they emphasized at this stage the intention of punishing Nazi war criminals. This was the reason for stopping the war crimes trials in Sicily in 1943 and the Anglo-American decision in 1944 not to segregate suspects in their prisoner-of-war camps.

However, as public opinion grew more bitter, and once the Allied armies crossed into Germany itself and top Nazis began to fall captive, the statesmen could delay no longer. They were aware that their stories had reached the American public and in January 1945 found there had been a large number of those friendly feelings had evaporated. In the view of the British Embassy in Washington the newspaper reports and the newsreels had made the American public think again. They were thinking of punishment.

There had been clamour for a clearly defined policy from other quarters too. Once Europe was invaded by the Allies governments in exile feared, rightly, that Hitler would inflict a final programme of death and destruction in their countries as he was forced to withdraw his troops. They called for specific declarations by all the Powers on how such action would be punished. Jewish organizations hoped to save some of the Jews still in Nazi hands. They lobbied governments to issue threats of retribution for any future murders.

The governments of the major powers resisted public outcry and military requests for a long time. Until the invasion of Europe it had been possible to haver and to defer any concrete decisions on the treatment of major war criminals. Indeed, it could be seen as desirable to postpone a decision. They expected German maltreatment of Allied prisoners-of-war if they emphasized at this stage the intention of punishing Nazi war criminals. This was the reason for stopping the war crimes trials in Sicily in 1943 and the Anglo-American decision in 1944 not to segregate suspects in their prisoner-of-war camps.

However, as public opinion grew more bitter, and once the Allied armies crossed into Germany itself and top Nazis began to fall captive, the statesmen could delay no longer. They were aware that their stories had reached the American public and in January 1945 found there had been a large number of those friendly feelings had evaporated. In the view of the British Embassy in Washington the newspaper reports and the newsreels had made the American public think again. They were thinking of punishment.

There had been clamour for a clearly defined policy from other quarters too. Once Europe was invaded by the Allies governments in exile feared, rightly, that Hitler would inflict a final programme of death and destruction in their countries as he was forced to withdraw his troops. They called for specific declarations by all the Powers on how such action would be punished. Jewish organizations hoped to save some of the Jews still in Nazi hands. They lobbied governments to issue threats of retribution for any future murders.

The governments of the major powers resisted public outcry and military requests for a long time. Until the invasion of Europe it had been possible to haver and to defer any concrete decisions on the treatment of major war criminals. Indeed, it could be seen as desirable to postpone a decision. They expected German maltreatment of Allied prisoners-of-war if they emphasized at this stage the intention of punishing Nazi war criminals. This was the reason for stopping the war crimes trials in Sicily in 1943 and the Anglo-American decision in 1944 not to segregate suspects in their prisoner-of-war camps.

However, as public opinion grew more bitter, and once the Allied armies crossed into Germany itself and top Nazis began to fall captive, the statesmen could delay no longer. They were aware that their stories had reached the American public and in January 1945 found there had been a large number of those friendly feelings had evaporated. In the view of the British Embassy in Washington the newspaper reports and the newsreels had made the American public think again. They were thinking of punishment.

References for Chapter Two

1 Letter and memorandum to the Lord Chancellor's Office from J.H. Morgan, 19 March 1940. LCO 2. 2972
2 Ibid
3 Much of this section on Versailles and the Leipzig Trials is based on the two draft chapters which Sir John Wheeler-Bennett wrote for a projected history of the Nuremberg Trial and which is now in the library of St Antony's College, Oxford. Details have been added from the memorandum of J.H. Morgan and from the report of the International Commission for Penal Reconstruction and Development, July 1943. LCO 2. 2973
4 French memorandum to European Advisory Commission on War Crimes, 21 February 1945. LCO 2. 2978
5 Both quotations appear in the transcript of the Nuremberg Trial. IMT Vol. V
6 Quoted by Telford Taylor in an article in International Conciliation No. 450. April 1949 and elsewhere
7 Memorandum from Sir Cecil Hurst, 30 March 1944. LCO 2. 2976
8 Letter from Hurst to Simon, 22 November 1944. LCO 2. 2976
9 Letter from Schuster to Simon, 24 November 1944. LCO 2. 2976
10 Letter from Eden to Hurst, December 1944. LCO 2. 2976
11 Letter from Hurst to Simon, 3 January 1945. LCO 2. 2976
12 Telford Taylor article op. cit.
13 Minutes of Bohlen, quoted by the then Sir Hartley Shawcross in Tribute to Jackson, address to the New York Bar Association 1961
14 Quoted by Heydecker
15 Ibid
From the draft chapters prepared by Patrick Dean for Sir John Wheeler-Bennett's proposed history

Minutes of meeting at the Foreign Office, 6 August 1942. LCO 2. 1974

Simon to Eden commenting on a Cabinet Paper, May 1944. LCO 2. 1976

Schuster to Morgan, 27 November 1941. LCO 2. 1972

Wright to Churchill, 12 September 1944. LCO 2. 1976

Eden to Hurst, 18 October 1944. LCO 2. 1976

FO 571. 51019

FO 571. 51023

George Ball, *The Past has Another Pattern*

FO 571. 51018

FO 571. 51023

Forwarded to the Foreign Office from the British Embassy in Washington, 8 June 1945. FO 571. 51026
Chapter Four

The impetus to establish an international tribunal to try these major Nazi war criminals had come from America. It was accelerated by the outcry over the Malmedy massacre and direct experience of other atrocities once American forces invaded Europe, but it had begun and was sustained by the debate over the post-war settlement of Germany and Europe. Indeed it can almost be said that the Nuremberg Tribunal originated in an inter-departmental row in Washington over plans for the future of conquered Germany. (1)

Tentative thinking about what should ultimately be done with Germany had started in March 1943 when the American President, Franklin Roosevelt, asked his Secretary for War, Henry Stimson, and his Secretary of State, Cordell Hull, to outline their views. Both men had agreed that the Allies should insist on Germany's unconditional surrender, full Allied military occupation, de-Nazification, disarmament, and the dismantling of war industries. Neither wished to destroy German industry as a whole - they saw a tolerable standard of living as an essential condition for a flourishing future German democracy - and the only slight difference between them was that Hull thought subsistence adequate whereas Stimson preferred to allow for something slightly more comfortable.

These suggestions were not taken up by the President. While Allied victory remained a distant prospect, he preferred to devote his time and energy to winning the War rather than considering the peace. Thereafter, once Europe was invaded, he became increasingly sensitive to the argument that this time Germany must be taught more thoroughly than in 1918 the lesson of what happened to those who started and lost wars; he also became alert to public demands for punitive action against war criminals.

In this mood Roosevelt rejected two occupation policy guidelines which had been drawn up by the War Department in the autumn of 1944 for the use of the military, on the grounds that they were too lenient towards the Germans. He was prepared to lend a ready ear to strongly contrasting proposals from another member of his government.

In the United States Treasury, the Secretary, Henry Morgenthau, conceived and nurtured from August 1944 a dreadful retribution to be visited on Germany. The country which had waged war on Europe, exploited its peoples and resources, committed atrocities and exterminated millions, was to be torn to shreds. Germany must suffer - and must never again be capable of causing suffering to others. Under Morgenthau's plan, Germany must be demilitarized: the stern limitations on her armed services and armaments imposed by the Versailles Settlement in 1919 had not been enough - Germany had insisted on the right to defend herself, broken her Treaty obligations, and used her restored military might to subjugate and destroy Europe. This time demilitarization must be total and permanent. The Nazi Party had imposed a totalitarian regime on Germany, then used its country's strength to extend its evil doctrines over Europe. The Nazi Party must be destroyed: Germany must be de-Nazified, its officials at all levels of government and administration must be removed from their posts and interned. In view of their treatment of others it seemed fitting that they should in their turn be exploited - let them now be directed to forced labour, repairing some of the damage they had caused in Europe. Above all, Morgenthau saw German industry as the source of that country's seeming capacity for evil. German industrialists had backed Hitler, enthusiastically joined the Nazi Party in its schemes and finally and fatally provided the material for a second war. So German industry must be destroyed. For ever. Germany must be pastoralized: the country stripped of its military might to subjugate and must be total and permanent.

The Nazi Party was de-Nazified, its officials at all government posts interned. In the debate over the post-war settlement of Germany, (1)
Stimson's criticisms of Morgenthau's plan for the Germans did not, however, involve any softness towards war criminals. He wanted to substitute more discriminating methods; to shift the approach from one based purely on punishment to one aimed at some degree of rehabilitation. He was unwilling to criminalize the entire German nation, but saw a therapeutic value in punishing internationally recognized war criminals: cleanse the German body politic to obtain a healthy partner for the future.

On 1 September 1944, Secretary Stimson sent a memorandum to the President and to Morgenthau: 'It is primarily by the thorough apprehension, investigation and trial of all the Nazi leaders and instruments of the Nazi system of terrorism such as the Gestapo, with punishment delivered as promptly, swiftly and severely as possible, that we can demonstrate the abhorrence which the world has for such a system and bring home to the German people our determination to extirpate it and its fruits forever.' Given Stimson's views on establishing international legality, there could only be one way in which this lesson could be delivered to the Germans and in which other nations could share in the educative process. Stimson wrote to Roosevelt on 9 September: '... the very punishment of these men in a dignified manner consistent with the advance of civilization will have the greater effect on posterity ... I am disposed to believe that, at least as to the chief Nazi officials, we should participate in an international tribunal constituted to try them.' (2) In taking this stand, Stimson had not only revived the scheme devised by the lawyers at Versailles, he had added his voice to those who had called for international action in the St James's Declaration.

It was apparent, then, that though the aim of Morgenthau and Stimson was the same – lasting peace – the methods they wanted to use and the principles behind their thinking were as far apart as they could be. There was little chance they could be persuaded to co-operate and reach a compromise. Stimson was seldom troubled by spasms of doubt. He regarded the voice of his conscience as the most reliable guide and on this issue he had heard it loud and clear. Morgenthau was a more flexible character and in nearly all his dealings a man of warmth and generosity. But he was prepared to dig in his heels over this issue and argue passionately for rigorous punishment for Germany. The two men had one thing in common – both had viewed aspects of German life with some dislike for many years. Stimson had hated Prussianism in the Great War and had thoroughly enjoyed fighting it for seven months in France. Morgenthau had been deeply shocked at the same time by what he saw as a tendency to resort to brutality among the German officials he met while staying at his father's embassy in Turkey.

From then, however, their views had diverged. Stimson might have opposed the Covenant of the League of Nations in 1919, but he had been influenced strongly by the views of Elihu Root, head of the law firm he had joined as a young man, and championed instead a World Court and the increased effectiveness of international law to control relations between states. For Stimson, the defeat of Germany in 1945 seemed to offer the chance of advancing this cause. Morgenthau, on the other hand, was more influenced by memories of the 1930s when he had been appalled by what he saw as the timorousness of American policy towards Japanese militarism and European fascism. He had urged a strong line then; from the time of the Sudetenland crisis he had called for positive aid to France and Britain; after Munich he had demanded readiness for war. He felt the result of ignoring his advice had been disastrous. Soft words and conciliatory action had not secured the peace in 1939; Morgenthau was certain they would not be adequate bases for lasting peace in 1945.

As if character and beliefs were not enough to keep Stimson and Morgenthau apart, they also had conflicting ambitions for their departments. Stimson already felt that the War Department had only received half-hearted support for its policies during the War. It had played little part in military strategy; he now wanted it to play a fuller part in the strategy for peace. After all, he could argue, if part of Germany was to be run by American military authorities, then their activities were primarily the responsibility of his department. Morgenthau, however, saw American involvement in the government of Germany more as a foreign policy matter. This view did not mean he was prepared to leave it to Cordell Hull and the State Department. He had often seen aspects of foreign policy as coming within the Treasury brief and he and Hull had clashed over such overlaps for years. Before the War Morgenthau had been exasperated by what he considered Hull's obsession with Free Trade as the cure for all the world's problems and the State Department's hesitant diplomacy in tackling the Nazi regime; he did not trust them to get matters right now. He was taking a risk in sticking the Treasury's nose yet again into what would be seen as a foreign policy matter. Cordell Hull might give a mild-mannered impression, but this concealed strong personal ambition and jealousy of his prerogatives. He would not brook interference from the Treasury and had not enjoyed criticism from its Secretary and Roosevelt of his joint memorandum with Stimson on the future of Germany.

