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THE NUREMBERG WAR-CRIMES TRIAL

OTTO PANNENBECKER*

As a participant in the proceedings of the International Military Tribunal against persons and organizations accused of being Nazi war criminals, I would like to attempt to interpret the legal procedure and the maxims of law applied to these proceedings from the viewpoint of a defense counsel and as an observer of the events which have occurred in the seventeen years since the trial.

The International Military Tribunal was created by the so-called London Agreement. By this agreement, the Allied nations decided to create an international tribunal to charge and sentence those persons and organizations allegedly responsible for the war crimes. The Tribunal consisted of four judges, one from each of the Allied countries (U.S.A., Great Britain, U.S.S.R., and France), and the same number of alternates.

Before this court, the Allied nations indicted those persons and organizations which were considered to be principally responsible for planning and waging a world-wide war of aggression, war crimes and crimes against humanity committed before and during the war. The Tribunal was not trying the members of an overthrown administration to account for crimes committed by its own people, but was attempting to determine the responsibility of German persons and organizations for crimes perpetrated against other countries and peoples. The only areas in which the Tribunal took cognizance of the repression of the German people were those in which German citizens were executed for holding different political and philosophical attitudes for being Jews. Such repression was considered equivalent to preparation for aggressive warfare. The significance of this limitation is seen in the fact that the S.A., or Storm Troopers, was not officially declared to be a criminal organization, although—especially in the beginning of Nazism—it was particularly active in persecuting Jews. At that time, this persecution was not recognized by the S.A. as being linked to the planning of a war of aggression but was “only”

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anti-Semitism which was not an indictable count before the military tribunal.

Here begins the criticism of a defense counsel who, at the end of the war, was convinced of the advisability of extensively criticizing and accusing the entire political behavior of the defendants. This criticism extends to the handling of the defendants' attitude toward their own people which was not treated and administered any less criminally than has been the case with other peoples after they are conquered. The fact that the legal procedure was restricted to dealing with crimes against other peoples evokes the impression that the Nazi crimes were exclusively aimed at foreign countries. This impression was increased by the length of the proceedings, eleven months, and the almost daily press reports all over the world. It is nevertheless the fact that Nazism began with oppressing the supporters of deviating opinions, religions or races within its own people. The Nazis did not start to oppress foreign peoples and treat them inhumanly until they oppressed the "other Germany," including the German Jews, by use of force, sly acting and terror.

The trial before the International Military Tribunal was conducted according to the Anglo-Saxon system which differs greatly from the so-called Continental system used in France and Germany. There are clearly noticeable differences between the two procedures. In either system, the prosecution lodges the indictment and announces witnesses, documents and further evidence which serves a basis for prosecuting. In the Continental system, it is chiefly the judge who leads the further procedure. He receives the legal documents and has already read them before the trial opens. Thus, he knows the evidence given by the witnesses previously interrogated by the police and also the documents regarded as evidence. In the Continental system, the judge dominates the trial by examining the defendant as to his person and the accusations of the charge, and personally questions the witnesses. The only right reserved to the prosecutor and the defense counsel is to put further questions to the witnesses. Furthermore, they can move for witnesses to be summoned, either for the prosecution or for the defense. These witnesses will first of all be examined by the judge, allowing only additional questions to be asked both by the prosecutor and the defense counsel. In the Anglo-Saxon system, on the other hand, the prosecutor is responsible for the thorough questioning of the witnesses for the prosecution, whereas the

defense counsel examines the witnesses for the defense, with each having the right to cross-examine the witnesses for the other side. The presiding judge of the court confines himself to conducting procedure and deciding whether certain questions put to witnesses are permissible when an objection to them is raised by the opposing counsel. The court may ask additional questions, but it leaves the details of conducting the examination to the prosecutor and the defense counsel respectively. Judging the evidence is the concern of the court which decides the issue by giving a sentence of "guilty" or "not guilty."

