



Did a British Barrister Save the Nuremberg Trials? Well, we'll see.

On 1st October 2026 it will be 80 years since the Nuremberg trial ended and nineteen top Nazis were hung, sentenced to imprisonment or astonishingly, acquitted. The lazy view is it was "victor's justice" while the slightly sanctimonious view is it ushered in a new world order whereby international law could be used if not to stop, at least make countries pause before causing war and crimes against humanity.

By **Kevin McNerney**, Barrister, St Johns Buildings

There very nearly wasn't a trial at all. Many of us will have presumed it was the western liberal democratic powers of the USA, UK and France who sought the dignity of a trial. They were somehow the apotheosis of civilisation that was trying to re-assert itself by the humbling of Naziism. Not a bit of it. It was the Soviets who demanded it and let's be honest, they had form when it came to show trials, Stalin in particular. Churchill wanted a single drumhead execution of the top 50 Nazis and then get on with the job of rebuilding Germany or aka a bulwark against Soviet Russia. France, nominally a great power and provider of judges at the trial, were a busted flush and not real decision-makers on whether to have a trial or not. The US was diffident towards having one and was torn between two overarching policies that were being debated at the relevant time. One wing within the Roosevelt administration wanted to reduce Germany to an agrarian economy, in other words, pasteurise it and take out any heavy industry. The other wanted to rebuild Germany and as part of that process were attracted to a trial to make the top Nazis accountable. In the end Roosevelt favoured the latter and this fell in with what the Soviets wanted.

Stalin persuaded Roosevelt and the lobby in the USA that already wanted a trial, that a trial should be held and a recalcitrant UK, holding the ring, invited the four powers (USA, UK, Russia and France) to London. The London conference was all about procedure with the four meeting to decide how they would get from a desire to hold Nazis accountable to a trial that could be held and seen by the rest of the world as justice. Once the USA decided on a policy path, the rest followed (sound familiar?).

The four powers met in London to do the groundwork for a trial. Again, reading the material about the London conference you get the distinct impression that the Foreign Office hoped it would not happen. The prime mover once the principle of a trial was established was Mr Justice Jackson, an Associate Supreme Court Justice of the USA. He did not have a good



Nuremberg as we will see but was instrumental in getting the London conference established and at that conference getting the preparatory work for a trial done.

The job at the London conference was multifaceted. What sort of trial? What was going to be the indictment? What would the rules of evidence be? And crucially, who would be the defendants, and how many? As an aside, when I have been researching Nuremberg, at one point I was stunned. You come to the subject knowing that Hitler committed suicide in April '45 before the end of the war and then obviously never stood trial at Nuremberg. But the preparations for the trial prior to the London conference, had all worked on the assumption that Hitler would be a defendant in the dock with others. So, you have the possibility of the architect of the Final Solution getting a trial and unless that trial was to be a show trial, at least the theoretical possibility of acquittal. Extraordinary.

The 4 powers spent the summer of '45 deciding the format. The cultural difference between the Anglo-Saxon common lawyers and the civil-bred lawyers of France and Russia showed up over the framing of the indictment.

The UK/USA wanting a concise indictment with evidence coming out as and when and at a later stage. France and the civil system demanding a longer indictment with all or nearly all the evidence front-loaded. In the end a compromise appears to have been reached with a lengthy indictment buttressing a short recitation of counts: four in total; waging an aggressive war (counts 1 and 2); war crimes (count 3), and "crimes against humanity" (count 4). It is fair to say that we now see Nuremberg through a Holocaust lens but in fact that aspect was relative to the central or at least more important charge of waging an aggressive war.

They had an indictment and now they needed defendants. Again, debate and compromise between the four powers lead to a result that 24 leading Nazis from the political class, the military and civil society would be in the dock.

And finally, who to decide judgment and sentence? It was going to be a military tribunal. Germany was broken, the military powers were in occupation and there was in essence, no civil society to deal with this matter and only the brute force of the successful military could establish a system for trying the Nazis. The judges were to be civil though it was a military

tribunal save for the Russians, with four presiding judges and four alternatives. All eight judges attended but only four would decide outcomes.

