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**The Jurists' Trial and Lessons for the Rule of Law**

## The Nuremberg Trials International Criminal Law Since 1945

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### Introduction

In its Opinion and Judgment in "The Justice Case", in which leading figures in the Nazi legal establishment were brought to trial, the Tribunal summed up very powerfully: "The dagger of the assassin was concealed beneath the robe of the jurist."<sup>1</sup> The lesson delivered in these words is a somber one: Lawyers can commit hideous crimes, even mass murder, while going about their "normal" functions. Adopting that notion as its central theme, this paper addresses three issues of particular interest:

1. The most important crime with which the Defendants in The Justice Case were charged with crimes against humanity.<sup>2</sup> Yet it seems deeply incongruous when applied to members of the legal profession apparently practising their craft. Crimes against humanity are usually associated with massive atrocities: with concentration camps and death camps; with gas ovens and crematoria; with the *Einsatzgruppen*, being mobile killing squads that roamed the Soviet Union, shooting Jews into mass graves which they themselves had been forced to dig; with slave labor; and so on. In the modern era, we associate the term with ethnic cleansing in the former Yugoslavia, with wholesale macheting of people to death in Rwanda and the use of chemical weapons on the Kurds by the Iraqi regime. We do not naturally associate crimes against humanity with practise of the legal profession. When we think of lawyers, we think, first and foremost, of judges, wearing judicial robes, sitting in detached objectivity, listening carefully and impartially to the evidence and deciding cases fairly and strictly in accordance with the evidence and a reasonable interpretation of the applicable law. In criminal cases, we think of them bending over backwards to be fair to the defendant, insuring that no-one is convicted unless the case against them is proven beyond a reason doubt. In short, judges embody all we associate with the term "justice". In western systems of justice, we often view the role of prosecutors as not that of people intent on obtaining convictions at any cost; rather, we think of them as being officers of the court, whose duty is to inform the court fully, and advise the defense fairly and fully what the case against it is, and furnishing it with potentially exculpatory information. Finally, we think of civil servants, in positions in ministries of justice, as being faithful administrators of the law, under a legal duty to act fairly and properly vis-à-vis the general population affected by the law. All of which leads directly into the central question: How can these three categories of lawyers commit crimes against humanity, while pursuing their professional calling? (These lawyers are to be contrasted with other leading figures in the Nazi regime, who while qualified as lawyers, were responsible for the commission of atrocities, albeit not by practising law *per se*. eg Ernst Kaltenbrunner, Hans Frank and Wilhelm Frick.)

2. What was the fate of the Defendants in The Justice Case, given that so many of them were found guilty of crimes against humanity, and that, as a result, they may be said to represent the worst face of the legal profession under the Nazi regime?

3. Finally, what lessons may be derived from the Nazi judicial system, as represented in The Justice Case?

#### *The Defendants*

On trial in The Justice Case were 16 defendants, of whom six were judges in the Nazi era, four were prosecutors and nine were civil servants. (Some occupied more than one category of position, which accounts for the discrepancy in the numbers.)<sup>3</sup>

#### *Crimes with which the Defendants were Charged*

The principal crime, as mentioned above, was crimes against humanity, being the commission of atrocities such as murder, extermination, enslavement, deportation, illegal imprisonment, torture, rape and persecution on political, racial and religious grounds.<sup>4</sup> The net was cast wide, in the sense that the Defendants could be found guilty not only if they were principals in the commission of the above acts, but also if they were accessories to them or ordered, abetted, took a consenting part in, or were connected with plans and enterprises relating to the listed acts.<sup>5</sup> In sum, the defendants were charged with the destruction of the German legal system, and with using the shell for wide-scale atrocities – judicial murder.<sup>6</sup> The other charges, which are not centrally relevant here, were war crimes, conspiracy to commit both crimes against humanity and war crimes and membership in criminal organizations.<sup>7</sup>

#### **Lawyers Committing Crimes Against Humanity: Three Case Studies**

Three of the Defendants may be singled out for consideration, in order to illustrate the role of lawyers.

##### *Franz Schlegelberger*<sup>8</sup>

As a bureaucrat in the Justice Ministry, he played a central role in the tragic case of Markus Luftglass, an elderly Jew who was convicted on a charge of stealing a large quantity of eggs, and sentenced to two-and-a-half years' imprisonment. A brief report of the case appeared in a Berlin daily newspaper, and it was brought to the attention of Hitler himself, who expressed the view that the sentence was manifestly inadequate, and that the death penalty was appropriate. Correspondence involving Schlegelberger passed between various departments, with the result that Luftglass was ultimately handed over to the Gestapo for execution.<sup>9</sup> The correspondence is chilling in three respects.

