The Nuremberg Military Tribunals and the origins of International Criminal Law

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Conclusion

It is always tempting to look back at an international tribunal and ask whether it was successful. The answer to that question, however, depends on the criteria that ones uses to measure success. The NMTs pursued a variety of different goals: achieving retributive justice, educating the German people, creating a historical record, and contributing to the development of international criminal law. Some of those goals were achieved; others were not.

In terms of retributive justice, the verdict is clearly mixed. The first phase of the NMT program, the construction of the trials, receives low marks: the OCC was able to bring charges against only a fraction of the German war-criminals that deserved to be prosecuted. No tribunal, of course, can prosecute every deserving suspect. But it is undeniable that the OCC's inadequate budget, lack of staff, and oppressive calendar combined to unnecessarily limit the ambition of Taylor's plan for the trials. There is also reason to believe that many high-value suspects – the Wolffs and von Mansteins – escaped prosecution for reasons that had little to do with the quantity or quality of the evidence against them.

The second phase of the NMT program, the trials themselves, achieved much better results. The judges were committed to retributive justice – acquitting the innocent, convicting the guilty, and imposing appropriate sentences. Overall, they succeeded. There is little evidence that any of the defendants were wrongly convicted, although the law was occasionally deficient concerning specific counts.[1] Some of the defendants were wrongly acquitted, particularly the industrialists in *Flick* and *Farben*, but excessive credulousness toward defense claims was a problem that affected individual tribunals, not the trials as a whole. And the sentences the judges imposed were generally consistent within cases and over time, even if the tribunals that were the most inclined to acquit were also the most inclined to sentence leniently.

The defendants, of course, were also concerned with retributive justice. For them, the fairness of the trials was paramount – a wrongful conviction meant the loss of their freedom, or even their life. Here, too, the trials were a success. There is no question that the OCC enjoyed significant material and logistical advantages over the defense, and it is difficult not to be troubled by the fact that prosecutors relied heavily on incriminating statements made by the defendants without the benefit of counsel. But it is equally clear that, with very few exceptions, the tribunals did everything they could to provide the defendants with fair trials. There may not have been complete equality of arms between the two sides in the trials, but the scales of justice were balanced more evenly than at most international tribunals.[2] Dr. Sauter, the defense attorney, said it best: no German suspect would ever have chosen to be prosecuted by

[1] The best example being Keppler and Lammers's convictions for participating in the invasions of Austria and Czechoslovakia, which almost certainly violated the principle of non-retroactivity.
[2] See generally Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111-140 (2002).

a different court, because at the NMTs he could at least be confident that the judges wanted to reach "a just verdict."

Retributive justice, however, requires more than imposing an appropriate sentence on defendants convicted after a fair trial. Those defendants must also actually serve their sentences. From that perspective, the third phase of the NMT program – the post-trial phase – has to be viewed as a complete failure. Once the NMTs shut down, American war-crimes officials did everything they could to release the convicted defendants as quickly and as quietly as possible. In public, those officials, particularly McCloy, always insisted that their decisions were motivated solely by retributive concerns. In private, however, they openly acknowledged that the need to release the convicted defendants was driven by the politics of the Cold War, not by legal considerations. The American government believed that it needed Germany as an ally in the war on communism, and the cost of German cooperation was nothing less than a general amnesty – de facto if not de jure – for the convicted NMT defendants.

Telford Taylor agreed that the trials should provide retributive justice, but he also hoped that the trials would create a historical record of Nazi atrocities that would have a transformative effect on ordinary Germans. From that perspective, the scorecard is mixed. The collapse of the U.S. government's commitment to the NMTs fatally undermined the didactic goal of the trials: although convincing ordinary Germans to reject the atrocities committed in their name would have been difficult under the best of circumstances, whatever possibility for education did exist was effectively destroyed by the government's decision to bury the records of the twelve trials. By contrast, from a documentary perspective, the trials were a resounding success – "the greatest history seminar ever held," as Robert Kempner described them. The trials provided unprecedented detail about Hitler's rise to power, the inner workings of the Nazi regime, the planning and preparation of Germany's wars and invasions, and the execution of the Final Solution. That vast historical record, more than 130,000 pages long, will be of use to lawyers and historians for decades to come.

The tribunals' greatest success, however, remains their inestimable contribution to the form and substance of international criminal law. It is now second nature to speak about international criminal law's "special" and "general" parts. But that was not always the case: although the IMT established individual criminal responsibility under international law, it said relatively little about its basic principles. The NMTs, by contrast, took the raw materials provided to them – the London Charter, the IMT judgment, Law No. 10 – and honed them into a coherent system of criminal law, one in which crimes were divided into elements, modes of participation were precisely identified, and defenses were made available but cabined within reasonable limits. The NMTs, in other words, were committed to treating international criminal law as criminal law first and international law second.

That commitment almost certainly explains why judges who had little knowledge of international law were able, far more often than not, to reach substantive decisions concerning crimes, modes of participation, and defenses that remain good law more than 60 years later. Extending crimes against peace to bloodless invasions and deeming aggression a leadership crime; requiring legal process for captured partisans and criminalizing non-consensual medical experiments; developing contextual

elements for crimes against humanity and prohibiting genocide; adopting knowledge as the *mens rea* of aiding and abetting and extending command responsibility to non-military superiors; distinguishing necessity from the defense of superior orders and rejecting the idea of Total War – each decision has left a indelible mark on modern jurisprudence. The NMTs might not have given birth to international criminal law, but they clearly nurtured it into adolescence.