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War Crimes —

A Refutation of Objection

By OTTO E. REIK*

In the War Crimes Trials in Nuernberg and Tokyo, key military and civilian officials of our former enemies have been tried for the crimes they committed during World War II. These trials have become a target for attack from both representatives of the legal profession and laymen.

Most of the criticism can easily be refuted. Here are some of the most frequently expressed objections and our answers to them.

Objection No. 1. It is an offense against our concept of justice that the powerful victor should make himself the judge of nationals of a defeated and therefore helpless nation.

Answer. One of the most eminent living scholars in International Law, Lauterpacht, answered this objection in 1944. He declared:

“In the existing state of International Law it is probably unavoidable that the right of punishing war criminals should be unilaterally assumed by the victor. This is so in particular when, as may be the case at the close of the second World War, the victorious side represents the overwhelming majority of states and when there are few neutral states left capable of ensuring the impartial administration of justice.”¹

It is clear that anyone brought to trial for a crime is confronted by a most powerful opponent, the State engaged in the administration of justice. That is the fateful situation the offender has brought on himself by his illegal act. This is precisely the reason why states were created in the first place. Mankind knew that collective power alone could safeguard its greatest treasures: Life, Liberty Property. It is power which backs the policeman who arrests, the judge who sentences, and the jailer who imprisons the criminal. It is a truism that justice cannot be practiced without power.

It is correct to say that power can be either constructive or destructive. Power therefore is the source for the creation of order by

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¹ The British Yearbook of International Law 1944, “The Law of Nations and International Law” by Professor H. Lauterpacht; p. 59.

the honest and of disorder by the dishonest. The application of power to restore order and justice where disorder and injustice were created by the violators of international peace is a justified measure.

Objection No. 2. The right of the accused to a fair trial was denied because of the failure to choose the judges of the court from neutral countries.

Answer (a) The right to a fair trial was safeguarded because the judges were impartial jurists of undisputed integrity; the trials were public, and representatives of the international press were present. In addition, the accused were entitled to be represented by counsel of their own choice, and were confronted in open court by the witnesses against them.

(b) The objection is, moreover, invalid because individuals who have committed treason or other crimes against their respective countries have no claim to trial by a neutral power. The administration of justice within a country would suffer, if such a principle were adopted. In making the defendants stand trial before a court of the aggrieved countries the law of the charter followed an almost universal criminal law. If an offender escapes into jurisdiction of an indifferent society, he is extradited and the fugitive brought back to trial in the territory interested in his prosecution.

(c) In any event, what neutral powers were available for this mission? The only nations with legal systems comparable to ours that did not participate in World War II were Sweden, Switzerland and Portugal. However, there was a possibility that the so-called neutral jurists may have been influenced by the strong and well-financed Axis propaganda which had infiltrated all neutral countries.

Objection No. 3. The war crimes trials have set a precedent for all future victors to hold political and military leaders responsible for crimes committed during a war.

Answer. This objection must be admitted as correct. It has been acknowledged in the text of the last judgment pronounced in Nuernberg: "We may not, in justice, apply to these defendants because they are Germans, standards of duty and responsibility which are not equally applicable to the officials of the Allied Powers and to those of all nations" ²

There it has been stated clearly that we are prepared to be tried for any war crimes that we may commit. It is the very term "crimes" in which our statesmen and generals may find assurance. In a highly developed democracy like ours, standards of duty and responsibility

²TAYLOR: NURENBERG TRIALS, WAR CRIMES AND INTERNATIONAL LAW (1949), p. 353, published by the Carnegie Endowment for International Law.

have been created which rule out crimes of the order of those committed by the Nazis or Japanese. That has been proven in the last two world wars. Our concept of right led the court to assume the defendants innocent unless they were proven guilty and to acquit such defendants as Schacht and von Papen.

The often heard criticism, that some of the defendants committed the crimes charged against them under the compulsion of orders from their military superiors, can best be refuted by quoting Paragraph 7 of the German Military Penal Code:

"If execution of an order given in line of duty violates a statute of the penal code, the superior giving that order alone is held responsible for it. The subordinate obeying that order, however, is liable to punishment as an accessory in the event that he was aware that the order involved an act the commission of which constituted a common or military crime or offense."

