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THE NUREMBURG TRIAL REVISITED

CARL HAENSEL

HITLER having committed suicide, the four great powers decided in the London Agreement of August 8, 1945, to punish the major criminals, the men next to Hitler, by International Military Tribunal. Thus, it was not a world tribunal appointed by the United Nations which condemned the apocalyptic attempt to subject human beings to a diabolic mind.

CRIMES BEFORE 1939 NOT CONSIDERED

The indictments were limited to crimes which were supposed to have been committed after the seizure of Austria and Czechoslovakia in 1938, and after the beginning of the war against Poland, on September 1, 1939. Consequently, all the Nazi-crimes which were committed after the "seizure of power" in 1933 were neglected. The judgment of the International Military Tribunal emphasizes: "The first acts of aggression referred to in the indictment are the seizure of Austria and Czechoslovakia, and the first war of aggression charged in the indictment is the war against Poland, beginning on September 1, 1939."¹

"It was contended for the prosecution that certain aspects of the anti-semite policy were connected with the plans for aggressive war."²

The first real fact considered in the judgment was: "the violent measures taken against the Jews in November, 1938," in retaliation for the killing of an official of the German embassy in Paris.

The racial ideology was nothing more than a political instrument for Hitler, nothing else. He said to Rauschnigg: "Such a thing as race does not exist in a scientific sense. . . . I, as a politician, need a concept which is suitable to dissolve an order which hitherto was built upon historical continuity and to enforce a completely new

¹ Official Transcript of the Int. Mil. Trib., August 31, 1946, p. 16920. Hereinafter cited as Transcript.

² Transcript, p. 16919.

Chief Counsel for the SS (Die Schutz-Staffeln der Nationalsozialistischen Deutschen Arbeiterpartei) and the SD (Der Sicherheitsdienst) before the International Military Tribunal at Nuremberg; Professor of Law in the University of Tübingen; Author of Das Gericht vertagt sich ("The Tribunal Will Adjourn").

anti-historical order and to support it ideologically.”³ In the chapter, “The Consolidation of Power,” the Tribunal stated in the last sentence of the judgment that:

Through the effective control of the radio and the press, the German people, during the years which followed 1933 were subjected to the most intensive propaganda in furtherance of the regime. Hostile criticism, indeed criticism of any kind was forbidden, and the severest penalties were imposed on those who indulged in it. Independent judgment, based on freedom of thought, was rendered quite impossible.⁴

A clear distinction was also made between the Nazi party and the German people as a whole, and between the members of the Nazi party who were the officers and the men responsible for having taken a consenting part in the crimes committed during the war and the Germans who were the victims of the Nazi brutalities and Hitlerite domination.⁵ But the crimes of the Nazis against the German people were not considered by the International Military Tribunal (I.M.T.).

THE EUTHANASIA PROGRAM

Hitler ordered the Reichsleiter Buhler and Dr. Brandt to accord to incurable persons a “mercy death, after a most careful diagnosis of their condition of sickness.” This activity was called the euthanasia program. Any relation between these measures and the measures taken for the final solution of the Jewish problem was neither established nor even hinted at by the I.M.T. There was no distinction between Germans and Jews. Every German mental institution received questionnaires from the Interior of the Reich, which were to be completed for each inmate of the institution. Germans, Jews and other nationals were all subjected to euthanasia. About 100,000 people were killed as a result of this program in Germany and Austria alone. The whole program was kept absolutely secret; Hitler’s letter of September 1, 1939, ordering the euthanasia and marked “top secret,” was never published. The German Minister of Justice did not receive a copy of it until one year after its issue. Without any doubt, euthanasia was murder according to the German law.⁶ However, the letter of Hitler was not a law.

³ Speeches with Hitler, original edition: London, 1939. German translation: Zurich, 1940.

⁴ Transcript, p. 16813.

⁵ Moscow Declaration of November 1, 1943, printed in *Trials of War Criminals*. See note 1.

⁶ *Trials of war criminals before the Nuremberg Military Tribunals*, U.S. Government Printing Office, 1949, vol. I, p. 806.

In the opinion of the I.M.T., however, the word euthanasia is not used at all. It merely mentions the measures taken for the purpose of killing all persons who were in special institutions because of old age, mental illness, or disease. This included German nationals and foreign workers in the separate judgment of defendant Frick, Reichmaster of the Interior. Later, euthanasia was treated by the American Military Tribunal in the medical case in 1947. Another function of the euthanasia program was the killing of mentally and bodily deficient children. The German public was horrified by euthanasia and the manner of its execution. The wildest scenes imaginable are reported to have taken place, and some of these people did not board the bus voluntarily and were forced to do so by the accompanying personnel.⁷ These measures could not be excused as tasks to insure the "political security" or to punish rebels. The mercy death—*Gnadentod*—was accorded to such a large number of feeble and insane persons, that it was impossible to perform "A most careful diagnosis of their conditions of sickness." The I.M.T. had a great opportunity to demonstrate that the trials punished the inhumanity against Germans as well as the atrocities against foreigners. However, it did not take any advantage of the opportunity, and that was one of the reasons for the unpopularity of the I.M.T. judgment.