It is hard to define which of the two systems is more successful in crystallizing the truth in the most reliable way. Either procedure has a great many pros and cons. As to the application of the Anglo-Saxon system at Nuremberg, there was no disadvantage for those accused before the Tribunal. Moreover, the defendant is never entitled to demand a particular procedure to be used in his case. He always has the right to be tried justly, but this right is completely guaranteed by both the Anglo-Saxon and the Continental system.

A much more serious objection, however, is raised by the indictment of planning, preparing and waging a war of aggression which was lodged against the defendants. Such an indictment constitutes a violation of laws existing in constitutional civilized states. These laws ensure that nobody shall be charged with a crime not already subject to legal punishment at the time of perpetration. This axiom, existing in all civilized countries, says that penal laws are not permitted to be applied retroactively. The crime of planning and waging wars of aggression does not exist and has never existed in German law, nor do I think that such laws are included in the American, British or French penal codes. War of aggression was declared to be a punishable act by the London Agreement so that the persons and organizations accused before the Tribunal could be punished. Thus, the newly created charge constitutes a violation of laws existing in all civilized states and violates the guaranteed legal rights of the citizen, rights according to which nobody shall be charged with violation of such penal laws as those not yet in existence at the time of the act in question.

In my pleading, I insistently but vainly pointed out to the court that this, in my opinion, constituted an obvious violation of the law. It may be mentioned in this connection that the Nazi government en-

acted and applied certain penal laws retroactively. This was denounced by the prosecuting body of the Tribunal, and rightly so! The Nuremberg judgment has variously been called a "foundation of new international law" and a "revolutionary deed." It is still questionable whether it is permissible to apply new international law and revolutionary deeds as penal laws to such persons as those who were ignorant of such a potential legal status when acting.

Abstractly, the Nuremberg trials show that only one of the accused persons—R. Hess (Hitler's so-called deputy)—would have been acquitted by the court had it rejected this dubious and illegal accusation. Hess was the only defendant sentenced exclusively for planning and waging a war of aggression. All other persons and organizations were accused of other crimes in other counts of the judgment. Therefore, limiting the judgment to examining war crimes and crimes against humanity would not have prevented the other defendants from being sentenced. From this point of view, it is justified to add that the defendant Hess might well have been sentenced unjustly. No damage would have been done if this psychopath or lunatic who had gone to Britain by plane in the beginning of the war and was taken prisoner, had been acquitted.

In support of the fact that the crime of war of aggression is not a new episode in international law is seen by the fact that the Charter of the United Nations does not include the principals of the Nuremberg judgment as far as this particular crime is concerned nor is individual responsibility for the crime of war of aggression found. The generally composed "confirmation" of the Nuremberg principles by two resolutions issued by the United Nations in 1946 and 1947 has failed to yield any practical result and it is also acknowledged in Anglo-Saxon literature on international law.

Not only was the accusation of the crime of war of aggression a failure and not justified under the effective penal and international law, but there were also misgivings regarding the method used in dealing with the aggressive war on Poland which was conducted by the Soviet Union and Nazi Germany. The agreement between Nazi Germany and the Soviet Union on the partition of Poland between the two countries after Poland's conquest was concluded in August, 1939, which was prior to the war of aggression against Poland. It was not until 1945 that the Allies, including the Soviet Union, were able to charge the defendants with war of aggression against Poland before

the Tribunal with the Soviet Union being both a judge and accomplice. It must be mentioned, despite this fact, that the court conducted the procedure justly. The court endeavoured to impartially clarify the difficult counts, in view of decisions of the admissibility of certain evidence and objections by the prosecution or the defense. The evidence was approved or rejected, depending on the relevance or irrelevance for final judgment. It is self-evident that the question of the relevance of certain points maintained by the prosecution or the defense, or the question if such points could be proved properly by certain evidence was often not an easy one to decide. Interpretation on the part of the parties involved differed frequently.

