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On Nuremberg and War Crimes

Paul M. Hebert

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*Review
Club of Baton Rouge
2/24/49*

There seems to be a common erroneous public impression regarding the Nurn-
berg trials. From comments I have heard since returning from Nurnberg ^{in 1948} ~~last August~~,
I gather that the general public thinks that all of the war crimes trials are con-
cerned with affixing responsibility for participation in the initiation and the
waging of aggressive wars by the Axis powers. There is the further widespread im-
pression that there are no sound legal basis supporting war crimes trials in general
or the Nurnberg trials in particular. Nothing could be farther from the truth.

First of all, it is necessary to distinguish between the types of offenses
that have been charged in these proceedings. Only a very limited number of the
cases has involved the controversial Crime against Peace. War crimes in the more
restricted sense as constituting violation of the laws and customs of war are well
settled in international law. This does not mean that there are not areas of un-
certainty calling for interpretation and application to particular facts, but
the civilized nations of the world have long adhered to the principle that there
are certain recognizable rules governing the conduct of land and naval warfare.
These rules are reflected in customs and treaties and have particular application to
the protection of the rights of inhabitants of occupied countries. The violation
of these rules constitute crimes against international law which are punishable when
a belligerent obtains custody over an offender against international penal law. In
two important recent cases, the United States Supreme Court has reviewed the numerous
authorities supporting the accepted principle of international law under which a
belligerent has the authority to establish special tribunals for the trial of individuals
who have committed offenses in violation of the laws and customs of war. The laws
and customs of war have been the subject of such international treaties as the Geneva
Convention concerning treatment to be accorded to the prisoners of war, the Hague
Conventions of 1907, the Hague Regulations and various other international agreements
and treaties.

During the war, by the Moscow Declaration, the allied powers gave public warning that those individuals responsible for atrocities committed in the conduct of the war would be brought to justice. Pursuant to this declaration, the London Agreement established the charter of the International Military Tribunal, and set forth the offenses against existing international law of which the International Military Tribunal, known as the IMT, was given jurisdiction. Phrased in very similar language, the Control Council for Germany, composed of representatives of the four occupying powers, ^{Russia, U.S.S., Eng + France} enacted Control Council Law No. 10 to establish a uniform legal basis in Germany for the prosecution of war criminals. This Control Council law authorized each of the occupying powers to establish special tribunals for the trial of war criminals. Pursuant to this authority, the major war criminals were tried at Nurnberg. There were twelve cases involving a total of some one hundred eighty defendants. No attempt was made in these proceedings to try everyone deemed to be guilty of war crimes, but only to reach those representative leaders deemed to be most responsible and representing each segment of Nazism which went to make the Hitler conspiracy the hideous and effective thing it proved to be. It is also not generally known that the bulk of the war crimes cases were cases before military tribunals established to try offenders solely for violation of the laws and customs of war. These cases, thousands in number, and involving the largest number of defendants, have been held in practically every country coming under Axis dominion. For example, the celebrated case of Isle Koch, which has been so much in the daily headlines, is one of the cases tried by a military tribunal at Dachau, established pursuant to an original order of General Eisenhower, vesting jurisdiction in military tribunals for offenses against allied soldiers and for offenses committed in concentration camps over-run by allied forces. As distinguished from this category of war crimes cases, there are the subsequent proceedings at Nurnberg involving the twelve cases referred to. These cases were concerned with affixing the major

responsibility for the numerous horrors and atrocities which we associate with the conduct of the war by Nazi Germany. As to the substantive offenses that have been involved in the Nurnberg cases, much controversy revolves around the question of whether or not Goering and the eleven other defendants convicted by the IMT in Case No. I were the victims of ex post facto or retroactive law. The IMT sustained the validity of the charge of crimes against peace as a violation of existing international law. In the subsequent Nurnberg proceedings, the crime against peace has been involved in four of the cases. In the I.G. Farbenindustrie case, and in the Krupp case, the Tribunals decided that the Nazi industrialists who supported and collaborated with the Nazi regime were ⁺now shown to have been parties to any decision resulting in the initiation of Germany's wars of aggression. The industrialists, therefore, were acquitted of the crime charged involving war guilt. It was held, however, ~~that the industrialists were responsible for war crimes and crimes against humanity, for participation in plunder and spoliation in occupied countries, in violation of the Hague Convention, and for participation in the slave labor problem of the Third Reich which was held not only to constitute a war crime, but also a crime against humanity.~~ In the case of the High Command involving fourteen top ranking Nazi generals, high staff, army and corps commanders, only one step removed from the top military leaders such as Keitel and Jodl, the Tribunal likewise decided that these military officers were not guilty of participating in the decisions at the policy level which resulted in the initiation of Germany's wars of aggression. The last of the twelve Nurnberg cases, the case against the foreign ministers ~~should reach the stage of final judgment in the very near future. This case will likewise determine whether high governmental officers can be held criminally responsible with Hitler for participation in the launching of World War II.~~ ^{Several Conventions} The Control Council Law and the Charter of the Military Tribunals define the crime against peace as including planning, preparation, initiation, and waging of wars of aggression, or wars in violation

