American Involvement in the Nuremberg War Crimes Trial Process

By Joseph Brunner

The total destruction of Germany at the end of World War II was an event unique in world affairs. The pressing issue of what to do with captured German officials, and how to prevent such a calamity in the future, demanded a unique solution and international cooperation. From the beginning, the United States took the lead in creating the post-war world, particularly concerning the issue of war crimes. American involvement in the Nuremberg process was critical throughout, and the trial would never have materialized if not for American efforts. America's role in the Nuremberg trials set the tone for America's involvement in the post-war world, one of total involvement and leadership.

As early as 1942, a broad consensus developed among the Allied nations concerning the possibility of action against the German political and military leaders, should the Allies prove victorious. The Inter-Allied Commission, consisting of Czechoslovakia, Poland, Norway, Belgium, the Netherlands, Luxembourg, France, Greece, and Yugoslavia issued the St. James Declaration in London in January of 1942, which committed the signatories to "…the punishment, through the channel of organized justice, of those guilty of or responsible for"[1] crimes committed against them. Later in 1942 the United States, the United Kingdom, and the Soviet Union all made separate declarations of their intent to punish war criminals. Both these statements, however, were extremely vague, and lead to no real formulation of policy.

The Moscow Declaration of November 1943, although similarly vague and noncommittal, did introduce the possibility of a separate tribunal for "…major criminals whose offenses have no particular geographical location."[2] Up until the Tehran Conference later that November, Allied opinion was still split on the nature of the action to be taken. British opinion favored "expedient political action," or summary executions of leading Nazi offenders, while Soviet opinion leaned towards a trial or international tribunal. Likewise American policy was still in its formative stages, and would not be resolved until the middle of 1945.

In early September of 1944 the Secretary of the Treasury, Henry Morgenthau Jr., proposed a plan of action, later referred to as the Morgenthau Plan, calling for harsh post-war treatment of Germany and German leaders. The Joint Chiefs of Staff (JCS) had already begun debate on post-war war crimes policy in August of 1944,[3] but Morgenthau's proposal to the President and Henry Stimson's alternate occupation plan submitted four days later created significant administrative debate and prevented the JCS from developing a coherent war crimes policy until the middle of 1945. Nevertheless in October of 1944 the Joint Chiefs of Staff created the War Crimes Office as a division of the Office of the Judge Advocate General (JAG), Army to act as a coordinating and head agency for all State, War, and Navy Departments in the area of war crimes.[4]

By January of 1945, the President had accepted Henry Stimson's proposal for a

large international tribunal, and the Joint Chiefs of Staff created the Office, Chief of Counsel for the Prosecution of Axis Criminality (OCCPAC) on May 2, 1945. Supreme Court Justice Robert H. Jackson was appointed Chief of Counsel on the same day. At the founding of the United Nations in San Francisco on May 3, 1945, the American representatives submitted a draft trial proposal to the representatives from France, the Soviet Union, and the United Kingdom, who agreed to the proposal. Justice Jackson's interim report to the President in June of 1945, which outlined the charges of conspiracy, crimes against peace, war crimes, and crimes against humanity,[5] further clarified and publicized American policy. This position became the basis of the formal declaration of an international tribunal at the London Conference in late June and early August of 1945. The indictment of the German war criminals was served on October 6, 1945, and the Nuremberg trial began on November 20, 1945.[6]

The International Military Tribunal (IMT) ended on October 1, 1946. Nineteen of the twenty-two defendants were convicted, and 12 were sentenced to death. The remaining seven received prison sentences from 10 years to life. Furthermore, five organizations of the Nazi state were declared criminal by the IMT: the Nazi leadership corps, the SS, the SD, the SA, and the Gestapo.[7] American involvement in the Nuremberg process was not finished, however. In July of 1945 the Joint Chiefs of Staff issued JCS 1023/10 (Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offenses and Trial of Certain Offenders), which authorized the theater commander to "…identify, investigate, apprehend, and detain all persons whom (he/she) suspects to be criminals,"[8] in the American zone of occupation. Any person detained would be brought to trial at a later date through a trial system that would emerge from subsequent discussions. In November 1945 Brigadier General Telford Taylor was named the head of the Subsequent Proceedings Division of OCCPAC (SPD-OCCPAC).

