

Lessons from Nuremberg

In high school, Stanley Kramer's movie "Judgment at Nuremberg" made a big impression on me, sealing an earlier revulsion to war and evoking a passion for justice. Maximilian Schell stayed in my imagination, or so I thought. Forty years later, I discover he played the defender of nazis, while the prosecutors were all American, and the actors got mixed up in my mind. In other words, my views on international law are tied in with a movie that now seems more ideological (which is not to say it is unfactual).

I mention this now, for the question of justice for alleged perpetrators of violence (for instance, Augusto Pinochet, Slobodan Milosevic, Osama bin Laden, and some would add Henry Kissinger and the present Bush administration) through international law, has been raised again. Some people assume that the pursuit of those responsible for the attacks on September 11, in a criminal investigation under international law, is the only alternative to war. Yet, the proposal has also split some peace coalitions. Others argue that international jurisprudence is a moot point in light of the US's unveiled contempt for suggestions about legally acceptable evidence (e.g., tapes or wire taps) or the suggestion of an "extradition" hearing in an Islamic court or the treatment of prisoners in Camp X-Ray in Guantanamo.

It is also not easy to find substantial analyses of international law that are neither incomprehensible due to legalese nor suspect due to propaganda. And so, I was intrigued to read a closely argued piece by Jacques Ellul, written in 1947, right after the first Nuremberg

Trial, formally known as International Military Tribunals. (This time, charges were brought against nazi officials by France, Britain, the USA and the USSR, with judges from each country, unlike in the movie, which was based on later trials with only US judges.)

At the time, Jacques Ellul (who had not fought in the war against Germany, but had lost his job under the Vichy government and had been active in the Resistance) was teaching in the Faculty of Law at the University of Bordeaux, where his specialty was the history and sociology of institutions. That is, he was not merely writing off the top of his head. Politically, he was an anarchist socialist who refused both the Communist Party, because of its lack of coherence between life and thought (especially its conduct during the Spanish Civil War), and any version of liberal democracy that would lead to greater centralization and state power.

Jacques Ellul's brief must be one of the sharpest contemporary, critical reviews of Nuremberg, not designed to make him popular. Even now, I do not expect unanimous agreement with his argument, either theoretically or practically. I present it for two reasons—as a historical study so we can assess our own situation more realistically, and also because he raises the most important questions about international law, questions that have yet to be answered. I have translated the article from French and have edited it to highlight those concerns we continue to face. It originally appeared in *Verbum Caro*, August 1947.

—Katharine Temple

By JACQUES ELLUL

The legal literature on the Nuremberg trial is extremely poor. There were plenty of newspaper articles at the time of the verdict, a passing literature, politically tinged, but, as far as I know, nothing legally solid exists. We have to recognize that, despite the good will and imagination of the judges and the prosecutors, the Nuremberg trial was legally untenable. More than anything else, this was shown when the press substituted vengeful indignation for legal reasoning. Here, I shall try to determine the scope and value of this trial, its basis and meaning.

Legal Aspects

Three main charges have been declared: war crimes, crimes against peace, and crimes against humanity. First, we need to know what these mean from a legal point of view. Nobody can protest by rejecting a legal analysis—I did not choose the field; the judges did. Since a legal construct has been made, it is necessary to know its legal worth.

War Crimes. Here we come across a common notion of international law. It is a matter of the "laws and practices of war." But, these laws evolve with technical processes. For example, it was clearly recognized that we ought not to bomb civilian populations, but how to respect this condition with massive air raids over industrial centers? Public international law has not gone beyond the stage of the public lecture, for its application depends entirely on the good will of those subject to it. It is impossible to convict in the name of something which is not a law, but only a mark of what people do when they have the same habits and prejudices.

Crimes against Peace. In this category, two elements can be declared: the violation of treaties and war preparations. One serious objection: Can a government be considered bound by treaties signed by a former regime overthrown by revolution? As for war preparations, how careful we have to be! It is hard to make this a specific nazi crime, for there are surely parallels with the older pan-germanism, pan-slavism, pan-americanism, etc. We fall back into the insoluble problem of the just war. "Crimes against Peace" is a phrase that characterizes all states, all governments, and it seems to be extraordinary

to charge it to the representatives of this particular one.

Crimes against Humanity, for example, genocide. In this area, the judges felt they were on such shifting legal grounds that, in actual fact, they retreated before the enormity of the thing and limited a crime against humanity to a war crime. This decision means they wanted to safeguard the sovereignty of nations, and that a crime against humanity can be only international. It is exactly the opposite of what had to happen to open up hope.

[Sections on judicial theories of responsibility, the choice of Anglo-Saxon legal procedures that are unfavorable to the defense, and the very narrow grounds for a legitimate international prosecution in the case of World War II.]

In every respect, it is impossible to attach any worthwhile legal basis to the trial or legal value to the sentences. There was no law by which to convict the accused at Nuremberg, no framework, no principle, no legal foundation to the whole trial. In the entire lawsuit, there was nothing juridical, except perhaps as a starting point.

Why, then, this display? Why try to justify the procedure and the sentences specifically by legal arguments? A single response, which is harsh. It is a symbol of the hypocrisy the democracies are sunk into. It was necessary to play the game of apparent justice, so that the people would be well assured of the immense difference that exists between the arbitrary dictatorships and the democracies whose every act is founded in law.

The Meaning of the Trial

The trial, however, goes beyond its technicalities. If we look at these things carefully, we see we are in the presence of the defeated being executed by the winners. It has nothing to do with civilization condemning crime or war, but only the stronger doing what they want to the weaker. That is why we cannot speak of a division into good and evil, but only between conquerors and conquered. Was it possible that this relationship would become just? Or, that this sentence would be an element in the establishment of justice?

