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THE NURNBERG TRIALS

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Before writing here of the problems of a working lawyer in the International Military Tribunal at Nurnberg, Germany I want to set down a statement of the magnitude of the case of the *United States et al. v. Herman Goering et al.*

As Mr. Justice Robert H. Jackson has well said:

Never before in legal history has an effort been made to bring within the scope of a single litigation the developments of a decade, covering a third of a continent and involving a score of nations, countless individuals, and innumerable events.

The Nurnberg Trial was all of that and more. It was a detailed and exhaustive analysis, under judicial authority and through adversary proceedings, of the historical facts and forces, before and during the worst war in history. It was one of the most shocking conspiracy cases of all time. It was the greatest murder trial of record, covering, in a conservative estimate, six or seven million homicides, not including, of course, those killed in the armed services. Of course, the case involved many months of preliminary work, more than ten months of continuous trial, five and a half days a week, six hours per day. The translations, the examination and study of thousands of documents, the hearing of hundreds of witnesses, and the handling of hundreds of thousands of affidavits. Lawyers experienced at the criminal bar will understand, therefore, that in the space available, I can do no more than briefly touch upon some features of the trial which I hope will be of interest.

A great amount of physical evidence was offered. In addition, many visual aids, consisting of charts and graphs covering nearly all of the activities of the Nazi State and of its functions. Thousands of captured still photographs were studied, thousands of feet of captured Nazi film were reviewed, and at least three full length films, consuming hours of time in their showing, were presented for the Tribunal's consideration.

The record itself, when completed, will exceed by considerable margin much more than fifteen thousand printed pages. In it will be found the substance for ten thousand discussions, for innumerable analytical reviews, and, I expect, for hundreds of volumes. It is a vast reservoir of information, bearing the

stamp of hard judicial examination. But it is more than a record; it is more than a reservoir of information; it is more than a library. It is the written history of the first post-mortem on a catastrophe that cost millions upon millions of lives. The sweep of the proof is so enormous as to stagger even those who lived with it for many months. It is, consequently, impossible of description or of adequate discussion in its entirety at any one place or in any one time.

The working prosecuting staff would fill a large room. The files would fill a warehouse. The story of the physical problems connected with the conduct of this case would make a fascinating account in itself. And that story would start with the reconstruction of a court house before we could begin to talk about the problems of the trial. For penologists and those interested in detention and security problems, there is the engaging story of security at Nurnberg, maximum security for twenty-one important defendants in an enemy country mostly in ruins and without ordinary facilities or conveniences of any kind.

The statistical story of Nurnberg would warm the heart of the coolest accountant. The story of International cooperation between the lawyers of the four great powers, at a time when international affairs were not at their very best, contains, we hope, a lesson and a moral and some direction for our own generation and those who are to follow. At Nurnberg we were lawyers representing these four powers, trained in the procedures and fundamentals of our own jurisprudence, but we discovered that basically our systems were more alike than different. For we were all concerned about having a fair trial, and we were all concerned about ultimate justice. Thus, with a knowledge of the responsibility we carried, we found that in this common concern we met on a common ground. Now, let me make it clear that I do not intend to defend the Nurnberg Trial. It needs no defense. Nor do I intend to apologize for what may have been imperfections. I shall not discuss the *ex post facto* question; the matter of immunity for officials of state; the doctrine of "let's shoot them out of hand and be done with it"; the charge that the case is weak because the victors judged the vanquished, or the more remarkable proposition lately advanced in a high place that, although the trial was illegal *ab initio*, the court should have sentenced all the defendants to a maximum of life imprisonment. I am sorely tempted by these questions but they have been thoroughly discussed already and will be discussed in the future. There are now available some considerable thousands of printed words on these subjects.

I discuss here some of the practical problems of this trial with

lawyers who tussle with criminal cases in our own country. Let me say that every big case is bigger than the lawyers who are in it. The Nurnberg Trial was no exception to this rule.

First of all, this case was not tried to satisfy the newspaper reading public or to convince only the Nurnberg judges of the guilt of these particular defendants. Likewise, it was tried with more than the usual careful concern for the record. It was prepared and tried in great detail. It was tried without regard to high-spots or "pin-up" evidence. It was tried with great pains because it was tried for more than twenty-one convictions. It was tried so as to include every last bit of obtainable evidence, with the object not of overwhelming *alone* those in the dock, but as well to establish the fact of the crimes beyond the slightest question of doubt — now and forever.

