

Commentary

“THE LEGACY OF THE ICTY AND CONTINUING IMPORTANCE OF CRIMINAL TRIBUNALS” - A DOCUMENTARY VIEWING OF “WHAT OUR FATHERS DID: A NAZI LEGACY” & A TALK BY JUDGE LIU DAQUN

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Introduction

On the 15th of December 2017, the Screen for Justice, in coordination with the Centre for the Politics of Transnational Law and the Vrije Universiteit Amsterdam, organised a viewing of “What our Fathers Did: A Nazi Legacy”, a documentary by Philippe Sands. This was followed by a talk given by Judge Liu Daqun about his work with the ICTY.

Philippe Sands is a law professor, international lawyer, and author who was able to creatively document the lives of two men as the sons of senior Nazi officials.¹ He placed himself within the narrative, speaking of his own Jewish family and their demise by the fathers of the two men. Sands and the two men went on a journey to embrace the truth behind the facts they have been brought up with.

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¹My Nazi Legacy, at: <http://www.mynazilegacy.com/> (accessed on 01 January, 2018).

Judge Liu Daqun is the Vice President of the International Criminal Tribunal for the former Yugoslavia (ICTY). He also serves as a judge on the Appeals Chamber of the ICTY, the International Criminal Tribunal for Rwanda (ICTR) and the Mechanism for International Criminal Tribunals. In addition, judge Liu Daqun is a professor of international law and continues to lecture about international criminal law in China and internationally.²

This commentary will first dive into the documentary of Sands. Following that, it will look into the experiences of Judge Daqun. The talk of Judge Daqun and the documentary were a great mixture in the event as both he and the film dealt with the dilemma surrounding the fate of two Nazi officials and the fact of not being responsible for what they have done during the Nazi period since they were not the one giving the order, but simply following them. In the documentary we can see two different views expressed by the two sons of two Nazi officials. One son believes that his father should be held responsible for following orders whereas the other son believes the opposite that his father should not be held responsible for following orders. Judge Daqun brought an academic and professional perspective into the discussion of who can be held responsible. This commentary aims to show the importance of the film and of the work of the ICTY. The film and the discussion were worthwhile as they were able to bring about a dialogue on legal responsibility that brought about personal aspects from the 1940's from the film and the recent tribunal experiences of Judge Daqun from the ICTY.

I. Documentary Viewing

As the last remaining generation to grow up during the Nazi era passes away, the probing documentary "What our Fathers Did: A Nazi Legacy" dives into the minds and hearts of men who have lived in the shadow of their families' past. The movie explores the relationship between two men, Niklas Frank and Horst von Wächter - both sons of high ranking Nazi officials - and internationally renowned British human rights lawyer Philippe Sands, whose family was lost to the Holocaust. Sands became acquainted with Frank and von Wächter while researching for his book 'East West Street: On the Origins of Crimes Against Humanity and Genocide.' As they travelled together on their emotional journey, the movie portrays how the three men cope with their devastating family histories.

The documentary is made up of several interviews between the three aforementioned men: Niklas Frank, Horst von Wächter and Philippe Sands. Philippe Sands portrays the narrative aspect as he plunges into the sons' memories. He retraces their childhood and studies the dissimilar impact of the fathers' burden on each of them. He uses different kinds of media, such as old photography, historical locations, and the places of their infancy, with the prospect of linking the two sons.

Both Niklas Frank and Horst von Wächter have fathers who were highly involved in the cruel crimes of the Nazi regime during the Second World War. Hans Frank, who is the father of Niklas Frank, was the private lawyer of Adolf Hitler and the Nazi Germany's chief jurist. Moreover, he was known as the "Butcher of Poland" as he was the governor of Poland and responsible for the mass murder of thousands of Jews. He was executed in 1945 during the Nuremberg trials. Otto

²United Nations International Criminal Tribunal for the former Yugoslavia, "The Vice-President", at: <http://www.icty.org/en/about/chambers/vice-president> (accessed on 01 January 2018).

von Wächter - the father of Horst von Wächter - was an Austrian lawyer and the deputy of Hans Frank. He was the governor of Kraków and the district of Galicia in Poland. He died in 1949 in Rome, where he lived in exile.

