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## **The Nuremberg Military Tribunals and the origins of International Criminal Law**

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## CHAPTER 1: From the IMT to the Zonal Trials

### INTRODUCTION

On 1 November 1943, Britain, the United States, and the Soviet Union published the “Declaration on German Atrocities in Occupied Europe” – the Moscow Declaration – in order to “give full warning” to the Nazis that, when the war ended, the Allies intended to “pursue them to the uttermost ends of the earth... in order that justice may be done.” The final paragraph of the Moscow Declaration provided that “[t]he above declaration is without prejudice to the case of the major criminals whose offences have no particular geographical location and who will be punished by a joint decision of the Governments of the Allies.” That reservation ultimately led the Allies to create the IMT and to authorize the United States to hold the NMT trials.<sup>1</sup>

Chapter 3 traces the evolution of the twelve NMT trials. This chapter focuses on the creation of the OCC, the organization responsible for overseeing those trials. Section 1 discusses the approval of JCS 1023/10, the directive issued by the Joint Chiefs of Staff in July 1945 that first authorized the U.S. military to conduct trials in the American zone of occupation. Section 2 addresses the Allied Control Council’s enactment of Control Council Law No. 10, the U.S. decision to create the NMTs, and Telford Taylor’s appointment as the head of the Subsequent Proceedings Division, the forerunner to the OCC. Section 3 examines the early logistical issues that limited the SPD ability to create a comprehensive prosecutorial program, the most important of which was the prospect of a second IMT trial.

#### I. JCS 1023/10

As Valerie Hebert has pointed out, U.S. war-crimes policy proceeded on two separate but oft-intersecting tracks in the wake of the Moscow Declaration. The first track, led by the War Department, involved planning for the IMT. The second track, led by the Joint Chiefs of Staff and culminating in JCS 1023/10 and Control Council Law No. 10, involved determining what to do with lower-ranking Nazi war criminals who would not be tried internationally.<sup>2</sup>

Initially, the first track overshadowed the second. The U.S. Army did not begin drafting the directive that would ultimately become JCS 1023/10 until August 1944, nine months after the Moscow Declaration was issued. The third version of that directive – JCS 1023/3 – was approved by the Joint Chiefs of Staff on 1 October 1944 and forwarded to the Combined Chiefs of Staff a few weeks later. The Combined Chiefs never acted on JCS 1023/3, however, because the U.S. government soon became preoccupied with the fate of the highest-ranking Nazi war criminals.<sup>3</sup>

Those contentious negotiations ultimately culminated in the Yalta Memorandum, sent to President Roosevelt on 22 January 1945, by the Attorney General and the

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<sup>1</sup> TAYLOR, FINAL REPORT, 7.

<sup>2</sup> VALERIE HEBERT, HITLER’S GENERALS ON TRIAL 25 (2010).

<sup>3</sup> TAYLOR, FINAL REPORT, 3.

Secretaries of War and State. The Yalta Memorandum recommended a dual war-crimes program in which the “prime” Nazi leaders would be tried before an international tribunal (as opposed to being summarily executed), while less important Nazis would be tried “in occupation courts; or in the national courts of the country concerned or in their own military courts; or, if desired, by international military courts.”<sup>4</sup>

The war-crimes program contemplated by JCS 1023/3 differed “in several important respects” from the recommendations of the Yalta Memorandum. The Joint Chiefs of Staff thus advised the Combined Chiefs of Staff in April 1945 not to approve the directive.<sup>5</sup> No further progress on the directive would be made for the next three months.

On 26 April 1945, President Truman – who had succeeded to the presidency two weeks earlier, following Roosevelt’s death – approved JCS 1067/6, the basic directive regarding military government in Germany. Paragraph 8 of the directive, entitled “Suspected War Criminals and Security Arrests,” authorized the apprehension and detention of a vast number of war criminals, from Adolf Hitler to all of the members of the Gestapo, the SD, and the SS. A week later, President Truman appointed Justice Jackson as Chief of Counsel for the Prosecution of Axis Criminality.<sup>6</sup>

Germany surrendered unconditionally to the Allies on May 8, and less than a month later Justice Jackson submitted an interim report to President Truman in which he sketched the general outlines of the U.S. war-crimes program.<sup>7</sup> The report began by noting that his authority as Chief of Counsel extended – pursuant to the Moscow Declaration – only to those “major criminals whose offenses have no particular geographical localization.” That limitation, according to Jackson, excluded offences against American military personnel, which would be tried by the U.S. military; “localized offenses or atrocities against persons or property,” which would be prosecuted by national authorities; and treason, which would also be prosecuted nationally.<sup>8</sup>

Jackson then turned to how he proposed to deal with the major war criminals, the most controversial section of his report.<sup>9</sup> According to Jackson, the IMT – which was still being negotiated by the Allies – should have jurisdiction over three categories of crimes: “atrocities and offences against persons or property constitution violations of... the laws, rules, and customs of land and naval warfare,” such as mistreating prisoners of war; “atrocities and offences, including atrocities and persecutions on racial or religious grounds, committed since 1933”; and “[i]nvasions of other countries and initiation of wars of aggression in violation of International Law or treaties.” Individuals would be criminally responsible if they were involved “in the formulation or execution of a criminal plan involving multiple crimes,” if they

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<sup>4</sup> Memo to President Roosevelt from the Secretaries of State and War and the Attorney General, 22 Jan. 1945, sec. VI.

<sup>5</sup> TAYLOR, FINAL REPORT, 3.

<sup>6</sup> Executive Order No. 9547, 2 May 1945.

<sup>7</sup> Report to the President by Mr. Justice Jackson, 6 June 1945 (“Jackson Interim Report”).

<sup>8</sup> *Id.*, sec. I.

<sup>9</sup> See TAYLOR, FINAL REPORT, 131 (Appendix B).

