NUREMBERG EVENT 1 – THE BACKGROUND TO THE TRIAL AND THE GRAY'S INN PARTICIPANTS

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Welcome

My name is Stephen Irwin, Treasurer for 2020 of Gray's Inn

This is the first of three events to mark the 75th anniversary of the opening of the Nuremberg trial on 20 November 1945. As I hope most of you will know, the second event is the Birkenhead lecture, which takes place next Monday 16th November. The lecturer is Sir Christopher Greenwood – most distinguished international lawyer, formerly a judge of the International Court of Justice, now master of Magdalene College Cambridge. He will focus on the trial itself, and on some of the parallel proceedings. In the third event, again delivered as a webinar on Tuesday 24th November, a distinguished panel of experts will examine the legacy of Nuremberg and the successor jurisdictions. The panel will be chaired by Master Sir Howard Morrison, who is President of the Appeals Division of the International Criminal Court. The panel members will be Shehzad Charania, director-general Of the Attorney General's Office; Master Bill Clegg QC, who formerly acted as defence counsel before the International Criminal Tribunal for the former Yugoslavia; Prof Charles Garraway, who, after a career as a senior army lawyer, represented the Red Cross, then became Stockton Prof at US Naval College, visiting Prof King's College London, and the General Editor of the UK Manual on the Law of Armed Conflict; and finally William Shawcross CVO, historian, member of Gray's Inn, son of Hartley Shawcross, and currently writing on contemporary anti-Semitism in Europe.

In common with the other events, a recorded version of this will be available. A short bibliography is attached to your Zoom invitation.

Why bring ourselves to contemplate once again the appalling events which led to the Nuremberg trials? There is a natural tendency to put such things from our minds, to avert our eyes, to persuade ourselves such things cannot recur: at least in our world, at least in Europe or in the West. But that averting of the eyes, that entirely understandable, partly sub-conscious turning away, carries a risk: if we lose focus, if we drift from acknowledgement of what has happened in the past, and forego attention to it, we dissipate the energy needed to maintain measures which may diminish the recurrence of such events. Atrocity confronts us with the necessity for effective international law, and reminds us of the pressing case for a rule-based world order.

A full and eloquent account of the Nazi atrocities is set down in Prof Mary Fulbrook's book *Reckonings*, details of which are in the short bibliography sent out with the invitation to this webinar.

The critical defence advanced at the first and best known Nuremberg trial, and at the trials which followed, was that the defendants were acting in pursuance of orders from their superiors, who were the legitimate rulers of Germany, and thus the defendants said that they were acting in accordance with German law. This touches on a profound philosophical and legal debate: is the source of law the sovereign or the sovereign nation, or is there a higher law, often described as natural law, which in certain circumstances supervenes the law of the sovereign or sovereign state? As we shall see this is an ancient debate, at least in its essentials. Here I will try to take the long view. I am not a specialist in legal history, so I hope you will forgive this non-expert account.

Then, I shall touch briefly on why there was a trial rather than summary action against the leading Nazi defendants. Thirdly, I want to give a brief picture of the distinguished members of this Inn who played such a prominent part in the trial process.

ATROCITY

Atrocity is at least as old as organised warfare, and its roots lie in the dehumanisation of the victims. I choose one example from British history. Considering the mindset of Roman imperialism, in the context of the Claudian invasion of Britain, Prof Peter Salway[1] writes:

"There was... no third condition. If you were a non-Roman people, you were either dependent (*subiecti*) or proud and recalcitrant (*superbi*). The Romans felt they had absolute moral right on their side. This overrode any possible obligations to other peoples. It is this doctrine that explains why, for example, the Romans felt they could treat minor kingdoms in their power ('client kingdoms') exactly as they wished or why it was entirely permissible to exterminate whole tribes who proved intractable."

In the course of the revolt in AD 61 by the Iceni, following the Claudian invasion and the breakdown in relations with the Roman authorities, the armies of Queen Boudicca (IMAGE 1) killed colonists and their families. Tacitus writes[2]:

"A like destruction befell the town of Verulamium (St Alban's); for as the barbarians revelled in plunder, and were disinclined to effort, they passed by forts and military stations, and fell upon places rich in spoil which had no garrisons to defend them. No less than 70,000 citizens and allies were slain....For the barbarians would have no

[1] *Oxford History of England, Roman Britain*, (1981) page 66
[2] *Annals*, Book XIV Chap 33

capturing, no selling, no any kind of traffic usual in war; they would have nothing but killing, whether by sword, cross, gibbet or fire, as though hurrying to avenge themselves beforehand for the retribution which was to follow."

