

Victors' justice: The Nuremberg tribunal

Michael Biddiss, *History Today*; 05-01-1995

Fifty years on, the Nuremberg Trial continues to haunt us. This is not simply a matter of the Nazi horrors revealed or confirmed in the courtroom. It is a question also of the weaknesses and strengths of the proceedings themselves. The undoubted flaws rightly continue to trouble the thoughtful. Yet, equally, we remain disturbed by the fact that, over the subsequent half-century, the world community has done so little to build upon the positive features also attaching to this great event.

The enormity of the murderous terror unleashed by the Third Reich is now so evident to us that the mounting of some full-scale trial of its defeated leaders might well seem, in retrospect, entirely inevitable. The path to Nuremberg was, however, much more tortuous than that. The Moscow Declaration of November 1943 certainly made plain the aim of Roosevelt, Stalin and Churchill to punish, by some form of joint action, those major Nazis whose offenses could not be regarded as limited to any particular geographical location. Yet, as Germany's defeat approached, there was urgent need for the Allies to become less vague about actual procedures.

During the Tehran Conference at the end of 1943, Stalin had toasted the justice of the firing squad' and mentioned the need for 50,000 shootings. Roosevelt and Churchill seem to have been shocked by the number, even while sympathising with the method. In any case, the Soviet leader was probably jesting - something suggested by the fact that his regime (itself well-versed in the propagandist value of political trials) remained thereafter consistent in its demand for some form of detailed judicial enquiry. Conversely, it was the American and British governments that continued in 1944 to focus chiefly on schemes of summary process and prompt execution. Not until early 1945 did Roosevelt become fully converted to the 'Bernays Plan', devised during the previous September within the US Department of War. Once this proposal concerning comprehensive legal proceedings had won the day in Washington, Churchill found himself facing combined American and Soviet pressure to mount a major trial conducted by some specially constituted international tribunal.

In London there was particularly stout resistance from the head of the judiciary, Lord Chancellor Simon. He stood by the advice which he had

previously given to the Cabinet:

"I am strongly of the opinion that the method by trial, conviction, and judicial sentence is quite inappropriate for notorious ringleaders such as Hitler, Himmler, Goering, Goebbels and Ribbentrop. Apart from the formidable difficulties of constituting the Court, formulating the charge, and assembling the evidence, the question of their fate is a political, not a judicial, question. It could not rest with judges, however eminent or learned, to decide finally a matter like this, which is of the widest and most vital public policy."

There was some justification for Simon's anxiety about unavoidably protracted proceedings. He was deeply concerned lest an international public should come to see them simply as a 'put-up job' designed by the Allies to validate a series of prejudged punishments. Were the precedents for this kind of trial so weak as to prompt the condemnation that it amounted to nothing more than 'victors' justice'? And was there not great danger that, at certain points in such a process, Hitler and his colleagues might manage to reverse the arguments so as to embarrass the Allied case?

Only in May 1945 - by which time the Fuhrer himself was dead, and victory in Europe had been assured - did the British government finally yield to the American and Soviet policy of full-scale trial. Under the new Truman presidency a US delegation, headed by Justice Jackson of the Supreme Court, was principally responsible for driving the project forward in such a way that by August 8th (ironically, the same week as the Hiroshima and Nagasaki bombings), a series of ground-rules had been settled through the so-called London Agreement. With France now included among the signatories, the resulting Charter created a four-power International Military Tribunal. To this each government would appoint one judge plus a deputy, as well as supplying the court with prosecuting staff. The members of the Tribunal soon chose the senior British nominee, Lord Justice Geoffrey Lawrence, to preside over hearings that eventually stretched from November 1945 to October 1946. His alternate, Sir Norman Birkett, was surely right to believe that they were embarking on 'the greatest trial in history'.

