Louisiana Law Review

Volume 9 | Number 4
May 1949

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AN OUTLINE OF THE RESEARCH AND PUBLICATION POSSIBILITIES OF THE WAR CRIMES TRIALS

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Since the close of the Second World War, trials of individual persons charged with the commission of "war crimes" have been held on a scale which is quite without precedent in recorded history. The reasons for this are easy to perceive. The boundless havoc wrought by the war, the ruthless and barbaric practices of the Nazis and the Japanese militarists, and, finally, the widespread realization that another war might well put an end to modern civilization—these and other parallel factors aroused a worldwide demand for the trial and punishment of those who were guilty of launching the war and committing the atrocities.

War crimes trials—including a few very important trials—are still going on in 1949, but by the end of 1948 most of the major trials had been concluded. It is now possible to begin the task of surveying the overall results and analyzing the meaning of these trials—and of the facts which the trials disclosed—in human history.

A. General Background

The scope and variety of the war crimes trials which have been held during the last three years is not generally understood. The first trial at Nurnberg in which Goering and other top Nazi figures were defendants is, of course, the best known single trial. The judgment of the International Military Tribunal, and notable addresses by eminent counsel, including especially Mr. Justice Jackson, gave the first Nurnberg trial a unique quality and stature. However, viewing the war crimes program as a whole, it will be seen that the trials break down into four more or less definite categories.

First, there are the two trials conducted by four or more of the great nations jointly, pursuant to ad hoc international agreements. These are the first Nurnberg trial, in which judgment was delivered in October 1946, and the Tokyo trial, in which judgment was rendered in November 1948.

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Second, there have been more than a dozen trials held under the principal auspices of a single nation, but pursuant to international agreements or arrangements. For example, in Germany the four occupying powers (England, France, the United States and Soviet Russia) by quadripartite agreement authorized the establishment of war crimes courts in each of the four occupation zones. Twelve major trials have been held under the authority of this quadripartite enactment in the United States zone of occupation, and several have taken place in the French zone. The defendants in the American zone trials consisted of prominent German statesmen and politicians such as Lammers, Darre, Weizsaecker and Von Korsigk; military leaders such as von Leeb List, and von Kuechler; SS leaders such as Pohl, Ohlendorf, and Hildebrandt; industrialists such as Flick, Alfried Krupp, and the directors of I. G. Farben; physicians such as Karl Brandt, Rostock and Rose, and judges and lawyers such as Schlegelberger. Among the defendants in trials of this type in the French zone of occupation was the famous iron and steel magnate of the Saar, Hermann Roechling.

Third, thousands of war crimes trials have been held before tribunals constituted by a single nation. These include the many military trials held under the authority of the United States Army acting through the Judge Advocate General, the British military trials held pursuant to the Royal Warrant, and the numerous trials held by tribunals established in countries formerly occupied by the Axis powers, such as Soviet Russia, France, Holland, Norway, Denmark, Poland, Greece, Yugoslavia and the Pacific Islands.

Finally, there is a fourth group of trials arising out of the war which are essentially in the nature of treason trials, but which, like the war crimes trials, are basically concerned with "war guilt" and atrocities. These may be called the "Quisling trials," and include such proceedings as those against Petain and Laval in France and Graziani in Italy.

In the records of all these war crimes trials lies buried a wealth of information and ideas which can only be made meaningful to mankind by legal and historical analysis and research. Most of the leaders of Germany who survived the end of the war and many other prominent Europeans testified in the course of these trials. An incredibly large mass of documents, many of which are of the greatest historical importance, was introduced in evidence in the course of these proceedings. This is the raw material of history in wonderful profusion.

From the standpoint of law and contemporary morality, the importance of the trials is perhaps even greater. International penal law—a mere embryo a few decades ago—has developed with phenomenal rapidity. Many concepts and doctrines previously embodied chiefly or solely in treaties, addresses and textbooks have now been expounded and applied in judicial proceedings. Rulings by the tribunals on procedural questions will be of the utmost importance as precedents in developing a true system of international legal procedure. Indeed, it is not too much to say that these trials, more than anything else in recent centuries, have brought international law out of the lecture hall and into the courtroom. Almost overnight, international penal law has become a living reality.

