– a solution embraced in 1928 with the Kellogg–Briand Pact, by which state signatories disingenuously promised to renounce war as an instrument of national policy. The League of Nations, concerned by random assassinations of politicians and diplomats, managed by 1937 to draft a convention for the creation of an International Criminal Court with jurisdiction to try terrorist offences, but it failed to attract many signatories before most of its members slid into another world war.[7]

THE NAZI LEADERS: SUMMARY EXECUTION?

That the course of international law was changed so dramatically by the Nuremberg Charter, trial and judgment, is attributable to a curious mixture of American idealism and Stalinist opportunism, overcoming British insistence on summary execution for the Nazi leaders. As early as 1941, punishment for war crimes was declared by Churchill to be a principal war aim and by 1943 the Allies were sufficiently confident of victory to set up a commission to gather evidence. But Nazi crimes against humanity did not figure expressly in this thinking (the Allies themselves did not, for instance, bomb the railway lines to Auschwitz) and the idea of any trial process was the last thing that British leaders had in mind. Churchill simply wanted a political decision made as to whom to kill – a list of fifty prominent Nazis was proffered, to be executed without trial as and when they were captured. Eden, his foreign secretary, observed that 'the guilt of such individuals as Himmler is so black that they fall outside and go beyond the scope of any judicial process'.[8] Lord Chancellor Simon decided that they should revive the medieval concept of 'outlawry', a status imposed by a grand jury on suspects believed guilty of serious crimes who did not turn up for trial: they could be killed by anyone who captured them. Cabinet would declare the Hitler gang 'world outlaws', who must be executed within six hours of their arrest.[9] On no account should there be a trial: 'It would not rest with judges, however eminent or learned, to decide finally a matter like this, which is of the widest and most vital public policy.' The Foreign Office pointed to the lack of precedent for a trial, and the danger that any charges formulated might breach the

nulla poena sine lege rule against retroactivity. More persuasively, it warned of delays and procedural problems and (even more persuasively) of the risk of defendants propagating their policies from the dock and pointing an accusing finger at Allied war crimes. The UK maintained its position 'that execution without trial is the preferable course' until mid-1945, citing these 'dangers and difficulties' of attempting to do justice to international arch-criminals.[10] At first, its view won American support: when the question was first discussed – at the Moscow conference of foreign ministers in November 1943 – US Secretary of State Cordell Hull declared, '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.'[11]

That Hull did not have his way was due to the fact that it repelled Henry Stimson, the secretary for war. He wrote to Roosevelt the following year, '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.' Hull was eventually persuaded, and joined with Stimson to urge that 'a condemnation after such a proceeding will meet the judgement of history so that the Germans will not be able to claim, as they have been claiming with regard to the Versailles Treaty, that an admission of war guilt was exacted under duress'. Roosevelt wavered, but his successor, Harry S. Truman, had utter contempt for the British solution of summary execution, which was anathema to his idealistic belief in the 'beneficent power of law and the wisdom of judges'.[12] He appointed Supreme Court Justice Robert Jackson to report on the feasibility of a trial, and approved his conclusion:

> To free them without a trial would mock the dead and make cynics of the living. On the other hand, we could execute or otherwise punish them without a hearing. But undiscriminating executions or punishments without definite findings of guilt, fairly arrived at, would violate pledges repeatedly given, and would not sit easily on the American conscience or be remembered by our children with pride. The only other course is to determine the innocence or guilt of the accused after a hearing as dispassionate as the times

> and horrors we deal with will permit and upon a record that will leave our reasons and motives clear.[13]

So Truman wanted an international tribunal to try the Nazi leaders – for good reason. Joseph Stalin wanted one, too, but for reasons which were bad. He wanted show trials, of the kind that his UN ambassador, the vicious ex-prosecutor Andrei Vyshinsky, had rigged for him in the 1930s: proceedings in which guilt was predetermined, confessions unravelled according to a rehearsed script and, most important of all, each significant defendant would be convicted and shot. In terms of Allied power politics it meant one Russian vote for American idealism. De Gaulle cast the French vote the same way, and the British reluctantly fell into line, consoling themselves that the suicides of Hitler, Himmler and Goebbels had diminished the danger that the trial would become a soapbox for Nazi self-justification. Supreme Court Justice Robert Jackson was nominated by Truman as chief prosecutor, and the tribunal at Nuremberg took shape with eight judges (two from each of the four Allied powers) presided over by English Lord Justice Geoffrey Lawrence. International law would never be the same again.

