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Reflections on Nuremberg

FRANK TUERKHEIMER

Louise Arbor, former chief prosecutor for the Yugoslav and Rwanda war crimes tribunals remarked that, “collectively . . . we’re linked to Nuremberg. We mention its name every single day.”¹ With the passage of seventy years since the International Military Tribunal (“IMT”) announced its verdicts and pronounced its sentences much in the world has changed and the contour of international criminal law, founded in Nuremberg, has expanded enormously. Nevertheless, Nuremberg is still a point of reference, reverence and reflection.

I. AN AMAZING FEAT IN THE HISTORY OF TRIALS

That reflection begins with a statement of pure and basic awe. As a trial lawyer who has tried complex criminal and civil cases in New York City, Washington, DC and Madison, Wisconsin, I have some idea of what it takes to prepare a case. To me, the most astounding accomplishment in the long history of trials is what the Nuremberg prosecutors were able to do in the short time between the end of the war in Europe in early May, 1945 and the Fall of that year when they were ready for and began the trial.

First, the charges they brought were the first of their kind, brought under various treaties, pacts and protocols. It was obvious that the defense counsel would vigorously attack the novelty of the prosecution, and they had to prepare to defend the theory of the charges. Furthermore, there was considerable depth to the charges brought by the Allies. Largely at the initiative of a War Department (soon to be renamed as the Defense Department) lawyer, Murray Bernays, the Nuremberg charter contemplated more than just the one trial.

Bernays, and his colleagues, envisioned a massive post-war effort at dealing with German criminality. Appreciating that it would be impossible to reinvent the wheel at every trial of every death camp prison

1. JOHN HAGAN, *JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL* 18 (2003) (quoting Louise Arbor).

guard, Bernays suggested that the various Nazi organizations such as the SS, the Gestapo and the SD be charged as criminal organizations and that in subsequent trials, if the organization had been found guilty as charged in the Nuremberg indictment, all the prosecution would have to show was membership in the organization and then it would be up to the defendant to show either his unawareness of its illegal objectives or his non-culpable role in it. His suggestion was adopted in the Nuremberg Charter. The IMT Tribunal added slightly to the prosecution burden and found these organizations were in fact criminal organizations, thus paving the path to the kinds of prosecutions Bernays and his colleagues had contemplated. While some of the defendants in the later Nuremberg trials were charged under this theory, no one was charged solely with membership in a criminal organization. After the Nuremberg trials ended the concept was not applied—a great idea with no longevity.² Why that is so will be discussed later.

Aside from theory, there was considerable practical work to be done. The United States, which might be said to have carried the laboring oar in the case, still did not work alone and agreement on virtually all matters had to be reached with the partners in the prosecution—the British, the French, and the Soviets. Aside from the language problems attended to the resolution of issues, prosecutors from different countries, especially the Soviets, saw things differently and these differences had to be worked out, almost invariably through multiple interpreters as very few, if any of the prosecutors, spoke French, English and Russian. And these differences were not minor: for example, the French and Russians were reluctant to use conspiracy law, an alien concept to their systems. The United States and the United Kingdom prevailed and a conspiracy to wage aggressive war became part of the IMT Charter and the first count of the indictment.

Legal considerations, ponderous and novel as they were, were the least of it. The prosecutors had to get the facts, the witnesses, and the documents necessary to prove charges of aggressive war, war crimes, and crimes against humanity against two-dozen defendants. There was no such thing as collective guilt; the case had to be proved separately as to each defendant. Nothing underscores this better than the acquittal of

2. Ironically, in 2015, the German courts adopted a somewhat similar concept: participation in the administration of a death camp was presumptively complicity in murder. Former *See Auschwitz Guard Goes on Trial in Germany*, THE GUARDIAN, April 21, 2015, <https://www.theguardian.com/world/video/2015/apr/21/former-auschwitz-guard-goes-on-trial-in-germany-video>. While the Bernays idea could have been applied to thousands had the will been there, this similar approach may be applied half a dozen times, if at all, given its belated birth seventy years after Nuremberg.

three of the defendants. Significantly, the technology they had was light years from what we have today where a document in any part of the world can be scanned and sent anywhere in a matter of seconds. Documents from other cities in Germany or nearby countries had to be flown from and to hastily constructed airports since German airports had been thoroughly bombed. If taken by courier or jeep, the documents had to be driven on bombed out roads, thus making speed almost impossible.

There had to be an agreement as to which witnesses to call, in what order, and of course how the case would be divided among the four powers. Then, when all this was done, documents, which were mostly in German, had to be translated into English, Russian and French. A document in one of those three languages had to be translated into the other two and, of course, into German. Documents to be placed into evidence had to be made ready for review by defense counsel to avoid endless and needless hassles on authenticity. But, above all, there had to be an effort at consistency with respect to what was to be shown and what was not.

