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The Nuremberg Trials and Crimes Against Humanity

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While Germany’s unconditional surrender to Allied forces on May 9th, 1945 marked the conclusion of physical conflict on Western Front, this transfer of power at the end of World War II created a new conflict of an administrative nature. As victors, American, British, French, and Soviet officials were responsible for the development of a system to address the crimes of Nazi leaders. While international law—and popular opinion in several Allied countries—favored executions without trials, prominent leaders including Joseph Stalin and Justice Robert Jackson lobbied for a more equitable process.\footnote{Michael R. Marrus, \textit{The Nuremberg War Crimes Trial 1945-46: A Documentary History} (Boston: Bedford Books, 1997), 242.} Allied leaders met in August 1945 to sign the London Charter, a document which established an International Military Tribunal to try Nazi leaders for “Crimes against Peace, War Crimes, and Crimes against Humanity.”\footnote{Ibid., 58.} The resulting trials, held in Nuremberg, Germany, processed twenty-two prominent Nazi leaders, leading to the execution of twelve, the imprisonment of seven, and the acquittal of three.\footnote{Ibid., 261.} The Nuremberg Trials provided an immediate resolution to the issue of Nazi war crimes, yet their status as a novel form of international trial also spurred a lasting legal controversy. Citizens questioned the legitimacy of seemingly unprecedented legal proceedings, accusing the Allies of enforcing victor’s justice in order to justify revenge on wartime enemies. Others asserted that the London Charter represented an \textit{ex post facto} law which retroactively punished Nazi leaders for previously legal actions. These critics specifically targeted the concept of “crimes against humanity,” a charge which referred to destructive actions taken by German officials against the German people. This category of wartime wrongdoing may not previously have been codified into international law,
but its incorporation into the London Charter did not constitute the introduction of new legal doctrine. Rather, the explicit inclusion of crimes against humanity into the charges at Nuremberg, precipitated by the legal theories of Sheldon Grueck, represented a logical culmination of both long-standing wartime etiquette and codified humanitarian law.

The earliest standards for wartime behavior have their roots in multinational events centuries prior to the two World Wars. From 1618 to 1648, forces representing a large proportion of European nations participated in the Thirty Years War. During the war, only personal morality governed the behavior of soldiers. The state of Germany after the conclusion of the war provided compelling testimony to the lawlessness this lack of regulation encouraged—countryside battle sites were left destroyed and the population of Germany reduced from an original twenty million to an estimated sixteen to seventeen million.\(^4\) The political consequences of the war included a decrease in the power of the Holy Roman Empire; individual nations attempted to take advantage of this power vacuum by building larger armies to increase their own military strength.

Soldiering soon became a profession, and this increased volume of full-time fighters made strict organization necessary for productivity. Thus, both humanitarian and logistical concerns motivated European leaders after 1648 to establish regulated militaries. In addition to superficial changes in organization, including the establishment of standard national uniforms, leaders set standards for behavior and created procedures and personnel positions for the enforcement of these regulations. Nations established customs for the treatment of civilians during conflict, and

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while not yet incorporated into international law, these standards came to be viewed as “sensible” military practice.5

Enlightenment-era philosophy also supported the concept of civilian immunity in times of international conflict. Dutch legal philosopher Hugo Grotius authored his 1625 work *De Jure Belli ac Pacis (On the Laws of War and Peace)*, in the midst of the Thirty Years War. Grotius turned to Roman military history and Christian religious doctrine to argue for limitations on wartime violence, including “unnecessary violence in the taking of towns” leading to the loss of “great numbers of the innocent.”6 In 1762, Jean-Jacques Rousseau’s *On Social Contract* asserted that war represents a conflict between states rather than individuals. Because the individual is not a party to military conflict, and war only justifies destructive actions which serve a purpose in the dispute, Rousseau argued that “a just prince ... respects the purpose and property of private individuals” and those not acting as “instruments of the enemy.”7 Although this soldier-civilian distinction may have developed first in scholarly circles, European military leaders eventually embraced this new military philosophy. French foreign minister Charles Maurice de Talleyrand-Périgord shared a paraphrased version of the pertinent passage of *On Social Contract* with Napoleon in an 1806 letter; upon a later 1871 invasion of France, the Prussian king announced his intention to oppose French soldiers rather than the French people.8