THE TRIAL

The dispute between the Allies over whether Nuremberg should have happened at all is important in any analysis of its achievement. The bleak alternative – summary execution of the German political and military leaders – would have left their crimes against humanity to be revealed by posthumous propaganda rather than in an open forum where only those facts which were incontestable were not subjected to examination. Nuremberg was a show trial, but one in which the victors' sense of fairness was as much on show as the vicissitudes of the vanquished. The odds were stacked, of course: all prosecutors and judges were nationals of the Allied powers, and all defendants and, more regrettably, all their lawyers were German. (It was a measure of the contemporary collapse of adversarial ethics that the General Council of the English Bar refused to allow an English barrister to

defend the Krupp family, while several provincial Bar associations in Germany later took reprisals against members who had defended Nazis 'too vigorously' at Nuremberg.) The German defence lawyers, floundering in the alien Anglo-American environment of the adversary trial, were given limited facilities to prepare their cases and little notice of prosecution evidence.

The counts in the indictment prosecuted by the Americans (conspiracy to wage aggressive war) and the British (crimes against peace) were overblown and hypocritical: as E. L. Woodward, the Foreign Office historical adviser, noted on the eve of the trial, 'up to September 1st 1939, His Majesty's Government was prepared to condone everything Germany had done to secure her position in Europe'.[14] The Russian prosecution team had the easiest task of proving war crimes, but did so with the most repellent dishonesty, insisting on laying Soviet guilt for the Katyn Forest massacre of Polish officers on the Wehrmacht (the court, wisely, made no finding on this allegation). And if anyone was guilty of being an accessory to the crime of aggression it was Stalin, who approved the Molotov–Ribbentrop Pact of August 1939 with its secret promise of a slice of *Lebensraum* for Russia as a reward for acquiescing in Nazi conquest. (Jackson, in a rare example of prosecutorial misconduct, did not disclose this secret protocol to the defence: at Soviet insistence, it remained locked in his files.[15]) Convictions for the war crime of 'wanton destruction' came ironically from judges whose nations had bombed Dresden and Hiroshima, and that strand of the Nazi conspiracy alleged to consist in 'subverting the League of Nations' was positively comic, given that the US had never joined it and the USSR had been expelled from it for attacking Finland.

These elements of humbug in the first three counts were not exposed in the court; the defence of '*tu quoque*' ('I did it, but you did it too', or 'You did it first') was ruled irrelevant with such a predetermined speed and emphasis that it was obvious that the judges were bent on silencing any allegations about Allied war crimes. As a matter both of law and of morality, they were plainly wrong: *tu quoque* evidence is highly relevant to any assessment of whether a particular mode of warfare is justified by military necessity, or is sufficiently beyond the common pale to count as a war crime. So far as the counts alleging

the conspiracy to wage aggressive war and the commission of crimes against the peace were concerned, the *tu quoque* argument was most pertinent: the Germans were charged *inter alia* with violating the rearmament provisions of the Versailles Treaty which the French had ignored and the British had joined the Germans in circumventing. As Jackson confessed to Truman, the Allies had 'done or are doing some of the very things we are prosecuting Germans for. The French are violating the Geneva Convention in their treatment of prisoners of war . . . we are prosecuting the Germans for plunder and our allies are practising it . . . we say aggressive war is a crime and one of our allies asserts sovereignty over the Baltic States based on no title except conquest.'[16] This double standard pervaded the trial, until counsel for Admiral Dönitz persuaded the Americans and the French that evidence from Admiral Chester Nimitz, commander of the Pacific fleet, should be admitted to show that American submarine practices had been the same as those his client was standing accused for ordering.[17] Dönitz was in consequence acquitted of this charge. Otherwise, the *tu quoque* objection continued to be taken and upheld throughout the trial, depriving the court of the opportunity to make any meaningful comment on the irregular commando practices of both sides, the criminality of carpet-bombing, or on the distinction, if any, between the deportations and the forced labour which the Germans were accused of ordering, and the deportations and forced labour to which the Soviets were enthusiastically subjecting the people they now had at their mercy.

For all these failings, Nuremberg stands as a colossus in the development of international human rights law, precisely because its Charter defined crimes against humanity and its procedures proved by acceptable and credible evidence that such crimes had been instigated by some of the defendants. The spontaneous drama of the courtroom provided the defining moment of de-Nazification on the afternoon when the prosecutor showed newsreels of Auschwitz and Belsen and the defendants, spotlit for security in the dock, averted their eyes in horror from the ghastly screen images of the emaciated inmates of their concentration camps. Some sobbed, others sweated, or put their heads in their hands; they sat in stunned silence until the court rose, their individual and collective guilt and shame brought home to them

for ever and beyond reasonable doubt.[18] This was the moment – or at least, the afternoon – of truth, but it came after painstaking months of meticulously translated documentary evidence, showing the defendants' signatures on 'night and fog' decrees, on orders for the extermination of 'useless eaters' and 'lives unworthy of living', a record the judgment accurately described as one of 'consistent and systematic inhumanity on the greatest scale'. It was that record, emerging in a largely truthful evidential shape, which can be credited with effectively destroying any future for Nazism. It prevented – as summary executions of the Nazi leaders could not – myths and fantasies about the Second World War developing in Germany in the way they did about the First in the 1920s. For that reason alone, international justice worked.