On August 31, 1946, when the judgment of the I.M.T. was read at Nuremberg, the word "euthanasia" was used. But the Court of Assizes in Berlin, at the session of March 25, 1946, found the defendants Hilde Wernicke and Helene Weiczorek guilty of murder and sentenced them to death. The court of appeals in this case rejected the appeals of both defendants. The following quotation from the findings is of interest: "It cannot be mistaken that the defendants Wernicke and Weiczorek are only the last links of a chain, and that they are preceded by persons whose guilt is greater."

Professor Werner Heyde was the top expert of the euthanasia program. He disappeared in 1945 and lived as Dr. Fritz Sawade in Flensburg. In 1959 he was discovered and unmasked. A monumental trial against him and three leaders of the euthanasia program, Friedrich Tillmann, Dr. Gerhard Bohne, and Dr. Hans Hevelmann, was prepared. Before it started, on February 14, 1964, in Limburg, Heyde and Tillmann committed suicide; Bohne escaped to South America, and only Dr. Hevelmann, the least important of the four, appeared

⁷ Applice Report, quoted vol. 11, c.p. 802.

before the assizes in Limburg. There was a great rebellion among the German population, and the German prosecution was reproached for having failed to take suitable precautions, which proves that the German people never forgot the crimes against insane and incurable persons.

Referring to this failure of German justice, newspapers as well as wireless and television commentators pointed out the necessity of judging and punishing according to German law these abominable crimes, and denounced everyone who had helped the guilty individuals to commit suicide or escape so as to avoid punishment.

THE JUDGMENT APPLIED INTERNATIONAL, NOT GERMAN,
LAW TO GERMAN INDIVIDUALS

The crimes which were the subject of the trial took place during the war between 1939 and 1945, and those, the crimes of German nationals, were examined according to international law. Three of the twenty-four defendants were acquitted by the I.M.T.'s order of October 1, 1946, although many Nazi documents submitted by the prosecution and published in the German press gave these defendants' names. The German people did not understand the I.M.T.'s order to release the acquitted defendants, and the Bavarian police guarded the exits of the Nuremberg Court to restrain the excited men who demanded that the acquitted defendants be judged and punished by German courts.⁸

The Moscow Declaration, released on November 1, 1943, provided that members of the Nazi party who had been responsible for the activities or who had taken a consenting part therein be sent back to the countries in which their abominable deeds occurred so as to be judged and punished according to the law of those countries. The declaration also provided that major criminals, whose offenses had no particular geographical locale, would be punished by the joint decision of the governments of the Allies.

There would have been no difficulty in finding the twenty-four defendants in the I.M.T. guilty according to German law, had it been administered by the I.M.T. The German criminal law provided at that time for capital punishment, by means other than hanging;⁹

⁸ Telford Taylor, *Nuremberg Trials, War Crimes and International Law*, Carnegie Endowment, New York. German Edition: Zürich 1950.

⁹ Penal Law of May 15, 1871, with alteration laws and Military Penal Law of June 20, 1872, as fixed on October 10, 1940.

this provision was subsequently abolished.¹⁰ No difficulty was encountered in interpreting the Nazi laws enacted subsequent to January 30, 1933; these laws were deprived of effect by Law No. 1 of the Military Government after its proclamation on August 30, 1945. But, German legal and moral thinking is dominated by the principle of equal treatment, and the German prosecution has to prosecute every crime, for it is regarded as a failure and weakness not to punish every crime committed. In 1955, the Minister of Justice alarmed the public by stating that many more crimes were committed than prosecuted; many violations are not reported and remain unknown to the police. Only one out of ten parents report a sexual attack, so as to avoid their children's being shocked by the proceedings. The German Administration of Justice is convinced that the so-called "dunkelziffer" ("dunkel" means remaining secret) is a danger for German society.¹¹ For this reason the main objection against the I.M.T. trial was that the war criminals who were members of the victorious powers were not prosecuted.

