

Nuremberg: A Fair Trial? A Dangerous

Precedent

1.

The Nuremberg War Trial has a strong claim to be considered the most significant as well as the most debatable event since the conclusion of hostilities. To those who support the trial it promises the first effective recognition of a world law for the punishment of malefactors who start wars or conduct them in bestial fashion. To the adverse critics the trial appears in many aspects a negation of principles which they regard as the heart of any system of justice under law.

This sharp division of opinion has not been fully aired largely because it relates to an issue of foreign policy upon which this nation has already acted and on which debate may seem useless or, worse, merely to impair this country's prestige and power abroad. Moreover, to the casual newspaper reader the long-range implications of the trial are not obvious. He sees most clearly that there are in the dock a score of widely known men who plainly deserve punishment. And he is pleased to note that four victorious nations, who have not been unanimous on all post-war questions, have, by a miracle of administrative skill, united in a proceeding that is overcoming the obstacles of varied languages, professional habits, and legal traditions. But the more profound observer is aware that the foundations of the Nuremberg trial may mark a watershed of modern law.

Before I come to the discussion of the legal and political questions involved, let me make it clear that nothing I may say about the Nuremberg trial should be construed as a suggestion that the individual Nuremberg defendants or others who have done grievous wrongs should be set at

liberty. In my opinion there are valid reasons why several thousand Germans, including many defendants at Nuremberg, should either by death or by imprisonment be permanently removed from civilized society. If prevention, deterrence, retribution, nay even vengeance, are ever adequate motives for punitive action, then punitive action is justified against a substantial number of Germans. But the question is: Upon what theory may that action properly be taken?

The starting point is the indictment of October 18, 1945, charging some twenty individuals and various organizations, in four counts, with conspiracy, crimes against peace, war crimes, and crimes against humanity. Let me examine the offenses that are called in Count 3 of the indictment "war crimes," in the strict sense.

It is sometimes said that there is no international law of war crimes. But most jurists would agree that there is at least an abbreviated list of war crimes upon which the nations of the world have agreed. Thus in Articles 46 and 47 of the Hague Convention of 1907 the United States and many other countries accepted the rules that in an occupied territory of a hostile state "family honour and rights, the lives of persons, and private property, as well as religious conviction and practice, must be respected. Private property cannot be confiscated. Pillage is formally forbidden." And consistently the Supreme Court of the United States has recognized that rules of this character are part of our law. In short, there can be not doubt of the legal right of this nation, prior to the signing of a peace treaty to use a military tribunal for the purpose of trying and punishing a German if, as Count 3 charges, in occupied territory he murdered a Polish civilian, or tortured a Czech, or raped a Frenchwoman, or robbed a Belgian. Moreover, there is no doubt of the military tribunal's parallel right to try and to punish a German if he has murdered, tortured, or maltreated a prisoner of war.

In connection with war crimes of this sort there is only one question of law worth discussing here: Is it a defense to a soldier or civilian defendant that he acted under the order of a superior?

The defense of superior orders is, upon the authorities, an open question. Without going into details, it may be said that superior orders have never

been recognized as a complete defense by German, Russian, or French law, and that they have not been so recognized by civilian courts in the United States or the British Commonwealth of Nations, but they tend to be taken as a complete excuse by Anglo-American military manuals. In this state of the authorities, if the International Military Tribunal in connection with a charge of a war crime refuses to recognize superior orders as a defense, it will not be making a retroactive determination or applying an ex post facto law. It will be merely settling an open question of law as every court frequently does.

The refusal to recognize the superior-order defense not only is not repugnant to the ex post facto principle, but is consonant with our ideas of justice. Basically, we cannot admit that military efficiency is the paramount consideration. And we cannot even admit that individual self-preservation is the highest value. This is not a new question. Just as it is settled that X is guilty of murder if, in order that he and Y, who are adrift on a raft, may not die of starvation, he kills their companion, Z; so a German soldier is guilty of murder if, in order that he may not be shot for disobedience and his wife tortured in a concentration camp, he shoots a Catholic priest. This is hard doctrine, but the law cannot recognize as an absolute excuse for a killing that the killer was acting under compulsion--for such a recognition not only would leave the structure of society at the mercy of criminals of sufficient ruthlessness, but also would place the cornerstone of justice on the quicksand of self-interest.