In retrospect, the most astonishing feature of Nuremberg was how the adversarial dynamics of the Anglo-American trial sucked in the defendants, who played an earnest and polite, at times desperate, part in making it work. Their leader, Göring, had initially advised them to confine their evidence to three words, 'Lick my arse' – the defiant catchcry of one of Goethe's warrior heroes.[19] But as months passed they became flattered by the fairness (at least, fairishness) of the procedures and rose to the bait of making their excuses to posterity. So they played the justice game – none more effectively than Göring himself. His defence (that the resurgence of Germany after the failure of both democracy and communism was only achievable by total support of Nazi ideology) drove Jackson, his American cross-examiner, to petulant rage. At this level, Göring was able to rebut the absurd conspiracy charge, which sought to try Germany alone for its pre-war political manoeuvrings. To his French accuser, who unemotionally put the case for his involvement in crimes against humanity, he had no answer.

What mattered above all else was that justice was seen to be done: the accused were accorded the right to defence counsel (but only from Germany), to a trial translated into their own language, to a detailed indictment and copies of all documents relied on by the prosecution, to the right both to give evidence on oath and to make unchallenged final summations. The only serious departures from Anglo-American trial procedures were standard features of Continental systems, namely the absence of any jury and the admissibility of hearsay

evidence. Neither were disadvantages. Jurors drawn from the post-war populace of Nuremberg would have been biased *against* the defendant: they had lost all love for the Nazi politicians who had led them to ruin, to such an extent that they demonstrated in their thousands against the acquittals of three defendants. The hearsay rule is a shibboleth which can handicap the defence as much as the prosecution, by excluding important evidence of what was said and done by persons who cannot be called to testify. In both these respects, Nuremberg set a precedent followed by the Hague Tribunal and by the International Criminal Court statute. Guilt on charges of crimes against humanity should be based on logical reasoning by experienced judges and not on the inscrutable verdict of a jury potentially prejudiced by media attacks on the defendant. And all relevant evidence should be available to a court where the discovery of truth is more important than in the ordinary adversarial process: the weight of hearsay evidence (because it cannot be cross-examined) may be less than direct testimony, but it should not be discarded whenever it raises doubts or confirms suspicions, or accurately depicts the historical background.

JUDGMENT DAY

Nuremberg changed and clarified international law in many ways. The Charter itself was the outcome of the four-power agreement signed in London on 8 August 1945, which provided for 'an international military tribunal for the trial of war criminals whose offences have no particular geographical location'. This was, in form, no more than the exercise by belligerents of an established customary right to try captured enemies who had infringed the laws of war as defined by the early Hague Conventions. The definition of crimes against humanity in Article 6(c) of the Charter, however, was not found in these earlier conventions, and was applicable to tyrannous behaviour within a state as much as to wartime conflict between states. Article 7 expressly rejected the 'sovereign immunity' principle which the Americans had at Versailles insisted must protect military and political leaders:

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

It was on this basis that Jackson blew away the dust of sovereignty in his prosecution opening, rejecting the notion that individual leaders could escape responsibility by arguing that they were merely agents of an immune state:

The idea that a state, any more than a corporation, commits crimes, is a fiction. Crimes always are committed only by persons . . . It is quite intolerable to let such a legalism become the basis of personal immunity.

The charter recognizes that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of state. These twin principles working together have hitherto resulted in immunity for practically everyone concerned in the really great crimes against peace and mankind. Those in lower ranks were protected because their orders were called acts of state. Modern civilization puts unlimited weapons of destruction in the hands of men. It cannot tolerate so vast an area of legal irresponsibility.

These defendants were men of a station and rank which does not soil its own hands with blood. They were men who knew how to use lesser folk as tools. We want to reach the planners and designers, the inciters and leaders . . .

The Tribunal, in its judgment, anchored its Charter in 'an exercise of sovereign legislative power by the countries to which the German Reich had unconditionally surrendered'. It was 'an expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law'. It rejected the argument that international law is concerned only with the actions of states, and therefore cannot punish individuals, or (alternatively) cannot punish them for carrying out the orders of a sovereign state: 'the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state . . . if the state in authorizing action moves outside its competence in international law'.

The significance of this ruling is that it provides an authoritative

basis for holding individuals at all levels, whether footsoldiers or leaders, liable for crimes against humanity. The torturers cannot rely on the defence of superior orders, any more than the commanders can rely on the privileges and immunities of the state they serve. Article 8 of the Charter provides:

The fact that the defendant acted pursuant to the order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment . . .

The true test, the Nuremberg judgment decided, was 'whether moral choice is in fact possible' for a soldier or official ordered to kill or torture in defiance of international law.[20] This leaves the proven perpetrator of a crime against humanity only two avenues of exculpation if the action was taken under orders: either that he did not appreciate its unlawfulness, or that he acted under a duress so threatening to himself or his family that it left him no reasonable option but to comply. The Nazi leaders tried at Nuremberg were superiors who gave the orders. In the follow-up trials, duress usually failed as a defence for bankers and doctors, industrialists and bureaucrats, who were personally or politically disposed in any event to carry out Nazi orders,[21] or for officers and soldiers who feared disciplinary sanctions or minor punishment in no way comparable to the gravity of the harm they inflicted by choosing to obey the order.[22] But it was crucial to the perceived fairness of these trials that 'duress' was available and availed of as a defence, however rarely it succeeded (a point which was overlooked by Amnesty International when in 1998 it demanded abolition of duress as a defence to war crimes (see p. 348)).

