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The Nuremberg Military Tribunals and the origins of International Criminal Law

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Introduction

On 9 December 1946, Telford Taylor gave the prosecution's opening statement in the *Medical* case, the first of twelve trials held by the United States in Nuremberg between 1946 and 1949.¹ Over the next 28 months, the Nuremberg Military Tribunals² (NMTs) tried 177 defendants representing "all the important segments of the Third Reich"³: Nazi judges and prosecutors; SS officers; military leaders; German industrialists and financiers; members of mobile killing squads; Nazi ministers and diplomats. 142 of those defendants were convicted; 25 were sentenced to death; dozens of others were sentenced to life imprisonment or lengthy prison terms. Very few of the convicted defendants, however, ever served even a fraction of their sentences. The last NMT defendant walked out of Germany's Landsberg Prison a free man in 1958.

A. The Lacuna in the Literature

In his final report on the NMT trials, submitted to the Secretary of the Army in August 1949, Taylor predicted that "there will be no lack of books and articles in the years to come" about "the actual outcome of the trials, the legal reasoning of the judgments, the historical revelations of the documents and testimony, [and] the immediate and long-term significance of the trials in world affairs."⁴ Six decades later, it is clear that Taylor was a better prosecutor than prognosticator. Very few books and articles on the trials exist – and the vast majority were written by the judges,⁵ prosecutors,⁶ and defense attorneys⁷ who participated in them. Moreover, the even smaller number of scholarly works on the trials have focused almost without exception⁸ on individual trials⁹ or specific legal issues.¹⁰ Indeed, only two general studies of the trials have ever been written: Telford

¹ I 27 (1949) (hereafter "TWC").

² Although the trials are often referred to as the "Subsequent Proceedings," the "American Military Tribunals," or the "United States Military Tribunals," I have chosen to refer to them as the "Nuremberg Military Tribunals," because that is the name used both by Telford Taylor, and by the Green Set, the fifteen-volume official record of the trial. See TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, 36 (1949); I TWC 4. I have, however, changed their spelling from the old-fashioned "Nuernberg" to the more modern "Nuremberg."

³ Memo from Taylor to Jackson, 30 Oct. 1946, NA-153-1018-8-84-1, at 1.

⁴ TAYLOR, FINAL REPORT, VII.

⁵ See, e.g., Paul M. Hebert, *The Nurnberg Subsequent Trials*, 16 INS. COUNSEL J. 226 (1949).

⁶ See, e.g., JOSIAH DUBOIS, *THE DEVIL'S CHEMISTS: 24 CONSPIRATORS OF THE INTERNATIONAL FARBEN CARTEL WHO MANUFACTURE WARS* (1952).

⁷ See, e.g., Otto Kranzbuehler, *Nuremberg Eighteen Years Afterwards*, 14 DEPAUL L. REV. 333 (1964-65).

⁸ Matthew Lippman's historical work is the primary exception. See, e.g., Matthew Lippman, *The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany*, 3 IND. INT'L & COMP. L. REV. 1 (1992).

⁹ See, e.g., HILARY EARL, *THE NUREMBERG SS-EINSATZGRUPPEN TRIAL, 1945-1958* (2010).

¹⁰ See, e.g., Allison M. Danner, *The Nuremberg Industrialist Prosecutions and Aggressive War*, 46 VA. J. INT'L L. 651 (2006).

Taylor's *Nuremberg Trials: War Crimes and International Law*, published by the Carnegie Endowment for International Peace in 1949; and August von Knieriem's *The Nuremberg Trials*, published in 1959.¹¹ Neither book is scholarly, and both are anything but comprehensive. Taylor's short book simply provides a basic history of the tribunals, summarizes the trials, and comments on a few of what he saw as the trials' most important legal issues. Von Knieriem's much longer study is a sustained attack on the fairness of the trials – which is not surprising, given that he was I.G. Farben's chief lawyer and had been prosecuted (unsuccessfully) in *Farben*.

B. The Importance of the Trials

The lack of academic interest in the trials is difficult to explain. Scholars have produced literally dozens of books and hundreds of articles about the IMT trial, yet a strong case can be made that the NMT trials are of far greater jurisprudential importance than their more famous predecessor. The IMT is justly celebrated for establishing that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”¹² The Tribunal also gave birth – perhaps through immaculate conception¹³ – to crimes against peace, crimes against humanity, and the crime of criminal membership. But there is remarkably little criminal law in the IMT judgment: nothing on evidence and procedure; almost nothing on modes of participation, defenses, or sentencing. Even the discussion of the crimes themselves is relatively cursory and unsystematic.