1. The callous fate of a human being in his 70s, which is its subject-matter.
2. The deep personal reach it reveals of Hitler into the daily workings of the legal system, being emblematic of the very antithesis of US-style separation of powers, represented by the "Führer-principle".
3. The bland, almost matter-of-fact bureaucratese in which the correspondence is couched, completely belying the seriousness of the subject-matter.

The case of Marcus Luftglass was by no means an exception, and Schlegelberger was involved many times.<sup>10</sup> Indeed, the Tribunal focused on the fact that Schlegelberger disregarded legal judicial process in his efforts to fulfill the will of Hitler, contributing to the destruction of judicial independence;<sup>11</sup> specifically, that he concocted many "legal justifications" for SS shootings of defendants whose court sentences were deemed disapproved of, as insufficient, by Hitler.<sup>12</sup> If it happens once, as in the case of Marcus Luftglass, it is murder; if it happens twice, that is two counts of murder. And if it happens enough times, it is a crime against humanity.

##### *Curt Rothenberger*<sup>13</sup>

As a judge, who coveted the position of State Secretary of the Reich Ministry of Justice, Rothenberger wrote an infamous Memorandum,<sup>14</sup> in which he sought to curry favor with Hitler, and to

which he attributed his eventual appointment as State Secretary. In the Memorandum he said, among other things: "Law must serve the political leadership";<sup>15</sup> "[T]he Führer is... the supreme judge. Theoretically, the authority to pass judgment is therefore only his";<sup>16</sup> "[A] judge who is in direct relation of fealty to the Fuehrer must judge 'like the Führer'."<sup>17</sup> The message was absolutely clear and unequivocal: There was no such thing as judicial independence; the role of judges was, quite simply, to execute the political will, as embodied in, and expressed by, the Führer himself.

Quite extraordinarily, when under cross-examination in The Justice Case, in a passage that reads like an excerpt from Alice in Wonderland, Rothenberger steadfastly maintained (presumably with a straight face) that his Memorandum had been an argument for judicial independence!<sup>18</sup> In relation to Rothenberger, the Tribunal focused, among other things, on actions which had “materially contributed toward the prostitution of the Ministry of Justice and the courts and their subordination to the arbitrary will of Hitler...”<sup>19</sup>

#### *Oswald Rothaug*<sup>20</sup>

There are many ways of illustrating what Kurt Rothenberger meant when he declared that judges “must judge like the Fuehrer”, at the levels of both form as well as substance. At the formal level, one may, for instance, point to scenes, captured for posterity in archival film footage, in which judges are seen entering the courtroom and giving the “Heil Hitler!” salute before taking their places on the bench, thereby affirming their primary loyalty to Hitler himself, as opposed to the constitution. This was not, they thereby declared, a government under law, but very much a case of law being subordinated to government. Indeed, their oath of office, declaring loyalty first and foremost to the Fuehrer, affirmed as much. Or, one may recall archival footage showing the President of the People’s Court, Roland Freisler, in action, in the trial of the plotters who attempted to assassinate Hitler on July 20, 1944. Freisler, who had the dubious distinction of sentencing some 5,000 people to death, and was characterized by William Shirer, in his classic work *The Rise and Fall of the Third Reich: A History of Nazi Germany*, as a “vile, vituperative maniac”,<sup>21</sup> is seen and heard yelling and screaming, and generally carrying on in decidedly unjudicative fashion.

And at the substantive level, Oswald Rothaug gave expression to Rothenberger’s dictum in the infamous Katzenberger case,<sup>22</sup> which was immortalized in Stanley Kramer’s film *Judgment at Nuremberg*. In that case, Rothaug resorted to blatant distortions and machinations in order to guarantee that the hapless Leo Katzenberger, who was charged with “racial pollution”,<sup>23</sup> arising out of an alleged relationship with an Aryan woman, was sent to his death<sup>24</sup> on the basis of no credible evidence. Consistent with the goal of “judging like the Fuehrer”, Rothaug had two clear objects in presiding over the Katzenberger case: Most importantly, the Jew had to lose and, further, he had to lose big, meaning, in the case of Leo Katzenberger, that he had to be sentenced to death. The problem for Rothaug, however, was that each of these goals faced what, in normal circumstances, would have been insurmountable obstacles.