Of course, there always remains the fundamental separateness of the problem of guilt and the problem of treatment. And no one would expect a tribunal to mete out its severest penalty to a defendant who yielded to wrongdoing only out of fear of loss of his life or his family's.

2.

In addition to "war crimes," the indictment, in Count 4, charges the defendants with "crimes against humanity." This count embraces the murder, torture, and persecution of minority groups, such as Jews, inside Germany both before and after the outbreak of war. It is alleged in paragraph X of the indictment that these wrongs "constituted violations of

international conventions, of internal penal laws, of the general principles of criminal law as derived from the criminal law of all civilized nations and were involved in and part of a systematic course of conduct."

I shall pass for the time being the last phrase just quoted, for that is merely a way of saying that the Nazis persecuted the minority German groups to harden the German will for aggression and to develop an issue that would divide other countries. In other words, the legal validity of that phrase rests upon the same considerations as the validity of the charge of "crimes against the peace."

I consider first the legal validity of the other phrases upon which is premised the charge that murdering, torturing, and persecuting German Jews and other non-Nazis from 1933 to 1939 as well as from 1939 to 1945 are crimes. And before I say anything of the legal question, let me make it abundantly clear that as a human being I regard these murders, tortures, and persecutions as being morally quite as repugnant and loathsome as the murders, tortures, and persecutions of the civilian and military personnel of American and Allied nations.

In paragraph X of the indictment, reference is first made to "international conventions." There is no citation of any particular international convention which in explicit words forbids a state or its inhabitants to murder its own citizens, in time either of war or of peace. I know of no such convention. And I, therefore, conclude that when the draftsman of the indictment used the phrase "international conventions" he was using the words loosely and almost analogously with the other phrase, "general principles of criminal law as derived from the criminal law of all civilized nations." He means to say that there exists, to cover the most atrocious conduct, a broad principle of universal international criminal law which is according to the law of most penal codes and public sentiment in most places, and for violations of which an offender may be tried by any new court that one or more of the world powers may create.

If that were the only basis for the trial and punishment of those who murdered or tortured German citizens, it would be a basis that would not satisfy most lawyers. It would resemble the universally condemned Nazi

law of June 28, 1935, which provided: "Any person who commits an act which the law declares to punishable or which is deserving of penalty according to the fundamental conceptions of the penal law and sound popular feeling, shall be punished." It would fly straight in the face of the most fundamental rules of criminal justice--that criminal laws shall not be ex post facto and that there shall be *nullum crimen et nulla poena sine lege*--no crime and no penalty without an antecedent law.

The feeling against a law evolved after the commission of an offense is deeply rooted. Demosthenes and Cicero knew the evil of retroactive laws: philosophers as diverse as Hobbes and Locke declared their hostility to it; and virtually every constitutional government has some prohibition of ex post facto legislation, often in the very words of Magna Carta, or Article I of the United States Constitution, or Article 8 of the French Declaration of Rights. The antagonism to ex post facto laws is not based on a lawyer's prejudice encased in a Latin maxim. It rests on the political truth that if a law can be created after an offense, then power is to that extent absolute and arbitrary. To allow retroactive legislation is to disparage the principle of constitutional limitation. It is to abandon what is usually regarded as one of the essential values at the core of our democratic faith.

But, fortunately, so far as concerns murders of German minorities, the indictment was not required to invent new law. The indictment specifically mentions "internal penal laws." And these laws are enough in view of the way the question would arise in a criminal proceeding.

Under universally accepted principles of law, an occupying belligerent power may and indeed often does establish its own tribunals to administer the domestic law of the occupied country for the inhabitants. Thus if Adolph killed Berthold before the American Army occupied Munich, it would be normal for the United States government to set up a military tribunal to try and punish Adolph.

But suppose Adolph raised as a defense the contention that he was acting pursuant to orders from superiors which were the law of Germany. If that defense were raised, and if we assume (contrary to what some German jurists tell us) that in Germany there were on the statute books pertinent exculpatory laws, nonetheless under well-known principles of German law,

going back to the middle Ages and differing from current Anglo-American theories, the superior order could be disregarded by a court applying German law, on the ground that it was so repugnant to "natural law" as to be void. That is, perhaps a German tribunal or one applying German law can disregard an obviously outrageous statute or executive order as offensive to natural law just as the Supreme Court of the United States can disregard a statute or executive order as offensive to the United States Constitution.

