Justice after Atrocity: Nuremberg, Tokyo, and the Birth of International Criminal Law

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Introduction

This book examines how the unprecedented prosecutions at Nuremberg and Tokyo reshaped the legal landscape after the Second World War and, in doing so, inaugurated the field we now call international criminal law. It traces the emergence of new doctrines—crimes against humanity, crimes against peace, and command responsibility—while situating them within older traditions of the laws and customs of war. The trials did more than punish notorious individuals; they also built an architecture for judging political violence, institutional complicity, and large-scale bureaucratic wrongdoing. By placing the tribunals' innovations alongside their contradictions, this study shows how legal forms were adapted to reckon with atrocity on a civilizational scale.

The narrative begins with sovereignty's crisis. Total war blurred the line between battlefield and home front, implicating states, corporations, doctors, soldiers, and propagandists in an interlocking machinery of destruction. The Allied response—inventing international jurisdictions with authority over individuals—marked a departure from nineteenth-century diplomacy and classic interstate responsibility. Yet every legal advance carried a political price: choices about charges, defendants, forums, and procedures reflected negotiations among victors with divergent strategic aims. The result was a juridical experiment whose legitimacy was debated even as it unfolded.

Central to this book is the tension between accountability and the specter of victor's justice. Critics argued that retroactive criminalization and selective prosecution undermined legality, while defenders maintained that unprecedented crimes required principled but pragmatic adaptation. We will explore these debates in detail: how the principle of legality was interpreted, how conspiracy and organizational liability stretched traditional culpability, and how command responsibility evolved through the Yamashita standard. By reconstructing these arguments from judicial opinions, dissents, and prosecutorial memoranda, the chapters that follow assess where fairness was vindicated and where it was compromised.

The tribunals also transformed evidentiary practice. Prosecutors assembled a paper trail of governance—orders, minutes, and memoranda—alongside eyewitness testimony, captured film, and forensic investigations. Such scale demanded procedural innovation: rules on hearsay and authentication, translation regimes for multilingual records, and safeguards for defendants' rights in extraordinary courts. Attention to these evidentiary choices reveals how law contends with mass atrocity's characteristic features: bureaucracy, distance, and denial. It also illuminates the human dimension—survivor testimony that shaped the moral imagination of audiences

far beyond the courtroom.

Beyond the verdicts, Nuremberg and Tokyo seeded legal instruments and institutions that continue to structure global accountability. The articulation of crimes against humanity informed the Genocide Convention; humanitarian protections crystallized in the 1949 Geneva Conventions; later ad hoc tribunals and the International Criminal Court drew directly on the jurisprudence and procedural templates first tested in the postwar years. At the same time, the Cold War, decolonization, and shifting geopolitical alignments exposed the limits of universalism, producing gaps between aspiration and enforcement that persist today. Understanding these legacies requires reading the trials not as endpoints but as beginnings.

This book is designed for law students, practitioners, and readers of human rights history who want both doctrinal clarity and contextual depth. Each chapter pairs close analysis of statutes, charters, and judicial opinions with attention to institutional design, political bargaining, and public reception. The goal is neither celebration nor condemnation, but careful evaluation: what legal problems the tribunals solved, what compromises they accepted, and what questions they bequeathed to later generations.

Finally, the study asks how we should judge the judges. Can extraordinary tribunals deliver ordinary justice? What standards of legality, proportionality, and non-selectivity should govern accountability for mass atrocity? By the end of the book, readers will be equipped to assess the promise and perils of criminal law as a response to political violence—and to consider how the precedents forged at Nuremberg and Tokyo might guide, and constrain, future efforts to secure justice after atrocity.

CHAPTER ONE: From Armistice to Accountability: The Road to Nuremberg and Tokyo

The dust had barely settled on the battlefields of Europe and the Pacific when a different kind of war began—a war not of bullets and bombs, but of briefs and jurisprudence. The cessation of hostilities in 1945 brought with it an immediate, overwhelming question: what to do with the architects of such unprecedented destruction and depravity? The idea of simply executing them, while tempting to some, felt too crude, too reminiscent of the very lawlessness the Allies sought to condemn. There was a burgeoning, if not fully formed, consensus that a more formal, more civilized reckoning was necessary, one that would articulate the scope of the crimes and, crucially, establish a legal framework for their prosecution.