“incited, ordered, procured, or counselled the commission” of such crimes, or if they took what the Moscow Declaration had described as “a consenting part” therein. Head-of-state immunity would not be recognized, but the Tribunal would have the discretion to decide whether to recognize the defence of superior orders.<sup>10</sup>

Criminal liability, however, would not be limited to individuals. Jackson also intended to prove the “criminal character of several voluntary organizations which have played a cruel and controlling part in subjugating first the German people and then their neighbors,” such as the SS and the Gestapo. If the Tribunal deemed an organization criminal, members of that organization other than those tried by the IMT would then be prosecuted “before regular military tribunals” – an early indication of Jackson’s preference for zonal instead of international trials. The criminal nature of the convicted organization would be binding during such subsequent proceedings; the individual member would be limited to pleading “personal defenses or extenuating circumstances, such as that he joined under duress,” and would bear the burden of proof for those defenses and circumstances.<sup>11</sup>

Jackson’s interim report accelerated the war crimes program. On 19 June 1945, the Combined Chiefs of Staff lifted previous restrictions – imposed at the end of 1944 – that limited military trials to offences involving “the security or the successful carrying out of the military operations or occupation.”<sup>12</sup> According to the new regulations, theater commanders were empowered to try suspected war criminals other than those “who held high political, civil or military positions,” whose prosecution was to be deferred until the CCS decided whether they were to be tried by an international tribunal.<sup>13</sup> The Theater Judge Advocate in Germany quickly began to prepare the military tribunals that would prosecute the atrocities committed in various concentration camps later in 1945.<sup>14</sup>

Jackson’s report also encouraged the Joint Chiefs of Staff to renew work on JCS 1023, the general war-crimes directive, and on July 15 they approved a new draft, JCS 1023/10, entitled “Directive On the Identification and Apprehension of Persons Suspected of War Crimes or Other Offenses and Trial of Certain Offenders. JCS 1023/10 closely tracked Jackson’s report, instructing the commander-in-chief of the U.S. occupation forces, General Eisenhower, to detain all persons suspected of committing one of the crimes mentioned in the report: war crimes, crimes against peace, and crimes against humanity.<sup>15</sup> The directive then divided those suspects into two categories: “[p]ersons who have held high political, civil or military position in Germany or in one of its allies, co-belligerents, or satellites,” who were to be detained until the Control Council decided whether to try them before an international tribunal; and less-important suspects, who were to be either delivered to one of the United Nations for trial<sup>16</sup> or tried by the U.S. in “appropriate military courts.”<sup>17</sup> Finally, the

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<sup>10</sup> Jackson Interim Report, sec. III(5).

<sup>11</sup> *Id.*, sec. III(3).

<sup>12</sup> Quoted in TAYLOR, FINAL REPORT, 3 n. 15.

<sup>13</sup> *Id.* at 3.

<sup>14</sup> See, e.g., HEBERT, HITLER’S GENERALS, 26.

<sup>15</sup> JCS 1023/10, para. 5(a), reprinted in Taylor, Final Report, 245 (Appendix C).

<sup>16</sup> *Id.*, para. 6.

directive instructed General Eisenhower to “urge” the other occupying powers to adopt the same policies.<sup>18</sup>

## II. LAW NO. 10 AND THE SUBSEQUENT PROCEEDINGS DIVISION

In September 1945, General Eisenhower appointed Brigadier General Edward C. Betts, the Theater Judge Advocate, to oversee the “effective application” of JCS 1023/10.<sup>19</sup> Betts responded by instructing the head of the American Legal Division of the Allied Control Council, Charles H. Fahy – Roosevelt’s Solicitor General during the war – to draft a law that would permit the Allies to prosecute suspected war criminals in zonal trials.<sup>20</sup> Jackson strongly believed that zonal trials were a better option than subsequent quadripartite trials, particularly in light of the tensions that had already begun to emerge between the Americans and Soviets involved in IMT preparations. The London Charter was also set to expire in August 1946, making a law sanctioning the prosecution of major war criminals other than those prosecuted by the IMT a practical necessity.<sup>21</sup>

Fahy’s team proved more than equal to the task. On November 1, after weeks of intensive work, the Control Council’s Coordinating Committee approved a draft of Law No. 10.<sup>22</sup> A slightly revised version of Law No. 10 was then enacted by the Control Council itself on 20 December 1945.<sup>23</sup>

In the interim, Betts turned his attention to the massive logistical problems created by JCS 1023/10. The directive had resulted in the detention of nearly 100,000 Germans,<sup>24</sup> only a fraction of whom would be prosecuted by the IMT and in the concentration-camp trials. On October 19, Betts suggested to Justice Jackson that his organization, the Office, Chief of Counsel for the Prosecution of Axis Criminality (OCCPAC), take responsibility for organizing the post-IMT trials that would be held in the American zone. He also expressed his hope that Justice Jackson would continue as Chief of Counsel, although he acknowledged the possibility that Jackson would appoint one of his subordinates at OCCPAC instead.<sup>25</sup>

As Betts suspected, Jackson had no intention of remaining in Nuremberg after the IMT concluded. He wanted to return to Washington as soon as possible to resume his position on the Supreme Court, and he admitted that the prospect of dealing with the nearly 100,000 Germans in U.S. custody “frightened” him.<sup>26</sup> Nevertheless, because Jackson recognized that it “would discredit the whole effort” if the U.S. did not prosecute the other war criminals in U.S. custody, he encouraged Betts to pursue zonal trials and promised to help plan them while he was still in Nuremberg. He

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<sup>17</sup> *Id.*, para. 7.

<sup>18</sup> *Id.*, para. 1.

<sup>19</sup> TAYLOR, FINAL REPORT, 5.

<sup>20</sup> *Id.* at 6.

<sup>21</sup> Memo from Jackson to OCCPAC, 7 Feb. 1946, TTP-20-1-3-34.

<sup>22</sup> TAYLOR, FINAL REPORT, 6.

<sup>23</sup> *Id.*

<sup>24</sup> EARL, 26.

<sup>25</sup> Letter from Betts to Jackson, 19 Oct. 1945, cited in HEBERT, HITLER’S GENERALS, 231.

