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The International Military Tribunal at Nuremberg: British Perspectives

Sixty years after the International Military Tribunal in Nuremberg (IMT) sat in judgment on the surviving leaders of Nazi Germany its proceedings still cast a shadow over history. Since 1946 it has informed the ways in which diplomats, politicians and lawyers have attempted to reckon with war crimes, atrocity, and the mass violation of human rights. However, it was not self-evident that the IMT should have attained the salience it commands today. Nor has it necessarily served well as a beacon to jurisprudence, policy makers or public opinion.

In the public mind the IMT has been sanctified by time. It exercised an almost magical effect on the debates that raged during the 1990s when politicians approached the question of retribution for crimes of war and peace in such varied contexts as South Africa, the former Yugoslavia, Rwanda, and Iraq. Rather suddenly, the IMT became the point of reference and urgent precedent. It was even given the Hollywood treatment in a major TV movie starring Alec Baldwin as Justice Robert Jackson.

This veneration hardly reflected its dubious origins, shaky legal foundation, controversial modus operandi, and highly equivocal results. In the post-war decade the judicial process for which the IMT formed the keystone was treated as something of an embarrassment. Time and effort was expended undoing the work of the subsequent trials, exercising pardons on those who had been convicted, reducing penal sentences, and placating West German opinion that had never accepted their validity. Thanks to the Cold War the narrow application of justice against Nazi war crimes perpetrators, in particular, and the broader application of the international law developed for the IMT atrophied.

In the light of this nemesis the British, who had never been keen on the trial of Nazi malefactors, could have been excused a feeling of smug self-satisfaction. Writing in 1996, Lord Annan, who had served as an officer in the Political Branch of the British element of the Control Commission, evoked the cautious pragmatism that governed Whitehall in all matters concerning de-Nazification. While making the ritual comment that “Die-hard Nazis, of course, should be removed, and if guilty of crimes put on trial” he did not conceal his scorn for those who had been prepared to pay a heavy price in real terms for the application of an abstract notion of justice.

The success and failure of the IMT and the larger Nuremberg process can thus be observed with advantage through the optic of the British experience. Britain had fended off occupation during the war, but was the host to the governments-in-exile of less fortunate countries. When it came to deliberating on war crimes, debate in Whitehall was uncontaminated by the problems connected with defeat and collaboration. Britain was at the heart of policy making towards the treatment of Nazi war crimes and the Nazi elite. British jurists, notably Sir Hartley Shawcross, Sir David Maxwell-Fyfe, Sir Geoffrey Robertson, and Geoffrey Robertson,

1 From the extensive literature tracing the impact of the IMT see Geoffrey Robertson, Crimes Against Humanity. The Struggle for Global Justice (London: Allen Lane, 1999), Howard Ball, Prosecuting War Crimes and Genocide. The Twentieth Century Experience (Lawrence: University of Kansas Press, 1999); and Phillipe Sands ed., From Nuremberg to the Hague (Cambridge: Cambridge University Press, 2003).


4 See Robertson Crimes Against Humanity, 236-44 for one lament. Whitney R Harris, Tyranny On Trial. The Trial of the Major German War Criminals At the End of World War II At Nuremberg. Germany, 1943-1946 (Dallas: Southern Methodist University Press, 1999 edn. [first published in 1954]), 571-78, expresses the early hopes, disappointment, and ultimate triumph of an American participant in the IMT who held a candle for the creation of a permanent international criminal court.

Lawrence and Justice Norman Birkett played a leading part in the proceedings. The response of the British public to the work of the IMT exemplifies its contemporary impact.