At the beginning of the film, Horst von Wächter walks through an old building accompanied by Sands. Although this meeting was meant to be a conversation about his father, von Wächter only talks about the meaning behind the architecture or the historic background of every particular part of the building. It takes an hour-long tour before Horst von Wächter shows an old photo album of his family. According to von Wächter, his normality ended in 1945. He describes the moment of his birthday, when the Allied bombed the lake in front of von Wächter's house and started to take over control in Germany. Horst von Wächter has tears in his eyes, while he portrays the ending of his peaceful childhood.

By watching the initial part of the documentary, the spectator gets a first impression of Horst von Wächter. Right at the start, his behaviour seems to be very contrarily if one considers the highly criminal background of his father. At this point, especially two moments are remarkable. Firstly, Horst von Wächter avoids talking about his father. Secondly, he emphasises his beloved childhood and even starts to cry when he describes how it suddenly ended. Observing the emotional manner of conducting himself, it appeals that he recognises his past only in brackets and blanks out all the negative about his father. While doing so, it occurs that he is protecting his childish viewpoint. His outburst of feeling at the end is maybe the reaction of an overwhelmed child that has never left the bubble of having an admirable father.

In the next scene, Niklas Frank is introduced to the audience. He is standing next to an old run-down house, a ruin which was the previous home of Niklas Frank in Schliersee, Bavaria. Touched by the familiar surroundings, Frank remembers his childhood and the close connection he had to the housemaid named Hilde. Hilde, not his mother, is responsible for everything that is human in his personality, Frank explains to Sands. He reveals, furthermore, that he never had any connection to his parents. It becomes apparent that the relationship between Niklas Frank and his father was completely different in comparison to the one of Horst von Wächter. In detail, Niklas Frank describes how his father loved Adolf Hitler more than his family. He even avoided a divorce simply because Adolf Hitler did not allow it, although the parents hated each other. To Hans Frank, the love to the Nazi's leader became a legal concept. According to his son, Frank knew what was right and wrong but did not care about the truth; Hans Frank wanted to serve Adolf Hitler.

Until that point, the film tries to find a reason and explanation for the sons' differing handling of the past. Philippe Sands leads Horst von Wächter as well as Niklas Frank to places which inevitably reinvigorate their memories. On the one hand, von Wächter takes a position which obligates him to protect his father and argue that his father was actually a good person; on the other hand, Frank condemns his father. Frank's denunciation hits its peak when he says that his father deserved to die. Philippe Sands and Niklas Frank stand in the father's execution cell in Nuremberg, when Niklas Frank takes out a photo from his pocket and acknowledges while looking at the picture of his father, that he wants to be sure about his father's death and that he wants to have a reminder of how fast democracy can get lost. Although, these statements sound extremely hard, Niklas Frank seems to be more reflected about the burden imposed to him. Different to Horst von Wächter, he does not transfigure the impact of his father on the cruel deeds of the Nazi

Regime. In fact, he is taking a complete opposite position and is judging the delinquency of his father very sharply, which is also more comprehensibly for the spectator.

Frank and von Wächter agree to accompany Sands to a Q&A session in London, where the men were asked to talk about their thoughts and feelings regarding their fathers and to tell the audience of how they have met and of how they came to be friends with one another. As established earlier in the documentary, Frank and von Wächter have significantly different opinions of their respective father figures which they were not shy to stand up for, even in front of the large audience. Frank is remorseful and ashamed of his father and not for one second does he seem to want to defend his persona. Even if he received attention and affection from his father as a child, he feels the weight of Hans Frank's actions and cannot forgive him.

Curiously, while Horst von Wächter has no such recollections of his father, he is seemingly still deep in denial and tries to explain to Sands and the audience that like a coin, the Holocaust too had a different side to it; that not every German - civilian or officer - was blindly committed to the Nazi ideals, regardless of the actions they may have taken. Subsequently, these people cannot be judged so easily. Sands and an audience member point out to von Wächter that his explanation is not as sound as he may believe. His father, though never charged with his crimes, was responsible for ordering the expulsion of over seventy thousand Jews in Kraków, Poland and in Galicia, Ukraine, that eventually led to these people's deaths. However, as Otto von Wächter did not have his signature on such decrees, his son blindly believes that von Wächter was not a bad man with bad intentions, but an unfortunate soul forced into cooperation with the Nazi system; this however does not justify the commission of crimes, irrespective of it being a generic form of defence among criminals throughout history.

