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Major War Crimes Trials in Nurnberg

James Morris

MAJOR WAR CRIMES TRIALS IN NURNBERG

JAMES MORRIS *

IN EARLY July of 1947 at the instance of the War Department, I left Bismarck for Germany to act as a judge in the trial of major war criminals at Nurnberg, and thus became a participant in a judicial experiment that will long remain a subject of discussion and comment by scholars and students of international affairs. I was accompanied by Mrs. Morris who had a strenuous time maintaining a household in a foreign land surrounded by strange customs of the Germans and enmeshed in constantly changing regulations of the Americans. Her energy, patience, and devotion to the exhausting task of securing the necessities and some of the comforts of a home made it possible for me to endure the labor of hearing a case and participating in the preparation of its judgment, that occupied over eleven months.

The Nurnberg War Crimes Trials were the result of a number of conferences between representatives of the United States and some of our allies in the struggle against the Axis powers. These conferences may be considered basic authority for the trials.

In October, 1943, representatives of the governments of the United States, China, the Soviet Union, and the United Kingdom pledged their united action for the organization and maintenance of peace and security, and further stated that they would confer and cooperate with one another and other members of the United Nations to bring about a practical general agreement with respect to the regulation of armaments in the post war period. The representatives of the three European powers then made a separate declaration regarding Italy in which it was stated that "Fascist chiefs and army generals known or suspected to be war criminals shall be arrested and handed over to justice."

On October 30, 1943, a statement on atrocities was signed by President Roosevelt, Prime Minister Churchill, and Premier Stalin warning the guilty of approaching punishment. This is known as the Moscow Declaration.

At the Crimean Conference (Yalta) in February, 1945,

* Associate Justice, North Dakota Supreme Court.

Roosevelt, Churchill, and Stalin declared that they were determined to bring all war criminals to justice. The surrender of the German Army on May 8, 1945, was followed on June 5 by a declaration of allied representatives regarding the defeat of Germany and the assumption of supreme authority by the allies including the provisional government of the French Republic. This declaration provided for the surrender to allied representatives of those suspected of having committed, ordered or abetted war crimes or analagous offenses.

In the spring of 1945 Mr. Justice Jackson went to London as a United States representative, in order to start high level governmental discussions on the establishment of procedure for the trial of major war criminals. These discussions resulted in the London Agreement of August 8, 1945, providing for the establishment of an International Military Tribunal for the trial of war criminals in Germany. Attached to this agreement was a document known as "The Charter" which set forth in a general way the powers of the tribunal, the procedure to be followed, and definitions of crimes coming within its jurisdiction. These were denominated crimes against peace, war crimes, and crimes against humanity.

One trial was held under the Charter. The indictment presented twenty-four names. One of the defendants was not tried because of ill health. One committed suicide during the trial. One, Martin Bormann, was tried and sentenced to death in absentia. Twenty-one were present at the trial and offered their defenses. The indictment presented against most, but not all, of the defendants charged the crimes heretofore enumerated and the additional crime of participating in a common plan or conspiracy. The trial began November 20, 1945, and the judgment was rendered on September 30 and October 1, 1946.

On December 20, 1945, while the IMT trial was in progress, the military governors of the four occupying powers in Berlin promulgated and enacted Control Council Law No. 10 in order to give effect to the terms of the Moscow Declaration, the London Agreement, and the Charter of the IMT, and to establish a uniform basis for the prosecution of German war criminals other than those dealt with by the International Military Tribunal. This law included by reference, the Moscow Declaration, the London Agreement, and the Charter and authorized the occupying authorities to set up tribunals within

their respective zones. It defined the following crimes in substantially the same terms as those used in the Charter.

ARTICLE II

1. Each of the following acts is recognized as a crime:

(a) Crimes against Peace. Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of 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. Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose, of civilian population from 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. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

(d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal."

Among the offenses enumerated as crimes against humanity is membership in a group or organization declared criminal by the International Military Tribunal. The Charter provided that the IMT might determine and declare, in connection with the conviction of an individual, that the group or organization of which the individual was a member was a criminal organization, and that in subsequent trials based on membership, the criminal nature of the group or organization would be considered proved and should not be questioned. The argument that the Nurnberg trials violated the principle of *nullem crimen sine lege, nulla poena sine lege,* finds its greatest support with reference to this provision. Most of the tribunals, however, in actual practice softened the impact of this criticism by holding that guilt is personal and that mere membership in an organization declared to be criminal is not suf-

ficient to warrent a conviction. Thus the dangers of embracing the principle of collective guilt and the consequent inhumanity of mass punishment were largely avoided.