Wherever there was any doubt in the guilt of officers who were alleged to have participated in the commitment of a crime, they were acquitted. For this reason Lt. Gen. Foertsch and Brig. Gen. Geitner were acquitted of all charges in Case No. 7 (*United States v. List et al.*). Although they had known of the criminal orders which led to the atrocities, and indeed had initialled and distributed some of them, the Tribunal concluded that their lack of "command of authority" and the "want of direct evidence placing responsibility" upon them required their acquittal.³

Objection No. 4. It was wrong to admit Soviet Russia as a member of the War Crimes Trials because she herself was guilty of conspiring with Germany in the aggression against Poland.

Answer. This objection justly points to a mistake which, though regrettable, is of little significance. It originated in the hopeful belief that we were entering into a new era with the creation of the United Nations. To ignore Soviet Russia as a participant might have endangered the very foundation on which the world was to be built. Quite aside from these considerations, the most important fact remains that Russia's vote, which for the most part was that of the majority had no bearing on the result of the trials.

Objection No. 5. The London Charter enacted on August 8, 1945, on which the War Crimes Jurisdiction is based is ex post facto and violates Article I, Section 9, Point 3 of the American Constitution. Criticism refers to the following statements by the United States representatives in Versailles, Major James Brown Scott and Secretary of

³ *Ibidem*, p. 325.

State Robert Lansing, who said on 29 March 1919 in the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: " The American representatives believe that the Commission has exceeded its mandate in extending liability to violations of the laws of humanity in as much as the facts to be examined are solely violations of the laws and customs of war. They also believed that the Commission erred in seeking to subject heads of state to trial and punishment by a tribunal to whose jurisdiction they were not subject when the alleged offenses were committed. A judicial tribunal deals only with existing law and only administers existing law They were adverse to the creation of a new tribunal, of a new law of a new penalty which would be ex post facto in nature and thus contrary to an express clause of the Constitution of the United States and in conflict with the law and the practice of civilized nations "4

Answer The answer was given conclusively by Justice Robert H. Jackson on 6 June 1945 in his report to the President of the United States in which he rebuts James Brown Scott and Robert Lansing: " Nor should such a defense be recognized as the obsolete doctrine that a head of state is immune from legal responsibility We do not accept the paradox that legal responsibility should be the least where power is the greatest. With the doctrine of immunity of a head of state usually is coupled another, that orders from an official superior protect one who obeys them. It will be noticed that the combination of these two doctrines means that nobody is responsible. Society as modernly organized cannot tolerate so broad an area of official irresponsibility "5

Here indeed we have arrived at the very central problem of the entire War Crime issue. Moreover, we have arrived at the judicial landmark which has been set by the creation of a new law This law for the first time introduces the criminal liability of the individual for wrongful acts committed during the course of a war.

Let us examine the precedents for establishing individual responsibility for war crimes.

Francisco de Vitoria, who is considered the first author who wrote on international law, said in 1532 that a belligerent is entitled to punish for war crimes those members of the armed forces of the opponent who happen to fall into his hands. This principle was frequently

⁴ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. Report of March 29, 1919, pp. 127-151 of the *Amer. Journal of International Law*, Vol. 14, 1919.

⁵ Report of Robert H. Jackson to the International Conference on Military Trials, London 1945, Document VIII, pp. 46-47.

repeated after that time by Grotius, Christian Wolff, Johann Jacob Moser, Holland, etc.⁶

The validity of this custom was reaffirmed as recently as April 25, 1945 when, in a communication from the British Government to the U. S. President, the following statement was made: "The question arises whether they (i.e., the major criminals associated with Hitler and Mussolini) should be tried by some tribunal claiming to exercise judicial functions, or whether the decision should be reached and enforced without the machinery of a trial. His Majesty's Government wish to put before their principal Allies the reasons which have led them to think that *execution without trial* is the preferable course."⁷

This is a direct continuation of the line of thought of Francisco de Vitoria who asserted that international custom does not subject the captor nation to any obligation. Its only opponent is the captured individual without rights who—as a war criminal—lacks all protection of an international convention.