Not only was there no court house in a proper condition in which to hold this trial until one had been reconstructed, but, in addition, there was not even a court. There had never been an international military criminal court. But long before the trial started — as far back as October 30, 1943, in what is now known as the Moscow Declaration, the Allied Powers laid the groundwork for the proceedings. After the surrender, the representatives of these four Allied Powers negotiated the London Agreement in June and July of 1945, and signed it on the 8th of August of that year. In that London Agreement it was established that the promise of prosecution made in the midst of war in Moscow in 1943 would become a practice in the days of peace after the war. Then was written the Charter of the International Military Tribunal, a document which will take its place among the great monuments marking the progress of man. The Charter was not born easily. But it was born well. And it is significant that its most severe critics have yet to make a suggestion that would have brought to it more clarity, more preciseness of language, or added strength to its basic character.

It established the Tribunal, the number of its members and alternates, gave it powers, granted it jurisdiction, and provided general workable rules for its operation. It set up safeguards and standards to assure a fair trial. And in language that all men can understand it stated the specific crimes falling within the Tribunal's jurisdictional sphere — crimes against the peace, war crimes, and crimes against humanity.

But the Charter did more. It charged each signatory with the responsibility for investigation and prosecution of all persons acting in the interest of the European Axis countries, whether as individuals or as members of organizations who committed any of the crimes defined in the Charter. This responsibility included the searching out of organizations as well as individuals. In due course the four prosecutors, after care-

ful consideration, charged twenty-four individuals and six organizations in a four-count indictment. The first count charged a conspiracy, and the second, third, and fourth counts were substantive. This indictment was filed on October 20, 1945. It is not altogether unlike those in use in the United States — certainly as to form and, to a considerable extent, as to substance: It is a detailed indictment. It had to be. It pleads evidence when necessary, and it states conclusions where required. No doubt it will allow of more artful drafting. But under all the circumstances, under the difficulties of language and of custom and tradition, it was completely adequate for the court, prosecution, and the defense. Certainly the defendants knew the nature of the charges, the court was well able to control the proof, and the prosecution was in no doubt as to its burden.

The division of the case in chief for the prosecution among the four participating delegations was not settled in the Charter. Article 23 of the Charter merely provided that: "One or more of the Chief Prosecutors may take part in the prosecution at each trial."

After the indictment was drawn up, a decision was made by the four Chief Prosecutors under which each undertook to present a separate portion of the proof. The United States undertook to present the evidence relating to Count One which charged the defendants with conspiracy to commit crimes against the peace; war crimes, and crimes against humanity. The British were assigned the proof of crimes against the peace under Count Two. The Soviet and French prosecutors assumed responsibility for both Counts Three and Four which charged war crimes and crimes against humanity, dividing the field between them on a geographical basis. The French were responsible for proof relating to crimes which took place in the West and the USSR for crimes committed in the East. The line of demarcation was drawn through Germany, running approximately north and south through Berlin.

It was contemplated under the Charter that members of the United Nations would investigate and report on crimes committed against their nationals by the Germans. Article 21 of the Charter specifically directed the Tribunal to take judicial notice of findings of fact incorporated in such reports. Delegations from some fifteen of the United Nations came to Nurnberg as official observers, and in the course of their duties supplied such material to the prosecution. Under the division of responsibility established by the Prosecutors, evidence relating to Counts Three and Four on behalf of the western European countries was presented by the French prosecution, and that on

behalf of the eastern European countries was presented by the USSR.

That the Moscow Declaration was something more than an instrument of psychological warfare and was understood as something more by the Allied armies is clearly evident from the fact of the establishment of special army units with the mission of capturing Nazi files and documents intact. So it was that long before the surrender of the Nazi armies tons of documents were lodged in army document centers. And immediately after the surrender new masses of written records were located, catalogued, and filed in these centers. All of these were placed at the disposal of the prosecuting powers in Nurnberg. Never before did the files of an enemy government fall so completely into the hands of the victor. The Teutonic passion for making every last detail a matter of written record provided us with our greatest trial weapon. At least 90 percent of the proof offered in Nurnberg consisted of the Nazis' own written records, in the form of orders, directives, diaries, journals, memoranda, and correspondence. And much of it bore the actual signature of the defendants in the dock. Of all the thousands of documents offered in evidence, only two items were questioned by the defense on the grounds of authenticity. Both of these items were withdrawn by the prosecution in order to make sure that our evidence was foolproof. This, in itself, is something of a record for litigation.