Although Britain’s role in the prosecution of the major Nazi war criminals is now celebrated in British memory of the war and its aftermath, it was never a foregone conclusion that Britain would support such trials. From 1939 to 1942 the Foreign Office [FO] was adamantly opposed to any form of judicial retribution against either the civil or military echelons in Germany except in the case of war crimes, as conventionally defined, and committed only against British and Allied nationals.6

In the first half of the war, pressure for a pledge to try German war criminals came from the governments-in-exile that were established in London. The Poles, Czechs, and French, especially, were in regular receipt of intelligence recording depredations against their civilian populations. The victims of Nazi occupation included Jews, although their specific experience featured only intermittently in the reports of the exile regimes. In the course of 1942, however, the deportation and mass murder of the Jews across Europe climbed the agenda of the governments-in-exile. Specific appeals were now also made by the representatives of Jewish organisations in London and Washington who sought a pledge of Allied retribution in the hope of dissuading the Nazis from following the policy of extermination.7

However, such requests met a chilly response. The FO had bad institutional memories of war crimes trials. Officials were haunted by the farcical experience of the trials conducted by the Germans in Leipzig after the Great War (1914-18). The failure to apprehend the fugitive Kaiser, despite assurances given to a vengeful public who wanted him hung, added to the memory of embarrassment. In April 1940, when the Polish Government-in-Exile pressed London for a declaration in favour of trials against Germans responsible for perpetrating atrocities in occupied Poland, Sir Alexander Cadogan, Permanent Under Secretary of State at the Foreign Office, remarked in a withering understatement that similar pronouncements “had led us into a certain amount of trouble after the last war.”

The Foreign Secretary, Anthony Eden, was wholly in agreement with his officials. During 1941, he effectively countered those in the War Cabinet, notably Hugh Dalton, who sympathised with the aspirations of the exiled governments. Eden had more difficulty coping with his effusive Prime Minister. In a speech in June 1941, shortly after the German invasion of the Soviet Union, Churchill said that the Allies would bring “quislings” to justice if no one in their own countries was willing to do so. Four months later, he publicly associated himself with a statement by Franklin D Roosevelt, the American President, promising “retribution” for acts such as the shooting of hostages. Nevertheless, Churchill always avoided any specific commitments. Sir Orme Sargent, Deputy Undersecretary of State at the FO, commented in a memorandum, that the government “must at all costs avoid saying anything which would commit us to the policy of making lists of war criminals for subsequent trial.” Consequently, the British Government declined to be a signatory to a declaration by the combined governments-in-exile on 13 January 1942 promising legal punishment of those guilty of war crimes.9

It became harder to hold the line during 1942. In response to the inter-allied declaration, Eden solicited a view of war crimes policy from the government’s law officers. On 19 April 1942, the Attorney General Sir Donald Somervell and the Solicitor General Sir David Maxwell Fyfe, recommended that the UK Government should adhere to existing international law, seek the prosecution of war crimes only, and exclusively when committed against British and Allied nationals, and use

military tribunals for the purpose. This policy would forbid consideration of acts before 1939 and, crucially, exclude crimes perpetrated by the Germans against their own nationals and stateless persons.\(^{10}\)

Yet it was precisely crimes of this nature that bulked increasingly large. When Churchill and Roosevelt met in Washington in June 1942 they were both under pressure from the exiled governments and public opinion in their own countries to respond to atrocities such as the Lidice massacre. Meanwhile, information about the systematic mass murder of the Jews accumulated and by the autumn the scepticism of British officials regarding this information was overcome. However, at this stage of the war the British had another reason for inaction. The Germans now held many thousand British POWs. The Foreign Office and, critically, the War Office and the army, feared that threats of retribution would lead the Nazis to use POWs as hostages or even retaliate against them.\(^{11}\)

During the summer of 1942, Whitehall looked for a policy that would enable Churchill to satisfy those calling for action. Eden favoured administrative justice against the top political and military leadership and quick trials, in situ, of middle and lower level perpetrators. Provision for such measures should be written into the armistice agreement with the vanquished enemy. The government's law officers, led by Lord Simon, the Lord Chancellor, disagreed. It would be wrong, they argued, to try those who followed orders while those who gave them were summarily treated. The War Office was content with the punishment of war crimes, as traditionally defined, but this would exclude proceedings against the civil echelon and would not easily cover atrocities carried out for religious, racial or political motives. In order to appear to be doing something and in a genuine search for a device to break the deadlock, on 6 July 1942 the War Cabinet agreed to promote a UN commission for the investigation of war crimes. A Cabinet Committee on the Treatment of War Criminals was set up and this, in turn, invited the governments-in-exile to appoint representatives to the UN body.\(^{12}\)

