The International War Criminal Trials and the Common Law of War

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proceeds as projected by the Bulwinkle Bill and the Interstate Commerce Commission itself, there is no need of any injunctive action by the Supreme Court or any further concern by bodies other than Congress and the Interstate Commerce Commission.

6. The pyramiding of regulatory controls and duplication of investigations is poor administration and worse economy. Consideration should be given to enlargement of control of the Interstate Commerce Commission over monopolistic practices in rate promulgation, removing this matter from the sphere of the Sherman Anti-Trust Act.

7. Finally, reduction of political pressure on the Interstate Commerce Commission by politicians and other pressure groups is desirable so that it will be able to continue to do the excellent work it has done in the past toward the goal of a soundly administered transportation system.

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THE INTERNATIONAL WAR CRIMINAL TRIALS AND THE COMMON LAW OF WAR

One of the most significant events in human history is at present taking place in Nuernberg, Germany. Here, for the first time, the nations of the earth have united to take legal action against those individuals who, it is alleged, have broken the most primary rules and laws of human society. At Nuernberg for the first time, the nations of this planet are applying internationally those principles of law enforcement which for centuries have been applied on a national scale. But just as every forward step in human progress has been met with opposition, so the international war criminal trials at Nuernberg have met with opposition.

The most frequent criticism hurled at these trials is that they are applying newly created law and that this type of procedure is without legal basis or precedent. Carrying on from there, these

41 H.R. 2536—To meet the criticism of the private nature of these rate bureaus the Bulwinkle Bill provides for adequate regulation by the Interstate Commerce Commission of the publishing of rates. The House Commerce Committee has recommended also that the Interstate Commerce Commission be given authorization to require reports from and inspection of the records of rate bureaus.

42 A. H. Feller, Administrative Justice, 27 Survey Graphic 494, "No one asks the court to relax its vigilance over administrative agencies; but it must proceed with caution, to intervene only where essential rights are transgressed, and not permit general principles to impede effective enforcement of the law."
critics arrive at the conclusion that *ex post facto* law is being applied in contravention of the recognized principles of law as evolved through centuries of legal and human experience. This contention is very far indeed from the truth. As a matter of fact, the law being applied at Nuernberg is not newly created, but has its roots in the very beginnings of human social organization.

The common law of war had its inception in antiquity. The sea lanes of the ancient world were beset by many pirates, and dealing with these pirates, who owed allegiance to no nation, became a matter of international concern. After the end of the Roman Empire, and with the advent of Feudalism, the development of the principles of the common law of war became dormant, for in this turbulent period there were no national states which could enunciate and enforce any form of law. The practices of war in this period were entirely brutal and without restraint. But with the decline of Feudalism and the recrudescence of the national state, once again western civilization was faced with the problem of dealing with the international pirates who preyed upon the peaceful trade of the world and committed excesses which even then were recognized as contravening the laws of war. These brigands did not confine themselves to the sea lanes of the world, but also operated on land, especially in the mountainous areas of Europe, near the international boundaries. The terrain particularly lent itself to the operations of these international criminals for by constantly crossing and recrossing the national boundaries, the criminals could avoid pursuit and capture.

From these obscure beginnings there began to develop a set of rules which were recognized throughout the civilized world and were applied by the nations of the world. A pirate when caught after a battle with the military forces of a nation, would never be afforded the immunities granted to the captured members of a recognized national military force. This body of rules had so grown by the 16th century that Balthazar Ayala (1548-84) was able to recommend that, “the Pope be recognized as supreme judge for instances where sovereigns violated the law of nations or resorted to indefensible cruelties in the conduct of their perhaps initially lawful military campaigns.”