Modern historians doubt the number of victims suggested by Tacitus, but not the substance of this account. And the retribution did follow. At the decisive battle which took place on Watling Street, somewhere between St Albans and Wroxeter (the Roman frontier town on the Severn)[3]:

"The Legion... dashed forward in a wedge-like formation. The auxiliaries charged no less vigorously; while the cavalry, with spears couched, broke through all serious resistance in their way. The rest of the host fled as best they could, the outlets being blocked by the ring of wagons behind. Our men gave no quarter, even to the women; the very beasts of burden, riddled through with darts, added to the heaps of dead. It was a glorious victory, fit to rank with those of the olden days."

Numberless other examples could be given.

WHAT HAD LAW TO SAY TO THIS?

One might be forgiven for thinking that law had nothing to say to the problem of atrocity, committed by those acting under orders of the state, until modern times.

But the notion of a natural law, supervening local laws or the whim of the ruler, was formulated long before Tacitus. The Roman jurist and politician Cicero (IMAGE 2) wrote:

"The most foolish notion of all is the belief that everything is just which is found in the customs or laws of nations. Would that be true, even if those laws had been enacted by tyrants?....[or if a law proposed] that a dictator might put to death with impunity any

[3] *Annals,* Book XIV Chap 37

citizen he wished, even without a trial? For Justice is one; it binds all human society, and is based on one law, which is right reason applied to command and prohibition."[4]

Of course, Cicero lived under the Republic, and was a strong opponent of dictatorship, and of the contemporary Roman tendency toward autocracy. Moreover, he himself was murdered at the command of the dictator Julius Caesar, without a trial.

In his masterly account of the development of legal thinking in Europe[5], Prof JM Kelly traces back to Cicero the development by early Christian thinkers of the doctrine of natural law, a notion which was articulated by the Church widely during the Middle Ages, notably by St Thomas Aquinas in his *Summa Theologiae.*[6] (IMAGE 3) For Aquinas, natural law was the product of rational thinking about the condition of mankind, although the true higher law was the "eternal law", God's law, from which all law was ultimately derived.[7]

There are signs, I would suggest, that people in many places and times have thought, or perhaps simply instinctively felt, that not all is fair in war. For example, both Saxon and Norse codes of justice, with pre-Christian origins, provided for compensation for injury and death, even where that arose within the kind of warfare prevalent in those societies. King Alfred's code provided for different levels of compensation for men and women, for the free and for slaves. Nevertheless, the implication was that obligations arose.

A similar point might be made in relation to the chivalric codes arising in mediaeval Europe.

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[4] *De Legibus* 1.15.42
[5] *A Short History of Western Legal Theory*, J M Kelly, Oxford (1992)
[6] *Summa Theologiae* 1a2ae 91-94
[7] *Summa Theologiae* 1a2ae 93.3; and see discussion https://iep.utm.edu/aq-moral/#H4, accessed 29.x.2020

In his play *Henry V*, Shakespeare describes an episode where some of the French army murder the boys who were looking after the baggage at Agincourt. Whether or not this episode actually took place is not perhaps central to the point: Shakespeare clearly knew his audience would respond to this as an outrage. Shakespeare voices the reaction in dialogue between two experienced soldiers, the Welsh captain Fluellen and the English captain Gower[8]:

"FLUELLEN: Kill the poys and the luggage! 'Tis expressly against the law of arms. 'Tis as arrant a piece of knavery, mark you now, as can be offert. In your conscience now, is it not?

GOWER: 'Tis certain there's not a boy left alive. And the cowardly rascals that ran from the battle ha' done this slaughter. Besides, they have burned and carried away all that was in the King's tent; wherefore the King most worthily hath caused every soldier to cut his prisoner's throat. O 'tis a gallant king."

One may note with irony, that when Laurence Olivier made his famous film of this play in 1944, part of the British war propaganda effort, he included the French atrocity but omitted the killing of the prisoners at the King's order.

Of course, that passage in Shakespeare illustrates a fundamental problem with any code of justice governing conflict, with any so-called law of war: save perhaps at times and places where the Church (usually through the Papacy) or other international institution could exercise supervening power, there was no worldly authority higher than the Prince, and thus no means of enforcement.