The fact that the case was mainly a documentary one was not just happenstance. On the contrary, the possession of this great mass of written evidence presented one of the first major questions on overall trial strategy and technique. Should we rest our case on these written records, on these captured documents, or should we make use of the very great number of Germans, Nazis, half-Nazis, and anti-Nazis who could and would make dramatic appearances on the witness stand under direct and cross examination? We were not all of one mind. The documents at this stage of the case were, of course, all in German. The translation problem was very great and it held some real dangers. Besides, the documents, or some of them, might be forgeries. On the other hand, there was considerable hazard in adopting the plan calling for live witnesses. So soon after the cessation of hostilities it was almost impossible to be dead certain about anyone living in Germany. We were very reluctant to assume any responsibility for living German witnesses. Passions were running high. All kinds of selfish motives were at play. The American staff split into two schools of thought and both pressed for the adoption of their own reasoning. Compelling arguments were offered on both sides, and our Chief Counsel, Mr. Justice Jackson, heard them out.

He made his decision. It was to be principally a documentary case. That decision, never regretted by any member of his staff, was, I believe, one of great strategical and tactical importance. It was, however, more than a decision of trial strategy or of trial tactics, for it made secure the complete truth of the trial, as a landmark in the progress of man. It was a decision that went to the very heart of our philosophy of the case. It demonstrated in a practical way the application of our resolution to try this case on the highest moral level and thus to write a record without stain or blot upon it. And thus it was that the American prosecution presented only a handful of witnesses, carefully selected on the basis of competency and credibility. So it was that we presented a great mass of Nazi documents. It was not, however, as simple to do as it is to relate. There was the translation problem. The document had to be in language that the Judges could understand, and we had to give the defense counsel an opportunity to study the document in order to be able to challenge its authenticity or its relevancy. In addition, there was the matter of the proper method of offering documents. Obviously we could not hold up the proceedings by the traditional use of the competent witness. It was decided to use affidavits and so avoid the burdensome and time-consuming technique ordinarily used to introduce written proof. But this was the least of our problems. Soon enough we found it was a physical impossibility to translate and mimeograph in sufficient numbers for either the Tribunal or the defense counsel and our colleagues or, indeed, for ourselves. As a consequence, the Tribunal ruled that only that portion of a document which was actually read into the record would be deemed in evidence. In this way, through the simultaneous translating system in use in the courtroom, any document would be automatically transmitted in all four languages as it was read into the microphone. Necessarily, this cut down drastically on the evidence to be offered as the submission of a document meant the expenditure of time in reading it. And many of the documents were more than fifteen or twenty pages in length.

From the point of view of the lawyer, this ruling, although obviously required, proved extremely difficult. An argument or presentation appeared disjointed and lost effect when it was punctuated with long recitals of documents which covered more points than the one under discussion. Mechanically it was not feasible to refer back and forth to several documents as the argument logically required. As the result, I repeat, the ruling excluded a large body of evidence and made it difficult to point out at the time the full significance of some of the documents which were put into evidence.

The Tribunal did relax the rule in exceptional cases to permit documents in German to be placed in evidence without being read when translations into French, English, and Russian were prepared for the use of the Tribunal. To enable defense counsel to examine a document in advance of its presentation, the Tribunal required the prosecution to furnish to the defense counsel two photostatic copies of the original document and, in addition, a number of copies in English, French, and Russian translation so that the defense counsel could maintain a reference file as well as compare the translation with the original text to check its accuracy.

Due to the mechanical problems involved, the Tribunal allowed defense counsel to object to a document at the time it was offered into evidence, or, if they chose, the document could be received into evidence without prejudice to their right later to move to strike it for cause. Thus, excerpts from speeches of defendants, Gestapo arrest reports, and directives, minutes of meetings, and the like were offered into evidence without objections. And in the great majority of instances defense counsel after ample time for careful consideration failed to make any objection at all.

