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# (De)Constructing the Nazi State: Criminal Organizations and the Constitutional Theory of the International Military Tribunal

DAVID FRASER\*

## I. INTRODUCTION

The place of the International Military Tribunal (“IMT”) at Nuremberg for both historical and legal scholarship is not yet beyond doubt as we approach the seventieth anniversary of the proceedings.<sup>1</sup> Some claim that, despite its many acknowledged shortcomings, the IMT occupies a place of singular importance for both lawyers and historians. The trial itself, and other international criminal proceedings, has become the object of a sub-genre of the historical study of “war crime trials.” Additionally, the efforts of the prosecution at Nuremberg to mount a detailed document-based case against the accused leaders of the Hitler regime, created a treasure trove of Nazi era documents that provides the basis for ongoing historical inquiry into many aspects of the period between 1933–1945.<sup>2</sup> The extraordinary process at Nuremberg not only occupies a significant place of historians of the Nazi and post-war periods, but it sits, in most accounts, as the fountainhead of the evolution of what we now know as “international criminal law.” As Michael Bazylar

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1. See generally TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946 (NUREMBERG 1947).

2. See generally MICHAEL R. MARRUS, THE NUREMBERG WAR CRIMES TRIAL 1945–46: A DOCUMENTARY HISTORY (St. Martin’s Press 1997).

has argued, the Nuremberg trials put the ideas of genocide, and more specifically, crimes against humanity on the agenda of international law.<sup>3</sup> Others are somewhat more skeptical about the contribution of the Nuremberg proceedings to our historical understanding of the nature and function of the Nazi period in Germany or throughout occupied Europe, or as a basis for a proper legal representation of the Hitler regime.

For those like Donald Bloxham, the Nuremberg trials do not offer the insights claimed by Marrus, nor do they provide a real jurisprudential setting for the development of international law. Adherents of this particular interpretative position argue that, due to the flaws in the evidence as well as the weakness of the legal and jurisprudential foundations for many of the claims proffered by the prosecuting authorities at Nuremberg, simply cannot serve as a valid bases for any positive assessment of the trials and their aftermath.<sup>4</sup> Moreover, the adherents of this broad view reject the idea that, with particular reference to the Holocaust, the IMT proceedings were, or are, of particular significance, either in relation to the historical understanding of the Shoah, or of the correct legal construction of the Nazi attempt to exterminate European Jewry. The inherent limitations of the conception of “crimes against humanity”—dependent upon their connection with “war crimes” or “crimes of aggression” at Nuremberg—create a legal roadblock to understanding the uniqueness of the Shoah by making extermination subservient to other, more traditional international criminal law offences. As a matter of historiography, or of socio-legal history, this means that the reality of the prosecution’s case was focused on these more accepted violations of the international legal order, which in turn led to a concomitant lack of focus on the killing of European Jews as a separate and core phenomenon of the Nazi regime. On these and related points, the debate is far from closed.

Together with a growing literature on the IMT proceedings, increasing attention is being paid to the subsequent trials heard before the Nuremberg Military Tribunal.<sup>5</sup> Works by Kevin Jon Heller and Kim Priemel, in particular, have added to the substantive discussions of these questions among legal scholars and historians.<sup>6</sup> While much remains to

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3. See generally MICHAEL BAZYLER, *THE HOLOCAUST, GENOCIDE AND THE LAW: THE QUEST FOR JUSTICE IN A POST-HOLOCAUST WORLD* (Oxford Univ. Press 2016).

4. See generally DONALD BLOXHAM, *GENOCIDE ON TRIAL: WAR CRIMES TRIALS AND THE FORMATION OF HOLOCAUST HISTORY AND MEMORY* (2001).

5. See generally *TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10* (U.S. Gov’t Printing Office Oct. 1946–Apr. 1949).

6. See generally KEVIN JON HELLER, *THE NUREMBERG MILITARY TRIBUNALS AND THE*

be done in terms of a more complete socio-legal history of the Nazi regime, and of the Shoah in particular, lawyers and historians are now more focused on the rich material created by post-war prosecuting authorities, and on the legal proceedings against Nazi officials and collaborators in different countries of occupied Europe, in an effort to create a more comprehensive socio-legal history of the 1933–1945 period generally, and of the Holocaust specifically.<sup>7</sup>

It is not my intention to offer a detailed historical or legal addition to this literature on the Shoah, or to provide a detailed analysis or critique of the strengths and weaknesses of the IMT proceedings. My goal is much more limited and narrowly focused, at least at first blush. My attention is directed towards what I consider to be a neglected, but important, aspect of the IMT proceedings which I believe could offer new and important insights into the broader questions regarding the value and place of the Nuremberg Trials and about the core goals and functions of legal and jurisprudential analysis of the Nazi regime. Again, there is a growing, but still minority, literature on the significance of law within Nazi Germany in general,<sup>8</sup> and, more particularly, on the instantiation of the Shoah.<sup>9</sup> My focus is not on the debates and issues that continue to agitate the world of jurisprudential concern over whether Nazi law is or was law as we might want to understand it, although much of what follows in this brief, and necessarily somewhat cursory investigation, will feed into those debates in—what I hope is—an important way. My attention will be on interrelated aspects of the legal history of the IMT proceedings against major Nazi war criminals, aspects that have been submerged, and perhaps even ignored, in all the debates that have surrounded the Nuremberg Trials. In particular, I will focus on legal concerns about retrospective norms, victors' justice, and the imposition of individual liability for crimes committed in a heretofore state-centric system of international law.

It appears to be often forgotten that the IMT considered more than just the individual guilt of the accused named in relation to crimes of

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ORIGINS OF INTERNATIONAL CRIMINAL LAW (Oxford University Press 2011); REASSESSING THE NUREMBERG MILITARY TRIBUNALS: TRANSITIONAL JUSTICE, TRIAL NARRATIVES, AND HISTORIOGRAPHY (Kim C. Primel & Alexa Stiller eds., Berghahn Books 2014).

7. See generally David Fraser, *Shadows of Law, Shadows of the Shoah: Towards a Legal History of the Nazi Killing Machine*, 32 OXFORD J. OF LEGAL STUD. 401 (2011).

8. See generally MICHAEL STOLLEIS, *THE LAW UNDER THE SWASTIKA: STUDIES ON LEGAL HISTORY IN NAZI GERMANY* (Thomas Dunlap trans., Univ. of Chicago Press 1998); INGO MULLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* (I.B. Tauris 1991).

9. See generally *Shadows of Law*, supra note 7; DAVID FRASER, *LAW AFTER AUSCHWITZ: TOWARDS A JURISPRUDENCE OF THE HOLOCAUST* (Carolina Academic Press 2005).

aggression, war crimes, crimes against humanity, conspiracy to commit, or planning such crimes. Another important part of the prosecution's case was brought against organizations: those corporate, collective bodies, believed to have been at the heart of the structure of the Nazi apparatus that planned and perpetrated the substantive offences of which the individual defendants stood accused. Each of the accused was identified in terms of his membership, leadership, and active involvement in these various organizations. The prosecution's case, against both the individual defendants and the organizations charged as "criminal" participants, was founded in the core idea that the defendants and the organizations they represented, participated in a vast criminal enterprise, the purposes of which were to plan and then carry out various violations of international legal prohibitions against aggressive war, war crimes, and crimes against humanity. The organizations named and pursued by the prosecuting authorities at Nuremberg were selected because of their central place in the criminal apparatus of the Nazi regime.

Naturally, the decision to bring criminal indictments against entire organizations raised significant legal issues. There were broad concerns about retrospectivity and victors' justice that informed legal and jurisprudential concerns about the trials generally. In addition, the idea of prosecuting organizations as criminal raised more specific legal and jurisprudential questions that continue to arise today. To some extent, as shall become more clear in what follows, both in fact and in law, the organizations were not in reality "convicted" in the traditional sense of the word. Instead, the Tribunal entered a declaration of criminality against the collective found to have been a participant in one or more of the crimes named in the indictment. This, in turn, would then have legal consequences—explored below—on later individual criminal defendants.

I believe that the choice to select organizations for prosecution as "criminal" groups offers potentially important insights into how the prosecution at Nuremberg, and the governments of the victorious and occupying powers they represented, conceived of and constructed the Nazi state itself. The prosecution of the named alleged "criminal organizations" opens up intriguing and important possibilities for us to begin to understand the constitutional jurisprudence of the IMT. This is important for at least three obvious reasons. First, it allows us at first blush to understand the prosecution's understanding of the nature of the Nazi state—an understanding that informed the prosecution of the individuals and organizations charged at Nuremberg. This in turn may permit us, after more detailed study, to further explore the bases for the prosecu-

tion of major (and other) war criminals in the postwar period and to further clarify the criminal charges brought against alleged Nazi criminals from both historical and socio-legal perspectives.

Secondly, the insights about the construction and understanding of the Nazi state that informed the Nuremberg (and other) prosecutions allow us to situate more precisely, both judicially and historically, the IMT proceedings in their own particular moment. The question is one that goes both to a fuller understanding of how the Nazi state was understood and portrayed by the prosecution authorities at Nuremberg, and, more importantly I believe, to test that construction against the rest of the historical and legal records of the portrayal and positioning of the Nazi state at other important and relevant historical moments. The Hitler regime existed in Germany between 1933 and 1945, a twelve-year period in which it functioned as the government of an internationally recognized nation state. The questions that arise for further inquiry are how and why an otherwise “legitimate” state became a “criminal state,” how that evolution and changing characterization informed the IMT prosecution, and how, or if, the IMT prosecution itself changed that characterization.

Thirdly, a study of the legal and constitutional theory behind the IMT and other trials in the postwar period may allow for more subtle and contextualized understandings of the Nuremberg and subsequent proceedings in their broader political and historical circumstances. Despite the centrality of the criminal law paradigm at the heart of these cases, the judicial proceedings also carried important pedagogical messages for a number of audiences, such as Germany, other European countries, and North America. The construction of the Nazi state, its proper political, ideological, and legal characterizations asserted, and to some extent confirmed, in the criminal organizations trial, were understood in different ways by different audiences, particularly in Germany.<sup>10</sup> Moreover, the reception and understandings of the IMT changed and mutated over time so that a contextualized account of this important aspect of the Nuremberg proceedings can serve as a starting off point for useful and more developed historical-legal debates.<sup>11</sup> The lead

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10. See generally Christoph Burchard, *The Nuremberg Trial and its Impact on Germany*, 4 J. INT'L CRIM. JUST. 800 (2006); Knut Wolfgang Nörr, *From Codification to Constitution: On the Changes of Paradigm in German Legal History of the Twentieth Century*, 60 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 145 (1992).

11. Elizabeth Borgwardt, *Re-examining Nuremberg as a New Deal Institution: Politics, Culture and the Limits of Law in Generating Human Rights Norms*, 23 BERKELEY J. INT'L L. 401, 454 (2005); see generally Matthew Lippman, *Nuremberg and American Justice*, 5 NOTRE DAME J. L. ETHICS & PUB. POL'Y 951 (1991).

American prosecutor was clear in his belief that the criminal organizations aspect of the case against the Nazis and their state apparatus was central to the overarching aims of the prosecution, and, in particular to the desire to punish, under the protective umbrella of the legality under which the IMT was sheltered, those who had so blatantly breached the existing international norms prohibiting crimes against peace, war crimes and crimes against humanity. For Justice Robert Jackson,

In administering retributive justice, it would be possible to exonerate these organizations only by concluding that no crimes have been committed by the Nazi regime. Their sponsorship of every Nazi purpose and their confederation to execute every measure to attain those ends is beyond denial. A failure to condemn these organizations under the terms of the Charter can only mean that such Nazi ends and means cannot be considered criminal, and that the Charter of the Tribunal is considered a nullity.<sup>12</sup>

In other words, the question I wish to raise is primarily one that goes to how the IMT understood, or created an understanding of the juridical nature of the Nazi state. This precise question of constitutional law and jurisprudence has received little or no detailed attention in the myriad discussions and analyses of the Nuremberg trials. Yet it would appear that a historically informed and accurate understanding of the very nature of the Nazi state was at the heart of the proceedings, which indicted and prosecuted both individuals and organizations for the role they were alleged to have played in the functioning of the Nazi regime. Removed from the trials themselves, the next question that must also be posed concerns what the historical and legal understandings of the Nazi state before the Nuremberg trials were. In answering this second question, one might begin by comparing and contrasting, in the appropriate legal and historical contexts, the characterizations of the Nazi state at different historical junctures and under different legal frameworks. This comparison will allow us to understand the precise way in which the IMT proceedings—in terms of the indictments, the evidence, and the IMT's judgment on the “criminal organizations” question—constructed a vision and constitutional understanding of the Nazi state, that may have differed, as I believe it did, from that of other historical times and under different sets of legal understandings. This inquiry thus demands that we investigate the “correctness” of the IMT characterization. Further, we must investigate by asking important theoretical and practical questions about how the creation of a “criminal state” at the IMT

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12. Robert H. Jackson, *The Law Under Which Nazi Organizations Are Accused of Being Criminal*, 19 TEMP. L. Q. 371, 389 (1945).

through the organizations part of the prosecution has influenced subsequent historical and legal understandings of the Nazi state. Finally, we must inquire into how the idea of a “criminal state,” arguably developed and concretized at Nuremberg, may have played important roles in subsequent international legal investigations and events. Again, it is not my intention to fully answer these questions or to even engage in the extensive and detailed examination of the proof and evidence advanced against the organizations before the IMT. Instead, I simply wish to outline the constitutive function of the prosecution of the so-called “criminal organizations” at Nuremberg in order to point out how and why this understudied aspect of the trials against Nazi officials is more deserving of our legal and historical inquiry and understanding.

The prosecution of Nazi officials and organizations, both before the IMT and the subsequent proceedings of the NMT, were not necessarily grounded in a clear and coherent jurisprudential or historical understanding of the Nazi state, or of the nature of legality under the Nazis.<sup>13</sup> Therefore, I am not suggesting that the prosecution had a worked through, solid, and intellectually grounded “theory” of the Nazi state and its constitution. Nonetheless, the prosecution did have very specific ideas about the acts and activities of the accused and of the organizational structures of “government” within the Nazi regime, and about the aims of those activities. From these understandings, and the arguments made by the prosecution, we can, in fact, glean the basic and core elements of a constitutional jurisprudence that informed the understanding of the Nazi state by the Allied powers. Indeed, it is only if we address the question of the constitutional law of the Nazi state that we can begin to understand the basis of the prosecution’s cases against the individual and organizational defendants before the IMT. The combination of the “conspiracy” and “planning” elements of the indictments shows us quite clearly how the Allied lawyers understood the processes and aims, not just of the accused individuals and organizations, but how they perceived the ways in which those aims and implementation processes figured at the heart of the Nazi state structure.

By examining the ways in which the prosecution proceeded, how the charges were laid, the evidence produced, and, finally, the judgments reached, we may be able to find not just only direct indications of the underlying constitutional theory of the IMT proceedings, but also draw clear inferences from these same elements about the legal and historical construction of the Nazi state at the Nuremberg trials. This arti-

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13. See generally David Fraser, *Evil Law, Evil Lawyers?: From the Justice Case to the Torture Memos*, 3 JURIS. 391 (2012).



cle will begin the process of engaging in a careful and historically accurate study, not just only of the nature of the state as the epitome of totalitarian regimes, but of the ways in which our current understandings of these historical issues have been shaped by the prosecution program before the IMT.

## II. THE CASE AGAINST THE CRIMINAL ORGANIZATIONS

The study of the case brought against the so-called “criminal organizations” at Nuremberg opens up avenues for future research into the nature of the Nazi state as revealed at the trial, and significantly, into the construction of the Nazi state presented by the prosecution before the IMT. A careful and detailed comparison between the two reveals, I believe, a fundamental flaw in the IMT proceedings, or at least, an instance indicating that we must approach the IMT as a historical and juridical phenomenon in its own specific legal and historical context. I am not suggesting that the entire process of the IMT was fatally weakened to such an extent that it must be removed to the garbage can of legal historical inquiry—quite the contrary. Firstly, I believe that an analysis of the criminal organizations part of the trials does, in fact, reveal important and useful information about the nature and functioning of the Nazi state, and for lawyers, of the constitutional law system of the Third Reich. The fact that the conclusions to be drawn might call into question the assertions and presumptions of the case against the various groups pursued does not fundamentally undermine the prosecution’s attempt to criminalize the organizational structures of the Nazi state. Instead, it might also offer a deeper and better understanding of the organizational and juridical structures of the state apparatus in Germany between 1933 and 1945, or even at various points within that period. Secondly, such an analysis serves the useful historiographical and jurisprudential functions of studying and understanding the IMT as an institutional process set in its own time and context. Most obviously, we now know more about the Nazi regime, its functioning, and in particular, about the Holocaust, than the prosecution authorities could have in 1945–1946. This is simply the nature of historical research: new sources are found and different intellectual perspectives are proffered concerning existing sources. Historical “knowledge” changes and evolves, so it would be unrealistic to set out a position in defense of the IMT that would insist that it could have offered a definitive and final account of the Nazi state and the criminality associated with that regime.

Finally, of course, it is not necessary to arrive at a conclusion rejecting any hint of historical significance or jurisprudential import by

insisting on the need for contextualization of the IMT proceedings. The Tribunal did not arise out of whole cloth. It was the result of lengthy and often heated negotiations among the vanquishing powers.<sup>14</sup> Each of those powers had its own agenda in relation to the conquest of Germany, the punishment of perpetrators of international crimes, and the (re)establishment of a new Germany. The jurisprudential basis of the prosecution was, and for some remains, both problematic and innovative. Germany was devastated; the Tribunal, its investigators, and its lawyers worked under very difficult circumstances. To say that the IMT process was flawed, or that its authorities perhaps misapprehended some of the evidence, or that they underestimated the true scale and scope of the Shoah,<sup>15</sup> is simply to recognize the difficult circumstances and contexts in which the IMT did its work. What is important is the way in which the “criminal organization” part of the IMT process can, I believe, provide fruitful avenues of investigation into the actual functioning of the Nazi state and its constitutional framework. At the same time, it provides a useful object lesson in the need for historians and lawyers to place the IMT proceedings, its assumptions, and its conclusions in their own particular context.

Part of the context in which we must place the “criminal organizations” aspects of the IMT proceedings is found in the formal legal documents under which the trial took place, and in the Tribunal’s judgments on the criminal organizations aspects of the charged offenses. Of course, a complete analysis of the IMT in this context would also involve a detailed examination of the charges against the named individual defendants in relation to their membership in, and leadership of, the organizations. Further, it would also involve a careful study of all of the evidence led by the prosecution and defense attorneys not solely in relation to this question, but more specifically, in relation to the activities of the alleged criminal organizations themselves. In this introductory study, I shall limit myself to an indication of the most important elements and questions for the development of a constitutional jurisprudence of the Nazi state to be found in the charges brought against the bodies themselves. Next, the findings of the IMT will be explored in so far as they concern the guilt or innocence of the organizations. I leave for another day the study of the roles played by the individual named defendants and the evidence adduced in relation to the acts and activities of the organizations.

