THE JUDICIAL AFFAIRS

By

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The old German city of Nuremberg was fittingly chosen as the site for the trials of the principal Nazi war criminals. This city had preceded discrimination against Jews as early as 1686 when a bulletin de Justice Ungerman was published there, and it was there that the infamous Nuremberg racial legislation was proclaimed two hundred and four years later. This was a symbolic choice, intended to demonstrate the historical will to destroy militant Nazis at the scene of its birth. It was to be the dividing landmark between the Third Reich and the New Germany.

All the Allies were in complete agreement as to the need to punish the criminals. Some of the Allied powers preferred to punish them without adherence to legal proceedings. However, Attorney General Robert H. Jackson declared that such administrative procedures would not satisfy the American conscience or be remembered by our children with pride.

The American view prevailed. And in accordance with Justice Jackson’s principle, the Allied Control Council in Germany promulgated a law permitting the varying occupation powers to try additional criminals in the name of international law. Thus, at Nuremberg, American Tribunals judged 177 defendants in 12 cases.

It is remarkable to describe the categories of these Nazi criminals. They were the commanders of special shock units — the “Einsatzgruppen” which had killed almost 4,000,000 innocent people in Soviet Russia — the directors of concentration camps, the men responsible for the creation of gas chambers, the industrialists who used slave-labor, the physicians who tortured and killed their patients and experimented upon the bodies of prisoners causing indescribable agony and death. They included the lawyers who had pledged allegiance solely to Hitler’s decree and disproved death sentences wherever so ordered by him, the generals who had killed hundreds in the proportion of one hundred to one for every German who fell, the cabinet ministers who had given legal form to the infamous order concerning the “final solution” of the Jewish problem — viz., the total extermination of the available Jews — the diplomats who had prevailed upon the Allied governments to deport their Jews to the death factories at Auschwitz and elsewhere.

The trials were more than trials of individuals; they were also an indictment of a system which had set up for human beings, violated human rights, annihilated defenseless persons, distinguished alien peoples from the master race by religion, race or political opinions. Every trial disclosed a separate field of the Nazi State’s infamous activities and demonstrated the criminal enterprise of high officials who were united by one political creed, by one prophet in the person of Adolf Hitler.

But, in spite of this ideological union and coordination of strategy, the tribunal did not contend that the defendants were bound by the conspiracy or were equally or jointly responsible for all the evil which was inflicted by the enormous machine called the Third Reich. On the contrary, the Tribunal stated in every case that the defendants were individually responsible only for their own acts and not for the acts committed by other persons in execution of a common plan.
These trials were not acts of vengeance. They were fair trials. The defendants and their attorneys made use of all the rights provided by law. The number of witnesses called and affidavits presented by the defense is eloquent proof of this.

Let the evidence show that these crimes were perpetrated 'in cold blood' and were well planned in advance. The trials carried out a program of annihilation with the thoroughness of a bookkeeper and the callousness of an automaton.

The trials revealed much depth of Nazi cruelty that even some Germans were shocked. Dr. Hans Hase, the Minister President of Bavaria, wrote: "Every German must blush with shame that he is faced with irrefutable evidence of dolosely brutality of an insane obsession which debased the German soul."

For their crimes the 177 defendants received the following punishments: twenty-five were sentenced to death, twenty to life imprisonment, three to 35 years, four to 20 years, twelve to 15 years, three to 10 years, nineteen to 5 years, thirty to various terms ranging from 6 to 30 years, and eighteen to terms varying from 12 to 15 years. Thirty-three persons were acquitted.

Some of the defendants had their sentences reduced for "good behavior" during their term of imprisonment. And, after the sentences were passed, the prisoners used all the rights provided in the law for appeal. However, all death sentences with the exception of one were executed by the Military Governor. A committee named by the Congress of the United States to investigate the fairness of the trials concluded that all the defendants had been accorded a fair trial. Nevertheless, the defendants sentenced to death filed petitions for review of their cases with the U.S. Supreme Court, which later dismissed them. It seemed that all legal means of appeal were exhausted.

