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Culture, Society, and Praxis

Vice, Virtue, and Memory: The Question of Fairness at Nuremberg

Kiegan E. Lloyd

INTRODUCTION

At the end of World War II more than thirty-five million people—mostly civilians—were killed by the Allied and Axis powers. Therefore, the Nazi regime exterminated six million Jews in their concentration camps alone, and someone had to be held accountable.[1] Nazi leaders were prosecuted in the Nuremberg trials, beginning with the 1945 trial before the International Military Tribunal. The 1945 trial not only initiated a series of other trials, but it also held accountable twenty-two major figures of the Third Reich, charging them with four main indictments: crimes against the peace, war crimes, crimes against humanity and conspiracy to commit any of these crimes.[2]

The Palace of Justice in Nuremberg is remembered today as an institution that brought to justice those who committed or oversaw unforgivable crimes. However, I argue that the trials were biased for three reasons. First, the prosecution, headed by Robert Jackson from the United States of America, had considerably more latitude with the bench in preparing witnesses, cross-examinations, and preparing arguments compared to the defendants' counsel(s). Second, the defence lacked adequate time and facilities to prepare and present a reasonable defence and were not afforded fair due process. Finally, the unpreparedness of the defence counsel, the spoliation of evidence by the prosecution and the impartiality of the tribunal judges all contributed to making the trial biased.

BACKGROUND

The International Military Tribunal was established under the *London Charter* which was an agreement by the major ally nations.[3] Some critics condemned the use of judicial procedures to determine guilt and impose punishment of the war criminals, urging that to do so would be to turn a court into a political instrument by which the victors exercised their power to punish the defeated. As an example, Chief Justice Harlan F. Stone from the United States of America privately labeled the trial as a "high grade lynching party."[4] However, Levy and Sznaider point out that the symbolism of good and evil to many individuals during the aftermath of the Holocaust and especially during the Nuremberg trials represented to them remembrance and memory for those that perished in the war.[5] Therefore, the outcome of the Nuremberg trials represented either the triumph of good, or evil.

THE UNPREPAREDNESS OF THE DEFENCE COUNSEL

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The twenty-two defendants at Nuremberg were given a thirty-day period to prepare their defense before the trial began. The German lawyers assigned as defence counsel were acquainted with German legal procedure, not the Anglo-American trial procedures that were used throughout the Nuremberg Trials. The defence counsel had to quickly familiarise themselves with the Anglo-American accusatory model.[6] With only thirty days the counsel would have been primarily focused on looking through evidence and building their case with little time to get accustomed to trial procedure. This disadvantaged the defence counsel during the trial. They were often criticized by their legal counterparts and media for being "clumsy and unimaginative."[7]

The prosecution had an enormous quantity of German documentation to use as evidence in the trial. A group of military personnel established by the Allies were tasked with seizing and preserving all material German documents, records, and archives in preparation for the trial. By November 1945, the prosecution had over 17,000 pages of oral evidence, and over 22,000 pages of written evidence. The prosecution subsequently submitted approximately 12,000–15,000 pages to the Tribunal.[8] One of the biggest deprivations of due process rights was the defendants' lack of access to evidence held by the prosecution prior to the trial. This is a direct denial of the right to adequate facilities to prepare a defence. The prosecution had thoroughly searched the German archives and had seized all evidence relevant to their case. The remaining documents (of which there were few) were left for the defence to use. Even some of the most crucial and possibly exonerating material was not made available to the defence.[9] Occupying authorities barred the access of defence counsel to document archives, and they were unable to make the investigations necessary to form their defences. Even while the trial was in progress, access to material documentation remained difficult for the defence because often their requests were delayed.[10]