THE CONSPIRACY

Much discussed were the objections against the Nuremberg "indictment": that the acts violating the law of nations can only be done by the state.¹² I will neither discuss nor deny the opinion that guilty individuals should not escape by relying on this age old excuse, as Wyzinski does,¹³ but I agree with him as to his emphasis of the principle: *nullum crimen et nulla poena sine lege*. Justice Robert Jackson, Chief of Council, submitted at the beginning of the trial, as exhibit number one, four documents of the Briand-Kellogg Pact, and he asked the Tribunal for the interpretation and application of this pact and for the adoption of the "system of collective security." There was, however, no penal law involved here. The Charter of the Internal Military Tribunal was a penal law, signed on August 8, 1945, by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government

¹⁰ Grundgesetz für die Bundesrepublik Deutschland of May 23, 1949, art. 102.

¹¹ Universitas, Stuttgart, April, 1963, p. 379.

¹² Smith, President, American Bar Association: The Nuremberg Trials, Am. Bar Assoc. Journal, Chicago, July, 1946, p. 394.

¹³ Wyzinski: "Nuremberg—A Fair Trial?" The Atlantic, Boston, April, 1946.

of the Union of Soviet Socialist Republics. On August 8, 1945, all defendants were imprisoned, but all the crimes were committed before the unconditional surrender of May, 1945. There is no criminal code which is merely restricted to setting forth the constituent elements of maintenance of peace, as in the diplomatic pacts, according to the Kellogg and Briand suggestions. On the contrary, every national penal code contains a great number of regulations which determine the general and special conditions which make an act punishable, conditions which are fundamentally common to all crimes, be this in the form of a definite decree, of common law brought into a system by decision of trial courts, or of publications of members of the legal profession. To the theory of individual responsibility the prosecution stated: "If these men be immune, then law has lost its meaning and men must live in fear." But, if men are involved in and believe in the murdering of Jews or of prisoners of war, the quotation from a paragraph of international law is not needed to punish them by a military tribunal during war, administering national law. But Count Two of the indictment charged the defendants with committing specific crimes against peace by planning, preparing, initiating, and waging wars of aggression against a number of other states. In the judgment of the I.M.T. (treated in the chapter "The Law as to the Common Plan or Conspiracy") the planning and preparation of a war of aggression by the defendants is a crime under international law. Only four of the twenty-four defendants were found guilty of having "conspired" in preparing an aggressive war.

The indictment asked that the Tribunal declare the following organizations to be criminal: the Leadership Corps of the Nazi Party, the Gestapo, The S.D., the S.S., the S.A., the Reich Cabinet, and the General Staff and High Command of the Armed Forces. The judgment stated: "A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose."¹⁴ But only three of the six organizations were declared to be criminal: the Gestapo, the S.D., and the S.S. The Tribunal believed that no declaration of criminality should be made with respect to the S.A., Reich Cabinet, or General Staff and High Command of the Armed Forces. The chapter closes with the following words: "Where the facts warrant it, these men should be brought

¹⁴ Transcript, p. 16930.

to trial so that those among them who are guilty of these crimes should not escape punishment." *Guilty of individual crimes, not of conspiracy!*

General Nikitschenko protested on the first of October, 1946, by a dissenting opinion, to the release of three defendants and also stated that the three acquitted organizations were criminal. Nikitschenko was the justice nominated by Stalin as a member of the I.M.T. for the U.S.S.R. Nikitschenko also protested because Rudolf Hess, the representative of Hitler, was not condemned to death. Hess is to this very day a prisoner of the Four Allied Powers at Spandau.

Subsequent to the International Military Tribunal, the United States held a series of twelve trial proceedings at Nuremberg. The Control Council Law No. 10, promulgated December 20, 1945, was the legal basis for these proceedings. The defendants in these proceedings, charged with war crimes and other offenses against international penal law, were prominent figures in Hitler's Germany, and included such outstanding diplomats and politicians as: two State-Secretaries of the Foreign Office; Cabinet Ministers; Field Marshalls; S.S. Leaders; and leading professional men including attorneys and physicians. In the I.M.T. case against the major criminals, the indictment of conspiracy was not without effect because the sentence would have been the same whether or not conspiracy was found. In the subsequent Military Trials, however, it could have been decisive, as, for example, in the case of the State Secretary of the Foreign Office (my client), who could be implicated in war crimes by conspiracy, though he neither shot nor gave an order to shoot, but was a member of the Hitler Government. For this reason, on June 30, 1947, I presented a trial brief addressed to the Military Tribunals I, II, and III at Nuremberg, alleging that the indictment was legally insufficient because the crime of conspiracy is known neither to the international law nor continental law. I was encouraged by the statement of Francis B. Sayre that "it is utterly unknown to the Roman law; it is not found in modern continental codes; few continental lawyers ever heard of it. It is a doctrine which has proved itself the evil genius of our law wherever it has touched it."¹⁵ The three acting Military Tribunals had only one general session during the trials. The

¹⁵ 35 HARV. L. REV. 397—Carl Haensel: "Das Organisationsverbrechen," Munich, 1947. Carl Haensel: "Die Zyklische Wiederkehr des Nauurrechts," Schweizer Zeitschrift für Strafrecht, 1950, number 3.