<sup>26</sup> Draft of letter from Jackson to Betts, 24 Oct. 1945, cited in *id.*

warned the General, however, that OCCPAC would need considerable staff and funding if it was to fulfill JCE 1023/10's mandate.<sup>27</sup>

Over the next six weeks, as the IMT trial got underway, Betts continued to discuss the logistics of implementing JCS 1023/10 with a number of U.S. officials, including Jackson and Telford Taylor. All agreed that, given the large number of potential defendants, preparations for zonal trials could not wait until the IMT trial was concluded.<sup>28</sup> Finally, on December 3, Betts' group issued the following written recommendations:

(a) The Theater Judge Advocate would continue to be responsible for the trial of cases involving war crimes against United States nationals and atrocities committed in concentration camps overrun by United States troops;

(b) Mr. Justice Jackson's Nuernberg organization, the Office, Chief of Counsel for the Prosecution of Axis Criminality, would constitute the "parent organization" in preparing for trials under Law No. 10;

(c) Mr. Justice Jackson would proceed to appoint a Deputy Chief of Counsel to "organize and plan" for such trials.<sup>29</sup>

While President Truman considered the recommendations – he ultimately approved them on 16 January 1946<sup>30</sup> – Betts, Fahy, and Jackson focused on finding Jackson's successor. They first approached Frank Shea, an IMT prosecutor who was overseeing the economic aspects of the case – slave labor, plunder, preparations for aggressive war – to see if he would be interested. After some initial reluctance, Shea said he would accept the position if he received a presidential appointment, passage to Nuremberg for his wife, and guaranteed support from the Army. He quickly backtracked, however, when Jackson told him that taking over the subsequent proceedings would likely limit his ability to participate in the IMT trial.<sup>31</sup> Shea then suggested to Betts and Fahy that they should approach General William "Wild Bill" Donovan – the legendary head of the OSS, who was also serving as one of Jackson's deputies – instead.<sup>32</sup>

When contacted by Betts on October 22, General Donovan said that he would succeed Jackson as long as "it [was] cleared up and down the line."<sup>33</sup> Nevertheless, after talking to General Clay, the head of the Office of Military Government, United States (OMGUS), Fahy told Shea that Clay would "much prefer" him to Donovan. Fahy also told Shea that he would make a concerted effort to meet all of his conditions for accepting the position. Fahy's entreaties went nowhere, however, because Jackson reiterated on October 25 that his successor would be unable to "carry any substantial

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<sup>27</sup> Id.

<sup>28</sup> EARL, 30.

<sup>29</sup> TAYLOR, FINAL REPORT, 10.

<sup>30</sup> Executive Order 9679, 16 Jan. 1946, reprinted in id. at 267 (Appendix G).

<sup>31</sup> TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG WAR TRIALS: A PERSONAL MEMOIR 273 (1992).

<sup>32</sup> Id.

<sup>33</sup> Id.

part of the actual labor of the major trial.”<sup>34</sup> Indeed, that same day, Jackson reorganized the IMT staff in a way that antagonized Shea, leading him to leave Nuremberg for good less than two weeks later. That left Donovan, but his relationship with Jackson was also deteriorating, and he followed Shea back to the States not long thereafter.<sup>35</sup>

In his post-war account of the Nuremberg trial, Telford Taylor speculates that Jackson’s interest in Shea and Donovan was little more than a pretext to remove them from the IMT staff. As Taylor notes, Jackson and Donovan had already fought over the indictment at the first trial, and Jackson was aware that other prosecutors on his staff, particularly John Amen and Robert Storey, were very critical of Shea’s “economic case.”<sup>36</sup> Indeed, Amen had said that OCCPAC’s job was to convict war criminals, not “reform European economies,” and Storey believed that the economic case would “make us all look silly.”<sup>37</sup>

Whatever the explanation, Fahy then turned to Taylor, a 37-year-old Colonel who had been serving as one of Jackson’s senior deputies in OCCPAC. Taylor had spent much of the war at Bletchley Park, where he had served as a liaison between American and British officials and had been responsible for securely distributing decoded German war plans – Magic and Ultra – to American field commanders. Because Taylor’s experience in military intelligence was unique among Jackson’s IMT staff, he had been assigned to prosecute the General Staff and High Command of the German Armed Forces (OKW) as a criminal organization.<sup>38</sup>

Taylor was interested in the position, but made it clear to Fahy that he did not want to give up his role in the IMT trial, which was about to begin.<sup>39</sup> Fahy did not object, and neither did Jackson – further evidence that Jackson’s uncompromising position with Shea was a pretext for getting rid of him. Taylor then conditionally accepted, insisting that his appointment not be publicly announced until a number of logistical issues – two personal, two logistical – had been resolved.<sup>40</sup>

The personal issues were minor obstacles. To begin with, Taylor insisted that his wife be allowed to join him in Nuremberg. Jackson had always taken the position that service in OCCPAC was a temporary assignment that did not justify the presence of wives; indeed, he had rejected a number of requests from his staff similar to Taylor’s.<sup>41</sup> Taylor remained firm, however, recognizing that overseeing the zonal trials might require him to remain in Nuremberg for a number of years.<sup>42</sup> Finally, after OMGUS changed its regulations to permit civilians and soldiers stationed in Germany to be accompanied by their wives, Taylor got his wish.<sup>43</sup>

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<sup>34</sup> *Id.* at 274.

<sup>35</sup> *Id.*

<sup>36</sup> MARK TURLEY, FROM NUREMBERG TO NINEVEH 103 (2008).

<sup>37</sup> *Id.*

<sup>38</sup> Jonathan A. Bush, *Soldiers Find Wars*, 679.

<sup>39</sup> TAYLOR, ANATOMY, 274.

<sup>40</sup> *Id.*

<sup>41</sup> Memo from Jackson to Peterson, 14 Mar. 1946, TTP-20-1-3-34, at 1-2.

<sup>42</sup> TAYLOR, ANATOMY, 290.

<sup>43</sup> *Id.* at 291.