It will be seen, therefore, that the research problems arising from the war crimes trials are numerous and varied and do not fall into any single category. To be sure, the legal aspect is the most important, but the historical phase is almost as impressive, and the trials contain much of interest to sociologists, scientists, soldiers and others. In the paragraphs below, an effort has been made to sketch some of the more important research and publication projects in summary form.

B. LEGAL ASPECTS

1. It is important, to begin with, that the war crimes trials be put in their proper perspective in the history of law. There is a school of thought that the war crimes trials are not judicial proceedings at all, but are mere political inquisitions which have no legitimate place in jurisprudence. Such controversial questions can be best approached by an objective study of the actual character of the several categories of war crimes trials in order to determine the extent to which they meet the requirements of judicial process according to the general standards of civilized countries. Furthermore, much can be learned by analogy from the early history of the development of domestic law. For example, many of the obstacles with which international law is confronted today are very similar to those which English judges encountered in the time of Bracton.

2. In the field of comparative law, it would be well worthwhile to make a comparative study of the concepts and procedures which prevailed in the various categories of war crimes trials. Naturally enough, a trial tends to take on the "color" of the country which constitutes the tribunal and, perhaps to a

lesser degree, of the country of which the defendant is a national. The practical obstacles to a thorough and detailed study of war crimes trials the world over are obvious, especially in the case of the countries of Eastern Europe. But the study is well worth making. For instance, in the war crimes trials held in the Soviet Union, the Soviet zone in occupied Germany, and, upon occasion, in other countries of Eastern Europe, Soviet jurisprudence has had to "come out of its shell." Whatever one may think of the merits of Soviet jurisprudence, it is making its mark in Europe, and the jurists of Eastern Europe are constantly endeavoring to influence the development of international law, and of domestic law in other countries.

3. Quite apart from the comparative law aspect, a general survey of war crimes trials the world over is necessary in its own right. Particularly since the dissolution of the United Nations War Crimes Commission, it has become extremely difficult to obtain accurate information as to how many trials have been held in each country, and how many convictions, acquittals, et cetera, have resulted. This is vital information which should be assembled as soon as possible, as the task will become increasingly difficult with the passage of time.

4. Needless to say, war crimes trials have raised a host of questions under the laws and customs of war. The permissible scope of reprisals, the treatment to be accorded to hostages, and the interpretation of rules governing the employment of prisoners of war are examples of this type of problem. A wide variety of other questions relating to the treatment of civilian populations in occupied territories have been argued and judicially determined, especially in the fields of forced labor and economic exploitation. There is no doubt that the laws and customs of war as embodied in the Hague and Geneva Conventions and in textbooks need to be re-examined in the light of modern experience. The records of war crimes trials constitute a unique source of information on the basis of which to make a new appraisal, containing as they do extensive testimony—both oral and documentary—by military and economic experts on the actual facts and practical requirements of modern warfare both at and behind the front.

5. Both at the first Nurnberg trial and at Tokyo the defendants were charged with criminal responsibility for planning and waging aggressive war. The same charge was brought in four of the subsequent Nurnberg trials and in the French zone trial of Hermann Roechling. Aggressive war as a concept in international

penal law has, as is well known, aroused much discussion, which so far has been based chiefly on the judgment in the first Nurnberg trial. Since then, the defendants at Tokyo have been convicted on the same charge, but numerous industrialists and military leaders have been acquitted at Nurnberg in the Farben, Krupp and High Command cases. One more Nurnberg trial involving this charge, in which the principal defendants are officials of the German Foreign Office and other leading government ministers, will be concluded in the very near future. It is now timely to make a careful analysis of the development and application of this doctrine in all seven of these cases. There are not likely to be any more until the conclusion of another war.