The rule requiring the submission of our proof to the defense well in advance of the offer worked something like the Rules of Discovery in civil cases which Federal Court practitioners are familiar with. The philosophy underlying the Rule of Discovery as we know it was the philosophy of the Nurnberg Trial procedure. The facts of the case were wide open and known to both sides before the proof was submitted to the Tribunal. It was serious business and not a game. On cross examination, the rule was limited, and both prosecution and defense were free to use new documentary evidence provided that it was, at the time of its use, ready in the German, French, Russian, and English languages. The reason for this modification is too clear to all trial lawyers to need amplification here.

I wish it were possible in the space available to describe some of the documents that were offered in evidence. The Hossbach minutes — the Schmundt notes — all on-the-spot records of conspirators' actual conversations well in advance of the start of the war. Through these papers I suppose we came close to the proverbial conspiratorial setting in the dark room, so often referred to in criminal courts and so seldom proved at trial. Many of the documents were offered as physical evidence. For example, the death rolls of the Mauthausen Concentration Camp — consisting of several volumes and containing some seventy thousand names — were offered as a whole. In these books the German passion for the written record took on a grisly form. Here were listed the names and some identi-

fyng data on those who had been murdered. In one volume, entries covering page after page listed deaths for March of 1945 — only a few weeks before the war ended. In the space of twelve and three-quarter hours, for example, two hundred and three persons were recorded as having died. The deceased all died of the same ailment — heart trouble. They died a few minutes apart — they died in alphabetical order. The first who died, as listed for that day in the record, was named Ackerman. He died at 1:15 a.m. The last, named Zynger, died about midnight.

Very early in the proceedings it became clear that it would be necessary to use affidavits in order to conclude the trial in anything like a reasonable time. Indeed, the Charter specifically provided for the use of affidavits. But the Tribunal adopted a rule which allowed the use of affidavits with a safeguard. Either side could offer an affidavit in proper form, but if the opposing side made the request, the offering side was required to place the affiant on the witness stand for cross examination. Perhaps this procedure can best be explained by describing a concrete situation in the course of the trial. A witness offered by the United States prosecution with respect to concentration camps was a Czech physician named Dr. Blaha, who was arrested as a hostage in March of 1939 and after a long imprisonment without trial was shipped off with other similar victims to Dachau Concentration Camp, where he remained for four years. Dr. Blaha, a noted physician in Prague, was assigned to work in the morgue in the concentration camp where there were a variety of duties, including extraction of gold teeth from the dead victims for the SS, tanning of human skins for lampshades and ornaments, and establishment of the causes of death of the inmates who were subjected to medical experiments by SS doctors. The evidence on this subject matter was reduced to an affidavit which ran to considerable length in pages. The defense requested that Dr. Blaha appear for cross examination so the witness was placed on the stand and the affidavit was read into evidence after he was properly sworn. He was then asked if this was the affidavit that he had executed, and he affirmed that it was. He was then briefly interrogated on a few matters not covered in the affidavit. As a matter of interest, he specifically testified that five of the defendants — Rosenberg, Frick, Kaltenbrunner, Funk, and Sauckel — had visited the Dachau Concentration Camp while he was an inmate. He was then examined to some extent by both the French and the Soviet prosecutors, by the members of the Tribunal, and was turned over for cross examination to the defense counsel. Now the importance of the testimony of the witness Blaha was one of the most dramatic moments of

the trial. But an interesting comparison from the point of view of the mechanics of presenting proof is offered by the fact that the witness Blaha was on the stand for approximately three hours, a longer period of time than was required by the United States to present the entire documentary case dealing with concentration camps, but not nearly as long as would have been required had Blaha's testimony been adduced by direct examination. It is significant, I believe, that this case was prosecuted without the use of any defendants as a prosecution witness. In most criminal prosecutions involving many defendants, the State is happy to have one or more of those on trial "turn State's evidence." Some overtures, always vague and carefully veiled, were made at Nurnberg before the trial started and after it was well under way. Mr. Justice Jackson made clear that we were not interested in any deal or understanding of any kind in exchange for any help from the dock. We had the proof, and we were content to rest on it. The intermediaries were told that the defendants could tell their stories from the witness stand and so help themselves if they so desire, but not under the sponsorship of the American prosecution.

