

The Path to Nuremberg and its Legacy

During the Michaelmas Term the Inn held three events: a lecture (the 12th Birkenhead Lecture); a webinar; and a panel discussion – all delivered virtually – to mark the 75th Anniversary of the beginning of the Nuremberg Trials in November 1945. All three drew large audiences from those in this country and across the world. Reflections on the webinar and panel discussion follow.

Nuremberg: the background to the trials and the Gray's Inn participants

In a webinar address on 12th November, the Treasurer (Master Stephen Irwin) traced the path to the Nuremberg tribunals held shortly after the end of the Second World War. Their origins, he said, lie in atrocity, a fact of world history 'at least as old as organised warfare, and its roots lie in the dehumanisation of (its) victims'.

This raised questions about whether there existed a duty on all of us to observe a higher law, often described as natural law, to act humanely. Such a law has little truck with pleas that place a premium on blind loyalty to the State or its acts, or indeed on claims 'I was only following orders' – the last refuge of many of the rebarbative defendants at Nuremberg. Nor does natural law rest on a belief in God or in any religion, though later in answer to a question from Bishop Michael Doe the Treasurer acknowledged this was not an easy position to adopt.

The Treasurer gave a number of illustrations of atrocities in war, stretching from the Roman Empire to the two World Wars, where respect for natural law was absent. Shakespeare's history canon also demonstrated awareness of the dehumanising effect of war. As an example, the Treasurer offered the famous 'word picture' in *Henry V* where French soldiers are described as having (in Master Irwin's words) 'murdered the boys who were looking after the baggage at Agincourt'. That atrocity was in turn avenged by murderous reprisals, recounted in the play by the English Captain Gower, who says, admiringly, that the King 'most worthily hath caused every soldier to cut his prisoner's throat. O 'tis a gallant King'. If irony is present, it is obviously shared by Shakespeare himself.

The German invasion of neutral Belgium in the First World War

and the indefensible sinking of the passenger liners *Lusitania* and *Housatonic* were further stark examples of breaches of international norms. Following the Armistice there was some attempt by the Allies to hold German leaders, particularly the Kaiser, to account for their breaches of the customs of war. This failed because The Netherlands, where the Kaiser had fled, wouldn't extradite him and Germany refused point blank to hand over any other political or military leaders deemed responsible for war crimes. Instead, as a compromise, it was agreed that the Germans would hold their own trials at Leipzig, with observers present, starting in 1922, which, in the event, were a charade. Most of the defendants were acquitted or went missing along with witnesses. Those who were found guilty received light sentences.

All the while across the centuries, from the time of Cicero and antiquity, natural law has continued to be debated and refined by writers and academics, most notably, we learnt, in the 17th century by the Dutch Scholar Grotius, to whom Professor d'Entreves in his book on *Natural Law* (1969) credits the important philosophy 'that command is not the essence of the law'. Putting it in modern parlance, each of us is ultimately responsible for our own actions, especially perhaps in war.

It was largely Harry Truman's unequivocal insistence in 1945 on an international judicial trial of those Nazi leaders considered to be implicated in war crimes during the Second World War that led directly to the Nuremberg tribunals, proving once again why this once little regarded President of the United States is now considered one of its greatest tribunes and holders of that office. Truman did not seek 'victor's justice' but due process and victim's justice, particularly for victims of crimes against humanity.

The Treasurer ended by recalling the proud roles played at Nuremberg by four members of Gray's Inn: Hartley Shawcross, the lead British prosecutor, David Maxwell Fyfe, who often deputised for Shawcross, Elwyn Jones and Hersch Lauterpacht. All four went on to achieve conspicuous success after Nuremberg in politics, business or the law, the first three also serving as Treasurer of the Inn in the decades ahead.

The webinar was followed by a short film showing Shawcross' closing speech at Nuremberg – much of it drafted by Lauterpacht – which burnished the reputation of the English Bar amongst the international jurists and observers present. It was a forensic success, ensuring guilty verdicts and proving, in the words of Shawcross himself, that 'right shall triumph over evil'.

History Society: Nuremberg and After

Since the History Society was revived in 2013 there have been 18 lectures but this one, on 24th November, was the first delivered as both a virtual event and as a panel discussion.

The evening was moderated by Master Howard Morrison, President of the Appeals Division of the International Criminal Court (ICC). The other panellists were Shehzad Charania MBE, Director General of the Attorney General's Office, Master William Clegg QC, counsel for the defence for the former Yugoslavia before the International Criminal Tribunal (ICTY), Professor Charles Garraway CBE, Visiting Professor at King's College, London and General Editor of the *UK Manual on the Law of Armed Conflict*, and William Shawcross CVO, historian, son of Hartley Shawcross.