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14. See generally ARIEH J. KOCHAVI, *PRELUDE TO NUREMBERG: ALLIED WAR CRIMES POLICY AND THE QUESTION OF PUNISHMENT* (1998).

15. See generally BLOXHAM, *supra* note 4, at 93–184.

It goes without saying that a full understanding not just of the charges and findings against the organizations would require a detailed review of the substantive and inchoate offenses at the heart of the Nuremberg proceedings. War crimes, crimes of aggression, crimes against humanity, and participation in the planning and execution of those crimes, as part of a common plan or criminal conspiracy, are the violations of international law alleged by the prosecution against both the individual and corporate defendants at Nuremberg. The substantive content, or lack thereof, of each of these offenses has been at the heart of international legal scholarship in its consideration of the Nuremberg Trials. A full-blooded contemporary reconsideration of these "crimes" would have to be carried out in order to complete a study of the organization's part of the trials and of the constitutional theory of the Nazi state emerging therefrom. However, that too, is an exercise for another day.

The Charter of the International Military Tribunal established the basic jurisdictional frame for the prosecutions of alleged Nazi war criminals.<sup>16</sup> Article 6 set out the international crimes within the remit of the Tribunal: (a) crimes against peace; (b) war crimes; and (c) crimes against humanity. More significant for the Trial as it developed, particularly in the hands of the chief US prosecutor, Justice Robert Jackson, was the final paragraph of Article 6, which states:

Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.<sup>17</sup>

As is now well known, the US case in particular would proceed along the lines outlined in this last paragraph of the Charter. In other words, it was the basic understanding of the Nazi state, and of events during World War Two (and leading up to hostilities), that the accused, as representatives of the Nazi regime, acted in concert as part of the "Common Plan or Conspiracy" to commit acts in violation of international law (i.e., crimes against peace by waging aggressive war, war crimes, and crimes against humanity). The case against the defendants was understood as one in which the entire state apparatus of Nazi Germany was a large criminal conspiracy against world peace and against civilian populations throughout Europe. While the acts concretizing the

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16. *See generally* Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 284 [hereinafter Nuremberg Charter].

17. *Id.* § II art. 6

offences were set in motion with the invasion of Poland in early 1939, in effect, the preparatory steps in the conspiracy took place almost immediately following the seizure of the state apparatus and the assumption of power by Hitler in the spring of 1933. Again, it is not possible to detail the case made out by the prosecution about the nature of the Nazi regime from Hitler's rise to power until the unconditional surrender of the Reich military in May 1945.<sup>18</sup> But the idea of the Nazis engaging in a mass criminal conspiracy to prepare the three substantive offences of war crimes, crimes against peace, and crimes against humanity from the earliest moments of the Third Reich was at the heart of the prosecution's case.

Justice Jackson, in his opening statement, expressed the broad jurisprudential and legal historical understanding that informed the prosecution of all of the defendants, including the "criminal organizations:"

In general, our case will disclose these defendants all uniting at some time with the Nazi Party in a plan which they well knew could be accomplished only by an outbreak of war in Europe. Their seizure of the German State, their subjugation of the German people, their terrorism and extermination of dissident elements, their planning and waging of war, their calculated and planned ruthlessness in the conduct of warfare, their deliberate and planned criminality toward conquered peoples,—all these are ends for which they acted in concert; and all these are phases of the conspiracy, a conspiracy which reached one goal only to set out another and more ambitious one. We shall also trace for you the intricate web of organizations which these men formed and utilized to accomplish these ends. We will show how the entire structure of the offices and officials was dedicated to the criminal purposes and committed to the use of the criminal methods planned by these defendants and their co-conspirators, many of whom war and suicide have put beyond reach.<sup>19</sup>

The basic and core idea of a Nazi criminal state (*Verbrecherstaat*) was reinforced by the provisions of the Charter relating to the question of criminal organizations. Article 9 provides:

At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

After receipt of the Indictment the Tribunal shall give such notice

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18. Act of Military Surrender, May 8, 1945, 59 Stat. 1957.

19. *Second Day, Wednesday, 21 November 1945, Morning Session*, II TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 104 (Nuremberg, 1947).

as it sees fit that the Prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.<sup>20</sup>

Article 10 permitted for the subsequent trials of individual members of criminal organizations before national courts of States Party to the Charter, and created an irrefutable presumption that “the criminal nature of the group or organization is considered proved and shall not be questioned.”<sup>21</sup> Finally, Article 11 permitted the national prosecution of individuals charged with offenses “other than of membership in a criminal group or organization.”<sup>22</sup>

It seems evident from the plain text of the Charter that the prosecuting authorities saw the criminalization of groups and organizations central to the operation of the Nazi state as an essential part of their mandate. As with many other aspects of the Nuremberg process, the Charter sought to draw a careful line between the necessities of justice and fairness on the one hand, and judicial efficiency on the other. Individuals were given rights not just as criminal defendants charged with one of the substantive or inchoate offenses, but also insofar as their membership in a criminal organization was concerned. At the same time, however, the Charter, by creating the irrebuttable presumption about organizational criminality determinations by the IMT in Article 10, insured that the issue would not be re-litigated in each subsequent trial. Finally, and perhaps most importantly, it highlighted that membership in a criminal organization was a separate and distinct finding and did not preclude the conviction of individuals for their participation in other offences. The IMT Charter at this level sought to balance the accused individual's rights, judicial economy, and the binding authority of the findings of the IMT before other jurisdictions, with the liability of individuals and the criminality of organizations, quasi organizations, or groups. The core idea was that organizations within the Nazi apparatus were themselves guilty of crimes over and above the issue of offenses committed by individuals associated with them.

The basic position and understanding of Nazi criminality outlined in the foundational Charter of the IMT was subsequently concretized in

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20. Nuremberg Charter, *supra* note 16, § II art. 9.

21. *Id.* § II art. 10.

22. *Id.* § II art. 11.

the accused's indictment.<sup>23</sup> Section I of the indictment embodied the three substantive violations of international law against the defendants as well as the inchoate offense of a "Common Plan or Conspiracy" to commit those crimes. After listing the defendants, section 1 concludes with the indication that they are being charged "individually and as members of any of the groups or organizations next hereinafter named." The text of the Nuremberg Indictment itself highlights the clear and unambiguous nexus in the understanding of the criminality of the Nazi regime by the prosecuting authorities between individual culpability and corporate, collective, and organizational responsibility. But the Indictment at Nuremberg is not entirely unambiguous or without need for further study and clarification.

The notion of a "Common Plan or Conspiracy" between and among the named defendants already indicates a conception of Nazi criminality involving an important "collective" element. The accused were charged with participating in a "Common Plan or Conspiracy" in relation to some or all of the three substantive international crimes. Concerted agreement and activity between and among the individuals are not only necessary elements of the "common plan" as an offense, but the idea of such an agreement, and the acts in fulfillment of that agreement is, in essence, about the nature of the Nazi state. These remaining leaders of the Hitler regime stand accused in section I of the indictment of having engaged, as part (if not all) of their official functions, in a vast conspiracy, or in an interconnected series of smaller conspiracies, to violate international legal norms.<sup>24</sup>

This understanding of the Nazi state, which is portrayed as a vast criminal conspiracy, is then concretized in section II of the indictment:

The following are named as groups or organizations (since dissolved) which should be declared criminal by reason of their aims and the means used for the accomplishment thereof and in connection with the conviction of such of the named defendants as were members thereof . . . .<sup>25</sup>

At a formal textual level, the indictment of the named organizations is somewhat confusing, and, to some extent, apparently subsidiary

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23. See generally *Indictment*, I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 27 (Nuremberg, 1947).

24. *Judgment*, I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 224 (Nuremberg, 1947).

25. *Indictment*, *supra* note 23, at 28.

to the conviction of the accused in section I. The “criminality” of organizations is made dependent upon, in part at least, “the conviction of such of the named defendants as were members thereof.”<sup>26</sup> In this part of the construction of the idea of a Nazi criminal state, the focus appears to have been on the leadership of the named organizations in the hands of the individual accused. Thus, for example, the second part of section II might lead one to believe that the simple conviction of Joachim Von Ribbentrop, Hitler’s Foreign Minister, under one or more of the crimes in section I, would lead to the declaration of the criminality of the Reich Cabinet of which he was apparently a member, or that the SS, in which he held the rank of *Obergruppenführer*, could be declared criminal under section II as the direct result of his conviction. This idea of collective responsibility of an organization is, or would be, incredibly problematic under most understandings of criminal liability.

At the same time, of course, it would also have been consistent with an understanding of the Nazi state not just as a vast criminal conspiracy, but also as a set of conspiracies led by a hierarchical structure within the institutional apparatus of government. Indeed, this would also reinforce the ideas implicit in section I of the indictment that the individuals accused were chosen for the leadership positions they had occupied in the Nazi state apparatus and that they were accused not just of the offenses, but of belonging to criminal organizations. Even at its most expansive, the criminal organization aspect of the IMT proceedings offers what could be useful insights into the prosecution’s understanding the Nazi state, and how it affected the entire prosecution process. On the other hand, this part of section II of the indictment appears to be somewhat circular in its jurisprudential, criminal, and constitutional law logic. If the accused are charged with belonging to a criminal organization, and the organization can be declared criminal based upon the conviction of the named accused, for the substantive and inchoate offences, then the logical connection between sections I and II is clearly circular and of no real value in helping us understand the nature of the Nazi state either in reality or as constructed in the prosecution case at Nuremberg.

A more logical and coherent approach is to see the core of section II in the first part of the substantive accusation against the organizations (i.e. that, “by reason of their aims and means used for the accomplishment thereof,” they were properly characterized as “criminal” enterprises). Indeed, the wording used in this part of the indictment is indicative

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26. *Id.*

of the consistent approach adopted by the prosecuting authorities as part of their constitutive theory of the Nazi state. The indictment uses the conjunctive “and” between the criminality of the “aims” of the organizations and “the means used for the accomplishment thereof.”<sup>27</sup> In other words, a plain reading of the indictment indicates that the prosecution understood the named organizations as being criminal enterprises by origination, as well as by carrying out acts and activities that were themselves criminal. This is not a case in which the prosecution is making the historical and juridical argument that a legitimate state structure was taken over and slowly subverted by the insinuation of criminals and criminal aims. From their inception, the named organizations had criminal aims, and they used criminal means to obtain and achieve their goals. As a matter of constitutional law, and perhaps as a matter of political science and sociology of the Nazi state, this means that the indictment and the evidence proffered by the prosecution to prove these allegations about the liability of the criminal organizations in terms of their own aims and acts, regardless of the involvement or leadership of the individual accused named in section I, were informed by an understanding of the Nazi state apparatus from its very beginnings as a revolutionary apparatus organized by a gang of criminals or “gangsters” for illegal aims. This was a way of comprehending the Nazi state as a criminal state from its very beginnings. Of course, if we accept the idea that the IMT proceedings created a broader public apparatus for understanding Hitler’s Germany and jurisprudence, there can be little doubt that the idea that comes out of the indictment itself is one of an entire state apparatus in the hands of criminals from the spring of 1933 until the spring of 1945, and, therefore, as an always lawless entity ruled by ruthless criminals.

The importance of this conclusion, and of this informing constitutional and jurisprudential matrix to our understanding of the place and function of the IMT and its constitutional jurisprudence of the Nazi state as it emerges from the terms of section II of the indictment, is highlighted and enforced when one begins to list the organizations against which the prosecution wished to obtain declarations of criminality. The Reich Cabinet, the Leadership Corps of the Nazi Party, the SS, (including the SD and the *Gestapo*), the SA, and the General Staff and High Command of the German Forces were identified as organizations whose “aims and the means for the accomplishment thereof” were declared in the indictment to be “criminal.”<sup>28</sup> The structures of the government, police, secu-

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27. *Id.*

28. *Id.*



rity apparatus, military forces, and the Nazi Party leadership constituted criminal enterprises which had no other goals or means of accomplishing those goals other than through the violation of international legal norms.

The specific roles, as well as the specifics of the inherent criminality of each of the named organizations, are set out in more detail in Appendix B of the Indictment. The Reich Cabinet was charged with having been vested with “legislative, executive, administrative, and political powers and functions of a very high order in the system of German Government,” and, as such, with being responsible for crimes committed under each of the named offences.<sup>29</sup> Constitutionally, the Cabinet was portrayed as a body that had centralized and monopolized most of the functions of effective government and governance. For the prosecution, the Nazi state was one in which the separation of powers, as understood either within the British or American constitutional systems, had been destroyed under a Nazi party dictatorship under the leadership of Hitler.

The Leadership Corps of the Nazi Party, in particular, was alleged to have been a key aspect behind all of the offenses charged, specifically in relation to the “constitutive” ideas of significance here of having played an active and leading role in the subversion of the German state and the takeover of the government apparatus by illegal means and for illegal purposes.<sup>30</sup> The SS and Gestapo, unsurprisingly, were accused of the illegal suppression of the opponents of the Nazi regime and the Nazi takeover of the German state, as well as of the active participation in acts of oppression and extermination in pursuit of Nazi policies of aggression and racial purity. The SA was likewise accused based on its core role as the security arm of the Nazi Party in relation with the criminal takeover of the state, and of subsequent criminal activity in relation to all counts of the Indictment.<sup>31</sup> Finally, the General Staff and High Command were charged with active participation in the planning of war, and of the commission of the substantive offences once armed conflict had begun.

The Indictment, and the more detailed accusations in Appendix B, portray the Nazi state as one informed by individual and collective criminality from its very beginnings. Power was seized illegally and its consolidation was carried out by means of force and subversion of law led by the Nazi Party and its leadership, namely the Reich Cabinet, the

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29. *Id.* at 80.

30. *Id.* at 30.

31. *Id.* at 83.

SS, Gestapo, and the SA.. All of this was done with the aim of planning and then committing acts of war, war crimes, and crimes against humanity, in the pursuit of the illegal ideological and political aims of the Nazi Party, aided and abetted by the military leadership of Germany. The constitutional law theory of the charges against the named organizations in section II of the indictment differs little from that which informed the charges against the individuals named in section I. However, because section II focuses on the idea that the organizations in their very essence, aims, and means of implementation were criminal, it presents a much clearer idea that the Nazi state was structurally, in its genesis and throughout its existence, a vast criminal enterprise. More powerfully than in the actions and crimes of some named individuals, section II offers the idea that the very core of the German state, its political and administrative structures, its security apparatus, and its armed forces, was from 1933 until 1945, nothing more than a vast conspiracy (or again a series of interconnected conspiracies) aimed at violating basic norms of civilized collective behavior, and of imposing a violent, barbaric, racially informed, New Order, on Europe.

### III. THE JUDGMENT OF THE TRIBUNAL

The final judgment of the IMT represents a somewhat more sophisticated, and temporally nuanced understanding of the Nazi regime, and by strong implication, of the constitutional law order of the Third Reich than that presented by the prosecution. In particular, the way in which the Tribunal dealt with the issues arising from the prosecution of the organizations reveals a careful attempt to grasp the roles played by each organization indicted by the prosecution, and to place those groups within the structures and context of the Nazi regime's crimes against international law.

In order to streamline the proceedings, the Tribunal appointed Commissioners to hear evidence in the organization part of the proceedings and, in the end, those Commissioners obtained oral testimony from 101 witnesses, received 1,809 affidavits, and submitted six written reports to the IMT summarizing the evidence from a large number of other affidavits.<sup>32</sup> Thirty-eight thousand affidavits signed by over 155,000 people were submitted on behalf of the political leaders of the Nazi Party; 136,213 for the SS; ten thousand for the SA; seven thousand for the SD; two thousand for the Gestapo; and three thousand supporting the High Command. In addition, the IMT itself heard twenty-two witnesses

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32. *Judgment*, *supra* note 24, at 172.

on behalf of the different organizations, and received and reviewed thousands of documents submitted in relation to the case involving the question of collective liability.<sup>33</sup> In other words, a massive judicial inquiry was undertaken on the criminal organizations aspect of the IMT and the findings of the Tribunal on this part of the proceedings against Nazi war criminals were clearly evidence-based.

The Tribunal considered the charges against each of the organizations and came to conclusions in their regard that allow us a glimpse into the constitutional jurisprudence that emerged from the Tribunal's understandings of the place of each group in the structure and functions of the Nazi state. Again, it is important to underline that the Indictment itself referred to the organizations as criminal in their "aims" and in the actions they undertook to concretize their nefarious goals. The criminal law basis of the Tribunal's analyses of the guilt or innocence of the organizations was set out in the following terms:

A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced in the Charter.<sup>34</sup>

In so far as the Leadership Corps of the Nazi Party was concerned, the Tribunal found that the aims of the organization were to help the Party gain and maintain control over the German State.<sup>35</sup> The Tribunal determined that the Leadership Corps of the Nazi Party was active in maintaining German control over occupied territories and in relation to the systems of harsh penal governance in those territories. Most importantly, the Tribunal found that there was nothing criminal in the Leadership's role in the "consolidation of control of the Nazi Party," because this did not constitute participation in a criminal conspiracy to wage aggressive war.<sup>36</sup> In fact, the Tribunal in its general analyses of the aggressive war planning aspect of the conspiracy/common plan part of the indictment, had focused on a series of planning meetings that had taken place between 1937–1939.<sup>37</sup>

This meant that the Tribunal rejected the idea put forward by parts of the prosecution case that the Nazi regime, and the Party Leadership as a key part of that regime, had been a simple criminal conspiracy led

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33. *Id.*

34. *Id.* at 256.

35. *Id.* at 258.

