

# Introduction: The Legacy of Nuremberg

*Beth A. Griech-Poelle*

On October 6–7, 2006, the Graduate Program in Policy History of Bowling Green State University in Bowling Green, Ohio, welcomed social scientists and legal experts to a conference entitled, “The Nuremberg Trial and Its Policy Consequences Today.”<sup>1</sup> The conference, marking the sixtieth anniversary of the International Military Tribunal proceedings, featured leading authorities on the Nuremberg Trials, as well as sessions which engaged in examining the historical meaning of Nuremberg and its implications for today’s world. Without the dedication and limitless energy of Professor Don K. Rowney, the international conference might never have come to fruition. The volume’s second edition presented here continues to reflect the scholarly commitment to confronting the meaning of justice, just as the original edition did.

By the close of the Second World War, the most destructive conflict in human history, there was a pervasive feeling that Nazi Germany’s wartime behavior was so unprecedented and so horrifying that the war could not conclude without some form of criminal punishment. News of the atrocities had already reached media outlets across the world beginning in 1942, and by the time Allied troops reached Berlin, it had been decided that an international trial composed of the four major Allied powers (the United States, Great Britain, France, and the Soviet Union) would take place in the southern German city of Nuremberg. The location was both practical and symbolic: symbolically, the Nazi regime had met annually at Nuremberg to showcase the “best” of National Socialism; practically, Nuremberg was one of the few cities to retain its courthouse after so much aerial bombardment. So Nuremberg, it was determined, would be the location for a trial of “major war criminals.”

How were alleged war criminals to be brought to justice? For many of the Allied leaders this was a perplexing question. Many leaders referenced

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1 The title of this volume, *The Nuremberg War Crimes Trial and Its Policy Consequences Today*, was adopted because, though perhaps technically not altogether correct, it seems to reflect more accurately the general public’s consciousness that more than one person was tried at Nuremberg.

the treatment of Napoleon Bonaparte after his defeat at the Battle of Waterloo in 1815, while still others reflected on the attempt to hold war crimes trials following World War I. What certainly helped Allied leaders in a post-World War II world was an agreement signed in 1928, the Kellogg-Briand Pact (also called the Briand-Kellogg Pact), in which recourse to war was condemned and, in essence, made illegal. This pact was signed by fifteen countries, including Germany, and formed at least a part of the basis for the trials at Nuremberg. In the words of Henry L. Stimson, U.S. Secretary of War, "War between nations was renounced by the signatories of the Briand-Kellogg Pact. This means that it has become illegal throughout practically the entire world."<sup>2</sup> However, saying that there should be a tribunal and actually establishing one that worked would prove to be two different things for the victorious Allied Powers.

Various plans and competing visions were proposed as to how a tribunal should proceed, and all types of conflicts emerged regarding how the Allies would work together. It was ultimately the impact of the new President of the United States, Harry S. Truman, that swung the pendulum in favor of the American policy of establishing an international military tribunal (as opposed to a civilian one) composed of one representative of each of the four powers. Each power was immediately to begin collecting evidence which would then be presented to the IMT. It was also proposed that Nazi organizations be placed on trial rather than individuals, so that anyone who had willingly joined the organization would be guilty of a war crime if the organization was proven guilty. As the Americans forcefully pursued this vision of a tribunal, their determination eventually convinced the British, the French, and the Soviets to accept their plan.

Once the four powers had worked through a series of negotiations on the general plan for prosecution, a formal indictment was signed on October 6, 1945. Setting the pace for all of the Allied team was the Chief Prosecutor for the United States, Robert H. Jackson. However, Jackson immediately encountered a very different attitude on the part of the Soviet jurists. To them the Nazi leaders were already guilty, and the tribunal's chief task would be to determine each individual person's level of guilt and what their punishment should be, whereas to Jackson and to the other Western delegations, the trial's outcome was not going to be a foregone conclusion—that is, actual cases had to be built and proven to establish guilt. Once the many hurdles were overcome, the Allied Powers signed an agreement for a

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2 Henry L. Stimson, "The Pact of Paris: Three Years of Development," *Foreign Affairs* 11 (1932), Special Supplement, iv.

trial. Attached to the agreement was a charter which was to function as the governing tool of the International Military Tribunal, and included in this charter was Article 6, which laid out crimes against peace, war crimes, and crimes against humanity as crimes falling within the jurisdiction of the IMT and for which there would be individual responsibility.