United Tribunal, administering only international law,¹⁶ decided after my pleading that the conspiracy was not a matter of the indictment.

It was a great moment. The German people as a whole were finally acquitted of criminal conspiracy for planning, preparing, initiating and waging a war of aggression, including murder and ill treatment of civilian population of occupied territory, not justified by military necessity. If the indictment had been completely successful in all counts and against all the individual defendants, and all the six organizations had been declared criminal, a doctrine so vague in its outlines and uncertain in its fundamental nature as criminal conspiracy would have led to a great number of criminal proceedings against individual Germans. Perhaps even individuals who were Nazi victims themselves might have been involved. But now the circle of war criminals was confined; now there was established for the future a uniform rule for the prosecution of similar offenders.

SUPERIOR ORDER AND EMERGENCY

The majority of the 199 men accused before the I.M.T. and the American Military Tribunal in Nuremberg during 1945 to 1949 admitted that they committed the acts with which they were charged, following superior orders in presumed self-defense or under conditions of presumed emergency. The Military Tribunals developed the theory: It would not be in conformity with the principles of material justice if principles alien to the German and European concept of law were applied in considering the legality of various forms of conduct, such as acting in emergency or presumed emergency, acting in self-defense or in presumed self-defense. During the years following the last military judgment, rendered on April 14, 1949, a great number of proceedings were held by German courts administering German law, and based on the documents of the Nuremberg Trials.

THE DOCUMENTS

The first surprise in Nuremberg in October, 1945, was the enormous quantity and quality of documents which were introduced in evidence by the prosecution. When the United States Army entered

¹⁶ Telford Taylor, "Nuremberg Trials," New York, 1950, German Edition: Zürich 1950, p. 127.

German territory, it had specialized military personnel whose duties were to capture and preserve German documents, records and archives. Such documents were assembled in temporary document headquarters. Later each army established fixed document centers in the United States zone of occupation where their documents were assembled and the slow process of indexing and cataloging was begun.¹⁷ The documents of the Staff Main Office (S.S. Center) alone filled six large railway cars. These documents showed that the extermination program on racial and political grounds also extended to prisoners of war. Many of these cruel documents were deposited in armored safes. The question arose: Why have these mortal proofs not been destroyed? No answer. It was the desire of the defense to have access to the document center, but it was not granted. The documents introduced in evidence by the prosecution were presented in document books. Only an index of the seized documents of the Staff Main Office was submitted. These documents constitute a source of historical material, covering all the events in the fateful years preceding 1933, up to 1945, in Germany and elsewhere in Europe. The bulk of these documents were presented for historical purposes, as only a few of them would have been sufficient for sentencing purposes. The hunting for documents resulted in the most complete documentation ever compiled of the history of a single period.

THE JUDGE APPOINTED BY STALIN

The I.M.T. consisted of four members, each with an alternate. One member and one alternate was appointed by each of the signatories: the United States; the French Republic; the United Kingdom; and the Stalinist Government. The Stalinist member of the Tribunal was the Major General of Justice, I. T. Nikitschenko.

In the chapter "The Aggression Against Poland," the judgment of the I.M.T. established that Hitler held an important military conference on May 23, 1939, at which he announced his decision to attack Poland. The judgment continues:

During the weeks which followed the conference other meetings were held and directives were issued in preparation for the war. The defendant Ribbentrop was sent to Moscow to negotiate a non-aggression pact with the Soviet Union.¹⁸

¹⁷ Trials of War Criminals, I.c., vol. 1, p. 75.

¹⁸ Official Transcript, p. 16841.

