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G. R. McConnell

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THE TRIAL OF WAR CRIMINALS AT NUREMBERG

G. R. McCONNELL*

Pursuant to an ancient custom, the time is at hand for the President of this Association to deliver an address. This is one of the few mandatory acts imposed upon this Association. In reviewing the records it is found that all my predecessors have taken as their subject some phase of law. Some addresses have dealt with the local problems confronting the Bar and their existence. Other addresses have explained the difficulty of the practice of law. Other addresses have been on subjects of law of nationwide importance. Your President could have chosen for his subject any one of a great number of legal problems peculiarly local to the State of Wyoming, or especially appropriate to the government of the people in the United States of America.

At the present time too little thought is being given to the internal problems of the United States and much of our energy is being expended to save the world. I find myself making the same great error, but purposely because of the unusual procedure and new philosophy of international law established.

For the past few years we have been living in an outstanding age of the centuries. All records are being broken; all precedent has been thrown aside. A new order is being created. In the realm of law and legal procedure all precedent is being overruled, the same as in physical and economic problems.

A new and significant experiment in international cooperation was completed on October 16, on which date the war criminals of Europe paid with their lives for leading a nation into one of the most horrible and destructive wars that the world has ever known. Some months ago when I began to think about a subject appropriate for the Wyoming Bar I felt that a paper on the trial of war criminals at Nuremberg would be a safe subject to discuss, and that surely there could be no political question involved nor the procedure of such trials be controversial, but much to my surprise, within the last few days I find many leaders, men in high places, differing as to whether or not the Court trying these European war criminals had jurisdiction or power or authority to try them. I deeply regret this difference of opinion and sincerely hope that everyone will agree that the trial occurring at Nuremberg was, and is, founded upon basic law. From the research that I have been able to make, I am thoroughly convinced that the International Military Tribunal possessed ample power and authority to try those accused of the various crimes, to be hereafter enumerated and, that the Tribunal had lawful authority to impose sentence, so recently carried out. The fact is that this trial in the

* Retiring President of the Wyoming State Bar. Address given at the Annual Meeting of the Wyoming State Bar, October 18, 1946.

procedure is primarily a child of the United States of America. According to Ernest O. Hauser:

For the first time the topnotchers among the United Nations have had to settle down to the tedious chore of dealing realistically with a concrete case, a well-defined piece of business. Nuremberg thus became the laboratory where the United Nations set out to prove that their joint effort could deliver the goods.

From the very beginning of this joint effort the United States carried the ball. Although the cooperation of other nations was genuine and sincere, there is ample proof to show that Nuremberg is a 100 per cent American plan. It was American initiative, American persistence and American idealism that produced the final results in the face of serious difficulties. The story of how, under constant American prodding, representatives of the four nations set up the machinery is a human, rather than political story. It brings out clearly the different temperaments and ideals of the nations concerned, highlighting French logic and pettiness, British passion for law and order, Russian inscrutability and American righteousness.

When our late President talked of punishing the Hitler gang and of pursuing the Nazi criminals to the utmost ends of the earth, what he had in mind was probably the executive way of dealing with these men—meaning punishment without trial. This method was also approved by the British. Shooting the culprits and publishing a white paper about their sins afterward would have saved many an international headache.

It was the inner circle at Washington who conceived that Nazi criminality had followed a definite pattern involving the smashing of trade unions and of all political opposition within Germany, the attempt to exterminate an entire race, the war against religion, the breaking of international treaties and promises, the looting of occupied Europe, the killing of prisoners and hostages, the plan to conquer the world. If this was madness, there was a method in it and it wouldn't do to single out specific trespasses and try the culprits for disconnected acts. It was one crime premeditated and totalled, and the conspirators should be presented with a total bill.