While the Nuremberg Trials are now regarded as both a unique and successful experiment in building the foundations of international law, particularly criminal law, it is nonetheless a remarkable fact that their influence remained largely dormant for nearly 50 years after 1946, a point made by Sir Christopher Greenwood in his Birkenhead Lecture. It was not until May 1993, when the United Nations established the ICTY to prosecute serious crimes committed during the Yugoslav wars, that previously defined concepts of international law, not ruled on since the Nuremberg Trials, were revived to become part of the legal lexicon once again.

The panel discussion was preceded by opening statements by each of the participants beginning with Master Morrison. While he was in no doubt that Nuremberg formed the 'bedrock' that led to the ICC being created by the Rome Statute of 1998, Master Morrison was equally certain that the Court, which started its operations in July 2002, was a 'child of its time'. Consequently, he felt, it was unlikely that the Court would have been created today because of what he described, rather enigmatically, as the present 'political situation'. He accepted that, while the costs of running the Court at The Hague were large, the benefit of its work was 'not small'. Nevertheless he acknowledged criticisms made of it. He himself was concerned that the replacement of some of its judges every three years contributed to the absence of any 'institutional memory'.

William Shawcross, who followed, characterised his childhood as having been 'defined by Nuremberg' and went on to evoke strong

boyhood memories of being out walking with his father when they would often be accosted by strangers eager to thank Sir Hartley for his work at Nuremberg. On Nuremberg itself, he quoted from one of Rebecca West's reports on the main trial which recorded the reaction of some of the notorious defendants to an atrocity involving children, recounted by his father during proceedings. Miss West wrote that they wriggled in their seats with extreme discomfort 'as their faces grew old'. He saw the trials as demonstrating that the rights of the individual could triumph over the rights of the State.

Mr Shawcross ended on an increasingly dark note by addressing anti-semitism today. It was present in France where 20,000 Jews had now fled the scourge; it was evident amongst the far right in Germany and the UK, and it was part of 'the awful travails of the Labour Party'.

Professor Garraway spoke of the influence of the International Committee of the Red Cross (ICRC) and the Red Crescent in the development of the ICC. Perhaps scarcely known, we were told by Professor Garraway that it was Gustave Moynier, one of the founders of the ICRC, who 140 years ago first suggested setting up an International Criminal Court. When at last it was created, the Court was welcomed by both the Red Cross and Red Crescent movements as a step towards ensuring that war crimes, crimes against humanity and genocide would no longer go unpunished.

He ended by quoting F.E. Smith – who has been heavily referenced throughout this series of webinars, particularly remarks taken from his lecture entitled 'Law, War and the Future', delivered to the New York Bar Association on 11th January 1917. It was from that same lecture that Professor Garraway selected a passage that referred to Germany's transgressions during the Great War and what was required of international law in response. F.E. Smith was clear that, to be effective, the coercive power of international law was critical. It needed to be in a position to punish the wrongdoer; that was the public expectation; there needed to be sanctions or a degree of 'enforceability', as Professor Garraway put it.

Master Clegg was next. He had always been fascinated by international criminal law. He said advocacy as defence counsel before the ICTY was not markedly different from that in the Appeal Court in the UK, though his opponents at the ICTY were rather taken aback when he approached them at the outset to introduce himself and shake their hands. Nor was there much fraternisation outside court: for example, as defence counsel

he was not permitted to use the court canteen, though the prosecution team were. This, of course, contrasted very obviously with how things were in the UK. He thought that Nuremberg offered some evidence that it was 'victor's justice', as he saw no difference between the war crimes committed by the Germans in the Second World War and some of the actions of the Allies: the bombing of Dresden was, in his view, 'capable of being a war crime'.

Examining the credibility of the ICC as it appears today, Mr Charania accepted that out of 15 cases pursued by the Court only a minority of trials had ended in convictions, which on the face of it was not impressive. That, however, was not how the Court ought to be judged (he said), though it was not clear what he felt did justify success. Perhaps he felt the old argument held sway that the very existence of the Court deterred those engaged in war from committing atrocities.

Mr Charania ended by putting his finger on one of the persistent themes of the evening – particularly when questions were asked of the panel – saying: 'The future for international criminal law lies in the domestic arena.' By that he meant that nations ought to develop their responses sufficiently to take on the burden of prosecuting their own nationals for war crimes. All well and good, but we know how that played out following the Great War.

Whether we are anywhere near reaching such a desirable outcome, now or anytime soon, is highly questionable. At least all the panel were against any statute of limitations applying to prosecutions in the ICC. This was true so long as the trial was not dependent solely on evidence of identity, Master Clegg making the argument that a time bar would give an accused the incentive 'to avoid arrest until they were safe', ie until the limitation period had expired. But don't fugitives from justice wish to avoid being arrested whether a time bar exists or not, or whether limitation still runs or not? It is human instinct and preservation.

This series of Lectures on Nuremberg and its legacy – held in unpromising circumstances – was a considerable achievement. A debt is owed to all the contributors but to the Treasurer in particular who did much to drive the project towards its undoubted success.

Master Timothy Shuttleworth