of international treaties, agreements, and assurances. The concept of "waging" aggressive war would imply mass guilt, making it difficult to distinguish between those to be held responsible and those who are merely compelled to go along with the government in time of war. The subsequent proceedings at Nurnberg have recognized this difficulty and there has been no holding of guilt of the crime of "waging" aggressive war. The only convictions on the charge of crimes against peace therefore were in the first case involving the top Nazi leaders and in the Tokyo case. *4 of the leaders in the Munich Case*
One other case in the French Zone also resulted in a conviction. Three of the twelve Nurnberg cases involved defendants who were charged with war crimes and crimes against humanity for activities in connection with Himmler's notorious SS. For example, one of these cases involved SS officers who commanded special task forces sent into eastern occupied Europe charged with the task of exterminating the Polish intelligentsia and exterminating the Jews. The defendants in this case were charged with approximately one million murders of Jews and Poles. They were convicted of murder on a huge scale which, of course, during military occupation constitutes a war crime and a crime against humanity. Their conviction was based largely upon their own official reports setting forth their activities of massacre in the greatest detail. One of the Nurnberg subsequent proceedings involved the so-called "hostages" case. There was also involved charge of destruction of property not justified by military necessity in Norway. Some of the defendants were convicted on an individual basis for war crimes and crimes against humanity but the tribunal was unwilling to extend guilt for the taking of hostages. I recall also the outcry in Norway when certain of the acquittals on that phase of the case were publicly announced. One of the subsequent Nurnberg trials involved leaders of the German medical profession who were charged with atrocities consisting of medical experiments upon unwilling victims of concentration camps. There can be no doubt that these offenses constitute war crimes and crimes against humanity. A particularly interesting case, which has real meaning today, in the light of the trial *behind the Iron Curtain* of Cardinal Mindszenty, and the coming trials and convictions of protestant leaders in Bulgaria, is the so-called Justices trial. With great care, the Tribunal in the Justices case went into the facts pursu-

to which the Nazi Ministry of Justice had been perverted into legalizing murder under the guise of judicial decree. The Tribunal quite appropriately described the judiciary as:

"A nationwide, governmentally organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice; and through the instrumentality of the courts. The dagger of the Assassin was concealed beneath the robe of the jurist."

A number of provocative questions are asked in connection with the war crimes trials: were these trials legally objectionable because they were by victors over the vanquished? What do they mean for our leaders should we lose a war? Were the victors themselves without fault?

It would have been preferable, if existing international machinery for the trial of offenders against international penal law had developed to the point of providing the machinery to cover offenses of this magnitude. Unfortunately, we are in an era in which the development of substantive law has proceeded beyond our enforcement machinery. As has been properly said, we could not afford to ignore these crimes because we could not survive from their being repeated. Rather than ignore the offenses charged in the Nurnberg proceedings, the victors established their own tribunals to try the offenders. There is ample precedent for this in international law as applied to violations of the laws and customs of war. The crime against peace has been particularly limited in its actual application as has the crime against humanity. Of course, there rests on the victors the obligation of insuring a fair trial. In the Nurnberg subsequent proceedings, and in the procedural ordinance governing the Tribunal, every safeguard is provided to provide the defendants a fair trial. They were represented by counsel of their own choosing; they were not required to take the witness stand; they had the processes of the tribunal available to obtain evidence, and utilized this privilege; they were given ample opportunity to present their defenses and to make their arguments, and the record in the acquittals and in the numerous rejections of contentions of the

prosecution contains evidence of the dispassionate attitude with which the trials were conducted by the Nurnberg judges. The Nurnberg trials meant that our moral commitments, expressed in the Moscow Declaration, were carried out. These trials should have a great influence on the future development of international law. The trial ~~of Cardinal Mindszenty~~ ^{behind the Iron Curtain} poses again before the world the basic question of how human rights may be vindicated under a regime of world law. We may expect further developments in the recognition of human rights and may expect the development of the crime against humanity as part of a system of international law which will know no boundaries as the means of protecting these rights. However discouraged we may be at the daily headlines, we must live in the hope that there will be a re-assertion of moral, legal, and spiritual values throughout the world and that civilization will somehow develop the wisdom to establish a legal system which will mean the vindication of human rights wherever these are violated, whether in the name of government, or not, or whether in peace or in war. Progress is being made in focusing the development of substantive law in this direction and, to the substantive doctrines that are involved, the Nurnberg trials have made a great contribution. They are the grist for the mill for the codifier of the future. When seen in proper perspective, I am confident that the verdict of history will not be unfavorable to the Nurnberg trials and to the fairness with which they were conducted.