

THE LEGACY OF NUREMBERG: SUSTAINING HUMAN RIGHTS

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On July 17, 1998, the cause of human rights was given great impetus when the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Rome Statute of the International Criminal Court, thus creating for the first time an independent and permanent court with jurisdiction over the most serious crimes of concern to the international community: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. Also on this date, a beautifully sunny day in Ithaca, Henry Korn, B.A. '68, and his wife, Ellen Schaum Korn, B.S. '68, contributed a significant new addition to the law library: nearly 150 bound volumes of Nuremberg trial transcripts and documents from the personal archives of General William J. Donovan (1883–1959).

This coincidence is an apt one, because the International Military Tribunal at Nuremberg and the Nuremberg Military Tribunals (also known as the Subsequent Proceedings or Subsequent Trials) were the direct historical antecedent for the formation of the International Criminal Court. The Nuremberg tribunals were established at the conclusion of World War II to mete out justice to the principal perpetrators of the Holocaust, with the International Military Tribunal addressing four counts: (1) the common plan or conspiracy, (2) crimes against peace, (3) war crimes (including genocide), and (4) crimes against humanity.

Donovan played an important part in the International Military Tribunal proceedings in his role as special assistant to the U.S. chief of counsel, Supreme Court justice Robert H. Jackson. Both men grew up in upstate New York, Jackson in Frewsburg and Donovan in Buffalo. Jackson attended the Albany Law School for a year and would become the last member of the Supreme Court to gain admission to the bar by reading law in a law office instead of through graduation from law school. Donovan graduated from the Columbia Law School and, despite an undistinguished academic record, became a prominent attorney in New York City. In World War I he earned the Congressional Medal of Honor

and many other decorations. Most importantly, however, he was the founding director of the Office of Strategic Services—the precursor of the Central Intelligence Agency—and thus offered valuable intelligence to Jackson as the Allies gathered evidence to construct their case against the German war criminals.

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The American case is being prepared on the assumption that an inescapable responsibility rests upon this country to conduct an inquiry, preferably in association with others, but alone if necessary, into the culpability of those whom there is probable cause to accuse of atrocities and other crimes. We have many such men in our possession. What shall we do with them? We could, of course, set them at large without a hearing. But it has cost unmeasured thousands of American lives to beat and bind these men. To free them without a trial would mock the dead and make cynics of the living. On the other hand, we could execute or otherwise punish them without a

A woodcut from the "Apocalypse" series that Albrecht Dürer created for Die heimlich Offenbarung Iohannis (The Revelation of St. John), first published in Nuremberg in 1498

hearing. But indiscriminating executions or punishments without definite findings of guilt, fairly arrived at, would violate pledges repeatedly given, and would not set easily on the American conscience or be remembered by our children with pride. The only other course is to determine the innocence or guilt of the accused after a hearing as dispassionate as the times and horrors we deal with will permit, and upon a record that will leave our reasons and motives clear.¹

Jackson continues, cautioning:

We must not forget that when the Nazi plans were boldly proclaimed they were so extravagant that the world refused to take them seriously. Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during the war. We must establish incredible events by credible evidence.²

The relationship between Jackson and Donovan was not an easy one. Although Donovan could not be said to have been in disagreement with any of the foregoing, he did have a different conception about how to develop the prosecution's case. Jackson's approach was to rely predominantly on documentary evidence, while Donovan thought it politic to pursue a greater use of testimonial evidence as well. Jackson, however, did not yield on the question of negotiating with the defendants or their counsel for testimony. Partly in response to Donovan's efforts in that direction, which included the possibility of using Hermann Göring as a witness against other defendants, Jackson addressed a memorandum to Donovan and other senior staff lawyers that detailed in no uncertain terms the ground rules for dealing with the prisoners of war.

This memorandum is among the Donovan Papers now at the Cornell Law Library. A penciled check next to his name on the list of recipients indicates that it is Donovan's own copy. Under the heading "Matters which I think may cause criticism and confusion in reference to high-ranking prisoners of war require that the following instructions will be observed," point two, which has been underlined, reads: "No social entertaining of any prisoner of war shall be undertaken or permitted by any member of this staff." In the right-hand margin next to it is a cartoon figure with a smiling face. Although it would be impossible to prove that this editorial comment was in fact the handiwork of Donovan, it is entirely plausible, especially given the known tensions between Donovan and Jackson. (Donovan, in fact, would leave Jackson's staff in November 1945.)

