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LAW AND THE HOLOCAUST

Course: Law 678-001-14A
Classroom: TBA

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THEMATIC SYLLABUS

COURSE OUTLINE

This course combines comparative law, constitutional law, criminal law and procedure, jurisprudence, conflicts of laws, international law, human rights and legal history to examine the Nazi philosophy of law, emanating from the egregious racial ideology, and how it was used to pervert Germany's legal system, to discriminate against, ostracize, dehumanize and, ultimately, eliminate certain classes of people; and then, the role of international law in seeking to rectify the damage by, on the one hand, bringing perpetrators to justice, and, on the other, creating a system of international human rights designed to avoid a repetition.

The course is conceived as having a conceptual coherence. It starts with the underlying Nazi racial ideology and its implications, both as to the sort of legal system needed to implement it as well as its broader implications, translating particularly into the denial of human rights; it then traverses the legal system itself, demonstrating its sick, perverse logic in light of the ideology; and concludes by elucidating how the international legal system reacted, on a measure-for-measure basis, attacking the corollaries of the racial ideology and, even more fundamentally, the core notion at its very heart, thereby bringing the course full circle.

COURSE MATERIALS

The prescribed materials for the course are: Reicher, *Law, The Holocaust, International Human Rights: Materials and Commentary* (Preliminary Edition, University of Pennsylvania Law School, 2011) ("Cases and Materials"). They are available, in full, on the Course Portal.

THEMATIC SYLLABUS

TOPIC: THE HOLOCAUST: “LAWFUL BARBARISM”

This Topic will provide an introductory overview of (a) the course, and (b) the Holocaust, in historical perspective, laying the foundation for an understanding of how the Nazi regime went about “anchoring the destruction process in a legal framework” (to borrow Raul Hilberg’s insightful phrase).

Documentary: *Trial Story: Nuremberg Trial: War Crimes on Trial*

This documentary serves as a useful introduction to the course, via the Trial of the Major War Criminals at Nuremberg. It revolves around excerpts of archival footage of the Trial itself, interspersed with film of atrocities and interviews with important figures who participated in the Trial (including prosecution and defense counsel), as well as leading commentators.

TOPIC: THE IDEOLOGY THAT MADE IT POSSIBLE: PART 1: NAZI THEORIES OF RACE

This Topic is predicated on the truism that legislation does not spring up out of thin air. Rather, it is the conscious application of an underlying philosophy or *weltanschauung*. The Nazi legal system was no different. In fact, a useful analytical tool, for purposes of understanding that legal system, is to imagine oneself in the shoes of the legal counsel to the Nazi Party, the day after Hitler came to power, charged with the task of mapping out a legislative program to implement the Party’s goals. A natural starting point would be to open and go through a copy of *Mein Kampf*, and, at each point, pose the question: What legislation is necessary to give effect to what is written here? Viewed in this light, in so far as the Nazi assault on the Jews had a legal dimension to it, an understanding of the racial ideology, especially as it applied to Jews, is an indispensable prerequisite. Once that underlying ideology is understood, the legal system emanating from it has about it a sick, perverse logic. Accordingly, Hitler’s racial views - both general as well as those specifically directed against the Jews - as expressed in *Mein Kampf*, will be examined, and will be compared to the writings of the Nazi party’s ideologue, Alfred Rosenberg. Special emphasis will be placed on Hitler’s bifurcated view of the Jews (Jews as racial vermin and polluters/Jews as insidious, mortal threats to the fabric of society), laying the groundwork for considering the different types of legislation needed to implement both limbs of that view. Consideration will also be given to the manner in which the regime harnessed contemporary movements in science (such as eugenics) and political thought (such as Social Darwinism) to their own ends. We will also encounter, for the first time, Carl Schmitt, the “Crown Jurist of the Third Reich,” and the jurisprudential “bridge” his writings provided, between the racial ideology and the legal system which gave expression to it.

TOPIC: THE IDEOLOGY THAT MADE IT POSSIBLE: PART 2: NAZI THEORIES OF THE STATE

The underlying racial ideology permeated the Nazis’ theories of the state. This translated into both their views of the nature of a state, and the goals which it existed to serve, as well as the methodology by which the state was to operate. As to the former, the state will be seen to exist for the purpose of perpetuating the racial ideal, the test of a successful state being the extent to which it achieved that goal. And the latter will be examined per medium of the *Fuehrerprinzip*, under which all state power - legislative, executive and judicial - was aggregated in very few sets of hands, and ultimately in one set of hands, those of the Fuhrer himself - the very antithesis of US-style constitutional separation of powers. Three distinct aspects of the *Fuehrerprinzip* will be considered: as a constitutional principle (“Hitler is Germany, just as Germany is Hitler,” as proclaimed by Rudolf Hess, at the

1934 Nuremberg Party Rally), as the expression of the cult of personality (quasi-Messianic mystique) and in terms of the distribution of power in the government (physical proximity to the Fuhrer as one of the keys to power).