[8] *The Life of Henry the Fifth*, Act 4 scene 7

Scholars suggest that *Henry V* was written in 1599.[9] A decade later, in *Bonham's Case* (1610)[10] Sir Edward Coke CJ (IMAGE 4) addressed the enforceability of higher or natural law in a national context, by asserting that the English courts had an ancient jurisdiction, arising from natural law, to treat as void even Acts of Parliament which conflicted with natural justice. He ruled:

"And it appears in our books, that in many cases the Common Law will control Acts of Parliament .....; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the Common Law will control it and adjudge such Act to be void'.

At the same time, Prof Kelly identifies the 17th-century as producing the "first virtual denials of the existence of a higher order of natural law". Somewhat disturbing for us at Gray's Inn, he focuses first on our own Francis Bacon (IMAGE 5) :

"As an advocate, Francis Bacon had invoked the law of nature; but generally he rejected mediaeval notions, intertwined with theology....And, in an uncompleted work, *Nova Atlantis*, he presented law as the product of simple considerations of human utility, not the reflection of, or something which should ideally conform with, some higher order."[11]

Kelly identifies this as the emergence of legal positivism, a position echoed by Hobbes in *Leviathan.* It may well be that once Europe, particularly Protestant Europe, had moved away from the authority of the Papacy, and princes (not just in England) were understood to be ordained by God as rulers, and assumed leadership of the church in their domains, it was more difficult to identify a basis for law constraining the authority of the monarch. That was Coke's difficulty. That was at the root of the English Civil

[9] Folio Edition *Henry V* Introduction, p387.
[10] 8 Co Rep 107a
[11] Kelly *ibid.*p223

War, a conflict that Irish and Scottish historians refer to as the War of the Three Kingdoms.

However, again at much the same period, the idea of natural law was elaborated into a system by the Dutch Protestant scholar Hugo de Groot, or Grotius. (IMAGE 6) In his treatise *De iure belli et pacis* ('On the Law of War and Peace') of 1625, Grotius was responding to the horrors of the Dutch Revolt against Spanish rule in the Netherlands, and of the Thirty Years War in Germany. His seminal proposition was that natural law would retain its validity even if God did not exist. Grotius used the analogy of mathematics:

"Measureless as is the power of God, nevertheless it can be said that there are certain things over which that power does not extend....Just as even God cannot cause that two times two should not make four, so He cannot cause that which is intrinsically evil to be not evil."[12]

As Professor d'Entreves puts it in his book "Natural Law", this:

"...appears as a turning point in the history of thought. It was the answer to the challenge of voluntarist ethics. It meant the assertion that command is not the essence of the law."[13]

Grotius has been recognised as a fundamental influence on the subsequent development of international law, although the role of other jurists and philosophers may have been understated.[14]

[12] *De iure belli et pacis* 1,I,x
[13] A P d'Entreves *Natural Law* Hutchinson (1969)
[14] Professor Malcolm Shaw *International Law* Cambridge 6th Edition (2008) pp22 to 25.

In the period after Grotius, Professor Shaw emphasises that positivist legal thinking became dominant:

"Positivism developed as the modern nation-state system emerged, after the Peace of Westphalia in 1648, from the religious wars. It coincided too, with theories of sovereignty such as those propounded by Bodin and Hobbes, which underlined the supreme power of the sovereign and led to notions of the sovereignty of states."[15]

Yet, in a different strain of thinking which grew up during the 18th century, the theory of natural law developed into the concept of natural rights, the belief which underpinned the American and French revolutions. Perhaps the most well-known text is *The Rights of Man* of Thomas Paine, published in 1791. There was a vigorous debate about this at the time.: John Locke formulated a system of natural rights; Edmund Burke and, perhaps more surprisingly Jeremy Bentham, thought that the proposal of natural rights was nonsense.

Through the 19th century, the thinking of the German philosopher Hegel (IMAGE 7) was of huge importance. In relation to the formation of law, Hegel emphasised the role of the state, in an analysis which is antithetical to the existence of natural law.

As Prof Shaw puts it:

"Since law was ultimately dependent upon the will of the sovereign in national systems, it seemed to follow that international law depended upon the will of the sovereign states.

This implied a confusion of the supreme legislator within a state with the state itself and thus positivism had to accept the metaphysical identity of the state. The state had a life

[15] Shaw *ibid.*p26

and will of its own and so was able to dominate international law. This stress on the abstract nature of the state did not appear in all positivist theories and was a late development.

It was Hegel (writes Professor Shaw) " who first analysed and proposed the doctrine of the will of the state. The individual was subordinate to the state, because the latter enshrined the 'wills' of all citizens and had evolved into a higher will, and on the external scene the state was sovereign and supreme. Such philosophies led to disturbing results in the 20th century and provoked a reawakening of the law of nature, dormant throughout the 19th century."[16]

This brings us closer to the Nuremberg trial, and to the events which lay behind it.

