I. The Soviet Role in the International Military Tribunal Trial

The nation first to announce their preference for a judicial process for the crimes of the Nazis was the Soviet Union. This was in 1944, even before the war ended, and was in opposition to the Americans, who at that time were favoring the plan of U.S. Treasury Secretary Henry Morgenthau Jr. The so-called Morgenthau-Plan aimed for the total denazification of Germany and severe economic reparations to make Germany into a weak agricultural state. As for individual criminal responsibility, “Morgenthau’s eye-for-an-eye proposal suggested summarily shooting many prominent Nazi leaders at the time of capture and banishing others to far off corners of the world. Under Morgenthau’s plan, German POWs would be forced to rebuild Europe.”¹ The British also were not keen on setting up a court to judge the Nazis. Winston Churchill likewise favored execution by firing squad of the major Nazi war criminals.² Of course, the Soviet understanding of the concept of judicial process was quite different than its meaning in the West. To the Soviets, the judicial proceedings—which they wanted to hold in Berlin—were going to be “show trials” of the kind they were quite used to under Joseph Stalin. In fact, Major General I.T. Nikitchenko, the judge appointed by the Soviet Union to the IMT, had earlier presided over some of the most notorious of Stalin’s show trials during the purges of 1936-1938. Nikitchenko publicly pronounced his view that all of the defendants were guilty even prior to the start of the IMT proceedings:

“We are dealing here with the chief war criminals who have already been convicted and whose conviction has been already announced by both the Moscow and Crimea [referring to Yalta] declarations by the heads of the governments.... The whole idea is to secure quick and just punishment for the crime.”³

He then famously added: “If... the judge is supposed to be impartial [at Nuremberg], it would only lead to unnecessary delays.”⁴

When it came time to render judgment, Nikitchenko dissented against the three acquittals issued by the other three judges, and also argued that Rudolf Hess, the great enemy of the Soviet Union for his effort to create a separate peace with the British when he parachuted into England and was captured there, should also receive a death sentence. Nikitchenko also resisted French efforts to have the judgment against the defendants receiving a death sentence to be carried out by a firing squad—considered the more honorable way to die—than death by hanging, reserved for common criminals.⁵

² As Linder explains, “Churchill reportedly told Stalin that he favored execution of captured Nazi leaders. Stalin answered, ‘In the Soviet Union, we never execute anyone without a trial.’ Churchill agreed saying, ‘Of course, of course. We shall give them a trial first.’” Linder, Id.
⁴ Id. Nikitchenko’s views were also rooted in a different understanding of the role that a judge plays in a criminal proceeding. The Soviet legal system was modeled on Continental Europe’s view of criminal procedure. As Conot explains, “Unlike procedure in Anglo-American law, where the prosecutor and defense counsel are adversaries, with the judge sitting as arbiter, in continental law[,] prosecutor, defense counsel and judge are all charged with the task of arriving at the truth. Thus, Nikitchenko did not really understand what Jackson meant when he emphasized that the judges must be independent and impartial....” Conot, supra, 18.
⁵ Goering, in his suicide note, explained the importance of this distinction. “I would have had no objection to being shot. However, I will not facilitate execution of Germany’s Reichsmarshall by hanging! For the sake of Germany, I cannot permit this.” Linden, supra.
The Soviet Union played an active role in the London Conference, in which Britain, France, the United States, together with the U.S.S.R. in 1945 mapped out their plan to establish the IMT. The Soviets played a major role not only in drafting the procedural rules of the tribunal, but also in defining the legal theories under which the defendants would ultimately be tried. For example, the notions of criminal organizations "proved a major bone of contention from the start." The Soviets maintained that the IMT should focus on the leaders and members of the Nazi organizations, with the authority to rule after each case whether the entire organization -- for example, the Gestapo -- constituted a criminal enterprise. This procedural move would thereby "eliminate the need to prove the criminality of the organization in each subsequent case of prosecution of a member of the organization." In the end, the Soviet position prevailed, and became an important prosecutorial tool during the trial. Additionally, the Soviets were responsible for the clause in the London Charter stating that the IMT "may require to be informed of the nature of any evidence before it is offered so that it may rule on the relevance thereof." Moreover, the Soviets directed that the tribunal take judicial notice of facts of common knowledge instead of requiring their proof. They also attempted to have the judges agree -- not always successfully, though -- to take judicial notice of, among other things, the evidence propounded by committees established by the allies for the investigation of war crimes (such as the Soviet Extraordinary State Commission, discussed below).