Defense Counsel

Readers will be interested, perhaps, in some comment on the attitude and the demeanor of defense counsel. First of all, they were in the main selected by the defendants themselves. Some of them were outstanding lawyers at the German Bar — long before the advent of Nazism. One of them, indeed, was a pro-Nazi president of the German Bar. Some were Nazi Party members. As a whole, I think it is fair to say they were competent and, as a general group, despite the terrible years under Nazi lawlessness, they conducted their defenses according to the best traditions of the profession. To be sure, some of the techniques were new to them — as some were new to us. But they made their adjustments as we made ours. It is my own observation that out of the experience at Nurnberg we have reason to hope that the Germany of tomorrow will be a better nation because, in part at least, of the members of the legal profession who participated in the trial. Stated simply, it was high class and convincing denazification, although on a small scale.

Those of us who were privileged to serve at the Nurnberg Trial are proud of the fairness of the entire proceeding. Whatever else may be said about the case, no man can charge that it was tried unfairly. Every right of the defendants was scrupulously observed. They were given opportunity to make every possible explanation and every possible defense. Witnesses were obtained for them merely at their request. Documents were made available, library facilities were at their disposal,

and throughout every hour of the trial they were afforded every opportunity to answer every charge. German secretarial and legal assistance was placed at the disposal of defense counsel, and military officials were assigned solely and entirely to assist them in preparing and conducting the defense. The defense itself, I am sure, would be the first to express appreciation for the way it was treated, for the manner in which the trial was conducted, by counsel and by the Court. And this leads me to observe that not the least of the benefits of Nurnberg was the moral victory that was won over the defendants and over their counsel and over thinking German people by the demonstration of judicial process honestly at work. I saw it take place — this moral victory — from day to day, slowly but surely in the dock and at the defense tables.

As a matter of interest, I would like to make reference to the manner in which the Tribunal handled matters of judicial notice. Article 21 of the Charter directed the Tribunal to take judicial notice of official documents, and under this provision it accepted not only comprehensive reports on concentration camps and on other matters as well as the findings, and the sentences of the United States Military Courts and the Courts of other powers, and the Tribunal took notice as well of official German laws and decrees, an example being the Nazi suspending the right of Habeas Corpus and vesting in the Nazi State the power to take persons into so-called protective custody. With respect to all documents which were subject to judicial notice, the Tribunal did not require that they be read into the record in order to be received into evidence. As a practical matter, this rule was not of very great value to the prosecution because unless such documents were read into the record it was difficult, if not impossible, for the judges who did not understand the language in which the document was written to utilize it for a basis of decision.

These are but a few of the problems that confronted us as matters of procedure and operation in the course of the Nurnberg Trial. No discussion of the Nurnberg Trial can be had without reference to the United States Chief of Counsel, Mr. Justice Robert H. Jackson. More than that of any other man, the Nurnberg Trial was his case. For the lawyers of his staff he was a sustaining inspiration. For our colleagues he was a tower of strength. For the bench he was a great intellectual aide. He was the architect of this great proceeding. He was the conscience of the case. His was the vision, the patience, the character, and the strength that made it possible. The imprint of his character and of his intellect is on every page of the record. Those of us who served under him for these many long and difficult months know best what he gave for this cause

of peace by law in which he so passionately believes. We are all in his debt, and some day men will thank him for what he did in Nurnberg.

The operation of the International Military Tribunal at Nurnberg indicates that an International Criminal Court can function successfully. The procedures worked out at the trial I feel sure will make it easier for similar courts to operate in the future. Much of the success of the trial has been due to the ingenuity and the work of administrative and technical personnel, without whom the lawyers would have found their problems insoluble.

It is expected that as the world recovers from the ravages of the war, the mechanical aspects of this form of trial will assume less and less importance. But the present trial, which has been organized under the most unfavorable physical conditions, establishes conclusively, we think, that a trial of this character is feasible. A vital code of International Law with sanctions and an effective enforcement machinery is an essential element in the maintenance of peace. The practical solution of the problems of procedure before an International Tribunal which has been accomplished in Nurnberg represents an important contribution to this goal.