THE 19TH CENTURY – MECHANICAL WARFARE and PHOTOGRAPHY

I have already suggested how war, and the horrors associated with it, have been known from antiquity. The history of the 19th century is of course hugely complex, but I suggest two areas of development in technology brought these issues into the minds of a widening public in the powerful nations of the world. The first was the combined effect on warfare of the modern rifle and modern artillery, the explosive naval shell, of railways and the telegraph: the instruments of a major industrial power at war. The second was photography.

These factors came to prominence together first in the Crimean War (1853 -1856). The *doyen* of modern war correspondents, William Russell of the London Times (IMAGE 8) was present in the field. His vivid writing and his criticism of the shortcomings of

[16] Shaw *ibid.* p29

military organisation were augmented by shocking photographs of the effects of war. We have this example of the aftermath of the siege of Sebastopol. (IMAGE 9).

Perhaps even more striking was the impact of the American Civil War (1861-1865). In the battle of Antietam / Sharpsburg, on 17 September 1862, there were more than 28,000 casualties, including 5,000 killed outright on the field.[17] Pictures of the field, particularly that of the 'Bloody Lane', shocked the world. (IMAGE10) It is suggested that the most likely number of soldier deaths in that war was 761,000. That does not include civilian deaths, particularly those of slaves or ex-slaves, and the total overall likely exceeded 1 million.[18] To get an idea of the scale of that suffering, the population of the USA in the 1860 census was 31,443,321, including 3,953,761 slaves.[19]

Similar scenes following the Battle of Solferino, between the forces of France and Piedmont on the one hand, and Austria on the other, in June 1859, inspired the Swiss businessman Henri Dunant, who after touring the battlefield following the end of the action, began the process which led to the foundation of the Red Cross in 1863, and the adoption of the first Geneva Convention in 1864.

In the late 19th century, as Ottoman power declined, the Ottoman Empire began to fragment under the pressure of local nationalisms, often stimulated by the great powers acting as patrons for client groups. These groups, defined on ethnic and often religious grounds, represented potential client states for the great powers, competing for the spoils[20]. As we saw again at the end of the 20th century, such conflicts in the Balkans were accompanied by terrible atrocities. These events resonated in the public sphere in

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[17] Shelby Foote *The Civil War* (1958) Random House, Volume 1 p702

[18] *The American Civil War* Wikipedia, sourced 28.x.2020

[19] en.wikipedia.org/wiki/1860_United_States_Census#:~:text=The%20United%20States%20C sourced 28.x.2020

[20] Misha Glenny *The Balkans 1804-1999* Granta (1999) *passim*

London, Paris, Vienna and St Petersburg. As part of this turmoil, Austria-Hungary occupied Bosnia-Herzegovina in the 1870s and formally annexed the territory in 1908. Six years later, in Sarajevo in the summer of 1914, a Bosnian Serb group assassinated Archduke Franz Ferdinand, the heir to the Austrian throne, the spark which lit the fuse for the First World War.

The commencement of hostilities by Germany in 1914 represented a flagrant breach of international law. Not only was it a breach of treaty obligations, but the German army invaded Belgium, a neutral country. As the war proceeded, allegations of "Hunnish atrocities" mounted: these were probably exaggerated, but there was certainly substance to some. The German sinking of the liner Lusitania on 7 May 1915, with the loss of 1100 passengers and crew, was a turning point for public opinion in Britain and USA. In fact there were many other sinkings of passenger ships during the war. On 31 January 1917, Germany announced that it would resume unrestricted warfare in the war zone waters of the Atlantic. Three days later the USA broke diplomatic relations with Germany and entered the war on the side of the Allies. Within hours, the American passenger ship Housatonic was sunk by a German U-boat.