Taylor also believed that it would be inappropriate for a mere Colonel to prosecute German generals or represent the U.S. in international negotiations over the war-crimes program. He thus wrote to Jackson in early 1946 that “[i]f it is decided that I should undertake the assignment, I feel that I should be given the rank which the appointment needs. This should be done not in my interest, but in the interest of the assignment and so that the United States may be more effectively represented in international negotiations on war crimes matters.”<sup>44</sup> Jackson was more favorably disposed to this request and Taylor was quickly promoted to Brigadier General.<sup>45</sup>

The logistical issues were far more serious. The first stemmed from Article 2 of Law No. 10, which gave the zonal trials jurisdiction over the crime of “[m]embership in categories of a criminal group or organization declared criminal by the International Military Tribunal.” Depending on how the organizational charges fared at the IMT, Article 2 meant that more than 100,000 Germans could potentially be subject to prosecution.<sup>46</sup> That number “could not possibly be dealt with... without hundreds of courts and years of hearings,”<sup>47</sup> even if the judges at the IMT accepted Jackson’s position that members of organizations deemed criminal would bear the burden of proving “personal defenses or extenuating circumstances, such as that he joined under duress.” Worse still, by the time Law No. 10 had been approved by the Control Council, it had become clear that the IMT judges were likely to further restrict criminal responsibility for criminal membership,<sup>48</sup> which would make individual trials even more complicated and time-consuming.<sup>49</sup>

Taylor considered the criminal-membership issue so serious that he considered refusing to assume responsibility for the zonal trials. Fortunately, in mid-January 1946, Fahy sent him a copy of a Draft Report produced by the Denazification Policy Board, which had been established by the U.S. in November 1945 with Fahy as its chair. The Draft Report was based on the assumption that the zonal trials would “not be able to prosecute more than a few hundred, or at the outside, a few thousand major and sub-major war criminals.” It thus recommended “that the vast majority of the so-called ‘organization cases’... be handled under the denazification program rather than separately.”<sup>50</sup>

Taylor was more than satisfied with this division of labor, which he believed would “bring the task of the Office of Chief of Counsel, after the present proceedings, into manageable proportions.” Indeed, with the criminal-membership issue solved, he was able to send Jackson a memo on 30 January 1946 that offered his “best guess at the shape of things to come” for the U.S. war-crimes program:

- (a) One more international trial, at which the list of defendants will include a heavy concentration of industrialists and financiers.

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<sup>44</sup> Memo from Taylor to Jackson and Fahy, 6 Feb. 1946, TTP-20-1-3-34, at 2.

<sup>45</sup> TAYLOR, ANATOMY, 292.

<sup>46</sup> Id. at 273.

<sup>47</sup> Id. at 278.

<sup>48</sup> Id. at 277-78.

<sup>49</sup> Id. at 278.

<sup>50</sup> Id. at 279. On March 5, 1946, the Draft was published by the Länderrat as the “Law for Liberation from National Socialism and Militarism.”



(b) Several or a series of trials of other major criminals to be tried in American courts in the American zone. The defendants in these trials will consist of those major war criminals not included in the international trials, and who can not appropriately be tried in the courts of the occupied countries or by one of the other allied powers.

(c) A continuation of the trials of local criminals being conducted by the American theatre Judge Advocate.

(d) Trials of other major war criminals in the courts of the occupied countries or by one of the other allied powers.

(e) Treatment of the general run of organizational cases under the denazification program.<sup>51</sup>

The second logistical issue was the lack of qualified lawyers who were interested in remaining in Nuremberg for the zonal trials, which at this early stage Taylor anticipated would involve “in the neighborhood” of 100 defendants.<sup>52</sup> According to Taylor, no more than six to eight members of the IMT staff were willing to work on the zonal trials, none of whom he felt comfortable leaving in charge of the SPD while he returned to the U.S. to recruit new staff.<sup>53</sup> Taylor thus recommended to Jackson in the January 30 memo that “the United States enter into no commitments whatsoever for any further trials of war criminals until we can ascertain that staff will be available to handle same.”<sup>54</sup> He also reiterated his request that he not be announced as Jackson’s successor until the staffing problem had been addressed.<sup>55</sup>

On February 7, Taylor left Nuremberg for Washington. Jackson had given him a letter for Robert Patterson, the Secretary of War, in which Jackson sought Patterson’s assurance that the War Department would facilitate recruiting and guarantee adequate funds for the zonal trials.<sup>56</sup> Taylor presented the letter to Patterson, who introduced Taylor to the head of the War Department’s Civil Affairs Division, Major General John K. Hildring. Hildring, in turn, referred Taylor to his subordinate in charge of war crimes, Colonel Mickey Marcus.<sup>57</sup>

Although Taylor’s friends in New York had begun recruiting for him even before he arrived in D.C., Marcus’ efforts proved the most fruitful. By the end of March, Taylor had been able to recruit 35 attorneys<sup>58</sup> and dozens of administrators, court reporters, translators, stenographers, and typists.<sup>59</sup> The first recruits, a group of 27

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<sup>51</sup> Memo from Taylor to Jackson, 30 Jan. 1946, NA-260-183a1-2-13, at 1.

<sup>52</sup> Memo from Taylor to Jackson, 5 Feb. 1946, TTP-20-1-3-34, at 2.

<sup>53</sup> Memo from Taylor to Jackson, 30 Jan. 1946, at 2-3.

<sup>54</sup> *Id.*

<sup>55</sup> TAYLOR, ANATOMY, 287.

<sup>56</sup> Letter from Jackson to Patterson, 7 Feb. 1946, TTP-20-1-1-34, at 1.

<sup>57</sup> TAYLOR, ANATOMY, 289.

<sup>58</sup> TAYLOR, FINAL REPORT, 11.