The Soviets and the Americans agreed that the tribunal need not be bound by the technical rules of evidence, allowing for introduction of any evidence considered to have probative value. In addition, the Soviets and Americans wholeheartedly agreed that waging an aggressive war constituted an international crime deserving of sanctions. Moreover, the Soviet terminology eventually used in the indictment, that of "crimes against peace", prevailed over the then-existing draft by the United States of "crimes of war." The Soviet insistence on the aforementioned terms of the IMT was not intended to cause conflict between the Soviets and the three other prosecuting nations, but was meant to encourage a "court drama that would lay bare all the evilness of the Nazi system by detailing in public the criminal career of its leading personages".

One of the criticisms made of the IMT trial is that the accusers were also victims of the Nazis and acted as prosecutors, judges and executioners. Therefore, the argument runs, the defendants could not and did not obtain a fair trial. The general proposition that the victims (and here also the victors) cannot also be the adjudicators of guilt, while superficially appealing, is not correct. As Professor A.L. Goodheart of Oxford explained soon after the conclusion of the trials in an article entitled "The Legality of the Nuremberg Trials",

"Attractive as this argument may sound in theory, it ignores the fact that it runs counter to the administration of law in every country. If it were true, then no spy could be given a legal trial, because his case is always heard by judges representing the enemy country. Yet no one has ever argued that in such cases it was necessary to call on neutral judges. The prisoner has the right to demand that his judges shall be fair, but not that they shall be neutral. As Lord Witt has pointed out, the same principle

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7 Id. at 98.
8 Id.
9 Id.
10 Id.
11 Id. at 102.
12 Id.
13 Id. at 103.
14 Id. at 104.
15 Id. at 105.
16 Id. at 107. Indeed, it has also been argued that Soviet judge Nikitchenko raised objections to several American proposals in order to display "Moscow's determination not to serve as a rubber stamp." Arie Kochavi, Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment (Chapel Hill and London: University of North Carolina Press, 1998), 240.
is applicable to ordinary criminal law because 'a burglar cannot complain that he is being tried by a jury of honest citizens.'

The same argument was made by Adolf Eichmann, who argued that it would be unfair for him to be adjudged by a Jewish judge. The three-judge Israeli court rejected the argument. As explained by Presiding Judge Moshe Landau,

"Will the memory of the Holocaust prevent the judges from carrying out their considered intention to conduct a fair trial? No...[W]e shall have no difficulty adhering to the guarantees given all defendants under our criminal code, to be considered innocent until proven guilty and to be judged solely according to evidence presented before the court....The judge, in his capacity as adjudicator, does not cease to be a creature of flesh and blood, with feelings and urges[,] but he is required by law to control them. We shall abide by this requirement."  

It is clear from Nikitenko’s statements quoted above that he did not abide by this proposition as a judge at the IMT. Of course, this is not surprising, since the Soviet view of trials was not of a proceeding before finders of fact who aim to put their prejudices aside and decide culpability solely on the basis of facts presented to them. If the remaining three judges were also Soviet, or followed Nikitenko’s view, it is likely that today the legacy of Nuremberg would be quite poor.