6. Among the victims of Nazi atrocities were many German nationals. These domestic atrocities did not constitute "war crimes" in the strict sense, since they were not committed against the nationals of an enemy power. Most of these barbarities were crimes under German domestic law. The extent to which they constituted crimes under international penal law has been the subject of much controversy. There is a strong body of opinion that such acts, when committed with the approval or toleration of the government, are crimes under international law. Others regard such a result as an encroachment on national sovereignty. The International Military Tribunal in the first Nurnberg trial treated Nazi atrocities against Germans as crimes under international law only if they had been committed after the outbreak of the war, on the theory that such crimes committed thereafter constituted a part of the entire process of waging an aggressive war. In several of the subsequent Nurnberg trials, the defendants have been charged—under the term "crimes against humanity"—on the basis of acts committed prior to the outbreak of the war. No defendant has been actually convicted on this basis, but conflicting views on this very fundamental legal question have been expressed by the Nurnberg tribunals.

The practical importance of this question can hardly be overstated, and the debates in the United Nations on the definition of "genocide" were a manifestation of the lively interest which it has awakened. Important as is the concept of "aggressive war," and beneficent as the Hague and Geneva conventions may be, we can hardly expect much further judicial development and interpretation of "crimes against peace" or "war crimes" except in the unhappy event of another war. The concept of "crimes against humanity," however, if it becomes an established part of inter-

national penal law—as it seems to be doing—will be of the greatest practical importance in peace time. Indeed, it may prove to be a most important safeguard against future wars, inasmuch as large scale domestic atrocities caused by racial or religious issues always constitute a serious threat to peace.

7. A particularly fruitful field for research and publication is that of legal procedure. Almost all the war crimes trials have presented procedural questions to which different answers might be given depending upon what system of law the court chose to follow. The evidentiary weight to be given hearsay evidence or affidavits is a common example of this type of problem. Furthermore, the unsettled state of the world and the unusual nature of the trials precipitated many novel procedural matters which the tribunals had to determine without much in the way of past practice to guide them. Based upon the records of the Nurnberg trials alone a most useful study could be made, but a full treatment would require examination of the records of many other trials in order to make a comparative study. From such a study, the outlines of international legal procedure should emerge.

8. Numerous questions are common both to domestic law and international law. For instance, the charge of conspiracy provoked much opposition among German counsel at Nurnberg, partly because the concept of conspiracy has been more fully developed in Anglo-American law than in continental law. Conversely, no less an authority than Mr. Henry L. Stimson has criticized the judgment of the International Military Tribunal in the first Nurnberg trial on the ground that its decision on the conspiracy charge was too narrow.[1] Another good example is the question of what weight should be given to the defense that the act charged as criminal was committed under duress or fear of future punishment. To such questions systems of domestic law do not give uniform answers. Judges in war crimes cases have, therefore, had considerable elbow room in determining them. This has tended to develop a sort of "international common law," derived by an eclectic process from various systems of municipal law.

9. In many of the more important war crimes trials, the defendants and their counsel have challenged the fundamental "fairness" of the proceedings. These attacks should be carefully and objectively studied on a factual basis.

1. Stimson, the Nuremberg Trial: Landmark in Law (January 1947) Vol. 25, No. 2, Foreign Affairs 180, 187-188.

10. Perhaps less important than most of the foregoing problems, but interesting enough nevertheless, is the development of the concept of treason in state trials held in such countries as England, Norway, Holland, Belgium, France, and Italy. In many of these trials the defendants were leading statesmen, such as Petain in France and Graziani in Italy, and often the charges have been somewhat similar to those brought in war crimes trials. A comparative study would surely be worthwhile.