This is the real problem with Nuremberg. We do not have to be scandalized at the assertion that, at Nuremberg, there was only a relationship of force and the expression of

vengeance, for this is indeed the state of affairs that provides the starting point for all law. We should be scandalized at the spectacle that says, "This is justice" where there is violence, or "This is right" where there is vengeance. This situation of violence and vengeance has to be surpassed; we should consider ourselves as being at the source of law. We have to ask what conditions are necessary for law to be worked out; if those necessary conditions are currently in place; if this demand for law does not challenge more than war and peace, but goes further to pose a decisive question for human beings, pushing us into an impasse?

We come back to what has been called a crime against humanity. The abomination of concentration camps, torture, executing hostages, deportations, bombing civilian populations, total war, looting of conquered peoples—all this is well known, but what exactly does it represent? It is a bit simplistic to see it as the result of dictatorship (though that would also be true), a particular or national sadism, etc. What makes it so immense is that it is not a single episode conditioned by politics or war. All this murderous activity is based on a conception of the world that comes directly from the givens of our civilization. Human beings are only matter. Why have more respect for this matter than for any other?

New Moral Criterion

It is enough to push this assertion of materialism to its ordinary (and not outrageous) conclusions, which are both scientific and popular, to find out that we do not have to respect the human person, who is only an instrument that it is necessary to know how to use. It is enough to have a reason to do it, and the nation/state appears as the supreme value—in the USSR as well as in the USA. It is the new moral criterion that governs our time.

The primacy of the useful is the first political virtue. This realism is only a rational application that leads to the concentration camp, to total war, etc. We do not have to appeal particularly to nazi ideology to find the basis for crimes against humanity. With another ideology, it would be only a change in the category of victims (e.g., negroes, the bourgeois, the physically deformed, drunks) but not a change in the crime. In reality, the nazis pushed to logical conclusions ideas contained in basic principles that are universally accepted.

In order for the Nuremberg verdict to be valid, it should have applied not only to the visible consequences, to the obvious scandal, but also to the causes. It should have called into question not just nazi concentration camps, but the concentration camp itself, including those of Russia, Spain or France. It should have called into question not only antisemitism but racism, including that of England and the USA—and so on, up to the values of a civilization that manufactures these widespread facts. It would appear obvious that it is a spiritual attitude that has made these crimes against humanity possible.

Success is the criterion for everything and replaces justice and truth. We are thrown into a system with laws independent of individual willing. We call the nazi leaders "crim-

inals," but what was their crime? The effects of their acts are visible and terrible, but what is their responsibility, their perception or their will? It is easier to push a button and so unleash an atomic bomb that kills 100,000 people than to plunge a knife into the stomach of your adversary. It is easier to sign a decree than to lean on a button, one signature among a thousand an administrator makes every day. In the enormous abstraction of our civilization, life and death have also become abstract. Decisions made are abstract; they are no longer human problems but technical problems.

In such an absence of responsibility (which was demonstrated in the Nuremberg testimony) that could not be overcome by legal theories, nobody could say in the name of what it was possible to convict at Nuremberg [except a vague ideology of liberal democracy which was impossible to pin down]. In the name of what is the act of the victor an act of justice? Thus, the judgment at Nuremberg leads to an impasse we cannot avoid.

The only part of this story that is really full of life is the public opinion that demanded censure. It was a spontaneous revolt, a cry for vengeance, that could not be denied, for it expressed a genuine sentiment, albeit to kill rather than to judge. This public awareness, however, did go further than a cry for vengeance; it also made a claim, demanded that things respond to a certain justice. But, as we have seen, the law they asked for was impossible to realize in the absence of a stable scale of public values.

And, for this, I object to Nuremberg, precisely for having betrayed the thirst for justice that is found in the people. ✚

Jacques Ellul's critique of the Nuremberg trial is more radical than the claim that war itself is a crime against humanity. His focus on relations of power (with the clarity that would mark his best known sociological study, *The Technological Society*, 1954) exposes war as the sign of a deeper malaise—our confusions about what it means to be human.

Catholic readers might expect a turn to Natural Law (perhaps with the conclusion that all violence is contrary to the natural order). This was not Jacques Ellul's path. He was a Protestant in the French Reformed tradition, and in 1946 had written *The Theological Foundations of Law*, which remains an enormous challenge to all natural law theorists—who really should not sidestep it.

Unfortunately, over the years, there have been very few philosophical, practical endeavors to ground law differently from Nuremberg. One exceptional attempt has been the Truth and Reconciliation Commission in South Africa, called by then President Nelson Mandela in 1994 and headed by the Anglican Archbishop Desmond Tutu, who wrote about this work in *No Hope Without Forgiveness* (1999).

True Confessions

No doubt this Commission had its limitations; e.g., the need for the right time and the right conditions in a single society, with the final guarantor being the force of the State. Still, at the end of a brutal conflict, they tried to establish justice on a set of principles that could be called the Common Good. The Commission stands as a beacon of hope.

If we want to hold to such a hope, as North Americans, though, we would make a mistake if we then gave up analyses of power such as Jacques Ellul made. Archbishop Tutu's doctrine depends on some sort of confession by the powerful, and, as Dorothy Day said in 1967, "We are, among nations, the most powerful and the most armed, and we are supplying arms and money to the rest of the world where we are not ourselves fighting. We are eating while there is famine in the world." Such confessions are in as short supply now as they were at Nuremberg.

—Katharine Temple



Brian Kavanagh