Horst von Wächter's denial carries on to the next scenes. Frank pleads with von Wächter to reconsider his thoughts when so much mounting evidence exists that contradicts his stance on his father's "innocence". Sands pulls out a document that he found during his tedious research. This document lists Otto von Wächter as an individual very much responsible for mass murder and other criminal acts. Yet, not even tangible proof is sufficient for von Wächter, who stubbornly argues that there are numerous other documents that prove the contrary. Sands, frustrated that von Wächter is resisting the truth with 'every fibre in his body', then takes the men to his family's town in Ukraine where his family perished as a direct result of Hans Frank's and Otto von Wächter's actions. To Sands, the guilt of the fathers of both men is undeniable. Niklas Frank is as remorseful as ever upon seeing the ruins of the synagogue. Von Wächter, however, remains in denial. Claiming that nothing could have been done to prevent the atrocity, he attempts to erase his father's responsibility. Sands, dumbfounded and clearly hurt by Horst's attitude, argues that there is such a thing as individual criminal responsibility and Horst cannot just state that his father could not have taken preventive measures and is thus "innocent".

Von Wächter appears to be internally conflicted as he does not endorse the atrocities and mass murders committed by the Nazi regime, but simultaneously insists that Sands does not understand the power of "the system": going against the regime and its orders would mean punishment and perhaps execution. This, in von Wächter's eyes, leads to reduced, if any, responsibility for the acts committed.

In front of the mass grave of the 3,500 executed Jews, dated 25/03/1943, Niklas Frank expresses the emotional burden of the scene by saying “This our fathers did”, and encourages Horst von Wächter to at least recognise and accept what took place there. Sands attempts to counter von Wächter’s arguments about his father’s “inescapable involvement in the system” by explaining the concept of the chain of command. He explains that Otto von Wächter was in charge and had signed off on every killing, even though he may not have planted each bullet himself. Yet, Horst’s conviction of his father’s decency and lack of responsibility for mass murder remains unshakeable. Contrastingly, he is eager to shake the hands of modern Nazis in Ukraine who assure him that his father was a decent man. This deeply upsets Niklas Frank, who concludes that he despises Horst and that he considers him to be a Nazi just like his father. Horst on the other hand, thinks of Niklas as “selfish” and too attached to the acts of his father. The contrast between the two men becomes increasingly stark, and yet both of their states of mind can seem understandable to viewers.

Sands explains that we tend to see people as “us or them”, “victim or perpetrator”, however being a lawyer means to set aside those tribal instincts and let justice be delivered in courts and tribunals. Indeed, the Nuremberg trials administered justice. Frank’s father was convicted for the death of four million people. Von Wächter’s father died in Rome in 1949 and escaped trial. Despite his son’s belief in his intentions or decent character, his name was linked to the creation of the Krakow Ghetto. In a scene depicting Hans Frank’s execution day, he is shown as admitting to the priest his wish to be an innocent child again and not having done anything wrong; his son, standing in that same room decades later, says that to him “this is a happy room”.

II. Talk by Judge Liu Daqun

Liu Daqun has been a judge at the ICTY since 2000 and the Vice President thereof since 2015. He began his talk by providing the audience with a brief history of the ICTY. The tribunal was set up in 1993 as a subsidiary body of the United Nations Security Council, with jurisdiction for four categories of crimes committed in the former Yugoslavia since 1991. The last judgment was delivered on November 29, 2017, on the case *Prosecutor v. Jadranko Prlić et al.*³ In its 24 years of operation, 161 individuals were indicted, 19 were acquitted, and 39 were released or died in prison cells. It has been the only tribunal adjudicating on crimes forming part of the conflicts in Yugoslavia, and to a large extent dealt with uncharted waters without much precedent. Back then, it was not clear enough what concepts such as “crimes against humanity”, “war crimes” and “command responsibility” - legacies of the innovation of the Nuremberg trials - meant, and yet the ICTY had to flesh them out, thus contributing to international criminal justice in a profound manner.

Liu Daqun particularly emphasised the lack of clarity of the term “command responsibility”, which also played an important part in the documentary since this was the type of responsibility carried by the two Nazi fathers. He mentioned the case of Japanese army general Yamashita, who was on trial for war crimes committed by his troops in the Philippines in 1944. Yamashita claimed to have lost contact with his army as a defence, but he was in command - and was sentenced to death.

³ Prlić et al. (IT-04-74), available online at: <http://www.icty.org/case/prlic/4#acjug> (last accessed: 07 March 2018).