<sup>59</sup> TAYLOR, ANATOMY, 291.

attorneys, arrived in Nuremberg the second week of May,<sup>60</sup> and the others soon followed.<sup>61</sup>

In the interim, on 29 March 1946 – after the bulk of the recruiting had been completed – Jackson publicly announced that he was naming Taylor his Deputy Chief of Counsel and placing him in charge of the Subsequent Proceedings Division, which had been formally created in January after President Truman approved Betts’ recommendations.<sup>62</sup> The SPD would remain part of OCCPAC until Jackson resigned and Taylor became Chief of Counsel for War Crimes. At that point, the SPD would be placed under the auspices of OMGUS.<sup>63</sup>

### III. THE PROSPECT OF A SECOND INTERNATIONAL TRIAL

Taylor returned to Nuremberg on April 26 and assumed control of the SPD.<sup>64</sup> He and his staff were immediately faced with what Taylor called a “rather special problem,” one anticipated in his January 30 memo to Jackson: the prospect of a second IMT trial. The uncertainty surrounding that issue made it almost impossible for the SPD to plan the zonal trials, because the IMT judgment “was certain to be an extremely weighty precedent... [that] would determine or comment upon numerous basic legal questions which would also arise before the Law No. 10 tribunals.”<sup>65</sup>

Taylor was deeply involved in the negotiations over a second IMT at the time, and the Allies did not conclusively abandon the idea until November 1946. As a result, for the first six months of its existence, the SPD “occupied a very inconspicuous place in the scheme of things at Nuernberg.”<sup>66</sup>

The question of a second IMT, however, arose long before the SPD was created. The London Charter clearly contemplated the possibility of multiple IMT trials: Article 22 provided that “[t]he first trial shall be held at Nuremberg, and any subsequent trials shall be held at such places as the Tribunal may decide”; Article 23 permitted “[o]ne or more of the Chief Prosecutors” to “take part in the prosecution at each Trial”; and Article 30 referred to the obligation of the signatories to meet “[t]he expenses of the Tribunal and of the Trials.” That possibility became much less abstract two weeks before the IMT trial, when Gustav Krupp’s counsel filed a motion with the Tribunal requesting that the proceedings against him be deferred on the ground that he was too mentally and physically unsound to be tried – a request that was supported by the Tribunal’s own medical commission.<sup>67</sup> Krupp was the only German industrialist indicted by the IMT prosecutors, even though all of the Allies had agreed that it was important to include private economic actors in the trial.<sup>68</sup> If Krupp’s case was severed, it would mean that no representative of German industry would stand trial at the IMT.

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<sup>60</sup> Letter from Taylor to Peterson, 22 May 1946, NA-153-1018-8-84-1, at 4.

<sup>61</sup> TAYLOR, FINAL REPORT, 14.

<sup>62</sup> See OCC General Memo No. 15, 29 Mar. 1946, TTP-20-1-3-34.

<sup>63</sup> *Id.*

<sup>64</sup> TAYLOR, ANATOMY, 292.

<sup>65</sup> TAYLOR, FINAL REPORT, 21.

<sup>66</sup> *Id.*

<sup>67</sup> TAYLOR, ANATOMY, 153.

<sup>68</sup> *Id.* at 90.

With the exception of the Soviets, all of the Allies filed briefs opposing Krupp's severance motion. Jackson's brief reaffirmed the U.S. government's view that "the great industrialists of Germany were guilty of the crimes charged in this Indictment quite as much as its politicians, diplomats, and soldiers" and argued that if Gustav Krupp was not fit for trial, he should be tried *in absentia*, which was permitted by the London Charter.<sup>69</sup> The brief also suggested that, in the alternative, the Tribunal should replace Gustav with his son, Alfried Krupp von Bohlen.<sup>70</sup> The Americans had always favored prosecuting Alfried instead of Gustav, because the younger Krupp had played a critical role in the company as early as 1941 and had assumed formal control of the company – blessed by Hitler himself in the *Lex Krupp* – in November 1943. Unfortunately, because of a mix-up between the prosecutors, the Americans did not realize until it was too late that the other Allies favored prosecuting Gustav instead.<sup>71</sup>

The British also favored trying Gustav *in absentia*, insisted that his critical role in the Nazi conspiracy to wage aggressive war justified trying him even if was not able to understand the charges against him. The motion was silent, however, concerning the possibility of replacing Gustav with his son Alfried.<sup>72</sup>

The French position echoed Jackson's, arguing that the Tribunal should either try Gustav *in absentia* or replace him – now its preferred choice – with Alfried. The motion also foreshadowed the debates to come by justifying its opposition to eliminating the Krupp concern from the trial on the ground that "the other prosecutors do not contemplate the possibility of preparing at this time a second trial directed against the big German industrialists."<sup>73</sup>

The Allies' arguments fell on deaf ears. On November 15, the Tribunal granted Gustav Krupp's motion "in accordance with justice" and severed him from the trial. The following day it also denied the Allies' motion – which by then had been joined by the Soviets – to substitute Alfried for Gustav.<sup>74</sup> The Tribunal did not, however, completely rule out the possibility that Gustav would eventually stand trial. On the contrary, it ordered "that the charges in the indictment against Gustav Krupp von Bohlen shall be retained upon the docket of the Tribunal for trial hereafter, if the physical and mental condition of the defendant should permit" – a clear reference to the possibility of a second trial. That order led Jackson to immediately file a memorandum reminding the Tribunal and the other Allies that "the United States has not been, and is not by this order, committed to participate in any subsequent Four Power trial. It reserves freedom to determine that question after the capacity to handle one trial under difficult conditions has been tested."<sup>75</sup>

Jackson's reluctance to endorse a second IMT trial was not surprising, because he had already concluded that zonal trials might be preferable to holding even the *first* IMT trial. On July 23, frustrated by the slow pace of preparations for the trial, he had

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<sup>69</sup> London Charter, art. 12.

<sup>70</sup> TAYLOR, ANATOMY, 154.

<sup>71</sup> *Id.* at 92.

<sup>72</sup> *Id.* at 154.

<sup>73</sup> *Id.* at 155.

<sup>74</sup> *Id.* at 158.