But further suppose that Adolph raised as a defense the point that the wrong was so old as to be barred by some statute of limitations. If there is such a statute in Germany, the limitation may be set aside without involving any violation of the ex post facto principle. As our own Supreme Court has pointed out, to set aside a statute of limitation is not to create a new offense.

3.

I turn now to Count 2 of the indictment, which charges "crimes against peace." This is the count that has attracted greatest interest. It alleges that the defendants participated "in the planning, preparation, initiation and waging of wars of aggression, which were also wars in violation of international treaties, agreements and assurances."

This charge is attacked in many quarters on the ground it rests on ex post facto law. The reply has been that in the last generation there has accumulated a mounting body of international sentiment which indicates that wars of aggression are wrong and that a killing by a person acting on behalf of an aggressor power is not an excusable homicide. Reference is made not only to the Briand-Kellogg Pact of August 27, 1928, but to deliberations of the League of Nations in 1924 and subsequent years--all of which are said to show an increasing awareness of a new standard of conduct. Specific treaties outlawing wars of aggression are cited. And, having regard to the manner by which all early criminal law evolves and the manner by which international law grows, it is claimed that now it is unlawful to wage an aggressive war and it is criminal to aid in preparing for such a war, whether by political, military, financial, or industrial means.

One difficulty with that reply is that the body of growing custom to which reference is made is custom directed at sovereign states, not at individuals. There is no convention or treaty which places obligations explicitly upon an individual not to aid in waging an aggressive war. Thus, from the point of view of the individual, the charge of a "crime against peace" appears in one aspect like a retroactive law. At the time he acted, almost all informed jurists would have told him that individuals who engaged in aggressive war were not in the legal sense criminals.

Another difficulty is the possible bias of the Tribunal in connection with Count 2. Unlike the crimes in Counts 3 and 4, Count 2 charges a political crime. The crime which is asserted is tried not before a dispassionate neutral bench, but before the very persons alleged to be victims. There is not even one neutral sitting beside them.

And what is most serious is that there is doubt as to the sincerity of our belief that all wars of aggression are crimes. A question may be raised whether the United Nations are prepared to submit to scrutiny the attack of Russia on Poland, or on Finland or the American encouragement to the Russians to break their treaty with Japan. Every one of these actions may have been proper, but we hardly admit that they are subject to international judgment.

These considerations make the second count of the Nuremberg indictment look to be of uncertain foundation and uncertain limits. To some the count may appear as nothing more than the ancient rule that the vanquished are at the mercy of the victor. To others it may appear as the mere declaration of an always latent doctrine that the leaders of a nation are subject to outside judgment as to their motives in waging war.

The other feature of the Nuremberg indictment is Count 1, charging a "conspiracy." Paragraph III of the indictment alleges that the "conspiracy embraced the commission of Crimes against Peace;...it came to embrace the commission of War Crimes...and Crimes against Humanity."

In international as well as in national law there may be for almost any crime what the older lawyers would have called principal offenders and

accessories. If Adolph is determined to kill Sam, and talks the matter over with Berthold, Carl, and Dietrich, and Berthold agrees to borrow the money to buy a pistol, and Carl agrees to make a holster for the pistol, and all of them proceed as planned and then Adolph gives the pistol and holster to Dietrich, who goes out alone and actually shoots Sam without excuse, then, of course, Adolph, Berthold, Carl, and Dietrich are all guilty of murder. They should not be allowed to escape with the plea Macbeth offered for Banquo's murder, "Thou canst not say I did it."

If the conspiracy charge in Count 1 meant no more than that those are guilty who plan a murder and with knowledge finance and equip the murderer, no one would quarrel with the count. But it would appear that Count 1 meant to establish some additional separate substantive offense of conspiracy. That is, it asserts that there is in international law a wrong which consists in acting together for an unlawful end, and that he who joins in that action is liable not only for what he planned, or participated in, or could reasonably have foreseen would happen, but is liable for what every one of his fellows did in the course of the conspiracy. Almost as broad a doctrine of conspiracy exists in municipal law.