But some sectors of the German population, still imbued with the Nazi ideology, claimed that the German honor and particularly the honor of the German army, was hurt by the convictions of some generals. Failing to yield to pressure, Mr. John J. McCloy, the American High Commissioner for Occupied Germany, decided to appoint a Clemency Board which had no particular basis in law.

What reasons could be found for extraordinary clemency in regard to these criminals? Did the Clemency Board or Mr. McCloy find that the crimes committed were not as hideous as had been stated by the defendants? Did they find that the defendants had been chosen only as scapegoats?

On the contrary, in the introduction to the official Clemency Board report, we find a brilliant analysis not only of the criminal activities of each defendant whose case was reviewed but of the German philosophy of annihilation as well. This philosophy, the report said, was based on the concept that the Germans were a master race destined to conquer, subjugate and enslave the inferior races of the East, and that all individuals (and to serve the Nazi.

The defendants had continued that the homicidal activities were not criminal because they were part of the program of the Nazi regime and because they were undertaken under orders. But, the report continued, their activities were criminal because "no act can be called upon to defend the murder of Jews or gypsies, the enslavement of their entire race, and the brutal treatment of masses of people... Murder, pillage and enslavement are against the very rights that have been for at least the twentieth century."
The Clemency Board, following the precedent of the Nuremberg Judgments, did not recognize that the order of a superior can excuse anybody for criminal acts. It seemed strange to the Clemency Board that "in an entire nation of sixty million people there was only one man, or a very small group of men, responsible for any and all things which happened, and that no one else was responsible for anything." The Board termed this explanation "a blind philosophy" because "individuals in a position of some authority must at least be held answerable for their acts."

Did the Board mean that the trials had not been fair enough and did it therefore recommend acts of grace to redress wrongs?

On the contrary, the Board agreed that justice had been done; that there was nothing ex-post-facto about the laws applied and that the deeds committed by the defendants were considered as others even in ancient times. The Board approved in general all the trials, stating:

"What Nuremberg means is that the law remains at all times over all people, including the leaders of a state and all who follow in their train, and that the individual will be held answerable to society."

Are, then, did the Board destroy this import of Nuremberg by its contradictory review?

Was it that the prison conditions of the defendants were so appalling that a reduction of the sentences seemed an imperative act of clemency? No. The Board stated that "the care, treatment and attention given to the inmates are all that could be asked." Yet, finally, the moral stature of the defendants so high that their remorse so sincere that they deserved special clemency?

In the decision of the Board we read the following: "The majority of the defendants still seem to feel that what they did was right and that they were doing it under orders."

On the other hand, however, the Board found that "in several cases the defendants occupied subordinate positions with little authority," that they were "little more than common members of a criminal organization," therefore "adjustments in sentences" must be made and the Board "has not hesitated to recommend salary reductions in sentences." This set of recommendations was accepted by Mr. John V. McCloy, who made even sharper reductions in some cases.

Let us call attention to some of the more astonishing decisions:

The Medical jobs - The defendants were charged with having performed medical experiments on concentration camp inmates with unnecessary suffering and injury. The miserable inmates experienced extreme pain and agony. The result of these so-called experiments was death or at best disability. Young girls were subjected to various experiments in sterilization.

Seven of the convicted defendants were hanged, seven were discharged. The others were sentenced to imprisonment ranging from 10 years to life. Their part in these scientific torture was by no means negligible. The criminals were not men without authority. Siegfried Handlopp, for example, summoned to life imprisonment, was the head of the Army Medical Service. The Court had found that there was no "local responsibility," or so he was convinced. Yet his sentence was commuted to 20 years, though Mr. McCloy himself stated concerning all the defendants.
in this case that it was "difficult to find room for clemency."

To Gerhard Rose, who was a consulting medical official and who gave his consent for conducting criminal experiments, extraordinary clemency was shown; his sentence was reduced from life imprisonment to 15 years. Karl Gemkow, on 28 Jan. was in charge of the SS Medical Service and carried out Himmler's orders on those experiments; clemency was granted in the same measure. One of the scientific hangmen was freed; his 10 year sentence was commuted to time already served.

