Introduction

On 9 December 1946, 23 defendants sat in the main courtroom of Nuremberg's Palace of Justice. Most were doctors, such as Karl Brandt, Hitler's personal physician, and Waldemar Hoven, the chief doctor at Buchenwald. Some had been high-ranking Nazi officials, like Viktor Brack, the Chief Administrative Officer in the Reich Chancellery. All stood accused of horrific crimes, as Brigadier General Telford Taylor, the chief prosecutor, explained to the three-judge bench:

> The defendants in this case are charged with murders, tortures, and other atrocities committed in the name of medical science. The victims of these crimes are numbered in the hundreds of thousands. A handful only are still alive; a few of the survivors will appear in this courtroom. But most of these miserable victims were slaughtered outright or died in the course of the tortures to which they were subjected.
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> . . .
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> The charges against these defendants are brought in the name of the United States of America. They are being tried by a court of American judges. The responsibilities thus imposed upon the representatives of the United States, prosecutors and judges alike, are grave and unusual. They are owed not only to the victims, and to the parents and children of the victims, that just punishment be imposed on the guilty, and not only to the defendants, that they be accorded a fair hearing and decision. Such responsibilities are the ordinary burden of any tribunal. Far wider are the duties which we must fulfill here.
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> These larger obligations run to the peoples and races on whom the scourge of these crimes was laid. The mere punishment of the defendants, or even of thousands of others equally guilty, can never redress the terrible injuries which the Nazis visited on these unfortunate peoples. For them it is far more important that these incredible events be established by clear and public proof, so that no one can ever doubt that they were fact and not fable, and that this Court, as the agent of the United States and as the voice of humanity, stamp these acts, and the ideas which engendered them, as barbarous and criminal.[1]

Thus began the *Medical* case, the first of 12 trials held by the United States in the Palace of Justice, many in the same courtroom that had witnessed the IMT trial. Over the next 28 months, the Nuremberg Military Tribunals[2] (NMTs) tried 177

[1] *Medical*, Prosecution Opening Argument, I *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, 27 (1949) (hereinafter "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 15-volume official record of the trial. See Telford Taylor, *Final Report to the Secretary of the Army on*

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 who escaped the gallows, 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.

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In his final report on the NMT trials, submitted to the Secretary of the Army in August 1949, Telford 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 of those were written by the judges,[5] prosecutors,[6] and defense attorneys[7] who participated in them. The scholarly literature, in turn, has focused almost without exception[8] on individual trials[9] and specific legal issues.[10] Indeed, only two general studies of the trials have ever been written: Telford 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*.

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

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).

[11] August von Knieriem, *The Nuremberg Trials* (1959).

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 conception[13]—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 conclusion that international law permitted the morale bombings of civilians, even with atomic weapons, and the *Hostage* tribunal's holding 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* and 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*).

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 to 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

[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).

[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.

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 did 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 war[18] 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 12 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. 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*.

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There is, in short, a significant need for a comprehensive jurisprudential and historical analysis of the NMT trials. This book attempts to provide that analysis. First, in terms of jurisprudence, it seeks to explain how the tribunals as a whole

[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, 681–2 (1999).
[21] See Chapter 3.
[22] Genocide is discussed in Chapter 10.

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 study had existed a few years ago, the court might have reached a very different conclusion.

The second goal of the book is to place the trials in their historical context. While the trials were being planned, Churchill gave his "Iron Curtain" speech, the United States 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.

The history of the trials, in short, is the (early) 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 were 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

[23] 582 F.3d 244, 259 (2nd 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/> (accessed 12 January 2011).

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]

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The book 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 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 book, provides a synopsis of each of the 12 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 book 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 the rules 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 book 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

[26] Diarmuid Jeffreys, *Hell's Cartel: IG Farben and the Making of Hitler's War Machine* 347 (2008).

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 book 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.

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