The Soviet aim to make Nuremberg a “show trial” by putting forth mounds of evidence of Nazi atrocities, especially those committed after the Nazi invasion of the Soviet Union, ironically had the effect of making the Nuremberg proceedings more legally effective. The chief Soviet prosecutor R. A. Rudenko and his staff were in many ways the most prepared prosecuting team of the four Allied prosecutorial teams. Moreover, the Soviet presentation of their case through extensive documentary evidence played a critical role in the thorough documentation of Nazi crimes and the exposure to the world of the brutality of the Nazi regime. Rudenko offered vast amounts of paper evidence to support the counts of conspiracy and crimes against peace. Such evidence included not only the official documents of the defendants and their associates, but also transcripts of speeches at congresses and Reichstag sessions, books, maps, private correspondence, diaries, and memoirs. Rudenko also presented material proof such as written depositions and statements of victims and witnesses, including those of the Germans. The Soviets “claimed credit for convincing their partners not to build the proceedings around documentary evidence alone”, for the offering of live evidence would produce “a dramatic effect on the atmosphere in the court-room”.

Much of the Soviet evidence came from the work of their “Extraordinary State Commission for Ascertaining and Investigating Crimes Perpetrated by the German-Fascist Invaders and their Accomplices”. Created in November 1942, its task was to

"...keep complete records of the vile crimes perpetrated by the Germans and their accomplices and the damage inflicted by them on Soviet citizens and the socialist state; establish wherever possible the identity of the German-Fascist criminals guilty of the organization or execution of the crimes in occupied Soviet territories, so that they might be handed over to the courts for severe punishment; [and] unify and coordinate the work already performed by Soviet state organs in this area."

Among the detailed and massive work performed by the Commission was inspection of graves and corpses, gathering of witness accounts, forensic examinations, and interrogations of captured Germans. The records contained “the most complete description possible of the crimes committed, the full name and place of residence of the individuals furnishing the evidence”, and “all the relevant

19 Ginsburgs, supra, p. 111.
20 Id.
21 Id. at 112.
22 Id.
23 Id. at 37-8.
24 Id. at 39.
documents" such as minutes of the interrogations, medical expert conclusions, German documents, and films. The Commission's extraordinary efforts resulted in an impressive list of "hundreds of Germans, from generals to humble privates", and a "specific and detailed enumeration of the crimes of which they stood accused". These records proved indispensable at the IMT.

The Soviets also had the earliest experience in trying Nazis. In Kharkov in December 1943, the Soviets conducted the first domestic trial of Germans accused of atrocities. The defendants consisted of a military intelligence captain, an SS lieutenant, a police private, and a Russian collaborator who chauffeured the Kharkov Gestapo. The Soviet prosecution in the Kharkov trial invoked the theme of collective complicity in that the atrocities committed by the defendants were "links in a long chain of crimes...committed by the German invaders on the direct instructions of the German Government and of the Supreme Command of the German Army." The Kharkov indictment "sounded vaguely like a medium for indicting a criminal gang and so anticipated the novel concept of 'criminal organization' later consecrated in the Charter of the Nuremberg Tribunal". The Kharkov defendants admitted that the orders for atrocities for which they stood accused "emanated from the German government". In its closing argument, the prosecution de-legitimized the defense of superior orders and "insisted that the accused be personally and individually held to account for their actions".

At the same time, the prosecution did not hesitate to take advantage of the plea of respondeat superior in order to "trace the responsibility to the men at the top of the Nazi pyramid", thus again emphasizing the notion of collective responsibility for the German atrocities. Thus, the importance of domestic war crimes trials such as the Kharkov trial lies not only in their bringing of Nazi war criminals to justice, but also their effect, as put by Professor George Ginsburgs, of "point[ing] the way toward the grand finale at Nuremberg".

Last, the Soviet evidence at the IMT did not focus only on crimes against its own citizens. In total, the evidence presented by the Soviets

"...recorded the systematic execution by firing squads, torture, and abuse of Soviet, Polish, French, and English prisoners of war, the extermination and enslavement of peaceful population in "death camps" and in Jewish ghettos, the senseless destruction of towns and villages, the plunder of both public and private property, as well as historical and cultural treasures in Yugoslavia, Poland, Greece, and the U.S.S.R."