On November 1, 1943, the Big Three pledged themselves to punish the war criminals. The United Nations War Crimes Commission collected data and compiled black lists. Major General William J. Donovan's Office of Strategic Services scanned incoming intelligence reports and war crimes evidence. The first concrete suggestion for setting up the international machinery was first outlined by Judge Roseman of Washington, D. C., and forwarded by our late President to London, where it was accepted in principle by the British Cabinet. On May 2, 1945, President Truman appointed Robert H. Jackson as American representative and chief Counsel for the prosecution of major European war criminals. He chose the difficult road of charg-

ing the Hitler gang with conspiracy to plunge the world into war, in preference to such simple charges as murder, atrocities, forced labor, broken treaties, thefts—charges which could have been easily proven and punished. The conspiracy charge holds the Nazis guilty from the time Hitler first became head of the party. On June 7, 1945, Justice Jackson expressed the American view thus: "Our case against the major defendants is concerned with the Nazis' master plan, not with the individual barbarities and perversions which occurred independently of any central plan. The groundwork of our case must be factually authentic and constitute a well-documented history of what we are convinced was a grand, concerted pattern to incite and commit the aggressions and barbarities which have shocked the world. Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during the war. We must establish incredible events by credible evidence."

Later on Jackson stated, "If we can cultivate in the world the idea that inclusive war making is the way to the prisoner's dock, rather than the way to honor, we will have accomplished something toward making the peace more secure." On June 24, 1945, at London, he found the British delegates willing to set up the International Tribunal. Shortly thereafter the first Four Power meeting took place in the Church House in London, at which time it developed that there was some difference of the legal concepts. The Russians desire was to punish and they contended that the Moscow declaration of the Big Three stated that the war criminals should be punished. The Big Three did not say that they shall be charged.

During future negotiation many controversial questions arose as to when and where and whom of the German gang would be tried, but after much diplomacy, aided by Sir David Maxwell Fyfe, Solicitor General in Churchill's Government, the obstacles were overcome, the principle was accepted, and on August 8, the Charter was signed by the Four Powers. The International Military Tribunal and the procedure for the trial had been determined. It took six weeks of negotiations to establish the principle procedure that will make history, and we hope change the attitude of men in the future who shall attempt to lead a nation into inclusive war, and the committing of atrocities which have long been considered a crime against humanity. Thus Nuremberg was the result of a sincere American effort to make United Nation cooperation work.

To set forth the agreement and the Charter for the establishment of an International Military Tribunal and the Charter of the International Military Tribunal would make this paper entirely too long. Suffice it to quote the Preamble Agreement by the Government of the United States of America, The Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain

and Northern Ireland, and the Government of the Union of Soviet Socialist Republics, for the prosecution and punishment of the major war criminals of the European Axis, to state that that agreement and Charter provide an orderly and just procedure in full detail to try the accused in a fair and equitable manner, and to pass judgment and sentence and provision for the division of the expense thereof.

The Indictment in the name of the Four Powers against the various defendants, charges them with definite counts and specific acts in each particular case, but the one following the American plan general design of conspiracy, which I believe would be of interest to you, is as follows:

COUNT ONE—THE COMMON PLAN OR CONSPIRACY
(Charter, Article 6, especially 6 (a))

III. Statement of the Offense

All the defendants, with divers other persons, during a period of years preceding 8th May, 1945, participated as leaders, organizers, instigators or accomplices in the formulation or execution of a common plan or conspiracy to commit, or which involved the commission of, Crimes against Peace, War Crimes, and Crimes against Humanity, as defined in the Charter of this Tribunal, and, in accordance with the provisions of the Charter, are individually responsible for their own acts and for all acts committed by any persons in the execution of such plan or conspiracy. The common plan or conspiracy embraced the commission of Crimes against Peace, in that the defendants planned, prepared, initiated and waged wars of aggression, which were also wars in violation of international treaties, agreements or assurances. In the development and course of the common plan or conspiracy it came to embrace the commission of War Crimes, in that it contemplated, and the defendants determined upon and carried out, ruthless wars against countries and populations, in violation of the rules and customs of war, including as typical and systematic means by which the wars were prosecuted, murder, ill-treatment, deportation for slave labor and for other purposes of civilian populations of occupied territories, murder and ill-treatment of prisoners of war and of persons on the high seas, the taking and killing of hostages, the plunder of public and private property, the wanton destruction of cities, towns, and villages, and devastation not justified by military necessity. The common plan or conspiracy contemplated and came to embrace as typical and systematic means, and the defendants determined upon and committed, Crimes against Humanity, both within Germany and within occupied territories, including murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations before and during the war, and persecutions on political, racial or religious grounds, in execution of the plan for preparing and prosecuting aggressive or illegal wars,