JCS 1023/10 was the foundation for Control Council Law Number 10, which authorized the trial of individuals associated with organizations found to be criminal by the IMT, and was the "…jurisdictional foundation of all Nuernberg trials except the first."[9] Control Council Law No. 10 was reinforced by Executive Order No. 9679 in January 1946, which authorized the Subsequent Proceedings Division of OCCPAC to begin planning for the post-IMT American trials. When the International Military Tribunal ended in October of 1946, SPD-OCCPAC became the Office, Chief of Counsel for War Crimes (OCCWC). The process of screening documentary evidence, determining who should be tried on which charges, and creating the individual tribunals to try the defendants began in earnest.[10]

The Nuremberg Trials under Control Council Law No. 10 continued until 1949, when the JCS deactivated the OCCWC on June 20. The OCCWC indicted 185 defendants that spanned 12 trials under Law No. 10. Four prisoners committed suicide before their trial, and four were deemed unable to stand trial. Out of the 177 whom stood trial, 35 were acquitted and 142 were convicted. Twenty-four of those convicted were sentenced to death, twenty-two were sentenced to life imprisonment, and the remaining defendants were given prison sentences ranging from 5 to 25 years.

What did Nuremberg do? Countries still wage aggressive war, and war crimes and crimes against humanity are still committed by those who handed out judgement at Nuremberg. The "manifest failure" of the world to live up to the standards and judgements of Nuremberg make the IMT and the subsequent American Law No. 10 trials seem like an exception to the rule of international lawlessness.[11] The American commitment, our "political and moral investment," in all aspects of the Nuremberg process was extensive, more so than any of the other participating nations. Thus, the overall outcome of the trials was of critical importance for the United States.[12] Michael Marrus states that "the task here is less to judge than to understand in historical terms – and to do so with an eye to the values, characters, and circumstances of the time."[13] Marrus proposes three areas of evaluation: legal, political, and cultural or historical.

Legal criticisms of the Nuremberg trials can be roughly divided into two areas: objections to the decisions and sentences of the Tribunal, and objections to the law or existence of the Tribunal itself. The major objection to the decisions and sentences of the IMT concerns the application and interpretation of the charge of conspiracy.[14] Introduced in the formulation of American policy in late September 1944 by Murray Bernays, a military advisor to Henry Stimson, the charge of conspiracy accused the defendants of planning to wage aggressive war. This charge was the foundation for declaring Nazi organizations criminal and the subsequent Law No. 10 trials.[15] This distinctly American tactic was the base of the American prosecution's case, and was intended to be widely interpreted by the judges of the IMT in sentencing. However, the final judgement of the IMT severely restricted the application of the charge of conspiracy, which Stimson called the biggest flaw of Nuremberg.[16]

Immediately after the Tribunal there was widespread American dissatisfaction over the fact that defendants found guilty on counts one and two, conspiracy and crimes against peace (waging aggressive war), most noticeably Erich Raeder and Rudolf Hess, did not receive death sentences. However, Ernst Kaltenbrunner and Hans Frank, both convicted of war crimes (count three) and crimes against humanity (count four) but acquitted on count one and not even charged with count two were sentenced to die.[17] This contrasted sharply with the Tribunal's own judgement, which stated that "…to initiate a war of aggression is the supreme international crime, differing only from other war crimes in that it combines within itself the accumulated evil of the whole."[18] Likewise, the limited scope of conspiracy hurt the American Law No. 10 trials. Telford Taylor, the chief American prosecutor after the IMT, states that the majority of convictions came under the charges of war crimes and crimes against humanity. No one was convicted of conspiracy, and only five defendants out of 52 charged with crimes against peace were convicted. The charge of membership in a criminal organization also yielded relatively minor results: 74 defendants were convicted out of 87 charged, and the convictions did not lead to significant prison sentences.[19]

The condemnation of the IMT on the grounds that it had no legal jurisdiction or precedent in international law was widespread. Critics charged that the Nuremberg trials

were blatant examples of victor's justice, that they applied *ex post facto* law,[20] and that the trials violated German national sovereignty. Senator Robert Taft (R-OH) declared in Kenyon, OH that the total deterrent value of Nuremberg would be nil, because no potential aggressor expects to lose, so the prospect of a trial will create no fear.[21] Critics also attacked the American Law No. 10 Trials on the grounds that they violated the scope of international law set forth in the London Agreement, the basis for the IMT. Since the Law No. 10 Trials (apparently) punished defendants for crimes not codified in international law, critics charged that the Law No. 10 Trials were null and void under the principle of *nullum crimen nulla poena sine lege*. How did advocates and supporters of the Nuremberg process refute these charges?