Given the similarity of their views, it was inevitable that Hull would fight with Stimson against Morgenthau. Morgenthau, however, even if resisted by two such formidable rivals, could count on several doughty weapons: the respect and trust of the President built up over years of political co-operation since they first met in 1915, a close friendship between the Roosevelt and Morgenthau families, and the instinct he shared with the President that any policy towards Germany must be tough.

If Stimson wanted to dish the Treasury and see the triumph of his own principles over those of Morgenthau, he needed an ingenious instrument to lever the President away from a position where his political and personal inclinations tended to keep him. A possible tool to achieve this purpose might be an attractive solution to the niggling problem of what to do with the major war criminals. Quite obviously Morgenthau's plan to dispose of them by firing squad had the instant appeals of simplicity and cheapness.
Stimson’s proposal of an international tribunal would probably involve the
President in lengthy and intricate diplomatic wrangling, then risk incur­ring public irritation at incomprehensible legal procedures and the time
and trouble involved. Was it possible to package a scheme which at one and
the same time would embody Stimson’s demand for legality, yet seize
the imagination of the President and public?

On 9 September, Stimson sent a memorandum to his Assistant Secret­ary, John McCloy, who condemned Morgenthau’s plan for summary execu­tion of Nazi leaders. He insisted that: ‘the method of dealing with
these and other criminals requires careful thought and a well-defined
procedure. Such procedure must embody, in my judgement, at least the
rudimentary aspects of the Bill of Rights, namely notification to the accused
of the charge, the right to be heard and, within reasonable limits, to call
witnesses in his defence.’ (3) Obviously then, Stimson did not see a show trial
as an adequate tool for eradicating the criminal elements in Germany,
nor as a fit beginning for an era of international relations governed by law.
He wished the Nazi leaders to be tried by an international tribunal which
applied the rules and safeguards normally used in a court of law.

Having laid down the principles, Stimson left the details to be filled in
by McCloy, and he speedily passed the buck down to a lowly section in the
War Department, the Special Projects Branch – and to the office which up
to then had spent much of its time considering how to prevent German
reprisals against Allied prisoners-of-war. The head of the Branch was
Colonel Murray C. Bernays, in civilian life a not very distinguished New
York lawyer. Like so many Americans, Bernays had passed the War
relatively insulated from the current horrors of Europe. He seems to have
framed his picture of Nazi brutality mainly from the accounts of refugees
who came to the States before the War. (Indeed, he learnt little later. In
1949 he could still say that most anti-Jewish atrocities had been committed
before the War.)

By 15 September Bernays had produced a six-page scheme for a trial. In it
he criticized Morgenthau’s proposal for military executions on the
grounds that it did not accord with American views of justice. He admitted
that a trial of Nazi leaders would be difficult: it would have to cope with
unwieldy numbers of defendants and to reconcile the demand of the vic­
tims for punishment of their tormentors with the demand for justice. Even
so, he loyally opted for the establishment of an international tribunal, and
being a man of tidy mind with a penchant for order and system, he drew
up a concise, logical plan by which not only all the individual defendants
but also all the Nazi institutions whose policies had been denounced by the
Allies could be tried at once. As if all this were not enough, in a plan
covering a mere six pages Bernays stretched the concept of Nazi criminality
to cover not just occupied Europe but Germany itself and extended it back
in time to the very beginning of the Nazi regime.

In doing so, according to Bernays, the Nazi regime would implicitly be
on trial. The defendants would be tried not just as individuals accused of
specific crimes but as representatives of the organizations in the Nazi state
to which they had belonged and which were allegedly criminal. As leaders
and organizations were tried at the same time, evidence against an indi­
vidual could be held against his organization and vice versa. Finally
Bernays wove a net to hold them all and enmesh them with Nazi crimes at
any period. All would be charged as criminal conspirators. The Nazi
regime, its leaders and its institutions would be seen as plotting from the
very beginning all the crimes of which they were now accused. They would
be indicted for a series of acts which must all be seen as part of the same
criminal intention – plotted for many years, begun at home and then
gradually extended all over Europe to fulfill the intention to dominate, to
establish Aryan supremacy, and to subject all human and physical resources
to German needs.

At first glance a proposal which only covers six pages can seem simple.
Indeed, the Bernays proposal had the supreme bureaucratic attraction of
brevity. It had considerable virtues besides. In a few days, Bernays had met
Stimson’s demand for international judicial proceeding and the avoidance
of ruthless vengeance. He had also formulated a plan which would obvi­
ously appeal to politicians and public opinion. A single trial with leaders
and organizations lumped together could be comparatively quick and
cheap. It would make a dramatic impact, exposing graphically to the Ger­
man people the criminal nature of the Nazi regime and demonstrating that
the Allies meant to put into effect their declared war aims on punishment
and justice. Out of the jumble of abhorrent acts, evil men and the com­
plexities of law incomprehensible to the layman, Bernays had composed a
single theme to explain it all and capture the imagination – one huge
criminal plot carried out by a group of criminal conspirators. And more
than this – after the trial was over, what a contribution the plan could make
to the speedy de-Nazification of Germany; how quickly lesser officials and
military men could be rounded up and tried. Thanks to the evidence against
the Nazi organizations on which the Tribunal would be asked to make
declarations of criminality, the subsequent proceedings would not get
bogged down in defence claims that their defendants were innocent cogs
in the State machine or patriots performing a duty to their country. Once
these declarations were on record, later courts would know that the ac­
cused were members of criminal organizations; the defence would be
limited to trying to show that their clients had not committed criminal acts
or to finding mitigating circumstances. The plan was gratifyingly coherent
and seductively comprehensive. So much so that many of its elements were
to shape the Nuremberg Tribunal – for good and bad.

Whatever its immediate attractions, however, Bernays’ plan showed all
the signs of having been written in a few weeks to a departmental brief, and
by a not very distinguished lawyer. It hinged on the idea of conspiracy.
Conspiracy is a fairly familiar charge in American and British law. It is a
useful one to bring against a gang leader who does not himself blow the
safe, kill the bank guard or drive the getaway car; who cannot therefore be
charged with the actual crimes, but who has played the *vital part in planning* them and in hiring and directing those who committed them. The charge of conspiracy had been much used in the United States; it is a catch-all which was often the only effective way of dealing with large-scale, organized crime. Even so, conspiracy is always difficult to define and the charge can cause problems in court. Judges have to decide exactly what makes a man a conspirator – planning a crime but not actually carrying it out? Being a plotter at an early stage but leaving the conspiracy before the crimes are committed? Implied in the conspiracy charge can be the idea that all members of a gang share guilt for all its acts. In Anglo-American law, defendants can be accused of conspiracy to commit all its acts whatever their length of stay in a gang and regardless of whether they even met most of its members. These are concepts found dangerous by many judges and ludicrous by many juries. If such a wide definition of the charge could be difficult to prove in cases involving relatively small numbers, how much more difficult it would be to pin it on an entire regime whose acts were allegedly criminal for twelve years. Bernays had recommended a wide definition of conspiracy when experience showed that many judges tended to narrow it: and to endeavour to impose limits of time during which they would accept that the conspiracy was active and to look for incontrovertible evidence to prove criminal purpose and criminal action on the part of individual defendants.

Worse still, the charge of conspiracy is viewed with even greater suspicion on the Continent, even though there it is not as widely defined as in Anglo-American law. Yet Bernays was suggesting that the charge be heard by an international tribunal, in which Continental judges would expect charges of criminal acts rather than of criminal intentions. Furthermore, he was recommending trying German defendants on a charge relatively unfamiliar in German law and unknown in international law. Even more disturbing, the potential defendants had received no prior warning that the charge would be brought against them. Most of the charges relating to war crimes were already well-established in international law (any German murdering a prisoner-of-war, for example, knew that he was committing a war crime). There had been plenty of warnings from the Allies that men committing these categories of crime would be punished. But there had been no specific warnings that men would be accused and punished for conspiring to commit them. All legal systems condemn the idea of *ex post facto* law – law which retrospectively makes criminal acts which were not illegal at the time they were committed. It is a fundamental principle of justice that a man can only be accused of committing a crime if he knew in advance, or should have known, that his acts would be crimes.

Bernays was on equally weak legal ground in extending the conspiracy charge to include the pre-war period in his anxiety to cover such policies as the persecution of German Jews, the Trades Unions, the Christian Churches, the establishment of concentration camps and the euthanasia programme. Before the War, most of these allegedly criminal acts had been committed by the sovereign German state against its own German nationals. International law recognized the right of a nation to try foreigners who committed crimes in war against its subjects; it accepted that once Germany had surrendered unconditionally, the occupying Powers were sovereign and could establish tribunals to try German nationals for war crimes against others. But there was no precedent in international law for other nations to try defendants on charges relating to domestic acts by a sovereign state. International law dealt only with the relations between nations and the acts committed by one nation against another.

Similarly without precedent not just in international but in every national legal system was Bernays’ idea of trying organizations as well as individual defendants. It carried with it a dangerous possibility – that mere membership of a group might automatically make a man criminal; that there was no need to show the nature of his membership (whether it was voluntary, active, and based on full information about all the aims and activities of the group). Like conspiracy at its widest definition, the idea of asking a court to declare whole organizations criminal could be seen as creating a ‘catch-all’ charge. This, unless severely limited by the most scrupulous safeguards, can easily become an instrument of injustice.

To be fair to Bernays, he had done his best to cobble together some working suggestions. It was now up to better lawyers to turn them into something more viable and in conformity with accepted legal principles and procedures.

Better lawyers abounded in the US War Department, the Judge Advocate General’s office, the Legal Division of the State Department and in the Justice Department. From the second half of September they began to sink their teeth into Bernays’ plan. Not surprisingly the Justice Department, though in favour of a trial in principle, was extremely critical of what was seen as Bernays’ sloppy thinking. On 29 December, Assistant Attorney General Herbert Wechsler, in a memorandum to his superior Francis Biddle, urged dropping the charges concerned with pre-war acts and acts against German nationals on the grounds that they were *ex post facto*. He objected to the idea of trying organizations since it was without precedent and involved too great a risk of injustice. He considered the charge of conspiracy to be purely Anglo-American and therefore inapplicable in an international court, and against German defendants.* Biddle was in full

*It is indeed true that the conspiracy charge as broadly defined as in the American and British systems does not exist elsewhere. Other legal systems do have similar, more tightly defined charges which give a superficial appearance of similarity: the French have the concept of an association criminale; the Germans talk of criminal associates; the Russians have sweeping charges to deal with banditry. On the Continent, however, the law stresses the need to prove a clear connection between the plotting and the criminal acts; to show complicity in the crimes which the conspirators actually carry out. In Britain and America the mere act of conspiracy can be treated as a crime. It is odd indeed that when lawyers were planning a trial of men they were certain were criminals, and when ample evidence was available to prove it, they should have stuck to a vague and contentious charge of conspiracy when complicity could have been demonstrated and all participants been satisfied."
agreement. So were many others — not just in America, but even more so later when the trial was under discussion in Europe and the charge came under heavy criticism from Continental lawyers. Even so, though the Bernays plan drew heavy fire from all sides, though much of it was damaged and even wiped out, the essentials were to remain. Their seductions were irresistible.

Yet personal experience as much as legal judgment shaped reactions. Biddle may have viewed the conspiracy charge with a particularly jaundiced air since as Attorney General he had an uncomfortable recent failure with it in court when prosecuting Nazi sympathizers. Conversely, Stimson could associate the charge with success — in the 1920s he had effectively prosecuted big business in trust-busting cases by alleging conspiracy. In fact his immediate reaction to Bernays' suggestion of the charge was to tell lawyers in the War Department that 'in many ways the task which we have to cope with now in the development of the Nazi scheme of terrorism is much like the development of business' in the United States. (4) Others, with slightly different legal experience might have substituted for 'business' 'organized crime' — the conspiracy charge had been equally damaging against big gangs.

At least the conspiracy charge had often been used by American lawyers. Stimson now threw into their discussions an idea totally unfamiliar which was viewed by many with deep distaste. During the War, several of the leaders of the smaller Allied states had revived the possibility once discussed by the legal committee at Versailles that launching aggressive war was in itself a crime. They suggested that one day Nazi leaders should be punished for it. Stimson had found this proposal most attractive at the time; it would now fit neatly into Bernays' wide concept of a trial. If this element were added, it could be argued that the war crimes and crimes against humanity with which the Nazi leaders were charged had inevitably and intentionally resulted from the aim and act of waging war to dominate Europe. To obtain that domination the conspirators had committed all their crimes — those against German nationals to strengthen their grip on Germany, the war crimes to ensure victory, the crimes against humanity toterrorize and enslave captured populations. The central crime, to and from which all the others flowed, was war.