London provided the base for the UN war crimes commission, inaugurated on 20 October 1943. Its initial mission was to collect information on alleged war crimes, the names of perpetrators, and to report this data to the seventeen member states. The USSR, which felt snubbed and wanted trials during the war, refused to participate. The United States was less than keen, either. In English eyes this was no bad thing. According to Arieh Kochavi, “The FO viewed the establishment of the commission largely as a means of neutralising calls for acts of retribution against the Germans and of creating the impression that the war crimes issue was being handled.”\(^{13}\)

Contrary to the view propounded in the 1970s by John Fox, that the Allies were responding in earnest to the mounting evidence of crimes against the Jews, it is more likely that the creation of the commission was merely coincidental with the evolution of the Allied statement on the extermination of the Jews that eventuated on 17 December 1942.\(^{14}\)

The FO rejected all efforts by Jewish organisations to achieve recognition that the Jews were suffering from a specific onslaught or that the Allies should empower themselves to try Germans and their collaborators for crimes against their own nationals or crimes against stateless persons carried out on German territory. The negative response of FO officials is sometimes attributed to actual or latent anti-Semitism, but the demand that the Allies should try Germans for crimes committed against their own nationals or against stateless persons on Axis territory was to seek something unprecedented and, indeed, taboo.\(^{15}\) Furthermore, it could feed Nazi paranoia about Jewish influence in the Allied capitals and incite a reaction. This is, put charitably, what Frank Roberts, at the FO Central Department, meant when he said that it “seems to me unnecessary to irritate him [Hitler] more than is necessary,
particularly on the Jewish issue." In any case, as Kochavi maintains, "Knowledge of the massacre of European Jews had an insignificant effect on either British or American officials who dealt with the issue of Axis crimes."\(^\text{16}\)

As often happens in international bureaucracies with a remit over a conflicted area of policy, the UN war crimes commission experienced "mission creep". Under the guidance of Cecil Hurst, the British delegate and Herbert Pell, from the US, it went much further than Whitehall had intended. Hurst and Pell initiated a debate over the definition of war crimes, seeking to extend the commission's scope to include offences committed on a religious, racial or political basis. They further innovated by coming up with a category of "waging aggressive war". And they sought to invest the UN with jurisdiction over such offences committed by Germans from the humblest to the highest rank.\(^\text{17}\)

In the long term, this was valuable work. But in the short term it set the commission on a collision course with both Downing Street and the White House. As far as Churchill and Roosevelt were concerned the fate of any surviving Nazi leaders would lie in their hands and they would not be tied by any judicial process. The Moscow Declaration of 1 November 1943, to which they and Stalin were signatories, promised retribution against Germans responsible for "atrocities, massacres and executions" (it is notable how restrictive the categories were: they did not include forced labour, expulsion etc). But it specifically excluded the "major war criminals whose offences have no particular geographical location and who will be punished by a joint decision of the Government of the Allies."\(^\text{18}\)

Churchill and Roosevelt notoriously concurred that the best policy with regard to the leading Nazis was summary execution. At the same time as the UN war crimes commission was drawing up lists of war criminals for prosecution, Churchill was ordering his law officers to provide a roster of "outlaws" whose culpability was held to be beyond any doubt, who would be shot by the military after a commission of inquiry had established their identity. In fact, by June 1944 British policy had reached an impasse. Churchill and Eden favoured quick executive action against the Nazi leadership, Like Victor Cavendish-Bentinck, head of the Joint Intelligence Committee, they deplored the idea that men like Hitler and Göring should be allowed to defend themselves before a court and the bar of international public opinion in the course of a protracted legal process. However, the FO was wary of summary justice, could not produce a list of candidates for execution, and was sensitive to what other arms of government thought about such a proposal. The War Office [WO] and the army, for example, were appalled at the notion that members of the German general staff might be shot like dogs once their identity was known. As a compromise, the FO and WO suggested passing these hot potatoes to the UN.\(^\text{19}\)

