THE LAW ON TRIAL: A JURISPRUDENTIAL ANALYSIS OF THE NUREMBERG TRIALS

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ABSTRACT

The Nuremberg trials go down in history as the end of the Second World War. They represent more than that. This is because it was not only criminals who were being put on trial but also an ideology. However, great care should have been taken into making sure that this does not become a kangaroo trial and that justice is done. In parts of the trial, a few legal grey areas were reached and it is still impossible to objectively judge whether this trial was truly in the interests of justice and if the judgment was due to judicial and not political considerations. However, a bare analysis of the facts makes it obvious that something had to be done and the War Criminals could not be allowed to go free, and this was seen as the fairest alternative. In this paper, an attempt had been made to analyze the facts and circumstances present during the trial, and to understand the delicate jurisprudential arguments made by the parties in an objective manner. The law used and the reasoning given by both the lawyers for the parties and the bench have been discussed, and all in all, the legality and fairness of the entire process will be evaluated. One of the main issues with these trials was that there was no legal basis for them, and it was questioned if law has the ability to judge itself and if there were legal grounds to discuss the legality of a law passed by the sovereign in a nation. It is because of these reasons that the Nuremberg trials are an important part of international criminal law.

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INTRODUCTION

“...that four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power ever has paid to Reason.”¹

These were the opening lines to the Nuremberg Trials, uttered by the American Prosecutor, Robert Jackson. History, however, does not seem to agree with him. In what has been cited by jurists worldwide as a classic case of victor’s justice, the Nuremberg Trials have always been mired in controversy.

At the Yalta conference, there was the question raised on what should be done with the Nazi leadership that will get captured after the capitulation of Germany. Winston Churchill, PM of the UK, was of the opinion that they should be “shot on sight.” He thought that it was a political, rather than a judicial decision to make. However, a consensus prevailed and the Declaration on German Atrocities in Occupied Europe was signed² and it was agreed that Hitler and his accomplices will have to answer to an International Military Tribunal (IMT³), and the victorious allied powers (USA, USSR, Great Britain and France) shall be the judge, jury and executioner. Along with the main IMT trials, other side trials like the Doctor’s Trials⁴ and the Jurist’s Trial⁵ also took place. In this way, the “legal” basis for prosecuting Nazi criminals was in fact nothing more complex than “politics”. The winners judged the losers because they lost, not because of what they did or because of immutable principles of international law. Intriguingly, this critique of Nuremberg, which was only partly correct, then stood historically as the baseline for arguments urging the creation of a true international jurisdiction which could sit in judgment precisely because it was the representative not of the victors but of the community of nations. Thus, the model of the current International Criminal Court (ICC) owes much of its existence to the fact that it does not reflect the structural

²http://archive.org/stream/unitednationsdoc031889mbp/unitednationsdoc031889mbp_djvu.txt
defects of the IMT/NMT. Of course, the existence of the ICC also pre-supposes at some level that the best, or at least one possible mechanism for dealing with questions of “justice” in post-conflict situations is that of a criminal trial in which alleged perpetrators are judged according to prescribed international criminal standards.

**BUILD-UP TO THE TRIAL**

“There were, I suppose, three possible courses: to let the atrocities which had been committed go unpunished; to put the perpetrators to death or punish them by executive action; or to try them. Which was it to be? Was it possible to let such atrocities go unpunished? Could France, could Russia, could Holland, Belgium, Norway, Czechoslovakia, Poland or Yugoslavia be expected to consent to such a course? ... It will be remembered that after the First World War alleged criminals were handed over to be tried by Germany, and what a farce that was! The majority got off and such sentences as were inflicted were derisory and were soon remitted.”⁶– British Judge Geoffrey Lawrence

The facts and figures of the victims of the Nazi’s reign of terror over Occupied Europe stand as testament to the brutalities unleashed by Hitler’s Reich. Roughly 11 million people had been “liquidated.”⁷ Occupied countries like Poland and France were the worst hit.