<sup>75</sup> Quoted in TAYLOR, FINAL REPORT, 23.

informed the other Allies that “the United States might well withdraw from this matter and turn our prisoners over to the European powers to try, or else agree on separate trials, or something of that sort.”<sup>76</sup> He had offered similar sentiments the following week during a phone conversation with Samuel Rosenman, who had been Special Counsel to President Roosevelt and was now a legal advisor to President Truman; according to Rosenman, Jackson told him that, unless the Soviets were willing to defer to the U.S. in terms of the definitions of crimes and certain other matters, he would “take the course of having each nation try the criminals in its respective jurisdiction.”<sup>77</sup> Those concerns applied even more strongly to the prospect of a second IMT trial, particularly as Jackson was convinced that the Soviets would insist that such a trial be held in their zone of occupation with a Soviet presiding judge.<sup>78</sup>

The French and British response to Krupp’s severance, however, made it much more likely that the Allies would hold a second IMT trial despite Jackson’s reluctance. France was particularly aggrieved by the decision, not only because many French nationals had been forced to work in Krupp factories during the war,<sup>79</sup> but also because it hoped that an international conviction of an industrialist would facilitate domestic prosecutions of French industrialists who had collaborated with the Nazis.<sup>80</sup> The British were not as enthusiastic about a second trial involving industrialists, but agreed to support a second trial because of French lobbying and its own embarrassing refusal to support replacing Gustav Krupp with Alfried.<sup>81</sup> France and Britain thus published a joint declaration on November 20 – the day the IMT trial began – indicating that their delegations were “now engaged in the examination of the cases of other leading German industrialists... with a view to their attachment with Alfried Krupp, in an indictment to be presented at a subsequent trial.”<sup>82</sup>

Formal discussions among the prosecutors about the possibility of a second IMT trial resumed the following April. In the interim, though, the French and British found a new ally: Telford Taylor. Taylor shared Jackson’s concerns about the Soviets regarding the location of the second trial and the nationality of the presiding judge, and he was generally skeptical of quadripartite trials because he disliked “continental and Soviet law principles unfamiliar to the American public.”<sup>83</sup> Nevertheless, he believed that a second trial focused primarily, if not exclusively, on a small number of private economic actors would be both cheaper and more legally straightforward than

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<sup>76</sup> Telford Taylor, *The Nuremberg Trials*, in *PERSPECTIVES ON THE NUREMBERG TRIAL* 372, 384 (Guénaël Mettraux, ed., 2008).

<sup>77</sup> TAYLOR, *ANATOMY*, 72.

<sup>78</sup> EARL, 33.

<sup>79</sup> TAYLOR, *FINAL REPORT*, 23.

<sup>80</sup> DONALD BLOXHAM, *GENOCIDE ON TRIAL* 24 (2001).

<sup>81</sup> *Id.* at 24-25.

<sup>82</sup> TAYLOR, *FINAL REPORT*, 23.

<sup>83</sup> Quoted in Paul Weindling, *From International to Zonal Trials: The Origins of the Nuremberg Medical Trial*, 14 *Holocaust & Genocide Studies* 367, 369 (2000).

the first trial.<sup>84</sup> He also thought it was an open question whether industrialists “could be as broadly charged or as effectively tried” in zonal trials.<sup>85</sup>

Sir Hartley Shawcross, the British Attorney-General, brought the issue of the second IMT trial up at the 4 April 1946 meeting of the Committee of Chief Prosecutors. He was ambivalent, but noted that “preparations must be started now” if a second trial was to be held. General Rudenko said that the Soviets were interested in holding a second trial, but wanted to defer a final decision until after the first trial concluded. M. Champetier de Ribes, the French prosecutor, reiterated his government’s desire to hold a second trial. Jackson insisted that the U.S. would not commit itself to a second trial until he knew the results of the first one. Instead of reaching a final decision, therefore, the Committee decided to appoint a small working group to begin identifying potential economic defendants for a second IMT.<sup>86</sup>

Jackson reported the results of the meeting to Patterson at the War Department four days later, taking the position that although he was still opposed to a second trial, he believe that the SPD should prepare for the possibility that one would nevertheless be held.<sup>87</sup> Patterson responded on April 24, approving Jackson’s recommendation but agreeing with him that a second trial would be “highly undesirable.”<sup>88</sup> Patterson and Jackson’s opposition, however, was not indicative of the U.S. government as a whole. In particular, Rosenman continued to believe that a second trial was necessary – and that failing to cooperate with the other Allies would undermine the U.S.’s credibility with the international community.<sup>89</sup>

When Taylor returned to Nuremberg at the end of April, Jackson appointed him his representative on the working group established by the Committee of Chief Prosecutors.<sup>90</sup> Nevertheless, Jackson continued to make his opposition to a second IMT trial known. On May 13, he sent a long memorandum to President Truman summarizing his reasons for preferring zonal trials. Some were logistical, such as the inevitable length and expense of a quadripartite trial.<sup>91</sup> But Jackson also had substantive reasons for opposing a second trial. To begin with, he believed that one of the primary goals of the war-crimes program – establishing “the responsibility of Germany for starting the war, and... proving high planning of atrocities and war crimes” – had already been accomplished through the use of captured documents at the first trial. A second trial would thus add little to the historical record “except subsidiary detail.”<sup>92</sup>

Jackson also believed that the case against industrialists and financiers prosecuted at a subsequent IMT trial would be no stronger than the case against Schacht, which he

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<sup>84</sup> Memo from Taylor to Jackson, 30 Jan. 1946, TTP-20-1-3-34, at 1.

<sup>85</sup> Memo from Taylor to Cohen, 18 Jun. 1946, reprinted in TAYLOR, FINAL REPORT, 281 (Appendix F).

<sup>86</sup> TAYLOR, FINAL REPORT, 24.

<sup>87</sup> Id.

<sup>88</sup> Id.

<sup>89</sup> Letter from Rosenman to Truman, 27 May 1946, cited in HEBERT, HITLER’S GENERALS, 234.

<sup>90</sup> TAYLOR, FINAL REPORT, 24.

<sup>91</sup> Jackson to Truman, 13 May 1946, 3-4.

