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International Precedent or Victor's Justice

INTRODUCTION:

Telford Taylor states, "Nuremberg is a name which conjures up the moral and legal issues raised by applying judicial methods and decisions to challenged wartime acts" ("The Nuremberg War Crimes Trials" 23). The Nuremberg Trials have established a precedent for international law since their post World War II creation. Yet, these Trials and the Charter on which they rely for justification and legitimacy are extremely biased. Instead of creating a fair and just legal code for international law there has in its place emerged a sense of victor's justice. This has further been applied to contemporary conditions, so as to continue the vicious cycle of illegality, as seen in Guantanamo Bay and the current War in Iraq.

The Nuremberg Trials were not the first attempts taken to enforce some form of international law over sovereign nations. World War I, a not so distant past to the victors, left in its wake a set of legal standards, which implemented a system of ethics on the subscribing individual states. The League of Nations, the Treaty of Versailles, and the Kellogg-Briand Pact of 1928, attempted, though poorly, to employ this international code of conduct in order to prevent another world war from occurring. The Kellogg-Briand Pact was an international treaty for the renunciation of war as an instrument of national policy and was signed by forty-four nations, including all of the Great Powers with the exception of the Soviet Union (Taylor, *Anatomy of the Nuremberg Trials* 20). Yet, the largest failures of these policies came from their

lack of enforcement. President Woodrow Wilson was the mastermind behind the League, but the U.S. Senate, practicing isolationist foreign policy, refused to allow American participation in the international body. Although the United States was not the powerhouse that it came to be in the aftermath of World War II, the League still needed U.S. support in order to create enforceable policies. The Italian-Ethiopian War in 1935, where Italy invaded the smaller country of Ethiopia to test its military prowess was a prime example of the League's inactive nature in preventing acts of aggression (Smith *The Road to Nuremberg* 88-89). Hitler's takeover of the Rhineland and the Sudetenland were other examples of the League's "appeasement" policies, which resulted in the continual undermining of its authority. Ultimately, the major players in the association like Great Britain and France were too weak to stop the ascent of fascist dictators like Hitler and Mussolini, leading to Hitler's mobilization of the German war machine and the eventual outbreak of World War II. Thus the Allied nations entered the Nuremberg Trials with two distinct outcomes in mind: to implement and successfully enforce a new international code of conduct and to provide a sense of retribution for the embittered war they had just fought.

HISTORICAL CONTEXT IN 1945:

In the wake of World War II the historical context was ripe for the victorious nations to legitimize violations of national sovereignty with their establishment of a controversial document. Although World War I was the first "modern war", World War II was the first "total war". It brought with it further advances in military technology, which led to an even greater number of casualties. But what was so devastating about WWII was the damage suffered by the civilian population. Countries like Great Britain, the United States, Germany and Japan began targeting civilian populations through military tactics such as strategic bombing, in order to bring down the morale of the enemy. The British Air Ministry sent a directive to the Royal Air Force

Bomber Command on 14 February 1942, which stated their principal method of waging war was through strategic bombing. The document said, “It has been decided that the primary object of your operations should now be focused on the morale of the civilian population and in particular of industrial workers” (McMillan 56). With this new aspect of war the civilian population suffered, as it never had before. Furthermore, this combined with the destruction that the war brought to the European countryside; the economic and political instability of European countries; and the war-weariness that the global community felt after having endured two major world wars in a span of thirty years created major public unrest. These things also aided in instigating the creation of the Nuremberg Trials.

The London Conference in June of 1945 was where the International Military Tribunal Charter, the central legal document, which outlined the codes of international law for the Nuremberg Trials was created. The conference was made up of diplomats from the United States, Great Britain, the Soviet Union, and France. Three of those countries were very familiar with the decline of the League of Nations, the catastrophe of the Treaty of Versailles, and the failure of the Kellogg-Briand Pact. Both the League and the Treaty suffered slow and painful deaths, with Hitler and Mussolini carefully undermining their authority and ultimately overthrowing their intended power. These realities created a heightened sense of fear and revenge in the victorious nations, which they took with them to the London Conference. The Allies thought that another diplomatic failure would result in the outbreak of World War III, something they refused to see happen. Hence the failures of these policies weighed heavily in the minds of those responsible for establishing the Charter and trying the Nazi war criminals at Nuremberg.