In the Joint Declaration of Four Nations on General Security⁸ (Moscow Declaration) the Allies resolved to bring war criminals to justice. Issued on November 1, 1943, the Declaration officially acknowledged Nazi ‘atrocities, massacres and executions’ and pledged that the Allies would pursue those responsible ‘to the uttermost ends of the earth and … deliver them to their accusers in order that justice may be done.’⁹ They opined that there were lessons to be learned from the past and that a trial would preserve them for posterity, and a record would be kept detailing Nazi atrocities. From June to August 1945, representatives of the Four Powers (the United States, the United Kingdom, the Soviet Union, and France) convened an international conference in London for the purpose of deciding the law and to be applied and the procedure to be followed against German war criminals. It was then reaffirmed that unprecedented criminality demanded unprecedented justice.

⁷https://www.jewishvirtuallibrary.org/jsource/Holocaust/NonJewishVictims.html
⁹Ibid.
The result was the Charter for the International Military Tribunal\textsuperscript{10} that attempted to declare that the Tribunal had jurisdiction over the following offenses, for which there would be personally responsibility of the Accused War Criminals irrespective of rank or position\textsuperscript{11}:

(a) Crimes Against Peace\textsuperscript{12}: included in this was- planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing. These were the only charges to have an indirect international precedent in the Kellog-Briand Pact of 1928\textsuperscript{13}, which the Nazi government's predecessor, the Weimar Republic of Germany had signed, which forbade the use of war (except in self-defence) and de-recognised war as an instrument for the furtherance of state policy;

(b) War Crimes: which meant violations of the laws or customs of war. Such violations included murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity\textsuperscript{14};

(c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the


\textsuperscript{14}Definition of War Crimes,\textit{CUSTOMARY IHL}, available at https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule156.
jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.\textsuperscript{15}

21 people from across the German leadership, from industrialists, Admirals, Generals and anti-Semitic editors of newspapers were put on trial at the International Military Tribunal. 12 were hanged, 4 were awarded life imprisonment, 3 were acquitted and the rest were given terms ranging from 10 to 25 years\textsuperscript{16}.

Nuremberg was chosen as the seat for the trials for two reasons. Firstly, because it was relatively undamaged, and secondly, because it was where the infamous \textit{Nuremberg Laws}, which were the first anti-semitic legislation in Hitler’s Reich, were passed,\textsuperscript{17} like the Law for the Protection of German Blood and Honor\textsuperscript{18} and the Reich Citizenship Law\textsuperscript{19} To try Nazi jurists at Nuremberg was to locate both physically and symbolically the struggle against Nazi jurisprudence.

\textbf{Jurisprudential Analysis}

It has been observed that in a situation like Nazi-Germany, the struggle with which the trial’s judges deal with is not that of “law” versus “law”, but rather of “law” versus “unlaw” or “not law” (\textit{Unrecht-moral judgments})\textsuperscript{20}. It was argued by the prosecutors that Nazi law, which was the core crime of which the accused were charged, is a perversion of law and how it is intended to be; it is law in form only, but not in substance. Law, in this instance was used as a tool for the pursuit of the ultimate and foundational perversion, the creation of the Nazi state. It is widely believed by a school of thought


\textsuperscript{17}Chase, J. L. (1954). The Development of the Morgenthau Plan Through the Quebec Conference. The Journal of Politics, 16(2), 324–359.


that an unjust law is no law at all\textsuperscript{21} and Nazi law was seen to be unjust, discriminatory, and against the basic principles of justice, equality and good conscience.

A basic jurisprudential debate which is the heart of the question of law and justice in most post-conflict situations as chaos and destruction of war starts of ebb, and one that was continuously argued upon in Nuremberg was the ability of law to judge itself. To put the question in the only way that makes such a subjective analysis possible is- how can we understand the moral core at the heart of law? This basic jurisprudential debate is one between proponents of the natural law position which asserts that law must have a basic moral core to be properly understood as law and that law and morality and interminably connected and one the other, and that a law without morality cannot qualify as a law in its true sense\textsuperscript{22}, and the supporters of legal positivism, which asserts that law must simply be recognizable in a formal sense (black and white law) as such to be 'law' and there must be a separation between law as is and law as it should be. The penumbra of the core is the area a statue is not intended to cover. Furthermore, Positivists argue that if a particular system establishes rules of procedure and institutional competence by which laws are promulgated and enforced, and those rules are adhered to and enforced by the government in power, then the substantive content of the rules, their morality or capacity to deliver justice is irrelevant to the taxonomical question\textsuperscript{23}.