36. *Id.*

37. *Id.* at 188.

by a bunch of “gangsters” from the very beginning. Instead the Tribunal focused on specific acts and plans that could be proven and fit those into the definition of the offences alleged to have been committed by the defendants, both individual and organizational. The way in which the Nazis came to power was not considered to have been illegal in the sense that the Tribunal had to construct that term, i.e. as constituting one of the three substantive offenses, crimes against peace, war crimes, crimes against humanity, or most probably in the earliest days of the Nazi State, as a conspiracy to commit one of those offences. Once the war began, and Germany occupied other European countries, the role played by the Leadership Corps became criminal as the Party structure became intimately involved in the unlawful occupation policies, including anti-Jewish persecution, slave labor practices, and the ill treatment of prisoners of war.<sup>38</sup>

Each of these acts was found to be a violation of the international legal regime and the organization itself, encompassing the higher leadership echelons only, was held to be a criminal organization. More importantly, the Tribunal stated that:

The basis of this finding is the participation of the organization in War Crimes and Crimes against Humanity connected with the war; the group declared criminal cannot include, therefore, persons who had ceased to hold the positions enumerated in the preceding paragraph prior to 1 September 1939.<sup>39</sup>

In other words, the Leadership Corps of the Nazi Party did not participate in a conspiracy to commit war crimes or crimes against humanity before the invasion of Poland, nor did it ever participate in a common plan to wage aggressive war or to commit those offences. For the IMT, the Leadership Corps of the Nazi Party became a criminal enterprise only after World War II began. The IMT’s aims before 1933 and from 1933 to 1939, as it participated in the consolidation of Nazi power, were the elimination of political and ideological opponents; the Nazification and Aryanization of the state and the civil society were not “aims” that were criminal under international law such that they fell within the jurisdiction of the Tribunal. This is, of course, an internally legally correct position and a valid expression of the jurisdictional and temporal limits imposed upon the IMT by its Charter and by the way in which the prosecution of Nazi war criminals proceeded. “Crimes” against German citizens, especially against German Jews, were not within the consideration

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38. *Judgment*, *supra* note 24, at 258–61.

39. *Id.* at 262.

of the Tribunal because it had to consider only the substantive and inchoate offenses relating to war crimes, crimes of aggression and against peace, and crimes against humanity. This did not mean that it was temporally limited to events after September 1, 1939, because it could consider events leading up to the war as part of the “common plan” allegations. But it did consider that it had to understand the “common plan” or “conspiracy” aspect in light of the substantive offences. In doing so, it clearly reflected in its judgment about the criminality of the Leadership Corps of the Nazi Party. In doing so, the Tribunal clearly rejected the idea underlying the prosecution’s broader and more flowery assertions of the basic and inherent criminality of the entire Nazi state apparatus as a criminal conspiracy. Instead, the Tribunal looked to the evidence and found no proof that high-ranking Nazi officials, who very quickly after the spring of 1933 had taken control of the German state apparatus, were engaged in a common plan to commit war crimes, crimes against peace, or crimes against humanity, until after the war had begun.

The foundational document of the Tribunal itself emphasizes this point in so far as crimes against humanity are concerned. It is well known that crimes against humanity were only within the remit of the IMT if and when they were committed “in execution of or in connection with any crime within the jurisdiction of the Tribunal.”<sup>40</sup> Whatever the Leadership Corps, or any other of the charged organizations, may have done before the outbreak of the war, could not have been an international crime unless it was done in furtherance of the substantive crimes, or more specifically, since the substantive offences could not have been committed until the acts of aggression, etc., had been committed as part of the common plan or conspiracy. At this level, the prosecution’s constitutional proposition about the Nazi state as a criminal state, could have served as the basis for expanding the liability of the accused to “crimes” committed in Germany between 1933 and 1939. Under this theory, the Leadership Corps would have been considered “criminal” in its aims and in the means used to achieve those aims because it would have been a core part of a common plan to wage aggressive war and commit war crimes in its very essence. The Particulars of the Nature and Development of the Common Plan or Conspiracy clearly set out this argument. For Jackson and his colleagues, from its very origins the Nazi Party engaged in a single-minded plan to wage war on Europe in the name of a racially pure German people.<sup>41</sup>

Clearly this “criminal state” vision was rejected by the Tribunal

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40. Nuremberg Charter, *supra* note 16, at § II art 6(c).

41. *Indictment*, *supra* note 23, at 30.

who chose instead to focus on the post-1939 period. For the judges, the Nazi State and the Nazi Party that controlled it, was not criminal *per se*.

The consideration by the IMT of the criminality of the *Gestapo*/SD organization echoes these points. While the Tribunal highlighted the role played by this group in the police/security apparatus behind the Nazi consolidation of power, and even in the persecution and confinement in concentration camps of Jews,<sup>42</sup> it found that the criminality of the organization was based in its acts after 1939.<sup>43</sup> As was the case with the Leadership Corps, the Tribunal limited the criminal responsibility of the organization, (and of its members) in precisely the same temporal sense.

The basis for this finding is the participation of the organization in War Crimes and Crimes against Humanity connected with the war; this group declared criminal cannot include, therefore, persons who had ceased to hold the positions enumerated in the preceding paragraph prior to 1 September 1939.<sup>44</sup>

Despite its emphasis on the *Gestapo*/SD's role in the persecution and imprisonment of German Jews in 1938 for example, the Tribunal, consistent with its understanding of the substantive criminal offences at the heart of the charges against all the organizations, confined the "criminality" of the security and police apparatus to its acts after the war had commenced. Again, within the framework adopted here, this is a clear rejection of the prosecution's thesis that the Nazi state was a criminal state, a terror state, from the very beginning. In the strict, and of course limited, understandings of criminality underpinning the jurisdiction and the jurisprudence of the IMT, such a thesis could not hold water.<sup>45</sup> Thus, if it could not hold up against the *Gestapo*/SD, it would likewise fail against the SS. Once more the Tribunal found that the SS, including most of its constituent elements, was a criminal organization, guilty of War Crimes and Crimes against Humanity, but limited to the time period from the beginning of September 1939. None of the brutality or acts of oppression committed before that time by the SS could be attributed to the organization's involvement in a common plan or conspiracy to commit any of the substantive offences.

The decision of the Tribunal in relation to the SA, the so-called Brownshirts of the Nazi rise to power, is of even greater significance in juxtaposing the formal jurisprudence in relation to the Nazi criminal state that emerges from the IMT's judgment and the rhetorical invoca-

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42. *Id.* at 265.

43. *See id.* at 265–268.

44. *Id.* at 268.

45. *See generally id.* at 27–95.

tion of collective and unadulterated gangsterism that informed the prosecution's account. According to the Tribunal, "the SA was a group composed in large parts of ruffians and bullies who participated in the Nazi outrages of that period."<sup>46</sup>

Most crucially, the Tribunal declared that "[i]t has not been shown, however, that these atrocities were part of a specific plan to wage aggressive war, and the Tribunal therefore cannot hold that these activities were criminal under the Charter."<sup>47</sup> Therefore, IMT was fully cognizant of the atrocities and the brutality of the Nazi regime, as well as the primary organizational branches of the Hitler state. Yet that awareness did not mean that the IMT would, or indeed could, declare, as the prosecution wished, that each group that played an important role in the Nazi's rise to power, the consolidation of the Nazi state, and the repression of its enemies, was a "criminal organization." Because of the limited and limiting nature of the jurisdictional bases for the Tribunal's very existence and the restricted number and nature of crimes it could consider, it could not, in fact, without ignoring the evidence, accept the prosecution's vast criminal conspiracy vision of the Nazi state. Indeed, based on the evidence of the "Night of the Long Knives" and the purge of the SA in internecine Nazi struggles, the Tribunal did not find that the SA was a criminal organization at all.<sup>48</sup> As the Tribunal put it, "[a]fter the purge, the SA was reduced to the status of a group of unimportant Nazi hangers-on."<sup>49</sup>

Like the acquittals of some of the individual defendants, the Tribunal's refusal to name the SA as a criminal organization because of the evidence it had heard, can be seen as an affirmation of the adherence of the IMT to the basic principles of the rule of law, the ideals of fundamental fairness, and the burden of proof in the criminal law. In the context of the understanding of the Nazi state as a constitutional apparatus that emerges from the IMT proceedings, the "acquittal" of the SA demonstrates a more sophisticated and temporally nuanced understanding of the Hitler regime than that espoused by the prosecuting authorities. The SA, for all intents and purposes, was wiped out in the "Night of the Long Knives." Therefore, consistent with the IMT's holdings in relation to the other groups, it could not be implicated in crimes against

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46. *Id.* at 275.

47. *Id.*

48. The violent, some would say murderous purge of the SA, often referred to as the *Röhm-Putsch*, after the SA leader Ernst Röhm, took place between June 30 and July 2, 1934, and allowed the Nazi regime to consolidate its power and the SS/SD to dominate the state security apparatus.

49. *Judgment, supra* note 24, at 275.

humanity, war crimes, or crimes against peace as of September 1939, and its corporate existence was more formal than real. Therefore, the only possible remaining criminal activity would have been its participation in the common plan to commit any or all of these substantive offences. This would only have covered the period at the outside between its founding in the 1920's until its murderous dissolution in 1934.

The Tribunal found that there was no evidence that the SA, in perpetrating "Nazi outrages," had been engaged in any way in a specific plan to wage aggressive war. Not only is this a clear and unambiguous rejection of the prosecution's claims that the SA played a key role in overall structures of Nazi state's criminality, but it again reinforces the idea that the Tribunal did not accept the foundational notion that the Nazi state from its very beginnings, and indeed in the planning stages, was a criminal conspiracy aimed at conquering Europe. While no counter-understanding in any specific way of what the constitutional character of the Nazi regime may have been emerges from this part of the IMT judgment, the Tribunal's findings against, or in favor of, the alleged "criminal organizations," marks a clear rejection of the "criminal state" theory, at least from 1933–1939. Once the war began, it does seem evident that the Tribunal in an important way was willing to construct the Nazi state and its apparatus as a vast criminal enterprise.

The finding that no declaration of organizational criminality could be entered against the Reich Cabinet is perhaps more instructive on the level of the factual understanding of the operation of the Nazi state that operated in the Tribunal's decision-making.<sup>50</sup> As the Tribunal stated:

The Tribunal is of [sic] opinion that no declaration of criminality should be made in respect to the Reich Cabinet for two reasons: (1) because it was not shown that after 1937 it ever really acted as a group or organization; (2) because the group of persons here charged is so small that members could be conveniently tried in proper cases without resort to a declaration that the Cabinet of which they were members was criminal.<sup>51</sup>

Again, it is probably worth noting that here, the IMT operates under a clear temporal understanding of the offences that it was charged within considering. That understanding was not strictly *de jure* since it might have been possible to establish the beginnings of a common plan prior to 1937, although the evidence before the Tribunal did not make out that case to the satisfaction of the judges. Instead, the Tribunal con-

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50. *Id.*

51. *Id.*



sidered the evidence and determined that the meetings where the common plan or the conspiracy to wage an aggressive war was concretized took place from that date. If the Reich Cabinet did not operate as an organization with aims or means of putting in place those aims, then it could not factually been a party to any conspiracy.

The Tribunal does however offer some concrete insights as to how it understood the operations of the Hitler state at this time. For the Tribunal:

[I]t is to be observed that from the time that it can be said that a conspiracy to make aggressive war existed the Reich Cabinet did not constitute a governing body, but was merely an aggregation of administrative officers subject to the absolute control of Hitler.<sup>52</sup>

It becomes clear at this point that in 1937, the IMT understood the Nazi state as one in which the administrative apparatus functioned as a structure in which the sole purpose was to implement the will of the *Führer*. Indeed, this is confirmed by the Tribunal's subsequent statement concerning the actual law-making process of the Third Reich, post-1937 that:

It does appear, however, that various laws authorizing acts which were criminal under the Charter were circulated among the members of the Reich Cabinet and issued under its authority signed by the members whose departments were concerned. This does not, however, prove that the Reich Cabinet, after 1937, ever really acted as an organization.<sup>53</sup>

Not only do we once again find a clear indication that the IMT had a particular idea of the nature of a "criminal organization" against which it tested the evidence, but we also see the clearly elaborated idea that the "organization" was always something more than a (partial) agglomeration of its members. It had a separate existence as a collective undertaking. The simple fact that the Nazi state functioned by way of laws and decrees signed and put into formal effect by a *Reichsminister* with particular jurisdiction over the matter, did not mean that the Reich Cabinet existed or acted as a collective, unitary body, especially after 1937 when planning for aggressive war was found to have begun.

Again, what we know of the constitutional understanding of the IMT is gleaned from oblique inferences grounded in concrete findings that an organization was or was not "criminal" under the Charter. In the case of the Reich Cabinet, we have come to understand that it was not a

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52. *Id.*

53. *Id.* at 276.

body of collective governance of the German state after 1937. Members of the group continued to fulfill their individual functions but stopped performing their collective duties. Indeed, members occupied administrative roles under the direct command of Hitler. At some level, the IMT understood that in 1937, the power of governance, however characterized, was firmly in the hands of the leader and the Cabinet no longer carried out roles or functions that could attribute to it any form of collective responsibility.

A similar, but more nuanced, understanding of the Nazi state emerged when the Tribunal found that the General Staff and High Command could not be declared criminal organizations. Once more, this finding is grounded in both a legal conceptual position and a careful factual analysis of the evidence presented. Despite the prosecution's claims of the centrality of the Military High Command and General Staff in both planning the war and supervising the international crimes committed, the Tribunal rejected this understanding of the military's place in the Nazi state and in the commission of international crimes. For the IMT, the key legal point was that the meaning of a criminal "group" or "organization" had a particular significance "more than this collection of military officers."<sup>54</sup> As had been the case with the Reich Cabinet, the Tribunal sought a collective identity, beyond the agglomeration of some or all of the individual members of an organization, in order to find the criminal nature of the aims and acts of the organization as a legally identifiable body itself. Jackson later reported his chagrin concerning this analysis and decision, noting that "the failure to hold the General Staff to be a criminal organization is regrettable."<sup>55</sup>

The IMT unambiguously identified the "clear and convincing" evidence of the criminal acts of many individual members in the upper echelons of the German armed forces.<sup>56</sup> Nevertheless, the Tribunal refused to recognize that there was sufficient evidence that the General Staff and High Command, as opposed to individual military leaders, as identifiable organizations, could have been involved in international criminality:

To derive from this pattern of their activities the existence of an association or group does not, in the opinion of the Tribunal, logically follow. On such a theory the top commanders of every other nation are just such an association rather than what they actually are, an ag-

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54. *Judgment, supra* note 24, at 278.

55. REP. OF ROBERT H. JACKSON TO PRESIDENT TRUMAN, INT'L CONF. ON MIL. TRIALS (1946).

56. *Judgment, supra* note 24, at 278.

gregation of military men, a number of individuals who happen at a given period of time to hold the high-ranking military positions.<sup>57</sup>

#### IV. THE CONTEXT OF THE "CRIMINAL ORGANIZATIONS" CASE AND JUDGMENT

It appears to emerge from this necessarily brief examination of the IMT's criminal organization aspects that there was a conflict between the vision of the Nazi state proffered by the prosecutors and that embodied and confirmed in the judgment of the Tribunal. On the one hand, Justice Jackson and his fellow prosecutors followed a path informed by the foundational ideals of a gangster state. For them, the Nazi Party and all those associated with the apparatus of the Nazi seizure of power, its consolidation of control over the state apparatus, and the unleashing of World War II and all of its atrocities, had from the very beginning, been engaged in an evolving common plan to commit acts against peace, war crimes, and crimes against humanity. On the other hand, the Tribunal adopted a somewhat subtler approach. It fixed the date of the conspiracy well after the Nazi seizure of power, and carefully analyzed the nature and role of the indicted organizations to determine their role with precision, if any, in the conspiracy and in the commission of substantive criminal offenses.

The ideas that were presented about the Nazi state ranged from a crude assessment of the entire period from at least 1933 to 1945 as a large scale criminal conspiracy put into effect after the invasion of Poland, to one that considered the Nazi state as having evolved towards a planned aggressive war with different degrees of involvement (or none at all) from the various accused organizations. The Tribunal did not sugar coat the nature of German militarism, or the thuggish brutality of the SA. Instead, it limited itself to the facts as proven and as they related to the limited and narrowly defined criminal offenses over which it had jurisdiction. Even in the cases of the SS and the *Gestapo*/SD, it did not and could not find that the evidence supported the contention that they had been part of an overarching criminal conspiracy, or an intertwined series of criminal combinations, to wage war throughout Europe. Without ever really articulating a clear or coherent understanding of the constitutional order of Hitler's Germany, the IMT implicitly identified its functioning structures as something other than an international criminal conspiracy, and this was particularly evident in its treatment of the organization's case.

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57. *Id.*

If one digs a bit deeper into the jurisprudential structures and premises of the IMT and the broader judicial apparatus established by the Allied Occupying Powers in Germany, one can find evidence of the reasons behind the organization's case and the care with which the IMT dealt with the law/fact nexus regarding the prosecution of major war criminals and understanding the nature of the Nazi state.

We have already seen how the Tribunal received an enormous number of witness statements, affidavits, and documents in relation to the cases against indicted organizations. As part of its broader concerns with ensuring the delicate balance between and among the needs of judicial efficiency, adherence to basic principles of the rule of law, procedural fairness, and the practical realities of a militarily devastated Germany, the IMT developed mechanisms for concretizing those competing goals. It produced an Order "Regarding Notice to Members of Groups and Organizations" indicted before the Tribunal ("Order").<sup>58</sup> In addition to informing members of the organizations in question of the upcoming trial, the Tribunal also declared that members of identified criminal organizations could potentially face charges and punishment pursuant to their membership. In addition, members were entitled to apply for hearings before the Tribunal "upon the question of the criminal character of the group or organization."<sup>59</sup>

Radio, postings, and newspaper advertisements published notices in German throughout occupied Germany with sufficient breadth and time "to give [the notices] the widest possible dissemination."<sup>60</sup> The Secretariat of the IMT served notices on the four occupying powers, which then disseminated the notices throughout Germany.<sup>61</sup> Two hundred thousand notices were prepared, nine thousand of which were given to the different sectorial authorities, and one thousand were retained for distribution among POW facilities. Fifty thousand were given to each Soviet Bureau of Information and British Public Relations branches. Forty thousand were given to the French. The United States received the remainder. Newspapers and radio throughout Germany published the announcements. Each occupying authority submitted affidavits cer-

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58. See generally *Order of the Tribunal Regarding Notice to Members of the Groups or Organizations*, I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 97–101 (Nuremberg, 1947).

59. *Id.* at 100.

60. *Id.* at 101.

61. See generally *Certificates of Compliance with Orders of the Tribunal Regarding Notice to Members of Groups and Organizations and to Defendant Bormann*, I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 104–06 (Nuremberg, 1947).

tifying its compliance with the publication and distribution of these notices.<sup>62</sup> The organizations' trial was considered significant and was conducted to the best of the Tribunal's ability.

However, a further level of inquiry is necessary to determine why the organizations' trial was given such significance and why the Tribunal went to such extensive measures to give notice to members of the indicted groups. The answer lies not in the consequences of the declarations of criminality against the organizations, but in the potential subsequent criminal liability of members of the organizations. Again, the IMT process needs placement in its juridical framework and in the broader political, social, and military contexts as well.