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Although both philosophers and military leaders worldwide discouraged violence against noncombatants, no codified national or international law included this precept until two military conflicts during the nineteenth century. During the U.S. Civil War, Columbia professor Francis Lieber prepared “Instructions for the Government of Armies of the United States in the Field,” later known as the Lieber Code, to serve as a handbook for the Union Army. This document, which outlined the rights of both combatants and civilians, represented the first codification of humanitarian military law. Notable in the U.S. Judge Advocate General’s interpretation of the code is a rejection of any ex post facto accusations from soldiers accused of violating its regulations. Referring to the consensus in customary law against the crimes outlined in the document, the Judge Advocate General characterized the code as “merely a publication and affirmance of the law as it had previously existed.”9 Thus, while the Lieber Code was novel in its status as a written document, the familiar nature of the ideas it represented justified its enforcement. While the code applied only to the U.S. military, Richard Baxter suggests that this first codification of war law inspired the development of similar codified regulations in multiple European nations within the next century.10 Perhaps also contributing to the push for firm military laws were the Crimean and Franco-Austrian Wars, fought on the European continent several years prior to the U.S. Civil War. Because no laws existed to ensure the protection of medical staff on the battlefield, doctors could not properly assist wounded soldiers during these two conflicts. During one of the earliest international conferences on war law, twelve European

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10 Ibid., 114.
nations signed the first Geneva Convention, which provided the privileges of neutrality to hospital employees, ambulance staff, and any civilians who chose to assist the wounded.\textsuperscript{11}

The Hague Convention of 1899 represented the final development in international war law prior to World War I. Drawing heavily from precepts first outlined in the Lieber Code, the “Convention with Respect to the Laws and Customs of War on Land” ensured additional protections to civilians in war zones. The convention forbade collective punishment, the establishment of penalties against the general population for a crime for which only select members are responsible. Other articles of the document denounced attacks against undefended towns and the pillaging of captured areas.\textsuperscript{12} Signatories to the convention included major North American, European, and Asian forces. Despite this broad coalition, Telford Taylor suggests that the convention’s failure to define any means of enforcement for the regulations it set diminished its practical impact. However, similar to the Lieber Code in both its content and influence, the Hague Convention did spur individual nations to incorporate humanitarian concepts into their own military legal codes.\textsuperscript{13}

The violence of World War I provided the first major test of the national and international war laws developed in the previous two centuries for the protection of noncombatants. Several developments in military technology facilitated violence against civilians beyond the scope of the Hague protections. Germans began Zeppelin air raids over London, a technically “defended” town therefore excluded from the Hague protection, killing over two hundred civilians in 1915.


\textsuperscript{13} Taylor, The Anatomy of the Nuremberg Trials, 10.
alone. Germans also initiated unannounced attacks on merchant ships in the waters surrounding the British Isles using new U-boat submarines; the Hague Convention of 1899 did not prohibit such attacks unless the targeted ship served as a hospital. In eastern Europe, leaders of the Ottoman Empire, a German ally, pursued a racial cleansing agenda strikingly similar to Nazi activities which would occur decades later. Fueled by a long-standing conflict between the Christian Armenians and the Muslim government, Ottoman leaders cited perceived Armenian sympathy with the Russian enemy to justify state-sponsored genocide. Mass executions and unhealthy conditions in concentration camps reduced the Ottoman-Armenian population from approximately 2.5 to 1.5 million. While Allied officials recognized the extent of this violence, condemning Ottoman actions as “crimes against humanity and civilization,” the narrow scope of the Hague Convention again rendered international law powerless in preventing further damage. Because the Armenians were Ottoman citizens, and not a separate belligerent nation, no Hague protections applied to them.

While some instances of German aggression circumvented the limitations of the Hague Convention, others more clearly violated international law. Reports indicated that German armies pillaged the city of Louvain in neutral Belgium and took civilian hostages in other areas; Europeans began to refer to the invasion and occupation as “the rape of Belgium.”

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14 Ibid., 13.