The four power enactment, Control Council Law No. 10, was supplemented in the American Zone by a decree of the American Military Government known as Ordinance No. 7 which provided for the establishment of Military Tribunals within the zone, and made further provisions concerning their powers and procedure. These tribunals consisted of three judges. In some instances an alternate was also appointed who did not participate in the decision unless he succeeded to regular membership upon the disability of one of the regular members. I served on such a tribunal. It was designated as Military Tribunal No. VI and tried the case of The United States of America v. Karl Krauch, et al., which was popularly known as the I. G. Farben case. This tribunal consisted of Hon. Curtis G. Shake of Vincennes, Indiana, presiding judge, Hon. Paul M. Hebert of Baton Rouge, Louisiana, and myself. The alternate was Hon. Clarence F. Merrell of Indianapolis, Indiana.

The defendants were business, professional men and chemists, who were top officials of the I. G. Farben Industries. Twenty-four were indicted. One of them was gravely ill and unable to attend the trial. He was severed from the case and ordered held subject to subsequent proceedings. The other twenty-three pleaded not guilty and the case proceeded against them. The trial opened August 27, 1947, and the judgment was rendered on July 29 and 30, 1948. The case was prosecuted by a staff of twelve American attorneys headed by the Chief Counsel of War Crimes. Each defendant was represented by a Chief Counsel and an assistant. The defense attorneys were all German nationals selected by the respective defendants from a list approved by the American Military Government. The defendants were also represented by a specialist in international law who was a professor at Heidelberg University. The proceedings were conducted by simultaneous interpretation into English and German and were recorded on a sound track and also stenographically reported.

During the trial 6,384 documents were submitted, 189 witnesses testified and the transcript covered 15,638 pages of legal cap paper. The testimony was transcribed into both German and English and was made available to the tribunal

and the attorneys on both sides during the progress of the trial. An interval of about three days elapsed between the testimony and the availability of the transcript. A law library was maintained in Berlin but distance and difficulties of travel rendered it of little value to the tribunal. The trial was held in the main courtroom of the Nurnberg Palace of Justice, a huge, rambling, four-story stone structure consisting of over six hundred rooms. In that courtroom a few months before, modern justice had overtaken and brought to trial and judgment the surviving political and military leaders of Nazi Germany. Spectators were permitted to occupy a large gallery and balcony, after being carefully screened and checked by the Army Security Office. Admittance was by pass only, and armed guards were in attendance at all times at entrances to the building and doors of the courtroom. No incident of disorder or rudeness occurred throughout the entire proceeding.

The indictment consisted of five counts. Count 1 charged that the defendants committed crimes against peace by planning, preparing, initiating and waging wars of aggression and invasions of other countries. Count 5 charged a conspiracy to commit the crimes set forth in Count 1. Count 2 charged war crimes and crimes against humanity in the plunder of public and private property, in countries and territories which came under the belligerent occupation of Germany in the course of its invasions and aggressive wars. Count 3 charged the defendants with war crimes and crimes against humanity through participation in the enslavement and deportation of members of civilian populations, the enslavement of concentration camp inmates, including German nationals, the illegal use of prisoners of war, and the mistreatment and murder of enslaved persons. Counts 1, 2, and 3 also said that the defendants were members of organizations or groups, including Farben, connected with the commission of the crimes charged in those counts under which all of the defendants were indicted. Count 4 charged four of the defendants with membership in the "SS," an organization which had been declared criminal by the International Military Tribunal.

The defendants denied generally their commission of or participation in the crimes charged against them. They further interposed the defense of necessity. They took the position that such acts which they performed that might otherwise fall within the terms of the indictment were performed under

the compulsion of the Reich dictatorship which left to the defendants no moral choice.

All defendants were acquitted of crimes against peace under Counts 1 and 5. Eight were convicted under Count 2. Four were convicted under Count 3. One was convicted under Counts 2 and 3, and ten were acquitted on all counts. There were no convictions under Count 4. Thus the trial resulted in thirteen convictions and ten acquittals.

The decision of the tribunal was unanimous in result with respect to all counts, except part of Count 3.

In 1941 the Farben organization at the instance of the Reich undertook the construction of a plant for the manufacture of synthetic rubber, gasoline, and oil at Auschwitz, in western Poland near the German border. Forced foreign workers and concentration camp labor was utilized to a considerable extent in construction work and in nearby mines. This labor was obtained from the SS, the organization in exclusive control of the concentration camps at Auschwitz. Farben's control over and treatment of these workers were hotly contested issues in the case.

Among the defendants were 19 members of the Farben Vorstand, a body roughly comparable to the Board of Directors of an American corporation. A reading of the judgment will disclose that the members of the tribunal were unable to agree upon the inferences of guilt to be drawn from the fact of Vorstand membership and authority. It will also indicate that we were not able to agree whether necessity and the lack of opportunity to exercise moral choice was available as a defense or could only be considered in mitigation of the use of slave labor. The result with respect to Count 3 was the unanimous conviction of five defendants, including four members of the Vorstand, the unanimous acquittal of three defendants, and the acquittal of fifteen members of the Vorstand by a vote of two to one, Judge Hebert dissenting.