The Tribunal's Order clearly set out the notification requirement by stating individual members of organizations were subject to charges in subsequent proceedings of separate offenses pertaining to membership affiliation in criminal organizations. Therefore, there was an interest, both practical and legal; in ensuring that individuals potentially facing serious criminal charges because of membership affiliation be given adequate notice of that fact, or that penal law must be public and knowable. Moreover, other understandings of fairness, the rule of law, and broad ideas of criminal justice also demand that individuals, belonging to organizations with stakes in the outcome of IMT proceedings, be given an opportunity to address the Tribunal and present exculpatory evidence about the group to which they belonged. This exculpatory evidence, if accepted, may allow such individuals to avoid personal culpability. Such rule of law concerns were always present in the mind of the Tribunal and prosecution teams. While the prosecutors clearly had a vision of the Nazi state structures and apparatuses, which would have imposed a broader liability than the Tribunal accepted, they were also fully conscious of the legal, moral, and practical difficulties of imposing severe criminal consequences against individuals based on their membership to organizations that the Tribunal classified as "criminal." This was particularly true given the fact that after the verdicts of the IMT, it would not be open to re-litigate the core and condition precedent norm that the organization in question was criminal.

The significance of the organizations' part in the IMT proceedings transcended the declaration of group criminality because the nexus between this finding and subsequent trials of individuals for the crime of membership in a criminal organization. This was particularly true given the juridical framework in which the IMT operated beyond its own

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62. *See id.*

Charter, its own rules of procedure, and evidence gathering. In fact, the failure of the IMT to focus specifically on the nature of the Nazi state, the “how’s and why’s” of the various organizations, and their place and role within that constitutional structure, may well be understood in terms of the significance of concerns over subsequent criminal proceedings for membership crimes. This partially explains why the Tribunal in each of the declarations of criminality of the different organizations focused on the temporal elements already highlighted and, in many cases, offered an indication of the limited roles within some organizations, such as the Leadership of the Nazi Party, that it considered to be key parts of the organizational criminality. With regard to the SS, this may indicate why the IMT carefully examined the voluntary nature of participation in the criminal activities of the organization in its declaration. Throughout proceedings, the IMT appears to have focused more on delimiting and explaining the criminal nature of organizations, with one eye on the issue of the directing or voluntary roles played by individual members.

It is important to note that in addition to concerns about future consequences for individuals charged with membership crimes following declarations of criminality, cause for concern might lie in the absence of a clearly articulated and detailed description of the operative structures of the Nazi state in the organization trial. In fact, none of these organizations existed in law. This does not mean that the criminal organization aspect of the IMT proceedings is or was a mere hypothetical or theoretical undertaking. The issue of future trials on charges of membership in a criminal organization was concrete. Moreover, it is clear the prosecution (and perhaps to a lesser extent, the Tribunal) had an understanding of the Nazi state’s nature and wished to preserve it in concrete jurisprudence. Such a judgment of the criminal nature of the state apparatus would clearly serve as some kind of foundational element in cultivating a vision of future world peace and an international community.

In addition, there was clearly a pedagogical element to the IMT proceedings.<sup>63</sup> The world was meant to compare and contrast democracy with the rule of law, with the constitutional order in Germany that inevitably led to the mass killing of the Second World War and the Shoah. A declaration that core parts of the Nazi apparatus plotted against world peace and for the destruction of Europe (and European Jewry) would go a long way in the eyes of the prosecution in educating the international community on the dangers of the Nazi ruling. However, this declaration

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63. See generally LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST* (2005).

was exacerbated by the real and pervasive fear at the time that despite the annihilation of Nazi Germany's military forces and supporters, the Nazi regime could perhaps mount some form of resurgence. Robert Jackson expressed the legal and political consequences of failing to prosecute the so-called "criminal organizations" in this context.

In administering preventive justice with a view of forestalling repetition of these crimes against peace, crimes against humanity, and war crimes, it would be a greater catastrophe to acquit these organizations than it would be to acquit the entire twenty-two individual defendants in the box. These defendants' power for harm is spent. That of these organizations goes on. If they are exonerated, the German people will infer that they did no wrong and will easily be regimented in reconstituted organizations under new names, behind the same program.<sup>64</sup>

Military defeat and physical devastation alone could not eliminate the twelve-year ideological and political legacy of the Third Reich. The declaration of organizational criminality could perhaps go some way towards eliminating that threat, and more concretely, it could serve as a basis on which many former Nazis could be prosecuted for membership crimes where evidence of substantive offenses might be more difficult to prove amid the disruptions of the immediate postwar and occupation periods.

Despite the valiant and mostly successful attempts by the IMT to adhere to and implement principles of fairness, justice, and the rule of law, the work of the Tribunal nonetheless must be placed in concrete historical, political, and ideological, not to mention legal, frameworks in order for us to properly situate the organizations case in a proper context. The prosecution and the Tribunal were each keenly aware of the overarching conditions in which they had to perform their judicial functions. The Tribunal clearly knew that the singular importance of the declarations of organizational criminality could be found in its foundational function for future prosecutions of individuals for membership crimes. Likewise, the prosecutors were careful to draw a clear legal line between organizational criminality and the personal liability of future defendants, while at the same time they continued to promote their particular vision of the way that the Nazi state apparatus operated, which was implicated in the indictment of international crimes.

The first part of the context in which the Tribunal and its officials operated was the absolute military defeat of Nazi Germany. As the Al-

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64. Robert H. Jackson, *The Law Under Which Nazi Organizations Are Accused of Being Criminal*, 19 TEMP. L. Q. 371, 388-89 (1945).

lied forces reported on June 5, 1945:

The German armed forces on land, at sea and in the air have been completely defeated and have surrendered unconditionally and Germany, which bears responsibility for the war is no longer capable of resisting the will of the victorious Powers.

There is no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers.<sup>65</sup>

The idea that Germany had been utterly defeated and its entire governmental infrastructure had been destroyed gave the Allied Occupying Authorities a legal *carte blanche* to impose an entire system of occupation government, abolishing Nazi laws, banishing all forms of extant Nazi organizational infrastructure, and removing officials who might remain in place—all without having to feel bound by the international legal limits imposed on armed military occupiers by the Hague Convention.<sup>66</sup> Whether this Kelsenian view of the *sui generis* nature of the Allied Occupation is in fact correct, it appears to have been the informing notion under which the governance structures and judicial apparatuses of the Occupation, including the IMT to a large extent, operated.

The instructions issued to Eisenhower as Supreme Allied Military Commander not only make this clear, but their specifics indicate that the ideas of dismantling the Nazi state apparatus and ridding Germany of Nazi influence, including the organizations indicted before the IMT, were among the highest priorities.<sup>67</sup> From the earliest period of the “postwar,” the criminality and dangerousness of the organizations that were later tried before the IMT were informing ideas behind the Allied pursuit of demolishing and removing the threat of the resurgence of the Nazi state.

Section 6(a), under the title “Denazification,” instructed Eisenhower and the Occupying Authorities to issue a “Proclamation dissolving the Nazi Party, its formations, affiliated associations, and supervised

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65. Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany, Fr.-U.K.-U.S.-U.S.S.R., Jun. 5, 1945, 3 U.S.T.

66. See generally Hans Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 AM. J. INT’L LAW 518 (1945); Charles Fahy, *Legal Problems of German Occupation*, MICH. L. REV. 11, 13 (1948); Max Rheinstein, *The Legal Status of Occupied Germany*, MICH. L. REV. 23, 27 (1948).

67. See U.S. DEP’T ST. BULL., U.S. DIRECTIVE TO GENERAL EISENHOWER REGARDING THE MILITARY GOVERNMENT OF GERMANY (April 1945) [hereinafter U.S. Directive], <http://usa.usembassy.de/etexts/ga3-450426.pdf>.



organizations, and all Nazi public institutions which were set up as instruments of Party domination, and prohibiting their revival in any form.”<sup>68</sup>

Eisenhower was further instructed to abolish all laws establishing the powers and functions of the Party and its organs,<sup>69</sup> to remove Nazis from all leading social and political functions and positions,<sup>70</sup> to ensure the dissolution and disarmament of all military and para-military units, including personnel,<sup>71</sup> and to pursue and arrest war criminals.<sup>72</sup> Eisenhower issued Proclamation Number 1 beginning this process, and a number of other more targeted Proclamations followed. Control Council Directive No. 18 abolished all German armed forces.<sup>73</sup> All of this was consistent with the declared aims of the four Occupying Powers.

The Potsdam Agreement identified the goals of the postwar Occupation by Allied forces.<sup>74</sup> Among the key objectives was the complete and final abolition of all German military forces, the SS, SA, SD, *Gestapo*, as well as the General Staff.<sup>75</sup> Additionally, the Agreement was aimed at the destruction of “the National Socialist party and its affiliated and supervised organizations.”<sup>76</sup> Section IX of the Agreement abolished and declared illegal the National Socialist German Workers’ Party (NSDAP), and targeted “all Nazi public institutions created as instruments of Nazi domination, and of such other organizations as may be regarded as a threat to the security of the Allied forces or to international peace and for prohibiting their revival in any form.”<sup>77</sup> The practical and legal effect of these Allied decisions, directives, and proclamations was that by the time the IMT proceedings began, the accused group criminality organizations no longer existed. The real effect of the IMT declarations of criminality was always intended to be both pedagogic and historical on the one hand, offering a formal legal statement about each group’s nature and functioning in the matrix of the Nazi state, and

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68. *Id.* § 6(a).

69. *Id.* § 6(b).

70. *Id.* § 6(c).

71. *Id.* § 7(a).

72. *Id.* § 8(a).

73. Control Council Directive No. 18, For Disbandment and Dissolution of German Armed Forces ¶ 1 (Nov. 12, 1945).

74. See THE BERLIN (POTSDAM) CONFERENCE, JULY 17–AUGUST 2, 1945, reprinted in S. COM. ON FOREIGN RELATIONS, A DECADE OF AMERICAN FOREIGN POLICY: BASIC DOCUMENTS, 1941–1949 (U.S. Gov’t Printing Office 1950), [http://avalon.law.yale.edu/20th\\_century/decade17.asp](http://avalon.law.yale.edu/20th_century/decade17.asp).

75. *Id.* § II(A)(3)(i)(a).

76. *Id.* § II(A)(3)(iii).

77. Defeat of Germany: Additional Requirements (September 20, 1945), § XI, ¶ 39.

prospective on the other. In this second set of effects, the declaration of criminality could not be subsequently contested for so-called membership crimes. A defendant would only be able to refer to his or her own criminal activities to the organization to which he or she belonged. The IMT expressed concerns over this part of their remit in the following terms:

In effect, therefore, a member of an organization which the Tribunal has declared to be criminal may be subsequently convicted of the crime of membership and be punished for that crime by death. This is not to assume that international or military courts which will try these individuals will not exercise appropriate standards of justice. This is a far reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice.<sup>78</sup>

In fact, the IMT did limit the dangers to a certain extent by refusing to enter a declaration of criminality against some organizations and placing clear temporal restrictions on the declarations relating to those organizations found to be criminal. It set the group criminality date on September 1, 1939—the invasion of Poland. Therefore, the criminal organizations' trial was clearly part of the overall aims and goals of Allied Occupation policy. It also took place in a context in which all of the accused groups had ceased to exist. The limits of the IMT's declarations were grounded in the pedagogical realm of offering a clear statement about the organization's roles in the implementation of Nazi international legal norms violations, and were situated in the context of the ongoing denazification processes in the occupied zones.<sup>79</sup> Finally, the legal framework also involved interplay between the IMT and its trials of "Major War Criminals," operating under Control Council Law No. 10. These included the indicted organizations and the other Occupation tribunals, such as the later Nuremberg Tribunals.<sup>80</sup>

Control Council Law No. 10 established the legal framework for implementing the Moscow Declaration related to war criminals not covered by the IMT proceedings against major war criminals.<sup>81</sup> As already seen, the two judicial apparatuses (1) the IMT, and (2) all other courts

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78. *Judgment, supra* note 24, at 257.

79. *See generally* Karl Lowenstein, Comment, *Denazification*, 14 SOC. RES. 365 (1947); Artur Sträter, *Denazification*, 260 ANNALS AM. ACAD. POL. & SOC. SCI. 43 (1948).

80. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity (Dec. 20, 1945), <http://avalon.law.yale.edu/imt/imt10.asp> (last visited Aug. 26, 2016) [hereinafter Control Council Law No. 10].

81. *See Joint Four-Nation Declaration, THE MOSCOW CONFERENCE, OCTOBER 1943, reprinted in S. COM. ON FOREIGN RELATIONS, A DECADE OF AMERICAN FOREIGN POLICY, 1941–1949* (U.S. Gov't Printing Office 1950).

trying war criminals, were intimately linked in the question of organizational criminality. The declarations emerging from the IMT not only identified those groups that were liable for Nazi war crimes, crimes against humanity, and crimes against peace, but also acted as irrebuttable presumptions in all other proceedings. Finally, the wording of Control Council Law No. 10 contained one major and crucial amendment to the defining offences that could be brought before courts for adjudication. In addition to the crimes against peace and war crimes, Control Council Law No. 10 also included Crimes Against Humanity, with an important change in the definition of the offence.

Article II paragraph 1(c) defined crimes against humanity as “[a]trocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.”<sup>82</sup>

The vital change here was that crimes against humanity were now legally constructed as a separate and distinct category of international criminal offences. This broadened the limiting factor from the IMT Charter such that crimes against humanity had to be connected with the commission of one of the other substantive offences, like war crimes or crimes against peace, or with the inchoate offences of a common plan or conspiracy. It also meant that other courts could now consider crimes against humanity separately as contrary to international law. More specifically, because the crimes no longer need to be connected with the more “traditional” international crimes, criminal offenses “against any civilian population,” regardless of “whether or not in violation of the domestic laws of the country where perpetrated,” would now theoretically encompass Nazi offenses against their own nationals, including the persecution and killing of German Jews.<sup>83</sup>

Further consideration of the revolutionary potential of the changes to the world legal order brought by Control Council Law No. 10 is beyond the scope of my study here. However, another provision of Control Council Law No. 10, Article II, paragraph (1)(d), is central to the examination and understanding of the criminal organizations’ trials before the IMT. This provision added another new international criminal offence, which targeted “[m]embership in categories of a criminal group or organization declared criminal by the International Military Tribu-

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82. Control Council Law No. 10, *supra* note 80, at art. II, ¶ 1(c).

83. *Id.*

nal.”<sup>84</sup> Article II, paragraph (3), provided for a series of possible penalties including death, imprisonment for life or a lesser period with or without hard labor, a fine and imprisonment with or without hard labor, property forfeiture, an order of restitution and the deprivation of some or all civil rights.<sup>85</sup>

While it is not my goal to explore the ways in which membership crimes evolved after the IMT, it is simply important to note that the declarations of criminality against certain organizations did have a subsequent and significant impact on the prosecution of alleged Nazi criminals.<sup>86</sup> Beyond the pedagogical aims of setting out in clear terms the roles played by these organizational structures in the carrying out of Nazi international crimes, the declarations concerning criminal organizations in the subsequent trials provided oblique information about the understandings of the Nazi state abroad at the time. When taken in the context of the abolition of these groups in the earliest days of the Allied Occupation, the understandings by legal, military and political officials of the centrality of these groups for the structure and functioning of the Nazi state and the creation of the new international crime of membership in a criminal organization or group and the analyses of the prosecution and the final decision of the Tribunal offer competing and complex constitutional portrayals of the Nazi state. The broad and general idea of a criminal state proposed by the prosecution was reduced by the temporal nature and other limitations imposed by the IMT itself; in some cases, these declarations were refused. It seems clear that this more limited and narrower construction of the idea of a foundational criminality of the Nazi state found in the IMT judgment was the result of several interacting factors.

First, the IMT was aware of the issues raised by the interactions between its final declarations of criminality and the newly created offense of membership in a criminal organization under Control Council Law No. 10. Second, it is also clear that the IMT findings were limited by the wording of the substantive offenses, both in relation to the proof of the actual common planning for aggressive war, and in reference to the subsidiary character of crimes against humanity and the requirement of a nexus with one of the other offenses in the Charter. As a result, the IMT limited its declarations of organizational criminality to a limited period in 1937 and 1938, and then more concretely and generally to the

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84. *Id.* at art. II, ¶ 1(d).

85. *Id.* at art. II, ¶ 3.

86. See generally FRANK M. BUSCHER, *THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946–1955* (1989).

post-September 1, 1939 period. To a large extent, the criminal organization judgments and their utility for understanding the nature and function of the organizational structures of the Nazi state are only limited, if they are of any use at all, in relation to the study of the Nazi state after the War began. The periods of the Nazi rise to power, the consolidation of Hitler's rule, and the persecution of Germans, especially of Jewish Germans, that had been featured to a greater or lesser extent in the indictments and in the presentation of the prosecution case, were defined out of contemplation by the factual and legal positions adopted by the Tribunal.

However, the Tribunal's organizational declarations did have a direct impact on the subsequent creation of at least a skeletal constitutional law framework for understanding Nazi Germany. The interactions between these declarations of organizational criminality and the membership crime in Control Council Law No. 10 did play a role in allowing subsequent cases to consider the constitutional jurisprudence of the Nazi state. This was then confirmed by the language changes in relation to crimes against humanity and the focus on substantive offenses in Control Council Law No. 10. With its emphasis on accessorial liability, and its new membership crimes, this statute allowed prosecutors in a broader scope not just to pursue Nazi officials for crimes committed in Germany and against Germans, Jews and others, but also to paint a picture of Nazi criminality from the earliest days of the regime. Treating racial persecution of German Jews and others and the ideas of imprisonment and enslavement that could cover the concentration camp system before 1939 as criminal offenses under Control Council Law No. 10 meant that subsequent prosecutors and judges could, and arguably did, paint a juridical-ideological picture of the Nazi state as a criminal state from its very inception. Because courts could now consider the nature and function of Nazi organizations and individual perpetrators in a different geographical frame (Germany itself), in relation to a different time period (1933–1945), and in relation to different groups of victims, (German opponents, religious believers, German Jews, victims of the euthanasia and racial hygiene sterilizations measures, etc.), the combined effects of these cases have arguably been the reinforcement of the original position adopted by Jackson before the IMT of the Nazi state as a criminal enterprise.

On this view, even the IMT efforts to draw back on the prosecution's overarching criminal state theory for rule of law, fairness and justice concerns, particularly in relation to the organization's part of the proceedings, were defeated under Control Council Law No. 10 proceed-

ings. Before briefly considering the consequences of this development, however, one final aspect of the IMT judgment on the organization's issue needs to be highlighted. The Tribunal was not unanimous in delivering its verdicts on the declarations of group criminality. In fact, the Soviet judge dissented and accepted much more of the prosecution's case against the named collective bodies.

## V. THE SOVIET DISSENT

While the USSR representative on the IMT, Major General Nikitchenko, dissented both in terms of the accused's guilt or innocence, and on the question of the sentencing of Rudolf Hess, whom he wished to execute, the significant point is that the disagreement lodged over the Tribunal's refusal to declare the criminality of the Reich Cabinet, the General Staff, and the High Command.