The diplomats participating in the Conference were presented with a very difficult task. They were first asked to decide what was to be done about the captured Nazi war criminals. Three possibilities were put before them: release, summary punishment, or trial (Marrus “Why Nuremberg Resonates 60 Years Later” 1). Ultimately trial was decided upon and the Allies had to create some legal system to serve as a basis for the trial. That therefore led to the creation of the Charter, which became the centerpiece of judgment for deciding the guilt or innocence of the Nazi war criminals during the Nuremberg Trials.

INHERENT CONTROVERSY IN THE CHARTER:

Unfortunately, the Charter was riddled with controversy. All the judges, prosecutors, rules of evidence, and the Statute of the Tribunal were from the major injured parties (McMillan 134). This went against the basic rules of international arbitration and their demand for neutral judges as cited by the Permanent Court of International Justice at The Hague (Marrus *The Nuremberg War Crimes Trial* 120). The fact that the laws, which top German officials were being tried for, were not in existence at the time of their breaking became a harping point for the defense. According to the traditional legal principle of division of powers, how could citizens of a sovereign nation be tried, by an international court, for laws that were not in existence at the time of their commission? Or the reality that Germany was not invited to partake in any diplomatic negotiations prior to or at the creation of the Charter is another aspect that undermined its legitimacy. That the individuals who created the Charter were the same who actively participated in the prosecution of the Trial: Justice Robert H. Jackson (American prosecuting attorney), Robert Falco (French alternate judge in Nuremberg), and I. Nikitchenko (Russian member of the IMT) (Marrus, *The Nuremberg War Crimes Trial* 34). As Marrus argues, “Ever since the French Revolution it had been regarded as a ‘sacred’ principle that, if

legislators, prosecutors and judges were the same people, this constituted a gross violation of guarantees for the rights of the individual” (34). Nuremberg was so divisive because it went against things that had been regarded as ‘sacred’ principles, precedents since the beginning of national sovereignty.

The IMT Charter became the centerpiece of judgment for deciding the guilt or innocence of the Nazi war criminals. It revolved around three key pieces of evidence cited as “war crimes”, which were used as indictments against the defendants. They were:

“(a) **Crimes Against Peace:** Namely, planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties...

(b). **War Crimes:** violations of the laws or customs of war...murder, ill-treatment, or deportation to slave labor or for any other purpose, of civilian population, prisoners of war, killing of hostages, plunder of public or private property, wanton destruction of cities towns, or villages, or destruction not justified by military necessity...

(c). **Crimes Against Humanity:** murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.” (McMillan 26).

Yet, in drafting the document, the Allies overlooked, that they too were guilty of their own enumerated war crimes. Moreover, the hypocrisy of the Trials somewhat invalidated the international precedent which the victors intended to establish. As Brian K. Feltman points out in his article, *Legitimizing Justice: The American Press and the International Military Tribunal, 1945-1946*, “The trial of the major German war criminals uncovered information that the Allies would have preferred remain unrevealed” (311). The instances of strategic bombing, the secret nonaggression pact that the Soviet Union signed with Germany in 1939 for the partition of Poland, and the Soviet Union’s mistreatment of prisoners of war as well as their own soldiers

and citizens all were used by the defense to undermine the legality of the proceedings. The Charter established an international precedent, but the legality of the precedent remained controversial due to its various instances of Allied guilt.