But what is the basis for asserting so broad a substantive crime exists in the international law? Where is the treaty, the custom, the academic learning on which it is based? Is this not a type of "crime" which was first described and defined either in London or in Nuremberg sometime in the year 1945?

Aside from the fact that the notion is new, is it not fundamentally unjust? The crime of conspiracy was originally developed by the Court of Star Chamber on the theory that any unlicensed joint action of private persons was a threat to the public, and so if the action was in any part unlawful it was all unlawful. The analogies of the municipal law of conspiracy therefore seem out of place in considering for international purposes the effect of joint political action. After all, in a government or other large social community there exists among the top officials, civilian and military, together with their financial and industrial collaborators, a kind of over-all working arrangement which may always be looked upon, if its invidious connotation be disregarded, as a "conspiracy." That is, government implies "breathing together." And is everyone who, knowing the purposes of the

party in power, participates in government or joins with officials to be held for every act of the government?

To take a case which is perhaps not so obvious, is everyone who joins a political party, even one with some illegal purposes, to be held liable to the world for the action that every member takes, even if that action is not declared in the party platform and was not known to or consented to by the person charged as a wrongdoer? To put upon any individual such responsibility for action of the group seems literally to step back in history to a point before the prophet Ezekiel and to reject the more recent religious and democratic teachings that guilt is personal.

4.

Turning now from the legal basis of the indictment, I propose briefly to consider whether, quite apart from legal technicalities, the procedure of an international military tribunal on the Nuremberg pattern is a politically acceptable way of dealing with the offenders in the dock and those others whom we may legitimately feel should be punished.

The chief arguments usually given for this quasi-judicial trial are that it gives the culprits a chance to say anything that can be said on their behalf, that it gives both the world today and the world tomorrow a chance to see the justice of the Allied cause and the wickedness of the Nazis', and that it sets a firm foundation for a future world order wherein individuals will know that if they embark on schemes of aggression or murder or torture or persecution they will be severely dealt with by the world.

The first argument has some merit. The defendants, after hearing and seeing the evidence against them, will have an opportunity without torture and with the aid of counsel to make statements on their own behalf. For us and for them this opportunity will make the proceeding more convincing. Yet the defendants will not have the right to make the type of presentation that at least English-speaking persons have thought the indispensable concomitant of a fair trial. No one expects that Ribbentrop will be allowed to summon Molotov to disprove the charge that in invading Poland Germany started an aggressive war. No one anticipates that the defense, if

it has the evidence, will be given as long a time to present its evidence as the prosecution takes. And there is nothing more foreign to those proceedings than either the presumption that the defendants are innocent until proved guilty or the doctrine that any adverse public comment on the defendants before the verdict is prejudicial to their receiving a fair trial. The basic approach is that these men should not have a chance to go free. And that being so, they ought not to be tried in a court of law.

As to the second point, one objection is purely pragmatic. There is a reasonable doubt whether this kind of trial, despite the voluminous and accessible record it makes, persuades anyone. It brings out new evidence, but does it change men's minds? Most reporters say that the Germans are neither interested in nor persuaded by these proceedings, which they regard as partisan. They regard the proceedings not as marking a rebirth of law in Central Europe but as a political judgment on their former leaders. The same attitude may prevail in future because of the departure from accepted legal standards.

A more profound objection to the second point is that to regard a trial as a propaganda device is to debase justice. To be sure, most trials do and should incidentally educate the public. Yet any judge knows that if he, or counsel, or the parties regard a trial primarily as a public demonstration, or even as a general inquest, then there enter considerations which would otherwise be regarded as improper. In a political inquiry and even more in the spread of propaganda, the appeal is likely to be to the unreflecting thought and the deep-seated emotions of the crowd untrammelled by any fixed standards. The objective is to create outside the courtroom a desired state of affairs. In a trial the appeal is to the disinterested judgment of reasonable men guided by established precepts. The objective is to make inside the courtroom a sound disposition of a pending case according to settled principles.

The argument that these trials set a firm foundation for a future world legal structure is perhaps debatable. The spectacle of individual liability for a world wrong may lead to future treaties and agreements specifying individual liability. If this were the outcome and if, for example, with

respect to wars of aggression, war crimes, and use of atomic energy the nations should agree upon world rules establishing individual liability, then this would be a great gain. But it is by no means clear that this trial will further any such program.