All those grievances led to demands for justice, or punishment, both during and after the war. One of my predecessors as Treasurer of Gray's Inn, FE Smith, later Lord Birkenhead, took office as Treasurer at the turn of 1916 into 1917. (IMAGE 11) He had been in office as Attorney General since October 1915. The Christmas holiday of 1916 saw him on a ship bound for New York and a speaking tour of America designed to garner support for the allies in the war. Two days before he left, he entertained the Prime Minister Lloyd George to dinner in hall at Gray's. His biographer suggests this was the

culmination of a determined campaign to be awarded the baronetcy which now came his way.[21]

In the course of his speaking tour, FE Smith was consistently dismissive of President Wilson's plans, already then articulated, for the formation of a League of Nations after the war. While most of his speeches were more general, he delivered a major speech to the New York Bar Association on 11th January entitled "Law, War and the Future", in which he considered the history and role of international law, the track record of Germany in breaking international law, and the prospect of punishment for those responsible for the breaches[22]. He began by emphasising that the coercive quality of law was critical. He said "In our domestic law, the power of punishing the man who is in breach of the law is essential to its very conception." He contrasted this with the situation in international law. He said: "The difficulty in dealing with international law has always been that there has been no *sanction* in our public law – and sanction, as you very well know, is the term technically used to express the penalty which is imposed on the wrongdoer."

Of some interest today is a passage from the speech in which Lord Birkenhead recounted that he, as attorney general, had argued before the Judicial Committee of the Privy Council that Orders in Council, (ie the executive orders of government, as opposed to legislation by Parliament) which sought to set aside some provisions of international law, could not be challenged or called into question in a British prize court. It was clear he himself regarded the argument as suspect, although he was instructed to present the submission. He noted that the argument had been advanced before, in the era of the Napoleonic war, to the great Admiralty and Prize judge of that era, Baron

[21] John Campbell *F E Smith, First Earl of Birkenhead* Pimlico p440
[22] Lord Birkenhead: *The Speeches of Lord Birkenhead* Cassell (1929) p93

Stowell. He quoted from a judgment of Lord Stowell rejecting that argument as follows: "We sit here as a Court of International Law, and in spite of what our enemies have done, we still believe there are binding doctrines of International Law and sitting here as we do sit as a Court, whose duty it is to construe those doctrines, we utterly refuse to be bound by Orders in Council issued by the Executive. And if you force us by Act of Parliament, as you can, to recognise your Orders in Council, we will recognise them because we must, but it will become clear to the world that we have ceased to be a court which administers International Law, and that we have become the mere mouthpiece of executive and legislative authority in this country."

Against that backdrop, Birkenhead went on to castigate German breaches of treaty obligations and international law. He contrasted the attitude of Germany to the position as he held it to be in England and the United States:

"It would have been as absolutely impossible for a great statesman in your country to go before his fellow countrymen, as it would have been for a great statesman in my country, and say: 'we made that treaty, but the conditions have altered; it does not pay us to observe it. We propose to break it'..... Such a Minister would have been broken in England; such a Minister would have been broken in your country."[23]

Lord Birkenhead's conclusions were in essence that, without the agreement of sovereign states to comply with international law, it would only retain the quality of law, ultimately, by enforcement through war.:

"If we win, and if we punish those who have broken the public laws of the world, International Law will have received a supreme public vindication. Perhaps no nation,

[23] Birkenhead *Speeches ibid*.p107

however strong, will ever dare again dream of aggressive war. Perhaps – I do not know – perhaps the great and splendid dream of an international tribunal administering a law which would satisfy the analysis I have already examined, may be realised. Perhaps, I say, these things may happen...."[24]

He went on:

"Will a Prussian, crouching for a second spring, be an agreeable bedfellow [in a League of Nations]? Is an un-purged Germany a possible member? Obviously no – only punished Germany! So, by every route, we are driven back to the one static feature in a dynamic controversy: public law disappears forever from this world if we are proved powerless ..... to castigate the wrongdoer... Yet, I agree that it is worthwhile trying for the ideal. It is worthwhile to make the attempt. It is better to harness your wagon to a star than to a machine-gun, though a knowledge of the one may be very useful as a means of attaining to the other."[25]

At the Versailles peace conference after the First World war, a multinational committee of lawyers was set up to draw up charges against German leaders accused of war crimes. This committee considered adding a charge of causing the war itself – but they could not agree if that was a crime in international law. [26] The lawyers abandoned the idea, but the politicians grasped it, against the legal advice. German war guilt was written into the Versailles Treaty, and in Article 227 the Kaiser was accused of "a supreme offence against international morality and the sanctity of treaties." After much negotiation it was concluded that a special tribunal with judges from Britain, the USA, France, Italy and Japan should be set up to try the Kaiser. Article 228 of the treaty called

[24] Birkenhead *Speeches ibid.* p109
[25] Birkenhead *Speeches ibid.* Pages 112/3
[26] Ann and John Tusa *The Nuremberg Trial* Macmillan (1983) p18

for a series of military tribunals to deal with German leaders accused of violating the laws and customs of war.