In refuting the charge that the Nuremberg trial had no basis in international law, several solutions have been proposed. Franz Neuman introduces three theories concerning Germany's international legal position in 1949: 1) Germany was being governed under The Hague Convention law of belligerent occupation, 2) Germany was in a state of debellitato – Germany could not govern itself so the occupying powers were the sovereign authority in Germany. Thus, the IMT was actually a German court. And 3) "The law under which Germany is being governed is a new international constitutional law of intervention which authorizes a government to interfere in the domestic affairs of any other country in order to maintain or restore liberty and democracy."[22] Quincy Wright addresses the question of German sovereignty by stating that, under international law, "sovereign states… cannot be subjected to a foreign jurisdiction without their consent, but no such principle applies to individuals. The Nuremberg Tribunal did not exercise jurisdiction over Germany, but over certain German individuals accused of crimes."[23] The Nuremberg trials contributed widely to the scope of international law, and set precedents for later applications.

What role did American involvement play in this development of international law, and how did the American prosecution team respond to challenges that there was no justification for the Law No. 10 Trials or precise definition of the charges used? Telford Taylor compares the development of international law to the development of American common law. He asserts that there is no precise definition of the charges, for example of crimes against peace, because the necessary machinery for prosecuting crimes against peace, such as the IMT, is still in its infancy. "If we reject international law unless it is embodied in codes and statutes… we shall never find it at all, for it cannot exist in this form without a correspondingly highly developed world political organization. And it is, indeed, from the very process of enforcing law that political institutions develop."[24] Taylor states that, despite the fact that the British, French, and Soviets did not prosecute criminals in their respective zones of occupation, the American application of Law No. 10 illustrated that Nuremberg was a process based on judicial principles, not an episode spawned from momentary political forces. The fact that the IMT and the Law No. 10 Trials worked within the same framework, agreed upon by three other nations at the London Conference, helped to create a body of international law. Taylor calls this achievement the major contribution of the Nuremberg Trials.[25]

In the minds of most Americans, the legal debates and innovations that accompanied Nuremberg were not pressing issues. In the political sphere academic and legal concerns counted for little – public opinion and how people perceived the Nuremberg process was what mattered. To most Americans, Nuremberg was simply a means of dealing with the Nazis and the Third Reich.[26] William Bosch states that the American people have a habit of oversimplifying foreign affairs, and viewed the IMT as an instrument of achieving international peace. The trial demonstrated to the public that cooperation with the Soviets was possible at a time of increasing uncertainty concerning American-Soviet relations, and was generally supported by American public opinion.[27] Michael Marrus insists that much of the legal criticism of the IMT stemmed from the "failure to realize that the trial was really a political exercise,"[28] an American show of involvement in world affairs. The domestic political process that created that show was a complex interaction between inter-administration negotiating and foreign pressures which shaped American war crimes policy.

Circumstances dictated the United States war crimes policy. Bradley Smith claims that early American reluctance to formulate a coherent policy stemmed from administrative concerns over the German reaction against American prisoners of war if the United States announced an intention to punish German prisoners after the war.[29]

D-day and the Allied breakout from Normandy in July and August of 1944 forced debate to begin on the possibility of treatment of high-ranking German prisoners as the possibility of victory approached. The eventual formulation of Allied war crimes policy was not the result of inter-Allied negotiations at the Moscow and London Conferences – by then American policy was firmly established. The Allied war crimes policy was the result of internal American politics, such as the debate between Morgenthau and Stimson, which was then presented to the Allies to be agreed upon.[30]

In September of 1944, the President was leaning heavily in favor of the Morgenthau Plan for harsh retribution, as were the British who had favored summary execution all along. However in late September, the details of the Morgenthau Plan were leaked to the press and American public opinion swelled against the "inhumane and unrealistic" measures that it entailed. Faced with changing circumstances, Roosevelt backed away from the Morgenthau Plan and allowed Stimson and Bernays to present their constructive approach to occupation and a trial of major German offenders, using the charge of conspiracy. By early November the Conspiracy Plan had circulated the State, War, and Navy Departments, and had been approved "in principle."[31]

By this time the United Nations War Crimes Commission (UNWCC) had also begun debate on the issue of war crimes, and was nearing a vote that would endorse an international tribunal. American policy had not yet been formulated, and the American representative to the UNWCC was instructed to delay a vote until the American delegation could propose its own plan. The vote was delayed, and this set the tone for American participation in the United Nations after World War II: American policy must be adhered to.[32] Serious opposition to the Conspiracy Plan was also developing within the administration, particularly from the Joint Chiefs of Staff and the Judge Advocate General.

There was serious doubt "…whether any court could do a respectable job of adjudicating what were in reality the major historical issues in the life of Europe and much of the world during the period from 1933 to 1945."[33] Again, circumstances jumpstarted the debate on war crimes.