<sup>92</sup> Id. at 5.

considered to be “one of the weakest in the present trial.”<sup>93</sup> A second trial would thus likely end in disaster – and “with an American presiding officer, with nearly all the evidence ours, with most of the prisoners ours, and with the lead in the prosecution ours,” the blame would almost certainly fall on the U.S.<sup>94</sup>

Finally, and most notably, Jackson had undergone a complete *volte-face* concerning the very desirability of prosecuting industrialists and financiers. In his report to President Truman in June 1945, he had emphasized the need to prosecute individuals “in the financial, industrial, and economic life of Germany who... are provable to be common criminals.”<sup>95</sup> Now, despite acknowledging the absence of such individuals from the first trial, he was convinced that prosecuting industrialists and financiers would be counterproductive to the coming struggle against the Soviets, whom he believed were committed to overthrowing the capitalist system<sup>96</sup>:

I also have some misgivings as to whether a long public attack concentrated on private industry would not tend to discourage industrial cooperation with our Government in maintaining its defenses in the future while not at all weakening the Soviet position, since they do not rely upon private enterprise.<sup>97</sup>

Despite Jackson’s objections, the representatives of the Committee of Chief Prosecutors met three times between May 15 and July 2 to select potential defendants for a second IMT trial. All of the representatives agreed that a second trial should not involve more than eight defendants and that Alfried Krupp should be one of the eight. They then settled on four more industrialists and financiers: Kurt von Schroeder, a German banker who had raised a significant amount of money for the Nazis as a member of Himmler’s notorious Circle of Friends, proposed by the British; Hermann Roehling, the coal and steel magnate who had played a significant role in Germany’s rearmament, proposed by the French; and Hermann Schmitz and Georg von Schnitzler, two high-ranking officials in the I.G. Farben chemical combine, whose use of slave labor and involvement in German rearmament was being documented by Taylor’s SPD.<sup>98</sup> The representatives also addressed the location of a second trial, with the British and French favoring Nuremberg for continuity reasons, the Soviets unsurprisingly preferring Berlin, and Taylor reserving judgment until a later date.<sup>99</sup>

On July 25, a few weeks after the group disbanded to report back to their respective Chief Prosecutors, Attorney-General Shawcross wrote a letter to Jackson suggesting that they “make as early a declaration as possible that we are prepared to participate in a second trial involving the five defendants whose names have been agreed.” He

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<sup>93</sup> Id. at 2.

<sup>94</sup> Id. at 5.

<sup>95</sup> TAYLOR, ANATOMY, 91.

<sup>96</sup> TOM BOWER, BLIND EYE TO MURDER 343 (1981).

<sup>97</sup> Memorandum for the President on American Participation in Further International Trials of Nazi War Criminals, 13 May 1946, NA-549-2236-1, at 3.

<sup>98</sup> TAYLOR, FINAL REPORT, 25. The Russians did not offer any names, but reserved the right to do so at a later date. According to Taylor, they never did. Id.

<sup>99</sup> Earl, 36.

also indicated that he “felt little doubt the British government will adopt this view.”<sup>100</sup> Sir Hartley not only underestimated Jackson’s aversion to a second trial, he also overestimated his government’s support for one. Unbeknownst to him, Ernest Bevin, the Foreign Secretary, and Orme Sargent, the Permanent Under-Secretary in the Foreign Office, had already decided to ask James Byrnes, the U.S. Secretary of State, to enter into an agreement with the Foreign Office to oppose a second trial.<sup>101</sup> Sargent was particularly opposed to prosecuting industrialists, suggesting that a second trial would devolve into a “wrangle between the capitalist and communist ideologies” and that “[t]he Russians might exploit the proceedings to discuss irrelevancies such as... our attitude to German rearmament.”<sup>102</sup> Byrnes readily agreed to the deal, in large part because the American business community was strongly opposed to prosecuting industrialists.<sup>103</sup>

Shawcross was never told about the deal between the Secretary of State and the Foreign Office, and he did not learn that the Foreign Office was opposed to a second trial until July 31. By that time, Taylor had submitted a long memorandum to the Secretary of War, Patterson, expressing his support for a second IMT trial.<sup>104</sup> A number of considerations, Taylor believed, militated in favor of deferring to the other Allies’ wishes. To begin with, Taylor pointed out that, in light of Article 14 of the London Charter – which gave any two Chief Prosecutors the right “to settle the final designation of major war criminals to be tried by the Tribunal” – the U.S. could only refuse to participate in a second IMT trial by giving notice of its intent to terminate the Charter. “In that event, the entire responsibility for terminating the international machinery [would] fall on the United States,” causing significant harm to the U.S.’s international reputation.<sup>105</sup>

Taylor also believed that any U.S.-initiated effort to terminate the London Charter would “be most unfortunate from the standpoint of general international jurisprudence.” The future importance of the legal principles embodied in the Charter would be determined by the willingness of the international community to adhere to them, and terminating the Charter before its time would simply undermine “the prospects for [their] universal acceptance.”<sup>106</sup>

Finally, Taylor feared that terminating the London Charter would undermine the legal basis of the zonal trials that his office was currently preparing:

It is probable, though not absolutely clear, that a termination of the London Agreement is a complete termination for all purposes, so that Articles 10 and 11, relating to zonal trials of members of organizations, would be terminated. Furthermore, the Article (6) which specifies the three categories of crimes, would probably

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<sup>100</sup> Letter from Shawcross to Jackson, 25 July 1946, NA-153-1018-8-1-54-2, at 1.

<sup>101</sup> BOWER, 345.

<sup>102</sup> BLOXHAM, 30.

<sup>103</sup> BOWER, 346.

<sup>104</sup> Memorandum for the Secretary of War, 29 July 1946, para. 5, reprinted in TAYLOR, FINAL REPORT, 272 (Appendix J).

<sup>105</sup> Id., Memorandum, para. 7.