ALLIED WAR CRIMES:

The most blatant violation was the Allied use of strategic bombing on civilians during World War II. Strategic bombing was a direct violation of “war crimes” in that it was “wanton destruction of cities, towns or villages” as well as “murder or ill treatment of the civilian population”. Mark McMillan describes strategic bombing as, “the deliberate destruction of entire districts...directed against the morale of the civilian population” (56). The Allied bombing on Dresden in February of 1945 inflicted somewhere “in the region of 80,000 fatal casualties” the majority of whom were refugees from the east, fleeing from the advancing Russians (McMillan 57). The Royal Air Force’s bombing on Hamburg in July of 1943 killed 40,000 civilians and left another 900,000 homeless (McMillan 56). This can be compared to the German bombing on Rotterdam, which rendered fewer than 900 deaths (McMillan 57). To further understand the brutality of Allied bombings, Martin Middlebrook quotes a survivor, Anna Lie Schmidt, in his book, *The Battle of Hamburg*, she states:

“Women and children were so charred as to be unrecognizable. Those that had died through lack of oxygen were half-charred and unrecognizable. The brains tumbled from their burst temples and their insides from the soft parts under the ribs. The smallest children lay like fried eels on the pavement. Even in death they showed signs of how they must have suffered --- their hands and arms outstretched as to protect them from that pitiless heat” (57).

More interesting is that Neville Chamberlain, British Prime Minister, said in 1939 that, “His Majesty’s Government will never resort to the deliberate attack on women, children and other civilians for the purpose of mere terrorism.” (McMillan 58). Yet, four years later and they are engaging in massive destruction of civilian populations. The Allies were never brought to trial

for their violations of the Charter, yet they still were able to dispel justice to those whom they deemed “guilty”.

Another area of Allied hypocrisy centered on the Soviet Union’s crimes against humanity. Prisoners of war were malnourished, tortured, and forced to work in Soviet prisons. Their violation of the charge concerning persecutions “on military or religious grounds” is seen in that they “specified missionary religious work” and acts of subordination as treasonous offenses and punishable by death (McMillan 59). The air of suspicion continued after the war for Red soldiers who were prisoners of war while fighting for their country. Once they were returned to the Soviet Union, the Party suspected them of divulging Soviet secrets or committing subversive acts and many were sent to work camps in the Urals, where some froze and starved to death (Smith, *Reaching Judgment at Nuremberg* 126).

A further deficiency was that the “defense was restricted to using purely German material” (Marrus, *The Nuremberg War Crimes Trial* 249). This meant that foreign archives remained strictly barred from the legal proceedings and that the trial was creating a relatively one-sided argument (Marrus, *The Nuremberg War Crimes Trial* 249). Most importantly due to this fact was that the skeleton in the closet of the Trial, the Nazi-Soviet Non-Aggression Pact of 1939, was remaining “overlooked” by the Allies. Yet, during the trial, it was suggested, by the defense, that the Russians might have been accomplices in the Nazis’ conspiracy against the Poles in September 1939 (Marrus, *The Nuremberg War Crimes Trial* 133). Joachim von Ribbentrop, former Nazi foreign minister who oversaw the diplomatic negotiations of the Pact, revealed the Soviets’ eager involvement in the attack of Poland and their “aggressive ambitions...on the eve of the war” (Marrus, *The Nuremberg War Crimes Trial* 133). This testimony proved to be quite detrimental to the legality of the Soviet’s prosecution.

The United States, through Executive Order #9066, infringed upon the civil liberties of Japanese Americans, on the West Coast, during World War II. The federal government sent American citizens of Japanese ancestry to internment camps because they were suspected of being spies for Japan. There was such a state of paranoia by U.S. citizens, that magazines like *Life*, began running articles like, “How to Tell Japs from the Chinese”, which focused on all of the anatomical differences between the two ethnicities as well as fostering an “othering” effect. Yet, many of the citizens interned had been born in the United States and only knew America as their homeland. The families of soldiers fighting for their country were being sent to these camps. And Japanese-American citizens were disgraced and persecuted merely due to their ethnicity.

The precedent overlooked the war crimes committed by victorious nations precisely because members of those victor nations were implementing it. It allowed the injustice to continue as Soviets tortured prisoners of war as well as their own citizens, British killed and uprooted hundreds of thousands of civilians and Americans violated their own citizens’ civil rights. Therefore, the Charter created a standard, but because that standard was not uniformly enforced, it undermined the legality of precedent and further allowed war crimes to be perpetrated by the victorious nations.