The following examples are included to show the endeavour of the court to reach fair and objective judgment of the points mentioned above: The court followed the practice of allowing depositions, or affidavits, only in case of persons who were not able to appear or who could not appear without severe difficulties. When evidence was of minor importance to the essential counts of the trial and was only illustrative and supplemental to the fundamental pieces of evidence, depositions could be taken. This held true, for instance, for the extent of pillage of art treasures in the Eastern war zone, or for details on concentration camps, both of which could very well be depicted by affidavits. However, for clarifying important questions of the trial, it was necessary for the witnesses to appear personally before the court so that they could be cross-examined by the opposite party to find the truth in statements by certain representations or to shake the credibility of witnesses by presenting facts which the witnesses had then to admit.

A good example of the use of affidavits is seen in the case of Field Marshal Paulus. The Soviet prosecution produced an affidavit by Paulus, the commander of the Sixth German Army during the battle of Stalingrad who was taken prisoner of war and held in Soviet custody, which formed part of the Russian charge against the head of the High Command of the Wehrmacht, Field Marshal Keitel. Keitel's defense counsel objected to this affidavit because of the importance of the witness. The Soviet prosecutor pointed out the difficulty of summoning the witness and asked for the admittance of the affidavit. The Tribunal rejected the affidavit and summoned the witness. The prosecution answered that the witness was staying in Nuremberg and

could be examined within a few minutes. Thus, the defense counsel was given the opportunity to cross-examine the witness thoroughly.

Another example was the introduction by the defense of an agreement between the Foreign Ministers of the Soviet Union and Germany, Molotov and von Ribbentrop, on August 23, 1939, fixing the mutual fields of interest in Poland in the event Poland was partitioned, which was soon thereafter attacked by Germany. The Soviet prosecution fiercely resisted the admittance of this document which was so important for the historical development of World War II. This resistance was backed by untrue arguments that the documents were forgeries and merely a means of Nazi propaganda. The document was finally admitted despite Soviet opposition, and it proved that Germany and the Soviet Union had actually fixed their mutual interests in the occupied areas in Poland, prior to the conquering of that country. In the judgment regarding the war of aggression against Poland, there is nevertheless only one sentence on this point: "The defendant von Ribbentrop had been sent to Moscow to conclude a non-aggression pact with the Soviet Union."

That the prosecution was able to succeed was not surprising since the evidence provided by witnesses and the documents were in many cases damning. Hitler and his accomplices and underlings divulged their intention of initiating a war of conquest in numerous documents. Most of these documents have been preserved, since they were secret minutes of conferences of top leaders of the Nazi party and of Hitler's speeches before the commanders-in-chief of the Wehrmacht. The documents also show the increase of rigidity in exercising power and oppression on the German people by force and the suppression of any opposition within the country by imposing death sentences or imprisoning people in penitentiaries and concentration camps. The purpose of this oppression was two-fold: to make the exercise of power in Germany absolute, and to maintain a firm grip on both the organization of the Wehrmacht and the majority of those unable to make a carefully considered political decision being liable to instigation and political passion.

The problem of propaganda by demagogues cannot be dealt with in this connection. As far as Nazism is concerned, the Nuremberg war trial has proved that a clever demagogue can direct the mass as he desires and bring them to heel by ostensibly high-principled aims and ideals. Thus, he can kindle the low instincts of cruelty and make them

useful for his purposes. Nearly all revolutions and authoritarian systems set examples for the truth of that, as well as religious witch hunts from the Middle Ages to Modern Times, so-called "lynch laws" in the United States, and the torturing of people of different races in Algeria and the Congo. These examples make it obvious that the disease of mass hysteria is not yet extinct and that there is little hope for a change within a measurable space of time. The elite of a people has sufficient education, culture and ideals to stay clear of such hysteria. Nevertheless, the trial in Nuremberg has made it evident that even a considerable part of that elite fell victim to the very same mass hysteria. Others again recognized Nazism sooner or later by its misleading catchwords and saw its evil. In spite of that, opportunism caused them to follow the Nazi leaders. The fact that a good number of persons in Germany and other countries were aware of the felonious and inhumane aims of Nazism in the trial was irrelevant.