The Alien Camps — Field Marshal Erhard Milch, State Secretary of the Air Ministry, right-hand man of Goering, had been convicted to life imprisonment for advocating and exploiting slave labor. Mr. McCloy characterized his activities as "almost "tendentious advocacy of and pressure for slave labor and disregard for the life and health of workers." The motive given for clemency was "the instability of temperament due to nervous strain aggravated by a head injury." Could a common criminal be granted clemency because of "instability of his temperament?"

The SS Camps — The defendants were administrators of the concentration camps. They built the gas chambers, they were aware of what was happening in them, and they participated in the genocidal program. Mr. McCloy rightly observed that "the liquidation of the Jews in the Auschwitz camp, the destruction of the Warsaw ghetto and the pillage of the Jews in the East... were among the crimes chargeable" to them.

The defendants, Oswald Pohl and Franz Birenzwald, were sentenced to death; eighteen others, to imprisonment ranging from 20 years to life. Oswald Pohl alone was not granted clemency by Mr. McCloy. The sentences of all the others were commuted. The death sentence of Franz Birenzwald, Pohl's right-hand man, was commuted to 9 years imprisonment.

The original Tribunal had stated that Birenzwald held a high position and that he had actual knowledge of the "final solution" of the Jewish problem (i.e., extermination). His activities, the Tribunal pointed out, constituted a "material cog in the machinery necessary for the operation of the concentration camps."

The Tribunal, we read further in the judgment, did not find that he had played a minor role in the concentration camp activities, but that he was involved and maintained the gigantic enterprise which resulted in the unlawful deaths of millions of slave laborers.

Mr. McCloy explained that extraordinary clemency in these cases was due to the introduction of new evidence, but he did not disclose this evidence.

The Extermination Camps (Konzentrationslager) — Thirteen of the 23 defendants were sentenced to death for the murder of 2,000,000 persons. The Tribunal had called attention to these economic figures and suggested, that to make them more intelligible, one should "visualize not one million people but only two persons: a man, woman, child... falling before the executioner's guns. If one million is divided by ten, this scene must happen one hundred thousand times."

The defendants insisted that they had been carrying out the order of their superiors because the defense of Germany required these measures. The Military Tribunal assured that "execution of the Jews had nothing to do with the defense of Germany; the genocide program was in no way connected with the protection of the Fatherland; it was entirely foreign to the military issue."
The High Commissioner confirmed this opinion, stating that the murder was on such a large and visible scale that the mind has difficulty in comprehending them.

Mr. Holley did not find any reason for clemency for four of those sentenced to death. The remaining death sentences were commuted from life to 25, 15, and 10 years imprisonment, and in one case a 20-year prison sentence was reduced to life already served.

Was in the moral calibre of the criminals in this category who were granted clemency?

Here are some examples:

Moller Hane: Doctor of Law, commander of a detachment which killed several thousand people. He did not deny his participation in mass murder. But he pleaded not guilty. Indeed the only guilt he admitted was that "as an individual he was not able to carry out the Fuehrer's orders," i.e., he had not killed more people. He made no attempt to conceal his worship of Hitler.

Robert Grabert, alias Gaukowsky: He charged his name than he voluntarily gave up his pastoral duties as a Lutheran minister and assumed those of a workable executioner. He signed a report on the slaughter of 2,000 persons by his detachment. He personally witnessed the executions. When asked by the Tribunal why he, as a minister of the Gospel had permitted people to go to their death without religious ministrations, he replied, "I did not want to cast pearls before swine."

Hans von Klugelhoffer: Well-known concert and opera singer. He was assigned as an interpreter to Einsatzgruppe B, which killed 65,167 persons. But his duties were not confined to translation work. He also assumed command of a detachment and admitted having shot 30 Jews because they left a ghetto.

Kurt Schmidt: A descendant of the famous composer, Franz Schubert. He stated that the enormous figures in his report on the number of executed persons were accurate.

Franz Stolz: Professor of Political Science. He regarded the killing of male Jews as proper because they were potential bearers of arms. In a conference in April, 1944, he expressed approval of the physical destruction of the East European Jews because it would deprive Jews of its biological reservoir.