Criticisms of Nuremberg are justified, but only up to a point: it was not the model of an unbiased international tribunal (that would have required judges from countries which had remained neutral); counts one and two (conspiracy to wage aggressive war and crimes against peace) were novel and infringed the rule against retrospectivity; the fairness of the trial on count three (war crimes) was affected by the ruling against *tu quoque* evidence. But the great achievement of Nuremberg was count four: the crime against humanity – in effect, an ordinary crime committed on a scale of barbarism unimaginable until the Holocaust. This was the crime recognizable even to its

architects when they saw the concentration camp films: the words of the Charter – 'extermination, enslavement, deportation and other inhumane acts . . . persecution on political, racial or religious grounds in connection with any crime' – hardly convey the unspeakable horror. These were not war crimes against enemy soldiers, but against German civilians – Jews, gypsies, homosexuals, the handicapped – who were regarded as pseudo-humans. They were not committed because of the exigencies of war, but because of the vicious racism of Nazi leaders. Unlike the crimes of pirates and slave traders, the traditional targets of individual responsibility in international law, they did not need any international or transborder element to attract jurisdiction: these were crimes that the world could not suffer to take place anywhere, at any time, because they shamed everyone. They were not, for that crucial reason, crimes against Germans (which therefore only Germans should punish); they were crimes against humanity, because the very fact that a fellow human could conceive and commit them diminishes every member of the human race. For this precedent alone, with its potential to destroy sovereign immunity, the Nuremberg judgment was one large legal step forward for humankind.

VICTOR'S JUSTICE?

That humankind did not progress much beyond the Nuremberg verdicts for the next fifty years was due to many factors, only one of which can be laid at the door of the Tribunal. In its end lay the negation of its beginning: it created crimes against humanity and then punished them inhumanely. Twelve defendants were sentenced to death by hanging, after which – by some grisly irony appealing to the Allied high command – the bodies were cremated in the ovens at Dachau. The ashes were consigned to an unidentified fast-flowing river so no grave would ever serve as a place of neo-Nazi pilgrimage. Goering eluded this act of vengeance by taking a capsule of poison on the night before the executions, choosing to die privately in brief convulsive agony rather than in a macabre ritual laid on for the Allied press. The worst feature of the executions was that they had been preordained, at least by the Russians. As early as the Tehran Conference, Stalin had proposed that the trial dispense 'the justice of the firing squad'. Very early in the trial he had it visited by Andrei Vyshinsky, choreographer of his own show trials. It was an excruciating occasion, as the Allied judges and prosecutors hosted a dinner in honour of a man who had been complicit in more crimes against humanity than those they were trying. True to form, Vyshinsky raised his glass and proposed a toast 'to the speedy conviction and execution of the defendants'. The judges drank it, to their subsequent mortification. The British Attorney-General Hartley Shawcross clamoured for death sentences, in breach of an ethical rule of the English Bar that prosecutors must not urge a particular punishment. He argued, perversely, that upon executing these defendants depended 'the ways of truth and righteousness between the nations of the world'.[23] Since he also accepted that they were broken and discredited men, 'the ways of truth and righteousness' were hardly paved by killing them.

But victor's justice required executions. The Russian judges followed their orders from Stalin and insisted on the death penalty for everyone, while only one of the French judges, De Vares, was in principle opposed to hanging. That three of the twenty-two defendants were acquitted, and seven spared the death penalty, gave the Tribunal's decision that element of weighing and balancing which is necessary to any 'judgment', but its punishments subsequently provided a precedent used to excuse the politically motivated execution of other fallen leaders (like Pakistan's Zulfikar Ali Bhutto) whose guilt was much less clearly proven. Something of this stain was removed in the 1990s, when the death penalty was abjured as an option for the international tribunals for former Yugoslavia and Rwanda, and then as a penalty available to the International Criminal Court. It remains historically the most regrettable aspect of the Allied war crimes trials that a process which commenced with Henry Stimson's call to punish 'in a dignified manner consistent with the advance of civilization' should end at Hamelin prison with the English hangman Albert Pierrepoint slavering over Irma Griese ('as bonny a blonde as one could ever hope to meet') as he measured her for the drop.[24]

Once the Nazi leaders had been tried, interest in prosecuting underlings and accomplices waned. A few industrialists – notably