The December 17 1944 massacre of 70 American prisoners by a German Panzer unit at Malmédy during the Battle of the Bulge spurred American public opinion in favor of a coherent war crimes policy, and pressured the administration to adopt a plan. Many top officials adopted the Conspiracy Plan, and in January of 1945, over the opposition of the JCS and the JAG, the administration adopted a proposal calling for the establishment of a treaty court and full use of the Conspiracy Plan. The demand for a full treaty court was later dropped in favor of an international tribunal when planning for the Yalta Conference began. This shift in policy can be attributed to the shift in public opinion, which now viewed the Nazis as "…involved in a lawless conspiracy to commit war crimes by use of criminal organizations such as the SS."[34]

Despite pressure from the British, who were staunchly in favor of summary executions, the United States proceeded with the above policy when President Truman immediately approved the plan following Roosevelt's death, who had been hesitant to officially endorse it. The French and Soviets agreed to the American plan, leaving the British isolated in opinion. The result of the American domestic political process was the adoption of the American plan at the London Conference in August 1945, with virtually all American conditions intact. These conditions included the setting of the tribunal (Nuremberg over Soviet-occupied Berlin), the use of the charge of conspiracy, a concept unfamiliar to Continental law, and the use of the IMT to declare certain organizations criminal to facilitate prosecution of other individuals at a later date.[35] The IMT was truly an American creation.

American involvement at Nuremberg can also be viewed through the lens of foreign affairs. Nuremberg is often considered the last act of the Allied Coalition against Nazi Germany, and with the Cold War storm gathering many hoped Nuremberg would be a lesson on how to negotiate with the Soviets in international affairs. Nuremberg seemed to justify the international affairs strategy of achieving international peace and concord by working together on concrete, limited problems.[36] Proper documentation and publication of Nuremberg related articles, transcripts, and opinions in Germany, moreover, was intended to provide a means of re-democratizing Germany, which was the political reason for the occupation itself.[37] Policy makers also used the judgements at Nuremberg as justification for their beliefs. Evaluating the charge of aggressive war handed down by the IMT, in 1948 John Foster Dulles defined "indirect aggression," as subverting the internal structure of another country, with or without the use of force. Dulles then used the Nuremberg judgement to declare that international movements such as communism were aggressors, and should be fought and punished.[38]

Michael Marrus states that "Nuremberg has been a voice for history,"[39] and makes the argument that this is the greatest legacy of Nuremberg. The incredible amount of

documentary evidence produced, and more importantly published, by the governments of the nations involved, particularly the American government, has dramatically increased present understanding of the nature of the Third Reich and German Nazism. The mass of documents collected at the trial provides an objective record of the proceedings, and "if we really believe we are capable of preventing such catastrophes in the future we had better ensure that we have as objective an evaluation as possible of what went so wrong in the past."[40] Similarly Telford Taylor advocated the full and immediate publication of relevant portions of the official transcript, due to "heavy (American) moral investment," for the purpose of "…(promoting) the interest of historical truth and to aid in the reestablishment of democracy in Germany."[41]

Marrus' statement, however, seems to ignore some of the most fundamental contributions of the Nuremberg process. The creation of the concept of crimes against humanity, the recognition of the concept of personal responsibility in the area of international crimes,[42] and the contribution to international law all seem to overshadow the historical contribution of Nuremberg. Judged according to Marrus' criterion, Nuremberg would seem to be a failure, because international aggression and other catastrophes still occur today. If documentation of the outcome and causes of World War II was so important, why were the records of the Tokyo Trials of major Japanese war criminals unpublished for 29 years?[43] Certainly our cultural and historical understanding of the circumstances surrounding Nazi Germany and World War II have been deepened by the Nuremberg process, and the world owes a huge debt to the IMT. However, other outcomes of the trial experience must be given priority to understand the full impact of Nuremberg.

What, then, are the significant outcomes of Nuremberg? The basis for a system of international penal law was established and agreed upon by the major powers of the post-war world, which ensured that the principle at least would remain intact. A constructive plan for the rehabilitation of Germany emerged, of which the trial was a part, which promoted a more integrated Europe and perhaps quickened the economic recovery of the war torn continent. Although the precedent was not always adhered to, the United States and the Soviet Union were able to negotiate with each other successfully and arrive at a result that was mutually beneficial to both. Most importantly, though, the United States recognized its position in the post-war world, and took an active role in its formation. Unlike the aftermath of World War I, the most powerful and stable nation in the post-war world worked to create an international structure to replace the old that had been destroyed, not simply retreating into isolationism. To a degree domestic politics and international politics were integrated by the Nuremberg experience. Although at times, the American representatives were seen as domineering and overly insistent on getting their way, the tone was set for full-fledged American participation in international affairs in the post-war world, and America's rise to power in it. Nuremberg is a microcosm of this experience, and deserves to be studied in detail.

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