SPOLIATION OF EVIDENCE BY THE PROSECUTION

The lack of access to documents was often because of the deliberate withholding of evidence by the prosecution. Initially, Justice Jackson indicated the willingness of the prosecution to make evidence available to the defence. When the Tribunal directed Jackson to provide the defense with all the evidence, he was reluctant to do so. Before the defence could access any documentary evidence, the prosecution ordered that the defense counsel must first state what they were looking for and then make a specific request. No indexes or summaries were provided; therefore, without knowing what the documents contained, defence counsel was unable to make any sort of specific request. When defence counsel did request copies of documents from the prosecution, they had often "disappeared," or were made available in insufficient quantities, incomplete, not translated and days too late.[11] During the trial, Justice Jackson suggested that the defence should not be permitted to read its documents into the records, and instead should be limited to submitting the document books to the Judges. Dr. Dix the counsel for Hjalmar Schacht addressed the Court in response:

> I cannot consider it just and I cannot consider it fair if the prosecution had the right, for months, not only once but sometimes repeatedly and often, to bring their evidence to the knowledge of the public…The defence counsel must and would consider it a severe and intolerable limitation of the defence, if, contrary to the procedure exercised so far by the prosecution, it were deprived of the possibility of presenting, in its turn, at

> least the relevant parts of its own documentary evidence to the Tribunal verbally and with comments.[12]

As a result of the evidential rules, the Tribunal accepted *ex parte* witness affidavits from the prosecution, though they deprived the defendants the right of cross-examination.[13] Another issue faced by the defence was that they faced language and translation difficulties, which exacerbated the time pressures in preparing the case. When the defence requested copies of documentation from the prosecution, they were often provided only in English. Once the documents were eventually translated, errors in the translations were found.[14]

IMPARTIALITY OF THE TRIBUNAL JUDGES

The equality of the trial regarding the legal procedure can also be questioned. As previously mentioned, the trial ran according to Anglo-American legal proceedings a method unfamiliar to the defendants and their counsel. This left the defence at a distinct disadvantage compared to the prosecution. There was no equality between the prosecution and the defence regarding the trial procedure adopted. In fact, the reliance on documentary evidence disadvantaged the defence because of the sheer quantity of documents the prosecution submitted as evidence. There was no real equality of manpower between the parties.[15] A major obstacle for the defense and impacting a fair trial was the one-sidedness of the charges. The Nuremberg Trial is widely criticized for not allowing the *tu quoque* defence, which meant that the Allies could not be charged with the offences they were charging the defendants with, despite having committed them. To prevent Allied acts being called into question, the prosecution-based charges solely on German documentation. The defendants were prohibited from presenting evidence that implicated the Allies in any war crimes, crimes against humanity or crimes against the peace.[16] Furthermore, the Tribunal at Nuremberg was not an independent body because there was a substantial overlap between lawmaker, prosecutor, and judge. Not only were there overlaps in the administration of justice at Nuremberg, the law makers, prosecutors and Tribunal Judges were all from the victorious Allied nations. The defence had strong objections against this:

> [T]he defense consider it their duty to point out at this juncture another peculiarity of this Trial which departs from the commonly recognised principles of modern jurisprudence. This one party to the proceedings is all in one: creator of the statute of the Tribunal and of the rules of law, prosecutor and judge.[17]

The impartiality of the Nuremberg Tribunal can be questioned regarding the four judges on the Bench and their prejudice.

At the opening session of the trial, the four Judges professed, "I solemnly declare that I will exercise all my powers and duties as a member of the International Military Tribunal honourably, impartially, and conscientiously"[18] While great efforts were made to honour this declaration, and such efforts were often successful, the impartiality of the Tribunal remains a contentious element of the trial. The victorious nations of the War sat on the Tribunal to judge the defeated. United States Senator Robert Taft declared, "The trial of the vanquished by the victors cannot be impartial."[19] The Allies suffered tremendous losses during the war at the hands of the Germans. The argument is that the victors would not be well equipped to judge the German war leaders because they would not be free from "hatred, passion and national prejudice."[20] As citizens of the victorious nations, the Judges occasionally interacted with members of the prosecution. For example, during the trial, Soviet prosecutor Andrei Vyshinsky came to Nurem-

berg to work with the prosecution. While he was visiting, a party was held in his honour, which the prosecution and Tribunal Judges all attended. Therefore, these types of interaction would have made impartiality difficult to maintain.[21]