While this fleeting attempt at levity is trivial in the context of the proceedings, it does point up their very real, human dimension. Nuremberg was about absolute conflict, about reasserting humanity in the face of inhumanity. A sense of this urgency is revealed in a terse response to an assistant's typed note, also among the Donovan Papers: "General Donovan: These are the copies of the excerpts of the Thomas diary, as far as it went. J.E.S." Donovan replies: "Get some more." The person referred to is Georg R. Thomas, a German general of the infantry who was arrested by the Gestapo in 1944 before being captured by the Allies. In an extended

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handwritten statement, entitled "Über die Schuldfrage," or "Concerning the Question of Guilt," Thomas begins:

The terrible indictment which the Allied Court has made against the war criminals of the period of the Nazi regime, against its political and military organizations, and indirectly thereby against the whole German people, must cause each thinking person to ask this question: How was it possible that a nation which gave to the world a Kant, Goethe, Lessing, Bach and Beethoven, trusted and obeyed such a regime for twelve years?

History will pass a terrible judgment over the past twelve years of the German people because even after the present feelings of hatred, vengeance and egotism will have made room for greater objectivity, and when the German people will no longer heap upon itself self-accusations and denunciations, in order to prove its political change of heart, the one thought will remain as a sad recognition: How could a whole nation follow the mad teachings of this man?

It is therefore absolutely essential that men who have proven themselves opponents of this regime, and who are able out of their personal experience to contribute to an elucidation of the question of the failure of the German people, say everything openly which might serve to disentangle this German question.

The Donovan Papers contain both Thomas's original statement in German and a typed translation in English that was prepared by the Allies. The German text is written in pencil and colored pencil on several different types of now very fragile paper (including a doctor's form for patients' medical history, or *Krankheitsgeschichte*) and fills all available space, with numerous emendations and afterthoughts. It is the record of a vanquished warrior—whether his remorse was genuine or not remains an open question.

There are many other remarkable documents among the Donovan Papers, including memoranda discussing how the military tribunal should be structured, working notes associated with the interrogation of Göring, drafts of trial briefs against various defendants, Nazi organizational charts, and evidentiary analyses prepared by the Office of Strategic Services and other agencies. The documents assume various formats, ranging from mimeographs, photostats, and carbon copies to photographs, maps, typescripts, and original manuscripts. While most of the documents are copies that can be found elsewhere, there are a significant number that are



Daniel Smith (right) and the Korn family (Greg and his parents, Henry and Ellen) looking at the bound volumes of the personal papers of General William J. Donovan, now available in the Cornell Law Library, thanks to Henry and Ellen Korn.

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unique to Cornell's holdings and that represent an important, though small, part of the history of the Nuremberg process.

The official version of the International Military Tribunal was published in Nuremberg as a forty-two-volume set by the secretariat of the tribunal. Extensive though this record is, it does not contain all the background material that animated the proceedings nor the vast archives that documented the machinations of the Nazi war apparatus. Jackson's staff screened over one hundred thousand captured documents, and around four thousand were translated and used as evidence.

Relatively few witnesses were called, but Jackson's prosecutorial strategy was ultimately vindicated when the court rendered its judgment on October 1, 1946:

Much of the evidence presented to the Tribunal on behalf of the Prosecution was documentary evidence, captured by the Allied Armies in German army headquarters, Government buildings, and elsewhere. Some of the documents were found in salt mines, buried in the ground, hidden behind false walls and in other places. The case, therefore, against the defendants rests in large measure on documents of their own making, the authenticity of which has not been challenged except in one or two cases.³

And in his final report to President Truman on October 7, 1946, in which he reviews the outcome of the International Military Tribunal and resigns his commission as chief of counsel to the United States, Jackson states:

We have documented from German sources the Nazi aggressions, persecutions, and atrocities with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people. No history of this era can be entitled to authority which fails to take into account the record of Nürnberg.⁴

In an effort to make such an accounting of the record, and to celebrate the fiftieth anniversary of both the Convention on the Prevention and Punishment of the Crime of

Genocide (December 9, 1948) and the United Nations Universal Declaration of Human Rights (December 10, 1948), I have organized an exhibition in the Dawson Rare Book Room by the same name as this article: “The Legacy of Nuremberg: Sustaining Human Rights” (see sidebar). The exhibition traces the evolution of international law and human rights over a span of four hundred years.

People have had not only an intellectual but also a visceral reaction to the materials in the exhibition.