In relation to the Reich Cabinet, the Soviet judge underlined the basic fact of a massive Nazi criminality already found in the various judgments of the Tribunal related to "the Hitlerites," who committed "innumerable and monstrous crimes," that were almost entirely "committed intentionally and on an organized scale, according to previously prepared plans and directives."<sup>87</sup> Broadly speaking, the judge characterized the majority's findings in terms that echoed the prosecution's adopted position. Indeed, the judge sought to base his findings on the concept of the broad common planning at the heart of the Nazi state. In relation to the Cabinet, he declared that a logical conclusion from the other findings of Nazi criminality by the Tribunal appeared to be inevitable:

In view of this it appears particularly untenable and rationally incorrect to refuse to declare the Reich Cabinet the directing organ of the State with a direct and active role in the working out the criminal enterprises, a criminal organization. The members of this directing staff had great power, each headed an appropriate Government agency, each participated in preparing and realizing the Nazi program.<sup>88</sup>

These words offer a glimpse into the emerging Soviet understanding of the Nazi state. For them, Hitler's role did not diminish the culpability of those who surrounded him and those who directed the various agencies that implemented the Nazi program within the relevant areas of governance. It was "the Hitlerites" who planned and carried out the

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87. *Dissenting Opinion of the Soviet Member of the International Military Tribunal*, I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 356 (Nuremberg, 1947).

88. *Id.*

Nazi program's ongoing international criminality. According to the Soviet point of view, to allow the Reich Cabinet to escape a criminality declaration was to fundamentally misapprehend the nature and function of this organization within the Nazi apparatus. Indeed, the absence of regular Cabinet meetings, and the personal power of Hitler within the state structure, merely confirmed the broader understanding of the Nazi state and the role of the Reich Cabinet within it. To the Soviets, "These peculiarities do not refute but on the contrary further confirm the conclusion that the Hitler Government is not an ordinary rank and file cabinet but a criminal organization."<sup>89</sup>

On this point, the USSR's position on the nature of the Nazi state directly echoes the argument made by the prosecution authorities throughout the IMT proceedings. The particularity of the Nazi state from its very inception was that it was a vast criminal enterprise aimed at the violation of the international legal order. A similar point about the state constitutional structure informed the Soviet dissent on the General Staff and the High Command. For the USSR:

This organic inter-relationship between the Nazi Party and the SS on the one hand and the Nazi Armed Forces on the other hand, was particularly evident among the upper circles of military hierarchy which the Indictment groups together under the concept of criminal organization—that is, among the members of the General Staff and the OKW.<sup>90</sup>

These high-ranking military officials were key conspirators in planning the Nazi war of aggression and in issuing the orders that led to war crimes and crimes against humanity.<sup>91</sup> Most importantly, they acted at all times as members of the small group that surrounded Hitler and were intimately involved as an organization in planning and implementing crimes against international law.<sup>92</sup>

It should come as no surprise that the Soviet judge would seek harsher punishments against the convicted or would see the culpability of all the accused and indicted organizations. Alone among the prosecuting powers, the USSR had suffered the full force of Nazi aggression, war crimes, and crimes against humanity. Britain had been bombed, and France had been occupied and had suffered under the Nazi yoke, but the war in the east was of a different level and measure of brutality and viciousness. This alone could explain and justify the attitude and position

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89. *Id.* at 358.

90. *Id.* at 359.

91. *See id.* at 359–64.

92. *See id.* at 364.

of the Soviet judge.

However, this ignores a fuller and more comprehensive contextualization of the USSR's dissent to the criminal organization question. For example, Marxist-Leninist ideology, the framework behind Soviet jurisprudence, ultimately saw law as a useful ideological and repressive tool to use against the enemies of the people. This approach perceived no clearer enemy of the people than the leaders of the Hitlerite aggression that destroyed much of the Soviet Union. However, it is necessary not to overemphasize the notion that some political ideology is the motivating force that distinguishes and explains the dissenting judgment. Clearly all the conquering powers represented in Occupied Germany and at the IMT perceived the Nazi state and its leaders as their enemies and as a threat to their political systems. All the Occupying Powers saw suppressing Nazi criminality through legal proceedings as a necessary method to defeat the Nazi state and its constituent parts; no other explanation adequately contextualizes the process from the Moscow Declaration to the IMT proceedings, to Control Council Law No. 10. Different understandings of the rule of law, or the role that the law that might have played, do not remove politics and ideology from the hermeneutic framework for understanding the jurisprudence of the IMT in general, or the operating constitutional assumptions about the Nazi state. This does not mean we must forego or forget Soviet ideology in an attempt to place the dissent in its context, but instead that we should be careful and aware of other contextual elements in our analysis.

On the negative side, we must never forget the atrocities associated with the German-Soviet Non-Aggression Pact and the secret protocol of the Von Ribbentrop-Molotov Agreement that divided Poland between the two States.<sup>93</sup> Nevertheless, this needs to be understood not in terms of the perfidy of the agreement, or its horrendous consequences for the people and nation of Poland, but rather in terms of obtaining a fuller understanding of the complex factual and legal history of the Soviet Union's perception of the Nazi state. The secret protocol and the agreement reveal firstly the ideological analyses Marxism-Leninism might have provided to understand Nazism as a state and constitutional form of government. *Realpolitik* allowed Stalin to reach a deal with a nation that had suppressed and perverted the working class. Secondly, the agreement and protocol note the significance of periodization in the historical and legal analyses of the Nazi state. The USSR did not begin to portray

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93. See generally Treaty of Non-Aggression Between Germany and the Union of Soviet Socialist Republics, Secret Additional Protocol, F.R.G.-U.S.S.R., Aug. 23, 1939 [hereinafter "Treaty of Non-Aggression"].



the Nazi state as criminal enterprise until Hitler broke the non-Aggression Pact by launching Operation Barbarossa. Instead, the USSR employed the techniques and legal framework of international relations and international law when dealing with Germany. It maintained diplomatic relations with Germany throughout 1933 and beyond. The arrival of Nazi control over Germany changed nothing between the Soviet Union and Germany. The Soviet Union entered into diplomatically negotiated and legally binding treaties with Germany. Only after hostilities began did the characterization of Hitlerite aggression and criminality surface in Soviet politics and legal discourse.

While all of this must be noted when attempting to understand the text and impacts of the Soviet dissent at Nuremberg, other factors also arise. Once hostilities did take place, the USSR played a key role in the international military action against the Germans. Soviet actions against the Nazis clearly had an important, impact that led to the ultimate defeat of Germany in 1945. On the legal front, the first real joint Allied statement outlining the understanding of Nazi international criminality and expressing the firm intention of the Allied countries to pursue Nazi criminals is included in the Moscow Declaration. The first trials against Soviet collaborators and against Nazi war criminals took place in the Soviet Union at Kharkov and Krasnodar.<sup>94</sup> As one sympathetic jurist put it, a key lesson from the trial at Kharkov was:

The responsibility of the heads of the Axis States—of Hitler, his gang and all other arch-criminals—for all the crimes which they have tolerated and ordered [are] personal and criminal. It is not merely political or moral. They must be tried and punished according to the criminal laws of their victims.<sup>95</sup>

Most importantly, the Soviets were consistent in their expressions of understandings about the nature of Nazi criminality and about the organizational structures and responsibilities behind this criminal behavior. From the start of Germany's Operation Barbarossa, the Soviets mounted a concerted effort aimed at documenting and denouncing Nazi crimes committed on their soil. For example, Foreign Minister Molotov sent a note to all countries with which the USSR had diplomatic relations. In that note he explained:

There have been many recent instances of atrocities which have taken on a specially glaring character, thus once again exposing the German Military Authorities and the German Government as a gang

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94. Michael J. Bazylar & Kellyanne Rose Gold, *The Judicialization of International Atrocity Crimes: The Kharkov Trial of 1943*, *SAN DIEGO INT'L L. J.* 77, 80 (2012).

95. BOHUSLAV EČER, *THE LESSONS OF THE KARKOV TRIAL* 14 (2d. ed. 1944)

of cut-throats who ignore all principles of international law and human morality.<sup>96</sup>

Two months later in January 1942, Molotov again issued an international complaint in the following terms:

Irrefutable facts prove that the regime of plunder and bloody terror against the non-combatant population of occupied towns and villages constitutes not merely the excesses of individual German officers, but a definite system previously planned and encouraged by the German Government and the German High Command, which deliberately foster the most brutal instincts among soldiers and officers in their army.<sup>97</sup>

At the end of 1942, the Soviets denounced the extermination of Jews as “a bestial plan for the physical extermination of a considerable part of the civilian population of German-occupation territories,” attributable to the “criminal Hitlerite rulers.”<sup>98</sup> That report concluded with a warning about the retribution awaiting a Soviet and Allied victory:

Heavy will be the punishing hand of the nations, which will cast off the yoke of the German-Fascist invaders. Neither the ruling Hitlerite clique nor the base executors of its criminal, bloody orders shall escape the vengeance of the liberated nations.<sup>99</sup>

These are a few examples of the way the USSR in its public pronouncements, often accompanied with evidence from captured German documents, or statements from the interrogations of German POWS, consistently characterized the German state as a criminal state, run by a ruling clique of gangsters. These examples also show how the USSR continued to portray the entire government structure of the Nazi state and the higher echelons of the military as core elements at the heart of the vast criminal enterprise.

At the present time the Soviet Government has in its possession documents recently seized in the headquarters of routed German army units, from which it is clear that the bloodthirsty crimes and atroci-

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96. Note from V.M. Molotov, People’s Commissar for Foreign Affairs of the U.S.S.R., to all Governments with which the U.S.S.R. has diplomatic relations (Nov. 25, 1942), *in* SOVIET GOVERNMENT STATEMENTS ON NAZI ATROCITIES 7 (1946) (on the subject of “Appalling atrocities committed by the German authorities against Soviet Prisoners of war”).

97. Note from V. Molotov, People’s Commissar of Foreign Affairs of the U.S.S.R., to all Governments with which the U.S.S.R. has diplomatic relations, *in* WE SHALL NOT FORGIVE!: THE HORRORS OF THE GERMAN INVASION IN DOCUMENTS AND PHOTOGRAPHS 3 (1942) (on the subject of “The Monstrous Crimes, Atrocities and Acts of Violence perpetrated by the German Fascist Invaders in the Occupied Soviet Areas and the Responsibility of the German Government and Military Command for These Crimes”).

98. *Id.*

99. *Id.*

ties of the German fascist army are being perpetrated in accordance with carefully drawn up and thoroughly worked out plans of the German Government and at the orders of the German Military Command.<sup>100</sup>

Leading Soviet legal officials fleshed out the understandings and juristic principles underpinning the consistent position of the USSR in its pronouncements of the Nazi criminal state. They rejected the idea of collective responsibility, at least in criminal law in terms of the German people. A. N. Trainin, the leading example of Soviet legal thinking on the subject, wrote,

It is necessary really and concretely to determine which groups, which persons must be recognized as having inspired, organized, facilitated and executed the Hitlerite atrocities. The question of responsibility of the accomplices of Hitlerite misdeeds thus acquires a very great importance.<sup>101</sup>

Trainin not only articulated an understanding that groups must carry a criminal burden with the deeds of the Hitler regime, the idea at the core of the organizations case, but he relied specifically on an understanding of the law in relation to complicity, a theory that is similar to the idea of a common plan or conspiracy later deployed by Jackson et al. at Nuremberg. More specifically, the Soviet jurist examined the more central role of “the Hitlerite superiors—the commanding authorities of Germany.”<sup>102</sup> A study of the structures of government and governance in Germany led to the conclusion that:

With the German Fascist Government group is inextricably bound up another political grouping- the great and little “Fuehrers” of the Fascist party. . . . The controllers of the Hitlerite ministries were at the same time leaders of the party. Persons in charge of the local authorities were at the same time leaders of the local party organizations.

With this same criminal governmental and party leadership must be classed likewise the German High Command, which organized the bandit activities of the Fascist armies and directed those activities.<sup>103</sup>

The Soviet Union had a consistent, somewhat belated, understand-

100. WE SHALL NOT FORGIVE!: THE HORRORS OF THE GERMAN INVASION IN DOCUMENTS AND PHOTOGRAPHS, *supra* note 97, at 1.

101. A. N. TRAI'NIN, HITLERITE RESPONSIBILITY UNDER CRIMINAL LAW 79 (Andrew Rothstein trans., Andrey Yanauryevich ed., 1945).

102. *Id.* at 81.

103. *Id.* at 82.

ing of the nature of the German state and of the place of leading structures and organizations within that state. Its view was of collective criminality at the highest levels, and of a state informed more by gangsterism than anything. They saw the government leaders within the Reich Cabinet and the Military High Command and General Staff as being intimately part of the broad criminality of the Hitler regime and more directly as the directing force behind the atrocities commissions and international law violations on Soviet territory. They developed a sophisticated legal complicity theory and the special nature of international criminality to carry forward thus understanding to the war criminal's prosecution, both domestically and in the IMT international forum.

General Nikitchenko's dissent was more than a mere frolic of his own, or one informed by a crude Leninist legal instrumentalism. In fact, and in law, the Soviet position, both in relation to the broad understanding of the Nazi state and as far as the issue organizational liability was concerned, was remarkably similar to that adopted in the case developed by Justice Jackson. The dissenting position related to the Reich Cabinet "acquittal" and to the failure to find that the High Command and General Staff constituted criminal organizations. Throughout the war, the consistent Soviet position had been that the highest-ranking German military officers were key actors in the vast array of international crimes perpetrated on Soviet soil and that leading political figures, such as members of the Reich Cabinet, fulfilled those roles because of their high-ranking party members' status. As such their role in Hitlerite criminality was almost a foregone conclusion. That the Soviet judge should hold firm to this position, when it had also formed part of the prosecution's main case, is in the end evidence only that different conceptions of the constitutional structures of the Nazi state, and foundational questions about the core nature of the Hitler regime, remained unresolved.

Historians and lawyers have begun to examine the complex processes leading up to the IMT's creation and operation.<sup>104</sup> Still others have offered studies of the Soviet role in the lead up to the Nuremberg Trials.<sup>105</sup> It is not my place to further these projects, but it is the function of this article to urge a more in depth study of the "criminal organization (or organizational)" aspects of the IMT proceedings, both in the formulation of the innovative ideas of group criminality and "membership crimes" at Nuremberg in relation to Control Council Law No. 10 proceedings. One potential way of looking at these questions comes

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104. See generally KOCHAVI, *supra* note 14.

105. See generally GEORGE GINSBURGS, *MOSCOW'S ROAD TO NUREMBERG: THE SOVIET BACKGROUND TO THE TRIAL* (Kluwer Law International 1996).

from a comparison of the Nazi criminal state's constitutional conception advanced by Justice Jackson, with the Soviet legal position's detailed history on this question.

None of this is meant to suggest the Soviet Union possessed an unblemished record in pursuit of Nazi criminality or in the international legal development order that emerged after the IMT; but instead, to suggest that historical and legal scholars need to begin to take the USSR's contribution to and role at the Nuremberg Trial both more seriously and as a consequence more contextually. As Francine Hirsch in her important study of the Soviets and the IMT has put it:

Ultimately, acknowledging the Soviet contribution to Nuremberg means looking with open eyes at the complex political forces that shaped the IMT and the postwar order. Nuremberg was as much about politics as it was about justice- and it could not have been otherwise. The USSR and the Western powers all had somewhat different ideas about the meaning of "justice" and how it should be served.

While all the countries of the prosecution saw Nuremberg as a political contest, it was a contest at which the United States particularly excelled. The fact that the Anglo-American narrative of the IMT continues to prevail testifies to the success of the U.S. and its Western Allies in making Nuremberg their own.<sup>106</sup>

Broadly speaking, I would add an important caveat to this analysis of the ideology and jurisprudence of Nuremberg. In relation to the "criminal organization" aspects of the IMT proceedings, it might be worth noting that there was not a single or singular vision of the constitutional system of the Nazi state or of the place and role of the different allegedly criminal "groups" therein among the U.S. and its Western Allies. What the criminal organizations cases as a whole demonstrate is that there was an overall vision of the Nazi state as a criminal combine from its very origins, in which the indicted organizations played a vital role. This vision was advanced by the prosecution led by Justice Jackson and echoed in Soviet political and legal discourse both at the trial and before. On the other hand, a more limited vision was set out by the majority judgment, limiting Nazi organized criminality to the later period of Hitler's rule—post-1937—and situating real organized criminality, in particular in relation to war crimes and crimes against humanity, to concrete offenses committed after September 1, 1939. This again was in part the result of the Tribunal's reading of the evidence, its conception of the common plan or conspiracy limited in temporal scale, and

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106. Francine Hirsch, *The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order*, 113 AM. HIST. REV. 701, 729–30 (2008).

the limited effects of the definition of the international crimes it had to consider. There is one understanding of the Nazi state from its origins at the heart of the Jackson/Soviet position, and another of the Nazi state at war, when it truly did become a criminal state.

A jurisprudential and/or a socio-legal analysis of the IMT and of the criminal organizations' aspect of the proceedings in particular therefore demands perhaps more details and more nuances than even Hirsch has applied. One final set of ideas will add still much needed historico-legal and intellectual, or at least jurisprudential, context to serve as a potential framework for future work on the subject.

#### VI. PREQUELS AND SEQUELS: THE LEGAL HISTORICAL CONTEXT OF THE IMT CRIMINAL ORGANIZATIONS TRIALS

It is not necessarily surprising that no overarching theory of the Nazi state and its constitutional apparatus emerged from the jurisprudence of the IMT. Indeed, given the history and nature of constitutional law debates between Nazi jurists themselves during the period of consolidation of power, it is little wonder that “outsiders” after the fact could come to grasp in a coherent way the complexities, both political and legal, of the evolving Nazi state.<sup>107</sup>

If one can trace the Soviet ideological and jurisprudential constructions of the Nazi state and its constituent and constitutive elements, he will find that a particular set of temporalities inform changing attitudes and analyses, and the same can be said of Western, especially American, understandings of the Hitler regime. I am not making a claim that such understandings were univocal or unanimous. Instead, I simply contend that the same historical periodization that is necessary to understand and fully comprehend the jurisprudence of the USSR and the Hitlerite regime must also be applied to American portrayals of the Nazi regime, its legal system, and its overall structural apparatus.

I have already examined in some detail the ways in which the British and American legal systems, and legal scholars within those countries, dealt with and characterized Nazi law.<sup>108</sup> Such studies reveal quite

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107. Peter Caldwell, *National Socialism and Constitutional Law: Carl Schmitt, Otto Koellreutter, and the Debate Over the Nature of the Nazi State, 1933–1937*, 16 CARDOZO L. REV. 399 (1994).