The common law of war continued to develop and be applied in the national courts of the world, gaining more and more certainty and clarity with the passage of years. In this country, we had many

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3 33 Calif. L. Rev. 176; cited supra note 1.
4 Ibid. at 188.
occasions to use this common law of war. As a result of the Modoc Indian War of 1873, a prisoner of war was tried and convicted before a military commission for having killed a bearer of a flag of truce; in upholding this action, the Attorney General of the United States said, "military commissions are competent to try for offences against the recognized laws of war and to subject those found guilty to such punishment as those laws require or justify." 6

Attorney General Speed, when asked for an opinion on the competency of a military tribunal to try offenses against the common law of war, wrote, "No one who has ever glanced at the many treatises that have been published in different ages of the world by great, good and learned men, can fail to know that the laws of war constitute a part of the law of nations and that those laws have been prescribed with tolerable accuracy." 7

These rules and conventions of war were again enunciated and recognized by the Hague Conventions of 1899, 1907, and the Geneva Convention of 1929. They were also declared by Article 228 of the Treaty of Versailles in which the German Government recognized the right of the Allies, "to bring before international military tribunals, persons accused of having committed acts in violation of the laws and customs of war." 8

Preparatory to writing that treaty, the Allies set up a commission to determine the law as to the punishment of war criminals and to submit their findings together with their recommendations as to the procedure best suited to punish these offenders. The majority of the commission recommended an international court which would apply "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience." 9

The attempted punishment of the war criminals of World War I resulted in a dismal failure, for although Germany had agreed to surrender all persons requested by the Allies, she refused to do so, when a list of names was presented to her. After much diplomatic maneuvering, Germany was finally allowed to try her own war criminals. Of an original list of approximately 700 persons accused of serious offenses, only twelve were actually tried and six convicted. The sentences were inadequate and the two whose sentences were most severe soon escaped from jail, apparently with official approval.10

In one of the trials at Leipzig, the German Supreme Court in the case involving the torpedoing of the British hospital ship, Llandeveny Castle, said, "any violation of the law of nations in warfare

8 Treaty of Peace With Germany (1919) 13 AM. J. INT. L. 151, 250.
10 Glueck, Trial and Punishment of Axis War Criminals (1942) 4 FREE WORLD 138; also see Glueck, War Criminals—Their Prosecution and Punishment (1944).
is . . . a punishable offence so far as in general a penalty is attached to the deed. . . . The fact that his deed is a violation of international law must be well known to the doer. . . . The rule of international law, which is here involved is simple and is universally known.”

Thus it can readily be seen that the substantive provision of the Charter of the International Military Tribunal is the logical culmination of centuries of legal decisions and social thought. The law being applied at Nuernberg is as old and well established as English common law. Furthermore, ex post facto law is not being used; the crimes for which the twenty defendants are being tried have been penalized by the courts of the world for centuries.

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12 Charter of The International Military Tribunal (1945) 31 A. B. A. J. 454:

Art. 6: The following acts or any of them are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility.

A. Crimes against peace. Namely planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

B. War Crimes. Namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose, of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages or devastation not justified by military necessity.

C. Crimes against humanity. Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war or persecutions on political, racial or religious grounds in execution of, or in connection with, any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan.

Art. 7: The official position of defendants, whether as heads of state or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Art. 8: The fact that the defendant acted pursuant to order of his Government, or of a superior, shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.
The next criticism which is leveled at the Nuernberg trials is directed at Article 8 of the Charter. It is said by many international lawyers that this provision is in direct contravention to the established law. The doctrine of
respondeat superior, or the defense of superior order, is an entirely outmoded principle and while there is some authority for this doctrine, there is greater authority in favor of disregarding this troublesome concept. It has always been held in this country that
stare decisis is fully sensitive to social, economic and political evolution or change, and in the face of conflicting precedents judicial choice is permitted. Therefore, faced with conflicting precedents and with a pressing social need, the victorious powers had a choice of doctrines and they discarded
respondeat superior.

The German court at Leipzig made the following striking statement, "The killing of enemies in war is in accordance with the will of the state that makes war... only in so far as such killings are in accordance with the conditions and limitations imposed by the law of nations." The German Military Penal Code says, "A subordinate who acts in conformity with orders is liable to punishment as an accomplice, when he knows that the ordered acts involve a military or civil crime or misdemeanor, without regard to whether it was dangerous for him to disobey."