The concept of holding individuals accountable for state-sanctioned atrocities was not entirely new, but its application on such a grand scale was revolutionary. Prior to World War I, international law largely focused on states as the primary actors, with individual responsibility for war crimes often relegated to domestic military tribunals. The Hague Conventions of 1899 and 1907, for instance, laid down rules for the conduct of warfare, but they lacked robust enforcement mechanisms for individuals who violated them. They were, in essence, a gentleman’s agreement among nations, with little teeth for those who chose to behave rather un-gentlemanly.

Even after the First World War, attempts at international accountability for German leaders were largely stillborn. The Treaty of Versailles, signed in 1919, included provisions for prosecuting Kaiser Wilhelm II for "a supreme offence against international morality and the sanctity of treaties." However, the Netherlands, where the Kaiser had fled, refused to extradite him, citing the lack of an existing international court and the political nature of the charges. This diplomatic impasse underscored the significant hurdles in translating the desire for justice into concrete legal action, highlighting the formidable challenge of prosecuting heads of state without a clear legal precedent or an enforcement body.

Despite the failure to prosecute the Kaiser, the interwar period saw a slow, deliberate intellectual shift towards recognizing individual culpability for certain international wrongs. Legal scholars and human rights advocates began to articulate arguments for a more robust system of international criminal justice, often spurred by the horrific innovations in warfare and the rise of totalitarian regimes. The Kellogg-Briand Pact of 1928, for example, which famously renounced war as an instrument of national policy, reflected a growing international sentiment that aggressive war itself should be deemed illegal, laying conceptual groundwork for future charges.

However, the leap from condemning war to prosecuting individuals for waging it was enormous. The traditional notion of state sovereignty, which held that a nation-state had absolute authority within its borders and its leaders were immune from external legal challenges, remained a powerful obstacle. The very idea that an international body could sit in judgment of a nation's leaders was, for many, an affront to national pride and a dangerous precedent that could destabilize the international order. It was a theoretical tightrope walk, attempting to balance the emerging desire for universal justice with deeply entrenched principles of national autonomy.

The atrocities of World War II, however, shattered many of these lingering reservations. The systematic extermination of Jews and other minorities, the widespread enslavement of populations, the indiscriminate bombing of civilian targets, and the sheer brutality of the conflict created a moral imperative that transcended traditional legal niceties. It became clear that the scale and nature of these crimes demanded an unprecedented response, one that would not only punish the guilty but also send a resounding message that such acts would never again go unpunished. The world had witnessed horrors beyond imagination, and the old ways of international law seemed utterly inadequate to the task of reckoning with them.

Even before the war concluded, Allied leaders began to discuss how to address the question of war criminals. As early as 1942, British Prime Minister Winston Churchill, American President Franklin D. Roosevelt, and Soviet Premier Joseph Stalin issued the Moscow Declaration, warning that those responsible for atrocities would be sent back to the scenes of their crimes to be judged by the peoples they had outraged. This early declaration, while vague on legal specifics, signaled a firm commitment to accountability, setting a crucial political precedent for the trials to come. It was a promise, delivered in the midst of conflict, that justice would follow victory, a pledge to the victims and to the world.

However, the initial discussions among the Allies were far from harmonious regarding the precise method of achieving this justice. There were powerful voices, particularly within the Soviet Union and among some British circles, advocating for swift, summary executions of high-ranking Nazi officials without the formality of trials. This "shoot them all" approach, while emotionally understandable given the enormity of the crimes, faced strong opposition from the United States, which championed a more judicial approach. The American argument was rooted in the belief that trials, despite their complexities, would provide a more lasting and legitimate form of justice, creating a historical record and establishing legal principles for the future.

The American position, championed by individuals like Henry Stimson, the Secretary of War, and Justice Robert H. Jackson, who would later become the chief U.S. prosecutor at Nuremberg, ultimately prevailed. They argued that trials would not only punish the guilty but also serve as a powerful educational tool, demonstrating to the world the

meticulous planning and execution of the atrocities. A trial, they believed, would strip away the veneer of state authority and expose the individual responsibility of those who committed unspeakable acts in its name. It was a vision of justice not just as retribution, but as elucidation, a meticulous unveiling of truth.