Meanwhile, the Allies had been debating the roster of potential defendants. Hitler, Himmler, Goebbels

and Heydrich were the principal figures who had not survived even to be indicted. As for Bormann, he could not be found either alive or dead, and thus was tried in absence. Any critical reading of the trial transcripts has to take account of the tendency for most of the other twenty-one defendants, all of whom did appear in the Palace of Justice at Nuremberg assisted by their own defense counsel, to shift responsibility for wrongdoing towards those leading Nazis who were not present. The accused had been chosen largely to ensure representation of all the major administrative groupings within the Reich, and thus to reflect the American emphasis on establishing the criminality of these organizations through judgments that could be treated as immune from further challenge during later denazification proceedings. Yet, perhaps inevitably, lawyers and public alike came to focus mainly on the human dimension to Nuremberg, as a trial of humiliated Nazi bosses (including the closest surviving associates of the Fuhrer) and as a record of their victims' suffering.

The prisoners themselves were not readily reducible to any single stereotype of Fascist leadership. In the case of Ernst Kaltenbrunner, latterly Chief of the Security Service, and of Hans Frank, the butchering Governor-General of occupied Poland, a stark brutality was plain. This also characterised the virulently anti-Semitic Julius Streicher, but here - as with Hitler's former deputy, Rudolf Hess - queries about insanity too were at issue. Seeking to maintain a certain distance from all these were four senior officers, Alfred Jodl and Wilhelm Keitel of the army, together with Eric Raeder and Karl Donitz from the navy. This quartet centered its defense on necessities of military obedience which the Allies were deemed incompetent to challenge. Similar indignation at the impropriety of summons before the Tribunal marked the bearing of the old conservatives, Franz von Papen and Constantin von Neurath, as well as that of Hjalmar Schacht, the banker who had helped to put Hitler's Reich on the road to economic recovery. As the trial proceeded, certain other defendants became increasingly revealed as over-promoted mediocrities: among them were Joachim von Ribbentrop of the Foreign Office, the self-styled 'philosopher' Alfred Rosenberg who had enjoyed formal responsibility for the Eastern Occupied Territories, and the painfully inarticulate Fritz Sauckel who had run the program of slave labor.

These same helot battalions had been most directly exploited by Albert Speer, a far more impressive figure within the Nuremberg dock. Just as the

former Armaments Minister had once used his great organizational talents to maintain Germany's war effort, so now in the courtroom he deployed the skills needed to save his own skin. The projection of Speer's stoical moralism depended on conceding a measure of 'responsibility', but hardly of criminal 'guilt'. How, he implied, could the Tribunal condemn a young architect who had simply been ensnared by the charismatic Fuhrer's flattery, and had fallen victim to that ethical tunnel-vision so pervasive among devoted technocrats?

This was a line of argument sufficiently insidious to prompt the British deputy prosecutor, Maxwell-Fyfe, into wondering privately whether Speer might be at heart a decent man who had been merely misled. Indeed, as things turned out, the plea succeeded in saving this prisoner from sentence of death. Such forensic resourcefulness was equalled only by Hermann Goring, albeit in circumstances where his status as the most prominent Nazi survivor made similar leniency unthinkable. From him especially, the familiar courtroom claim to have been ignorant of the Reich's genocidal practices rang utterly hollow. Yet, weaned from drugs, he did manage to rekindle at Nuremberg much of that shrewdness and intelligence which for long had made him Hitler's most powerful accomplice. At no point was this clearer than in March 1946, when, during Goring's cross-examination, it seemed to be he rather than Jackson, now the American chief prosecutor, who had the greater mastery over the documentary evidence and held the upper hand in much of their oral contest.

More than half of those accused were charged under all four headings of the indictment submitted to the Tribunal. This document, encapsulating the prosecution's overall strategy, needs to be assessed with one eye on Simon's qualms. The American team concentrated on Count One concerning a 'common plan or conspiracy', while the British focused on 'crimes against peace' under heading Two. Counts Three and Four, covering 'war crimes' and 'crimes against humanity', fell to the Soviet and French lawyers who divided their labour according to the geographical emphasis of such offenses in Eastern and Western Europe respectively. Attacks on the legitimacy of the Nuremberg proceedings are least convincing in regard to this latter pair of headings. We need to note particularly that, on the basis of massive documentary and photographic evidence concerning Nazi involvement in genocide and in the kind of atrocities thereafter symbolised by the names of such places as Lidice and Oradour, all but one (Streicher) of those eventually condemned to death

were found guilty under Three and Four together.