<sup>106</sup> Id., Memorandum, para. 9.

likewise disappear. Although I have not fully examined the question, I believe that those consequences would be harmful to our zonal trials under Control Council Law No. 10.<sup>107</sup>

The memo concluded by addressing the logistical issues raised by a second IMT trial. The number of defendants would not exceed eight, with the U.S. assuming responsibility for the case against Alfried Krupp and the Farben defendants, Schmitz and von Schnitzler.<sup>108</sup> The charges would involve not only traditional war crimes, but also crimes against peace, because the defendants had “joined with German leaders in other walks of life in assisting Hitler’s rise to power, waging aggressive war.”<sup>109</sup> The trial would last no more than three months and “would run simultaneously with our ‘zonal’ trials in which SS leaders, militarists, government officials, and other diverse types will be defendants.”<sup>110</sup>

Jackson was so disturbed by Taylor’s endorsement of a second IMT that he returned to the U.S. at the end of the July to discuss the issue in person with Byrne and Patterson.<sup>111</sup> Both agreed with him that another trial was undesirable – but they took no official position, mindful of Rosenman’s belief that it would be better to acquiesce to the other Allies than risk being seen as backtracking on the U.S.’s commitment to prosecuting Nazi war criminals. Jackson, Byrnes, and Patterson also agreed that, if a second IMT trial was not held, the industrialists and financiers being investigated by Taylor’s SPD would be prosecuted in zonal trials.<sup>112</sup>

The issue of a second trial flared up again after the IMT delivered its judgment on 1 October 1946. Schacht was acquitted, leading many at Nuremberg to speculate that the British had engineered his acquittal in order to protect German industrialists and financiers. That theory was not completely without merit: Francis Biddle, the American judge at the IMT, disclosed that Sir Geoffrey Lawrence, the British judge, had described Schacht as a “man of character” far removed from the “ruffians” that otherwise filled the dock.<sup>113</sup>

Six days later, as part of his final report to President Truman on the IMT, Jackson submitted his resignation as Chief of Counsel. His final report noted that “[t]here are many industrialists, militarists, politicians, diplomats, and police officials whose guilt does not differ from those who have been convicted except that their parts were at lower levels and have been less conspicuous.”<sup>114</sup> The question was whether the most important of those war criminals should be tried by the IMT or in zonal trials. As he had so many times before, he made clear his strong preference for the latter:

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<sup>107</sup> Id., Memorandum, para. 8.

<sup>108</sup> Id. at 273, Memorandum, para. 13.

<sup>109</sup> Id., Memorandum, para. 17.

<sup>110</sup> Id., Memorandum, para. 15.

<sup>111</sup> TAYLOR, FINAL REPORT, 25-26.

<sup>112</sup> Id. at 26.

<sup>113</sup> BOWER, 347.

<sup>114</sup> Robert Jackson, Final Report to the President Concerning the Nurnberg War Crimes Trial, reprinted in 20 TEMP. L. Q. 338, 340 (1946).



The most expeditious method of trial and the one that will cost the United States the least in money and in manpower is that each of the occupying powers assume responsibility for the trial within its own zone [and] with the prisoners in its own custody. Most of these defendants can be charged with single and specific crimes which will not involve a repetition of the whole history of the Nazi conspiracy. The trials can be conducted in two languages instead of four, and since all of the judges in any one trial would be of a single legal system no time would be lost adjusting [to] different systems of procedure.<sup>115</sup>

Jackson did not reiterate his belief that a second IMT trial involving industrialists and financiers would be a propaganda coup for the Soviets. By the time he submitted his report, however, many officials in the U.S. government had come to the same conclusion.<sup>116</sup>

On October 17, Jackson's resignation became official. The following day, OMGUS promulgated Military Government Ordinance No. 7, which formally established the zonal trials. On October 24, General Joseph McNarney, the Military Governor, disbanded the Subsequent Proceedings Division and reconstituted it as the Office, Chief of Counsel for War Crimes, a division of OMGUS. He then appointed Taylor the new Chief of Counsel of the OCC.<sup>117</sup>

President Truman decided that the U.S. would not participate in a second IMT trial in late October or early November,<sup>118</sup> but he did not inform the other Allies of his decision until late January, 1947. In the interim, two other events conspired to make a second IMT trial less likely. First, the newly-christened OCC relied on Article 4 of Law No. 10 to ask Britain to extradite nine suspects for prosecution in the zonal trials: six industrialists, including Alfried Krupp; Field Marshal Erhard Milch; and two Ministers in the Nazi government, Friedrich Gaus and Otto Thierack.<sup>119</sup> The British happily acceded to the request, with Patrick Dean, an adviser to the Foreign Office, noting with satisfaction that "[i]f any of the trials do go wrong and the industrialists escape, the primary political criticism will rest on American shoulders and not ours."<sup>120</sup>

Second, as explored in more detail in the next chapter, the first two NMT trials got underway. The *Medical* trial began on December 9, and the *Milch* trial began on 2 January 1947. Those trials did not rule out a second IMT, but they sent a powerful message that the U.S. was prepared to assume primary responsibility for prosecuting the high-ranking war-crimes suspects – industrialist, financier, and otherwise – that the IMT had left unpunished.

Despite those developments, the U.S. would have preferred to let the second IMT trial die a slow, quiet death. Unfortunately, France circulated a diplomatic note in late

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<sup>115</sup> Id.

<sup>116</sup> EARL, 37-38.

<sup>117</sup> TAYLOR, FINAL REPORT, 13.

<sup>118</sup> EARL, 38.

<sup>119</sup> BLOXHAM, 32.

<sup>120</sup> BOWER, 346.

December suggesting that the Committee of Chief Prosecutors “should reconvene as soon as possible” to discuss the second trial. The note forced the Americans’ hand, and on 22 January 1947 the U.S. officially informed the British, French, and Soviet Foreign Offices that “[i]t is the view of this Government that further trials of German war criminals can be more expeditiously held in national or occupation courts and that additional proceedings before the International Military Tribunal itself are not required.”<sup>121</sup> According to Taylor, the U.S. message put the issue of a second trial to rest once and for all.<sup>122</sup>

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<sup>121</sup> TAYLOR, FINAL REPORT, 27.

<sup>122</sup> *Id.*