108. See generally DAVID FRASER, *The Outsider Does Not See All the Game . . . : Perceptions of German Law in Anglo-American Legal Scholarship, 1933–1940*, in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS 87 (Christian Joerges & Navraj Singh Ghaleigh eds., 2003); David Fraser, *This is Not Like any Other Legal Question: A Brief History of Nazi Law Before UK and US Courts*, 19 CONN. J. INT'L L. 59 (2003).

clearly that the ideas of a Nazi state as a “criminal state” run by gangsters, or a legal system characterized from its beginnings as one of “assassins in judicial robes,”<sup>109</sup> was not the informing framework in which American lawyers, judges, and law professors, understood the Nazi system of law, and the overarching state and administrative apparatus that created and applied those laws. For the legal professions in the United Kingdom and the United States, the system of Nazi laws, including those laws particularly targeting Jews and Jewish property, did not rise to the same level of moral opprobrium as that which characterized the prosecution at the IMT or in subsequent proceedings. However, the Nazi state and its legal system were understood; they were never placed in the category of a “criminal state” operating a system of “law in name only,” until after the beginning of the Second World War. At this level of the ideological and jurisprudential construction of the Nazi state and its legal apparatus, the American (and British) attitudes and formulations share a remarkable similarity in their evolution along the path to the “criminal state” with the USSR’s own evolving taxonomies.

Like the Soviet Union, the United States also treated the Hitler regime from 1933 until it declared war in 1940 as a legitimate actor in world affairs. Unlike its relations with the USSR, the United States always recognized Germany as a state actor in the international realm.<sup>110</sup> Whatever the intricacies, contradictions and factual and legal complications that might inform the international framework of state recognition, there was never a serious attempt by the United States to treat Nazi Germany as a “criminal state,” in the sense of a mere group of gangsters pretending to be legitimate.<sup>111</sup> Until the outbreak of armed hostilities between the United States and Hitler’s Germany, the American government treated the German Reich as an equal international entity. American and British firms (in)famously continued to do business in the Third Reich without issue.<sup>112</sup> As those found to be mentally unfit were compulsorily sterilized, as political and religious opponents or “enemies” of the Nazi state were imprisoned in increasingly harsh conditions of con-

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109. See generally *Evil Law, Evil Lawyers?*, *supra* note 13.

110. See generally Hans Kelsen, *Recognition in International Law: Theoretical Considerations*, 35 AM. J. INT’L L. 605 (1941).

111. See generally SIR HERSCHE LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* (1947) (This is wrapped up in the even more difficult issue of exactly what a state is and how it might be considered to be constituted in its originary moments); Milena Sterio, *A Grotian Moment: Changes in the Legal Theory of Statehood*, 39 DENV. J. INT’L L. & POL’Y 209 (2010).

112. See generally Neil Forbes, *Multinational Enterprise, ‘Corporate Responsibility’ and the Nazi Dictatorship: The Case of Unilever and Germany in the 1930s*, 16 CONTEMPORARY EUROPEAN HISTORY 149 (2007); Gabriel Kolko, *American Business and Germany, 1930–1941*, 15 POL. RES. Q. 713 (1962).

finement as the Nazis tightened their grip on the apparatus of the state and the economy, and as German Jews were excluded, humiliated, expropriated, sent to concentration camps, expelled and killed, the German state that accomplished and carried out these acts, many of which would be classified as crimes against humanity under Control Council Law No. 10, continued to be a nation state with full and complete legitimacy under the operating norms of international relations.

This is important not only for the direct story it tells about the nature and state of international law in the 1930's, or about the apparently radical re-writing of these rules in the immediate postwar, but also for the more oblique narrative it helps to construct about the understandings of the Nazi state. I am not suggesting, of course, that the only regimes that can be, or are to this day, recognized as legitimate actors under international law and the rules of international legal recognition, are democratic, rule of law regimes. Instead, I am making the smaller and more focused point that whatever the rules of valid international legitimacy might have been, there was never an understanding that the Nazi regime was anything other than legitimate and lawful. There was no idea abroad, as there had been in the case of the USSR after 1917, that the Nazi revolution had caused such a change to the structures and normativity of the German Reich that Germany no longer existed as an international actor. Indeed, it seems clear that whatever changes the Nazis brought to the German state, those changes were not considered by the international community to have been "revolutionary" in the same sense as the Bolshevik conquest of power. Whatever goals the Nazis had in mind and whatever fundamental changes were brought by the consolidation of the Nazi state and of Nazi law and mechanisms of governance—including the idea of the *Führerprinzip*, the symbiosis between the Nazi Party and the state that resulted from the changes operated by the Nationalist Socialist "revolution," for the international community, and including the United States—were not fundamentally radical enough to constitute an equivalence with the Russian Revolution, or to constitute a radical break in the continuity and legitimacy of the German state.

This does not mean that the United States was unaware of the changes operated by the Nazi consolidation of power. However, it does indicate that the "criminal state," organized gangster-ism, and the illegitimacy thesis that informed the prosecution's case at Nuremberg was as ideological, political, contingent, and historically and temporally derived as the USSR's characterization of the Nazi state. For example, in one case, the phrase "the Hitlerite Government, the super-hangman



Himmler and their S.S. and S.D. henchmen” was used.<sup>113</sup> In fact, a brief survey of contemporaneous academic, political, sociological, and legal literature throughout the period of Nazi consolidation and rule, offers clear evidence that America and Americans fully understood the nature of the Nazi state apparatus, of the structures of governance, and of the ways in which power operated within those structures.<sup>114</sup>

Writing as early as 1934, Frederick Schuman produced a careful analysis of the Nazi regime.<sup>115</sup> He did not hesitate to characterize it at this early stage as a “dictatorship.” He offered a careful examination of the ideologies and positions adopted by the Nazi Party, but more significantly, for the construction of the Nazi state and the concepts reflected in and elaborated at Nuremberg. He carefully placed the Nazi Party and its hierarchy at the center of the German state apparatus.<sup>116</sup> He also identified the political and juridical violence that had characterized the elimination of political rivals, and offered a clear understanding of the dictatorship as building its power through a clear focus on the dangers a perfidious Jewish influence posed to the German people.<sup>117</sup> Finally, he carefully analyzed and portrayed the role played by leading industrialists and the landed Prussian gentry in supporting the rise to power of Hitler and the NSDAP, and the role they played in consolidating the dictatorship through a new economic power structure.<sup>118</sup> Finally, in a remarkable instance of prescience, or perhaps more simply of careful political and sociological thought, Schuman wrote that “Fascism is driven toward war by its own ideology and by the tightening ropes of economic strangulation in which its ruling classes are entangled.”<sup>119</sup>

Two years later, Fritz Marx authored a detailed analysis of the Nazi state’s apparatus.<sup>120</sup> Like Schuman, Marx portrayed and understood the Hitler regime in terms of the gradual *mainmise* over the mechanisms

113. *Judgment*, *supra* note 24, at 225.

114. In what follows, I focus by way of example only on four leading books written on the topic during the relevant time frame. The periodical literature, particularly by political scientists, reflects the same conceptions and concerns, but a careful or detailed study of that literature is for another day. *See, e.g.*, Arnold J. Zurcher, *The Hitler Referenda*, 29 AM. POL. SCI. REV. 91 (1935); Albert Lepawsky, *The Nazis Reform the Reich*, 30 AM. POL. SCI. REV. 324 (1936); John A. Hess, *Volk und Führer*, 11 GERMAN Q. 4 (1938); Taylor Cole, *Current Appraisals of German National Socialism*, 1 J. POL. 195, 195–205 (1939).

115. *See generally* FREDERICK L. SCHUMAN, *HITLER AND THE NAZI DICTATORSHIP: A STUDY IN SOCIAL PATHOLOGY AND THE POLITICS OF FASCISM* (2d ed. 1936).

116. *See id.* at 49–94.

117. *See id.* at 312–39.

118. *See id.* at 387–422.

119. *Id.* at 504.

120. *See generally* FRITZ MORSTEIN MARX, *GOVERNMENT IN THE THIRD REICH* 52, 90 (1936).

of government by the Nazi Party under the broad understanding of the unity of Party and a state within a system operating under the singular *Führerprinzip*. As Marx notes:

The blueprint of authority on which modern Germany emergency government is modeled displays two distinct features: the concentration of all power in the hands of the Leader in whose person the means of governmental and of extragovernmental adjustment, state and Party, are combined; and the deliberate elimination of all those statutory confines which qualify the exercise of power.<sup>121</sup>

Marx saw Germany under Hitler as a fascist dictatorship with a one-party system.<sup>122</sup> He placed special importance on the invocation of emergency decrees as the basis for consolidating state power as a *Führerstaat*.<sup>123</sup> Even at this stage in which the civil society, economic power, and the Party all operated in an apparently synergistic relationship under the unifying leader, he did not claim there to be a state without a normative constitutional basis. This was still not a “criminal state.”

One finds many similar elements offered in the leading and key analyses by Karl Lowenstein in 1939.<sup>124</sup> Lowenstein similarly offers a careful recitation of the Nazi rise to power and of the consolidation of the state apparatus around Hitler and the Party.<sup>125</sup> He adds the important element of the centralization of governance through the “elimination” of the states (*Laender*) and the creation of a unitary state apparatus.<sup>126</sup> Moreover, Lowenstein examines the maintenance of a system of police and justice, albeit under Nazi influence and control.<sup>127</sup> In other words, at the constitutional level, Lowenstein still identified the operative mechanisms of a state apparatus as late as 1939. While that apparatus had been completely Nazified, it nonetheless continued to function not as a gross and simple criminal conspiracy, but as a recognizable state system, working within the ideological and political structures of National Socialism. The state and civil society were becoming, or already were, consolidated, but this did not mean that there was no state in any meaningful sense.<sup>128</sup> In addition to the amalgamation of the state and civil society, Lowenstein also identified, as had Schuman, another key element

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121. *Id.* at 92.

122. *See id.* at 53–91.

123. *See id.* at 60–64.

124. *See generally* KARL LOEWENSTEIN, *HITLER'S GERMANY: THE NAZI BACKGROUND TO WAR* (1939).

125. *See id.* at 1–26.

126. *See id.* at 54–69.

127. *See id.* at 86–98.

128. *See id.* at 127–34.

of National Socialism, or perhaps of fascism more broadly (i.e. the centrality of a coordinated economic structure in which the private goals of industrial capitalists were made one with the aims of the state).<sup>129</sup> Finally, as a precursor to the organizational criminality aspect of the Nuremberg Trials, and its relation to understanding the constitutive elements of the Nazi state, Lowenstein offers this:

An equally important change in the constitutional set-up of the Third Reich is the establishment of a permanent Council of Ministers for the Defense of the State . . . For the time of the present political tension abroad and “for the uniform management of the administration and economic affairs” a Ministerial Council is formed, under the chairmanship of Goering, and comprising as permanent members . . . men holding key positions in the inner government circle.<sup>130</sup>

For Lowenstein, even after the invasion of Poland and the beginning of World War II, but before the entry of the United States, Germany still had a constitutional system and an “inner government circle.” Again, there is no sign at this date, the date at which the IMT had signaled the imposition of collective, organizational criminal responsibility in relation to the groups and individuals charged with membership crimes, of a theory of the Nazi state as a vast criminal conspiracy run by gangsters. Lowenstein’s vision would of course evolve and he would go on to become one of the leading figures in the Allied Occupation and the “restoration” of the rule of law in Germany.<sup>131</sup>

Finally, William Ebenstein produced a monumental study of the Hitler regime in 1942, in the middle of the war, and after the beginning of hostilities with the United States.<sup>132</sup> Yet he insisted that what he was studying was indeed a state, one recognized as the only legally recognized entity against which a declaration of war was possible in international law. He offered detailed analyses of the apparatuses of the Nazi regime, from national government,<sup>133</sup> state and local government,<sup>134</sup> the Nazi Party,<sup>135</sup> Law and Justice,<sup>136</sup> religion,<sup>137</sup> and the economy.<sup>138</sup> Ebenstein was quick to identify the oppressive nature of the Nazi re-

129. *See id.* at 143–46.

130. KARL LOEWENSTEIN, *supra* note 124, at 174.

131. *See generally* R. W. Kostal, *The Alchemy of Occupation: Karl Lowenstein and the Legal Reconstruction of Nazi Germany, 1945–1946*, 29 L. & HIST. REV. 1 (2011).

132. *See generally* WILLIAM EBENSTEIN, *THE NAZI STATE* (1943).

133. *See id.* at 23–44.

134. *See id.* at 45–55.

135. *See id.* at 56–68.

136. *See id.* at 69–107.

137. *See id.* at 199–226.

138. *See* WILLIAM EBENSTEIN, *supra* note 132, at 227–70.

gime and the roles played by the various organizational structures in the implementation of the aims of the Hitler state. He also comes closest to considering the Nazi state to be illegitimate or illegal in the ways in which, only four years later, the entire United States process of prosecution and occupation, more broadly conceived, would define and characterize the Nazi state. For Ebenstein, and to a lesser extent for Marx, the Nazi state was best understood as the embodiment of a state and a governance structure operating, almost from the beginning, under a system of martial law, but illegally imposed.<sup>139</sup> The Nazi state came into being as a revolutionary state both in fact and law.

Examining the original appointment of Hitler by Chancellor von Hindenberg, Ebenstein concludes that, "It was as legal as the appointment of Al Capone or John Dillinger as the headmaster of an industrial school for delinquent boys would be legal."<sup>140</sup>

The references to Capone and Dillinger echo or pre-echo the assertion that the Nazi state was run by gangsters. At the same time, the analogy does not fundamentally go to the core constitutional legality of the Nazi state. Appointing Capone or Dillinger to run a school for delinquents might well be naming the fox to run the henhouse, but if the person nominating the fox has the power to do so, the appointment is "legal." Ebenstein puts some emphasis on the idea that von Hindenberg may have acted illegally in naming Hitler since the Nazis had long expressed their hostility to the existing constitutional order, and von Hindenberg had sworn an oath of allegiance to that same constitutional order.<sup>141</sup>

However, Ebenstein's constitutional law analysis of the Hitler state really flows from his assertion that the Nazis operated a fundamental and revolutionary change to the nature of the German state when they came to power. We have seen that this was not the understanding of the world of international relations or international law in 1933 or thereafter, and therefore one must again put Ebenstein's analysis in its temporal context. Perhaps one finds here the same type of taxonomical change in constitutional analysis as can be detected in the rapid switch in Soviet legal and ideological positioning of the Hitler state after the German invasion of the USSR.

Ebenstein, nonetheless, does offer an intriguing reading of the formal, positive legality of the Nazi state that to some extent at least goes beyond the "criminal state" hypothesis. He places the Emergency

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139. *See id.* at 1–22.

140. *Id.* at 3.

141. *Id.* at 4.

Decree of February 28, 1933, under which the Nazis suspended many of the freedoms of the Weimar Constitution, at the heart of his case:

The decree is still law. No new constitution has been made since the destruction of the Weimar charter. The executive act destroying the Weimar Constitution is therefore the basic constitutional document of the Nazi regime because it deals with the fundamental rights of the citizen and the basic powers of the government. Let us remember again that this basic act established a state of martial law in Germany. Since it has never been lifted since then, it must be presumed that in law, as well as in fact, martial law is still in force and will remain so until it is revoked. Until a new constitution is passed, the constitutional pattern established by the presidential emergency decree of February 28, 1933, is the fundamental German constitutional document. Martial law has thus been the Nazi constitutional system since 1933.<sup>142</sup>

It is impossible to review the ways in which Ebenstein's analysis might be considered to be flawed or incomplete. He fails to recognize that under the Weimar Constitution itself, the same powers to suspend liberties were invoked numerous times by legitimate democratic governments. He also does not consider that on his own analysis, only some of the provisions of the Weimar Constitution were suspended while the rest, in theory, remained in effect. He does not contemplate the fact that many of the other provisions of the Weimar Constitution were rendered moot by other "legal" changes operated and instituted under the Nazi consolidation of power. This also means that his understanding of the "constitution" of the Nazi state is literally and restrictively "textual." A deeper understanding of "constitutionalism" and indeed of "constitutionality," particularly in the British unwritten constitution tradition, but not limited thereto, could perhaps lead to an understanding of the Nazi Constitution, or constitution, that would go beyond one textual provision, and to a position that constitutional, or at the very least, constitutive, change does not require, by definition and ineffably, a new formal text labeled "constitution."

But even if we ignore the intriguing political, jurisprudential, and ideological issues left open by Ebenstein's assertions, if we take him at his word and accept his position, it remains the case that there was always a Nazi constitution. "Martial law" is still law, and historical legal experience clearly indicates that a regime of martial law does not render a state illegitimate, unlawful, or criminal. Many intriguing and important questions for legal philosophy and constitutional theory arise in

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142. *Id.* at 5-6.

the context invoked by Ebenstein around issues of what becomes of the state when the “state of exception” under martial law becomes the norm and the normative jurisprudential reality.<sup>143</sup> But what does seem clear here is first, that martial law is still law, and second, Ebenstein seems to be laying the groundwork for the subsequent outright assertions of the “criminal state” theory, despite the gravitational pull in jurisprudential terms of the first point. What is important once again is that however logically, legally, or philosophically sound this analysis appears to be to us now, it did at the time manifest a clear move away from previous understandings of the Nazi state as a totalitarian, but legitimate, state towards the “criminal state” thesis of the Nuremberg prosecutors.

## VII. CAPITALISM AS ORGANIZED CRIME AT NUREMBERG

One element of the reorganization of the German state and society under the Nazi regime that is featured in each of these studies of the Hitler state is the focus on the role the wealthy capitalist class played in financing Hitler’s rise to power. The ways in which quasi-monopolistic capitalism functioned as a core element of the Nazi policy of rearmament, and then of the war economy, also played essential roles in understanding the way in which the Nazi state functioned. The problematic charges against the bed-ridden Gustav Krupp von Bohlen und Holbach as a representative of the Nazi version of the military industrial complex at the heart of Reich governance structures, is but one example of the ideas held by the prosecuting authorities of the IMT that cartel capitalism and its participants played a central part in the international crimes of the Nazi state. The subsequent prosecution of the Flick concerns and I.G. Farben before the NMT further highlights the fact that Allied legal officials understood the Hitler regime in terms that found a clear nexus between the ways in which monopolistic capitalist formations and the apparatus of the Nazi state existed at the heart of the regime.

Kim Christian Priemel has argued that an understanding of the organization of capitalist enterprise in Nazi Germany was not just a core element of the way in which the country functioned, but that such an understanding also informed much of the prosecution strategy before the IMT, and in some important subsequent trials at the NMT.<sup>144</sup> The focus on individual evildoers and concepts of barbarity that have come to dominate the post-Nuremberg understandings of the trials and their leg-

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143. See generally GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (1995).