Amongst all the charges, that of 'war crimes' had the strongest base in precedent. It built on the Hague Rules and the Geneva Conventions so as to deal with violations of law and custom during the actual conduct of hostilities. Thus Count Three explicitly condemned 'murder or ill-treatment' of civilians or prisoners of war, as well as 'killing of hostages, plunder of private property, wanton destruction of cities, towns or villages, or devastation not caused by military necessity'. The reference to 'crimes against humanity' under Four was more of an innovation. It reflected the prosecutors' need to adapt the war-crimes concept to conditions of total conflict in which barbarism had become systematised on a scale previously unimagined. The offense was defined as embracing 'murder, extermination, enslavement, deportation and other inhumane acts' and 'persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal'. Furthermore, international law was here extended to cover such acts even when they were committed against fellow-nationals - including in this case the wrongs which Germans had inflicted on Germans, whether Jewish or otherwise.

The Allies could have got most of what they wanted, and could have done so in a morally less dubious way, by limiting their prosecution solely to 'war crimes' and 'crimes against humanity'. However, as Simon had foreseen, the Americans were especially keen on a logic that emphasized how these actions had stemmed directly from the offense alleged under Count One - that of 'conspiring', not least to unleash hostilities in the first place. Like the German defense counsel, the Soviet and French prosecutors made heavy weather of this concept. The judges eventually ruled that it could be pursued only when linked to 'crimes against peace', and to events starting from November 1937 when some of Hitler's ideas about annexing Austria and Czechoslovakia had been recorded in the 'Hossbach memorandum'.

Yet this notion of conspiratorial plotting continued to influence all the proceedings. It encouraged the accusers to exaggerate the coherence of policy-making within Nazi Germany. Conversely, it spurred the prisoners into stressing the kind of organizational confusion that might assist their claims to have been ignorant about the worst horrors of the regime. Here the Nuremberg Trial heavily influenced future writing about the Third Reich. If the prosecutors tended to prefigure those 'intentionalist' historians who have seen the practice

of Nazism as the relatively simple unfolding of certain deep-laid ideas, the defense provided a first sketch for some elements within those 'structuralist' or 'functionalist' interpretations which have put greater stress on constant improvisations of policy and on confusions of responsibility.

That point is reinforced by the wrangles over Count Two. It condemned 'the planning, preparation, initiation, and waging of wars of aggression, which were also wars in violation of international treaties, agreements and assurances'. Thus the accusation knotted together many legal and historical complexities. It was easier to show the general aggressiveness of Hitler's foreign policies from 1933 to 1939 than to prove either that these sprang from what Jackson called a 'master blueprint' or that they were incontrovertibly criminal in substance. This was an area in which, as Simon had again warned, the law looked weak and the precedents seemed vague. In the absence of any international statute-making body, the accusers would have to rely heavily upon evidence that the states beyond Germany had actually behaved during the 1930s as though they already believed themselves to be confronting a criminal regime.

Here the Allied prosecutors faced numerous problems. For example, the Nazis' contempt for the League of Nations was doubtless deplorable. Yet Nuremberg's depiction of the organization as a legal linchpin seemed merely hypocritical, granted that the USA had never joined it and that the USSR had even been expelled from it after attacking Finland in 1939. Nor was there anything too convincing about the prosecution's frequent invocations of the Kellogg-Briand Pact of 1928. Did this not attract such wide formal support for its aim of renouncing war as an instrument of policy precisely by avoiding any actual definition of 'aggression' or any stipulation about penalties? Then, again, passages from Hitler's writings and speeches would be quoted in the courtroom so as to berate the defendants for their failure to see the criminal intent of his foreign policies, but no prosecutor ever directed the same harsh questions to those Allied 'appeasers' who had proved similarly blind. Concerning the 1930s, Schacht was surely entitled to enquire in his later memoirs: 'How were the German people supposed to realise that they were living under a criminal government when foreign countries treated this same government with such marked respect?' This was a point that E.L. Woodward, historical adviser to the British Foreign Office, was still making to the trial-planners on the eve of the Nuremberg proceedings, when he observed: 'Up to September 1st, 1939, His Majesty's

Government was prepared to condone everything Germany had done to secure her position in Europe.'