At the moment, the world is most impressed by the undeniable dignity and efficiency of the proceedings and by the horrible events recited in the testimony. But, upon reflection, the informed public may be disturbed by the repudiation of widely accepted concepts of legal justice. It may see too great a resemblance between this proceeding and others which we ourselves have condemned. If in the end there is a generally accepted view that Nuremberg was an example of high politics masquerading as law, then the trial instead of promoting may retard the coming of the day of world law.

Quite apart from the effect of the Nuremberg trial upon the particular defendants involved, there is the disturbing effect of the trial upon domestic justice here and abroad. "We but teach bloody instructions, which being taught, return to plague the inventor." Our acceptance of the notions of ex post facto law and group guilt blunt much of our criticism of Nazi law. Indeed our complaisance may mark the beginning of an age of reaction in constitutionalism in particular and of law in general. Have we forgotten that law is not power, but restraint on power?

If the Nuremberg trial of the leading Nazis should never have been undertaken, it does not follow that we should not have punished these men. It would have been consistent with our philosophy and our law to have disposed of such of the defendants as were in the ordinary sense murderers by individual, routine, undramatic, military trials. This was the course proposed in the speeches of the Archbishop of York, Viscount Cecil, Lord Wright, and others in the great debate of March 20, 1945, in the House of Lords. In such trials the evidence and the legal issues would have a stark simplicity and the lesson would be inescapable.

For those who were not chargeable with ordinary crimes only with political crimes such as planning an aggressive war, would it not have been better to proceed by an executive determination--that is, a proscription directed at

certain named individuals? The form of the determination need not have been absolute on its face. It might have been a summary order reciting the offense and allowing the named persons to show cause why they should not be punished, thus giving them a chance to show any mistake of identification or gross mistake of fact.

There are precedents for such executive determination in the cases of Napoleon and of the Boxer rebels. Such a disposition would avoid the inevitably misleading characteristics of the present proceedings, such as a charge presented in the form of an "indictment," the participation of celebrated civil judges and the legal formalities of rulings on evidence and on law. It is these characteristics which may make the Nuremberg trial such a potential danger to law everywhere. Moreover, if it were generally felt that we ought not to take a man's life without the form of a trial, then the executive determination could be limited to imprisonment. The example of Napoleon shows that our consciences would have no reason to be disturbed about the removal from society and the permanent detention of irresponsible men who are a threat to the peace of the world.

To be sure, such an executive determination is *ex post facto*. Indeed, it is a bill of attainder. To be sure it is also an exhibition of power and not of restraint. But its very merit is its naked and unassumed character. It confesses itself to be not legal justice but political. The truthful facing of the character of our action would make it more certain that the case would not become a precedent in domestic law.

As Lord Digby said in 1641 regarding the Strafford bill of attainder, "There is in Parliament a double Power of Life and Death by Bill, a Judicial Power, and legislative; the measure of the one, is what's legally just; of the other, what is Prudentially and Politickly fit for the good and preservation of the whole. But these two, under favour, are not to be confounded in Judgment: We must not piece up want of legality with matter of convenience, nor the defailance of prudential fitness with a pretence of Legal Justice."

This emphasis on procedural regularity is not legalistic or, as it is sometimes now said, conceptualistic. If there is one axiom that emerges clearly from the history of constitutionalism and from the study of any bill of rights or any charter of freedom, it is that procedural safeguards are the

very substance of the liberties we cherish. Not only the specific guarantees with respect to criminal trials, but the general promise of "due process of law," have always been phrased and interpreted primarily in their procedural aspect. Indeed it hardly lies in the mouth of any supporter of the Nuremberg proceedings to disparage such procedural considerations; for may it not be said that the reason that the authors of those proceedings cast them in the form of a trial was to persuade the public that the customary safeguards and liberties were preserved?

It is against this deceptive appearance, big with evil consequences for law everywhere, that as a matter of civil courage all of us, judges as well as lawyers and laymen, however silent we ordinarily are, ought to speak out. It is for their silence on such matters that we justly criticize the Germans. And it is the test of our sincere belief in justice under law never to allow it to be confused with what are merely our interest, our ingenuity, and our power.