17 Ibid., 12.

commission of the Paris Peace Conference tasked with evaluating the legality of Central Power actions issued a 1919 report which asserted that German forces had violated the laws of war and called for an international tribunal to determine the guilt of the most powerful military leaders. The first international war crimes court may have occurred the next year if not for the objections of U.S. president Woodrow Wilson, who feared that one such court would represent a form of victor’s justice. Instead, the Treaty of Versailles arraigned German Kaiser Wilhelm II not for war crimes but for a vague “offence against international morality and the sanctity of treaties”\textsuperscript{19} The treaty called for military tribunals to try all suspected German offenders, but the German government eventually convinced the Allies to permit the German Supreme Court to hear the cases. The 1921 Leipzig trials evolved into a “great fiasco,” with many acquitted and those convicted allowed to neglect their sentences.\textsuperscript{20} The Kaiser, who sought asylum in Holland in 1918, avoided the trials entirely. Similarly ineffective were the Ottoman Court Martial Trials of 1919 to 1920, ordered by the British during their occupation of Constantinople after the conclusion of the war. The indictment against top Ottoman officials supported government involvement in the Armenian massacres with forty-two different documents.\textsuperscript{21} Despite this compelling collection of incriminating evidence, Winston Churchill agreed to abandon the trials in exchange for the freedom of British prisoners of war held in Turkey.

The Leipzig and Ottoman Trials failed to punish German and Armenian officials for wartime violence against civilians, but succeeded in publicizing the extent of the atrocities

\textsuperscript{19} Marrus, \textit{Documentary History}, 10.


permissible under existing international statutes. The trial of Lieutenant Carl Neumann, a German U-boat commander, received coverage in numerous American newspapers. Although the Leipzig court acquitted the defendant because he had followed superior orders, the officer revealed that the Germans had given “explicit orders to sink British hospital ships.” The exposure similar acts of aggression received in the press, coupled with the failure of the Leipzig and Ottoman Trials to effectively punish the perpetrators, exposed a need for additional legal protections for noncombatants in future conflicts. In response, an international group of delegates at the 1922 Washington Conference drafted, yet failed to force into adoption, an agreement against bombings intended primarily to inspire civilian fear. In an attempt to prevent casualties from unannounced submarine attacks, the eleven signatories to the 1930 London Treaty agreed to prohibit the destruction of merchant vessels unless the attacking captain gave passengers time to escape to safety.

Just as World War I technology precipitated violence against civilians beyond the scope of the Hague protections, a change in German military goals led to unprecedented brutalities during World War II. Taylor argues that while the German leaders of World War I targeted civilians in the pursuit of military victory, the Nazi leaders of World War II endeavored to

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22 Arno Dosch Fleurot, “Trials of German Criminals is Farce,” *The Oregonian*, June 5, 1921, America's Historical Newspapers (11D63E4ECB789D70).

23 Arno Dosch Fleurot, “First German War Criminal Arraigned Convicts Himself,” *The Philadelphia Inquirer*, May 25, 1921, America's Historical Newspapers (1165DF483849CA40).


26 Arno Dosch Fleurot, “Trials of German Criminals is Farce,” *The Oregonian*, June 5, 1921, America's Historical Newspapers (11D63E4ECB789D70).
oppress select ethnic groups with violence unconnected to military goals. The publication of the Nuremberg Laws, which revoked the German citizenship of Jewish residents and prohibited intermarriage between Jews and Germans, presents evidence of this disconnect. Announced at a 1935 Nazi Party rally, prior to the start of official military conflict in 1939, the code suggests that Nazi oppression of Jews was politically motivated and not a means to any larger wartime goal. The brutalities of 1938 Kristallnacht, which included the murder of at least ninety-one Jews and the placement of approximately thirty thousand in concentration camps before the start of World War II, similarly present Nazi anti-Semitism as unrelated to the pursuit of military victory. Nazi abuses against civilians continued into World War II with the German occupation of Poland. Leaders forced the Jewish population to move into ghettos outside of main cities, while, according to a report by Polish Primate August Cardinal Hlond, other Nazi officials were tasked with the execution of two hundred and fourteen Polish Catholic priests. Statements issued by numerous world leaders indicate that Allied officials were aware from the beginning of the war of Nazi violence against noncombatants. The Polish government, existing at the time in exile in London, first suggested the punishment of German war criminals in 1940. The following year, President Roosevelt and Prime Minister Churchill issued statements condemning Nazi murders of “scores of innocent hostages” and promising unspecified “retribution.” The first official Allied document on war crimes came in 1942 as a product of the Inter-Allied Commission on the Punishment of War Crimes. The commission’s St. James’ Declaration stated that the Allied


30 Ibid., 25.
powers intended to systematically and justly punish those involved in the perpetration of wartime
crimes. Yet notable in the commission’s justification of this intention is its appeal not to codified
international law, but to “the sense of justice of the civilized world.” As Arieh Kochavi notes,
existing international law did not include provisions to support punishment for many instances of
Nazi violence against civilians. The prohibitions of the Hague Convention applied only to
violence against citizens of another belligerent nation; the document thus did not apply to
brutalities perpetrated by Nazis prior to the war or against German citizens. Allied leaders did
view these actions as blatantly wrong, but the commission’s desire to pursue punishment
“through the channel of organized justice” meant that Allied lawyers would need to condemn
these crimes against humanity using concepts from existing international law and legal
philosophy.  