These arrangements broke down. A particular difficulty was that the Kaiser fled to Holland and the Dutch government declined to extradite him. He remained in Holland until his death in 1941. In 1920, the Allies presented the German government with a list of over 900 individuals whom they sought for trial. The German government refused point-blank to hand them over. It was said that if the demand was pressed, it would lead to a renewal of war. As a compromise, the Allies persuaded the German government to institute trials in Germany of those on the blacklist, with international observers.

These proceedings opened in Leipzig at the end of 1922. They were a farce. Many of the accused and witnesses could not be found and there was no power to force them to appear. 888 of the accused were acquitted or their cases summarily dismissed. In respect of the few convicted, extremely mild sentences were passed. When several of those who had been sentenced escaped from prison, the warders received widespread public congratulation. [27] These events formed a poor precedent for the formation of an international tribunal after the Second World War.

WHY WAS THERE A TRIAL IN 1945?

I now move straight to the years of that second war, passing over the decades in which the League of Nations proved ineffectual, the Nazis rose to power in Germany, the Allies underestimated, or chose to ignore, the threat from the revival of military power in Germany, and then war broke out once more.

[27] Tusa *Nuremberg ibid.*pp18/9

From the early years of the war, some within the Allied governments began to contemplate the aftermath of victory, and how the aggressors should be punished. There was a complex churn of views within the Allies. For a period, Russia spoke for trials of the German leadership: after all, Stalin had extensive experience of mounting such trials, which only ever had one outcome. The issue became more acute from the time of the Normandy landings, when the Allies came to contemplate victory with confidence. Even then, in 1944, the French and British governments clearly favoured summary action against Hitler and the other German leaders. An enormous political battle was fought within the Washington administration, and Pres Roosevelt tilted from opposition to a trial process, to a position of rather ambiguous support. By then De Gaulle favoured a trial. At the Yalta conference in February 1945, Roosevelt set out to persuade the European leaders.

The current British position was formulated In a Foreign Office paper which stated that "the guilt of such individuals [giving the example of Himmler] is so black that they fall outside and go beyond the scope of any judicial process."

Even after Yalta, the dispute as to how to proceed rumbled on. The Lord Chancellor Simon, in discussion on 12th April 1945 led the cabinet to the unanimous conclusion that "for the principal Nazi leaders a full trial under judicial procedure was out of the question." The matter was not resolved until after the death of Roosevelt on that same day. His successor Harry S Truman took an unequivocal view in favour of judicial proceedings. In their superb narrative history of the Nuremberg process, Ann and John Tusa write: "Truman....had a profound belief in the beneficent power of law and the wisdom of judges, an abhorrence of summary execution, sensitive antennae to the balance of political forces in Washington and greater drive and disposition to make decisions than his ailing predecessor. Truman wanted a trial and he wanted agreement of its details

quickly…."[28] Truman prevailed. The convoluted detail of the negotiations to that point and the decisions as to procedure are set down in chapters 4 and 5 of the Tusa's book, which I would commend to anyone wishing to understand the detail.

Following agonising and extended debate between the lawyers of the victorious nations, the charges on the indictment were: [1] Participation in a common plan or conspiracy for the accomplishment of a crime against peace; [2] Planning, initiating and waging wars of aggression and other crimes against peace [3] Participating in war crimes and [4] Crimes against humanity, a count which included the allegation of genocide.

THE GRAY'S INN QUARTET - ADVOCATES IN THE TRIAL

I turn now briefly to look at the four members of Gray's Inn who played such a prominent role in prosecuting the trial. They were Hartley Shawcross QC, David Maxwell Fyfe QC, Prof Hersch Lauterpacht QC and Maj Elwyn Jones MP. In due course, all save Lauterpacht became Treasurers of this Inn.

Hartley Shawcross (IMAGE 12) was a glamorous figure. Charming, lively, conspicuously good-looking and most effective advocate, he was a Labour MP who became attorney general at the inception of the Attlee government in 1945. He was active in the preparation of the case so far as was possible, consistent with his huge responsibilities as Attorney General at that turbulent time. He took the lead in the opening and closing addresses in the trial. Shawcross subsequently led a very successful career in the law and in business. He was one of the founders of the legal organisation JUSTICE. He lived to be 101 years of age. In his 10th decade he published lively and engaging memoirs, rather ruefully entitled "Life Sentence". They are a delightful read. We will return to him.

[28] Tusa *Nuremberg ibid*.page 66.