For most of us, the photographs from Nuremberg reveal a courtroom, overwhelmingly grave, overcrowded with judges, defendants, lawyers, translators, reporters, and American guards all set about with headsets, wires, and all types of translating equipment, but it is the remembrances of Henry T. King, a member of Justice Jackson's team, that captures the electricity of the moment. In his preface here, King recalls the current of idealism that pulsated through the proceedings, largely due to Justice Jackson's belief that this tribunal represented a break with the past. Jackson, like so many others present, thought that they would be setting new benchmarks for all people's behavior by replacing the law of force with the force of law. In Jackson's opening statement of November 21, 1945, he made clear the difficulty in meting out justice in such a situation:

Unfortunately, the nature of these crimes is such that both prosecution and judgment must be by victor nations over vanquished foes. The worldwide scope of the aggressions carried out by these men has left but few real neutrals. Either the victors must judge the vanquished or we must leave the defeated to judge themselves. After the first World War, we learned the futility of the latter course. The former high station of these defendants, the notoriety of their acts, and the adaptability of their conduct to provoke retaliation make it hard to distinguish between the demand for a just and measured retribution, and the unthinking cry for vengeance which arises from the anguish of war. It is our task, so far as humanely possible, to draw the line between the two. We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspiration to do justice.<sup>3</sup>

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3 *International Military Tribunal, Trial of the Major War Criminals before the International Military Tribunal, 14 November 1945 – 1 October 1946*, 42 vols. (Nuremberg: International Military Tribunal, 1947), 2:104–105.

This volume explores both the immediate, short-term effects of the IMT at Nuremberg and the present-day impact that the trials have had on the field of international law. It seeks to examine how the legacy of the Nuremberg Trials has been implemented in subsequent trials and how it has impacted international tribunals today. The spirit which permeates this volume is similar to that at Nuremberg as expressed by Henry T. King, the notion that a “better and more peaceful world based on justice is within our grasp.”<sup>4</sup> Accompanying this desire for a just world is the idea that we as scholars must debate, discuss, and work to establish some rule of law in a dangerous and violent world. In January 1947 Henry L. Stimson, from the State Department, remarked on the legacy of the Nuremberg Trials:

International law is still limited by international politics, and we must not pretend that either can live and grow without the other. But in the judgment of Nuremberg there is affirmed the central principle of peace—that the man who makes or plans to make aggressive war is a criminal. A standard has been raised to which Americans, at least, must repair; for it is only as this standard is accepted, supported, and enforced that we can move onward to a world of law and peace.<sup>5</sup>

Section I opens with Marina Sorokina’s explication of how evidence was collected by Soviet academicians and researchers long before the war had come to an end and how their research was used by the prosecution team at Nuremberg. Her examination of newly available Soviet archival material reveals the myth-making machinery of the Stalinist regime and threatens to challenge the “accepted” history of the Soviet Extraordinary Commission for the Investigation of Nazi War Crimes. Sorokina’s essay is followed by Christoph Safferling’s examination of the German public’s attitude before and during the historical Nuremberg Trials, the role that German defense attorneys played there, and the many reservations and obstacles that had to be overcome by the legal experts.

Moving forward in time, Michael S. Bryant’s essay addresses the issue of how Germans were placed in control of prosecuting Nazi war crimes in French-occupied Baden from 1946 to 1951. Once the Nazi government was defeated, the Allies temporarily closed all ordinary German courts and then reopened them with limited jurisdiction. Allied Control Council Law No. 10 allowed these courts to exercise jurisdiction over crimes against hu-

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4 See Henry T. King, Jr., “Preface: The Spirit of Nuremberg—Idealism”, *The Nuremberg War Crimes Trial and Its Policy Consequences Today* (Baden-Baden: Nomos, 2009), 11.

5 Henry L. Stimson, “Nuremberg: Landmark in Law,” *Foreign Affairs* 25 (1947), 189.

manity when both the perpetrators and the victims were German nationals or “stateless persons.” Bryant observes that German prosecutors enjoyed distinct advantages in trying National Socialist crimes under Control Council Law No. 10 that were denied them under conventional German criminal law.

Winfried Garscha’s research examines how in the postwar world Austrians came to define crimes against humanity as violations of human dignity, making such a charge a punishable offense under Austrian law. In this case the War Criminals Act redefined violations of human dignity, as well as assault and battery, as severe crimes which could be punished under certain circumstances if they had been committed in the interests of the Nazi regime. Garscha explores the intent and the judicial reality of the new Austrian laws in comparison with the prosecution of Nazi atrocities by Allied and German courts.