The intellectual neatness of this idea and its acceptability to several nations might in themselves have been enough to win Stimson's support. But there was an even deeper appeal. As a constant and vocal proponent of the development of international law, Stimson had hailed as a crucial step the signing by sixty-three nations (including Germany) of the Pact of Paris (or the Kellogg-Briand Pact) in 1928. The signatories of that Pact had renounced war as an instrument of national policy for the solution of disputes. Some people regarded this as little more than yet another expression of pious hope. They pointed to the considerable number of similar agreements since the end of the First World War, to the constant vows not to resort to violence, then to the constant failure of the nations to make them binding. Stimson, and others, however, believed that the Pact was not mere aspiration but the expression of a legal commitment on the part of its signatories. Previous international agreements, starting with the Covenant of the League of Nations, had expressed the nations' belief that aggressive war should be seen as a crime; this Pact had made it so. Stimson had acted on his belief. Convinced that Germany was an aggressor, he justified escalating action against her while America remained neutral: economic pressure, embargo, naval threat. As he told a congressional hearing in 1944, he interpreted the Kellogg-Briand Pact as having changed international law so as to free nonbelligerents from any obligation to withhold aid when given against an aggressor.

But though Stimson and many others might think that war was now illegal, some did not. They argued that the Pact did not have the character or force of true law. It failed on two counts. Firstly, like innumerable scholars and politicians from Grotius to the drafters of the Covenant of the League of Nations, it had not succeeded in giving a clear, unambiguous definition of aggression. Next, critics of the Pact pointed out, it neither specified punishments for those who committed aggression nor proposed courts to try those accused of it. Real laws, they said, need sanctions and recognized institutions to apply them. Stimson was never impressed by any of these arguments. He believed that not only had the sixty-three nations made war illegal by their denunciation, they had also implied their preparedness to impose sanctions. They may not have done so this far but, as he put it in 1947, 'a legal right is not lost because it is not used.' (5)

Morgenthau's plan for the treatment of Germany had stirred up one hornet's nest; Stimson's plan for a trial had stirred up another. It had provoked bitter disputes over the international acceptability of the conspiracy charge, the legality of indicting organizations, the status of aggression in law, the extent to which many of the charges might be seen as ex post facto. It was Stimson's contention that in a properly constituted tribunal of the kind he had in mind, these disputed points would be subject to the test of evidence, the attacks of the defence, and to the practised scrutiny of the judges. Many maintained that the international community must clarify its wishes in adequately drafted law before such a trial could take place. The reply of Stimson and his supporters was that the wishes of the nations and their condemnation of crimes had been adequately expressed in dozens of declarations and agreements in the inter-war years; in the Common Law tradition, at least, law develops through court decision as well as by statute. The law was not being pushed into a dangerously extended leap as the opponents of this trial alleged; it was being encouraged to take a natural step along the line indicated by the international community.

Lawyers thrive on precedent. Critics of Stimson's proposals were not only hostile to the charges to be heard in the trial, they condemned the idea of trying a country's leaders as being without precedent. The Stimson camp could reply that there always has to be a first time; at some moment there
had been the first trial for murder, so why not now the first trial of criminal leaders of a state? Indeed, they would urge, this was the perfect time. Sufficient international agreement and law had been established; there was a strong demand for punishment of war criminals, a need to prevent blind vengeance, an intense desire to deter future criminals and aggressors and a cry for a just and permanent peace in Europe. What better justifications could there be for holding such a trial? What better moment for edging forward the rule of law than after a period of such lawlessness and resultant suffering? The detractors of the proposed trial would counter: are such responsibilities appropriate tasks for an ad hoc court, hearing disputed law in the atmosphere of hatred and recrimination following such a war?

Lawyers still wrangle over all these arguments. The proposal to set up an international tribunal to try Nazi war criminals had raised some of the most fundamental questions lawyers must ask about the law itself and the nature of judicial proceedings. Those who discuss these matters now, however, have the luxury of untroubled quiet for reflection and freedom from the responsibility for making effective and immediate decisions for a shattered continent. Statesmen in 1944 did not. The collapse of Germany was imminent; they had no time to hum and ha. They had to decide how to settle Europe and treat a defeated Germany; the policies put forward by Stimson and Morgenthau came near the extremes of the spectrum of choice available. It was now up to the politicians to make that choice.

For a brief moment it looked as if Morgenthau’s policies would prevail. Roosevelt went to a meeting with Churchill in Quebec from 11 to 19 September 1944. Roosevelt was concerned to assist British post-war recovery and Churchill had come to Quebec with the intention of asking for American financial assistance. It was logical, therefore, that Morgenthau, as Secretary of the Treasury, should be brought into the talks, and inevitable that he should take the opportunity of presenting his Plan for Germany. He found the British leader receptive. Whether or not Churchill suspected that support for the Plan was a quid pro quo for American financial aid, he was certainly in favour of one of its elements – summary execution for major Nazi war criminals. Before he and Roosevelt left Quebec they initialled the entire Plan. Morgenthau seemed to have scored a decisive victory.

He had not. His Plan had only been initialled, not signed. The two heads of government had kept their options open, and had decided to consult Stalin before reaching a decision even on the punishment of major war criminals. By sticking his head above the parapet at Quebec, Morgenthau had become an easy target. Details of his Plan were leaked to the Press, and all hell broke loose. The American public may have demanded punishment for war criminals, may have wanted all Germans taught a sharp lesson, but they had never envisaged anything as ruthless and vicious as this; Morgenthau’s measures went far beyond anything they could find acceptable.

Public indignation was kept boiling by a Press campaign denouncing Morgenthau himself. Meanwhile he came under bureaucratic assault from the formidable alliance of the War, State and Justice Departments. These allies might still not agree over details, but their principles were the same, and they were united by a departmental ambition – to stop Morgenthau. It was a daunting combination for Roosevelt to face, while at the same time his economic advisers were warning him that the dismantling of German industry would destroy the economy of Europe. He was faced too with criticism of the Morgenthau proposals from a man for whom he felt as much trust and affection as he did for Morgenthau – Judge Sam Rosenman. Rosenman was Roosevelt’s favourite speech writer and his special legal adviser. He was in favour of a trial. So too was one of the most respected figures in Washington, Justice Felix Frankfurter of the Supreme Court.

Roosevelt could not possibly withstand such a tide for long. A final wave hit him at the end of September. The Allied advance in Europe was stopped dead by German resistance. Once details of the Morgenthau Plan reached Goebbels, he had had a field day: ‘I myself am Number One on the list of war criminals,’ he boasted. The Nazi media cried for a fight to the last – why not, since the Allies demanded not only unconditional surrender but threatened to be merciless in victory? However unfairly, everyone in America blamed Morgenthau for the military setback; the Press campaign against him reached a new pitch of antagonism. With Roosevelt now a tired and sick man, there was no longer any possibility of standing up for Morgenthau.

So it was that Roosevelt was swept into the opposite camp. On 22 January 1945 he received a memorandum from Stimson, Hull and Biddle. In it they proposed setting up an Allied court to try Nazi leaders and organizations for ‘atrocious crimes’ and for their part in a ‘broad criminal enterprise’ to commit them. They recommended that the charges to be heard should include those concerned with acts committed before the outbreak of war against German citizens and suggested that a military tribunal was preferable to a civil body, since it would be ‘less likely to give undue weight to technical contentions and legalistic arguments.’ Having taken Morgenthau and his Plan to Quebec, Roosevelt took this altogether different memorandum to his meeting with Churchill and Stalin at Yalta in February 1945. Stimson, Hull and Biddle had decisively won the battle in Washington. They now had to see if Roosevelt would win a campaign with the European leaders.

Until now the odds had been heavily against winning British support for an international tribunal. In London, the views of politicians and officials had been perfectly clear at least since 1942. None of them wanted a trial of major war criminals. When Eden had told European Prime Ministers and Foreign Ministers on 6 August that the disposal of such men should be settled as a matter of high policy and that it was ‘undesirable’ that anyone should commit themselves to ‘a policy of bringing them to trial,’ (6) he was giving a précis of a paper drafted for him the previous month by the Foreign Office. This had argued that no international court should be set
up to try arch-criminals such as Himmler since 'the guilt of such individuals is so black that they fall outside and go beyond the scope of any judicial process.' (7) Lord Simon, the Lord Chancellor, had felt his lawyer's conscience slightly bruised by this declaration. He commented that he did not think 'that this programme will either satisfy public opinion or achieve a measure of substantial justice', and he drew attention to the wishes expressed in the St James's Declaration. Lord Simon's legal conscience was not so very tender, however. He expressed the hope that 'the principal criminals will be disposed of by their fellow countrymen before peace comes' – presumably meaning that he hoped the Allies would be relieved of the problem by prior German resort to the lamp-post or firing squad rather than judicial process. If not then the Allies must dispose of them; he disapproved of the notion that men like Himmler be considered 'too black to be dealt with as war criminals while their subordinates may be hanged'.

He appears to have believed that 'public opinion', the criteria of 'substantial justice' and the aspirations of the St James's Declaration could be satisfied with rather quicker and rougher methods than those to be expected from an international tribunal.

The consensus between British government ministers and civil servants was not shaken from 1942. Nor was their policy of postponing any further decision for as long as possible. They closed ranks against those who asked for specific details about the proposed 'high policy' action; indeed they tried to prevent anyone raising the question of war criminals at all. When a debate in the House of Lords on the matter was threatened in September 1943, a Foreign Office official spoke with the authentic voice of servants of the British democratic system; he preferred to discourage 'untimely public discussion.' (9) Their Lordships were persuaded to postpone their debate, then in October distracted from a thorough analysis of the whole question by the announcement of the establishment of the UNWWC (which gave the impression of government concern without guaranteeing any action) and finally soothed in December by Lord Simon's promise that major war criminals would receive 'exemplary punishment.' (10) He did not actually tell them what form it would take.

Thereafter British official opinion simply hardened – a process assisted by finding plenty of justifications for sticking to their policy. Most of these were summarized in a brief prepared by Sir William Malkin of the Foreign Office for Eden in February 1944. It was uncompromisingly entitled Against the Establishment of an International Court. In Malkin's opinion such a court would take too long to establish, it would look no more impartial than a national body, its proceedings would be intolerably slow thanks to language and procedural problems, it might very well not be recognized by those being tried and they would be given plausible grounds for contesting its legality. Send the minor criminals to be tried in whatever country seemed appropriate, said Malkin, and reserve the arch-criminals for the Four Powers. (11) Lord Simon noted his approval of every word. He agreed too with a Cabinet paper from Eden in May which proposed drawing up a list of less than fifty top criminals 'whose position or reputation is such public opinion will not object to their guilt being taken for granted without being established by any form of legal proceedings'. Once the world was convinced that action against these men was 'justified on the highest moral and political grounds' they could be punished by summary action. (12)

Thus far, the British had always taken for granted American approval of their views. They had been somewhat startled back in November 1942 when the Soviet Foreign Minister, Maisky, had written to Eden suggesting setting up a tribunal for major criminals. Eden had replied firmly that the United Kingdom wanted a 'political decision of the United Nations at the end of the war' (13) and everyone thought the Russians had been put back in their place when a note was received from them in January 1943 saying that any difference of opinion between the British and Soviet governments could 'be considered as eliminated'. (14) In fact, it was not. Whatever Stalin might say ad passa at Tehran, his official line was constant. By late 1944 the Foreign Office had to admit with some bewilderment that Stalin wanted leading Nazis to be put to death – but only after a trial. There was some relief at the realization that Stalin did not necessarily require such complicated preliminaries for imprisonment for life. (15)

So by the time the Big Three met at Yalta no one could be surprised when Stalin demanded that 'the grand criminals should be tried before being shot' (16) and there had been a complete reversal of the American position – Roosevelt had brought the Stimson-Hull-Biddle proposals and not the Morgenthau Plan. The British were isolated. The question of war criminals was discussed only briefly, but in that short time a major step was taken. The Big Three reaffirmed the decision of the Moscow Conference to send minor criminals back to the scene of their crime, but they adjusted the Moscow intention to punish the major criminals by joint 'declaration' into a specific commitment to a trial. The British had been routed.