Each of the powers provided advocates with Justice Jackson leading for the USA and a British barrister, Mr David Maxwell-Fyfe doing the advocacy at Nuremberg on behalf of the UK but Mr Hartley Shawcross was nominally in charge of the British delegation. He was absent for much of the hearing in Nuremberg as he was a member of the newly elected Labour government. However, Hartley Shawcross' opening and closing are perhaps the greatest pieces of oral advocacy in terms of statements at the tribunal and are well worth a listen. But did that closing come after Maxwell-Fyfe had saved the trial?

The trial followed the usual procedure familiar to many: witnesses for and against the defendants; cross-examination; huge rows about documents (it was ever thus); witness availability and complaints about a lack of intervention by judges to control witnesses being a common complaint by some on the prosecution teams.

Britain's judge was Lord Justice Geoffrey Lawrence, who was made president of the tribunal. His alternate was Mr Justice Norman Birkett. There were eight judges in total but only four giving judgment and sentence in the end. Lawrence, by many accounts, had a good Nuremberg and lent the proceedings the dignity it required if it was not to be seen as a show trial from the outset. He and Justice Jackson sparred over how the defendants, and in particular Goering, were managed. Not to put too fine a point on it, Jackson "lost it" when it came to Goering.

Goering was the highest-ranking Nazi to stand trial. He was the leader of the defendants and was the lightning rod for any resistance the defendants were going to mount at this trial. His evidence was going to be crucial. After his evidence-in-chief it fell to Jackson to cross-examine him. It did not go well.

Justice Jackson was no trial advocate. Goering fought back, giving answers that challenged every count on the indictment and went on the front foot by challenging the US and Justice Jackson over the treatment by the US of Native Americans when Goering was being cross-examined about crimes against Jews and others. Jackson, frustrated, repeatedly appealed to the bench to curtail or admonish Goering. Lawrence was no help. Days of this occurred and then step in Maxwell Fyfe.

Maxwell Fyfe was a Conservative MP at the time and would go on to become Home Secretary in the 1950s, but before Nuremberg he had been a criminal barrister cutting his teeth on circuit. He put Goering in a box when he took over from Jackson. Short questions hone of meticulous preparation and knowing the documents and calendars all assisted in his masterly cross-examination. No appeals to the bench from him for help.

One piece of cross-examination stands out. An issue arose when Easter was in a particular year. Goering had told Jackson he could not have given a particular order at a meeting because he was elsewhere that Easter, possibly at home. Goering had committed to the date in order to locate himself out of the room when a particular order was given. Under Maxwell-Fyfe's cross-examination, Maxwell-Fyfe used calendars to clearly demonstrate that the Easter in the particular year was not when Goering had said it was and therefore he could have been at the meeting and given the order which was now part of the indictment at Nuremberg.

After Maxwell-Fyfe had finished with him Goering returned to the dock, shrunken and no longer a trusted leader by the other defendants. Maxwell-Fyfe would later say that any skill he showed in cross-examination of Goering was in part a consequence of the "dock briefs" of his early career. For many, Maxwell-Fyfe's demolition of Goering turned Nuremberg around. The trial carried on and nearly a year later, verdicts and sentences were given.

What to make of Nuremberg? The common allegation is it is victor's justice, and with the Russia playing such a leading role with their record of atrocities (Katyn Forest) and complicity with Nazi Germany at the beginning of the war to destroy Poland, there is much substance to that charge. Add to that one US Supreme Court justice at the time referring to Nuremberg as "Jackson's lynch mob" and it is easy to accept that charge of victor's justice.

International lawyers will tell you it was the start of something significant, an addition to international law that stays the hands of tyrants or otherwise makes them accountable. Perhaps the truth is Nuremberg was something we felt we had to do, a story we had to tell ourselves that a patina of justice (via a trial) makes us feel categorically different to those who had perpetrated the most disastrous war in human history. That patina might cover what we really wanted to do and did – kill the leading Nazis.

As a postscript, the four powers were determined there would be no opportunity for a shrine in post-war Germany for those executed. Although no direct evidence of this, there is some suggestion that the bodies of those those sentenced to death by hanging were cremated. At Dachau.

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