many of such acts and persecutions being violations of the domestic laws of the countries where perpetrated.

The entire indictment contains 36 pages. The 35 pages following the general conspiracy count deal with acquiring totalitarian control of Germany-political; the violations of international treaties, international compacts and assurances, and specific war crimes, enslavement of peoples both civil and military, arson, larceny, looting, starvation and extermination of millions of people, and the extortion of reparations from conquered countries, the deportation and dislocation of conquered nationals.

It is necessary to deal with a few of the violations of treaties, compacts and assurances to give the foundation for the law to be applied. They are:

(a) Violation of the Convention for the Pacific settlement of international disputes, signed at The Hague, July 29, 1899.

(b) Violation of the Convention for the Pacific settlement of international disputes signed at The Hague, October 18, 1907.

1. Violation of The Hague Convention of October 18, 1907, for the opening of hostilities;

2. For commencing hostilities against specified nations without previous warning;

3. Disregard of the rights and duties to neutral powers as set forth in The Hague Convention of October 18, 1907;

4. Violating the Versailles Treaty signed June 28, 1919, especially Articles 42-44, 80, 81, 99 and 100, and repudiating various parts of Part 5, Military, Naval and Air clauses of the Treaty of Versailles;

5. Violating the Treaty between the United States and Germany, restoring free relations, signed at Berlin, August 25, 1921;

6. Violating the Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy, signed at Locarno, October 16, 1925, and especially Article 1, of the same Guarantee;

7. And the specific charge setting forth that Germany did invade each of the nations above enumerated without first endeavoring to settle said differences;

8. Violation of Convention of arbitration and conciliation between Germany and the Netherlands, signed on May 20, 1926, and of similar charges to Denmark;

9. Violation of the Kellogg-Briand Pact, signed at Paris, August 27, 1928, in which Treaty Germany solemnly agreed condemning recourse to war for solution of international controversies and which declared that an inclusive war was a crime against humanity. Under this general charge there follows ten charges, and each case based on the Kellogg-Briand Pact, accusing Germany of willful aggression of war against each of the nations individually; and within these charges is the law violated.

The question arises as to why did not the Allies handle these war criminals in the same manner as heretofore as in the case of Napoleon, the Kaiser and others who have been banished. Different authors give different reasons. Curtis Reese, an eye witness of the trial, said there were three reasons:

1. To declare inclusive war illegal once and for all, and to create a precedent for the future.

2. The moral goal: to punish crimes committed by the Nazis during the past 13 years, and by their punishment satisfy an indignant world.

3. The political goal: to show the German people that crimes such as those committed by the Nazis—persecution, murder and war—do not pay, and under this political aspect it was thought that there was need to make the accusations so clear to prove the crimes so conclusively that no one among the free nations might ever again claim that they never happened; and to let the German people know, wherever they are and whoever they are, what crimes were committed in their names and with their tacit approval.

The Christian Century, writing on this subject, says the object of this trial was first to set up in terms of case law a system of international jurisprudence, where statesmen responsible for wars of aggression can be tried according to the accepted legal procedure, and if found guilty, punished.

2. To bring home to the German people the responsibility of their former government for the countless horrors to which millions of innocent sufferers were subjected between 1932 and 1945.

Barnet Nover stated that the Nuremberg trial marks a great landmark in the history of civilization. What happens to the defendants is of little concern. They were convicted by world opinion without any procedure, but the trial record contains a wealth of evidence so great as to be unchallengeable and irrefutable.

