THE JUDICIAL AFFAIRS

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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 previously been the scene of the Nuremberg Race Laws, published in 1935, and it was there that the infamous Nuremberg Laws against Jews was proclaimed two hundred and four years later. This was a symbolic choice, intended to demonstrate the international will to destroy the Nazi system 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. None of the Allied powers preferred to punish them without the observance of local procedures. However, American Justice Robert H. Jackson declared that such administrative procedure 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 various occupation powers to try additional criminals in the name of international law. Thus, at Nuremberg, American Tribunals judged 197 defendants in 12 cases.

It is worthless to describe the categories of these Nazi criminals. They were the commanders of special death units - the "Einsatzgruppen" which killed almost 2,000,000 innocent people in Soviet Russia - the directors of concentration camps, the war criminals responsible for the extermination 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 inexcusable agony and death. They included the dealers who had pledged allegiance solely to Hitler's decree and imposed death sentences according to orders, the generals who had killed millions 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 death factories at Rumbach and elsewhere.

The trials were not just trials of individuals. They were also an indictment of a system which had been built on human blood, violated human rights, annihilated defenseless persons,剥夺ized slave peoples from the master race by religious, racial 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 co-ordination of strategy, the tribunal did not contend that the defendants were bound by the conspiracy or were guilty of any joint criminal enterprise. Each defendant was individually responsible for his 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 criminals carried out a program of annihilation with the thoroughness of a bookkeeper and the callousness of an automaton.

The trials revealed the depths of Nazi cruelty that even some Germans were shocked. Dr. Hans Bading, the Minister President of Bavaria, wrote: "We all have to blush with shame when we are faced with irrefutable evidence of undying brutality of an insane obsession which defies the German name."

For their crimes the 477 defendants received the following penalties: twenty-four were sentenced to death, twenty to life imprisonment, three to 20 years, fourteen to 20 years, twelve to 12 years, three to 10 years, eighteen to 10 years, thirty-three to various terms ranging from 5 to 10 years, and eighteen to terms varying from 9 to 6 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 commuted 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 persisted in death-filled 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 "Nazi honor," and particularly the honor of the German army, was hurt by the convictions of some generals. Failing to their 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 committe were not as hideous as had been stated by the Prosecution? 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 "sub to serve the State."

The defendants had contended that the inhuman activities were not criminal because they were part of the "national plan" and because they were undertaken under orders. But, the report contended, their activities were criminal because "no law can be violated to defend the murder of Jews or gypsies, the enslavement and accompanying cruel treatment of masses of people. . . . Murder, pillage and enslavement are against law everywhere and have been for at least the twentieth century."
The Clemency Board, following the precedent of the Nuremberg Judges, did not recognize that the order of a superior can exonerate 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 accountable 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 crimes even in ancient times. The Board approved in general all the trials, stating:

"What Nuremberg means is that the law rests 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 accountable to society."

But 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 decency? No. The Board stated that "the care, treatment and attention given to the inmates are all that could be asked."

Finally, the moral stature of the defendants in high or 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 dummy numbers of a criminal organization." Therefore "adjustments in sentences" must be made and the Board has not hesitated to recommend sharper reductions in sentences. This set of recommendations was accepted by Mr. John J. McCloy, who made even sharper reductions in some cases.

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

The Medical Jade - The defendants were charged with having performed medical experiments on concentration camp inmates with unnecessary suffering and injury, 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 Hasselrot, for example, condemned to life imprisonment, was the head of the Army Medical Service. The Court had found that there was no "crime of greater responsibility."

Yet his sentence was commuted to 10 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 had been an outstanding 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 Gemdsch, on 29 had also been in charge of the 54 Medical Service and carried out Himmler’s orders on these 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 54th Case - 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. McGlynn characterized his activities as “almost violent 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 55th Case - 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 gasroom program. Mr. McGlynn rightly showed that “the liquidation of the Jews in the Auschwitz camp, the destruction of the Warsaw ghetto and the pillaging of the Jews in the East . . . were among the crimes chargeable” to them.