In the autumn of 1944, Churchill and Roosevelt were forced to draw back from their drastic, not to say vengeful and savage, policy. Their volte-face is usually attributed to a combination of Stalin's rather surprising insistence on trials and the outcry against the vindictive Morgenthau plan for post-war Germany. However, their thinking was also influenced by the nagging fear about the fate of Allied POWs. Thousands of additional British and US airmen were now in German captivity as a result of the intensification of the air war in 1943-44. Goebbels routinely referred to the actions of the RAF and USAAF as "terror bombing" and airman who bailed out over Germany were at risk of lynching until they were taken into custody. Even then, as they showed in the treatment of the escapees from Stalag Luft III, the Germans demonstrated a willingness to massacre Allied POWs on the flimsiest of pretexts.\(^\text{20}\)


\(^{17}\) Kochavi, *Prelude To Nuremberg*, 92-103.


\(^{19}\) Kochavi, *Prelude To Nuremberg*, 73-76.

By early 1945, the British did not have a comprehensive policy on the treatment of German war criminals. Churchill and Eden had been checked. But there was no obvious alternative after the Foreign Office had successfully undermined the UN war crimes commission. While FO officials publicly decried the tardiness of the commission, in private, Sir William Malkin, the FO legal adviser, along with Denis Allan of the FO, assembled a compelling armoury of reasons why the commission was over-reaching itself. The commission had suggested an international court to try German war criminals, but this was an objectionable form of "universal retrospective justice". It would take so long to set up and operate such a court that the victims of Nazi persecution would resort to their own means. Which legal system would it use, anyway? And who would it try if the major war criminals were to be excluded? They preferred to leave the thorny matter of crimes by Germans against German nationals and stateless persons in Germany to German courts, a notion that the Lord Chancellor could see was full of holes. But the law officers had fared no better. Lord Simon had attempted to introduce into Parliament a War Crimes Bill to enable the prosecution of Germans for the most narrowly defined offences, but he was stymied by the War Cabinet which feared German retaliation.\(^{21}\)

Such a situation could not continue. By March 1945 it was clear that German military resistance was collapsing. In April the first concentration camps in western Germany were overrun, leading to publicity that generated an enormous head of steam for justice or revenge against the perpetrators. To some extent London was saved by the advent of the Americans with the first comprehensive plan for dealing with German war criminals. But it also implemented its own preparations for a limited war crimes trial programme.

In November 1943, following the Moscow Declaration, the War Cabinet resolved that war crimes, in the strict sense of the term, committed against British nationals between September 1939 and the end of hostilities, should be tried by military courts under a Royal Warrant. On 14 June 1945, the terms of the Royal Warrant were published. By focussing narrowly on war crimes and limiting jurisdiction to Allied nationals, the British essentially abdicated responsibility for the nightmarish problem of holding Germans to account for a European-wide genocide, the epicentre of which was the former territory of Greater Germany, that involved the systematic murder of German nationals by their own government and the deportation of persons for religious and racial reasons from Axis states to other Axis territory for the purpose of murdering them there or abusing them.\(^{22}\)

Here was the crux of the problem as the British saw it. Precisely because Nazi crimes were unprecedented there was no legal mechanism for coping with them. The traditional category of war crimes evidently excluded crimes committed before September 1939, could not encompass acts against German or Axis nationals, and did not fit many of the atrocities perpetrated by the Nazis. Never before had a government turned on its nationals in such a fashion or inflicted mass murder on the populations of its allies. Nor was there any accumulated experience of dealing with such crimes against vast numbers of stateless persons. While it was conceivable to hold Germans to account on the territory of Allied countries in the case of atrocities committed against Allied nationals, even if they were from a third country, there was simply no means of prosecuting Germans for acts against Axis nationals or stateless persons carried out on German soil. To encompass such acts required judicial innovation and as good lawyers, the British Government law officers and the legal advisors in other departments were leery of any such moves.