Yet, even with the agreement on trials, significant legal and logistical challenges remained. There was no existing international court with jurisdiction over such crimes, nor a codified body of international criminal law to draw upon. The Allies were essentially tasked with building the legal framework from the ground up, in the immediate aftermath of a global conflict, while still grappling with the immense task of postwar reconstruction. It was akin to building an airplane in mid-flight, with the added pressure of immense public and political scrutiny.

The question of who would be tried and for what specific crimes was equally complex. Should the net be cast wide, encompassing all who played any role, or should it focus on the primary architects and perpetrators? What constituted a "crime" in this unprecedented context, especially when many of the acts, however morally reprehensible, were not explicitly prohibited by existing international law at the time of their commission? These were not merely academic questions; they were the foundational pillars upon which the entire edifice of international criminal justice would be constructed, or crumble.

The initial discussions also grappled with the political implications of such trials. Would they be perceived as mere "victor's justice," a cynical exercise in punishing the vanquished by the victors? How could the Allies ensure a semblance of fairness and due process for defendants who, in many cases, represented the embodiment of evil? These were not easy questions, and the debates were often heated, reflecting the tension between the desire for retribution and the commitment to establishing a lasting legal precedent. The legitimacy of the entire endeavor hinged on these delicate balances.

Compounding these challenges was the sheer volume of evidence that needed to be collected, organized, and presented. Millions of documents, countless eyewitness testimonies, and vast photographic and film evidence awaited the prosecutors. This was a logistical nightmare on an unprecedented scale, requiring the coordination of multiple nations, languages, and legal systems. The task of transforming raw evidence of atrocity into admissible legal proof was a Herculean undertaking, demanding meticulous attention to detail and a profound understanding of legal procedures across different jurisdictions.

The concept of "crimes against humanity" began to emerge as a critical legal tool to address the systematic nature of the Nazi regime's atrocities against civilians, regardless of their nationality. While traditional war crimes focused on violations of the laws of armed conflict, crimes against humanity sought to capture the broader,

organized persecution and extermination of populations. This nascent legal concept would prove to be one of the most significant innovations of the postwar trials, establishing a powerful precedent for future international criminal law. It was a recognition that certain acts transcended national boundaries and affronted the conscience of all mankind.

Similarly, the notion of "crimes against peace" was developed to address the aggressive waging of war itself. The Kellogg-Briand Pact had outlawed war as an instrument of national policy, but it had not criminalized the individuals who initiated such wars. The Allied powers, particularly the United States, believed that holding leaders accountable for planning and initiating aggressive war was essential to preventing future conflicts. This was a direct challenge to the traditional understanding of state sovereignty and the immunity of heads of state, setting a daring new course for international law.

The groundwork for the trials was laid through a series of conferences and agreements. The London Agreement of August 8, 1945, between the United States, Great Britain, France, and the Soviet Union, formally established the International Military Tribunal (IMT) at Nuremberg and outlined its charter, defining the crimes it would prosecute and the procedures it would follow. This document, born of intense negotiation and compromise, became the foundational text for the Nuremberg trials, a testament to the Allies' ability to coalesce around a shared vision of justice despite their differing initial approaches. It was a truly historic document, charting unexplored legal territory.

Concurrently, similar discussions were underway regarding the prosecution of Japanese war criminals in the Far East. While the specific legal framework and political dynamics differed, the underlying principle of individual accountability for widespread atrocities remained constant. The eventual establishment of the International Military Tribunal for the Far East (IMTFE) in Tokyo mirrored the Nuremberg effort, extending the reach of this new form of international criminal justice to another theater of the war. These twin tribunals, born of the crucible of global conflict, marked a profound shift in how the international community would grapple with mass atrocity.

The road from the armistice to the establishment of these tribunals was fraught with political wrangling, legal innovation, and profound moral considerations. It was a journey from a world where state sovereignty often shielded perpetrators of even the most heinous acts, to one where the concept of individual accountability for international crimes began to take firm root. The very act of conceiving, negotiating, and ultimately establishing these courts represented a watershed moment, signaling the birth of a new era in international law. The world had irrevocably changed, and the legal order was, however imperfectly, struggling to catch up.

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