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

The original Tribunal had stated that Eichmann 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 link in the machinery necessary for the operation of the concentration camps.”

The Tribunal, in its further statement in the judgment, did not find that he had played a minor role in the concentration camp activities, but that he with others had “operated and maintained the gigantic enterprise which resulted in the wanton deaths of millions of slave laborers.”

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

The Extermination Camp Cases (Einsatzgruppen) - Thirteen of the 25 defendants were sentenced to death for the murder of 2,000,000 persons. The Tribunal had called attention to these enormous figures and suggested that to make them more intelligible, one should “visualise not one million people but only ten persons—men, women, children . . . falling before the executioner’s gun. If one million is divided by ten, this mere 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 asserted that “the liquidation of the Jews had nothing to do with the defense of Germany, as genocidal program was in no way connected with the protection of the Fatherland, but entirely foreign to the military aims.”
The High Commissioner confirmed this opinion, stating that the murders "were on such a large and vicious scale that the mind has difficulty in comprehending them."

Dr. Borkow did not find any reason for leniency for four of those sentenced to death, but for the others he did. 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 15 already served.

What is the moral caliber of the criminals in this category who were granted leniency?

Here are some examples:

Kurt Nage: 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 Führer's orders," i.e., he had not killed more people. He made no attempt to conceal his membership of the Nazi party.

Ernst Zimmer, alias Geymanovski: He changed his name when he voluntarily gave up his pastoral duties as a Lutheran minister and assumed those of a wretched 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 administrations, he replied, "I did not want to cost people before sin."

Hans Reichardt, well-known concert and opera singer. He was assigned as an interpreter to Einsatzgruppe 9, which killed 43,427 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.

Hans Schmal, a grandson of the famous composer, Franz Schubert. He stated that the enormous figures in his report on the number of executed persons were inaccurate.

Franz Steiner, Professor of Political Science. He regarded the killing of the Jews as proper because they were "potential centers of war." In a conference in April, 1944, he expressed approval of the physical destruction of the East European Jews because it would deprive them of their biological reservoir.

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."

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Nevertheless, clemency was granted to all but two of the defendants. No explanation has been given why, in one case, a 20-year sentence was reduced to 10 years and in another to 5 years. The man now free was originally convicted of killing 85 persons. In one case (November 1943) he ordered the shooting of 729 persons.

But if we can find no explanations either in his record or in the decision of the High Commissioner, perhaps his name — will enlighten us. He is the brother of former Premier Oskar Menthof, the leader of the West German Committee negotiating with the Allies about German rearmament.

The Lena Case — Alfred Krupp, the heir of the family of gun and munition makers, 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 greeted 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 decent Germans 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 sentences, 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, established a precedent whereby other war criminals could and would be liberated, and greatly hurt the efforts to democratize Germany, but also because it challenged the validity of the Nurnberg 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, a new trial should be held. Yet, in the case of the "Kleistgruppen," the report of the Clemency Board appointed by Mr. McCloy said that the review of sentences was "largely due to the introduction of new and persuasive evidence, which has recently been made available."

Secondly, a court accepts evidence in open court 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. 11 nor Instruction Order No. 7 covering the treatment of alleged war criminals provided for such an institution as a Clemency Board. They provided for the usual appeal procedure. This 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 raises and strengthens the German claims that the decisions in the Nurnberg 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—\footnote{This article dealt only with the sentences passed by the Military Tribunal in Nuremberg established by Central Council Law No. 10. It was not concerned with the judgments of the Military American Military Tribunal, therefore no analysis was made of the decisions of General Thomas C. Handy, who was guided by the same considerations as the Board of Censure.}—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—\footnotetext{}—that of the Ministers and Diplomats—ended up almost four years after VE Day. But the consequences 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.