In the outset of this paper we made the statement that the Nuremberg trial was primarily an American child. By that was meant that the general principle of the charge of conspiring was peculiarly an American idea, based upon the theory of conspiracy to violate federal law, but the fundamental legal question of a joint military tribunal idea is not new. Such a tribunal was considered at the close of World War I for the purpose of trying the Kaiser and others. The American members of the Commission on the Responsibilities of Violation of the rules of war at the close of World War I, recommend a Military Commission as an appropriate tribunal for the trial of war offenders. This procedure is written in the Treaty of Versailles. "Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the Military Tribunals of that power."—Treaty with Germany, Article 229. The only reason that the Military Tribunals were not set up after the

First World War was the promise on the part of Germany that she would try their leaders for the violation of the rules of war. Some 900 offenders were charged with crimes; only 12 were tried; only six were finally convicted and these soon escaped with connivance between the jailors and prisoners, and justice was never carried out. So in order not to commit the same error at the close of World War I again at the close of World War II, the Allied leaders very appropriately determined to set up an International Military Tribunal, under the historical, and under the rules of war, based upon existing treaties and assurances, dating from 1899 up to the outbreak of hostilities under the principle that an international treaty is as sacred and binding obligation between nations under international law as an individual's contract and agreement is binding obligation between individuals and enforceable by statutory law.

International law is created by treaties between nations or results from acceptable conduct between nations and ripens into international custom or law. Of course, there has never existed a body now referred to as an international nation to write statutory law applicable to all nations that might be referred to as international statutory law. International law thus becomes acceptable by nations, dealing with other nations.

The philosophy advanced in the present Nuremberg trial is that there is no more reason why international law applicable to nations should not keep pace with common law applicable to individuals, and the acceptance of the fundamental principle that directs the growth of common law to international law.

When the courts apply a remedy to the conduct of man in a given state of facts for the first time that there was no precedent for it, it might be argued that the conduct of the court in such instance was without authority, *ex post facto*, and the culprit escape just punishment. But such an attitude has never been taken by the legal profession when dealing with individuals. The first decision on any subject under this theory would be *ex post facto*.

There is no reason why international law should not progress and be applied to nations or nationals of that nation in the violation of international law. The proceedings of the International Military Tribunal is a joint effort by a group of nations, individually and collectively, indicting and trying men or nationals of a nation for violation of rules of war, of which the violation of various treaties are only an integral part. The rules of war have been crystallized since 1899, and is a progressive development to meet the problems of the day.

The laws and customs of civilized warfare are to be found in common and conventional international law, usually but not necessarily implemented by specific domestic law. In the United States such implementation is provided by the Articles of War, the Rules of Land

Warfare, the Naval Regulations, and a few federal criminal statutes. Among the chief offenses are killing of the wounded, refusal of quarter, ill treatment of prisoners of war, use of poisoned or otherwise prohibited arms and ammunition, firing on hospitals and undefended localities, ill treatment of inhabitants in occupied territory, and many other similar acts, most of which you know were originally contained in The Hague Pronouncement of 1899. The rules applicable to an International Military Tribunal and the power possessed by it are the same as a case where a military commission of one nation tries nationals under the rules of war. A Military Commission was appointed by General Washington in 1780, which tried and convicted Major Andre of the British Army as a spy under the laws of war. In 1875, the Attorney General of the United States in an opinion held a military commission competent to try for the offenses against the recognized laws of war prisoners captured in the Modoc Indian War of 1873, when the bearer of the flag of truce was killed. The offender was tried and hanged for murder and violation of the laws and customs of war. During the war with Mexico, officers were similarly tried and the proceedings in these cases were derived from the authority of the common law of war. During World War I hundreds of instances of every conceivable violation of the laws and customs of war by Germany were found, but there is no record of any prosecution by an American Military Commission.