C. HISTORICAL AND CULTURAL FEATURES

1. Nearly all of the more important war crimes trials contain some information of interest to historians, and the principal problem here is really one of so disposing of the original documents that they will continue to be available for examination by scholars, and of making arrangements for publication of such documents and oral testimony as are most significant from a historical standpoint. But of course certain of the big trials are of especial interest to historians. In the first Nurnberg trial and in the Tokyo trial, the general structure and functioning of the Third Reich and of the Japanese government, and the recent political and economic history of Germany and Japan, were sketched in broad outline. Many of the most interesting documents introduced at the first Nurnberg trial have been made available through government publication.[2] The subsequent Nurnberg trials have each been concerned with a more or less definite "subject" and, taken together, they have not only filled in a vast amount of detail, but have covered several areas which were not explored in the first trial.

Of outstanding interest to historians, of course, is the trial which is just now being concluded at Nurnberg involving leading officials of the German Foreign Office and other high ranking government officials of the Third Reich. Both the prosecution and the defense have had access to the archives of the German Foreign Office in the Berlin Document Center, and a very wide selection of documents from these archives was introduced in evidence in the course of the trial. These documents shed new light on many subjects, including especially the Anschluss, the destruction of Czechoslovakia, and the relations between the Nazis and the Vichy government of France.

A fascinating historical analysis of the rearmament of Ger-

2. See, for instance, the series entitled "Nazi Conspiracy and Aggression," published by the United States Government Printing Office.

many can be developed from the Krupp and Farben cases considered together with the High Command case. The Krupp documents are especially revealing concerning the years from 1920 to 1935, and the Farben documents are of prime importance for the period from 1933 to 1940. From the Krupp and Farben cases, as well as the Flick and Roechling proceedings, the nature of the relationship between Hitler and the leading German industrialists may be determined with reasonable clarity. The part played by the German generals has been laid bare in the High Command case, in which much additional information was brought to light concerning the political crisis of February 1938 —known as the Blomberg-Fritsch affair—which is now seen to have been a momentous episode in the history of the Third Reich.

2. Several of the documents discovered and first utilized in the course of the Nurnberg trials are of such major historical proportions that they should be published in toto, with appropriate editorial and reference annotations. Two such items are the diaries kept respectively by General Jodl, who became Hitler's most immediate military advisor on operational matters, and General Halder, Chief of the General Staff of the German Army from 1938 to 1942. Of these, the Halder Diary is perhaps the more important, as it covers in great detail almost every day from August 14, 1939, to September, 1942. Halder was skilled in shorthand, and made very full notes concerning what transpired in all the conferences and conversations which occurred in the course of his duties as Chief of the General Staff. He was very sophisticated politically, and had excellent contacts with the German Foreign Office. He was also highly articulate; his reporting is extremely clear and cogent, and there is little reason to doubt the accuracy of most of his statements. Up to the time of the attack on the Soviet Union in June 1941 the diary is full of political as well as military information; thereafter Halder was on the Eastern front and cut off from many of his contacts in Berlin and elsewhere, and the diary is concerned almost exclusively with the conduct of the Russian campaign. No worthwhile study of German or European affairs during these years can be made without taking full account of this amazing document.

The Jodl diary is much more sketchy, but it does contain numerous entries made between January 4, 1937, and September 29, 1938, a period which the Halder diary does not touch. This diary is a prime source of information on the Blomberg-Fritsch affair and its aftermath, and is also a very valuable supplement to the Halder diary for the first ten months of the war.

3. In various other branches of science and culture, one or more of the Nurnberg trials will be found of special interest. For example, the first of the subsequent Nurnberg trials was chiefly concerned with crimes committed by doctors, and the principal defendants included Karl Brandt, head of the medical and health services of the Third Reich, General Handloser, chief of the medical services of the Wehrmacht, and the internationally known specialist in tropical medicine, Gerhard Rose. The record of this trial is replete with information of interest to physicians and scientists, and the Tribunal's judgment undertakes to lay down with some precision the requirements to which a doctor must conform in order lawfully to perform medical experiments on human subjects.[3] In another trial of particular interest to lawyers, the defendants were judges and officials of the German judicial system. In this case several German judges were sentenced to prison for life or for a long term of years because, in the words of the Tribunal: "The dagger of the assassin was concealed beneath the judicial robe"; the opinion explores exhaustively and brilliantly the limitations of criminal responsibility for acts performed in a judicial or legal capacity in time of war.[4]