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25 Id.
26 Id. at 40.
27 Id. In addition, in July 1943, the Soviets prosecuted eleven Soviet citizens for treason and collaboration with the German authorities in what came to be known as the Krasnodar trials. These trials, because they were based upon the Soviet Criminal Code, were inapplicable to and thus could not serve as a judicial precedent for any subsequent proceedings against the Gestapo or German army. Still, they reinforced the notion that "responsibility...ultimately attached to the German government and High Command", and that the "atrocities were lengthy and convincingly depicted as an integral part of a total and premeditated plan basic to the whole Fascist way of life". George Ginsburgs, "The Nuremberg Trial: Background," in George Ginsburgs & V.N. Kudriavtsev, The Nuremberg Trial and International Law, 5 (Leiden, Netherlands: Martinus Nijhoff Publishers, 1990), 19-21.

Furthermore, the Krasnodar trials, in addition to the Kharkov trials, were the "first judicial record of cases on the crimes and criminal responsibility of the Hitlerites which served as the original introduction to the Nuremberg Trial, paving the way for the application and effectuation of many norms and principles which later constituted the basis of Nuremberg law." The evidence presented at the Krasnodar trials revealed that tens of thousands of peaceful Soviets were killed or tortured by the Germans, including many children, the elderly, women, prisoners of war, and all patients in hospitals. I.A. Lediakh, "The Application of the Nuremberg Principles by Other Military Tribunals and National Courts," in Ginsburgs & Kudriavtsev supra, 263-4.

28 Ginsburgs, Moscow's Road to Nuremberg, supra, 52.
29 Id.
30 Id. at 53.
31 Id. at 53.
32 Id. at 54.
33 Id.
34 Id. at 56.
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II. Tu Quoque: The Crimes Committed by the Soviet Union During World War II Under the IMT Charter

The criticisms made of the IMT trial that the accusers and adjudicators were also victims must be distinguished from another criticism: that the Allied Powers judging the individual German defendants at the dock also committed some of the same crimes for which the German defendants were being charged.

First on the list, of course, was the Soviet Union. It seems obvious that the Soviet Union also committed the crime of waging an aggressive war, its leaders – foremost Joseph Stalin – could be considered conspirators in that crime, and that the Soviets during the war committed both war crimes and crimes against humanity. At the same time, it must be remembered that the Soviets – among the Allies – were not only the greatest perpetrators of the crimes enumerated in the IMT Charter but also were the greatest victims of Nazi atrocities. Twenty million Soviet civilians and eight million Soviet soldiers perished at the hands of the Nazis.36

A. Crimes Against Peace: The German-Soviet Non-Aggression Pact and Soviet Conquest of the Baltic Republics and Eastern Poland

At the outbreak of World War II in September 1939, the official position of the U.S.S.R. was that of neutrality.37 Just a few weeks earlier, on August 23, 1939, the U.S.S.R. signed a treaty of non-aggression with Germany. This pact contained a secret additional protocol38 wherein in exchange for agreeing not to join the future war, Germany promised the Soviets the Baltic states of Lithuania, Estonia, and Latvia. By signing the non-aggression pact with Germany and including the secret provisions, Stalin and his cohorts actively collaborated with the Nazis in Germany’s invasion of Poland on September 1, 1939. On September 17, 1939, despite their “neutral” status, the Soviets marched into Eastern Poland, with the explanation of protecting the “ethnic brothers of [their] Ukrainian and White Russian populations”.39 As Bradley Smith explains,

"[I]f the Nuremberg prosecutors were correct that there was conspiracy in the planning of aggression against Poland in 1939, then Stalin was one of the parties to the conspiracy."40