They preferred to believe that they lived to fight another day. They issued an invitation in March for an American delegation to come to London to discuss the entire problem of how to deal with major war criminals. It was their undoubted intention to talk the Americans out of the idea of a trial. But when the delegation arrived in the first week in April, it was made up of three convinced proponents of the idea who had come to London with the aim of inspiring the British to buy the entire American package, give or take some minor adjustments to suit British taste. Judge Sam Rosenman was accompanied by Colonel Cutter (assistant executive officer to McCloy in the War Department) and Major General Weir (the Deputy Judge Advocate General). They had not yet reached a final decision on the details of their plan and its charges but they were committed to the outline of the Bernays paper.

Their first official meeting took place in the Foreign Office on 4 April. As Sir William Malkin put it: 'It soon became apparent that we and the
defend themselves before a tribunal (which need not be composed of lawyers) who would report their findings to the Allies. The Allies would then determine judgement and sentence. (19)

"Instrument of Arraignment" is a most impressive title. Under it Lord Simon had put charges which the Americans wanted to pursue and included provision for a form of hearing. Even so it could hardly be seen as much more than a proposal for an elaborately decorated show trial; it was certainly not the kind of full judicial proceeding the Americans were calling for, not one where final decisions rested with judges rather than politicians. Even so, Rosenman's instant response was that the idea was 'novel, ingenious and sound in principle'. Not that he was considering abandoning his plan in favour of Simon's. He was merely wondering if it was possible to arrange a marriage between them by offering acceptance of Arraignment as a dowry.

This meeting had uncovered a hitherto unsuspected piece of common ground. Rosenman explained American thinking behind their wish to put on trial representatives of such organizations as the Gestapo and the SS. Simon found it attractive and commented that there was 'a strong feeling in this country that the members of these organizations must be punished'. That said, the discussion for the remainder of the week only served to prove how very different were British and American forms of hearing and charges and how impractical it was to try to join the Arraignment procedure with the plan for a fully-fledged trial. It was a grotesque understatement by a British official at the end of the talks to suggest that there was merely 'some divergence of opinion on the nature of the trial of the arch-criminals'. (20) The divergence was almost total. The British noted that the Americans 'clearly felt themselves very bound to defer to Mr Stimson's desire for a 100 per cent judicial process'. They themselves did not really want much more than a fraction. Simon announced on 10 April that his Arraignment procedure would not actually allow for witnesses to be introduced for the prosecution or defence. That was not a trial in any normally accepted definition and the Americans inevitably retorted that they could not possibly countenance such a denial of an elementary right for the accused.

By the time Rosenman left London, the only concession he had wrung from the British was their agreement to sound out the feelings of the French and Russians. To make matters worse, Churchill had leapt at Simon's idea of Arraignment, passed it through his historian's mind and brought it forth transformed into a Bill of Attainder: get Parliament to pass one, he urged.* He and his Cabinet colleagues were unanimous on 12 April: 'for the principal Nazi leaders a full trial under judicial procedure was out of the question.' By all means publish a formal statement of the case against them, but on no account give them much of a chance to answer it. (21)

Whatever gloom the American delegates might have experienced at their failure to budge the British, it paled into insignificance on that very day

*Such an Act would have violated Article I, Section 9(1) of the American Constitution which prohibits any Bill of Attainder.
when the news reached them that President Roosevelt had died. Their sadness was natural faced with the death of a great leader and a man who had been a close personal friend of Rosenman. To be callous, however, Roosevelt's death can be seen as a positive advantage. He had never been more than a reluctant supporter of the plan for a trial; though he had been forced to accept the idea in theory, he had delayed giving approval to any specific proposals for the form it should take. His successor, Harry S. Truman, on the other hand, was a wholehearted supporter. He had a profound belief in the beneficent power of law and the wisdom of judges, an abhorrence of summary execution, sensitive antennae to the balance of political forces in Washington and greater drive and disposition to make decisions than his ailing predecessor. Truman wanted a trial and he wanted agreement of its details quickly - preferably in time for the next great international meeting scheduled to take place in San Francisco from April.

John McCloy was also determined to get the trial plan implemented. He was in Europe when Roosevelt died. He asked De Gaulle for his views; the General favoured a trial. As at Yalta, so now, the British could be outgunned. McCloy could use a combined American, French and Russian barrage. Thus equipped, and staunchly backed by Truman, McCloy arrived in London with strong forces (Rosenman, Cutter and Wechsler among them) in mid-April. He brought a new vigour and passion to the joint talks. While the British niggled about the 'political and practical dangers' of a trial, McCloy issued a clarion call to take the chance history was offering to show that 'Hitler and his gang had offended against the laws of humanity.' The British might be beset with anxieties; McCloy was 'prepared to take any risks or embarrassments which might theoretically ensue' if a trial were instituted. He dismissed the suggestion of summary execution with contempt; it was 'contrary to the fundamental conception of justice.' He swatted away the Napoleonic precedent; it was a 'retrogressive step' when a 'great opportunity now presents itself to move forward'.

The British continued to worry about the administrative problems of mounting a trial; McCloy confronted them with a memorandum in which he accused them not of arguing against a trial as such but against 'the ability of Allied brains to produce a fair, expeditious, reasonable procedure to meet the novel situation which is present'. He swept aside the British plaint that it was impossible to deal with the totality of acts over twelve years of the Nazi regime: 'the very breadth of the offence is not in itself an argument against judicial action.' He scoffed at British fears that the Nazis would use the trial for propaganda and counter charges: 'the advantages of the trial method over political action are so fundamental that we should not allow the bug-a-boo of possible embarrassment to hinder us from establishing the principle' of bringing international law into action against the whole 'vicious broad Nazi enterprise'.

Such certainty, such energy, so roundly expressed would have been hard to resist. The British were in no position to do so. McCloy had also brought to the talks the weight of Truman's commitment (emphasized by a telegram the President sent to the Cabinet on 24 April) and the support of the French and Russians for an international court and full legal hearing. The only wonder is that the British held out for so long. They struggled until 30 May. Then the Cabinet, sweetening capitulation with such humbug as 'the United States has gone a long way to answer Cabinet objections', and calling the proposed procedure 'carefully designed to prevent the accused from using the court as a platform' for propaganda, gave its approval to the draft American proposals.

It would hardly have mattered if they had not - though an international tribunal would have looked less international without them. Without waiting for their decision, Truman had gone ahead. At the end of April he had appointed a man to lead a prosecution team and prepare a case. His choice for the post was a decisive one with immense repercussions on the future trial. He appointed Robert H. Jackson.

References for Chapter Four
1 Full details of the genesis of the plan for a trial in America are given by Bradley Smith in Reaching Judgement at Nuremberg and The Road to Nuremberg
2 Both quotations taken from Bradley Smith, The Road to Nuremberg
3 Quoted by Hartley Shawcross in Tribute to Jackson
4 Quoted by Richard Current in Secretary Stimson
5 Ibid
6 Minutes of meeting at Foreign Office, 6 August 1942. LCO 2. 1974
7 Foreign Office paper, 18 July 1942. LCO 2. 1974
8 Simon to Prime Minister, second half of July 1942. LCO 2. 1974
9 Beckett to Simon, 3 September 1942. LCO 2. 1971
10 Simon in House of Lords, 15 December 1942. LCO 2. 1974
11 Brief by Sir William Malik, February 1944. LCO 2. 1976
12 Cabinet Paper Treatment of Major War Criminals, May 1944. LCO 2. 1976
13 Maisky to Eden, 12 November 1942 and memo for reply. LCO 2. 1974
14 24 January 1943. LCO 2. 1974
15 Malik to Simon, 18 November 1944. LCO 2. 1976
16 FO 371. 51077
17 FO 371. 51016
18 Jackson Papers, Box 202
19 Quotations from the discussion from FO 371. 51016 and LCO 2. 1980
20 Minutes of meeting, 10 April. LCO 2. 1980
21 Minutes of War Cabinet meeting, 12 April. LCO 2. 1981
22 Minutes of meeting, 16 April. LCO 2. 1980
23 Memo from Mclloy, 30 April. LCO 2. 1980
24 Telegram from Truman to War Cabinet, 24 April. LCO 2. 1980
25 War Cabinet minutes, 30 May. LCO 2. 1980
Chapter Five

Robert Jackson was a thick-set, round-faced man of medium height, frequently dapper in appearance - a gold watch-chain across the waistcoat with an inner white facing, black jacket, striped trousers and gleaming spats. He had had a distinguished legal and public career. Born in 1892 in Spring Creek, Penn., the son of a horse breeder, he had qualified as a lawyer without ever attending law school. He began in an attorney's office, and then built up a law practice in New York State before moving into public service, becoming Solicitor General in 1938, and Attorney General in 1940. In 1941, Jackson became an Associate Justice of the Supreme Court. A Foreign Office briefing pointed out that Roosevelt was said to believe that one day Jackson would make a great liberal President. 'Opinions differ as to the depth and breadth of his intelligence but he is undoubtedly highly respected as a jurist.' (1)

More vital for the development of the trial than his previous record and experience were Jackson's character and the vision he had of the law and the part it should play in society. His British counterpart in the trial, Sir David Maxwell-Fyfe, wrote of him later: 'In the truest sense of the word, he was a romantic of the law. For him, the vocation of the lawyer left dull huckstering and pettifogging things. It caught the full wind of the traditions of natural justice, reason and human rights.' (2) Jackson was a crusader for the rule of law. He brought immense energy and a total commitment to the idea of a trial of major war criminals - and to the plans recently put forward as to the form it should take. For many years Jackson had had a passionate conviction of the need to transform international law from a mere collection of hopes into an effective binding set of rules to govern the behaviour of nations. He believed that international law was the only means for realizing man's wish for peace.

Jackson had no doubts that aggressive war was a crime, no doubts either that courts should be established to try those who waged wars. Back in 1941, he had written a paper for a meeting of the Inter-American Bar Association in Havana, a meeting he could not attend because of bad weather. In this paper, he made a series of typically forthright statements. 'It does not appear necessary to treat all wars as legal and just simply because we have no court to try the accused.' (3) He urged that great international agreements, such as the Covenant of the League of Nations and the Kellogg-Briand Pact, should not be allowed to become dead letters; they must be given life through sanctions. 'A system of international law which can impose no penalty on a law breaker and also forbids other states to aid the victim would be self-defeating and would not help ... to realize man's hope for enduring peace.' Later that year, in a speech at Indianapolis to the American Bar Association, he again appealed for international action to put muscle into international law - above all to prevent war. He admitted that the machinery had not yet been created, and he well knew lawyers' reluctance to take the first step. But Jackson was clear in his own mind: 'We may be certain that we do less injustice by the worst processes of the law than would be done by the best use of violence. We cannot await resort to a military or political decision than to destroy belief in judicial process by conducting farcical trials. True trials must be based on the clear traditions of justice, must follow the principles and methods universally adopted by those with respect for the law. 'You must put no man on trial before anything that is called a court ... under forms of judicial proceeding, if you are not willing to see him freed if not proved guilty. If you are determined to execute a man in any case, there is no occasion for a trial; the world yields no respect to courts that are merely organized to convict.' (5)

This accidentally well-timed Washington speech seems to have been shown to the new incumbent at the White House, President Truman. Jackson, obviously, was the man for the job. The President asked Judge Rosenman to approach him to lead the American prosecution team. Jackson hesitated before accepting the position. He had to consider that his appointment would be criticized by many on the Supreme Court bench - a member might be expected to remain aloof from political affairs, indeed to take no part in any trial. Jackson did not consult any of his colleagues; Chief Justice Stone would have advised against the job - he had firm views on the need for exclusive devotion to the Supreme Court and a distaste for the projected trial which led him later to call it 'Jackson's lynching expedition'. (6) Jackson hesitated only for a few days, however. The job was irresistible. He was not easy at the Supreme Court; his relations with colleagues were scratchy and the Court at the moment did not have the glamour and excitement of its pre-war role. Leadership in a great international trial, on the other hand, would give him freedom of action and tremendous powers. He would be in a position to give substance to international law, to lay the foundations of a new world order under law. It was his moral and legal crusade.
On 29 April, Robert Jackson agreed to become the United States Chief of Counsel. In his letter to President Truman accepting the appointment he stressed that 'Time is of the essence' in getting an international agreement to mount the trial and in preparing the case. He feared that delay would only encourage men to take the law into their own hands. For this reason he was prepared, to some extent, 'to sacrifice perfection to expedition'. In addition, although he hoped for international co-operation, he wanted to start work on the prosecution case even before it was obtained - not least so as to take and keep control over the case. 'The best way to gain confidence and leadership in the matter, in my opinion, is not to ask for it but to be best prepared.' (7)