Alfred Krupp – received jail sentences, but the corporations which had profited by deliberately working Jews to death, such as Siemens, Volkswagen and I. G. Farben, were not forced to compensate their surviving relatives. By the end of 1947 the Allies ran out of both money and motivation for war crimes trials. The lawyers who had insisted on reasonable standards of fairness no longer called the shots: prosecutions fell to army officers, who were untrained for the task and uninterested in carrying it out. Most debilitating of all was the onset of the Cold War: Nazi scientists and businessmen who might be of use in the forthcoming battle between communism and capitalism were given immunity, by East and West alike. Justice became a mockery of power politics: while the palpably insane Rudolf Hess remained incarcerated at Soviet insistence for the rest of his life, the US released Krupp in 1951, before half his sentence had expired. This caused Jackson (who had returned to the US Supreme Court) to write despairingly to Shawcross that, 'This country is so heated up about communism at the present moment that the public temper identifies as a friend of the United States any person who is a foe of Stalin.'[25]

It had been fear of 'communism and chaos' which determined the fateful decision of General MacArthur's administration in occupied Japan to exempt from trial – indeed, from all retribution – the worst surviving war criminal of all, the Emperor Hirohito, who had personally approved all his country's barbaric military ventures and had held out against surrender until the radioactive dust cleared from Hiroshima. It was this crucial decision which made the Tokyo trials a mockery of justice, with their death sentences on politicians and generals who had served as the Emperor's accomplices. The French judge, Henri Bernard, said that the failure to prosecute the Emperor vitiated the entire proceedings, while the presiding Australian judge, Sir William Webb, argued that because 'the leader of the crime, though available for trial, had been granted immunity', his accomplices should have their death sentences commuted to life imprisonment. This was the tragic flaw in a trial which should have been as significant as Nuremberg and was in some ways an improvement on it – for example, the defendants were provided with American lawyers, who were permitted to challenge the jurisdictional basis of the Tribunal on the grounds that it was 'victor's justice' imposing '*ex post facto*

criminality'. The proceedings dragged on, from May 1946 to November 1948, because most of this time was occupied with the defence case (George Kennan commented caustically that 'at no time in history have conquerors conferred upon the vanquished such elaborate opportunities for public defence and for vindication of their military acts').[26] The Tokyo prosecution served the historical purpose of collecting hard documentary evidence of systematic atrocities which in their elemental bestiality were beyond even Nazi contemplation: this imperial army impaled women on stakes, after raping them and cutting their children in half. It dropped bubonic plague germs on Chinese citizens, and boasted of its contempt for the laws of war by executing Allied airmen alongside their parachutes and by sending surviving prisoners, at war's end, on death marches. The sadism that flourished with official approval in the prisoner-of-war camps cost 27 per cent of the Anglo-American prisoners their lives (compared with 4 per cent who died in German or Italian captivity). While Nuremberg had confined the concept of the crime against humanity to the wartime genocide of civilian Jews in concentration camps, the Tokyo trial extended the description to peculiarly barbaric acts of murder, generally of prisoners-of-war, in circumstances which amounted in isolation to war crimes, but which were given the extra dimension of guilt because they were proved to be widespread and systematic emanations of a policy approved (or at least tolerated) by Japan's military and political leadership.[27] The Tokyo trial's contribution to humanitarian jurisprudence was the concept of criminal liability for permitting, as distinct from intending, atrocities: this was the 'command responsibility' theory, approved by the US Supreme Court in ejecting General Yamashita's appeal, which half a century later would become the basis for the Hague Tribunal indictment of Karadžić and Mladić (see p. 222).

The absence of Hirohito, the supreme commander, undermined the trial both as a precedent and as a method of guilt acknowledgement. The Emperor, who had previously been psychologically incapable of contemplating surrender, did so on 14 August 1945, only because the atom bomb had been dropped on Hiroshima eight days before. His 'surrender' broadcast to his people was a monument of evasion ('the war situation has developed not necessarily to Japan's advantage,

while the general trends of the world have all turned against her interests') and he should have occupied Goering's place in the Tokyo dock. But MacArthur and his right-wing advisers decided that the imperative of avoiding 'communism and chaos' required the Emperor to remain in place, as an American puppet, even though this meant rigging the Tokyo trial to pretend that he was innocent. The proceedings were very much an American affair: the International Military Tribunal of the Far East was established by MacArthur's declaration, rather than by any international agreement, and he appointed the judges (eleven, which proved too many). His chief counsel, Joseph Heenan, edited Hirohito out of the prosecution evidence and encouraged the twenty-five defendants to make no mention of him (they happily colluded, 'for the future of the Japanese race'). When Tojo accidentally testified that it was inconceivable for a high Japanese official to take any action against the wishes of the Emperor, Heenan stage-managed a bogus retraction. Other indefensible decisions were taken by the American prosecutors: they exempted Japan's warmongering industrialists and its violent (but violently anti-communist) nationalist leaders; they overlooked the enslavement of Koreans and Formosans and hundreds of thousands of 'comfort women' forced to slake the lust of the imperial army. They made a Faustian bargain with the wicked scientists of Unit 731 in Manchuria (where thousands of human guinea pigs were killed in the course of Mengele-type experiments), giving them immunity in return for disclosing the results of their 'research' to the US rather than the USSR.[28]