Thus, the United States would have been fully justified in perpetuating custom and tradition by punishing World War II criminals without a trial. This however the U. S. did not feel justified in doing. Our attitude on this issue is vividly expressed by the U. S. Memorandum reported during the International War Crimes Conferences in San Francisco on April 30, 1945. "It may be argued that the Nazi leaders should be dealt with politically rather than judicially and that, without trial by joint action they should be put to death upon capture. The U. S. is vigorously opposed to such political disposition. The

⁶ Lauterpacht: *The Law of Nations and the Punishment of War Crimes*, BRITISH BOOK OF INTERNATIONAL LAW, pp. 61-62. "the practice and the doctrine of international law as well as the municipal law of a considerable number of states recognize that a belligerent is entitled to punish for war crimes those members of the armed forces of the opponent who fall into his hands. There is hardly a dissenting voice in the general approval of that rule. Neither is it a new doctrine in international law. Francisco de Vitoria, writing in 1532, stated the underlying principle. Grotius, while pleading for prisoners of war who have surrendered or desire to do so, says: "in order to warrant their execution it is necessary that a crime shall have been previously committed, such a crime, however, as a just judge would hold punishable by death." Christian Wolff, the German philosopher and lawyer, writing in 1764, reproduces, almost literally, the same view. Johann Jakob Moser, a leading German positivist writer of the same period, is even more emphatic: "Enemy combatants who act contrary to international law need not, when they fall into the hands of the belligerent, be treated as prisoners of war, but may be treated as robbers, murderers and so on." The Institute of International Law expressed the same view in 1832. Holland, writing in 1908, was very definite on the subject "

⁷ Report of Robert H. Jackson to the International Conference on Military Trials, London, 1945, Aide-Memoire from the United Kingdom, April 23, 1945, handed over by Sir Alexander Cadogan to Judge Samuel Rosenmann, Assistant of the President, pp. 18-20, Doc. II.

satisfaction of instincts of revenge and retribution for the sake of retribution are obviously the least sound basis of punishment. It will retard progress towards a new concept of international obligations simply because those who have sought in this war to preserve democracy will have made their most spectacular dealing with the vanquished, a negation of democratic principles of justice. They will have adopted methods repugnant alike to Anglo-American and Continental traditions. A political disposition of the Axis leaders would be a continuation of totalitarian practices⁸

Once having committed ourselves on this issue we then proceeded to draw the consequences by submitting to the victorious powers a far-reaching innovation which meant the introduction of a new element into international law

In the final analysis two measures were proposed and subsequently adopted.

(a) the yielding of unilateral power to self-imposed restrictions favoring the war criminal,

(b) the initial recognition of aggressive warfare as a war crime for which the individual was held answerable. In this category also fell such violations of the laws of humanity which could not be regarded as customs of war.

This second measure seems to be a violation of the *ex post facto* rule.

But this interpretation is a fallacy because the conditions which make the *ex post facto* rule applicable did not exist.

This rule has its origin in the very concept of an organized community which guarantees to its members life, liberty, and property. The creators of the *ex post facto* rule—which is only a variation of the continental principle “*Nullum crimen, nulla poena sine lege*”—were Montesquieu, Rousseau, Beccaria, and Feuerbach.⁹ These men regarded the State as a contract between the community and its indivi-

⁸ Report of Robert H. Jackson to the International Conference on Military Trial, London 1945, Document V pp. 33-37.

⁹ Hall, *Nulla Poena Sine Lege*, 47 YALE L. JOUR. (1937) 165, 167-169: “those who find the origin of *nulla poena*, in its present significance, in Magna Charta are on unsettled territory—it is parliamentary influence which in fact transformed what might only in a very vague style be termed *nulla poena* into some real approximation to the rule. For with legislation came gradual subordination of common law and also, the distinctive techniques of statutory construction which characterize the continental significance of the rule. The English tradition of the rule of law, translated by eighteenth century French philosophers into terms expressive of the Revolutionary ideology joined with the continental movement for codification to provide *nulla poena* with its particular, current meanings. Feuerbach is generally credited with the statement of *nulla poena* in its current form. Feuerbach's integration of prevailing political ideology with the criminal law was simple enough: one who violates the liberty guaranteed by the social contract and safeguarded by penal laws commits a crime.

dual members. It is evident that the rule cannot apply to a community if it does not protect life, liberty and property of its members. If we apply this principle to the arbitrary actions of war criminals, we would thereby recognize these acts as being within the law. Punishment of such acts would be impossible because no previously enacted law exists which would provide for punishment. Application of that principle would mean the recognition of arbitrariness in international relations.