144. See generally Kim C. Priemel, *A Story of Betrayal: Conceptualizing Variants of Capitalism in the Nuremberg War Crimes Trials*, 85 *J. MOD. HIST.* 69, 71 (2013).

acy has, he argues, served to distort not only the functional reality of the Nazi state and the core place of monopoly capital therein, but it also ignores the fact that the Nuremberg prosecutors and investigators understood that reality very well.

Such a focus also fails to account for the broader conceptualizations of Nazi criminality underlying the trials— the understanding of the structure of the dynamics of the Third Reich that proved to be crucial in determining the way in which the trials were designed, which charges were brought against which defendants, and the place of the proceedings in the overall debate on the future of Germany. The economic dimension was not just one among many; it stood at the very center of the debate on National Socialism, how to deal with its crimes, and what to do with the vanquished nation.<sup>145</sup>

Priemel's argument is important for several interconnected reasons. First, the idea of refocusing on the economic aspects of Nazi criminality brings to the fore elements of the history of Nazi war crimes that have played a secondary role. Second, his position allows us to examine the complexities behind the legal thinking of the Nuremberg prosecutors in a way that demands that we consider all the factors that were present at the relevant time. There was in fact a complex legal theory, informed by historical and political analyses, of the nature and extent of Nazi criminality at work in the construction of the cases before the IMT, and later the NMT. Third, this permits a view of the IMT proceedings not just in the spectrum of trials that dealt with Nazi war crimes and crimes against humanity—for instance US and British military courts, the NMT, national courts in a number of recently liberated countries, Soviet war crimes trials, etc.—but also permits us to place the IMT proceedings in the broader context of occupation policy and practice more generally.

We have, for example, already seen that in the minds of the prosecutors, the criminal organizations aspects of the IMT proceedings fit not only within notions of retribution under law that formed a core jurisprudential basis for the cases, but also within the pedagogical scheme involved in both creating a juridico-historical account and record of Nazi atrocities. Moreover, it highlighted the roles played by different organizational structures in the perpetration of Nazi crimes. Beyond this, Germany was physically and economically wrecked at the end of the war. After significant debate around the Morgenthau plan, which proposed the reconstruction of Germany in terms of creating only an agri-

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145. *Id.* at 71.

cultural state, the Allies, and the United States in particular, opted for re-building an industrial economy in the new Germany.<sup>146</sup> This meant that there was always an economic understanding informing broader Allied policies and that this understanding was in itself grounded in an historical view of the intimate connection between the nature of German monopolistic capitalism and its involvement in the commission of Nazi crimes. Thus, it becomes necessary to any proper reconstruction of the history of the constitution of the Nazi state, as understood by Allied authorities at Nuremberg and beyond, to situate the arguments about criminal organizations (and of the IMT more generally) in this context and to examine, for example, the reasons behind the failure to pursue industrial combines under the “criminal organizations” head. It is also necessary to choose another mechanism to deal with what was nonetheless considered to be a core aspect of the Nazi state and social apparatus, and to pose an ongoing threat to the establishment of a *Rechtsstaat* and a peaceful liberal democracy in Germany. Thus the elimination of these criminal industrial combines took place not before the IMT and through a declaration of criminality from the Tribunal, but rather through a developed legal program of decartelization of the Germany economy.<sup>147</sup>

Priemel’s analysis offers us an important reminder that the IMT and the prosecutors did not operate in an intellectual, historical or jurisprudential vacuum. Instead, they operated with the understanding of the nature of industrial capitalism and its role within the Nazi state and Hitler’s war economy. Powerful industrial combines concretized the remilitarization of Germany in preparation for the plans to wage aggressive war; they benefitted financially from the Aryanization of the economy; they profited from the war and the policies and practices of pillage in Occupied Europe; and they employed slave laborers through contracts with the RSHA and SS, some of whom were in the heart of the Nazi death machine.<sup>148</sup> The prosecutors understood this, and they indicted

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146. See generally WARREN F. KIMBALL, *SWORD OR PLOUGHSHARES?: THE MORGENTHAU PLAN FOR DEFEATED NAZI GERMANY* (1976).

147. See generally U.S. ARMY, REP. TO THE HON. SECRETARY OF THE ARMY (Apr. 15, 1949) (Special Committee to Study Decartelization and Deconcentration in Germany) [hereinafter “The Ferguson Report”]; John G. Stedman, *The German Decartelization Program: The Law in Repose*, 17 U. CHI. L. REV. 441 (1950); Henrich Kronstein & Gertrude Leighton, *Cartel Control: A Record of Failure*, 55 YALE L.J. 297 (1945).

148. See generally *United States v. Flick*, VI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (U.S. Gov’t Printing Office Oct. 1946–Apr. 1949); *United States v. Krupp*, IX TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (U.S. Gov’t Printing Office Oct. 1946–Apr. 1949); JOSEPH BORKIN, *THE CRIME AND PUNISHMENT OF I.G. FARBEN* (1st ed. 1978); JOSIAH E. DUBOIS, *GENERALS IN GREY SUITS: THE DIRECTORS OF*



Krupp as a representative of that industrial oligarchy. They pursued industrialists before the NMT, and as noted, other lawyers in the Occupation machinery broke up the cartels. The question that remains is why the cartels did not feature as “criminal organizations” at the IMT.

The obvious explanation is that the decartelization mechanism was already well underway, but this is not sufficient since the organizations and groups included in the indictment had themselves already ceased to function or exist. Other factors, including the core issues of Nazi law and the nature of the Nazi state, also no doubt played a role.

Doreen Lustig has recently attempted to place the conception of the Nazi state and Nazi legality at the heart of her reading of the so-called “Industrialist Trials” before the NMT.<sup>149</sup> There is much to be applauded in Lustig’s analysis, particularly her conviction that the core question of the nature of the Nazi state was a strong intellectual and jurisprudential presence in the cases seeking to prosecute the perpetrators of Nazi international crimes. Her understanding of the difficult relationship between the liability of individuals for international crimes and the ideas of criminal organizational “liability” also echoes important themes. Finally, she is to be applauded, in part at least, for returning to the fundamental concern when she writes:

The state as such was never on the dock at Nuremberg. The aspiration of the Nuremberg architects was to hold men rather than abstract entities accountable for international law. Yet, the call to pierce the corporate veil of the state assumed such piercing could be done with no theory of the structures of authority at stake and led to a limited and incomplete allocation of responsibility.<sup>150</sup>

The “criminal organizations” aspect of the IMT proceedings, Jackson’s statements about the centrality of that part of the case to the prosecution’s understanding of the nature of Nazi criminality, and the goals of the pursuit of Nazi criminals, to some extent, belie the bold assertion found in Lustig’s characterization of “the Nuremberg architects.” The differing positions adopted by the prosecutors and the Tribunal or the

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THE INTERNATIONAL ‘I.G. FARBEN’ CARTEL, THEIR CONSPIRACY AND TRIAL AT NUREMBERG (1953); BENJAMIN B. FERENCZ, *LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION* (1979); PETER HAYES, *INDUSTRY AND IDEOLOGY: IG FARBEN IN THE NAZI ERA* (1987); DIARMUID JEFFREYS, *HELL’S CARTEL: IG FARBEN AND THE MAKING OF HITLER’S WAR MACHINE* (2008); STEPHAN H. LINDNER, *INSIDE IG FARBEN: HOECHST DURING THE THIRD REICH* (Helen Schoop trans., 2008); RICHARD SASULY, *IG FARBEN* (1947).

149. See generally Doreen Lustig, *The Nature of the Nazi State and the Question of International Criminal Responsibility of Corporate Officials at Nuremberg: Revisiting Franz Neumann’s Concept of the Behemoth at the Industrialist Trials*, 43 N.Y.U. J. INT’L L. & POL. 965 (2011).

150. *Id.* at 1044.

dissenting Soviet judge, point to the need to broadly analyze and contextualize the IMT and other parts of Occupation legal practice to highlight that there may not have been a hegemonic theory at work even in the cases studied by Lustig. Nonetheless, it does remain true that the ultimate focus on individual liability, even in relation to the “membership crimes” flowing from the declarations of organizational criminality, does appear to have constructed the narrative of “evil” and “barbarity” attaching to specific actors and to the detriment of an allocation of responsibility based on the historical, and legal, reality of the Nazi state.

It is here that Lustig’s contribution becomes important, not because it is ultimately “correct,” but because it brings to the fore of socio-legal inquiry about Nazi criminality and the IMT the question of the place of cartel capitalism in understanding the functional realities of the Nazi state, and the importance of the role played by understandings of the legal normativity of the Hitler regime. Lustig does this by examining the role played by the competing theoretical, jurisprudential understandings of the Nazi state offered by Ernst Frankel<sup>151</sup> and Franz Neumann.<sup>152</sup>

For Neumann the Nazi state was a totalitarian state characterized by the role of the party and Fuhrer,<sup>153</sup> supported by a “totalitarian monopolistic economy.”<sup>154</sup> The overall structure of the Hitler regime was informed by synergistic arrangements and relationships between and among the Party, the Ministries, the civil service and bureaucratic apparatus, the armed forces, and the industrial and agrarian elites, many of the elements identified in earlier analyses of Nazi Germany offered by Marx, Schuman and Lowenstein for example. These arrangements, however convenient and put to practical effect, resulted in a form of government and governance that was irrational and unpredictable.<sup>155</sup> For Neumann, this led to the conclusion that there was no operating or operative “law” in Nazi Germany since the core value of predictability for legal norms according to which citizens and economic actors could gauge their behavior was absent.<sup>156</sup>

*Behemoth* is a work deserving of a more in depth study than I

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151. See generally ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (E.A. Shils in collaboration with Edith Lowenstein & Klaus Knorr trans., 1941).

152. See generally FRANZ L. NEUMANN, *BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM* (1942).

153. See *id.* at 41–61.

154. See *id.* at 255–92.

155. *Id.* at 378.

156. *Id.* at 382.

could hope to offer here. Indeed, as Raul Hilberg, who himself changed Holocaust historiography, put it, it is shocking that Neumann does not figure more prominently in literature about the Holocaust since many of his key ideas about National Socialism, the state and law under the Nazis, etc., find clear echoes not just in the IMT proceedings but in the work of many scholars, yet without a direct attribution to Neumann's original insights.<sup>157</sup> Neumann is to a certain extent the ghost who haunts our attempts to come to terms, however temporarily and tentatively, with the long shadow of the law over the Holocaust and our broader understandings of the jurisprudence of the Nazi state. As shall become clear in the discussion that follows, I do not share Hilberg's assessment that Neumann's analysis was correct in many of its key elements, but I do share the feeling that we have ignored his contribution to debates on these core issues for too long.

Neumann's views are complex and his evidence, like his approach, is both historical and sociological. I can only offer a cursory summary of the central thematic of *Behemoth*. At its core is the characterization of Nazi Germany as a country operating under a "totalitarian monopolistic economy."<sup>158</sup> In its overall approach Neumann's analysis is thus fundamentally faithful to its Marxist origins, emphasizing as it does, the centrality of economic structure to the functioning of the state itself. But the analysis does remain somewhat removed from any crude economic determinism.<sup>159</sup> Instead, Neumann begins with a careful overview of the "state" itself, arguing that, following a Schmittian view, the National Socialist regime had in fact replaced the traditional Bismarckian and Weimar structures of the state with a new way of imagining sovereignty.<sup>160</sup> Sovereignty, and therefore the "state" organization, no longer resided in the "state" *per se* but in the racial *Volk*. Thus, the state apparatus as traditionally understood, had been replaced by a combination of racialized people: the Party, as the embodiment of the people's will; the Führer, as the spokesperson of that Will; and a series of structures, which functioned solely to put the needs of the people into practice.

In this part of his inquiry, Neumann returns to the joint theme that

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157. See generally Raul Hilberg, *The Relevance of Behemoth Today*, 10 CONSTELLATIONS 256 (2003).

158. NEUMANN, *supra* note 152, at 255–92.

159. See generally MARTIN JAY, THE INSTITUTE'S ANALYSIS OF NAZISM, in THE DIALECTICAL IMAGINATION: A HISTORY OF THE FRANKFURT SCHOOL AND THE INSTITUTE OF SOCIAL RESEARCH, 1923–1950, at 143–72 (1996).

160. See generally CARL SCHMITT, DIE KIDTATUR (1921); CARL SCHMITT, DER FÜHRER SCHÜTZT DAS RECHT (1934).

he had already signaled in his previous work on law and rationality.<sup>161</sup> The removal of the “state” under National Socialism was accompanied by an ideological vision of the *Volk*, and an understanding of sovereignty leading Neumann inexorably to a new set of organizational and normative imperatives. The bureaucracy no longer served a Weberian rational function within a broadly liberal understanding of the public or private divide between state and market, and state and civil society.<sup>162</sup> Under National Socialism, the distinctions of this Hegelian, Weberian conceptualization and sociological vision of the nation state disappeared. Instead, it was replaced by the total and unique goal of serving the interests of the *Volk*. Rationality, in the sociological sense, had been replaced by a different irrational “logic,” while, to a greater or lesser extent, similar structures of governance continued to exist and function. Under this new system, “law,” as Neumann defined and deployed it, as the embodiment of traditional understandings of political and sociological rationality, also ceased to function.

The rejection of state supremacy is therefore more than an ideological device intended to conceal the party’s betrayal of the army and the civil service; it expresses the real need of the system to do away with the rule of rational law. As Neumann points out:

We must not be deceived into assuming, however, that centralization of bureaucratic machinery has in any way lessened in Germany, that the party’s existence had in any way restricted bureaucratic powers. On the contrary, preparedness and war have noticeably strengthened authoritarian control in the federal, state, and municipal bureaucracies.<sup>163</sup>

Just as Weberian rationality, and with it “rational law,” had been subsumed by some new form of sovereignty under National Socialism, along with its vision of a racial *Volk*, so too did the conception of other forms of legality undergo an important set of changes. As the nation state was replaced by the racial state, it was not just domestic visions of sovereignty that were radically modified. For Neumann, the National Socialist project carried forward the old German imperial vision by substituting the *Volk* for the state in its conception of international law.<sup>164</sup> The idea of a Greater Reich, of *Lebensraum*, of imperializing aggres-

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161. See generally WILLIAM E. SCHEUERMAN, *THE RULE OF LAW UNDER SIEGE: SELECTED ESSAYS OF FRANZ L. NEUMANN AND OTTO KIRCHHEIMER* (1996).

162. See generally MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (1958).

163. NEUMANN, *supra* note 152, at 80.

164. See *id.* at 184–220.

sion in the service of the people, became the driving force of this reconceptualization of international law under the Nazis and the imperative ideological impetus behind the wars of aggression being waged by Germany against "Europe." At this level, consistent with the historical materialist conception and analysis, the Nazi state project was the logical and inevitable consequence of trends, practices, and ideological notions inherent in German history. This then leads to a conclusion that a primary purpose and function of the Nazi state apparatus and all of the constituents of this agglomeration of power were from their origins targeting aggressive war and the conquest of territory as a primary and original function and goal. The ideas of the Nazi state as a "criminal state," constituting gangs formed within a common plan or conspiracy to violate international legal norms, are echoed (or originated from) here.

Even more significantly, however, it is here that Neumann places the nature and function of Nazi law. For him, the Nazi re-imagining of the state and sovereignty led to a reconfiguration of public law and international law under National Socialism. The "regulation" of the economy also led to a Nazified reconceptualization of property and contract law that removed a number of hurdles to the proper functioning of the cartelized economic structure. Other aspects of Nazi law then come to the fore in Neumann's analysis as he studies the now familiar "phenomenon" of the terror state. Again, as a preliminary observation, this characterization is hardly surprising given Neumann's general position that even the legal changes operated by the Nazi regime to facilitate both the construction of a racialized *Volkisch* state and the operation of monopoly capitalism ultimately fail his test of individualized rationality as the core aspect of any "legal" system properly so-called. At an important level, I believe, this serves to disqualify much of what Neumann has to say about Nazi law as potentially useful to any current or future research project at a foundational level. Surprisingly perhaps, his legal philosophical position on Nazi law appears to operate from strongly *a priori* assertions about the proper and objective content of the "law." Given his historically and sociologically more complex studies of the Nazi state, its economic structures, and indeed his examination of core concepts of property and contract in those studies, it seems quite out of place that his analysis of Nazi law in almost all its aspects should proceed from such presumptions that do not ultimately assist our understandings.

As Lustig points out, it might in fact be more useful to turn to the work of Fraenkel to more accurately situate corporate monopolistic cap-

italism and its organs in the context and setting of Nazi constitutional structures and within an understanding of the nature and role of Nazi law. In Fraenkel's view, it was possible to understand the Nazi regime as embodying a so-called "dual state."<sup>165</sup> The traditional constitutional apparatus, including the judicial function and the ordering of private and business arrangements, could be understood as existing under the appellation of "the administrative state," an apparatus that continued to operate, more or less, under the Nazi regime. On the other hand, significant functions of the state were carried out under the auspices of the "discretionary state," including orders from party officials, the police and forces of order, the SS and SD/*Gestapo*. That part of the state apparatus existed and functioned, but did so largely along lines similar to those identified by Neumann, as directory missive and the exercise of personal, ideological and political discretion. For Fraenkel, the Nazi regime existed in a state of flux and of co-existence between the two parts of the "dual state" with the prerogative state eventually and ultimately, in the case of conflict, emerging victorious. But the key aspect of Fraenkel's analysis is that he left much more room for the existence of an operative and operating legal system within large parts of the German state, including in relation to monopoly capitalist enterprises.

It does not really matter at this point whether one accepts or is more convinced by these visions of the Nazi state and the presence, or absence, of the "law" within Hitler's Germany. What is more interesting in considering the "criminal organizations" aspect of the IMT proceedings and the broader legal, political, and ideological contexts thereof, is that, whether directly or obliquely, one can find, reflected in the different judicial and legal positions adopted by different actors at Nuremberg, variations on the jurisprudential themes identified by Neumann and Fraenkel. These themes relate directly to the issues of law and government exposed in detail in the conflicting understandings of "collective" criminality articulated before the IMT.

However, as Priemel has pointed out, it is necessary to proceed with caution and with a full set of contextualized understandings on these questions. More is, and was, at stake before the IMT (or NMT)—for example, the conduct of the legal officials in charge of the decartelization program—than a simple and unquestioning acceptance of Neumann's idealization of the Nazi state as the *Behemoth* of monopolistic capitalism. Indeed, the conduct of the legal officials in charge of the decartelization program was also at stake:

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165. See generally FRAENKEL, *supra* note 151.