His appointment was announced on 2 May. Immediately Jackson threw his vitality, his fervour and his impressive eloquence into his task. The German surrender took place on 7 May and within days he had to fight off a challenge to his trial. The Treasury proposed that members of organizations which might be declared criminal should meanwhile be allocated to penal labour - mopping up some of their mess. Jackson was resolute: there must be no decision, no punishment until a proper trial had been held. He was rapidly preparing for it. His chief associates were chosen: Robert G. Storey, a Texan law professor in civilian life, and Thomas J. Dodd were to be the executive trial counsel. Working with them were John Amen, now in the Marines but formerly a New York lawyer and special assistant to the US Attorney General investigating violations of the anti-trust laws, official corruption and gambling; Sidney Alderman, the General Solicitor to the Southern Railway Company; Francis Shea, once Dean and Professor of Law at the Buffalo Law School but from 1919 to 1941 the US Assistant Attorney General; and William Donovan, also with experience in the Attorney General's office, but from 1941 the head of OSS (the Office of Strategic Services, the predecessor of the CIA). The Foreign Office was relatively pleased by this particular appointment. In a briefing they prepared on Jackson's team they commented that 'Despite the tendencies of so many of the foreign-born employees of OSS, he himself, so far as we know, has been consistently pro-British... He is a man of great personal charm and considerable ability; more of a fighter than an administrator, with an Irishman's wit and mercurial temperament.' (8)

These men would form the inner circle around Jackson from now on and would in their turn recruit junior counsel to the prosecution team. They worked with representatives from the State, War, and Justice Departments on a draft agreement for a trial to be presented to the Powers at San Francisco. They could call on experts from any department for help in preparing their case, but they were not responsible to any department. They answered to Jackson and he, on the instructions of Truman, was totally independent on a special assignment and answerable only to the President himself.

On 28 May, Jackson and Donovan left for Europe, intending to confer with the United Nations War Crimes Commission in London and to galvanize the Allies. During the San Francisco Conference the British had finally given the impression that they would consider the idea of a trial 'in principle' though somewhat reluctantly. Jackson now hoped to secure their agreement to recently drafted outline proposals for the proceedings. Jackson had full powers from the President to draw up and sign an agreement and was rearing to go. The British, on the other hand, were an ad hoc collection from the various departments who had been passing the war crimes parcel - the Lord Chancellor's office, the Attorney General and Solicitor-General's offices, the Foreign Office and the War Office. They had set up an interdepartmental committee in February to consider war criminals in general but had applied little energy to the task and failed to coordinate efforts. Every department had grumbled that they lacked the staff for the job, then left the work to others. (9) Until 30 May they had no final government approval for a trial. Thereafter the imminence of a General Election tied their hands, since it was not certain whether a new government would wish to share the commitment of its predecessor.

However, Jackson's meetings in London were not a waste of time. He was pleased by the approval the British seemed to give his draft, and he was given the impression they would only wish to make a few amendments. The British wanted to get down to brass tacks and draw up lists of defendants; Jackson preferred to wait for more evidence to come in before making decisions. He made a good impression on the Foreign Office. Donovan came in for a little criticism for his 'somewhat cavalier notions of dealing with the minor Allies' (i.e. not consulting them) but on the whole confirmed his standing in Foreign Office eyes because he 'appeared very anxious to help', and rather surprisingly they also approved his desire to 'get a move on'. (10) It was agreed that the British would issue invitations to the French and Russians to join America and Britain at a conference in London in June to draw up an agreement on the whole project of a trial.

The new Attorney General of the caretaker government, Sir David Maxwell-Fyfe, was appointed on 29 May to lead the future British negotiating team. He was also to lead a prosecution team to be known as the British War Crimes Executive (BWCE). This was to replace the previous random dabblings of the interested government departments. It had a nucleus of members whose concern was primarily with the practical matters of the trial and the prosecution case.* Grudging though the Foreign Office had

*Working under Maxwell-Fyfe were G.D. ('Khaki') Roberts KC, Senior Treasury Counsel at the Central Criminal Court; Mervyn Griffith-Jones, a barrister who had spent the War in the Coldstream Guards (and who from 1950 would be Crown Counsel at the Central Criminal Court); Elwyn Jones, Deputy Judge Advocate from 1943 to 1945 (and one day Lord Chancellor); John Barrington, a barrister who had been in the Royal Artillery since 1935, and Harry Phillimore who had been called to the Bar in 1934 and was now Secretary of the BWCE. Watching briefs were held by the Treasury Solicitor and representatives from the Lord Chancellor's department and the Foreign Office.
been about a trial, they insisted on being kept in the picture (‘unwelcome though it is’) (11) because the planning involved negotiations with the Allies which they would not entrust to mere lawyers. In fact, the Foreign Office turned out to be invaluable to the prosecution case because of its access to the intelligence of their specialized sections such as the German Department and the Political Intelligence Department and the knowledge of the treaties and diplomacy of the inter-war years. It contributed the services of Jim Passant, a man capable of preparing at minimal notice comprehensive and lucid briefs. (He had recently been working with the Naval Intelligence Division at the Admiralty. He would soon become Deputy Director of the Foreign Office’s Research Department and Head of the German Section.) Representatives from the Judge Advocate General’s Staff and the Services were also called upon when their expertise was required or their weight could be useful – military assistance comes quicker in response to military orders.

From 3 June the BWCE met regularly and it was soon established in temporary headquarters at Church House in Great Smith Street. As they started to examine a possible case against the Nazi leaders, they began to get cold feet about Jackson’s draft proposals for the charges to be brought against them. They felt his case was abstract and high faluting, too complicated to be effective in court. They would have preferred a trial with fewer defendants, limited charges and simple procedure, not what Maxwell-Fyfe called Jackson’s concept: ‘an exordium of International Law in civilized countries’. As Sir Thomas Barnes, the Treasury Solicitor put it: ‘we ought to get Mr Justice Jackson to look at it from a practical point of view of the attempt to dominate Europe.’ (12)

Elsewhere strong opposition was being expressed to the idea of having a tribunal of the four Powers at all. Mr Troutbeck of the German Department of the Foreign Office finally boiled over: ‘Surely to have a Russian sitting in a case of this kind one day be regarded as almost a high point in international hypocrisy.’ Surely the Russians had ‘entered into a common plan or enterprise aimed at domination over other nations’ which involved ‘atrocities, persecutions and deportations’ on a colossal scale. ‘Is not the Soviet Government employed today in that very same thing in Poland, the Baltic States, the Balkan States, Turkey and Persia?’ (Someone added in the margin: ‘And what about Finland?’) ‘All this,’ seethed Troutbeck, ‘cannot be excused on the principle of the housemaid’s baby. There have been two criminal enterprises this century – by Germans and Russians. To set up one lot of conspirators as judges of the other . . . robs the whole procedure of the basis of morality.’ (13) A note later added to this outpouring said the Lord Chancellor had exactly the same view. Lawyers might reply that judges do not have to be without sin to assess guilt and apply the law to others. Politicians could only add that, like it or not, they were stuck with the Russians as allies, fellow victors, captors of some potential defendants and witnesses and perhaps the most bitter sufferers from Nazi brutality. The Russians could not be excluded now. The only way to make the best of a bad job was to keep a very wary eye on how they intended to prosecute and to try the Nazis.

All these doubts were raised behind closed doors. They did not seep through to the Americans. Jackson assumed from the end of May that he would get full co-operation and approval from the British. But by 6 June when he wrote a progress report to the President, the French had not yet appointed a negotiating team and the Russians, though still interested, had not yet fully committed themselves to this trial. Jackson was irked by the delays. In his report he made it clear that he thought it preferable to hold a trial in association with the others but he was quite prepared to act alone if necessary. He rejected any thought of freeing captured war criminals without trial: ‘it has cost immeasurable thousands of American lives to beat and bind these men. To free them without trial would mock the dead and make cynics of the living.’ He would not countenance any suggestion of punishment without trial; this ‘would violate pledges repeatedly given and would not sit easily on the American conscience or be remembered by our children with pride’. (14)

Many of the basic issues in the trial were already clear in Jackson’s mind. The ‘crime which comprehends all lesser crimes is the crime of making unjustifiable war’. International law had thrown ‘a mantle of protection around acts which otherwise would be crimes, when committed in pursuit of legitimate warfare’: killings, destruction, oppression. He was not worried about a lack of precedents or the absence of legislation: international law must grow ‘as did the Common Law, through decisions reached from time to time and adapting settled principles to new situations’. Nor had he any doubts that pre-war treaties and agreements had made aggressive war a crime; and ‘it is high time we act on the judicial principle that aggressive war-making is illegal and criminal.’ There could be no accepting claims that heads of state are immune from legal liability: American citizens could bring their officials before courts; this right should be available in the international sphere. Nor should leading officials and military men be allowed the defence that they bear no guilt for carrying out orders from their superiors. Let them show the facts about those orders, then leave judges to decide whether they were illegal and to what extent they might constitute extenuating circumstance. ‘We do not accept the paradox that legal responsibility should be least where the power is the greatest,’ said Jackson and he quoted Lord Chief Justice Coke’s rebuke to James I: ‘A King is still under God and the law.’ Jackson’s views on responsibility would be readily appreciated by Truman whose desk bore the notice: ‘The buck stops here’.

Jackson had intellectual certainty. He had a sense of urgency that the legal crusade must be launched immediately. He had great resources of energy which needed to find an outlet in action. It is not surprising that when he and his team returned to London on 20 June with proposals for a trial based on the main features of the Bernays scheme, they were filled
which only an occasional wintry smile would pass, his frequent stalling as he referred matters back to Moscow for instructions, all gave a misleading impression of a mere Party hack. In fact it was all a mask which could only temporarily disguise his warmth, his decency, and his genuine concern for the law. Those who cherished a stereotype of Russian law as kangaroo courts and politically controlled hanging judges were to be shaken by finding in Nikitchenko a shrewd legal mind and a devotion to the basic principles of justice. They were further surprised by his colleague at the Conference, Professor Trainin—a legal scholar whose writing Maxwell-Fyfe was later to recommend to his team as authoritative on several legal issues in the trial, and an agreeable man to do business with.

The French and the Russians were not men to be steam rolled; Jackson could not expect them to sit quietly and accept every American suggestion with a nod. They had views of their own, and convictions as strong as his, but sometimes different. What was disturbing for him, too, was that they represented the Continental legal tradition based on the Roman Law which he seems to have encountered in London for the first time. With the British, Jackson had colleagues whose reactions stemmed from the same Common Law assumptions, whose procedures and principles were very similar to those of American lawyers. With the French and Russians, however, he faced a different mentality, not conditioned by the Common Law and indeed potentially critical or even hostile to some of its bases. The proceedings at the London Conference were to reveal an appalling ignorance by both groups of the principles and methods of their counterparts—a preliminary crash course on the Roman and Common Law systems would have speeded up the discussions, not least because after interminable wrangling they were often to find that their laws and systems had more in common than they thought.

The London Conference opened on 26 June in Church House. The delegates sat around a square table, one side for each. Their deliberations were recorded in full by Mrs Elsie Douglas, Judge Jackson’s secretary. The meetings were held in private and they were informal—gruelling though the full day sessions often became, at least they spared the delegates endless prepared official speeches. Perhaps, in fact, the meetings were too informal to be efficient. There seems to have been no agenda; if there was, it was ignored and the delegates rambled, interrupted and wandered off the point. The discussions were repetitive and frequently at cross-purposes. On the whole the meetings were chaired by Sir David Maxwell-Fyfe—except when he was obliged to go to defend his parliamentary seat in Liverpool in the General Election. Maxwell-Fyfe on other occasions was to show a remarkable aptitude for the quick despatch of business. Here he made little attempt to rein in the speakers or direct their thoughts. His major contribution was to apply praise with a trowel when some accord was established and to end meetings abruptly if tempers were fraying. At the main sessions the delegations submitted draft proposals and argued with confidence and impatient to get the signatures of the others to their plans. Committed and convinced, they could not conceive that others would need convincing. Impatient and inexperienced in international negotiation, they were not ideally suited to overcome the inertia, the philosophical doubts or the practical criticisms of their prospective colleagues. Jackson expected that the London Conference would reach agreement within a week, and that it would fully agree to all the American proposals. In fact he was to face six weeks of wearing negotiations and to be alternately puzzled and appalled by the argument and the rejection of many of his views by the others.