On March 25, 1946, Alfred Seidel, defense counsel for defendant Hess, introduced as an exhibit the treaty between Germany and the government appointed by Stalin, dated August 23, 1939, for non-aggression and a secret complement fixing a *Demarkationslinie* dividing Poland. The Germany State Secretary and Ambassador of the Foreign Office, Dr. Friedrich Gaus, analyzed the importance of these pacts permitting Hitler to carry out the planned aggression against Poland on September 1, 1939. The exhibits were not admitted into evidence by the Tribunal because they were not the originals. General Rudenkov, chief of the prosecution staff of the Stalin Government, protested against the admission of these exhibits stating that he had no knowledge of a secret treaty. The motion to hear Stalin as a witness was overruled. The documents in Dr. Seidel's possession were only copies; the signed originals were in the hands of the Stalin Government. The German original had been captured in Berlin in 1945. At first, on October 14, 1946, two weeks after the reading of the judgment at Nuremberg, the State Secretary of the British Foreign Office officially revealed in the British House of Commons that the secret pacts of 1939 between Stalin and Hitler had been discovered in Germany.¹⁹

On April 9, 1940, the German forces invaded Norway and Denmark. The Tribunal unanimously denied the contention that this invasion was "an instant and overwhelming necessity for self-defense." The German Ambassador in Moscow had announced to Molotov, the same day, April 9th, that the invasion of Norway and Denmark would start, and Molotov answered: "I wish Germany a good and plentiful success with its defense measures."²⁰ Robert W. Cooper reported:²¹ The Russian prosecution did not follow the other Allies who charged Goering and Keitel with having murdered 11,000 Polish officers in the Katyn Forest during the war. The defendant replied that the Bolsheviks had committed this slaughter. In the course of four days the witnesses produced by both sides were heard, and the end results were injurious to the Soviets. Cooper concludes cautiously: in this matter the last word has not yet been heard. The Tribunal gained the impression that the defendants were not con-

¹⁹ "Die Beziehungen zwischen Deutschland und der Sowjet Union 1939 bis 1941, Dokumente des Auswärtigen Amtes."

²⁰ Seidel, L.C., p. 174.

²¹ The Nuremberg Trial, German edition: Kerfeld, 1947, p. 44.

vinced of this accusation. Everybody hearing Dr. Gaus and reading the documents submitted by Dr. Seidel at Nuremberg was even then convinced—now everybody knows it—that there existed a political conspiracy between Hitler and Stalin with the aim of taking possession of parts of Poland; but a political conspiracy is not the equivalent of a criminal conspiracy at Common Law. The President of the Tribunal, His Excellency Lord Justice Lawrence, had great difficulties in avoiding incidents while the sessions were going on, but he mastered every situation. On March 25, 1946, the defense counsel, Dr. Seidel, submitted the copy of the secret treaty, the original of which was signed by Ribbentrop and Molotov, Stalin's plenipotentiary. The charter of the I.M.T. defined as a crime against peace the participation in a common plan of international treaties, signed August 8, 1945, by General R. Rudenko for the Government of the Union of Soviet Socialist Republics.

CONCLUSION

The proceedings, the treatment of the defendants and the rights granted to the defense counsel were very fair; however, the legal foundation of the proceedings could be attacked. Suspicion could arise insofar as the proceedings could be looked upon as a retaliation of the victors, because the Tribunal consisted of neither a representative of the defeated Germany nor a representative of a neutral nation.

It took half a generation to mature the problem of international penal law and to understand that the peace of the world cannot be promoted by trial and punishment under the device: *Vae victis!* But the five years of Nuremberg had another positive result: Men who began the trial as adversaries became and remained friends for later common work. For the first time, lawyers did not discuss the different penal laws of different countries; on the contrary, they discussed the theoretical aspects of penal law based on the conclusions reached at the congresses and meetings of the past. Now for the first time in the history of the science of comparative penal law, American and English judges demonstrated and practiced their own rules in a proceeding in a continental country. They judged continental defendants according to their own rules. We observed that the Anglo-Saxon penal law for proceedings and for the hearings of witnesses is extremely exact, although complicated and expensive.

Hans Frank, at the beginning of Hitler's reign and in the preceding

time, acted as Hitler's personal counsel in legal matters. He was later appointed Governor of Poland where he employed a large staff of historians to assemble his famous diary, produced as an exhibit by the prosecution. He exclaimed in his last words, written in 1946, that:

We have fought against Jewry: we have fought against it for years: and we have allowed ourselves to make utterances—and my own diary has become a witness against me in this connection—utterances which are terrible. . . . A thousand years will pass and this guilt of Germany will still not be erased.²²

By emphasizing this he did not intend to save his life, nor did he do so. It was a confession of his moral guilt, a guilt beyond international law.

The German people failed ethically, according to the highest moral standards, by passivity, because the situation urged resistance, even at the price of life. This lack of activity however is not punishable by worldly judges, by representatives of other nations and by Stalin—who also are not infallible—administering an international criminal law not theretofore existing. But now, in their role as victors, they received the German people's confession of guilt, which was not to be taken advantage of in outlawing the offenders, but was to be used to construct a new international unit, administering a better international law.

²² Transcript, p. 16918.

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