Even the strongest defender of this rule has to admit that his standpoint contributes to the protection of the wrong-doer instead of bringing him to justice.¹⁰

Thus by being loyal to the ex post facto rule he finds himself in the position of committing the unethical act of defending the wrong against those to whom wrong had been done.

There is a close similarity between the theory advocated by those who object to international ex post facto legislation and that propounded by conscientious objectors. These men refuse to fight for their country with the argument that the commandment says: "Thou shalt not kill." They disregard the fact that this law is based on the premise of peaceful conditions within the community exactly as the ex post facto rule did at a later time. The advocates of both theories may be respected or excused because of their conviction but that does not mean that they are right.

It is the same basic approach which influenced the judgment of the International Military Tribunal in Nuernberg against Goering et al., rendered on 1 Oct. 1946, to such an extent that it came to the fallacious conclusion: "The Charter is the expression of international law existing at the time of its creation."¹¹

This statement is not correct. The international Military Tribunal considered itself bound by the Anglo-American constitutional prohibition forbidding ex post facto legislation as well as by the basic principle "Nullum crimen, nulla poena sine lege." It contested that the Charter had created a new international penal code on an ex post facto basis. But it reached its verdict on the basis of this newly created law

¹⁰ Hans Kelsen: *The Rule against Ex Post Facto Laws and the Prosecution of the Axis War Criminals*, Judge Advocate Journal, Vol. II, No. 3, Fall-Winter, 1945, p. 11. "There can be little doubt that, according to the public opinion of the civilized world, it is more important to bring the war criminals to justice than to respect, in their trial, the rule against ex post facto law, which has merely a relative value and consequently, was never unrestrictedly recognized."

¹¹ Judgment of the International Military Tribunal of 1 Oct. 1946, page 48 of the U. S. Government Publication "Nazi Conspiracy and Aggression," U. S. Printing Office, 1947.

On this issue the United States representatives to the International Conference on Military Trials, Robert H. Jackson and the Representative of the United Kingdom, Sir David Maxwell Fyfe showed greater sincerity. In preparing the Charter together with the Representatives of France and Soviet Russia they admitted frankly that without introduction of the concept of individual responsibility and without tying the Court, which was to be established thereby to the law of the Charter, they would not be in a position to indict the guilty and to bring about their punishment.

We quote verbatim the opinions expressed by Justice Robert H. Jackson and Sir David Maxwell Fyfe on 23 July 1945:

Sir David Maxwell Fyfe: " there is one fundamental point I don't want it to be left to the Tribunal to interpret what are the principles of international law it should apply. It should not be left to the Tribunal to say what is or what is not a violation of international law "

Justice Robert H. Jackson: " it is entirely proper that these four powers, in view of the disputed state of the law of nations, should settle by agreement what the law is as the basis of this proceeding; and, if I am wrong about that, I do not see much basis for putting these people on trial it would be entirely open to the Tribunal to adjudge that, while these persons had committed the acts we charge, these acts were not crimes against international law and therefore to acquit them. We must declare that they answer personally, and I am frank to say that international law is indefinite and weak in our support "

Sir David Maxwell Fyfe: " It seems to me that on that point is really substantial agreement except for the argument against ex post facto legislation which Professor Gros put forward. " (Professor Gros was representative of France.)