Witnesses had to be prepared, both for their direct examination and for anticipated cross-examination. Cross-examination of the defendants had to be prepared as well. All this was a colossal job requiring endless hours under a pressure cooker environment. In short, the burdens on the prosecution team were unprecedented: their time was limited, and the knowledge that all moves would be subject to international scrutiny, to say nothing of the scrutiny of history, only added to the pressure. Yet they pulled it off. Despite all obstacles, when the time came for trial they were ready to present the most significant case in the history of trials and their preparation was almost flawless.³

3. In a slightly different context, it has been said that "perfection in trials will not be attained so long as human beings conduct them." *U.S. v. Kahaner*, 317 F.2d 459, 485 (2nd Cir. 1963). A similar shortfall from perfection attends most human undertakings, including the massive effort by the Nuremberg prosecutors to bring to justice some of the greatest criminals in history. In their case, that shortfall was the indictment of the wrong Krupp. Krupp Industries benefited enormously from slave labor to the knowledge of its leadership. The Nuremberg prosecutors charged the elder Krupp, Gustav Krupp, instead of his son, Alfred Krupp, and by the time they discovered their mistake, it was too late to substitute the younger Krupp for his father who was quickly dropped from the case because of the infirmities of old age. If the trial were to go ahead with Alfred Krupp, it would have entailed a delay that no one on the prosecution side favored. Thus, he was not one of the indicted defendants. Alfred Krupp was charged in one of the later Nuremberg cases, convicted, sentenced to twelve years imprisonment and then pardoned after serving three years.

II. JUSTICE JACKSON'S CROSS EXAMINATION OF HERMAN GÖRING

Justice Jackson, in preparing his cross-examination of the main defendant, Herman Göring, did what most trial lawyers do: he outlined his questions which were mainly questions that could be answered with a “yes” or a “no” and plotted subsequent questions on that basis. The whole strategy fell apart when the presiding judge permitted Göring to expand on his answers when asked a question that could have been answered with just a “yes” or a “no.” This cramped a good part of the cross-examination and made it appear as if Göring got the best of Jackson because by the time Göring finished his answer, a follow-up question was more difficult to ask. Once this process was repeated, the court giving Göring the latitude of expanding on his answers, it appeared that Jackson's cross-examination was not going well.

This is not complicated. In a non-jury case—and all the Nuremberg trials were non-jury trials—if the court, once it hears the prosecution's case and the defendant's testimony, concludes the defendant is guilty, it will often relax the rules of evidence on cross-examination of the defendant and give the defendant greater latitude in answering questions. This was not a particularly difficult decision in Göring's case since his footprints were all over the plans for aggressive war (Counts One and Two) and war crimes (Count Three). As to crimes against humanity (Count Four) the evidence there was explosive: Göring had, in a written memorandum, to the head of the Main Security Office of the Reich on July 31, 1941—at about the time when virtually all of European Jewry was under the control of Germany and its allies—telling him he was responsible for and to obtain the cooperation of other government agencies in putting into effect the Final Solution to the Jewish Question. This document placed Göring at the heart of the Holocaust, a part of count four, and it was hardly necessary to show more.

In sum, by the time the judges heard Göring's testimony after the evidence against him had come in, they obviously decided that he was guilty and they did what many judges do in such circumstances—they gave him great leeway in answering while being cross-examined, if for no other reason, so he could at least feel he was given a fair shot at dealing with the prosecution's evidence.⁴

Perhaps Justice Jackson expected more deference from the court on his cross-examination of Göring. But the prosecutor's ego is not ordinarily something the court takes into account in making evidentiary

4. Normally, the opportunity to expand on a “yes” or “no” answer given on cross-examination comes on redirect examination.

rulings and the Nuremberg tribunal certainly did not. Jackson did not flounder; his cross-examination of Göring did not go as planned because his case was too strong. If Jackson is to be faulted, it is for not cutting the cross-examination once it was apparent what was happening. But that was a difficult alternative in a case such as this and criticism for not aborting the cross-examination is unwarranted.

III. FRITZ SAUKEL/ALBERT SPEER

Fritz Saukel was the defendant running the slave labor program.⁵ Saukel violated the rules of war relating to the treatment of civilian populations in occupied territory by administering a program which impermissibly removed civilian populations from their homes, using them for work while underfeeding and inadequately housing them, virtually assuring that many would not survive. They were literally worked to death. Saukel never acknowledged his guilt and before his execution he proclaimed his innocence and railed against what he called an unjust verdict.