David Maxwell Fyfe (IMAGE 13) was a highly ambitious and driving lawyer and politician. He served as Solicitor General during the war in the national government, and then briefly as Attorney General in Churchill's interim government, leading up to the 1945 election. Following that election, he took over the prosecution including much of the preparation, and acted as the leader of the prosecutorial team whenever Shawcross was away, which was for most of the trial. He was a capable lawyer, an efficient administrator and a phenomenal worker. Although cross examination had not been thought a particular strength, his devastating questioning of Hermann Goering has often been thought one of the most noted cross examinations in history. Maxwell Fyfe went on to be a champion of European integration, one of the instigators and drafters of the European Convention on Human Rights, Home Secretary and then Lord Chancellor as Viscount Kilmuir.

It was Shawcross who brought Hersch Lauterpacht (IMAGE 14) into the case. In the period before the trial, when the shape of the case and the charges to be indicted were under debate and negotiation, Shawcross gave Lauterpacht a seat on the British War Crimes Executive. I think it is fair to say that Lauterpacht possessed the best legal intellect which was associated with the Nuremberg process. He was born in 1897 to a Jewish family in a small town in what was then part of the Austro-Hungarian Empire and is today part of the Ukraine. He studied law in the city that was then Lemberg, was subsequently Lvov and is now Lviv. He moved to Vienna and then London, becoming an international lawyer. After a period at the LSE, writing several books on international law, he became an academic at Cambridge. He was crucial in the formulation of the indictment and it was he who was principally responsible for introducing the count of Crimes against Humanity. He ended his career as a judge of the International Court of Justice. His story, including the story of his intellectual contribution to law, is told fully in

that marvellous book by Prof Philippe Sands "East West Street", again to be recommended. Not only was Hersch Lauterpacht a Bencher of this Inn, but so was his equally distinguished son Prof Elihu Lauterpacht. The Lauterpacht Centre for International Law at Cambridge commemorates them both, and the Inn is the grateful recipient of their magnificent library of international law texts.

Finally, a more junior lawyer at the time was Elwyn Jones. (IMAGE 15) He came from Llanelli, fought during the war and then served as junior counsel at the first trial, and leading counsel in one of the subsequent trials in Germany. A charming and engaging man, he was elected to Parliament in 1945 for Labour and subsequently served as Attorney General and as Lord Chancellor under Harold Wilson and James Callaghan for six years during the 1970s.

Gray's Inn is rightly proud of all four of them and of what they did.

WHAT DID THE TRIAL COME TO?

Well, I hope that question will be answered by the two succeeding webinars.

I am not going to confront you tonight with any images of what the Nazi atrocities really meant. Many of us will carry in our minds what was revealed when the Allies liberated the concentration camps in Poland and Germany. If there are those of you who have never seen such photographs or footage, then when you are ready, they are readily available online. If we are to take fully on board why international law in this area is important, and perhaps even more so, why such enforcement of international law as can be established should be achieved, then it is necessary to understand what these atrocities meant, and what will arise, somewhere, sooner or later, once again. Both

YouTube and the United States Museum of the Holocaust[29] will give you access to sufficient material. Once again, I commend Prof Fulbrook's book *Reckonings*.

What I am going to do, in order to give you a flavour of the trial, is to show you some of Hartley Shawcross's closing speech to the judges in the main trial – not only is it a fine piece of advocacy, but he captured in vivid language what they were dealing with.

When that is completed, I hope there will be time for a few questions.

(FILM - Nuremberg Day 187 British Close https://m.youtube.com/watch?v=-mjzGGeuybc (accessed 12 November 2020)