The NMTs, by contrast, addressed all of those areas in detail. In some cases, their approach to international criminal law was misguided; particularly striking examples include the *Einsatzgruppen* tribunal's belief that international law permitted the morale bombings of civilians, even with atomic weapons, and the *Hostage* tribunal's conclusion that, under certain conditions, it was permissible to execute innocent civilians in reprisal. More often, though, the tribunals' jurisprudence was very progressive: requiring witnesses to be informed of their right not to incriminate themselves (*Medical*) and refusing to convict defendants solely on the basis of hearsay (*Ministries*); extending crimes against peace to include both aggressive wars and bloodless invasions (*Ministries*); insisting on the strict separation of the jus ad bellum from the jus in bello (*Hostage*); concluding that international law prohibited peacetime crimes against humanity that were not connected to aggressive war (*Einsatzgruppen*) and convicting defendants of genocide (*Justice*); adopting a finely-grained version of enterprise liability that distinguished between creators and executors (*Pohl*); and insisting that international humanitarian law limits military necessity “even if it results in the loss of a battle or even a war” (*Hostage*).

¹¹ AUGUST VON KNIERIEM, *THE NUREMBERG TRIALS* (1959).

¹² JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE TRIAL OF GERMAN WAR CRIMINALS 41 (1946).

¹³ See, e.g., F.B. Schick, *The Nuremberg Trial and the International Law of the Future*, 41 AM. J. INT'L L. 770 (1947).

The NMTs are also of great historical interest. Robert Kempner, one of Telford Taylor's chief deputies, referred to the trials as "the greatest history seminar ever held,"¹⁴ a description that applies equally to the courtroom proceedings and the judgments. The tribunals generated a massive documentary record of Nazi criminality, one that dwarfs the IMT's: the transcripts of the twelve trials run 132,855 legal-size pages and include the testimony of more than 1,300 witnesses and the contents of more than 30,000 separate documents.¹⁵ The twelve judgments, in turn – which total 3,828 pages – reflect the factual density of the trials, describing at great length everything from Hitler's transformation of the German courts into a "nationally organized system of injustice and persecution" (*Justice*) to the role that German industrialists played in financing Hitler's rise to power and equipping the Nazi war machine (*Flick, Farben, Krupp*) to how the Reich planned its various invasions and wars of aggression (*Ministries*).

The NMT trials are particularly important, however, because they foregrounded the Holocaust in a way that the IMT had not. As Lawrence Douglas has noted, although the IMT "has been hailed in many tributes as a path-breaking proceeding about the Holocaust," crimes against Jews actually "played a largely ancillary role in the trial."¹⁶ Indeed, Justice Jackson rejected a joint request by the World Jewish Congress and the American Jewish Congress to focus at least one count in the indictment specifically on the Holocaust,¹⁷ because he was more interested in using the trial to establish the criminality of aggressive war¹⁸ and was concerned that emphasizing the Holocaust would lead "other victimized groups [to] demand comparable status."¹⁹ Because of Jackson's aggression-centered approach to the IMT trial, the tribunal's judgment devotes a mere 12 paragraphs to the Nazis' systematic murder of the Jews.

The NMT trials could not have been more different. "For students of the Holocaust, these cases, perhaps more than the first Nuremberg trial, the Auschwitz cases in Poland and West Germany, or even Eichmann, represent an attempt at full judicial scrutiny of Nazi genocide."²⁰ The prosecution actively sought that scrutiny: although Telford Taylor rejected including a "Jewish case" in the NMT trials,²¹ he emphasized the extermination and persecution of Jews in nearly all of his opening arguments and included such crimes in all twelve indictments. His office also made a deliberate decision – supported by the Departments of State and War – to attempt to establish genocide as a crime against humanity, even though it was not mentioned in Control Council Law No.

¹⁴ Quoted in Lawrence Douglas, *History and Memory in the Courtroom: Reflections on Perpetrator Trials*, in *THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945*, 95 (Herbert R. Reginbogin & Cristoph J. Safferling, eds., 2006).