Finding the defendant guilty was confronted by the problem of there being no credible evidence against him; such evidence as there was consisted only of rumor, hearsay and flimsy circumstantial material. The only credible witness in the case was Irene Seiler, the woman with whom the alleged

improper relationship had taken place.<sup>25</sup> The difficulty was that Seiler’s evidence exonerated Katzenberger; her position was, quite unequivocally, that the “crime” had not been committed.<sup>26</sup> Rothaug, however, got around this inconvenience by having Seiler charged with perjury,<sup>27</sup> arising out of her statement on interrogation, and conducting the perjury trial concurrently with the trial of Katzenberger himself. He then found Seiler guilty of perjury<sup>28</sup> and, having done so, could therefore brush aside her evidence, and convict Katzenberger; in fact, if Seiler had perjured herself in denying crime, it followed that the crime had in fact taken place.

That still left the object of ensuring that the death sentence was passed. Here, too, there was a difficulty in Rothaug’s path. The crime of “racial pollution” arose under the *Law for the Protection of German Blood and Honor*<sup>29</sup>, one of the infamous so called Nuremberg laws, enacted on September 15, 1935. But the penalty for that crime was set at a maximum of a prison term or hard labor.<sup>30</sup> In fact, nowhere in the law was there provision for the death penalty. In this light, a curious aspect of the judgment in the Katzenberger case suddenly takes on a different mien. Although the charge against Katzenberger was “racial pollution”, the judgment gradually elides into another crime, namely that of being a “public enemy”,<sup>31</sup> and in fact when Katzenberger was ultimately sentenced, it was for that crime, in addition to the crime with which he was charged.<sup>32</sup> The difference, and therefore the importance of superimposing the additional crime even though the case had begun on a very different basis, lay in the fact that the penalty for being a public enemy was death.<sup>33</sup> So far as Rothaug was concerned, the Tribunal in The Justice Case focused, among other things, on the fact that he “made his court an instrumentality of terror...He was and is a sadistic and evil man...”<sup>34</sup>

#### **Sentencing of the Three Defendants and Their Respective Fates after the Trial**<sup>35</sup>

There were 16 Defendants in The Justice Case. Of these: ten were convicted on one or more counts,<sup>36</sup> four were found not guilty,<sup>37</sup> one suffered from ill health, and could not attend most of the

trial, as a result of which a mistrial was declared,<sup>38</sup> one committed suicide in prison, after being indicted and before the trial opened.<sup>39</sup>

**Franz Schlegelberger** was sentenced to life imprisonment<sup>40</sup> but was released in 1950.<sup>41</sup> After his release from prison, he received a monthly pension of 2,894 Marks (compared with the earnings of an average skilled worker of about 400 Marks).<sup>42</sup> In addition, he received 160,000 Marks, by way of back pension, which included payment for the time he had spent in prison.<sup>43</sup>

**Curt Rothenberger** was sentenced to seven years' imprisonment<sup>44</sup> and was released in 1951.<sup>45</sup> After his release, was awarded a pension of 2,073 Marks per month, plus a back pension.<sup>46</sup>

**Oswald Rothaug** was sentenced to life imprisonment,<sup>47</sup> and was the last of the convicted defendants released, in 1956,<sup>48</sup> all the others having been released by 1951.<sup>49</sup>

Rothaug's co-judges in the Katzenberger case were charged in Germany, but were held to be unfit to stand trial in 1976. This was despite the fact that one of the two was actively conducting a law practice at the time. The Nuremberg County Court held that that was not a bar to holding that he was unfit to stand trial, because he suffered from "intellectual and emotional disturbances".<sup>50</sup>

**Roland Freisler** was killed by a direct hit by a United States bomb on the courthouse where he was presiding over the People's Court, on February 3, 1945.<sup>51</sup>

The leniency with which the Defendants in The Justice Case were treated was symptomatic of the continuity which by and large characterized the legal system of the Federal Republic of Germany in the post-War years, one aspect of which was the re-employment of Nazi-era officials as judges, prosecutors and civil servants.<sup>52</sup>

#### **Duration of the Justice Case**

The trial opened on March 5, 1947,<sup>53</sup> and concluded on October 18, 1947,<sup>54</sup> with sentences being handed down on December 3 and 4, 1947.<sup>55</sup> From beginning to end, therefore, it lasted exactly nine months, and makes an interesting contrast with the current trial of Slobodan Milosevic, which is now mid-way through its fourth year.