In every war, individual persons as well as whole groups commit the most horrible crimes, as was seen in the recent war in Algeria. However, what was so extraordinarily shocking about Nazi warfare is the fact that those crimes were centrally organized and ordered on a large and detailed scale. Examples of such atrocities are the transportation of doomed Jews, the utilization of their belongings as well as the concealment by camouflage of the purpose of these transportations as alleged evacuations, and the gas chambers disguised as lavatories and shower rooms. Nuremberg has demonstrated this system was one of mass murder, the like of which has probably never existed in such a meticulously planned and detailed way.

On the other hand, it is correct, but of no consequence, that a few crimes for which the Nazis were held responsible by the public probably were not committed by them. Thus, the tribunal investigated thoroughly the evidence which had been submitted to prove the murder of a great number of Polish officers at Katyn. This investigation did not prove the Nazis to be guilty of murdering these officers as had been maintained by the prosecution. The murders at Katyn were not mentioned further in the judgment of the court. Even though mentioned in the indictment, the tribunal was hindered in giving a final determination of the case because the people responsible for this murder represented a nation which was a member of the tribunal and the prosecution, a fact which suggested itself to observers at the trial in the course of the taking of evidence.

German law provides for the punishment of every single member of a gang if the gang commits a punishable act like larceny or smuggling. Nevertheless, under German law, it is impossible for the gang itself to be declared criminal. Hence, each member of the gang cannot be prosecuted merely because he once belonged to an organization declared to be criminal. Therefore, an accusation against organizations was novel to the German defense counsel.

The prosecution labelled the following organizations criminal and thus moved for them so to be declared: The Leadership Corps, the Secret State Police (*Gestapo*); the Security Service, or S.D. (*Sicherheitsdienst*); the Elite Guard, or S.S. (*Schutzstaffel*); the Storm Troopers, or S.A. (*Sturmabteilung*); the Reich Cabinet; the General Staff; and the High Command of the Wehrmacht.

As to these organizations, especially the big mass organizations like the S.A., the question of their responsibility as an organization for the crimes of the Hitler regime was the starting point for the difficult problem of collective guilt, a problem which cannot be depicted in a few words. The Tribunal refused to depict the S.A. as a criminal organization, because a large number of its members were not concerned in the criminal plans for waging a war of aggression, in the war crimes, nor in the crime against humanity, particularly since the S.A. itself had not been engaged in these aims. The importance of the S.A. was already very much on the decline after the so-called "Roehm Putsch" of June 30, 1934, which occurred before the preparation for war and before the attended crimes reached a decisive stage. The prosecution of the four nations had alleged the criminal character of the S.A. It is interesting that even the Soviet member of the tribunal approved of this decision, although he had otherwise filed a dissenting opinion on various counts.

The Leadership Corps, on the other hand, was declared to be a criminal organization, allowing for certain limitations regarding the lower ranks of this organization. Also, the Gestapo and the S.D., or Security Service, were declared to be criminal, again with certain limitations, as was the S.S. or Elite Guard. In the latter case, the limitation was the exclusion of persons who had been transferred without volition on their part. This covered a number of policemen and soldiers. It was very difficult for these compulsory recruited persons to prove this fact to the tribunal, because they were members of a criminal organization. The Tribunal did not always succeed in passing just

sentences on persons who had involuntarily been incorporated as policemen or soldiers into the S.S. during the war. The tribunal, for that matter, was suspicious since many persons maintained that they had been forced to enter the S.S. although they had done so voluntarily.

The tribunal refused to declare as criminal the German cabinet, the General Staff, and the High Command. To this, the Soviet judge dissented.

The tribunal acquitted three of the twenty-one persons accused: Schacht, von Papen, and Fritzsche. In all these cases, the Soviet judge dissented, and he filed an objection against sentencing the defendant Hess to life imprisonment, holding that a sentence of death should have been imposed. Most other defendants were sentenced to death, while some of them were sentenced for life or to lesser prison terms.