¹⁵ OCCWC, *Statistics of the Nurnberg Trials*, 15 Mar. 1949, TTP-5-1-1-25, at 4-6.

¹⁶ Douglas, *History and Memory*, in *NUREMBERG TRIALS*, 96.

¹⁷ Robert Wolfe, *Flaws in the Nuremberg Legacy*, 12 *HOLOCAUST & GENOCIDE STUDIES* 434, 440 (1998).

¹⁸ JOHN HAGAN, *JUSTICE IN THE BALKANS* 25 (2003).

¹⁹ Wolfe, 440.

²⁰ Jonathan A. Bush, *Soldiers Find Wars: A Life of Telford Taylor*, 37 *COLUM. J. TRANSNAT'L L.* 675, 681-82 (1999).

²¹ See Chapter 3.

10, the tribunals' enabling statute.²² As a result of these efforts, the judgments are replete with detailed narratives of various aspects of the Holocaust: the creation and administration of the concentration camps in *Pohl*; the construction of Auschwitz III-Monowitz in *Farben*; the "resettlement" of Jews in occupied territory and the systematic theft of their property in *RuSHA*; the extermination of Jews in the Soviet Union in *Einsatzgruppen*; the use of Jewish slave labor by German industry in *Krupp*; the implementation of the Nuremberg Laws in *Ministries*.

C. Research Goals

There is, in short, a significant need for a comprehensive jurisprudential and historical analysis of the NMT trials. This dissertation attempts to provide that analysis. First, in terms of jurisprudence, it seeks to explain how the tribunals as a whole dealt with specific legal issues. Agreement was far more common than disagreement, and the tribunals routinely cited the conclusions of their predecessors in support of their own. But it is important to recognize that the tribunals did not speak with one voice, because a number of modern courts and tribunals have cited minority positions as if they were representative of the "NMT" as a whole. In *Presbyterian Church of Sudan v. Talisman Energy*, for example, the U.S. Court of Appeals for the Second Circuit relied solely on the *Ministries* tribunal's acquittal of Karl Rasche, the head of the Dresdner Bank, for the proposition that "international law at the time of the Nuremberg trials recognized aiding and abetting liability only for purposeful conduct."²³ In fact, Rasche was the *only* defendant in any of the trials held to a purposive standard: not only did every other tribunal apply a knowledge standard for aiding-and-abetting, the *Ministries* tribunal *itself* applied a knowledge standard to other defendants.²⁴ Regardless, the purposive standard is now the Second Circuit's official position, sounding what one scholar has described as the "death knell for most corporate liability claims under the Alien Tort Statute."²⁵ If this dissertation had existed a few years ago, the court might have reached a very different conclusion.

The second goal of the dissertation is to place the trials in their historical context. While the trials were being planned, Churchill gave his "Iron Curtain" speech, the U.S. conducted atomic tests Able and Baker, and the French landed in Indochina. The trials themselves witnessed Truman's announcement of his famous doctrine, Czechoslovakia's fall to the Soviets, and the beginning of the Berlin Blockade. And after the trials were over, the fate of the convicted defendants was determined alongside the emergence of the Soviet Union as the world's second atomic power, the rise of McCarthyism, the beginning of the Korean War, and the formation of the Warsaw Pact.

²² Genocide is discussed in Chapter 10.

²³ 582 F.3d 244, 259 (2d Cir. 2009).

²⁴ See the discussion in Chapter 12.

²⁵ Roger Alford, *Second Circuit Adopts Purpose Test for ATS Corporate Liability*, OPINIO JURIS, 2 Oct. 2009, <http://opiniojuris.org/2009/10/02/second-circuit-adopts-purpose-test-for-ats-corporate-liability/>.