The first few days in London gave him some false reassurance. Jackson found the British as co-operative as in May; news came that the French had accepted the invitation to the conference and although there was as yet no firm commitment from the Russians, the British Embassy in Moscow thought a Russian representative would leave for London on the 23 June. Some differences did emerge in discussion. The British talked more of practicalities than the cause of establishing the rule of international law. They were anxious to name the defendants, limit the scope of the trial, whereas Jackson talked of general aims and charges and in a memo stressed the need to authenticate the whole history of Nazism and show its criminal design. All this, however, did not seem significant enough to ruffle Jackson’s confidence. The British War Crimes Executive was keen on the principle of a trial and he was certain his draft proposals would only require minor modifications to ensure their full agreement.

Jackson’s troubles began with the arrival of the French negotiators on 24 June and the Russians on the 25th. Both groups must have suspected that the Americans and the British had been ganging up on them in their absence. The French would react with the prickliness of a delegation from a small, weak nation, the Russians with the assertiveness of a powerful one—and with traditional Russian suspicion of Western intentions.

The French team was led by Robert Falco of the Cour de Cassation. Patrick Dean of the Foreign Office, who was an observer at the conference, found him ‘rather a nonentity. He is pleasant and speaks English, but is over-legalistic in his approach.’ All these characteristics must have appeared in discussions behind the scenes. M. Falco hardly spoke at all during the conference—his very occasional comments in the transcripts of the sessions came as a startling reminder that he was there at all. French views were on the whole put forward by their representative at the UNWCC, Professor André Gros, a man with a sharp mind, an easy manner and with a wide experience of the problems of war crimes.

The Russians were led by General Nikitchenko, Vice-Chairman of the Soviet Supreme Court and one-time lecturer in criminal law at the Academy of Military Jurisprudence in Moscow who had started his working life as a coal miner at the age of 13. Nikitchenko’s steadfast refusal to admit he understood any English, his carefully preserved poker face over...
over them and the principles they raised. As time went on a drafting sub-committee was established to draw up final proposals on which agreement had been reached. There were fourteen full sessions in all, but plenty of informal meetings behind the scenes (alas, unrecorded). In the evenings White Ladies at Claridges and generous dinners at the Savoy restored relations strained at the conference table.

A high proportion of the time at the Conference was spent on procedural matters - working out how the trial should be run, what should happen when, who should have what powers. All were agreed that a military rather than a civil tribunal would free them to pool the best elements from all their national systems. Since they were embarking on a totally new enterprise they need not be hidebound by previously established procedures. For instance, they could ignore the rules of evidence which normally applied in trials with juries and allow the Tribunal to admit any evidence which seemed to have probative value - provided it was clearly relevant to the point it was substantiating and was not repetitive. All were agreed they could create a new court procedure for the occasion which must be efficient and fair. The trouble was they could not then agree on how to do it. All tended to cling to the conviction that their own national way of doing things was best. This was illustrated most clearly in the recurring argument over the nature of the indictment.

In Anglo-American trials, the indictment is a brief statement by the prosecution of who is accused and on what charges. The prosecution presents it to a court which fixes the time of trial. Once the trial opens, the full prosecution evidence for the charges is produced in open session. The court hears it, weighs it against that of the Defence and then determines guilt. In Continental Law, however, preliminary work on a case is not carried out by the prosecution; it is the responsibility in France of a juge d'instruction, in Russia of a commission of enquiry. They prepare an indictment which not only states the charges but is accompanied by the full evidence on which they are based and the law which applies. The prosecution only takes over once the case comes to trial. Though a judge may later call for more evidence or witnesses to clarify points and allow the prosecution and defence to apply for more, the bulk of the prosecution evidence has been presented with the indictment and is available for the defence to study from the moment the accused have been served with the indictment.

And this, said the French and Russian delegates to the London Conference, is the best system: it is more efficient, because the case has been thoroughly examined to check its soundness before a court is asked to spend time on it; it is quicker, because only effective evidence and witnesses are called in court; and it is infinitely fairer to the defendants who will be spared a hearing if the case against them is poor, and who will have had ample opportunity to prepare a defence against the prosecution evidence should they be brought to trial. The French and Russians were deeply shocked that in the Anglo-American system, as Professor Gros put it: 'the prosecutor could come out of the blue with evidences which were completely unknown until the moment of the trial'. (18) Falco was so shocked he was actually stunned to speech and complained that if the indictment did not present the full prosecution evidence, the defence would be faced during the trial with the 'opening of a Pandora's box of unhappy surprises'. (19) Maxwell-Fyfe continued to assure them that he had worked with the short indictment for twenty years and had not found the system unfair in practice - the court could always give the defence time to prepare answers to unexpected evidence. He was willing to compromise and suggest a fuller indictment on Continental lines plus greater latitude to introduce new evidence in court than Europeans were used to. Jackson was not. Day after day he argued for 'a longer trial but a shorter indictment'. (20) In spite of constant reassurance, he continued to believe that the Continental system prevented the calling of new evidence and witnesses. Even after umpteen explanations, Jackson still seemed to think, wrongly, that if the evidence was in the indictment it would not be heard in court. He complained that the American public would not believe it was 'a real trial' (21) if the evidence was not produced in court. (The French and Russians forebore to say that they were arguing for a system which was fairer to the defendants, not one which satisfied an ill-informed American public.) Jackson was never reconciled to the unfamiliar Continental system and remained blind to its virtues. He was rather pleased with Gros' description of Anglo-American procedure as 'perhaps the more combative and sporting system'. (22) He spoke with the emotion of the Common Law courtroom lawyer when he finally complained that if all the evidence went into the indictment there 'wouldn't be anything left for a trial'.

There were arguments too over the role of the judges. The French and Russians wanted their familiar system where judges intervene frequently to direct the course of the trial and examine defendants and witnesses. The British and Americans were more accustomed to the adversary process of challenge and cross-examination by opposing counsel. The Continental delegates also wanted to insist on the right of defendants to speak when not under oath and to make a final speech in their own defence.

It was certainly arguable that the Continental court procedure would be acceptable to half the judges in an international tribunal and undoubtedly more familiar to German defendants. It proved difficult, however, to combine elements of it with those aspects of common law procedure on which the Americans and British insisted. Would a compromise be a triumph of selective breeding or a dog's dinner?

On all procedural matters the French and Russians were the more prepared to compromise. Jackson was less willing to meet half way. He was the first to confess he was stubborn. He admitted that these procedural matters were 'so deeply ingrained in the thought of the American people' that

*In an aside recorded in Foreign Office minutes but not printed in the official record of the conference, Maxwell-Fyfe commented that British barristers tend to find judges interrupt rather too often anyway.
that alternatives were unacceptable. (23) But it was not just that he was so stuck on the ‘American Way’ as to have tunnel vision. He had been given ample reason to be wary of Continental attitudes. At the second session of the conference, Nikitchenko had thrown a bombshell by suddenly announcing: ‘We are dealing here with the chief war criminals who have already been condemned and whose conviction has already been announced by both the Moscow and Crimea Declarations by the heads of government.’ The Tribunal’s job was simply to announce ‘just punishment for the offences which have been committed’.(24) So presumably Nikitchenko did not want a trial, merely formal confirmation of political decision; saw no need for a careful examination of the evidence; thought the rights of defendants to be nothing more than an impediment to speedy punishment.

That is certainly what Jackson assumed. He leapt to defend his belief in a true trial. Amazingly calm and coherent under such provocation he insisted that the political declarations had been an accusation, not a conviction; ‘if we are going to have a trial then it must be an actual trial.’ He laid it firmly on the line that the Americans ‘would not be parties to setting up a mere formal judicial body to ratify a political decision to convict’ – the judges must ‘inquire into the evidence and reach an independent decision’. He was prepared to agree with Nikitchenko that ‘there could be but one decision in this case’ – the Nazi leaders were beyond all doubt criminal. But ‘the reason is the evidence and not the statements made by the leaders of state’. (25)

Nikitchenko’s statement had undoubtedly shattered Jackson’s assumption that Russian presence at the Conference implied acceptance of the basic principles of his scheme for a trial. It had also suggested a willingness to ride roughshod over the normal standards of justice. It must have created a deep suspicion in Jackson’s mind that the Russians lacked any commitment to true legality. (The suspicion deepened towards the end of the Conference when Nikitchenko again said: ‘The fact that the Nazi leaders are criminals has already been established. The task of the Tribunal is only to determine the measure of guilt . . . and meet out the necessary punishment.’ (26)) And yet these two flashes from Nikitchenko seem totally untypical in the general context of Russian attitudes. On all other occasions, Nikitchenko and Trainin were great sticklers for legal rectitude. They were firmer than anyone on the rights of the defence to have early and full access to prosecution evidence. They maintained a particularly hard line in opposition to the American suggestion that Masters be appointed to take evidence on commission from witnesses it would be difficult to bring to court. They insisted this scheme would lessen the Tribunal’s authority; all evidence must be presented and challenged fully in open court. They were also anxious that the judges should have maximum independence to determine the law and run the trial fairly and efficiently. So untypical are Nikitchenko’s remarks one wonders if he had been ordered by Moscow to trail a coat. Alternatively he could have been speaking without due care and only wanting to say what all the other delegates believed: the Declarations had said what everyone knew – that the Nazi leaders were criminals; that this was an open and shut case with incontrovertible prosecution evidence and the Tribunal would hardly need much time to reach their decision on the guilt of the defendants.

Whatever the reason, Nikitchenko’s words caused a lot of damage to the negotiations in London. Jackson was constantly prepared to place the worst construction on any Russian suggestion. When they proposed a scheme for replacing judges during the trial, he instantly assumed they were suggesting replacing them for ‘unsatisfactory decisions’, (27) though the Russian draft had made it clear they were worried about judges becoming ill or being recalled for other work. Patrick Dean, the Foreign Office’s observer at the conference, had decided by the end that Jackson was ‘afraid of the Russians, particularly of their methods of trial’. (28) Dean was worried during the negotiations that the Americans were trying ‘to magnify the differences between their own views on the one hand and the Russian views on the other’. The British thought the Russians were being ‘very reasonable’ and were ‘keen to have a fair trial and adopt the best features of all procedures’. Dean blamed Donovan rather than Jackson for American intransigence towards the Russians: he ‘clearly does not like the Russians much’ and ‘would happily do without them in the trial’. (29)

Suspicion and differences in legal thinking widened the rifts between the delegations when they began to discuss the American wish to indict the Nazi organizations. Nikitchenko’s very first comment at the opening session was: ‘I am not quite clear on the point of including the organization.’ (30) Jackson had hoped it was self-evident. From the days of the Bernays plan the declaration of criminality against the main organizations had been a fundamental part of trying the whole regime through its leaders. As the Americans saw it, these Nazi institutions had been the instrument through which the conspirators had carried out their evil plans. A legal pronouncement would confirm the criminality and speed up subsequent proceedings against members who would not be able to argue the matter all over again.

Nikitchenko tried to argue that no declaration was needed – the Moscow and Crimea Declarations had said that the Nazi Party and its organizations and institutions would be wiped out and they had been. All had been disbanded by the occupying forces; criminal proceedings and de-Nazification courts would deal with their members. But Gros quickly pointed out that the statesmen had made declarations of intention, not legal pronouncements. The French and Russians were in total agreement with Jackson that the Nazi organizations were criminal groups. They were, however, very dubious about the legality of a court pronouncement on their criminality. They worried about blanket condemnation, guilt by association. Jackson had to make clear that he envisaged safeguards: the need to prove voluntary membership, knowledge of criminal aims and so on. Even so, as Nikitchenko put it: ‘trying an organization to reach all its
members - I do not think it would be right and I do not think it is practicable.' (31)

French and Russian difficulties in understanding Jackson's plan were not the result of the lack of a concept of criminal groups in their own legal systems. * In both, members of criminal bands could be held responsible for the collective acts of their colleagues as well as for their own. But guilt had to be established by trying individuals; thereafter, from the proof of individual crime, the picture of group criminality could be built up, but an organization could not be tried. As Nikitchenko put it: 'Soviet law does not provide for the trial of anybody who is not a physical person.' (32) Jackson tried to argue that in American law corporations can be seen as judicial persons. So too in Russian civil law, replied Trainin; but not in criminal law, let alone international law (to which there was no reply).