Video Excerpts:

- Rudolf Hess, speaking at the 1934 Nazi Party Rally, in Nuremberg, making his proclamation (see above), which sounded like demagogic hyperbole, which, at one level it was, but in fact also constituted a statement of constitutional principle.
- Opening sequences from Leni Riefenstahl's classic propaganda film, *Triumph of the Will*, illustrating the quasi-Messianic aspect of the Fuhrer principle.
- Stunning color photographs taken by a *Life* magazine photographer at the 1939 Nazi Party Rally.

TOPIC: THE IDEOLOGY THAT MADE IT POSSIBLE: PART 3: NAZI THEORIES OF LAW AND THE LEGAL SYSTEM

The underlying racial ideology also informed and animated notions of the legal system, what it should accomplish and how it should operate. Consideration of the former will revolve around Alfred Rosenberg's ideas of "Nordic-German Law," focusing on different ways in which the racial ideal could be achieved legislatively. And the latter will revolve around Ernst Fraenkel's remarkable work, *The Dual State*, demonstrating how Germany developed a bifurcated court system, in which cases that implicated the racial ideology fell within the "prerogative state" (in contrast to the "normative state"), under which "the dagger of the assassin was concealed beneath the robes of the jurist" (as the Tribunal in *The Justice Case* at Nuremberg put it so powerfully). Consideration will also be given to the infamous Rothenberger Memorandum, which applied the *Fuehrerprinzip* to the judicial branch of government, proclaiming that "The Fuhrer is the supreme judge.... A judge... must judge like the Fuhrer," and the Alice-in-Wonderland air about the cross-examination of Rothenberger at Nuremberg.

Video Excerpt:

- Short but dramatic archival footage, showing judges entering a courtroom and throwing a "Heil Hitler!" salute, prior to assuming their places on the bench, thereby proclaiming that this was not a system of government under law, but the converse.

TOPIC: THE NAZI LEGAL SYSTEM IN ACTION: LEGISLATION

Having laid very firm ideological foundations, the course now proceeds to examine the legal system that emerged from them, beginning with the legislative scheme. During the twelve years of Nazi rule, something of the order of 2,000 laws were promulgated, directed solely, specifically and directly at the Jews. These ranged from, at one end of the spectrum, the quasi-constitutional Nuremberg Laws, which enshrined the heart of the racial ideology, to the regulation of absurd minutiae, at the other. The course will isolate, and concentrate on, nine major themes, selected by virtue of the significance of their impact on the daily life of their targets. Each theme begins with a consideration of the important legislation enshrining the theme, and then moves to a study of memoirs, diaries and survivor testimony, to emphasize the devastating personal impact, and dehumanizing effect, of the laws on the day-to-day existence of ordinary human beings. In each case, the dehumanizing effect of the law will be underscored by counterpointed reference to the corresponding provisions in the *Universal*

Declaration of Human Rights, by which the international legal system reacted to the dehumanizing impact of the Nazi laws.

Themes:

- * Definition
- * Racial purity
- * Denial of the Right to Citizenship

Video Excerpt:

- Dramatic and chilling archival footage, showing Hermann Goering, as President of the Reichstag, standing up in the Reichstag, convened in special session at Nuremberg, on September 15th, 1935, reading out the Nuremberg Laws, with Hitler sitting just a few feet away from him (having first been seen introducing the laws).

- * Deprivation of Income-Earning Capacity
- * Expropriation of Property
- * Exclusion from Educational Opportunity
- * Segregation and Restriction of Movement
- * Branding

Video Excerpt:

- From Roman Polanski's film, *The Pianist*, in which, in a few minutes, some seven or eight different laws, imposing serious restrictions on Jews, are implicated.

- * The Final Solution

Video Excerpts:

- From four-part documentary, *Science and the Swastika*, showing moving interview with Rolf Thurm, a victim of the *Law for the Protection of Heredity Health*, made all the more poignant by virtue of the fact that part of the interview is conducted in the court where Thurm was ordered to be sterilized.

- From the same series, showing interview with Monika Dombke, a victim of Dr Carl Clauberg's infamous sterilization experiments in Barrack 10, at Auschwitz, movingly bringing out the intensely human effects of enforced sterilization.

- From Stanley Kramer's classic movie, *Judgment at Nuremberg*, showing cross-examination of a victim of the *Law for the Protection of Heredity Health*, Rolf Pedersen (memorably and movingly played by Montgomery Clift), by defense counsel (Maximilian Schell, in an Academy Award-winning performance). The questioning is

insidious in setting up a defense that the judge who sentenced Pedersen was fully justified under the law, based on the history of “feeble-mindedness” in the witness’ family.