Of great interest to the ethnologists and sociologists are the several cases in which the leaders of the SS were tried. In these cases many of the barbaric and horrible superstitions of the SS were judicially examined and fanatically defended by such pseudo-intellectual SS leaders as Ohlendorf. Especially important ethnologically is the trial of the leaders of the Race and Resettlement Office of the SS.

Interesting social and scientific observations may be made concerning those who conducted the trials as well as those who were defendants. Why, for example, have so many death sentences been imposed and executed against Japanese military leaders without any visible public reaction, whereas German generals convicted of equally serious or even graver crimes are, with very rare exceptions, sent to prison but not executed?

D. CURRENT AFFAIRS

A number of developments since the end of the war have resulted in a great diminution of the "news value" of the war crimes trials in the United States and elsewhere, and have tended

3. See Mitscherlich and Mielke, Doctors of Infamy—The Story of the Nazi Medical Crimes (New York, 1949).

4. Braud, Crimes Against Humanity and the Nurnberg Trials (1949) 28 Oregon L. Rev. 93.

to obscure the importance of these trials to the public at large. In the long run these things will tend to assume their proper proportions. Already it is noticeable that in Germany the trials are awakening much more interest and controversy now that they are nearly concluded, than they did two or three years ago. Germans are beginning to shake off the numbed and apathetic mental state to which so many of them fell victim at the close of the war, and improved economic conditions are beginning to make possible a revival of the life of the mind, at universities and in the public press. The war crimes trials, more than any other features of the occupation, touch the soul and conscience of Germany; it is not too much to say that in ten years the trials will probably form a major focal point of German political and historical thought.

Presumably everyone would agree that the question of what currents of opinion and what attitudes toward recent history win general acceptance in Germany during the next decade is a matter of the most profound moment to Europe and, indeed, to the world. In shaping the foreign policy of the United States, and indeed, of any other occidental power, it is important to detect these currents of German thought and attitudes of mind at an early stage, and to predict their probable development as closely as possible. Obviously, those who once expected that the exposure of conditions in German concentration camps and the revelations of the war crimes trials would produce a profound "guilt" impact on the German mind, and precipitate a "cleansing" reaction which would facilitate the establishment of German democracy, have been sadly disappointed. This is not to say that the revelations concerning the concentration camps and other unsavory matters have had no effect in Germany, but obviously the reaction has been both slower and more complex than was foreseen. The following quotation from a special article which appeared in August 1948 in the German church periodical "Christ und Welt" (Stuttgart) is illustrative:

> "The Nurnberg Trials have entered into their last phase. The dismantling of the huge court bureaucracy has commenced. Day after day trucks full of suitcases and trunks are rolling to the railroad station. A wild race for new jobs has begun. Only a few members of the prosecution seem to want to return to the United States. And the offices, hardly vacated, are already filling up with new bureaucrats. What is given up by the prosecution is taken over by OMGUS . . . .

> Nurnberg cannot easily rid itself of the ghosts called by the third Reich, nor of the efforts to liquidate it in history. The colored guard regiment will probably stay, too, out there in the SS Kaserne before the Marsfeld. And also will remain the streams of baby carriages, in which Nurnberg girls wheel their black, and coffee-colored babies to the Kaserne, waiting for uniformed fathers, or friends of disappeared fathers, to throw packets of chewing gum and candy out of the upper stories of this huge building."

Obviously, the field of war crimes is only one of several which must be surveyed in order to study the profoundly important question of what shape the postwar German mind is taking. But the war crimes trials offer much which is of truly unique significance in this connection. In the arguments put forward to the Tribunals by the German defense counsel may be found much highly revealing material. By a careful scrutiny of the defense arguments, one may, in effect, see a "preview" of the German *apologia pro sua vitae* of the future.