The history of the trials, in short, is the history of the Cold War. Cold War pressures affected every aspect of the trials, from the initial decision to hold zonal trials instead of a second IMT to the release of the last convicted defendant in 1958. Sometimes those pressures were indirect, coloring the ways in which the judges viewed the trials. The presiding judge in *High Command*, for example, admitted to his sons that his hatred of the Soviets and fear of a Soviet invasion of Nuremberg was so profound that the defendants' crimes no longer seemed "so bad" to him. More often, though, the pressures were all too direct, such as when Republicans claimed on the floor of the House of Representatives that Taylor's staff was overrun by communists, or when the director of the War Department's War Crimes Division told the lead prosecutor in *Farben* that the Department was concerned that a successful prosecution of German industrialists for aggression might undermine the willingness of American industrialists to support U.S. foreign policy. It is impossible, of course, to draw a straight line between the Cold War and specific decisions by the tribunals and by American war-crimes officials. But there is little question that, in the absence of such indirect and direct pressures, the defendants would have been convicted of additional crimes and would have served far longer sentences. As Fritz ter Meer, one of the defendants convicted in *Farben*, noted to reporters when he was released for "good conduct" in 1950, two years into his seven-year sentence: "Now they have Korea on their hands, the Americans are a lot more friendly."²⁶

D. Research Methodology

This dissertation is the product of traditional desk-based research. Four categories of material were particularly important: (1) the NMT judgments themselves, along with various orders and motions in the trials; (2) archival material about the trials, particularly documents that explained the prosecution's decision-making processes and the thought processes of the tribunals' judges; (3) secondary literature, both past and present, about the trials and about the legal issues involved in the trials; and (4) contemporary jurisprudence that relies on the NMT judgments.

The dissertation itself includes both historical and thematic chapters. The historical chapters explain the Allied decision to hold zonal trials instead of a second quadripartite trial, the evolution of the NMT trial program, and the collapse of the war-crimes program in the aftermath of the trials. The thematic chapters discuss critical jurisprudential issues such as the legal character of the tribunals, the rules of evidence and procedure, substantive crimes, modes of participation, and defenses. The author chose to discuss the NMTs thematically instead of by trial because a trial-based presentation would make it difficult to compare jurisprudential issues across tribunals.

1. The Judgments

²⁶ DIARMUID JEFFREYS, *HELL'S CARTEL: IG FARBEN AND THE MAKING OF HITLER'S WAR MACHINE* 347 (2008).

In order to prevent the analysis from being unduly affected either by the secondary literature or by contemporary jurisprudence, research for this dissertation began with the judgments and supplementary legal documents. Those materials were largely contained in the fifteen-volume *Trials of the German War Criminals Before the Nuernberg Military Tribunals Under Control Council No. 10*, published in 1949 by the United States Government Printing Office. Because of the dissertation's thematic structure, it was necessary to identify what each tribunal said about each of the legal issues discussed in the thematic chapters. The author thus catalogued the legal issues discussed in each judgment and identified the supplementary legal documents relevant to those issues – motions, orders, etc. The legal issues were then organized thematically and assigned to a particular chapter in the dissertation.

2. Archival Material

Archival research was required for both the historical and the thematic chapters of the dissertation. That research took place over four months and involved five different document collections. The two most important were the Telford Taylor Papers at Columbia University, which contained hundreds of documents relevant to Taylor's prosecutorial organization, and the National Archives in Baltimore, the official repository of the records of OMGUS, the military government in the American zone of occupation. The other relevant collections were the Nuremberg Trials Collection at Harvard University, which contains the complete trial transcripts of the 12 NMT trials; the Drexel Sprecher Papers at John F. Kennedy Library in Boston; the Benjamin Ferencz Papers at the United States Holocaust Memorial Museum in Washington, D.C.; and the Papers of the Subsequent Nuremberg Military Tribunals at the University of Southampton in England. To the best of the author's knowledge, this dissertation is the first to explore the material in those five collections in its entirety.

3. Secondary Literature

The dissertation endeavored to identify and consider all of the books and articles that have been published about the NMT trials. It also sought to cite to the secondary literature concerning specific issues involved in the trials, particularly books and articles published between 1919 and 1958. The author thus spent considerable time in the Library of Congress, Columbia Law Library, and the Peace Palace Library. Additionally, he conducted numerous systematic searches of various on-line legal databases – particularly Lexis, Westlaw, and Hein Online – for discussion of the twelve judgments, Control Council Law No. 10, or the NMTs as a whole.

4. Contemporary Jurisprudence

As noted below, the final chapter of the dissertation addresses the influence of the NMT judgments on the development of international criminal law. That chapter required the author to identify and analyze every citation to the judgments by international criminal tribunals and by domestic courts prosecuting international crimes (such as *Eichmann*). To do so, the author

examined the websites of the modern international tribunals, on-line databases of national jurisprudence, and Oxford University Press's Reports on International Law. The citations thus identified were then arranged and discussed in the same order as the thematic chapters in the dissertation.