This reluctant complicity by the Allies regarding certain Nazi policies that had been deemed criminal only in retrospect was not the worst potential flaw in the accusers' case. With reference to the indictment as a whole, it was understandable that those in the dock should also take every chance to register even more direct charges of *tu quoque* - that is, to stigmatise the unwillingness of the prosecuting powers to relinquish the privileges of 'victors' justice' by confessing to the crimes which they themselves had allegedly committed while fighting Hitler. The anxiety in Whitehall lest the defense should complicate Count Two by examining the Cabinet papers of 1939-40 that dealt with pre-emptive action over Norway (as an option possibly to be pursued even against any Norwegian resistance thereto) was a relatively minor matter. Far more serious was the vulnerability of the British, and the Americans, to counter-charges under heading Three. These involved allegations about 'wanton destruction' inseparable from those modes of aerial warfare against civilian targets which, even in the 1990s, continue to render controversial the name of 'Bomber' Harris, and indeed to cast doubt on the legitimacy of the atomic explosions detonated at the end of the conflict with Japan. This was one theme from the initial indictment which the prosecution soon found it prudent to soft-pedal, while another related to the waging of unrestricted submarine warfare in circumstances where Anglo-American practices turned out to be broadly similar to German ones.

The gravest difficulties stemmed, however, from the involvement of the USSR at Nuremberg. Such was the extent of its human losses in the war (on a scale being hugely revised upwards even today) that by 1945 any absence of Soviet prosecutors and judges had become even more unthinkable than their presence. Yet, as the representatives of one totalitarian system waxed eloquent in their condemnation of the vanquished leaders of another, there was every prospect of the USSR's participation severely weakening the moral and legal integrity of the proceedings. The cogency of Count Two, for example, was scarcely enhanced by the Nazi-Soviet Pact that Molotov had signed with defendant Ribbentrop on August 23rd, 1939. Indeed, the charge was substantially weakened by growing (and accurate) suspicion that the agreement must have carried some form of secret protocol granting the USSR an entitlement to launch its own acts of

aggression against eastern Poland, the Baltic States and Finland.

60 Nor did Nuremberg benefit from the Soviet prosecutors' insistence upon specifying the massacre of Poles in the Katyn forest as a Nazi atrocity. By the close of the trial it was becoming plainer that the crime belonged not to 1941, as alleged, but to 1940 when the area was still under the control of the Red Army. By excluding from the final judgement all reference to this matter, the Western members of the Tribunal were paying silent and embarrassed testimony to the fact that in Eastern Europe, before as well as after Germany and the USSR became open enemies in June 1941, both the Nazi and the Stalinist regimes had pursued their irreconcilable goals with comparable ruthlessness.

On August 31st, 1946, the defendants made their own closing statements before the court, some showing defiance, others mere resignation at their expected fate. Over the next few weeks the members of the Tribunal completed their private deliberations, guided more by Lawrence's practical wisdom than by any flights of jurisprudential theory. From what we now know of these sessions, it is clear that, while some horse-trading between the judges became virtually unavoidable, they generally showed due care and fairness within the sometimes compromising framework of the Charter. The public reading of their findings began on September 30th. It ended the following afternoon with the announcement of their verdicts and sentences, which had been settled by simple majority vote whenever disagreement occurred. Acting probably on direct instruction from Moscow, the senior Soviet judge (General Nikitchenko) registered a last-minute dissent from the decision not to hang Hess, as well as from the three actual acquittals and from the Tribunal's selective approach towards deciding which Nazi organizations should be deemed criminal. In the early hours of October 16th - with seven defendants having been condemned to imprisonment, and with Bormann still missing - ten of the eleven remaining captives were duly hanged at Nuremberg. It was Goring who escaped the noose, by taking his own life via a cyanide capsule late on the previous evening. His corpse was simply added to the others roughly laid out in the prison gymnasium for the purposes of photographic record. All the bodies were then promptly transported to some unknown destination for a cremation and secret dispersal of ashes.