CONTEMPORARY EXAMPLES OF WAR CRIMES:

The current War in Iraq and the treatment of prisoners in Guantanamo Bay are both examples of contemporary war crimes being committed by the United States. The War in Iraq is a direct violation of the Charter’s “Crimes against Peace”. In that it is the “planning, preparation, initiation or waging a war of aggression...” But, the United States has not only committed a war crime. They have also created social and political upheaval through the belief that a U.S.

“puppet” regime in Iraq is going to instill democracy in a culture that does not want it nor believe in it. All they have done is to create more chaos through the power vacuum that they have implemented.

The policy has also had an effect on the civilian population in the United States. Similar to the racial profiling, of Japanese Americans, after the bombing of Pearl Harbor on December 7, 1941, Middle Eastern Americans have been ostracized and persecuted against. Racial profiling in airports exists; even though the federal government pays lip-service to the fact that America does not foster racism. The Patriot Act, which universally, violated all citizens’ civil liberties, allows the government with more access into citizens’ private lives than ever before. Similar to “red-baiting” in the 1950s, during the Cold War, these witch hunts are not only breaches in our sovereign nation but also against the international community.

Guantanamo Bay provides one more example of the Charter’s current controversial characteristics. It also furthers the argument that this legal code was a victor’s creation, in which those triumphant nations are immune to international justice. Guantanamo is a prison off the coast of Cuba where severe violations are being committed. American citizens and non-citizens suspect of being terrorist operatives are sent to this detention camp. Here, these prisoners are tortured for information, receive no fair standard of trial, and serve elongated sentences for suspicious fears. Although the United States has received some political responses to their actions in Guantanamo from the international community, they have not been tried for their violations of the Charter, nor is it expected that they will be.

In summary, the construction of the IMT Charter for the Nuremberg Trials has created a cycle of heated debate for international precedent, still ongoing today. The improper structure of the document’s formation allowed for a victor’s justice to emerge. The fact that it went against

the standards of international law, which had been respected since the French Revolution and instead espoused a biased paradigm led to controversy, which has yet to be rectified. The Iraq War and Guantanamo Bay, being contemporary examples of how the argument of a victor's justice is still in existence, show how the Charter has not fashioned a more globally unified world and how it has not established impartial rules for judgment of warfare. It has instead led to a weak international body, materialized in the form of the United Nations, which is unable to control strong sovereign states. Therefore, what this Charter has fostered is not international peace but instead superpower world domination.

CONCLUSION:

The Allies sought to create an international code that could stand the test of time in 1945. As Justice Robert Jackson stated during the London Conference, "If certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us" (Taylor, "The Nuremberg Trials" 499-500). Although, this sentiment is noted, the ensuing document created at that conference led to a whirlwind of controversy, still circulating today. The London Charter, the legal document created to dispel justice, was peppered with hypocrisy. Hence the legality of the International Military Tribunal, established to determine the guilt or innocence of the Nazi war criminals, was also formed in a state of retribution. The Allies, particularly, the French, British and Soviets felt a strong desire to make Germany pay for the damages of the Second World War. Their people had suffered the brunt of German attacks and the European countryside was left in tatters after seven years of bitter warfare. Yet, their haste in instilling justice created illegality and controversy when it was applied in an international courtroom. The Nuremberg Trials

overlooked many Allied crimes like: strategic bombing, the Nazi-Soviet Non-Aggression Pact, the Soviets treatment of their prisoners of war, and the United States' practice of Japanese Internment.

Therefore, the London Charter, created out of the ashes of World War II, led to an international precedent as originally intended. But, the precedent created was enacted in a controversial manner and that discrepancy remains in existence to this day. The Charter produced a victor's justice, where legality ruled as long as one was on the victorious side. It turned a blind eye to dominant nations' infractions of international code and allowed them hypocritically to dispel justice on lesser sovereign states. The War in Iraq and the United States detainment camp in Guantanamo Bay are current examples of how this sense victor's justice has created an international precedent in our society. It's unfortunate because the conception of the policy was not necessarily unsuccessful. Where the policy failed was its enactment. The Allies intended to pick up where Wilson's League of Nations had disintegrated, but their sense of revenge overtook their belief in an enduring international legal code and led to a victor's justice.

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