Indeed, the “most troublesome problem” facing the Nuremberg judges was that:

"Stalin’s signature on the Nazi-Soviet Pact had left Hitler free to move against Poland. Once the secret clauses of that pact appeared in evidence, even in summary form, it was difficult to avoid the conclusion that Stalin, like some of the defendants in the dock, had continued to “cooperate” with Hitler after he knew of the Nazi attack plans. If this kind of conduct would earn defendants such as Wilhelm Frick prison sentences or death, what was the Court to say about the actions of the Soviet Union?"41

As put by another author, if the participants at Nuremberg believed the “‘rape of Poland’ to be an international crime ‘then there follows an irrefutable implication that Soviet Russia and its officials were particeps criminis.’”42

36 During the course of the IMT trial, the Soviets failed to recognize that the largest proportion of those murdered by the Nazis in their territory were Jews. Rather, these Jewish murders were noted by the Soviet prosecutors as murders of Soviet citizens.
37 Ginsburgs, supra, 129.
38 Id.
39 Ginsburgs, supra, 142.
41 Id. at 147.
42 William Bosch, Judgment on Nuremberg: American Attitudes Toward the Major German War-Crime Trials (Durham, N.C: University of North Carolina Press, 1970) p.44. Alfred Seidl, attorney for Rudolf Hess, was most insistent in raising this argument during the course of the IMT proceedings. As Conot explains, “By revealing to the world that Germany and the Soviet Union had agreed to divide Eastern Europe between them in 1939, Seidl aimed to blow Count One, the Conspiracy to Wage Aggressive War, right out of the trial: For if there had been a conspiracy, then one of the conspirators, the Soviet Union, was in violation of all legal standards, participating in the prosecution and the judging of the
B. War Crimes and Crimes Against Humanity: The Katyn Massacre

One of the most embarrassing events at the IMT was the attempt by the Soviets to pin the massacre of 15,000 Polish officers, a proportion of whose bodies were discovered by the Germans in 1942 at the Katyn Forest near Smolensk, upon Germany. In the course of the IMT proceedings, Soviet assistant prosecutor Y.V. Porkovsky brazenly asserted, "One of the most important criminal acts for which the major war criminals are responsible was the mass execution of Polish prisoners of war shot in the Katyn forest near Smolensk by the German fascist invaders."[43] The United States and the United Kingdom refused to support the charge, and Justice Jackson, the American prosecutor, tried, but was unsuccessful, in convincing the Soviets to drop the Katyn matter. Unable to dissuade the Soviet prosecutors, the Soviets were given the opportunity to go forward and prove German culpability. This proved to be a disaster for the Soviets. German defense lawyers had a field day with this accusation by mounting an effective defense. As Conot explains, "Katyn consequently had become an albatross hung around their own neck by the Russians...."[44] After much embarrassment, the Soviet prosecutors eventually agreed to drop the Katyn incident from the proceedings, and there is no mention of Katyn in the Nuremberg final judgments.

In 1990, Soviet President Mikhail Gorbachev acknowledged that the Soviets were indeed the ones who carried out the massacre, under the direct orders of Stalin.[45] While one scholar commented that, technically, "the killing of Polish officers...at Katyn and elsewhere on Soviet soil would not qualify as a war crime or even a crime against humanity on the Nuremberg model,"[46] he admits that the massacre would "still leave the Stalin regime guilty of...the common crime of mass murder, notwithstanding today's preference...for calling the case a war crime". Thus, although the Katyn episode "raised few side questions" at Nuremberg, it succeeded in demonstrating that the "Nazis might not have a monopoly on atrocities."[47]

III. The Legal and Moral Implications of the Soviet Role as Prosecutors at Nuremberg

The culpability of the Soviet Union in committing similar offenses, and worse, its complicity in the commission of some of the crimes charged, arguably de-legitimizes the authority of the IMT to "judge and condemn their fellow criminals and accomplices."[48]