Although there can be little quarrel with the actual verdicts of the Far East military tribunals, which tried some 6,000 war criminals (imposing 900 death sentences but acquitting about one fifth of all defendants), these inadequacies diminish the main Tokyo trial as a historical example of international justice. Bizarrely, the Americans decided not to publish an official transcript of the judgments: in consequence, the best known is a querulous dissent by Justice Pal, privately published by the author in 1952 and distributed in Japan under the title *On Japan being Not Guilty*. Pal (who did not bother to attend many trial sessions) declared everyone innocent. He made the correct criticism that criminal liability for 'crimes against the peace' could not be derived retrospectively from the Kellogg–Briand

Pact, but irresponsibly he chose to turn a blind eye to the amply proved charges of war crimes, and unforgivably he tried to justify the summary murder of captured Allied airmen ('the conscience of mankind revolts not so much against the punishment meted out to the ruthless bomber as against his ruthless form of bombing').[29]

Pal's dissent provides an example of how a judge's nationality and politics (he was a bitter Indian anti-colonialist) can override his duty to do justice, but it proved influential – especially through its denunciation of the US bombing of Hiroshima. The absence of the Emperor from the dock meant that the US lost for all time the opportunity of proving in court that Truman's first use of the A-bomb did indeed, as he predicted, save hundreds of thousands of Allied and Japanese lives, since it was the only way to force this implacable man to surrender. More significantly, of course, the Emperor's immunity sent the indelible message that the nation itself was guiltless: subsequent generations felt no shame in having an executed war criminal in the family, and the Japanese government even today refuses to contemplate compensation for the victims of its atrocities, unlike the German government, which in 1999 stumped up over £1 billion in the settlement with wartime slave labourers.

The received wisdom in the US supreme command was that Japanese crimes against humanity were more readily forgivable than German, because the latter race were so much more civilized and hence deserved more punishment because they 'knew better'. This thinking, articulated by MacArthur in evidence to a US Senate inquiry, was ignorant as well as paternalistic. Imperial Japan was in fact more thorough-goingly racist than Nazi Germany, its innate superiority lauded over other Asian races as well as over 'decadent' Europeans. Japanese generals, diplomats and government lawyers knew all about the pre-war Hague and Geneva Conventions, and boasted of flouting them. The arrogant amorality with which Japanese soldier and general alike would hack or march to death inconvenient prisoners was arguably as wicked as the perverted ideology which could justify the destruction (by working them to death) of Jews, gypsies and homosexuals. The Nuremberg trial saw off the racist perversion of Nazism; but the Tokyo trial did nothing to deter the bestial military blood-vengeance that has been the hallmark of modern crimes against

humanity, from Rwanda and Bosnia to East Timor. Emperor Hirohito stayed on his throne until his death in 1989, masquerading as a meek marine biologist, touring in 1971 to meet Queen Elizabeth II and in 1975 to meet Mickey Mouse and Dr Kissinger: in that era when crimes against humanity were so regularly overlooked, few bothered to demonstrate against him. For all the promise of Nuremberg, the equivalent trial in Tokyo served more to underline a traditional Japanese song:

> There is a law of nations, it is true,
> But when the moment comes, remember,
> The strong eat up the weak.

Meanwhile, in Cold War Europe, the Nuremberg precedent was being ignored (although in West Germany, once the country had recovered, it was commendably applied in over 6,000 cases of Nazi war crimes). Once the Allies lost interest, nobody bothered to investigate thousands of crimes against humanity whose perpetrators quietly shipped themselves off to begin new lives in Allied countries which accepted them as refugees and did not wake up to their past until the 1990s, by which time most were too old to be satisfactorily tried. Some Nazi criminals found refuge in nations which needed them or sympathized with their crimes. In Perón's Argentina, they organized the army and much of industry; in East Germany, they occupied political positions as administrators and propagandists.[30] President Stroessner of Paraguay personally protected the Auschwitz doctor, Josef Mengele, while successive Syrian rulers not only extended hospitality to Alois Brunner, Eichmann's exterminator-general, but employed him in anti-Israeli work and rejected every request for his extradition.[31]

More positively, however, the United Nations General Assembly in December 1946 unanimously confirmed that the Nuremberg Charter and reasoning of the Tribunal reflected the principles of international law.[32] As the House of Lords was to recognize in the *Pinochet Case*, this set the seal on Article 6 of the Charter, which proclaims that there shall be 'individual responsibility' (notwithstanding that individual's exercise of state power or obedience to superior orders) for

(a) Crimes against peace (waging or initiating a war of aggression or a war in violation of international treaties);
(b) War crimes (violations of the law or customs of war); and
(c) Crimes against humanity.