Saukel's responsibility entailed responding to the demands of Armaments Minister Albert Speer. As Armaments Minister, Speer was, essentially, Saukel's boss and told Saukel exactly how many workers he needed and where. Speer, unlike Saukel, was erudite, suave and savvy, and had a sense of how he might thread his way through the labyrinth of evidence against him and avoid the hangman. Speer acknowledged his wrongdoing, he regretted it, but he managed to do so in a way that resonated with the judges. It was the same ability to judge and play people that had caused him to become close to Hitler. Speer was found guilty and sentenced to twenty years imprisonment, a sentence he served and then went on for fifteen years to live a productive life as a writer about the Third Reich. Speer's articulate and persuasive contrition, totally different from Saukel's persistent denials of wrongdoing, resulted in this inversion in sentencing. Normally, the person at the top of structured criminality is sentenced more severely than an underling. Not this time.

5. *See generally* BEN FERENZ, *LESS THAN SLAVES* (Harv. Univ. Press 1979) (Ferenz has incisively noted that the term "slave" does not accurately convey what was involved. Conventionally, slaves are encouraged to reproduce so there will be another generation of slaves. That was certainly true in the United States with an embargo against importation of slaves having been passed in 1807 to go into effect in 1808. In the case of the German slave labor program, slaves were underfed and worked to death, to be replaced by what appeared to be an endless supply of slaves. In short, the slave labor program was actually a method of slow murder.).

IV. HANS FRANK

Hans Frank was a leading lawyer in the Third Reich. Having worked closely with Hitler for years, he was appointed to head of what was known as the General Government in Poland. Once Poland was fully occupied by the Germans, it was divided into three parts. A small part was annexed to Germany, a chunk in the eastern part was separated from central Poland, and the remnant, most of the original Poland, was then designated as the General Government. Frank kept a diary—not in the sense of regular evening entries—but rather a collection of all his speeches, memos and official documents. By the end of the war this “diary” consisted of forty-three file cabinets which Frank preserved. It is unclear why he preserved them since they contained highly incriminating evidence. Perhaps he thought that because they reflected his numerous disputes with the SS—the bad guys—they might be exculpatory. If there was anything exculpatory in these file cabinets, it was eclipsed by what was inculpatory.

The diary contained a speech in which Frank spoke of the need to annihilate the Jews⁶ and a cabinet meeting in which it was decided to remove five hundred thousand tons of grains from Poland to Germany to be filled “at the expense of the . . . [Polish] population,” both evidence of war crimes and crimes against humanity.⁷ But what is generally overlooked in his Christmas 1941 speech to the German soldiers stationed in Cracow. Frank tells them to write home and assure their families that they are not wasting away in frigid Poland but rather are killing the Jews (he refers to them as “lice”). And while they cannot all be killed at once, Frank says, since they have been around for five thousand years, with enough time, they will be annihilated.⁸

This is an extraordinary document. Can it honestly be said that the fact of the Holocaust was unknown to the German people? Frank’s diaries contain proof that soldiers in Poland were explicitly instructed by the head of the German government in Poland to notify their families of the mass destruction of Jews occurring in Poland. Presumably those so informed would spread the word since Frank’s directive contained no suggestion to keep it a secret. Had he wanted secrecy, he would not have told the soldiers to let their families at home know about the mass

6. Hans Frank, Remarks at the Meeting of the Government of General Government Cracow (Dec. 16, 1942) (transcript available at <http://avalon.law.yale.edu/imt/2233-ps.asp>).

7. Hans Frank, Remarks at the Cabinet Session in Cracow (Aug. 24, 1942) (transcript available at <http://avalon.law.yale.edu/imt/2233-ps.asp>).

8. Hans Frank, Speech of the Governor General Closing the Cabinet Session (Dec. 16, 1942) (transcript available at <http://avalon.law.yale.edu/imt/2233-ps.asp>).

murder of Jews in the first place. This item of Nuremberg proof has not received the attention it deserves.

Frank, like Speer, was also contrite, testifying that “a thousand years will pass and the guilt of Germany will not have been erased.”⁹ But he did not play the contrition card as deftly as Speer and was sentenced to death and executed.

V. NUREMBERG PROSECUTORS

In 1995, I attended a conference of former Nuremberg prosecutors at the University of South Carolina Law School in Columbia, South Carolina. At the time there were at least a dozen former Nuremberg prosecutors who attended in what was quite a reunion for many of them. As someone who had just begun teaching a course on Trials of the Holocaust, I was thrilled to be at there. Two points stick in my mind: one of at least historical interest, the other staggering.