- From *The Wannsee Conference*, the recreation, in real time, of the infamous conference, on January 20th, 1942, at which the logistics of implementation of “the Final Solution of the Jewish Problem” were developed. The bizarre part that legalities played in the discussion will be emphasized.

TOPIC: THE NAZI LEGAL SYSTEM IN ACTION: THE COURT SYSTEM AND THE JUDICIARY

This Topic will trace the destruction of the German judicial system, during the Nazi era, and its metamorphosis into the “prerogative state,” an instrument of rampant terror. Among the characteristics that will be examined are the following: The decline in judicial independence; the evolution of the approach to statutory interpretation, based, in the end, on “the spirit of National Socialism” and “the sound instincts of the *volk*”; within this, the dominance of racial thought as the lodestar of judicial decision-making, resulting in decisions that were frightening in their bizarreness; the deep reach of Hitler down into the judicial system; the role of the state security forces in the courts, as a dominant influence on the judges, as members of the bench and in the post-verdict processing of prisoners. Examples from the careers of three of the defendants in *The Justice Case* – Franz Schlegelberger, Curt Rothenberger and Oswald Rothaug – will be drawn on, to personalize the atrocities committed by intelligent, educated lawyers. A special case study will be comprised by the trial, in the Nuremberg Special Court, of Leo Katzenberger, who was charged with “racial pollution,” over an alleged affair with Irene Seiler. The Opinion and Sentence in the case, which was immortalized by Judy Garland’s riveting portrayal of Seiler in Stanley Kramer’s classic movie, *Judgment at Nuremberg*, is a particularly vivid illustration of judicial machinations and intellectual contortions aimed at arriving at a predetermined result.

Video Excerpt: *Traitors to Hitler*

This remarkable documentary shows, in frighteningly graphic terms, the proceedings in a court in what Ernst Fraenkel called “the prerogative state.” It consists of archival footage of the trial of the plotters, who attempted to assassinate Hitler on July 20th, 1944. Before the trial even began, Hitler, exercising the full authority he had under the *Fuehrerprinzip*, ordered that the defendants be executed, by slow hanging, within two hours of the verdict being delivered. Among other things, the various means by which the defendants were humiliated are shown, as are the bizarre antics of the presiding judge, Roland Freisler, who is seen and heard screaming hysterical abuse. Freisler, who was President of the People’s Court, had the dubious distinction of having sentenced some 2,600 people to death, and was described by William Shirer, in his classic masterpiece *The Rise and Fall of the Third Reich*, as “a vile, vituperative maniac.”

TOPIC: JURISPRUDENTIAL ISSUES

The Nazi legal system raised profound issues, going to the very heart of the nature of law. These surfaced at both the jurisprudential as well as the judicial levels. In essence, the question for consideration, at both levels, is the same: Was the Nazi legal system really “law,” albeit bad, even perverse, law? Or was it lacking something so fundamental that it could not be regarded as law to begin with? At the jurisprudential level, the discussion will revolve around the celebrated Hart-Fuller debate, which took place in the pages of the *Harvard Law Review*. At the judicial level, consideration will be given to a number of cases, primarily decided in the United States, in which courts grappled with the applicability of the Act of State Doctrine in the context of such consequences of the Nazi legislative and judicial schemes as arose for decision in this country. Whilst the Doctrine requires the courts of the United States to respect, and give effect to, legislative and judicial acts of

foreign countries, should that principle be applied in the case of a legal system that so perverted and debased the very notion of law?

TOPIC: THE RESPONSE OF INTERNATIONAL LAW: INTERNATIONAL HUMAN RIGHTS

This Topic will lay out the revolutionary development of the whole international human rights movement of the post-World War II era, revolving around the *Universal Declaration of Human Rights*, the constituent document of that movement. Consistent with the overall theme of the course, the object will be to demonstrate the catalytic effect of the Holocaust on the recognition of the human rights that are today firmly entrenched in international law. Special emphasis will therefore be placed on correlating provisions in the Universal Declaration with categories of atrocities committed by the Nazi regime, especially per medium of the legal system. Having traversed the earlier parts of the course, the provisions in the Universal Declaration will take on a fundamentally different mien, as the framers of that document will be seen to have isolated the different themes in the Nazis' (legal) assault on the Jews, and proclaimed each of them to be human rights, to be enjoyed by everyone. The catalytic effect of the Holocaust will also be seen in a deeper sense: The starting point of the course was the underlying Nazi racial ideology, which regarded human beings as not being born with inherent dignity and worth, and therefore equality. The Universal Declaration will be seen to smash through that assumption, which lay at the heart of everything that happened to the Jews, by proclaiming, in its opening words, the inherent dignity and worth of every human being, simply and solely by virtue of being born human. In this way, the course will come full circle.