From a purely legal point of view, however, any accusations of crimes committed by the Allies during World War II could not be adjudged by the IMT tribunal. The London Charter, issued on August 8, 1945, specifically pronounced that the proceedings were restricted to the "trial and punishment of the major war criminals of the European Axis countries." If Stalin was a major war criminal, Nuremberg was not the place where his crimes would be adjudged. As Linder explains, "The indictments against the defendants would prohibit defenses based on superior orders, as well as tu quoque (the "so-did-you") defense. Delegates [to the London Conference] were determined not to let the defendants and their German lawyers turn the trial into one that would expose questionable war conduct by Allied forces."[49]
When the German defense attorneys attempted during the course of the IMT trial to introduce the behavior of the Soviet Union as a defense to their clients' actions, Soviet prosecutor Rudenko correctly objected: “We are examining the matter of the crimes of the major German war criminals. We are not investigating the foreign policies of other states.” Moreover, in any trial the adjudicators need not be completely innocent to be able to fairly judge the accused. William Shakespeare, in his play Measure for Measure, pointed out this reality: “The jury, passing on the prisoner's life, /May in the sworn twelve have a thief or two/ Guiltier than him they try.”

Benjamin Ferencz, the chief prosecutor in the Einsatzgruppen trial at the subsequent Nuremberg zonal trials, similarly countered this argument in a Court TV interview on the Nuremberg Trials, by noting that the individuals defendants were on trial for the acts they themselves committed, and their “You too” or “You also” argument bears no relevance on their individual guilt or innocence for such acts. From a moral or ethical point of view, the Tu Quoque [You Also/You Too] argument is also not recognized as a valid excuse. As the Encyclopedia of Fallacies explains,

"[Tu Quoque] is a fallacy regardless of whether you really did it or not. . . . For example, when one is arguing "Jack is a murderer", Jack's defendant says "You're a murderer too". The response is only blaming the claimer for the same thing he/she did as well. This doesn't refute the fact that Jack is a murderer, but only draws away the attention by involving another person." As with children, therefore, the cry of “Everyone else is doing it,” should have no consequence.

IV. Conclusion

The Soviet Union's suitability to play prosecutor and judge at Nuremberg understandably diminishes the legacy of the IMT. The secret collaborations with Germany makes the Soviets appear more as accomplices to some of Germany's crimes than the neutral bystanders or pure victims they held themselves out to be. In addition, the Soviets themselves were guilty of direct perpetration of atrocities not only against their "enemies", but also against their own people.

Nevertheless, the Soviets did not play a passive role in the development of the trials. Because of the enormity of the atrocities committed on Soviet soil by the Germans, the Soviets had a legitimate stake in the outcome of the trial of the perpetrators, and in that sense, were no different from the other prosecuting teams who were also directly impacted by the war. Indeed, Soviet contributions to the trials were numerous; from their scrupulous gathering of evidence, to the precedents set by their domestic trials of war criminals, to their substantial hand in the drafting of the London Charter, and to their presentation of the records of massive Nazi atrocities on Soviet and foreign soil alike. Such contributions cannot be underestimated and lends credence to the legitimacy of the trials as a whole.

50 Conot, supra, 421.
51 William Shakespeare, Measure for Measure, Act II, Scene 1.
Die Rolle der Sowjetunion vor dem Internationalen Militärtribunal in Nürnberg

Michael J. Bazyler

Die Rolle der Sowjetunion vor dem Internationalen Militärtribunal in Nürnberg


Trotz dieser von den Sowjets begangenen Völkerstraftaten schwindet die Legitimität des IMT insgesamt nicht, wenn auch die moralische Autorität des IMT darunter leidet. Das Verfahren gegen die deutschen Hauptkriegsverbrecher ist rechtlich weder der Ort noch der Zeitpunkt, um gleichartige Verbrechen der Gegenseite vorzutragen oder gar die Angeklagten zu entlasten.