However, as in the conduct of so many other aspects of policy at this stage of the war and the Anglo-American relationship, the British essentially came into line with the US perspective. At a meeting in London with US Judge Rosenman in April 1945, Lord Simon attempted to preserve the minimalist British position of quick trials of a small number of Nazi leaders, with the sentencing left to governments to decide. Simon did not have authority for such a proposal and his effort was negated first

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by the War Cabinet and second by the death of Roosevelt. When London and Washington resumed negotiations in the summer of 1945, the personnel on both sides had changed. Sir William Jowitt, the new Lord Chancellor, broadly went along with the American conception of the IMT with the full consent of the new Labour Government.23

At the London Conference in July–August 1945, held to draft the Charter of the IMT, the British delegation was led by the new Attorney General Hartley Shawcross, also head of the British War Crimes Executive, and his predecessor, Sir David Maxwell Fyfe, as his deputy. They were supportive of American aims, but with reservations. First, they could not comprehend the American plan to install conspiracy at the heart of the indictment. This reservation was based on both legal grounds and a shrewd understanding of the Third Reich. An official at the FO commented on the draft American indictment that: “The Nazis, and Hitler in particular, were supreme opportunists and, whilst they had almost certainly aggressive designs from the beginning, it is very probable that their aggressive plans only gradually took the shape in which they were carried through.” The FO Research Department scorned the idea that “Mein Kampf” could be used in evidence against the defendants. It “does not reveal the Nazi aims of conquest and domination fully and explicitly”24 Nor did the British understand the concept of prosecuting organisations. Maxwell Fyfe worried that the trial would diverge in two separate directions: war crimes and waging aggressive war. Above all, the British wanted to limit the scope of the trial, the number of the defendants, and the volume of evidence. All these anxieties were manifested in the draft indictment they produced, only to see it re-written by the American team.25

Shawcross feared an “exceedingly long and elaborate” process that would be perceived as a show trial or serve as a platform for the accused to defend Nazi ideology and actions. The danger was all the greater because of the legal innovation employed by the Tribunal. It was heightened also by awareness that the defendants were being accused of deeds that were not alien to those who were judging them. For example, when accusing the Germans of conspiring to wage aggressive war the British could only reflect uncomfortably on their part in the dismemberment of Czechoslovakia in 1938.26 For a connected reason, the British were always queasy about the participation of the Soviet Union but they knew there was nothing they could do to prevent it. Indeed, Jowitt and Maxwell Fyfe spent a lot of time mediating between the Americans and the Soviets to keep the show on the road.27

In the end, it is fair to say that the British were vindicated. The force of the IMT was dissipated by its extraordinary duration. On 26 March 1946, Earl Birkenhead, asked in the Daily Telegraph, “why is it dragging on month after month?” The charge of conspiracy was unprecedented, unwieldy, and hard to prove. The evidence of crimes against humanity was diluted both by the structure imposed on the trial by the need to demonstrate conspiracy and the salience afforded to the charge of waging aggressive war. Jackson’s insistence on bringing to bear a mass of documents as evidence slowed the proceedings and made them intolerably dull. The journalist Rebecca West reported that the Tribunal was “boredom on a huge, historic scale”. She praised Nuremberg for documenting Nazi crimes, but “For the rest the Nuremberg trial must be admitted as a betrayal of the hopes which it engendered.”28

Tedium, however, was a trivial complaint and hardly avoidable in matters to do with the law. Many more serious objections to the Tribunal were aired in Britain during its course and afterwards. In May 1946, Gilbert Murray, once a leading supporter of the League of Nations, attacked the Tribunal for systematic double standards. “I doubt if these trials will produce in history that moral effect which it engendered.”29