In the Anglo-American common law, which does not recognize responsibility of the government for torts of its officers, the superior order is not a justification and the officer who executed an unlawful order is liable to the injured. If he had to pay damages to the injured, he could in a proper case be indemnified, ex-gratia by the government.

Another principle of the international common law of war with conflicting precedents, is that of the immunity of the head of a state. This defense has been specifically ruled out by Article 7 of the International Military Tribunal's Charter. Thus we now have as a recognized principle the essence of the classic remark of Sir Edward Coke when he reminded James I that the medieval doctrine of the supremacy of the law took precedence over the divine right of monarchy by quoting to him the words of Bracton, "The king is subject not to men, but to God and Law."
After the last war, Germany conceded the right of the Allies to try the Kaiser for war crimes, and merely the refusal of Holland, a neutral country, to surrender him, saved the monarch. In World War I, the commission was of the opinion, "that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including chiefs of state, who have been guilty of offenses against the law and customs of war or the laws of humanity are liable to criminal prosecution." Here again the great powers of the world when faced with conflicting doctrines made a choice in light of the existing sociological facts.

Another favorite legalistic argument which is directed against the Tribunal is the doctrine of Nulì Poema Sine Lege (No Penalty Without Law). "But it doesn't follow from this that in the absence of domestic legislation an international court cannot justifiably punish acts well known by all concerned to be contrary to the law of nations. Direct application of international law to individuals who have violated the laws and customs of war does not amount to giving law retroactive force." This is borne out by our own legal history. For when Henry Wirz pleaded before a military commission established in 1865 that it had no jurisdiction since it was not authorized by statute, the plea was overruled and he was convicted and hanged for murder in violation of the laws and customs of war.  

Then also criticism might be leveled at the fact that the court which is now trying the twenty defendants had no jurisdiction at the time the crimes were committed since it was not in existence. But this is not a fatal defect for it is conceded that the military tribunals have always been able to take cognizance of offenses committed during the war before the initiation of the military government or martial law.  

There seems to be one legal factor about international law which is constantly being ignored, namely that international law is permissive rather than a restrictive body of rules. That is to say, "that

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23 Glueck, By What Tribunal Shall War Offenders Be Tried (1943) 56 Harv. L. Rev. 1059, 1081.
25 J. A. G. 1912, 1067 (1-C-8a) (3) (b) (2).
international law confines the jurisdiction of sovereignties and those rights which are not specifically ruled out accrue to the nations of the world as a residue of power." 26

The Permanent Court of International Justice said in 1927, 27 "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed. All that can be required of a State is that it should not over-step the limits which international law places upon its jurisdiction."

Immediately after the trials at Nuernberg had opened, the defense counsel argued that the defendants were not being given a fair trial because only the victorious powers were represented on the Tribunal. This is hardly a valid argument, for as a result of their activities in the prosecution of the war criminals of World War I, the German people have shown themselves to be utterly unreliable when it comes to administering this type of justice.

President Wilson, 28 when considering the formation of an international tribunal similar to the one now functioning at Nuernberg, was asked about German participation and he made the following statement:

As regards the German contention that a trial of the accused by tribunals appointed by the Allied and Associated Powers would be a one-sided and inequitable proceeding, the Allied and Associated Powers consider that it is impossible to entrust the trial of those directly responsible for offences against humanity and international right, to their accomplices in their crimes. Almost the whole world has banded itself together in order to bring to naught the German plan of conquest and dominion. The tribunals they will establish will therefore represent the deliberate judgment of the greater part of the civilized world. The Allied and Associated Powers are prepared to stand by the verdict of history as to the impartiality and justice with which the accused will be tried.

In conclusion it can be said that the trials in Nuernberg are founded on sound law and represent the most encouraging sign in the recent history of human relationship. It will now become impossible for an individual, who has power thrust upon him by the force of historical circumstance, to escape punishment for his international crimes merely because of their enormity.

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26 The Permanent Court of International Justice in 1927 (S. S. Lotus) France v. Turkey, 2 Hudson World Court Reports 23.
27 Cited supra note 26.
28 Glueck, By What Tribunal Shall War Offenders Be Tried (1943) 56 Harv. L. Rev. 1059.