110 So concluded an enterprise which, even amidst the vengeful passions so understandable in 1945-46, had

endeavored to subject the Nazi tyranny to the cooler analysis of reason and of law. If political considerations too could not be entirely expunged from the proceedings, at least they were never permitted to become dominant. Soon the trial was providing a broad model for the legal action instituted by eleven Allied nations against Japanese leaders which started at Tokyo in May 1946, as well as for some later prosecutions in Germany conducted by individual occupying powers - most notably, by the Americans at Nuremberg itself until 1949.

The International Military Tribunal had proved largely successful in attaining its immediate objectives. True, the USSR had criticised what it saw as a lapse into leniency at the end, and elsewhere there was, in and beyond 1945-46, considerable public disquiet about those major weaknesses which we have noted within the prosecutors' case. Even so, though the latter imperfections could be exploited by those keen to purvey neo-fascist myths and legends, far fewer fantasies developed in Germany than had followed the defeat of 1918 - and far fewer than would have flourished henceforth had the option of summary execution really been pursued. Who could ignore, above all, the contrast between the Tribunal's extended hearings and the peremptory conduct of 'justice' in the Nazi courts, let alone in the death-camps where even the pretence of legal process had been so murderously abandoned? In sum, the Nuremberg Trial played a very positive role in publicising the vicious origins, course, and consequences of Nazism, and thus in creating better prospects for democratic stability within the Federal Republic that would soon emerge from the zones of occupied Germany controlled by the Western Allies.

Yet those who organised the Tribunal placed no less store by their even broader aspirations for the decades ahead. Here the lack of success is something to which, half a century later, the state of our own world gives sad and ample testimony. Though by the end of 1946 the new United Nations had affirmed that the Nuremberg Charter and the concluding judgement should be entrenched as fundamental elements of international law, very little progress was made thereafter towards building on those strengths so as to establish a permanent court for the trial of relevant crimes. If Count Two depended on a dubious reading of the past, it had also represented an effort to mould a better law for the future. Another outbreak of world-wide conflict was certainly avoided during the long superpower confrontation of the Cold War, yet that perilous

peace owed far more to mutual nuclear deterrence than to any lasting conversion to the rules promulgated at Nuremberg. Meanwhile, albeit on a sub-global scale, many 'crimes against peace' have been occurring - only for these aggressions to be left judicially unpunished.

As for the actual conduct of war once begun, much of the world's experience since 1945 suggests nothing more than utter disregard for the principles proclaimed by the Tribunal. Above all, the horrors of genocide - in such places as Bosnia, Rwanda and the Kurdish lands - have been bulking ever larger on our international agenda. Under those circumstances, as Ronnie Landau recently argued (*History Today*, March 1994):

Occasional references to war-crimes trials add up to little more than empty political rhetoric, designed to salve our consciences, while having no effect whatsoever on the belligerent parties. Our role as 'peace-seekers' is one behind which we hide our passivity.

The weakness of action is especially evident from the international community's lack of sustained commitment to tackling perhaps the central difficulty. This is the fact that proceedings of the type pursued against the Nazis in 1945-46 are attractive to those who govern only when the identity of conquerors and conquered is conveniently settled in advance. We have urgent need of the political will to begin overcoming this problem, by developing a permanent international tribunal for the trial of war crimes - one which must be effective in putting at risk potential winners as well as losers. Failing this, even the best of any future proceedings which might be cobbled together - merely on an occasional basis, and normally after the completion of hostilities - will not escape that taint of 'victors' justice' which still leads us to moderate our admiration for the pioneering efforts of those who planned and conducted the Nuremberg Trial.

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