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23 Kochavi, Prelude To Nuremberg, 163-71, 216-27.
an object of sympathy rather than horror." George Bernard Shaw wrote to the press after the verdicts were announced to protest that, given the dropping of the atomic bombs on Japan, none of the Allied powers was in a position to hang Göring. To Lord Hankey, a minister in Churchill’s war cabinet in 1940-1, the IMT was a travesty of justice. War, he maintained, is an instrument of policy and not a crime. If it was a crime, then the countries sitting in judgement were equally guilty of aggressive war at one time or another over the previous six years. In this respect, alone, the participation of the USSR made a mockery of the proceedings and gave them every appearance of “victors’ justice”.

Perhaps the last word, however, should be left to Lord Shawcross. Fifty years after the Tribunal he reflected that: “For my part, while not excusing the imperfections and deficiencies of the trial, I still feel satisfied that it has laid down the law for the future, even if that law is imperfectly applied and still often disregarded.”

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29 The Times, 2 May 1946.
30 Letter, Daily Express, 10 September 1946.
Das Internationale Militärtribunal von Nürnberg: Britische Perspektiven


In den 60 Jahren nach dem Zweiten Weltkrieg diente das Tribunal nicht unbedingt als ein leuchtendes Beispiel für Justiz, Politik und öffentliche Meinung. Die nähere Betrachtung der Konflikte, die nicht nur seine Entstehung, sondern auch seine Arbeit begleitet haben, lässt es aus britischer Perspektive deshalb geraten erscheinen, das Tribunal nicht auf einen zu hohen Sockel zu stellen.

Zu Beginn zeigten sich die Briten gegenüber Nazi-Kriegsverbrecherprozessen nicht sehr aufgeschlossen, was nicht zuletzt in der Ergebnislosigkeit der Leipziger Kriegsverbrecherprozesse nach dem 1. Weltkrieg wurzelte. Außerdem war die britische Regierung darauf bedacht, die nicht unerhebliche Zahl der britischen Soldaten zu schützen, die sich in deutscher Kriegsgefangenschaft befand. Zugleich stand sie unter erheblichem Druck seitens der Exilregierungen der von den Nazis besetzten europäischen Staaten, die sich für eine strafrechtliche Verfolgung der Aggressoren aussprachen.

Die Erfahrungen der Nürnberger Prozesse hatten speziell in den 1990er Jahren einen beinahe magischen Effekt auf die heftigen Debatten, die aus der Annäherung der Politik an Fragen des Umgangs mit Verbrechen in Krieg und Frieden mit so unterschiedlichen Konflikten wie in Südafrika, dem früheren Jugoslawien, Ruanda und Irak entstanden.

Diese „Verehrung“ reflektiert kaum noch die zweifelhafte Herkunft, die unsichere rechtliche Basis, die umstrittene Verfahrensweise und die fragwürdigen Resultate der Prozesse in Nürnberg und die Tatsache, dass in der Nachkriegszeit die auf den IMT basierenden juristischen Prozesse als eher lästig und unangenehm angesehen wurden. Viel Zeit und Anstrengung waren notwendig, um die Verurteilungen der Nachfolgeprozesse zu relativieren, jenen, die verurteilt worden waren, gänzlichen Erlass oder Reduzierung ihrer Freiheitsstrafe zu gewähren, und die westdeutsche Bevölkerung zu beschwichtigen, die niemals die Gültigkeit der Nürnberger Prozesse wirklich anerkannt hatte. Die britische Intelligenzia zweifelte außerdem die Legitimität durch die eigenen ungesühnten Verbrechen der Alliierten während des Krieges an. Dennoch sah beispielsweise der britische Chefankläger Shawcross den Wert des Nürnberger Prozesses trotz seiner Mängel darin, dass internationales Recht für die Zukunft geschaffen wurde.