A. Julius Streicher

Julius Streicher was the publisher of a notorious anti-Semitic tract known as *Der Stürmer*. At some point in the late 1930s, its circulation exceeded six hundred thousand, which is sizeable for a country whose population was about one hundred times that. No U.S. newspaper approaches the one percent in circulation figure. Its contents, authored by Streicher, were vile, depicting Jews as lecherous, ugly, subhuman, and to be feared and despised. Some of his articles were specifically directed to German youth and designed to infuse anti-Semitism into their young minds. During the war, Streicher was either under arrest for a financial crime or the administrative head of a German province. He had zero role in the Holocaust. He did, however, deny that he was aware of the slaughter of Jews, an assertion refuted by information contained in a journal he received regularly. The prosecution’s closing argument in Streicher’s case sounded much like the much-later published *Hitler’s Willing Executioners* by Daniel Goldhagen. The prosecutors argued that without the willingness of the German population to go along, the Holocaust could not have happened. Streicher’s publications, the prosecution argued, ensured that they would. The prosecutors also claimed that Streicher’s crime was particularly venal because the writings directed to children would have the effect of poisoning German youth with his rab-

9. *Testimony of Hans Frank (18 April 1946)*, XII TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946 13 (Nuremberg 1947).

id anti-Semitism, ensuring its viability for at least another generation. The rambling defense argument included the point that there was no proof of any connection between anything Streicher wrote and the murder of Jews. That was a correct observation. Nevertheless, the Nuremberg judges found Streicher guilty of crimes against humanity and imposed the death penalty, which was carried out. They noted and apparently were somewhat influenced by the fact that he lied when he denied knowledge of the murder of Jews.

Fifty years later there was a general consensus among the attendees at the conference that Streicher probably should not have been convicted: all he did was write and virtually all his writings antedated the Holocaust. They also agreed that while a defendant who lies may find his or her sentence increased as a result, lies such as Streicher's were not proof that he was complicit in crimes against humanity. If Streicher had been charged under United States law—an obvious impossibility—he probably would have had a valid First Amendment defense.

B. Reaction at Home

Of far broader interest was the uniform recollection of these lawyers as to their reception on returning to the United States. These lawyers were bright young people most of whom abandoned lucrative jobs with Wall Street law firms to go to Nuremberg and do the grunt work necessary to prepare for the IMT trial and the twelve trials conducted by the United States Military that followed. No one did it for the pay or the prestige: they did it out of a deep sense of justice and desire to be part of whatever meager efforts could be made to bring to justice those who started a war that led to over twenty-five million deaths and then committed horrific crimes during the war.

When they returned to the United States in the late 1940s, no one was interested. If at a cocktail party or other social occasion someone asked them what they had done and they responded by referring to their work at Nuremberg, the questioner invariably changed the subject. Virtually all the former Nuremberg prosecutors I spoke to had a similar experience. Rather, they said it was only in the past several years, roughly since 1990, that conferences such as this one took place and that a segment of the general public was more than anxious to hear about their years at Nuremberg.

There is a significant parallel to their experiences that suggests a common cause. Between the end of the Second World War and 1990, there were only about half a dozen civil cases arising out of Second

World War claims. Considering all the life insurance policies held by victims, the many secret accounts held in the names of victims, their possible claims against entities such as Bayer, I.G. Farben, Krupp Industries and other entities who were the beneficiaries of slave labor and profited enormously by virtue of minimal labor costs, this is astounding. Since 1990, and around the same time that these former prosecutors finally found an interest in their experiences, civil litigation arising out of Second World War crimes has mushroomed—cases against insurance companies, Swiss banks, and other trusted institutions.¹⁰ Given the time frames—no interest in the late 1940s and interest at last starting around 1990—there is one plausible explanation: The Cold War. It began in the late 1940s when the former Nuremberg prosecutors returned home and ended in 1989–1990.

Official U.S. policy during the 1950–1990 period made the Soviet Union our enemy, and Germany, if it was anything, was a barrier to the spread of communism into western Europe and hence on “our” side. Somehow this larger image of “enemy” and “friend” appeared to have made Germany’s war crimes and crimes against humanity an unpleasant subject as it tainted an essential ally. It was, after all, the Soviet Union that had taken over the Baltic states, Poland, Czechoslovakia, Hungary, Romania, Bulgaria, a good chunk of Austria, and East Germany. At the same time, the communist parties in Italy and France regularly received about thirty-five percent of the vote in parliamentary elections. Germany was the bulwark, the barrier against the spread of communism. Why delve into the unsavory background of a critical ally? Once the Cold War ended, Nuremberg and all it represented safely became an object of great public interest. And rightly, remains so.

10. *See generally* MICHAEL J. BAZYLER, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS* (New York Univ. Press 2003); MICHAEL R. MARRUS, *SOME MEASURE OF JUSTICE: THE HOLOCAUST RESTITUTION CAMPAIGN OF THE 1990S* (Univ. of Wisconsin Press 2009).