[T]he different groups and individuals involved frequently differed strongly in their assessments of National Socialism, their interpretations of German history, and their recommendations for Allied occupation policies. But there were also a great many points where debates touched upon one another, where different branches of learning—history, political science, sociology, jurisprudence—found that they dealt with the same issues and actually built on each other's findings. Nuremberg became the historical site where these discourses coalesced, making for a case of partial and temporary, yet effective, epistemic convergence.<sup>166</sup>

Of course, this epistemic convergence was not always efficacious, and discourses sometimes did not coalesce. The position of the prosecutors, the Tribunal, and the dissenting Soviet judge in the “criminal organizations” aspect of the IMT proceedings clearly evidence ongoing and persistent disagreements and different understandings of the nature of the Nazi state, the common plan and conspiracy in which the organizations may or may not have participated, and in the temporal frame for Nazi criminality in all its aspects. But what is important is that all of these actors applied, explicitly or by clear inference, a clear understanding of the nature and function of the Nazi state and its constituent organs, including the place (or absence) of law within these structures. Moreover, the law itself played a crucial role in the manifestation of these understandings. The more narrow and temporally limited understanding of the common plan or conspiracy proffered by the IMT decision was in large part at least a function not just of law in the sense of the evidence and proof presented to the Tribunal, but of the narrow and contingent dependent status of crimes against humanity. As the wording of the relevant legal tests changed under Control Council Law No. 10, the provisions of which controlled the NMT proceedings, those cases brought to the fore in more substantive ways understandings of the “criminality” of the Nazi state between 1933 and 1939 (as well as after), and of the nature of that state apparatus and its criminal acts against German citizens and nationals during that period. The constructions of the Nazi state and of Nazi law and their relationship with organized and organizational criminality shifted and changed throughout the Occupation and beyond, from the IMT to the NMT. These contingencies and elements of context perhaps render the tasks associated with examining broad questions about the Nazi state and corporate criminality more complex than we might have imagined, but they also make such inquiries more relevant than ever.

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166. Priemel, *supra* note 144, at 73–74.

## VIII. CONCLUSION

One of the ironies of attempting to situate the ideas of collective responsibility or the criminality of an organization at the heart of the IMT processes is that a fundamental goal of the Nuremberg trials was, in fact, to place the individual as the responsible actor in relation to international crimes. The idea that the “state” was the only legitimate “person” in international law was invoked in an attempt to shelter the defendants from personal liability. As Judge Francis Biddle explained, the IMT took a large step forward by fixing personal responsibility at the center of its processes:

There is moral value in fixing responsibility in a field of anonymous irresponsibility. A State, after all, like a corporation, is a fictitious body. . . . But authors of acts criminal under international law cannot shelter themselves behind their official positions. If the State moves outside of its competence under international law the authority to act cannot create immunity.<sup>167</sup>

Lustig complains that an opportunity was lost during the subsequent trials before the NMT because those trials sought to focus on individual criminal liability. This focus meant that the Tribunals did not give voice to an understanding of the place of corporate capitalism and the cartels that operated under the Nazi regime and were central to its aggression. According to Lustig:

Although Nuremberg is celebrated for putting individuals in the dock, holding them accountable for international crimes, it ended up equating the notion of the individual with political leadership. The individual responsibility as such was not seriously addressed. In the context of crimes against peace, it led the tribunals to allocate responsibility only to those they identified as part of the leadership circle; the political leadership, so to speak. With regard to atrocities committed in the camps, responsibility was allocated only to those with direct, physical link to the crimes.<sup>168</sup>

While it is true that “the State” was never in the dock before the IMT or the NMT, and one can make a strong argument that the criminal trials missed an opportunity to consider the overall constitution of the Hitler regime and its constituent parts in terms of organizational liability, it is also the case that the “criminal organizations” part of the IMT proceedings did result in quite specific declarations concerning the criminal nature of many of the most important elements of the Nazi re-

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167. Francis Biddle, *The Nurnberg Trial*, 33 VA. L. REV. 679, 688 (1947).

168. Lustig, *supra* note 149, at 1043–44.



gime. These declarations did then expand the attribution of liability under Control Council Law No. 10 proceedings for membership crimes. Lustig appears too easily to have forgotten this aspect of the NMT proceedings and to approach the NMT trials as if there was no other surrounding context in which they took place. The decartelization process, for all its failures, did seek to attack the idea of a strong form of corporate liability for the evils of the Nazi regime. There was more to the Occupation policy and legal practice than the IMT, and the NMT cases and any analysis of the idea of organizational or collective legal criminal responsibility must always seek to take the broader and wider contexts into account.

In addition, two further technical jurisprudential points need to be taken into account in any assessment of the Nuremberg trials. As Biddle himself points out in his account of the importance of the IMT in establishing the personal responsibility of individuals for international crimes, the individual responsibility of officials is triggered when “the State moves outside of its competence.”<sup>169</sup> It seems clear, as I have argued, that the IMT did in fact take a view on broader issues of the constitutional law and validity of the Nazi state in reaching its determinations on individual and on organizational criminal liability. “Crimes of aggression” in particular are committed by states against states. “War crimes” are committed, or were committed at the time of the IMT, during the processes of a “war” between two states. Thus, constitutional and international law theories of the nature and proper function of the “state” were at the heart of the IMT’s jurisprudence, albeit in ways that remained largely un-articulated or under-articulated.

Secondly, it is important to remember that the jurisdiction of the Military and other courts operating under Control Council Law No. 10 was specifically limited to the pursuit of membership crimes in relation to organizations subject to a declaration of criminality by the IMT. They had no power to declare other organizations to be criminal. They acted against individuals because their jurisdiction was limited to taking action against individuals. However, the definition of criminality under which the NMT operated did contain a small element of “collective” responsibility since Article II (2) stated that anyone was “deemed to have committed a crime” against peace if they “held high position in the financial, industrial, or economic life.”<sup>170</sup> Thus, while the prosecution necessarily targeted individuals, the substantive provisions defining the scope of individual criminality under international law as defined in

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169. Biddle, *supra* note 167, at 688.

170. Control Council Law No. 10, *supra* note 80, at art. II § 2.

Control Council Law No. 10. implicitly, if not expressly, embodied understandings of the nature of organized criminality by industrialists and others in relation to the Nazi state's pursuit of a policy of illegal aggression.

Lustig's conclusion also appears to have forgotten that the entire apparatus of the legal administration of Occupied Germany, and attempts by lawyers to establish criminal liability and dismantle state and "private" apparatuses that were at the core of Hitlerite criminality, need to be taken into account in a much more contextualized way in order to examine and test Priemel's arguments about a much broader narrative of Nazi criminality informing a variety of Occupation policies.<sup>171</sup> Moreover, it is obvious even from the words of key officials of Allied policy such as Robert Jackson, that in dealing with the issue of "criminal organizations" aspects of the IMT trial, more was at stake than punishment or criminal labeling.<sup>172</sup> The destruction of the organizational apparatuses of the Nazi state, and the prevention of them from taking hold again, formed not just part of the "legal" aspect of the criminal organizations' trial in the IMT proceedings, but the declarations of criminality against key groupings meant to inform the German people of the nature of those organizations and the dangers posed by their operating ideologies.

More broadly, the entire Occupation process was meant to demonstrate not only the basic criminality of the individuals put on trial before the IMT and NMT, or the broader guilt of organizations declared to be criminal by the IMT, but also to create a narrative of culpability or guilt among the German populace at levels beyond the limitations of penal liability. Most famously, German philosopher Karl Jaspers set out a taxonomy of guilt arising out of the actions of the Nazi state and the defeat of Germany. For Jaspers, Germans had to consider criminal guilt, political guilt, moral guilt, and metaphysical guilt.<sup>173</sup> Beyond the obvious criminal guilt, political guilt is attributed to citizens who consented to, and participated in, a state-based system that violated basic normatives of natural and international law.<sup>174</sup> Moral guilt falls on individuals for the moral and ethical consequences of all of their own actions.<sup>175</sup> Metaphysical guilt is attributable to all as members of humanity in

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171. See generally Priemel, *supra* note 144.

172. Jackson, *supra* note 64, at 385–86.

173. See generally KARL JASPERS, *THE QUESTION OF GERMAN GUILT* 25–40 (E.B. Ashton trans., Fordham Univ. Press, 2001).

174. *Id.* at 25.

175. *Id.* at 25–26.

which a wrong against one is a wrong against all.<sup>176</sup> In relation to Nuremberg:

This differentiation of four concepts of guilt clarifies the meaning of the charges. Political guilt, for example, does mean the liability of all citizens for the consequences of deeds done by their state, but not the criminal or moral guilt of every single citizen for crimes committed in the name of the state.<sup>177</sup>

Even today, there are serious questions as to whether Jaspers' taxonomical structures of guilt were able to transcend the apparently overarching sentiments among Germans that the IMT instantiated a combination of victors' justice and collective guilt.<sup>178</sup> However, what this taxonomy does allow us to consider is the broader set of narratives about "guilt" and the wider and sometimes extra-criminal mandate and political and ideological goals of the Allied Occupation regime in Germany. There were sometimes competing understandings of the nature of the constituent elements of the Nazi regime and ideas of collective or organizational responsibility that informed a number of Occupation policies and practices. The powers vested in the IMT to issue declarations of criminality against certain groups played an important part in those broader policies both juridically, in terms of subsequent membership in crime proceedings, and ideologically, as part of the broader ideological and political goals of destroying the Nazi infrastructure and its ideological underpinnings in postwar Germany.

None of this means, however, that the IMT process in relation to "criminal organizations" is beyond criticism. Biddle himself confessed that the Tribunal was troubled by the apparent innovative character and juridical novelty of the idea of "criminal organizations" and especially concerned by the connection between declarations of criminality and individual guilt under the membership crimes provisions of Control Council Law No 10. "Conviction of a corporation does not taint its stockholders with its guilt."<sup>179</sup> The Tribunal therefore went out of its way to limit, as we have seen, the temporal frame for organizational criminality, and sought to limit their potentially dangerous application in subsequent proceedings:

The organizations were defined in terms to include in their membership only persons who voluntarily became or remained members

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176. *Id.* at 26.

177. *Id.* at 26–27.

178. See generally BERNHARD SCHLINK, GUILT ABOUT THE PAST (House of Anansi Press, Inc. 2009).

179. Biddle, *supra* note 167, at 692.

with knowledge that the organizations were being used for the commission of acts declared criminal by the Charter. In net result therefore it will be necessary to establish individual guilt in subsequent proceedings. The declarations are thus deprived of all but psychological significance, and there is no shadow of precedent to encourage the practice of mass prosecution.<sup>180</sup>

Biddle's concern about the possibility of "mass prosecution" is perhaps well-placed in the context of the IMT's ongoing concern for its own legitimacy and that it be seen to project the values of judicial prudence and attention to rule of law ideals. As Telford Taylor highlighted in his report about the work of the NMT, "The outstanding fact about the war crimes 'problem' at the end of the Second World War is that, like many other postwar problems, it was far bigger and far more difficult of solution than anyone had anticipated."<sup>181</sup>

In such circumstances, "mass prosecution" may well have appeared as a desirable and efficient way of dealing with the mass nature of Nazi criminality. However, it is disingenuous to suggest that rule of law issues were the only concerns or bases for the IMT's "criminal organization" jurisprudence. Control Council Law No. 10 was clearly targeted in its substantive offences at individuals and not mass prosecution. Even membership crimes were defined in terms of individual membership in the organizations. The limitations in time, and on what we might call the *mens rea* element in relation to individual awareness of the organization's goals and practices, did more than eliminate the possibility: they also reinforced the Tribunal's overall jurisprudence and reflected the IMT's somewhat limited understanding of the structures and apparatuses of the Nazi state. In effect, by placing the September 1, 1939 limit on the declarations of organizational criminality, the IMT handcuffed the NMT's ability to convict under the membership crime provision of Control Council Law No. 10. Because the NMT was not bound by the dependent nature of the definition of crimes against humanity from the Nuremberg Charter, it was free to consider acts committed after the Nazi rise to power in 1933, acts committed against German nationals, without having to tie those crimes to a common plan or conspiracy that the IMT had determined had commenced only in 1937-1938.

But because of the limitations imposed by the narrow findings of

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180. *Id.* at 693.

181. TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 104 (U.S. Gov't Printing Office 1949).

the IMT in relation to the organizations, the NMT and other tribunals could not consider “membership crimes” before September 1, 1939. Thus, it could, and did, find that the criminal justice system, the police apparatus, the sterilization and euthanasia programs, as well as the reindustrialization and rearmament of Germany before 1937–1938 constituted international crimes. But they could not find the perpetrators of those crimes guilty of membership crimes before the IMT’s artificial date. This meant, and means, that while the NMT was able to create a different constitutional understanding of the Nazi state and its international criminality that was created by the IMT, it could not give full force and effect to that criminality and the apparatus and structures that enabled and aided and abetted it, because of the apparently artificial limits of the IMT jurisprudence.

Richard Arens echoed Taylor’s concerns about the scale and scope of war criminality facing Allied Occupation authorities at the end of the war, stating that “The world was presented with the spectacle of the unprecedented scale of direct and indirect participation in the commission of that crime on broad, popular levels.”<sup>182</sup> Arens argued that the need for group sanctions in this postwar context flowed not just from the extent of criminality, but from a cultural demand, based on a broad understanding of the nature of Nazi criminality, for the “punishment” of groups at the heart of the Hitler regime.<sup>183</sup> He concluded that such moral imperatives were quickly moved to one side by the growing demand, in the context of the Cold War in particular, but also, more widely with the practical need to end the prosecutions and reconstruct Germany.<sup>184</sup> To Arens,

Abandonment of such prosecution under Allied auspices as authorized by the Nuremberg Charter embodied a body-blow to democratic doctrine and practice within Germany and the outside world. The harmful results of this abandonment are all too apparent. The effectiveness of any machinery for prosecution of Nazi criminality rested inevitably upon the use of group sanctions judiciously administered. Rejection of group sanctions meant the collapse of the only effective machinery for prosecution possible under Allied Western auspices and concomitantly therewith, the resurgence of Nazism in Germany. The tragi-comedy of an attempted prosecution under German auspi-

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182. Richard Arens, *Nuremberg and Group Prosecution*, 1951 WASH. U. L. REV. 329, 330 (1951).

183. *Id.* at 334–39.

184. *Id.* at 353.

ces need not be dignified with a formal discussion.<sup>185</sup>

Thus, for Arens and for the prosecution forces, the failure to pursue declarations of criminality against other groups and to fully implement the understandings of the Nazi state and its apparatus that informed the entire prosecution of the so-called “criminal organizations” had profound significance beyond the absence of strict criminal sanctions. While Biddle recognized the effect of the declarations by the IMT at the psychological level, according to Arens, he did not understand the full absence of effect stemming from the IMT jurisprudence or the broader Allied legal strategy of abandoning group prosecutions.<sup>186</sup> Not only did this position mean that many war criminals escaped personal liability, but it also led to the ideological conclusion (and the psychological effect of this for the German public) excluding many organizations and groups from an understanding of the nature of the Nazi regime, its apparatuses and structures, and the constitutional character of the Hitler state.

I am not suggesting that we must necessarily accept the constitutional normativity of a “criminal state” advanced by the prosecution at the IMT, confirmed by the Soviet dissent, or concretized by the further prosecutions under Control Council Law No. 10.<sup>187</sup> However, this suggests that the different positions adopted throughout the IMT, NMT, and Allied Occupation of Germany more generally, has left us with confused understandings of the nature of the Nazi state and of the place of law and lawyers in the apparatus of that regime. Postwar studies agree generally that there was a “dictatorship” in Germany between 1933 and 1945, but they offer little by way of convincing argument or historical, political, ideological agreement over just what that broad category means. For some, the idea of a Nazi dictatorship fits more broadly into an analysis of totalitarianism in which similarities, and indeed identity, must be found between brown and red totalitarian regimes, between the Soviet Union under Stalin and Germany under Hitler.<sup>188</sup> Others seek more specific understandings of the Hitler state, but again without any contextualized or worthwhile theory or analysis of law, legality, or constitutionalism to help us understand the Nazi regime as a juridical phe-

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185. *Id.* at 356.

186. *See generally* Burchard, *supra* note 10.

187. Indeed, I specifically reject this account of the Nazi state and of Nazi legality. *See generally* LAW AFTER AUSCHWITZ, *supra* note 9.

188. *See generally* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM (Mariner Books 1948).

nomenon.<sup>189</sup>

Perhaps by taking the issues of Nazi law and Nazi constitutionalism seriously and by examining these ideas carefully and in the full narrative context of Occupation law and practice in relation to the questions arising from the notion of “criminal organizations” at the IMT, we might begin to develop a jurisprudence of the Nazi state. This is important in terms of our own understandings of the past and current implication of the Nazi state, generally, and a juridified Holocaust in particular in the legal lifeworld.<sup>190</sup> It is also important because we live in a world where some of the most vital and dangerous issues of international law and international relations revolve around so-called rogue states.

In describing the foundational and constitutive issues at the heart of this phenomenon, Jacques Derrida explores the understanding that flows from the use of the term “rogue,” (and its French “equivalent *“voyou”*”).

We do not know whether it should be, as a substantive, linked by a hyphen to the substantive state, thereby indicating that some state is substantially a *voyou* and thus would deserve to disappear as a non-constitutional state or state of nonlaw, or whether *voyou* is an attribute, the quality temporarily attributed out of some strategic motivation by certain states to some other state that, from some point of view or in some context, during a limited period of time, would be exhibiting *voyou* behavior, appearing not to respect the mandates of international law, the prevailing rules and the force of law of international deontology, such as the so-called legitimate and law-abiding states interpret them in accordance with their own interests.<sup>191</sup>

With very few modifications, Derrida could well be describing the conflicts that emerged in relation to the Nazi state, Nazi law, constitutional theory and “criminal organizations” at the IMT. The jurisprudential issues still confront us, and will continue to confront us in the absence of a fuller engagement with the historical, juridical, and philosophical legacy of the Nazi state after Nuremberg.

189. See generally SIR IAN KERSHAW, *THE NAZI DICTATORSHIP: PROBLEMS AND PERSPECTIVES OF INTERPRETATION* (Bloomsbury 4th ed. 2015); KARL D. BRACHER, *THE GERMAN DICTATORSHIP: THE ORIGINS, STRUCTURE AND CONSEQUENCES OF NATIONAL SOCIALISM* (Praeger Pub. 1970); MARTIN BROZAT, *THE HITLER STATE: THE FOUNDATION AND DEVELOPMENT OF THE THIRD REICH* (Addison Wesley 9th ed., John W. Hidden trans., Longeman Ltd. 1981); HAJO HOLBORN, *REPUBLIC TO REICH: THE MAKING OF THE NAZI REVOLUTION* (Vintage Books 1973).

190. See generally *THE HOLOCAUST, GENOCIDE AND THE LAW*, *supra* note 3.

191. JACQUES DERRIDA, *ROGUES: TWO ESSAYS ON REASON* 79–80 (Pascale-Anne Brault trans., Michael Naas trans., Stan. Univ. Press 2005).