Questions remained, however, about the latter category, which the Nuremberg judgment itself had treated as if they were particularly heinous examples of war crimes rather than as a separate category of crime which could be committed irrespective of the existence of any inter-state conflict. On this approach, one significant distinction between a war crime and a crime against humanity would be that the latter could be committed by a government against its own nationals (e.g. the Nazis against German Jews), while war crimes could be perpetrated only upon enemies or foreigners. Article 6(c) of the Charter defines crimes against humanity as 'murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population *before or during* [my italics] the war', and is therefore apt to cover barbarities committed within a state against its own nationals, irrespective of the onset of war. Although the Charter may not have been intended to render individuals responsible in international law for the crimes against humanity they committed in time of peace, the question is now academic since 6(c) designated a class of crime which later treaties and precedents – culminating in the appeal judgment in the *Tadić Case* (see p. 327) – have recognized as capable of punishment, whenever and wherever committed.

It should be noticed, however, that an ingredient of the crimes defined as 'against humanity' in Article 6(c) was that they are committed 'in execution of or in connection with any crime within the jurisdiction of the Tribunal'. This suggested (ambiguously, since the absence of a prefatory comma could indicate that this was a requirement only for charges of 'persecution on political, racial or religious grounds') that any prosecution would have to prove a nexus with other crimes over which the Tribunal had jurisdiction, namely war crimes or the crime of aggression. The Tribunal itself adopted this approach, declining to convict any defendant for persecution of German Jews before the outbreak of war, and the Allies in the Tokyo and post-Nuremberg trials confined their crimes against humanity

charges to conduct clearly linked with armed conflict. A requirement to prove such linkage can therefore be said to have been an ingredient of the offence at the time it was established by the Nuremberg Charter and judgment. However, it was to disappear as a customary international law requirement over the following decades as treaties (beginning with the Genocide Convention) and the draft criminal codes promulgated by the International Law Commission contained no such limitation. The statutes for the Rwanda Tribunal and the International Criminal Court exclude this artificial linkage requirement, and after the *Tadić* decision it can be confidently stated to have withered away as an element of the offence.[33] Crimes against humanity may therefore be committed in peacetime, and irrespective of any internal conflict (although the requirement for widespread and systematic oppression will normally mean that such crimes will be committed at times of civil unrest). An element that does remain is the linkage of the conduct charged as a crime against humanity with an exercise of the power of the State, or state-like power asserted by a political organization. The Nuremberg Charter provided authority to punish persons 'acting in the interests of the European Axis countries', but decisions of the Hague and Rwanda Tribunals establish that the act need not be carried out on behalf of a recognized state. However, there must be some connection with an 'official' body which governs *de facto* or which aspires to govern through organized terror.

TOWARDS UNIVERSAL JURISDICTION (GENOCIDE, TORTURE, APARTHEID)

THE GENOCIDE CONVENTION

The first liberation of crimes against humanity from any temporal connection with a declared war came while the Nuremberg judgment still reverberated, in the form of the 1948 Convention on the Prevention and Punishment of Genocide. Article 1 simply states that 'genocide, whether committed in time of peace or time of war, is a crime under international law'. This treaty has been ratified by such a large majority of states that it can now be considered a rule of modern

customary international law, binding on all states (whether they have ratified the Convention or not) and *requiring* them to prosecute acts of genocide. As the ICJ explained in its decision in the *Reservations to the Convention on Genocide Case*, 'The origins of the Convention show that it was the intention of the UN to condemn and punish genocide as "a crime under international law" . . . involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the UN.'[34]

The Convention defines genocide as the committing, with the intention to destroy in whole or in part a national, ethnic, racial or religious group, of any one of the following five acts:

(a) killing members of the group;
(b) causing serious bodily harm or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within that group;
(e) forcibly transferring children of the group to another group.

This definition reflects contemporary preoccupation with genocidal Nazi policy towards the Jews as revealed at Nuremberg: it is wide enough to cover ethnic cleansing and religious pogroms, but it does not address Stalin's extermination of a particular economic class (the kulaks) or the millions he liquidated for suspected dissidence or disloyalty. It would cover gypsies and Rastafarians, but not homosexuals or members of a political or social organization unless membership was confined to a particular tribe, race or nationality. On this basis the British government declined to credit the Spanish prosecutor's allegation of genocide against General Pinochet: it could not by definition cover his attempts to exterminate left-wingers. Attempts to liquidate a political group could, however, be prosecuted as a crime against humanity consisting of 'persection on political grounds': on this basis the French Court de Cassation held that Klaus Barbie could be prosecuted for eliminating members of the French Resistance.[35] It is, moreover, limited to *material* destruction of a group, either by physical or biological means, rather than the destruction of

the 'command responsibility' theory was misapplied to the facts at the trial of Yamashita (who was wrongly convicted), and rejected as a basis for criminal liability at the 1971 trial of Captain Ernest Medina over the My Lai massacre: see Ann Marie Prévost, 'Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita', *HRQ* 14 (1992), p. 303. The question of when a commander is criminally responsible if his troops run amok requires a more careful analysis than is provided by either case.