5. Areas of Law

The dissertation relies on three interrelated areas of law: international criminal law, international humanitarian law (IHL), and national criminal law. Research into IHL was necessary because the tribunals relied primarily on the Hague Regulations of 1907 and the Geneva Convention of 1929 when addressing potential war crimes. And research into national criminal law – particularly German and American – was necessary because the tribunals relied on that law to resolve inconsistencies and fill gaps in their enabling statute, Law No. 10.

6. The Structure of the Dissertation

The dissertation is divided into five sections. The first focuses on the origins of the NMT trials. Chapter 1 explores the Allied decision to forego a second IMT in favor of zonal trials, Telford Taylor's appointment as the chief prosecutor of those trials, and the logistical problems that initially limited the ability of Taylor's office – first called the Subsequent Proceedings Division (SPD), later re-named the Office, Chief of Counsel for War Crimes (OCC) – to create a comprehensive trial program. Chapter 2 examines the structure of the OCC, particularly issues of staffing and funding, and discusses the operation of the tribunals themselves: where they sat, how individual tribunals were formed, and the role of their administrative wing, the Central Secretariat. Chapter 3 explains how the OCC selected defendants for prosecution and traces the evolution of the OCC's trial program, which Taylor originally expected to consist of at least 36 trials. Finally, Chapter 4, which serves as a reference for the rest of dissertation, provides a synopsis of each of the twelve trials that were actually held – the counts in the indictment, biographical information about the judges, the verdicts and sentences, and noteworthy aspects of each trial.

The second section of the dissertation turns to the law and rules governing the tribunals. Chapter 5 explores four difficult questions concerning the legal character and jurisdiction of the NMTs: whether they were international tribunals, domestic courts, or something else; whether they applied international law or domestic law; whether they had personal jurisdiction over the German defendants; and whether the law they applied violated the principle of non-retroactivity. Chapter 6 focuses on the rules of evidence applied by the NMTs, particularly the rules permitting the use of hearsay. Chapter 7 then discusses the tribunals' procedural regime, asking whether that regime adequately protected the defendants' right to a fair trial and ensured equality of arms between the prosecution and defense.

The three chapters in the third section of the dissertation examine the "special part" of Law No. 10: crimes against peace, war crimes, and crimes against humanity, respectively. Chapter 8 focuses on the tribunals' criminalization of

invasions, their insistence that only leaders could commit a crime against peace, and their careful delineation of the *actus reus* and *mens rea* of the crime. Chapter 9 catalogs the war crimes recognized by the tribunals – against POWs, against civilians, against property – and explains their approach to controversial issues such as the definition of “occupation,” whether partisans could qualify as lawful combatants, and whether unlawful combatants could be summarily executed. Chapter 10 discusses how the tribunals distinguished crimes against humanity from war crimes and explores the divide among the tribunals over the criminality of peacetime atrocities and persecutions that were not committed in connection with crimes against peace.

Section four of the dissertation then turns to the “general part” of criminal law. Chapter 11 explains how the tribunals defined the various modes of participation in Law No. 10, such as ordering, command responsibility, and taking a “consenting part” in a crime – a mode of participation unique to the trials. It also refutes the common claim that the trials serve as precedent for holding corporations criminally responsible for international crimes. Chapter 12 explores the tribunals’ rich jurisprudence concerning enterprise liability, comparing and contrasting that mode of participation with the substantive crimes of conspiracy and criminal membership. And Chapter 13 discusses the various defenses recognized by the tribunals, with particular emphasis on their treatment of superior orders, duress/necessity, mistake, and military necessity.

Section five, which bookends the first section, focuses on the fate of the convicted defendants and the long-term impact of the NMTs. Chapter 14 discusses the sentences imposed by the tribunals, asking whether they were consistent within and between cases. Chapter 15 then recounts the collapse of the American war-crimes program after the NMTs shut down, showing how Cold War pressures – particularly the perceived need to rearm Germany as part of the struggle against communism – ultimately led the overwhelming majority of the convicted defendants to be released long before their sentences expired. Finally, Chapter 16 explores the significant influence, both positive and negative, that the NMT judgments have had on international criminal law.