CONCLUSION

Each of these the discussions of unpreparedness of the defence counsel, the equality between the prosecution and defense, the impartiality of the tribunal jud-ges and the spoliation of evidence by the prosecution all contributed to the heavy burden placed on the defense counsel(s) shoulders and as result these burdens impacted the defense to present a reasonable defence. And ultimately, they were not afforded fair due process; as Hermann Wilhelm Göring puts it: *"Der Sieger wird immer der Richter und der Besiegte stets der Angeklagte sein."*[22] Someone had to be held accountable for the actions of World War II. The overwhelming evidence against the accused, the emotional impact of the Holocaust and the societal and media pressures to assign blame meant that due process was sacrificed. The legal history of the Nuremberg Trials illustrates the complexities of determining guilt or innocence and assigning accountability in the context of large-scale atrocities.

[1] David J. Hogan and David Aretha, eds., *The Holocaust Chronicle* (Lincolnwood, IL: Louis Weber, Publications International, 2009), 18, 46; and J. Pollard, *The Papacy in the Age of Totalitarianism 1914 - 1958* (Oxford: Oxford University Press, 2014). 291-292.

[2] Robert M. W. Kempner, "The Nuremberg Trials as Sources of Recent German Political and Historical Materials," *The American Political Science Review* 44, no. 2 (1950), 447.

[3] Bernard D. Beltzer, "'War Crimes:' The Nuremberg Trial and the Tribunal for the Former Yugoslavia," *Valparaiso University Law Review* 30, no. 3 (1996): 895-896.

[4] Alpheus T. Mason, "Extra-Judicial Work for Judges: The Views of Chief Justice Stone," *The Harvard Law Review* 193, no. 212 (1953): 209-214.

[5] Daniel Levy and Natan Sznaider, "The Institutionalization of Cosmopolitan Morality: The Holocaust and Human Rights," *Journal of Human Rights* 3, no. 2 (2004), 144.

[6] Tessa McKeown, "The Nuremberg Trial: Procedural Due Process at the International Military Tribunal," *Victoria University of Wellington Law Review* 45 (2014), 116.

[7] Charles Anthony Smith, *The Rise and Fall of War Crimes Trials from Charles I to Bush II* (Cambridge University Press, New York, 2012), 100.

[8] Hans Laternser, "Looking Back at the Nuremberg Trials," in *Perspectives on the Nuremberg Trial* (Edited by Guenael Mettraux. Oxford: Oxford University Press, 2008), 473-475.

[9] Gerry Simpson Law*, War and Crime: War Crimes Trials and the Reinvention of International Law* (Cambridge: Polity Press, 2007), 115.

[10] Law*, War and Crime,* 115-116.

[11] Werner Maser, *Nuremberg: A Nation on Trial* (Translated by Richard Barry. London: Penguin Books, 1977), 73.

[12] International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal,* 661.

[13] McKeown, "The Nuremberg Trial," 128.

[14] McKeown, "The Nuremberg Trial," 129.

[15] McKeown, "The Nuremberg Trial," 118-119.

[16] Smith, *The Rise and Fall of War Crimes Trials from Charles I to Bush II,* 102.

[17] "Motion Adopted by all Defense Counsel," in *Trial of the Major War Criminals Before the International Military Tribunal,* 94.

[18] "Minutes of the Opening Session," in *Trial of the Major War Criminals Before the International Military Tribunal,* 500.

[19] McKeown, "The Nuremberg Trial," 122.

[20] Karl-Heinz Lueders, "The Nuremberg Judgment: Penal Jurisdiction Over Citizens of Enemy States," in *Nuremberg: German Views on the War Trials* (Edited by Wilbourn E. Benton and George E. Grimm. Dallas: Southern Methodist University Press, 1955), 135.

[21] McKeown, "The Nuremberg Trial," 122.

[22] "The victor will always be the judge, and the vanquished the accused" said by Hermann Wilhelm Göring at the Nuremberg Trials cited in Gilbert M. Gustave, *Nuremberg Diary* (Berlin, Germany: Farrar, Straus and Giroux Publishers, 1947), 32.

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