3. *United States* v. *Ohlendorf (Case 9)* (1946–7), IV Trials of War Criminals before the Nuremberg Military Tribunals, p. 498.

4. *Barcelona Traction Case* (*Spain* v. *Belgium*), ICJ Rep. (1970), para. 33.

5. *The Antelope* (1825) 23 US (10 Wheat) 64.

6. Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, 2000), ch. 3.

7. Proceedings of the International Conference on the Repression of Terrorism, League of Nations (1937).

8. Foreign Office Paper (18 July 1942).

9. Richard Overy, *Interrogations* (Allen Lane, 2001), p. 6.

10. UK Aide-mémoire (May 1945). *Life Sentence – The Memoirs of Sir Hartley Shawcross* (Constable, 1995), pp. 90–91.

11. Conference minutes, quoted by Sir Hartley Shawcross, *Tribute to Justice Jackson* (New York Bar, 1969).

12. Ann and John Tusa, *The Nuremberg Trial* (Macmillan, 1983), p. 66.

13. Ibid., Report (1 June 1945), Jackson to Truman.

14. Quoted by Michael Biddiss, 'Victor's Justice?', *History Today* (May 1995), p. 40.

15. Richard Overy, *Interrogations* (Allen Lane, 2001), p. 54.

16. Robert E. Conot, *Justice at Nuremberg* (Weidenfeld & Nicolson, 1983), p. 68.

17. Ibid., p. 325. And see Michael Walzer, *Just and Unjust Wars* (Basic Books, 1991), p. 148ff., for a discussion of the Laconia Order (U-boats must not attempt to rescue all survivors) and its US and British equivalents.

18. Conot, *n.* 16 above, p. 160.

19. Ibid., p. 329.

20. 'The Nuremberg Judgement', *American Journal of International Law* 41 (January 1947), p. 172.

21. *Re Krupp and others* (1948), 15 ILR 620.

22. *Re Ohlendorf and others* (1948), 15 ILR 656.

23. Tusa, *n.* 12 above, pp. 421 and 423.

24. See Albert Pierrepoint, *Executioner Pierrepoint* (Harrap, 1974), p. 148.

25. Shawcross, *n.* 10 above, p. 133.

26. John W. Dower, *Embracing Defect: Japan in the Wake of World War 2* (W. W. Norton, 1999), p. 453. Dower's is the best, and most recent, analysis of the long-term damage done by Hirohito's immunity. He concludes (p. 562) that, 'Even Japanese peace activists who endorse the ideals of the Nuremberg and Tokyo Charters, and who have laboured to document and publicize Japanese atrocities, cannot defend the way the war crimes trials were carried out; nor can they defend the American decision to exonerate the Emperor of war responsibility and then, in the chill of the Cold War, release and soon afterwards openly embrace accused right-wing war criminals like the later Prime Minister Kishi Nobusuke.'

27. Ibid., p. 437.

28. See Yves Beigbeder, *Judging War Criminals* (Macmillan, 1999), p. 72.

29. Ibid., p. 69.

30. Simon Wiesenthal, '*Justice Not Vengeance*' (Weidenfeld & Nicolson, 1990), pp. 91, 208–9.

31. Ibid., ch. 30.

32. Resolution 96(1) of the UN General Assembly (11 December 1946).

33. The debate over the need for linkage is summarized by Stephen Ratner and Jason Abrams, *Accountability for Human Rights Atrocities in International Law* (Oxford, 1997), pp. 45–57; and see the decision of Justice Toohey in the High Court of Australia, *Polyuknovich* v. *Commonwealth* (1991), 172 *CCR*, pp. 501, 664–77.

34. *Reservations to the Convention on Genocide Case* (1951), ICJ Rep. 15, p. 23.

35. *Barbie* (1988), 78 ILR, pp. 137–40.

36. See the commentary to Article 19 (Prohibition of Genocide) of the ILC Draft Code of Crimes against the Peace and Security of Mankind (report of the ILC on the work of its 43rd session, 1991). The definition of genocide in Article 6 of the Rome Statute of the International Criminal Court is identical to that in the 1949 Genocide Convention.

37. *Prosecutor* v. *Akayesu* (1998), 37 ILM, p. 1399.

38. *Kevin Buzzacott* v. *Hill and Downer*, Federal Court of Australia (1 September 1999).

39. *A-G of Israel* v. *Eichmann* (1962), 36 ILR, pp. 18 and 277; *Extradition of Demjanjuk* (1985), 776 F2d 571.

40. *Ex parte Pinochet (No. 3)* (1999), 2 All ER 97, pp. 108–9 (Lord Browne-Wilkinson). The quotation is from *Extradition of Demjanjuk*, *n.* 37 above.

41. *Al-Adsani* v. *UK* (2002), 34 EHRR 11.

42. *Filártiga* v. *Peña-Irala* (1980), 577 F. Supp 860.

43. See the Privy Council decision in *Re Piracy Jure Gentium* (1934), AC 586.