For a defense counsel to criticize the decisions is a rather delicate problem. I shall confine myself to saying that the sentence against the defendant Frick, whom I represented, was well justified on grounds of evidence. Frick, as Nazi Interior Minister, had held a controlling position in regard to the establishment of totalitarian power in Nazi Germany. He also played a key role in the preparation of and the waging of war, which in turn was a relevant factor for the decision of the tribunal. Even if Frick, in his capacity as Nazi Interior Minister, did not personally take part in the planning and preparation of the war or in working out the strategic plans, he was nevertheless responsible for the decisive orders which entirely suppressed free expression of opinion in Germany and helped to establish a regime of terror. He held this position until the post was taken over by Himmler. Subsequently, he was appointed Protector of Bohemia and Moravia, the area which is to a large extent identical to Czechoslovakia. Hence, he was principally responsible for the outrages after April, 1943, a fact which he could not reject on the ground that he was a subordinate of the Minister of State, Frank. The problem of Frick's responsibility in his first dominant position as Nazi Interior Minister was somewhat parallel to his responsibility in the subsequent position as Protector of Bohemia and Moravia. In both cases, he occupied the highest positions and thus bore the chief responsibility. In the Nazi Ministry of the Interior, the notorious Reichsführer S.S., Himmler (chief of the German police), was placed under him. Yet, Himmler did not feel himself bound by any of Frick's instructions. His superior position in the N.S.D.A.P. (National Socialist German Worker's Party) and his in-

fluence with Hitler caused him to disregard Frick when he gave instructions to the police assigned to the Nazi Ministry of the Interior. A similar position was taken by the Minister of State, Frank, who was able to arrange for any cruelty whatsoever within the area of Czechoslovakia without having to ask Frick, the Protector. The tribunal justly charged Frick with entering upon both of the above-mentioned posts voluntarily, and the charges were substantiated by numerous laws and decrees carrying his personal signature, documents supporting to a large extent the criminal regime of Hitler and his party, even if Frick himself had never taken part in individual actions.

I would like to say on grounds of personal knowledge that Frick was the kind of official who could have signed any measure that promoted the Nazi politicians' aims. He ignored the outcome of those measures, comfortably conscious of acting in the name and interest of the Fuehrer, who had accepted the sole responsibility for all measures. Because of this, he failed to understand, as did other defendants, that the indictment, as well as the proceedings, could put the blame for acting criminally on him because the government, in the person of Hitler, had taken all responsibility. Since he had not been guilty of any personal infringement, never murdered a Jew and always acted within the scope of the legality of the Nazi regime, he regarded himself as an official who has always remained loyal to his "Highest Master." Even during the course of the trial, he still believed for quite awhile that the prosecution would not be able to prove any personal crime of his and would therefore have to acquit him.

The Nuremberg trials have shed light on the point that a positive attitude toward the law cannot go so far as to allow and justify everything that is covered by a regime's formal legality. Critical appreciation of state laws and regulations, taking at least obvious crimes as standard, is imperative for every citizen or soldier, allowing for differences and varying views on the question if and on what condition formal orders by superiors have to be obeyed. Taking crimes as standard, neither law nor orders are compulsory, and the Nuremberg trials have proved that it is not always the most advantageous way to ignore all misgivings and calm conscience by the thought that the law is formally faultless or the order has been given by competent superiors, even if criminal acts are involved.

As for outlawing war of aggression as a crime, the proceedings of Nuremberg might therefore have been, despite all good wishes, actu-

ally only an episode which has not been followed by vigorous development of criminal and international law, stamping it as a crime. The Nuremberg trials have, in that respect, been a disappointment for the future. It remains, however, a symbol of warning, because statesmen and their adherents cannot excuse themselves for crimes by stating that the acts in question have been ordered and are covered by the leader or the leading party. The men accused in Nuremberg were not able to protect themselves from being sentenced before the international court by such excuses, and no more than the S.S. leaders, physicians and officials who are even now being charged in Germany with inhuman behavior in concentration and extermination camps in Auschwitz and at other places. No judge accepted such an excuse for the defendants, rightly so, and it is to be hoped, for all the time to come.

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