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Image 1

Image 2

Image 3

Inage 4

Image 5

Image 6

Image 7

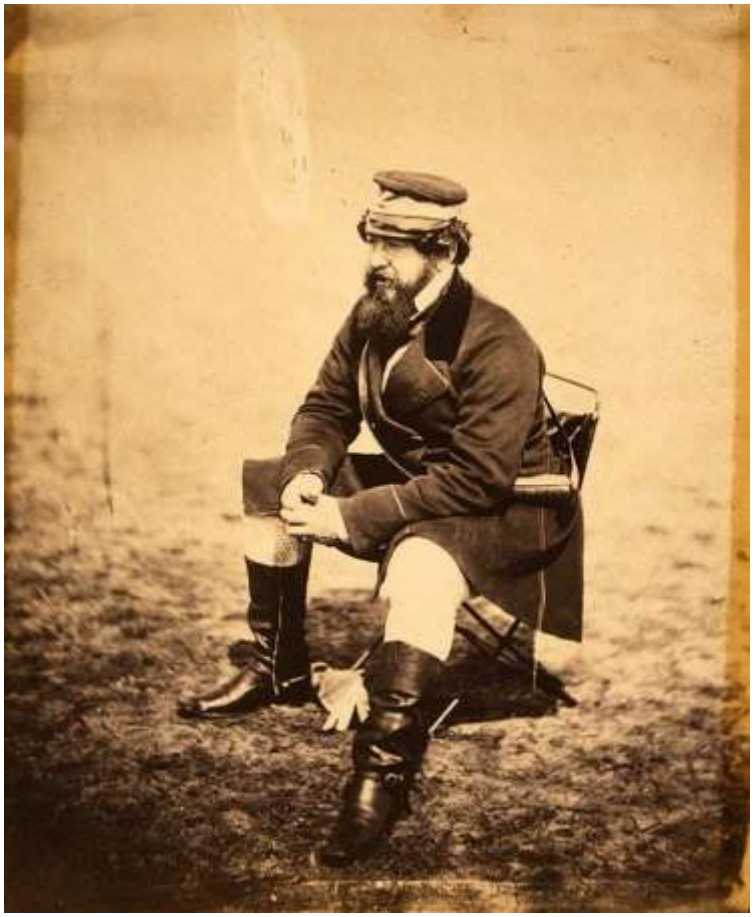

Image 8

Image 9

Image 10

Image 11

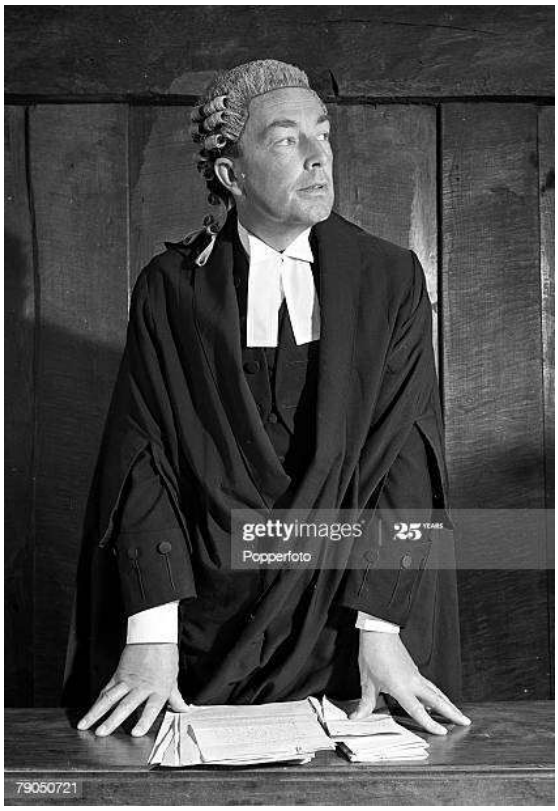

Image 12

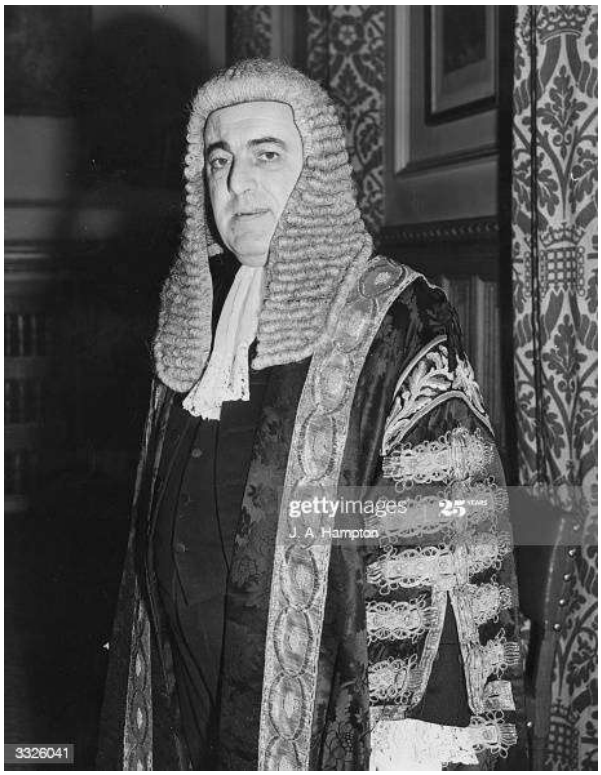

Image 13

Image 14

Image 15