Documentary: *A Question of Rights: The Universal Declaration*

Short documentary on the creation of the Universal Declaration, including archival footage, showing the dramatic scene during the vote of the General Assembly of the United Nation on its adoption, in Paris, on December 10, 1948, and focusing on leading figures involved in the process of creation, including Mrs Eleanor Roosevelt and Professor Rene Cassin.

TOPIC: THE RESPONSE OF INTERNATIONAL LAW: THE GENOCIDE CONVENTION

This Topic will trace the extraordinary development of a term that, as recently as 1944, did not exist in the English language. The word "genocide" was coined by a Polish-Jewish refugee to the United States, Dr Raphael Lemkin, as a response to a challenge implicit in a remark by Sir Winston Churchill, that the mass annihilation of the Jews was "a crime without a name." A mere four years after Lemkin published his neologism, in 1948, the General Assembly of the United Nations adopted the Genocide Convention, confirming that genocide is a crime in international law, and requiring states parties to prevent it, and bring perpetrators to justice. Today, 140 states are parties to the Convention, and genocide is the most egregious crime in international law, which forms a central pillar of the jurisdiction of every tribunal – whether international, national or hybrid - dealing with human rights atrocities. Thus, just as the underlying Nazi racial ideology permitted individuals to be discriminated against in the worst possible ways, including by annihilation, simply on the basis of their membership of particular racial groups, the Genocide Convention responded, on a measure-for-measure basis, making it a crime in international law to attack individuals in a manner calculated to destroy the groups to which they belong.

Video excerpt:

- From interview of Raphael Lemkin, in which he explains the principal achievement of the Genocide Convention.

TOPIC: THE RESPONSE OF INTERNATIONAL LAW: THE NUREMBERG TRIALS

A first priority, in the immediate aftermath of the Holocaust, was bringing perpetrators to justice. What emerged were the Nuremberg trials, which revolutionized international criminal law, international human rights law and international law generally. Discussion will revolve around the three principal rationales advanced for conducting orderly trials, as opposed to the summary execution of leading Nazis that was favored by some: (a) the establishment of international law precedents, of a procedural as well as substantive nature; (b) setting a high moral plane, and not descending to the level of the perpetrators, and (c) collecting and writing the historical record, so that future generations might learn the lessons of the regime of evil. Special emphasis will be placed on the articulation of crimes against humanity, and several of the defenses invoked by the defendants: retroactive law-making; sovereignty; superior orders; lawfulness under German law; judicial immunity.

Video excerpts:

- Excerpts from interview with President Harry S Truman, explaining the principal reasons which impelled him to insist on orderly legal trials, over the objections of the other victorious allied powers.

- Archival footage of Sir Geoffrey Lawrence, of the British Court of Appeal, opening the Nuremberg trials, solemnly intoning their uniqueness.

- Archival footage of Justice Robert Jackson's stirring and eloquent opening address.

- Documentary recreation of the Wannsee Conference, in which Reinhard Heydrich refers to a passage in *Mein Kampf*, where Hitler laments the non-use of poison gas on Jews in the First World War, and adds: "Learn to take the Fuhrer at his word."

- Archival footage of cross-examination of Hermann Goering, in which he attempts to "write a positive legend," by downplaying the regime's atrocities, and whitewashing Hitler personally.

- Archival footage of the Trial of Adolf Eichmann, showing searing first-person accounts by witnesses recounting the horrors they endured, and Eichmann himself summarizing his defense of superior orders.

- From Stanley Kramer's classic movie, *Judgment at Nuremberg*, showing cross-examination, by defense counsel (Maximilian Schell, in an Academy Award-winning performance), of the character representing Irene Seiler (portrayed in a gripping performance by Judy Garland), who was alleged to have had an affair with Leo Katzenberger, leading to his prosecution for "racial disgrace," under the *Law for Protection of German Blood and Honor*. The questioning is insidious, in setting up a defense that the judge who sentenced Katzenberger was required by law to do so, as the "crime" had been committed, and Rothaug was merely following the law.

- From the PBS series, *Auschwitz: Inside the Nazi State*, recreating an act of moral heroism by SS Lieutenant Albert Battel, who defied superior orders to deport Jews.

- Archival footage showing sentencing of the defendants in *The Justice Case*, being leading figures in the Nazi legal establishment, i.e. judges, prosecutors, and bureaucrats in the Ministry of Justice, thereby putting a human face on “murderous lawyers.”