Being in command means there is an assumption of having had the knowledge, and the responsibility for one's failure to know and prevent wrongdoings by one's subordinates. The judge juxtaposed ICTY's interpretation of command responsibility, which is more flexible than that adopted by the ICC. According to the interpretation under the ICTY regime, a causal relationship is required between a failure of the person in command and their subordinate's crimes. The ICTY has thus greatly contributed to the evolution of such concepts and especially the enrichment of international procedural law. Consequently, judges now have more room to manoeuvre.

Another innovation of the ICTY is the possibility for the Rules of Procedure (RoP) to be amended by judges, who have the knowledge and awareness of what happens in a courtroom, instead of being amended by diplomats and politicians (the Contracting Parties) who do not have the first-hand information of what is going on during the trial process. The RoP have been amended 50 times⁴.

Finally, a constant difficulty for international criminal tribunals is the issue of evidence. The Nuremberg trials adopted the common law legal system which, in comparison to civil law systems, has a strict stance regarding the admission of evidence. Indeed, historically the two systems have been grounded on different philosophical bases; while civil law traditions are known for a certain "freedom of proof", common law traditions entail a highly regulated system of criminal evidence⁵. Judge Liu Daqun suggests introducing some civil law elements in this regard.

III. Discussion with Judge Liu Daqun

After the presentation of the ICTY and of Judge Liu Daqun's work, members of the audience were able to ask questions. Many questions were aimed towards Daqun's work in the ICTY and a recent appeal judgment. He made clear that during war it is possible to commit individual criminal crimes and referenced the Nazi period where state and individual responsibility at first were not distinguished from one another. Judge Daqun spoke about his views in international crime and about the legacy of the Nuremberg trials. It was the first time that the highest leaders were tried in court and could not escape punishment regardless of their position. The ICTY has been successful in arresting leaders and Judge Daqun boasted about the effectiveness of the tribunal by chiming in that 161 suspects had been arrested. For example, General Radislav Krstić of the Bosnian Serb army became the first genocide conviction before the ICTY in 2001.

Judge Daqun talked with fervour about the ICTY, but his own journey towards the ICTY also inspired warmth. He was the ambassador to Jamaica before China recommended him to the Security General as a judge in The Hague. On a cold day in Amsterdam, such as the 15th of December, Judge Daqun reminisced of the sun he left in Jamaica. Judge Daqun spoke about how the use of common sense inspired him to pursue a career in law. In law, he finds that evidence is the most important thing and that it has to be used to persuade. His last remark was that in the

⁴ For an example of amendments to the RoP, see <http://www.icty.org/en/press/amendments-tribunals-rules-procedure-and-evidence-22nd-plenary-session> (last accessed: 07 March 2018).

⁵ Jackson, J., & Summers, S., *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions (Law in Context)*, Cambridge: Cambridge University Press 2012, p. 30-31.

tribunal one can present a point of view in front of an impartial judge and that is where the international tribunal is able to address individual criminal responsibility.

Conclusion

The Nuremberg Trials was the legal mechanism for addressing the war crimes that occurred during World War II. Quite similarly, the International Criminal Tribunal for the former Yugoslavia was the legal mechanism that addressed the war crimes that occurred in the Balkans during the 1990's. The documentary by Philippe Sands details the different views the sons of two Nazi leaders can have in finding guilt in their fathers. In the documentary, the father of Niklas Frank had been convicted during the Nuremberg Trials and he appears to believe that justice was served. Another man, Horst von Wächter's, whose father had also been a Nazi leader, truly believes that his father was innocent, as he had never been tried in the Nuremberg Trials. This signals the importance of legal mechanisms in establishing guilt.

As von Wächter's father was never tried, history would have remembered him as an innocent man if it were not for Sand's documentary that revealed that von Wächter's father had actually signed off on killings. Even von Wächter himself is surprised by the evidence Sands found against his father and refuses to believe it. If the Nuremberg Trials had found him guilty there would have been no doubt on his guilt, but as he was never tried, his judgement will forever lie in history. Judge Liu Daqun highlights the importance of the Nuremberg Trials for establishing the importance of trying leaders before a court. His role in the International Criminal Tribunal of the former Yugoslavia involves trying important leaders for their actions during the Yugoslav Wars. He recognises the importance of investigating and addressing criminal responsibility. One can hope that the tribunals continue to fully investigate all actors during conflicts to ensure that no doubt remains in establishing guilt or innocence.