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United States Department of State
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Washington, D.C. 20520

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INFORMATION MEMORANDUM
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TO: S/WCI - Pierre Prosper

FROM: PA/HO - Marc Susser *MS*

SUBJECT: History and Establishment of the Nuremberg Tribunal

The International Military Tribunal (IMT) at Nuremberg represented a turning point in the development of international cooperation and law. The IMT owed its existence to the desire of the United States, Great Britain, and the Soviet Union to formulate a unified policy toward war crimes during World War II.

Until late 1944, most allied officials approached international war crimes law with skepticism. The attempt to conduct war crimes trials after World War I, the Leipzig trials, had failed despite the articulation of relevant principles of international law in the form of the Hague Conventions of 1898 and 1912. The "war guilt clause" of the Treaty of Versailles, which codified the concept of "collective guilt," generated international backlash. During the interwar period, most efforts to refine the principles of international law and cope with the legacy of war occurred outside the framework of the League of Nations, a nascent body that quickly proved ineffective. The Kellogg-Briand Pact of 1928, which outlawed war, and the Geneva Convention of 1929, which addressed the collateral killing of civilians in war and the mistreatment of prisoners of war (POWs), attempted to lay a foundation.

During most of the World War II years, the Allies focused on defeating the Axis and paid little attention to the issue of war crimes. The State Department and the British Foreign Office believed international law was inadequate to deal with Nazi crimes (insofar as details of them became known). They also feared German reprisals against allied POWs if they announced a clear intention to try German war criminals. Nevertheless, in October 1943, to placate governments-in-exile in London, the Foreign Office proposed (with State Department agreement) the establishment of a United Nations War Crimes Commission (UNWCC) for the purpose of studying allegations of Nazi war crimes (the Soviet Union refused to

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participate). However, the Anglo-American allies had no intention of taking the UNWCC's activities seriously.

Toward the end of the war, however, with allied troops entering Germany and incontrovertible evidence of Nazi crimes mounting, London and Washington reversed course. Secretary of the Treasury Henry Morgenthau, who feared that Secretary of War Henry Stimson would apply a "soft" peace to Germany, proposed to deindustrialize Germany and create a mechanism to punish war criminals. Both President Franklin D. Roosevelt and British Prime Minister Winston Churchill toyed with the idea of summary executions. However, a key factor was the development by U.S. War Department lawyer Lt. Col. Murray C. Bernays of guidelines to capture and try war criminals on the basis of international law and under the procedures of Anglo-American legal systems. When Harry S. Truman took over as President, he approved the Bernays plan.

The Western allies then negotiated with the Soviets. The Moscow Declaration of October 1943, which had laid out the Big Three's war aims, included a "Statement on Atrocities" calling for the return for trial of German war criminals to countries in which war crimes had taken place. At the July/August 1945 Potsdam Conference, the allies endorsed the principle of trying war criminals. The Americans and the British persuaded the Soviets to sign the London Agreement in August 1945, which took the important step of establishing an international tribunal--since the most grievous Nazi war crimes transcended national boundaries. The London Agreement included a charter that set up the machinery for the Nuremberg Tribunal. The IMT convened in November 1945. The Allied Control Council Law No. 10 of December 1945, gave the four occupying powers in Germany the authority to arrest war criminals in their zones of occupation.

The Nuremberg Tribunal applied evolving principles of international law and overcame the weaknesses of the post-World War I Leipzig trials. Defendants were tried for conspiracy against the peace and wars of aggression, which Kellogg-Briand had outlawed (a concept that has since withered away), and war crimes (which were outlawed by the Hague and Geneva conventions). The new category of crimes against humanity, developed by Bernays, attempted to replace the concept of collective guilt with that of individual guilt while recognizing the conspiracy to murder millions of civilians represented by the Holocaust. The legacy of Nuremberg has been to establish crimes against humanity, as well as the later category of genocide, firmly in international law. This was embodied in the 1948 UN Universal Declaration of Human Rights.

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FROM: PA/HO - Marc Susser - *MS*

SUBJECT: Detention of POWs, Unlawful Combatants, and Other Detainees

U.S. Government strategy for detaining and prosecuting prisoners of war, unlawful combatants, and other detainees during military operations in recent years has involved three broad types of military action: traditional military campaigns, the pursuit of political leaders, and peacekeeping operations.

During the Persian Gulf War of 1990-91, particularly the ground invasion of Iraq in February 1991, U.S.-led coalition forces encountered an enemy in a traditional combat setting. At the time of the cease-fire, approximately 30,000 Iraqi troops found themselves under allied control, in both Iraq and Kuwait. U.S. and allied forces decided to confiscate the 700 Iraqi tanks they had captured; however, they disarmed and then repatriated the 30,000 soldiers. The allies thus avoided the complications inherent in according the Iraqi soldiers formal POW status.

A second type of military engagement focused less on rank and file soldiers and more on pursuing a nation's political leadership. For example, the U.S. invasion of Grenada, in October 1983, was precipitated by the overthrow and murder of Prime Minister Maurice Bishop. The U.S. had long criticized the presence of Soviet and Cuban advisers on the island. After a short military campaign, all but 17 of approximately 1,500 detainees were released under an amnesty agreement. These remaining 17, consisting of the coup plotters, were tried and convicted for Bishop's murder by a Grenadan court. They remain in prison today.

In a variant of this second approach, U.S. forces focused on capturing a single individual in Panama and Somalia. Panamanian dictator General Manuel Noriega had long been accused

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of drug trafficking and election fraud. In February 1988, federal grand juries in Florida indicted him. Deciding against a small Special Forces operation designed to capture Noriega alone, the U.S. launched a 25,000-man invasion. Noriega was quickly captured and taken to Miami, where he was tried and convicted on federal drug charges. Unlike Panama, the operation in Somalia ended without success. In an effort to defend a U.N. humanitarian mission from terrorist attack, U.S. Special Forces tried to capture the politically powerful Somali warlord, Mohammed Aided. However, Aided escaped, U.S. forces suffered serious losses, and President Clinton decided to withdraw American forces from Somalia.

Finally, the third type of situation in which military forces have dealt with the issue of combatants has been in Balkan peacekeeping missions. In Croatia, Bosnia-Herzegovina, Kosovo, and Macedonia, however, international forces -- whether U.N. or NATO -- have not encountered combatants directly. The United Nations Protection Force (UNPROFOR) mission, which entered Croatia in 1992 and then moved into Bosnia-Herzegovina, did not have a mandate that was broad enough to include military engagements. UNPROFOR thus failed to stop the war. In 1995, the Croatian offensive in the Krajina and NATO's bombing of Bosnian Serbs finally induced the warring parties to negotiate the Dayton Peace Accord. Thereafter, a more heavily armed and NATO-led Implementation Force (IFOR) -- later called SFOR, Stabilization Force -- arrived to maintain the peace, encourage displaced refugees to return to their homes, and capture suspected war criminals. Building on the IFOR model, NATO sent a peacekeeping force called KFOR to Kosovo, after the air campaign against Serbia in 1999. Rather than pursue suspected war criminals, however, KFOR has tried to create an international police force.

Both KFOR and SFOR have construed their mandates as including the authority to detain in certain circumstances, e.g., force protection. However, there has been no widespread attempt to take prisoners. Other than seeking some suspected war criminals for the International Criminal Tribunal for Yugoslavia (ICTY), their principal task has been to encourage the reconstruction of a multi-ethnic society.

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