All were agreed that the main Nazi organizations were criminal. In the course of discussion all began to be persuaded that they wished this view to be established in court. Nikitchenko finally admitted (33) that before the London Conference, the Soviet Government had objected to the trial of organizations; they had now come round to respect the American view. What they could not do was to agree on the correct way to prove guilt. And the argument really intensified when Jackson insisted that members of all organizations charged must be given notice of the trial and a chance to defend their group. In American law a judgement against someone is only effective if he has been, in some manner, party to the proceeding. Gros objected that this would turn the hearing into a complexity of trials of minor offenders. Nikitchenko envisaged hundreds or thousands of members turning up and the court grinding to a halt faced with sheer numbers. Jackson thought that no one would dare to come forward to defend the indefensible - unless he was desperate enough for prison food. (Nikitchenko was to be proved right, Jackson wrong).

Trainin thought the whole idea merely muddled. Were those who came forward witnesses, accused or experts? Unless they fitted into one of those categories, they could have no status in court. Jackson was adamant - there must be notice, there must be a hearing, otherwise the American sense of justice would be outraged. The Continentals were appalled. They were equally worried about injustice, but over the very idea of trying organizations; and Jackson's method seemed to be a morass of practical problems. Jackson tried to sway them with some of the horrors he had recently read in Nazi documents: 'These organizations are criminal beyond anything I can dream.' (34) The Russians and French did not need to read Nazi documents; they had lived under, suffered from these organizations too long. But that did not mean they would accept just any scheme for ensuring the punishment of their members. It had to suit their sense of justice too.

*Professor Gros had written a memo for the UNWCC in March pointing out that crimes by groups such as the Gestapo had raised the 'entirely new phenomenon of mass crime' and the need to hold groups responsible before the law. He quoted those articles of French Penal Code and the Code of Military Justice in which the criminality of groups is defined.
Jackson had shown fervour for the cause of international law. He had
taken care to consult such eminent jurists as Hersch Lauterpacht to confirm
his belief that aggression was a crime. He was gifted with persuasiveness
in arguing the need to outlaw war for the future. It is a great pity that so
little of this appeared during the London Conference. Jackson, in fact, very
much lowered the tone of the debate on aggression by constantly harping
on one theme: that American policy before she entered the War, her help
to neutrals, her lend-lease programme had all been based on the conviction
that the War was illegal. In one heated moment he went so far as to mention
that he would rather do without an agreement on an international tribunal
than 'stultify the position which the United States has taken throughout'.

(38) This might seem a theoretical matter to others, 'but it was not too
theoretical a basis for our help in action'. (The others were too polite, or
shocked, to reply that they were there to organize a trial, not an ex post facto
justification of American policy - or, indeed, to get Mr Justice Jackson off
the hook of what they considered the ill-founded advice he had given his
government as Attorney General on the illegality of the War).

Robert Jackson's talents were not those of a diplomat. It had probably
not occurred to him that it would require diplomacy to get international
agreement to his plan for a trial. His convictions were so strong he could
not believe they were not shared by everyone. He became hurt, bewildered
or angry when he discovered they were not - and then lost his capacity for
superbly phrased argument and well-directed passion. A man whom close
colleagues found reasonable and patient all too easily blew his top in public
argument. And the six weeks of the London Conference placed an increas­
ing strain on him. As the arguments and frustrations mounted he toyed
with the idea of calling the whole thing off, 'I am really getting very
discouraged about this, I must say ... I am getting very discouraged about
the possibility of conducting an international trial with the different view­
points ... I think the United States might well withdraw from the matter.'

Maxwell-Fyfe, who described himself as 'a born optimist and also a
working politician', assured him that there were bound to be difficulties.
What was remarkable was the wide area of agreement. (40) As Falco said
of his approach in negotiation: 'I find Judge Jackson is always optimistic
(before he starts) but I find him pessimistic towards the end.' (41)

Jackson was soothed by his fellow delegates' repeated assurances. He
found some relief from the strains of the conference table by flying to
Potsdam to discuss his problems with Secretary of State Byrnes. A visit to
the American prosecution document collection centre in Paris reassured
him that some progress was being made somewhere and that there could
be no doubt of the criminality of the Nazi regime. However the delay in
establishing a court to hear that evidence was intolerable. Not that he was
the only one to feel impatient. Nikitchenko snapped one day when yet
another row began over the definition of aggression: 'If we start discussion
on that again I am afraid the war criminals would die of old age.' (42)

The only American plan which was not discussed exhaustively day after
day at the Conference was the intention to charge the Nazi leaders with
conspiracy, the essential bond of the Bernays plan. The conspiracy charge,
as Jackson argued at London, was to deal only with 'those who deliberately
entered a plan aimed at forbidden acts' not with the millions of soldiers, or
the farmers who occasionally employed slave labour at harvest time. He
wanted to reach 'the planners, the zealots who put this thing across'. These
were the people the British, French and Russians wanted to reach too. They
just did not think that the American concept of conspiracy was the way to
do it. The charge was little discussed at their main sessions - while it
endured death by a thousand cuts in the drafting sub-committee. In draft
and redraft, conspiracy was either omitted altogether, or it was whittled
away to an accusation of 'planning' or 'organizing' specific crimes.

The British might take the American concept for granted, but their
pragmatism suggested its use was too vague, too grandiose to be effective
in court. The Russians and French were accustomed to the idea that con­
spiring to commit crimes is illegal, but in their law the concentration must
be on the criminal act itself. Given their experience of invasion and occupa­
tion in recent years, it seemed only too obvious that the Nazis had com­
mited crimes and that these crimes had been planned and supervised by
their leaders. Why, then, bother to make planning, for which conspiracy
only seemed a fancy word, a separate charge? There was evidence in plenty
to prove the top Nazis committed actual crimes.

Jackson had to face much more argument over what might have seemed
a straightforward question - where the international tribunal should be
established. Jackson wanted an early decision so that work could start on
preparing a prison for the defendants and many of the witnesses, a
courtroom, accommodation for the judges, barristers and their staffs as
well as for the numerous journalists and visitors who could be expected.
A multitude of facilities would be needed for feeding those present, giving
them communications with the outside world, for storage, duplication and
circulation of the thousands of sheets of record and printed documentary
evidence. It would be a major logistical task at any period. In the rubble
of a starving Germany - where everyone was agreed the trial must take
place - it was a herculean one. The US Army had advised Jackson that
Berlin was already overcrowded and its resources overstretched. He visited
Munich whose ruins offered little possibility for staging a trial. General
Clay, however, recommended Nuremberg. Although Allied bombing had
reduced the city to the point where 90 per cent of it was officially termed
'dead', by a miracle certain essentials had escaped destruction. Jackson
went to look. He reported to the Conference that the courtroom in the
Palace of Justice at Nuremberg 'is not as large as it ought to be, perhaps,
but it is larger than any other courtroom standing' (43), and 'the jail
facilities are very adequate' (1,200 prisoners could be accommodated) and
linked directly to the court. There was enough office space in the Palace of
Justice and possible billeting in the suburbs – all in need of repair, but at least repairable in a country virtually bereft of building materials.

Added to these advantages were other attractions. Nuremberg had symbolic significance. It was the scene of the huge Nazi Rallies, the promulgation of the infamous Laws against the Jews. Not least – it was in the American zone. American rations were notoriously better than anyone else’s in 1945; the Americans had the money, the access to equipment, the ‘can do’ for the construction work and the provision of adequate comforts for a major international event. The British and French were delighted with the offer. The Russians were not. Nikitchenko insisted that the trial must be held in Berlin. So keen was he on Berlin he even described it as ‘central’.

His best argument was that it was jointly run by the Four Powers, which made it fit for an international tribunal; he thought the Allied Control Commission could provide the necessary back-up personnel (the ACC was less certain). It was clear to the others, though, that Berlin was an island in the Russian sector. The trial would be dependent on the Russians for rations and communications – and Russians were not famous for comfortable living or efficiency. Jackson must have raised their hearts talking about installing central heating; their hearts must have sunk again as Nikitchenko disputed the need for heating in the early months of the winter – even in the mornings, as Jackson recommended. Jackson offered everyone a trip in his plane to Nuremberg. At the last moment, the Russians refused to go.

Everyone else went and was impressed. Gradually they wore the Russians down into accepting Nuremberg as the site of the trial on condition that Berlin was named ‘permanent seat of the Tribunal’ and that the judges met there first. The compromise was eased by Maxwell-Fyfe who had delighted Nikitchenko with the analogy of a business firm with registered offices in one place and actual activities in another. The old Communist gleefully began to refer to the Tribunal as ‘this new firm of ours’.

Agreement on the site of the trial was not reached until 2 August. It took quite as long to agree on the nature of the charge of aggressive war. The Russians had stuck to their guns for weeks. When they finally compromised it was probably because of outside political pressure. The Potsdam Conference had opened on 15 July. The British had persuaded the other Powers to include the question of war criminals on their agenda (though Jackson had been worried that this would look like political interference in what he wanted to keep a purely legal matter). Once the question of the trial was discussed at Potsdam, British and American enthusiasm for a trial finally won Stalin over to approval of the plans under discussion in London. In a communiqué from the heads of state, the hope was expressed that ‘the negotiations in London (would)… result in speedy agreement’ and that the trial would ‘begin at the earliest possible date’. The Powers called for the publication of a list of defendants early in September.

Given Stalin’s backing, the Russian representatives in London could drop their final objections, and everything now fell rapidly into place. Agreements were ready for signature by 6 August. Jackson was empowered to sign; the others, however, had to wait a few days for the approval of their governments. Trainin had been anxious that their decisions should take the form of an international treaty – in his view treaties were the source of international law and this form would give binding force to their agreements. Others were not certain about imposing law in this way, and Jackson pointed out that any treaty would have to be ratified by the US Senate which might cause renewed argument and would certainly cause delays. So, finally, on 8 August the heads of delegation in London signed two documents which they had been working on at the suggestion of the Russians from the earliest stages of the Conference. The first was a statement of the general intention to fulfil the wishes of the United Nations and the signatories of the Moscow Declaration. This London Agreement announced the intention to establish an International Military Tribunal ‘for the trial of war criminals whose offences have no particular geographical location, whether they be accused individually or in their capacity as members of organizations or groups or in both capacities’. Nineteen other nations later expressed their adherence to this London Agreement.*

Attached to it was a fuller document setting out the composition, jurisdiction, powers and procedure of the Tribunal. The name for this document had caused a certain amount of bother to the drafting sub-committee. Sidney Alderman thought ‘Annex’ was adequate; Trainin wanted it to be called a ‘Statute’ – to imply its binding force. Sir Thomas Barnes, the Treasury Solicitor, finally suggested the name which stuck – the Charter. (41)

The Charter expressed the eventual happy union between the Common Law and Continental systems of procedure. As everyone had wished, the accused were given the right to counsel, and to an indictment and trial in their own language. As a compromise between the two systems the defendants would be served in advance of the trial with an indictment which gave a full summary of the evidence against them and which was accompanied with as many of the relevant documents as possible; others could then be produced in court and time given to the defence to study them. The Tribunal might decide to have evidence taken by Masters on commission, but, thanks to Russian insistence, these Masters were only to take statements, they could not make recommendations to the court, as Jackson had wished. Defendants would have the right to take the stand and testify under oath, subject to cross-examination (which is not usual on the Continent); and to make a final statement without prosecution challenge and not under oath (a right unfamiliar in Anglo-American courts). The result of the blend of two systems was, in Jackson’s view, to give rather more rights to the defendants than might have been available in either system separately. (46)

*Greece, Denmark, Yugoslavia, The Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay, and Paraguay.
When it came to the definition of the charges, however, the London Conference had found compromise more difficult. Some of the contentious issues had not been settled by the Charter. Nor had the French and Russian delegates been prepared to set out the law on which the charges were based—given the unprecedented nature of the trial and the uncertain state of international law, they insisted on leaving it to the judges. The conspiracy charge had virtually disappeared—into a phrase attached to the first count and a hazy sentence added to the other three. And the Charter was no clearer about asking the Tribunal to declare indicted organizations criminal. Thanks to delegates’ doubts about the legality and practicality of the matter, Article 9 did not say the Tribunal ‘must’ decide the guilt or innocence of the groups; it merely said ‘the Tribunal may.’ Some sort of compromise between the warring viewpoints had been reached in the provision that the criminality of organizations must be connected with the criminal acts of individual defendants, together with the entitlement of members to be heard in their organization’s defence.