It begins with William Fulbecke’s compendium *The Pandectes of the Law of Nations* (1602) and concludes with the Rome Statute of the International Criminal Court (1998), downloaded from the United Nations Web site.⁵ Along the way are representative works in various languages and editions—by such seminal legal commentators as Grotius, Pufendorf, Wolff, Bynkershoek, and Vattel—that reflect the development and transmission of legal thought across temporal and physical borders. Observers will also find the locus classicus of the term *international law*, coined by Jeremy Bentham in 1780, as well as the origin of the word *genocide*, a neologism created by Raphael Lemkin in 1944 to “denote an old practice in its modern development” and first employed judicially in the indictment at Nuremberg the following year.

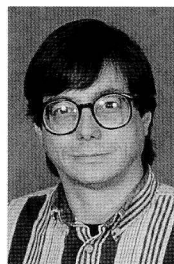
Within this historical context the exhibition features materials selected from the Donovan Papers, some of which have been described above. Complementing the Nuremberg documents are several memoranda by Otto Charles Doering Jr. (copied from microfilm in the Special Collections of the Kroch Library) that were written in the sixties to assist a biographer of Donovan. Doering was a longtime law partner of Donovan and served as his right-hand man and executive officer in the Office of Strategic Services. Doering, one of Donovan’s few confidants, received his LL.B. in 1928 from the Cornell Law School.

It can be said without exaggeration that people have had not only an intellectual but also a visceral reaction to the materials in the exhibition. The weight of history is palpable when one sees and contemplates Grotius arguing the distinction between just and unjust wars side by side with Jackson seeking to redress one of the worst calamities of the modern era. The exhibition thus far has attracted members of the Law

School Advisory Council and many law students interested in human rights and international law. Across campus, Jewish student groups have also evinced interest, and I am beginning to field research queries from scholars at Cornell and elsewhere. A reception for the Korn acknowledging the receipt of the Nuremberg transcripts and documents (and the newly instituted Henry Korn Lecture Series) drew both university officials and members of the press to the Dawson Rare Book Room.

Primary historical materials are essential for the researches of scholars and students alike, and although curiosity is the only prerequisite to gain access at the law library, special collections require special attention. Rare, fragile, and unique materials must be given the care they deserve. When one considers how many generations of committed individuals and institutions have sustained the works that make up our historical collections—for centuries, in many instances—it is readily apparent that we are only transitory custodians of what will be the intellectual heritage of the future.

Various initiatives are under way at Cornell to preserve and promote access to this body of knowledge, and in these endeavors the electronic world has much to offer. Look to a future issue of the *Forum* for word of progress, or visit the legal history and rare books section of the law library’s Web site.⁶



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1. Robert H. Jackson, *The Nürnberg Case* 7–8 (1947).

2. *Id.* at 10.

3. 1 *Trial of the Major War Criminals before the International Military Tribunal* 173 (1947).

4. Jackson, *supra* note 2, at xvi.

5. URL: www.un.org/icc. The Cornell International Law Journal is sponsoring a symposium devoted to the International Criminal Court on March 5 and 6. Entitled “The International Criminal Court: Consensus and Debate on the International Adjudication of Genocide, Crimes against Humanity, War Crimes, and Aggression,” the symposium will feature, among others, Philippe Kirsch, chair of the ICC conference’s primary deliberative body, the Committee of the Whole, and David Scheffer, the head of the U.S. delegation at Rome.

6. URL: www.lawschool.cornell.edu/library.

A GUIDE TO THE EXHIBITION "THE LEGACY OF NUREMBERG"

The list below is in chronological order. An annotated version of this guide, as well as guides for the exhibitions "Some American Firsts" and "Rejuvenating Blackstone," can be found at the law library's Web site: www.lawschool.cornell.edu/library.

William Fulbecke [1560–1603?]. *The Pandectes of the Law of Nations: Contayning Severall Discourses of the Questions, Points, and Matters of Law, Wherein the Nations of the World Doe Consent and Accord. Giving Great Light to the Understanding and Opening of the Principall Objects, Questions, Rules, and Cases of the Civill Law, and Common Law of This Realme of England.* London: Thomas Wight, 1602.

Hugo Grotius [1583–1645]. *The Most Excellent Hugo Grotius His Three Books Treating of the Rights of War & Peace. In the First Is Handled, Whether Any War Be Just. In the Second Is Shewed, The Causes of War, Both Just and Unjust. In the Third Is Declared, What in War Is Lawful; That Is, Punishable. With the Annotations Digested into the Body of Every Chapter. Translated into English by William Evats.* London: printed by M.W. for Thomas Basset and Ralph Smith, 1682.