#### **The Judges**

It is interesting to reflect on the positions, which the judges in The Justice Case held in the United States, before presiding at Nuremberg. One was a former Chief Justice of the Supreme Court of Ohio, another was a Justice of the Supreme Court of Oregon, the third was an Associate Justice of the Court of Civil Appeals for the Third District of Texas, and the fourth was a former Assistant Attorney-General of Ohio and a District Judge of the First Division of the Territory of Alaska.<sup>56</sup>

On the one hand, this was a reflection of the fact that, by the time The Justice Case was held, interest in bringing Nazi-era perpetrators to justice had waned in the United States; in fact, continuing prosecution of Nazi-era crimes had become so unfashionable that, in certain judicial circles, accepting a position on one of the tribunals was considered an obstacle to advancement in the US.<sup>57</sup> At the same time, though, it illustrates one of the profound lessons about judicial character and temperament, as brilliantly portrayed in the counter pointing of two central characters in *Judgment at Nuremberg*. Ernst

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was endowed with an exceptionally brilliant mind, and had stellar careers in academe and the judiciary, but a fundamental element was missing at the core of his judicial persona; indeed, of his very being. As a result, he was capable of committing terrible atrocities, thereby debasing the very notion of law. By contrast, Judge Haywood (portrayed by Spencer Tracy), who presided over the trial, was no intellectual heavyweight. But, at his core, he was a decent human being, endowed with genuine common sense, and, very importantly, with a highly-tuned moral compass that allowed him instinctively to differentiate between right and wrong. The two personalities together represent the moral equivalent of the hare and the tortoise.

### **Other Lessons Emerging from The Justice Case**

Among the sobering lessons that emerge clearly from The Justice Case are the following: First and foremost, perhaps, the critical importance of a system of constitutional separation of powers, with its concomitant checks and balances. The underlying message is that the ultimate guarantee of individual freedoms is a diffusion of power, as opposed to the aggregation of power in few sets of hands, and ultimately in one set of hands, namely that of the Führer, which resulted in Hitler being not only chief legislator and chief executive, but also Chief Justice. Within that, the importance of an independent judiciary, which is empowered to judge governmental action by reference to constitutional standards and, if the occasion arises, is prepared to tell the government that it has gone too far. At its heart, all this means that government must be under law, and not the reverse.

Law, in its judicial aspect (and the same applies to its legislative aspect) is inherently neutral. If it is administered by righteous people, it can accomplish the greatest good in a society. But if it falls into evil hands, it can become the instrument of the greatest brutalities, inflicting untold amounts of suffering, misery and loss of life.

The case also underscores the fragility of democracy itself, when it is borne in mind that Hitler came to power lawfully, under the Weimar Constitution, which was never repealed, yet managed to turn the court system into a grotesque caricature of a judiciary which, in parrot-like fashion, spewed out the Government's hatred and poison, directed at the targets of its racial ideology.

The case also illustrates an important principle, which is emblematic of a theme which links all the twelve subsidiary trials conducted by the United States, after the conclusion of the trial of the major war criminals. The notion of "crimes against humanity" is normally associated with politicians, and military personnel; in other words, those who make the policy decisions, and those who actually carry out the atrocities, namely the killings, the torture, the enslavement, and so on. In the case of Nazi Germany, as Professor Raul Hilberg has pointed out, all corners of German society were involved in some way or other.<sup>58</sup> In prosecuting the twelve subsidiary trials, the defendants were categorized by "profession" – the doctors, the lawyers, the industrialists, and so on.<sup>59</sup> The message for future generations was clear: If all corners of society are complicit, then all corners of society are potentially liable to give account for their actions and, if found guilty, to face the consequences. The Nazi regime went to extraordinary lengths to "legalize" the Holocaust, in the process harnessing the German legislative system as well as the judiciary and the legal bureaucracy to accomplish its ends. Legalization of the Holocaust could not have taken place without the active participation of lawyers, and The Justice Case therefore teaches the lesson that, in the context of major human rights violations, lawyers, like anyone else, are ultimately liable to face the consequences of their actions.