Harvard law professor Sheldon Glueck provided this critical link between existing legal
custom and the seemingly novel concept of crimes against humanity. Glueck worked as a
translator during German interrogations prior to the Leipzig trials; the failure of these judicial
proceedings likely familiarized him with the shortcomings of existing international law. A legal
realist, Glueck viewed law as a body of rules whose interpretation could vary based on political
and moral concerns. Thus, both Glueck’s background and liberal legal philosophy may have
informed his decision to express support for the legal validity of crimes against humanity during
his 1943 Harvard seminar on war crimes. Referring to centuries of legal precedent in both

31 Ibid., 25.
national and international law against harming civilians, Glueck asserted that “the laws of civilized humanity” justified an explicit condemnation of German crimes against humanity in international law. According to Glueck, the Allies could reasonably assume that, as citizens and members of the military, Nazi criminals had knowledge of these common laws prohibiting crimes such as murder and torture. While Glueck recognized that the prohibition of state-sponsored violence against a country’s own citizens was unprecedented in these laws, he believed it unreasonable to base the legality of violence singularly on the nationality of the victims. Glueck also cited basic morality in his argument, claiming that because Nazi leaders must have understood “full well that murder is murder” before committing acts of brutality against civilians, indicting these leaders for crimes against humanity would not constitute the enforcement of *ex post facto* law.

While Glueck did teach and write extensively on the subject of World War II war crimes, his presence at a number of meetings tasked with the formulation of the Nuremberg Charter principles most directly suggests the influence of his legal philosophy. Glueck testified before the United Stated Congress on the nature of war crimes, then in 1942 served as a corresponding member of the London International Commission on the Trial of War Criminals. In 1945, Glueck attended negotiations on the London Charter itself, serving as the advisor to U.S. Justice Robert Jackson. Shortly after, Article 6(c) of the London Charter officially defined “Crimes Against Humanity” as a crime under the International Military Tribunal. In justifications of the inclusion of this new charge, legal leaders at the Nuremberg Trials further underscored the

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34 Ibid., 239.

35 Marrus, *Documentary History*, 52.
influence of Glueck’s legal philosophy. Both Justice Jackson, who became the chief prosecutor for the United States, and Hartley Shawcross, the British chief prosecutor, echoed elements of Glueck’s legal theory when defending the legitimacy of crimes against humanity. In a correspondence to Allied leaders, Jackson appealed to Glueck’s concept of the consensus against basic crimes in civilized society, referring to Nazi crimes against citizens as “acts ... regarded as criminal since the time of Cain.”\textsuperscript{36} Offering a closing argument during the trials, Shawcross cited Glueck’s belief that the nationality of a victim of violence should not alter the legal permissibility of brutality.\textsuperscript{37}

The London Charter’s prohibition of crimes against humanity drew from centuries of customary and codified legal precedents protecting civilians during times of war. While new to the body of official international law, this condemnation represented the next logical step in a pattern of war law development spanning several centuries. From the emergence of larger armies after the Thirty Years War to the development of new weapons technology during World War II, each advance in military power made necessary a commensurate increase in the ability of international law to limit this power. Viewed in this context, Glueck’s decision to make the minor logical leap from previous humanitarian law to the legal legitimacy of crimes against humanity appears as the most desirable of two undesirable choices: to face accusations of enforcing \textit{ex post facto} law, or to allow Nazi actions unprecedented in their brutality to go unchecked. In a sense, all international war law, which limits national sovereignty to prevent unregulated violence, represents the lesser of two evils. While the inclusion of crimes against humanity into

\textsuperscript{36} Hagan, “Making War Criminal,” 253.

\textsuperscript{37} Marrus, \textit{Documentary History}, 189.
international law at Nuremberg aroused controversy in the years immediately following the trial, legal experts nevertheless included the concept in the 1998 Rome Statute of the International Criminal Court. Because it attempts to impose moral regulations on an inherently immoral endeavor, international war law can never reach perfection. But as the one hundred and sixty signatories to the Rome Statute affirmed in 1998, even controversial developments can eventually constitute significant improvements.
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