Samuel von Pufendorf [1632–94]. *Of the Law of Nature and Nations: Eight Books. Written in Latin by the Baron Pufendorf, Counselor of State to His Late Swedish Majesty, and to the Late King of Prussia. Done into English by Basil Kennett, D.D. Late President of Corpus Christi College in Oxford. To Which Are Added All the Large Notes of Mr. Barbeyrac, Translated from the Best Edition; Together with Large Tables to the Whole. The Fourth Edition, Carefully Corrected. To Which Is Now Prefixed Mr. Barbeyrac's Prefatory Discourse, Containing an Historical and Critical Account of the Science of Morality, and the Progress It Has Made in the World, from the Earliest Times Down to the Publication of This Work. Done into English by Mr. Carew of Lincoln's-Inn.* London: printed for J. Walthoe, R. Wilkin, J. and J. Bonwicke, S. Birt, T. Ward, and T. Osborne, 1729.

Christian von Wolff [1679–1754]. *Institutiones juris naturae et gentium in quibus ex ipsa hominis natura continuo nexu omnes obligationes et jura omnia deducuntur.* Halae Magdeburgicae: prostat in Officina Rengeriana, 1763.

Cornelius van Bynkershoek [1673–1743]. *A Treatise on the Law of War. Being the First Book of His Questiones Juris Publici. With Notes, by Peter Stephen du Ponceau.* Philadelphia: Farrand & Nicholas, 1810.

Emmerich de Vattel [1714–67]. *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns. From the French of Monsieur de Vattel.* Philadelphia: printed and published by Abraham Small, 1817.

[Thomas] Rutherford [1712–71]. *Institutes of Natural Law; Being the Substance of a Course of Lectures on Grotius De Jure Belli et Pacis, Read in St. John's College, Cambridge.* Baltimore: published by William and Joseph Neal; John D. Toy, printer; 1832.

[American Peace Society]. *Prize Essays on a Congress of Nations, for the Adjustment of International Disputes, and for the Promotion of Universal Peace without Resort to Arms. Together with a Sixth Essay, Comprising the Substance of the Rejected Essays.* Boston: published by Whipple & Damrell for the American Peace Society, 1840.

[William] Evans Darby [1844–1922]. *International Tribunals: A Collection of the Various Schemes Which Have Been Propounded, and of Instances since 1815.* London: Peace Society, 1899.

Jeremy Bentham [1748–1832]. *An Introduction to the Principles of Morals and Legislation.* Oxford: At the Clarendon Press, 1907.

Raphael Lemkin [1900–59]. *Axis Rule in Occupied Europe. Laws of Occupation. Analysis of Government. Proposals for Redress.* Washington: Carnegie Endowment for International Peace, 1944.

William Joseph Donovan [1883–1959]. *Nuremberg Trial Transcripts and Documents.* [Donovan Papers, Rare Books, Cornell Law Library].

Otto C[harles] Doering Jr. [1904–79]. *Memoranda to Corey Ford.* [Doering Papers (1946–ca. 1965), #4445, Department of Manuscripts and University Archives, Cornell University Library].

Office of United States Chief of Counsel for Prosecution of Axis Criminality. *Nazi Conspiracy and Aggression. Opinion and Judgment.* Washington: U.S. Government Printing Office, 1947.

Telford Taylor [1908–98]. *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council Law No. 10.* Washington, D.C.: U.S. Government Printing Office, 1949.

[International Military Tribunal for the Far East]. *General Index of the Record of the Defense Case. [And] General Index of the Record of the Prosecution's Case; pages 1–16,997.* N.p.: [International Military Tribunal for the Far East], 1947.

Jacob Robinson and Henry Sachs. *The Holocaust. The Nuremberg Evidence. Part One: Documents.* Jerusalem: [Yad Vashem Martyrs' and Heroes' Memorial Authority and Yivo Institute for Jewish Research], 1976.

Abdullah M. Al-Hammadi and Abdulateef Al-Abdalrazaq. *Atlas of Iraqi War Crimes in the State of Kuwait.* Kuwait: Al Qabas Commercial Press, [1995].

John R. W. D. Jones. *The Practice of the International Tribunals for the Former Yugoslavia and Rwanda.* Irvington-on-Hudson, NY: Transnational Publishers, 1998.

Rome Statute of the International Criminal Court. [U.N. Document, A/CONF.183/9].