James Burnham Sedgwick’s article provides yet another contrast with Allied and German courts through his examination of the International Military Tribunal for the Far East 1946–1948, more commonly known as the Tokyo Trial. Sedgwick argues that, taken together, Tokyo and Nuremberg attempted to establish a legal framework to end future wars, but fitting the Tokyo proceedings into the Nuremberg legacy is filled with incongruities: “Japan was not Germany; Tojo was no Hitler.”<sup>6</sup> The limitations exposed by the Tokyo Trial underscore the need for flexibility and justice, and by examining the flaws that emerged out of Tokyo, future international tribunals can hopefully avoid these mistakes.

The final essay of Section I, by Roger Citron, examines the influence of the Nuremberg Trials on American legal thought, specifically on the decline of legal realism, the revival of natural law, and the development of legal process thought. Citron’s work discusses how all of these jurisprudential developments were related to and reflected the debate over the question of the legitimacy of the Nuremberg Trials.

Section II of the volume includes several essays addressing problems that have emerged since the Nuremberg Trials and the establishment of the International Criminal Court. Aaron Fichtelberg’s work delves into the objection of “selective justice,” which has been a common complaint since the Nuremberg Trials, the idea being that only a few people are punished while others are left either unmolested or are prosecuted in lesser

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6 See James Burnham Sedgwick, “Brother, Black Sheep, or Bastard? Situating the Tokyo War Crimes Trial in the Nuremberg Legacy 1946-1948,” *The Nuremberg War Crimes Trial and Its Policy Consequences Today* (Baden-Baden: Nomos, 2009), 63.

courts and receive a lesser punishment. This objection emerged at Nuremberg and resurfaced again in the former Yugoslavia and Rwanda. Fichtelberg argues that a limited form of selective justice based on ethical principles of distributive justice in the international tribunal context is an unavoidable aspect of modern international criminal justice.

Dan Plesch and Leah Owen explore the other major institution of wartime and postwar international criminal justice, the United Nations War Crimes Commission (UNWCC). Plesch and Owen demonstrate how the UNWCC developed alongside that of both the Nuremberg Trials and the Tokyo Trial. The UNWCC indeed provided many of the documents and dossiers used in the Nuremberg Trials. The UNWCC, instead of trying all cases reported to it, aimed to strengthen the existing legal systems in member states. Plesch and Owen argue that the example set by the UNWCC as innovative in its approach to the implementation of positive complementarity could serve as a model for the international criminal justice system of today.

Tazreena Sajjad's article examines the impact of both the Nuremberg and Tokyo Trial's roles in strengthening the regulations against wartime rape and sexual violence. In particular, Sajjad pays special attention to the development of legal jurisprudence of such crimes as instruments of genocide. The essay analyzes the legacy of the trials in laying the groundwork for the ad hoc tribunals of the 1990s and the creation of the International Criminal Court. The article reveals the lack of gender consciousness at both Nuremberg and Tokyo, which resulted in a failure to prosecute rape and sexual violence as war crimes and crimes against humanity. This lack of awareness, Sajjad asserts, continues to play a role in obstructing these crimes in the ICC as acts of genocide.

Judith Haran's essay, as the 75<sup>th</sup> anniversary of the beginning of the Nuremberg Trials approaches (in 2020), delves into the current status of the evidence collected to document the crimes of Nazi Germany. Most scholars are well aware of the sixty-seven volumes published by the U.S. government at the end of the trial, however, these volumes contain only a small fraction of the trial records. Haran explains the origins of the collection of the documentation, the attempt to find a place for 100 tons of research documentation in the postwar world, and how very little has actually been written about the documents themselves (not their content). Apart from the National Archives in the United States, only Harvard Law School is known to have the nearly complete set of trial records and Harvard has been working on making these documents easily available through the creation of a database and there is still a possibility that other repositories

could be linked to the Harvard Law School sight, making future research easier for scholars.

Section II concludes with an essay by Rex A. Childers which brings the current ICC standards of combat to the grim reality of U.S. soldiers on the ground trying to abide by international regulations. Using existing U.S. military training and leadership manuals, theater Standard Operating Procedures (SOP), and Rules of Engagement (ROE) guidelines, and following the Judge Advocate General's Operational Law Handbook, Childers examines current practices of the military with regard to internationally identified criminal acts and the ICC's inherent ability to affect the U.S. ground soldier under current U.S. military law practices.

It is with great pleasure that I have the opportunity to thank the many people and programs that made this revised edition possible. First and foremost, my thanks go back to the original conference hosted by Bowling Green State University in Bowling Green, Ohio. Professor Don K. Rowney, who conceived the idea and chaired the program committee, was unstinting in his commitment to seeing this project come to fruition. Countless other faculty and graduate students, including the conference executive administrator, Christi Bartman, all poured their enthusiasm into making the conference a success.

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