Over two hundred German attorneys, many of them highly competent, were employed as defense counsel at Nurnberg during the course of the trials. These well-educated professional men, by no means homogeneous from a political standpoint (many of them were Nazi party members and a number were active Nazis) were thrown into close contact with the documentation which revealed the inner workings of the Third Reich, with the responsibility of doing the best that they could for their clients. Although their tactics were at first cautious, the defense counsel soon realized that they could adopt a bold and intransigent attitude without risking any unpleasant consequences, and a number of them proceeded to take what appear to be very extreme positions in defense of their clients.

For example, among the leaders of this "intransigent" group was Dr. Otto Kranzbuehler, a former German naval judge advocate, who defended Admiral Doenitz before the International Military Tribunal, the industrialists Alfried Krupp and Burkart in subsequent Nurnberg trials, and the industrialist Herman Roechling before a French zone tribunal. Kranzbuehler and certain of his colleagues have worked out and presented a very methodical and elaborate defense based on the propositions that (a) modern warfare has developed to such a "total" point that all of the laws and customs of war are obsolete, (b) Germany was not responsible for this change in the character of warfare,

but on the contrary, it is the United States and England that are chiefly responsible, since they developed economic warfare and strategic bombing, (c) therefore it was certainly no more blameworthy for the Germans to enslave and deport civilians from Poland and France than it was for England and the United States to bomb German cities, (d) if the slaughter of Jews by the Germans must be admitted to have been in excess, certainly this was no worse than Russian treatment of German prisoners or the British air raid on Dresden, and (e) anyhow what about the atomic bomb?

Regardless of what one may think of the merits of this line of argument, it is important to realize that many Germans will surely find it attractive. And other defense counsel, who did not go to such lengths, nonetheless sought to confine responsibility for the crimes of the Third Reich within very narrow limits. A careful analysis of the defenses put forward at Nurnberg, and of the extent to which these defenses are winning acceptance in educated and professional circles in Germany, would be of the most profound importance in gaining that deep understanding of Germany which is necessary to the intelligent shaping of our occupation policy and of our foreign policy in Europe.

To pass from German to more general aspects of the entire war crimes question, it is of the first importance that the task of planning and developing permanent judicial machinery for the interpretation and application of international penal law be tackled immediately and effectively. The war crimes trials, at least in Western Europe, have been held on the basis that the law applied and enforced in these trials is international law of general application which everyone in the world is legally bound to observe. On no other basis can the trials be regarded as judicial proceedings, as distinguished from political inquisitions. On any other basis, the trials may become a reproach to those who sponsored them, and will surely have a damaging rather than a beneficent effect in Germany. No task which confronts international lawyers and statesmen today is more important than that of solving the numerous and difficult problems which surround the project of making international law a hard reality throughout the world.[5]

5. "The fundamental problem confronting the world today is to establish world order under the rule of law," A Projet for a World School of Law (Harvard Law School, 1948) 5.

E. CONCLUSION

All these projects have as their common denominator that they are based largely on the records of the major war crimes trials, and obviously the most immediate problem is that those records be disposed of in such a way that they will be available to those who need them. The indictments and judgments and some of the basic documents can and should be made generally available by government publication, but there is nonetheless a real need to supplement government activities in this field. Only a very limited number of complete sets of the testimony and documents of all the Nurnberg trials can be assembled. Each of these sets is very voluminous and requires a large amount of library space. These complete sets should, it appears, be deposited in the largest and most centrally located libraries and be carefully indexed.

The foregoing by no means exhausts the problems growing out of the war crimes trials which warrant exploitation. It is an attempt only to touch the highlights. Clearly this is an *international* problem, which can much more profitably be approached in close collaboration with the lawyers and scholars of other countries. Obviously, too, this is no small job. It will require the support of at least several large institutions and the best efforts of many minds.