Professor Gros: " Those acts have been known for years before and have not been declared criminal violations of international law. It is declaring as settled something discussed for years and settling a question as if we were a codification commission "

Justice Robert H. Jackson: " But we are a codification commission for the purpose of this trial as I see it. That is my commission " ¹²

The subsequent judgment of Military Tribunal III in the *Justice case*, rendered on 4 December 1947 has officially rectified the false statement (in the Verdict of the International Military Tribunal) that no new legislation had been applied. The following quotation from the above mentioned judgment is an explicit recognition of the fact that the ex post facto rule is not applicable within the field of international law

¹² Excerpt from document No. XLIV Minutes of Conference Session of 25 July 1945 in the publication "Report of Robert H. Jackson to the International Conference on Military Trials," London, 1945.

"It would be sheer absurdity to suggest that the ex post facto rule, as known to constitutional states, could be applied to a treaty, a custom, or a common law decision of an international tribunal, or to the international acquiescence which follows the event. To have attempted to apply the ex post facto principle to judicial decisions of common international law would have been to strangle that law at birth."¹³

Previously, on 24 October 1946, the Secretary General of the United Nations suggested to the General Assembly that the principles established at Nuernberg should be made a permanent part of international law

On 11 December 1946 the General Assembly of the United Nations unanimously affirmed the principles of international law recognized by the Charter of the Nuernberg Tribunal and judgment of the Tribunal.¹⁴

We may summarize the new development of international criminal law as follows:

(a) On August 8, 1945, an international agreement was made by the four Great Powers with the adherence of 19 additional nations which established an International Military Tribunal in Nuernberg for the purpose of meting out justice to war criminals. In the so-called London Charter (Annex to this Agreement) they determined the principles of international law to be used by this tribunal.

Among the 23 signatory nations were the three great democracies, United States, United Kingdom, and France, as well as a number of the smaller nations which in their domestic codes recognize the validity of the ex post facto principle.

(b) On October 1, 1946, the judgment of the International Military Tribunal was handed down in accordance with the principles of international criminal law as set forth in the London Charter; these principles of the Charter and Judgment were used as precedent in subsequent War Crimes trials held by the U. S. and by the International Military Tribunal for the Far East in Tokyo.

(c) On December 11, 1946, the entire membership of the United Nations affirmed unanimously these principles of international criminal law recognized by the London Charter and by the Judgment of the International Military Tribunal in Nuernberg.

¹³ Taylor: "NURENBERG TRIALS, WAR CRIMES AND INTERNATIONAL LAW," p. 288 (published by the Carnegie Endowment for International Peace, New York, 1949). See also, Jorge Amencano: *THE NEW FOUNDATION OF INTERNATIONAL LAW* (New York, 1947), "The rule that there is no crime without a prior law defining it, and the rule that there is no penalty without prior legal commination, are not applicable to international law"

¹⁴ The Charter and Judgment of the Nuernberg Tribunal, United Nations Publications No. 7, ex 1949, p. 15.

The inference drawn from these facts, especially from the decision of the top-level international body of the United Nations is:

The conscience of mankind rejects the fallacious theory that the new international legislation provided by the London Charter of August 8, 1945, has violated the *ex post facto* rule or any other rule of ethics and fairness.

This "Affirmation" of the United Nations constitutes a logical end to any dispute on the justification of the War Crimes legislation and the trials based on it.

The beneficial effects of the War Crimes program after World War II have been shown recently in several cases.

For instance, the judgment in the so-called "Hostage Case" (United States v List and al.), rendered in February 1948, has been much criticized as unduly lenient because of the Tribunal's ruling which upheld the right of an occupying power to shoot hostages under certain circumstances. The Court reluctantly held that the laws of war do not prohibit the killing of hostages. In so doing, the Tribunal practically invited a revision of the Hague Conventions which would expressly forbid the killing of hostages.

The new "Geneva Convention Relative to the Protection of Civilian Persons in Time of War" of 12 August 1949 was signed by the United States and fifty-nine other nations including Soviet Russia. In Article 34 of this convention we find that "the taking of hostages is prohibited."

Had the courts not examined such cruelties of war that were previously tolerated the civilian population would never have gained this vital protection in a future war. In this connection it should be remembered how much the world was stirred by the killing of innocent hostages during World Wars I and II.

Progressive mankind will always strive to rid itself of evil and in this struggle it will not be deterred by adverse criticism until it has achieved its goal.

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