Under Article 228 of the Treaty of Versailles, the German Government recognized the right of the Allies to bring before Military Tribunals persons accused of having committed acts in violation of the laws and customs of war. Under Article 29-31 of The Hague, rules of land warfare and the laws and customs of warfare are contained in an Appendix to the Army Field Manual. It follows that the Army is ordered to comply with them in this manner. Germany has carried out her obligations under Article One of the Laws and Customs of Land Warfare and contained them in her Army Field Manual. The laws and customs of land warfare are law, not because they are reproduced in the field manual, but because they are international law.

The Imperial Decree of 1899 speaks of punishment in accordance with laws and customs of war and special decrees of competent military authority. This shows clearly that the customs of war are recognized as a source of law. They are binding on individuals by virtue of the Imperial Decree which orders the authorities administering justice to follow these rules.

So far as the United States is concerned, our military establishment has taken it for granted that in time of war it may punish enemy, as well as its own, violators of the laws and usages of war, without being much concerned with the technical question whether the law of war must have been previously implemented by Acts of

Congress, transforming violations into crimes. There are cases where the prestige of an occupying power simply demands that certain acts be punished, and they can be punished on the basis of the customs of war, which supplements the rule of national law. The customs of war may furnish substantive law.

The Military Commission has wider discretion than is ordinarily given to civil courts. It may impose any lawful and appropriate sentence, including death or life imprisonment. The question of jurisdiction, place of trial and many other impediments imposed upon statutory courts are not considered.

In the present trial several nations have joined together to try the present war criminals, and each nation is represented on the Tribunal, and each nation has presented its specific evidence in a joint proceeding, rather than through separate military commission trying the same persons, perhaps for the same offenses in separate trial.

This direct application of international law to individuals who have violated the laws and customs of war does not amount to giving law retroactive force. In the trial involving the torpedoing of the British hospital ship, Llandovery Castle, and the machine-gunning of survivors, the court said, "any violation of the law of nations in warfare is a punishable offense, 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 rules of international law which is here involved is simple, and is universally known. The court must in this instance affirm Patzig's guilt of killing contrary to international law."

This joint undertaking has many advantages, in assembling the evidence, facilitating the trial, and is the first step along the road to an international criminal procedure, which may result in an international court that will try future violations of the rules of war, and no doubt will be a guidepost for the present World Court which the United States, by act of Congress just before adjournment, joined.

In conclusion, I believe that we can accept this crystallization of international law as a more tangible method of enforcement of international law, and the application of the same to nations and the individuals of nations as has been done in this recent trial.

Nations are like corporations. They act only through individuals and it is these individuals who primarily should be held accountable for a nation's conduct in the violation of international law, and the violation of the rules of war.

The prosecution of war is necessarily inherent to a nation's sovereignty; but that nation and its method of war and the acts of its individuals are governed by "the rules of war," and this recent trial is a natural development brought about by necessity, the same

as has been required of states and nations to enlarge and expand the method of control, and regulation of individuals, governed under the civil law.

Most of us can remember the attitude of many after World War I, who doubted the stories of atrocities committed in that war, and as years went by, we were prone to believe that none were committed. The same opinion would no doubt prevail in a short time concerning the atrocities of World War II. But, by this trial, indisputable evidence has been recorded to prove incredible acts. The violators of the crime against humanity have paid with their lives. The deed is consummated and will go down in the annals of history as a milestone in the progress of man to the end that peace may be attained throughout the world.

This trial was a matter of necessity, not only to make the unjust pay for their violations against humanity, but to set an example for future generations that aggressive war carried on by those in power shall not be able to avoid the responsibility of their act by plea that has become outmoded, "the king can do no wrong."

During the progress of man's climb to greater security, old order, old reliances and long respected procedure are found to be obsolete and inoperative, and new methods based upon fundamental law arise to meet the emergency of the day.

We must remember the millions of people that were exterminated, dislocated and enslaved, not for the purpose of maintaining a vengeance or ill will, but to remind us of the unjust facts so that there may be no doubt in our mind as to the justice of the verdict rendered in the trial. Civilization marches onward and upward.