Clearly, this is an issue that cropped up repeatedly during the Nuremberg Trials, as the very legitimacy of the Nazis as Germany's sovereign was challenged. The prosecution alleged that the Nazis lost the moral right to govern Germany when they started making war, tyranny and genocide a part of state policy. Therefore, the laws created by them could not be equated to the "command of the sovereign" as Nazi law was a perversion of law, a system of tyranny which cloaked itself in legal form, but the core principles of which were completely offensive and foreign to any proper and civilized understanding of law. The defence insisted that the Defendants simply acted as they were required to by their head of state, and were only serving their country by following the command of their leader.

This must be the case a fortiori when the “law” in question permitted, enabled, justified and encouraged the atrocities of the Nazi regime. If Nazi law was law, what justification for the prosecutions of any Nazi leaders can be found, let alone legitimated? Thus, the positioning of the natural law/positivism debate is not just about law, it is also about legitimacy and ultimately about politics. The problem here was the deployment of a criminal trial as a pedagogical and ideological device. There is no doubt that all trials at a fundamental level serve these twin functions, however in a case like this, where “victor's justice” was an important theme, the symbolic value of the trial became imperative.

**EUGENICS LAWS**

As soon as Hitler gained power, he enacted a law based on the principles of Eugenics. After the war got over, the men responsible were put to trial. There is no doubt that eugenics, both “positive” and “negative”, was central to the Nazi ideology and their legal program to ensure the survival of a healthy Aryan population. As an essential element part of their legislative, i.e. legal, armory to combat the 'pollution of the national bloodstock', German officials introduced a series of measures aimed at preventing so-called “defectives” from reproducing. Among these provisions are the Law for the Prevention of Hereditarily Diseased Offspring and the Law for the Protection of the Hereditary Health of the German People (Marriage Health Law). Each of these statutes carried penal compulsion for the sterilization of the unfit, but they also set forth complex administrative, quasi-judicial proceedings before such compulsion could occur. In practice, the Appellate jurisdiction of the Hereditary Health Courts regularly overturned decisions to sterilize by the lower branch on legal and factual grounds.

What this indicates is that the German system for compulsory sterilization carried with it the

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procedural and institutional safeguards which we still commonly associate with the rule of law in Western democracies. How then are we to characterize the Nazi abuse of law, as law in name only?

The defence argued that a lot of other countries, (including the USA), still had eugenic laws in place. The defence quoted a US Supreme Court case, Buck v. Bell\textsuperscript{29}, a compulsory sterilization case from the State of Virginia. Oliver Wendell Holmes wrote the opinion of the Supreme Court upholding the validity of the statute under which Ms.Carrie Buck would be made infertile. He said-

“We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.”\textsuperscript{30}

Therefore, it was proved that such practices go on everywhere, similar laws that hinder the spread of “unwanted” genes are prevalent in the 21\textsuperscript{st} century, however, the war criminals were still held guilty.

**USE OF POSITIVISM BY THE DEFENCE**

The Nazi defence attorneys used John Austin’s theory of legal positivism as their central argument. Two of the tenets of Austin’s legal positivism is his Command Theory and the notion that there is a fundamental separation of law from morality. Specifically, Austin’s Command Theory was utilized by the Nazi defence attorneys while the presupposition of the separation of morality and law lay underneath each side. Where Austin and all forms of legal positivism diverge most fundamentally from the more traditional natural law theory is in its position on the role of morality in determining law’s validity. In contrast to natural law, legal positivism sees no necessary connection between morality and genuine legal obligation, and considers both to be very distinct.