Soon some of these men will be free.

The Generals Case: Two generals were charged with criminal disregard of civilized rules of warfare, particularly in respect to the treatment of hostages and the killing and mistreatment of prisoners of war.

The Clemency Board characterized the activities of the defendants as follows:

"Departing from military measures and in violation of the laws of war, the South- East Army engaged in the murder of political leaders captured with troops, collected the civilian population, and, after destroying their villages, held them as hostages to be shot together with the prisoners of war in arbitrary reprisal ratios, as high as 100 to 1 for the death of a single German soldier."

The High Commissioner added that, in his opinion, "these highly responsible officers... passed far beyond the limits permitted by justifiable military considerations."
Nevertheless, clemency was granted to all but two of the defendants. No explanation
has been given, in one case, a 20-year sentence was reduced to 10 years
and in another to five years. The man now free was originally convicted of killing
women and children. In one case (November, 1949) he ordered the shooting of 725
persons.

But if we can find no explanations either in his record or in the decisions of the
High Commissioner, perhaps the answer will lie in the fact that he is now a member of the
East German Committee negotiating with the Allies about German repatriation.

A man from a family of German soldiers, he was found guilty of having made extensive use of slave labor
and caused the death of countless workers. He was set free by Mr. McCloy. After his liberation he was
welcomed with flowers, and a banquet was given in his honor.

The computations of dozens of sentences and the liberation of some war criminals
was a cause for rejoicing among Hitler's partisans and a day of sorrow for all
German who desire the democratization of the homeland.

Protests were made by a variety of organizations. France and Great Britain indicated
that they did not approve of these measures, and it would appear that they
do not intend to follow the example of Mr. McCloy.

However, a new propaganda campaign has been launched to reconsider the remaining
sentences of war criminals under American jurisdiction. Most observers expect
further mitigative action.

The McCloy decision was dangerous, not only because it liberated war criminals,
who advocated a precedent whereby other war criminals could and would be liberated,
but also because it challenged the validity of the Nuremberg principles through questionable legal steps.

First of all, no Board of Clemency is expected to act as a court. It is not the
function of such a board to examine new evidence. If such new evidence is available,
no new trial should be held. Yet, in the case of the "Klingenberg," the
report of the Clemency Board appointed by Mr. McCloy said that the review of sen-
tences was "due largely to the introduction of new and persuasive evidence, which
has recently been made available."

Secondly, no court accepts evidence in absentia except under unusual circumstances.
The American Clemency Board interrogated the defendants and their attorneys. It
examined new documents and new evidence in closed session. No unusual circumstances
were noted.

Thirdly, neither Control Council Law No. 10 nor Instruction Order No. 7 covering
treatment of alleged war criminals provided for such an institution as a Clemency
Board. They provided for the usual appeal procedure. That procedure had been
exhausted before the Clemency Board was appointed.

It would appear, therefore, that the appointment of the Board and its subsequent
decisions were based purely on political expediency. The danger in this is that
it revives and strengthens the German claims that the decisions in the Nuremberg
trials were influenced by desire for vengeance and not for justice since the
the decisions were already reached immediately after the war when passions still ran high. The German allegations, of course, are not true. The first sentence that in the case of General Milch was handed down on April 17, 1947, almost two years after the unconditional surrender of Germany to the Allies, one case - the trial of the Ministers and Diplomats - was up almost four years after V-E Day. But the convulsions enabled the Germans conveniently to forget these facts. They were provided with material for unscrupulous propaganda to glorify the condemned criminals as martyrs of political justice.

Thus, the entire validity of the Nuremberg Code has been challenged. It is ironical that at a time when the United States was endeavoring in the United Nations to accelerate the codification of the Nuremberg principles and when a total of 57 nations had ratified the Genocide Convention, clemency was granted to criminals guilty of the worst genocidal acts in history.)

(2) This article dealt only with the sentences passed by the Military Tribunal in Nuremberg established by Central Council Law No. 40. It was not concerned with the judgments of the regular American Military Tribunals, therefore no analysis was made of the decisions of General Thomas A. Buzby, who was guided by the same considerations as the Board of Clemency.