Individual defendants and organizations were to be heard on three counts. The first was the crime of planning and waging aggressive war. It had been given a new name—previously coined by Professor Trainin—Crimes against Peace. In view of the doubts of the French and Russians as to the status of aggressive war in international law, it was not given a general definition, and the introduction to the charge made it clear that the Tribunal was empowered only to try and punish those who acted in the interests of ‘the European Axis Powers’. This was an undoubted defeat for Jackson who had so longed for the chance to show that any war was criminal. But he put the best face he could on the situation in a Press release which stated: ‘If we can cultivate in the world the idea that aggressive war-making is the way to the prisoner’s dock rather than to honours, we will have accomplished something to make the peace more secure.’ (47) The Charter had created a minor problem for him as the leader of a prosecution team, however. In defining a crime against peace as the waging of war, it had probably ruled out reference by the prosecution to the takeover of Austria in the Anschluss or the invasion of Czechoslovakia, since in those cases no actual fighting had occurred. Law Ten of the Allied Control Council cleared this up for subsequent proceedings by talking of wars and invasions.

In the deliberately created murk of the wording on conspiracy it seemed the Nazi leaders would be held to account for planning Crimes against Peace. However, it was far from clear that they would have to answer for planning the other two forms of criminal activity in the Charter, as Jackson had wished. Count Two dealt with War Crimes. At first glance this charge was less novel than Crimes against Peace. The Charter’s definition of War Crimes followed that of firmly established international agreements; war criminals had frequently been prosecuted and punished for these crimes. It was however an innovation to suggest that responsibility for these criminal activities ultimately rested with those who governed or commanded those who engaged them. Jackson may not have convinced the

London Conference that war crimes were an intended result of the War rather than an unhappy by-product, nor had the wording of the Charter made clear his belief that the Nazi leaders had conspired from the beginning to commit them. But he had found ready ears for his argument that those at the top must bear the brunt of responsibility for the acts of their underlings. Article Seven of the Charter emphasized their view that those at the top could not shelter behind their official positions—holding high office was to be an implication of greater guilt, not a mitigating factor.

The final Count in the Charter—that of Crimes against Humanity—was a totally new charge. The name first coined at Versailles was recommended to the Conference by Professor Hersch Lauterpacht to cover the persecution of racial and religious groups and the wholesale exploitation of European people and resources. Perhaps many of the acts covered by this charge could have been included in the list of war crimes. But existing laws did not always envisage the nature and scale of the atrocities which had been committed. Nor could the charge of War Crimes be stretched to deal with, for example, the attempted extermination of German Jews. The charge of Crimes against Humanity expressed the revulsion against Nazi attitudes and methods which had been so strongly felt by those who drew up the Charter.

As lawyers, however, some of them had felt scruples about the right of an international court to interfere in the domestic policy of a sovereign state. Strong though the temptation had been to prosecute German leaders for persecuting the Jews, the Christian churches, and political opponents in the 1930s, the Charter resisted it. Persecutions had to be examined ‘in connection with any crimes within the jurisdiction of the Tribunal’. This strongly suggested that they must be directly connected with the War and probably had to be committed after 1939. Jackson would have a hard job to convince the Tribunal of his belief that they were all deliberately part of the entire Nazi design right from the beginning of the regime.

No such problems of limitations hedged Article Eight of the Charter which made clear that no defendant could claim the protection of having obeyed orders from a superior, though superior orders might be considered by the Tribunal as a mitigating factor in sentencing. The denial of the defence of superior orders has often been called the ‘Nuremberg Principle’. It was not, however, new at the trial. It was perfectly familiar in national legal systems—and, indeed, it was probably even more familiar to the German military than to anyone. Every German soldier’s paybook contained ‘Ten Commandments’ one of which stated that no soldier should obey an illegal order. (48) (Only in 1944 did the Americans and British clarify their military legal manuals to emphasize that any soldier is personally responsible for the acts he commits.) As Maxwell-Fyfe had pointed out at

*Article Forty-seven of the German Military Code provided that: ‘If the execution of a military order in the course of duty violates the criminal law, then the superior officer giving the order will bear the sole responsibility therefore. However, the obeying subordinate will share the punishment of the participant (1) if he has exceeded the order given to him, or (2) if it was within his knowledge that the order of his superior officer concerned an act by which it was intended to commit a civil or military crime or transgression. (Quoted by Jackson 31 November Vol. II IIMT. Code in Reichsgesetzbblatt 1916, 86*
the London Conference, (48) the defence of superior orders had not been allowed by German judges in at least one of the Leipsig trials after the First World War; and in recent editions of Oppenheimer -- the Bible of international lawyers -- superior orders were likewise inadmissible in international law.

Clear though the Charter might be on questions such as this, it was in fact riddled with unanswered questions; not least, what was the law on aggressive war? Had the Nazis planned to commit crimes other than launching war; if so, from what date? What makes a man a conspirator? Can declarations of criminality against organizations be made and then be binding on subsequent courts? Nor had the framers of the Charter chosen to impose many rules on the Tribunal for handling the case in court.

It might have been expected that the signatories of the London Agreement would have invented the game, evolved rules for playing it which gave the advantage to one side only, then gone out to play certain of victory. Instead, thanks to lawyers' rectitude and national differences, the rule book was vague, the options available to the players ill-defined but not limited to one side, and even the size of the pitch was not specified. In this situation the referee can start to create much of the game. The Charter had established the outline for a trial of the Nazi leaders, but it left many of the important details to be settled by their judges. Through their analysis of the law and the interpretation of the sketch they had been given for the trial, by the way they chose to use the powers given to them and by the rules they evolved for controlling the process, they could shape it and largely determine its outcome. This was going to be very much a trial held by the judges, not one staged by the prosecution. The negotiators at the London Conference had all been agreed on one thing -- that the case against the Nazi leaders was open and shut; they would all be found guilty and punished. Whether they now realized it or not, though, the Charter had taken the initiative from the prosecution and given it to the judges. A walkover victory for the prosecution was no longer guaranteed.

It might well be argued that this very failure to build in a guarantee of prosecution success was one of the great strengths of the Charter -- even if it was not one of its intended virtues. It had other virtues too. Given the extent of the doubts and the intensity of the differences between the delegations it is perhaps surprising they could have agreed to so much. It is easy to accuse them of slack drafting in places -- but this was necessary to avoid snapping national tolerance and in some cases an honest admission of uncertainty which they wished to leave to others to consider. The Charter certainly demonstrated the intention to hold a fair hearing according to commonly accepted principles of justice. Basic issues as well as prosecution and defence cases remained to be heard fully in court. The delegates in London had had to engage in negotiation and co-operation of a kind that seasoned diplomats would have found testing. As lawyers they were faced with the added nightmare of legal innovation. Under the circumstances the London Agreement and Charter were remarkable achievements.

Few of the questions they raised, philosophical or practical, troubled the public at large in August 1945. Some of them were highly technical and only appreciated by lawyers. Some of them would only become apparent during the trial itself. The Agreement and Charter were universally welcomed by the Press. The New York Herald Tribune acclaimed the Charter as 'a great and historic document, an essential companion piece to the Charter of the United Nations'. (49) All papers spotted -- as the Glasgow Herald put it -- that 'the court is new and so are the charges'. (50) All of them too, like the New York Times, welcomed 'a new code of international morals' in the Charter. (51) Lawyers might wince at acting without precedent. Press and public alike in 1945 were delighted by innovation. In the post-war mood men were looking for a new and better world; new, they thought, would undoubtedly be better than the old. As the New York Times put it, 'there are not days in which the people of the world are inclined to quibble over precedents. There must sometimes be a beginning.' (52)

No one questioned the desirability of a trial. Like The Times they called on the 'Grand Assize' at Nuremberg 'to record the solemn abjuration by the general conscience of the supreme offences against humanity (by the Nazis), to vindicate the effective reality of the law of nations and to leave to posterity a supreme warning of the fate of the guilty'. (53) Least of all did any newspaper question the right of the victorious powers to conduct it. The Press had already condemned the Nazi regime. They might welcome a full judicial procedure and the right of the accused to defend themselves, but everyone would agree with the New York Times that: 'Most of the people of the world would judge it poor justice if the men who brought about this war were to escape their punishment.' (54)

In his statement to the Press on the signing of the London Agreement, Jackson tried to preempt any criticism of the victors trying the defeated Germans. He feared the trial would be seen as the victor wreaking vengeance on the vanquished. But 'however unfortunate it may be, there seems no way of doing anything about the crimes against peace and against humanity except that the victors judge the vanquished.' The questions of victory or defeat were in fact irrelevant. 'We must make it clear to the Germans that the wrong for which their fallen leaders are on trial is not that they lost the War, but that they started it.' (55)

An interview for home consumption with the New York Times showed something of the spirit with which Jackson had negotiated in London -- and something of the lessons he had learned there. He said he feared yet another European war, and found Europeans fatalistic, resigned to plus ça change. 'They are less obsessed than Americans with the ambition to reform the world and have less confidence in their ability to do so. Hence there is more disposition to accept future wars as natural.' Even within this philosophy, Jackson thought there was much to be said for a serious attempt 'to make the conduct of wars as humane as possible'. But Jackson denounced this European defeatism and passivity. He wanted the trial to show that war was a crime and outlaw it for the future. His visits to Europe
in the last few months had shown him cities in ruins; people 'hungry, feverish and sullen', homeless and without fuel. Something of his former exuberant confidence had gone. He admitted it would be hard to restore a sense of law and order. He even toyed with the idea that perhaps Americans needed a dose of pessimism to 'shatter their illusions'. (16)

Deep down, however, Robert Jackson only believed in minute homeopathic doses of pessimism. His vitality, optimism and crusading spirit were now to be launched in full measure into the preparations for the trial. The four prosecuting nations must choose their evidence for the final attack on the Nazi regime.

References for Chapter Five

1 FO 371. 51022
2 Obituary in Stanford Law Review, December 1945. Quoted by Maxwell-Fyfe (Kilmuir) in his memoirs
3 Quoted by Telford Taylor in Columbia Law Review. Vol. 53 1935
4 Ibid
5 Ibid
6 Quoted by Biddle in In Brief Authority
7 Jackson Papers, Box 201. National Archives, Washington
8 FO 371. 51022
9 FO 371. 51019
10 FO 371. 51024
11 FO 371. 51019
12 FO 371. 51026
13 FO 371. 51029
14 Jackson Papers, Box 200
16 FO 371. 51033
17 Transcript printed in International Conference on Military Tribunals
18 Ibid 3 July
19 Ibid 20 July
20 Ibid 16 June
21 Ibid 20 July
22 Ibid 3 July
23 Ibid 29 June
24 Ibid 29 June
25 Ibid 29 June
26 Ibid 19 July
27 Ibid 3 July
28 FO 371. 51033
29 FO 371. 51029
30 Transcript printed in International Conference on Military Tribunals, 26 June
31 Ibid 29 June
32 Ibid 13 July
33 Ibid 15 July
34 Ibid 13 July
35 Conversation with William Jackson
36 Transcript printed in International Conference on Military Tribunals, 19 July
37 Ibid 25 July
38 Ibid 25 July
39 Ibid 25 July
40 Ibid 25 July
41 Ibid 2 August
42 Ibid 25 July
43 Ibid 17 July
44 Ibid 17 July and passim
45 Report 11 July from Sidney Alderman to Jackson. Printed with transcripts
46 Jackson's introduction to International Conference on Military Tribunals
47 Jackson Papers, Box 213
48 Transcript, 24 July
49 Leader New York Herald Tribune, 10 August
50 Glasgow Herald, 9 August
51 Leader New York Times, 9 August
52 Ibid
53 Leader The Times, 9 August
54 New York Times, 9 August
55 Ibid
56 Interview New York Times, 9 September