\textsuperscript{29}274 U.S. 200 (1927)
\textsuperscript{30}Ibid.
The German defence team said that one should look into the habit of obedience to a determinate human superior. According to its adherents, the existence and contents of a law do not depend on whether or not it is based on a moral standard. Indeed, in a passage outright rejecting the very idea that natural law is based on, Austin holds that “To say that human laws which conflict with the Divine law are not binding, that is to say, are not law, is to talk stark nonsense”\(^31\). Law rather derives its legitimacy from being posited, that is, being brought legally into existence by a supreme legislative power, into what we know as black and white law. The identity of the sovereign is not a question of legal right, but a question of who satisfies certain legal as well as political conditions. As he puts it in a well-known passage:

"The superiority which is styled sovereignty... is distinguished from other superiority... by the following marks or characters: 1. The bulk of the given society are in a habit of obedience or submission to a determinate and common superior... 2. That certain individual, or that certain body of individuals, is not in a habit of obedience to a determinate human superior."\(^32\)

Now we must turn to the prosecution. While of course most legal positivists would hold that mass murder is wrong, outside posited law, they would have little basis for establishing reasons for it, except the same morality-driven arguments. The only way the prosecution could ever legally condemn the actions of the Nazis was an appeal to a higher human law, which itself is morally neutral, as any law should be. This would take the form of international law as enforced by the tribunal and the United Nations.

The trial was in danger of being dressed as being ex post facto since “crimes against humanity” “and crimes against peace” was made a crime long after the existence of the Nazi regime’s repressive policies. Addressing this question, the Court turned to Sir William Blackstone’s exposition of ex post facto laws. Here Blackstone says that an ex post facto law of this is that by which after an action indifferent in itself is committed, the legislator then for the first time declares it to have been a crime and inflicts a punishment upon the person who has committed it. It should be impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilty by a subsequent law.

\(^{32}\) Ibid.
The Court held that the Law could not be seen as *ex post facto*, reasoning that mass murder forbidden by the Law could no way be construed as an “indifferent action in itself” and that “neither has the retroactive legislation dealt with a created new crime that had not hitherto been unknown.” In support of this assertion, the Court pointed out that all nations, Germany included, before and after the Nazi regime, had recognized mass murder as crime. The Court held that there was no way the Nazi leadership could possibly say that what they did was morally correct. Taking a note from Aquinas, the court said that the “law” and “criminal decrees of Hitler are not laws,”33 which established the reason court’s competence in judging the Nazi legal system. Furthermore, the court argued that the fact that the Nazis took measures “to efface the traces of their crimes” such as the destruction of the Gestapo archives proved the Nazi’s guilty mind, and that they knew that their actions would have consequences when the Allies take back power.34 Even though it is agreed that the protection against *ex post facto* laws are one of the bedrocks of the concept of a free and fair trial, the level of brutality and the extraordinary burden of 11 million dead was too much to set aside and ignore on an issue regarding procedure.

In truth, it was plain and clear to all that the moral guilt that the defendants so clearly had would find its way to get translated into a legal verdict, and that very few judges, especially British, American, Soviet and French judges would be able to look at this case in a completely objective manner. 35

**CONCLUSION**

Historically, perhaps no set of trials shows the elemental and basic conflict between the two theories on the validity of law more than the Nuremberg Trials. The legal wrangling and complex defence put forth were not enough to save Goering and 10 others from the moral burden they so obviously had, and they were pronounced guilty and given the death penalty. When they asked to be executed

33 Judgment of the Nuremberg International Military Tribunal 1946 (1947) 41 AJIL 172.
by firing squad (as is tradition amongst the military), their request was rejected and they hanged till death. (Goering himself committed suicide a night before his execution)

The Nuremberg Trials, despite their procedural failures was still a necessity, as there needed to be a way to punish those guilty of Nazi atrocities, and a judicial solution was much better than a political decision. It has been asserted that this was a Kangaroo Trial and that legal justice was sacrificed at the altar of appeasing the public, but everything said and done, all the laws and principles kept in mind, the simplicity of Justice Jackson, in his opening speech cannot be forgotten, when speaking of the millions dead at the Nazis’ hands: “Does it take these men by surprise that murder is treated as a crime?