Under Count 2 the defendants were charged with the plunder of private and public property. They took the position that plunder, while it may be illegal, is not a crime under international law, and that as a matter of fact, the acts which the defendants committed did not constitute plunder in any event.

The codification of the laws and customs of war by The Hague Convention of 1907 and the annex to this code is

known as The Hague Regulations. Under Articles 46, 47, 52, and 53 of these regulations private property must be respected and cannot be confiscated. Pillage is formally prohibited. The right of requisition is limited to the necessities of the occupying force, must not be out of porportion to the resources of the country, and may not involve the inhabitants in the obligation to take part in military operations against their country. The prohibitions contained in these regulations and the definition of war crimes in the Charter and Control Council Law No. 10 form a legal basis for the sufficiency of the charges made in Count 2 of the indictment.

There was no evidence of direct participation by any of the defendants in the physical acts commonly known as plunder. On the other hand it was clearly established that through the action of some of the defendants, Farben promptly acquired properties in France that had been confiscated by the Reich, and took permanent title thereto. In other instances, acting in the shadow of the German military forces and by capitalizing upon the ever present threat of German military power, they acquired without adequate compensation, substantial or controlling interests in private property in France and Norway contrary to the wishes of the owners. Such acts we determined could be differentiated only in degree from direct acts of plunder committed by the Army or the officials of the German Reich. We therefore determined the participants therein to be guilty under Count 2.

A study of Counts 2 and 3 and the definitions of the crimes involved therein will disclose that they actually charged crimes which have long been recognized as such in the more simple definitions of the common law and the codes of civilized nations. Murder, mayhem, slavery, kidnapping, plunder, robbery, and theft are not new crimes, though new terms are devised for them. Hundreds of Germans of lesser note were tried for similar crimes in various places throughout western Germany by tribunals composed of Army officers.

The issues involved in the trial of Counts 1 and 5 transcend all other issues in the case in both interest and importance. They were predicted on the same facts and involved the same evidence. They were considered together in the judgment. Count 1 consisted of eighty-five paragraphs. The general criminal charge was contained in paragraphs 1, 2, and 85.

The others were in the nature of a bill of particulars. The charging paragraphs read as follows:

"1. All of the defendants, acting through the instrumentality of Farben and otherwise, with divers other persons during a period of years preceding 8 May 1945, participated in the planning, preparation, initiation, and waging of wars of aggression and invasions of other countries, which wars of aggression and invasions were also in violation of international laws and treaties. All of the defendants held high positions in the financial, industrial and economic life of Germany and committed these Crimes against Peace, as defined by Article II of Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations or groups, including Farben, which were connected with the commission of said crimes."

"2. The invasions and wars of aggression referred to in the preceding paragraph were as follows: Against Austria, 12 March 1937; against Czechoslovakia, 1 October 1938 and 15 March 1939; against Poland, 1 September 1939; against the United Kingdom and France, 3 September 1939; against Denmark and Norway, 9 April 1940; against Belgium, the Netherlands and Luxembourg, 10 May 1940; against Yugoslavia and Greece, 6 April 1941; against the U. S. S. R., 22 June 1941; and against the United States of America, 11 December 1941."

"85. The acts and conduct set forth in this count were committed by the defendants unlawfully, wilfully and knowingly, and constitute violations of international laws, treaties, agreements and assurances, and of Article II of Control Council Law No. 10."

Count 5 charged a conspiracy to commit the crimes set forth in Count 1.

In the IMT indictment, Count 1 charged a conspiracy to wage aggressive war. Under it the twenty-two defendants upon whom the tribunal passed judgment were indicted; eight were convicted and fourteen acquitted. Count 2 of that indictment alleged the commission of crimes against peace by planning, initiating and waging wars of aggression. Of the twenty-two defendants six were not indicted under this Count. Twelve were found guilty and four acquitted. It will be noted that the first two counts charged substantially the same crimes as those set out in Counts 1 and 5 of the Farben case. The Farben tribunal looked upon the IMT judgment with great respect and regarded it as persuasive precedent.

Tribunal No. VI decided unanimously that all of the defendants should be acquitted under Counts 1 and 5. Judge He-

bert in a special concurrence based his decision almost exclusively upon what he regarded to be the binding precedent of the IMT judgment. The majority of the tribunal found little difficulty in determining, on the facts, that none of the defendants knowingly participated in the planning, preparation, and initiation of wars of aggression in view of the obviously correct declaration of the IMT in connection with the acquittal of Hjalmar Schacht that "Rearmament of itself is not criminal under the charter. To be a crime against peace under Article 6 of the Charter it must be shown that Schacht carried out this rearmament as part of the Nazi plans to wage aggressive wars."

Various Farben enterprises produced large quantities of synthetic gasoline and synthetic rubber by means of processes developed by their chemists. Large quantities of nitrogen, the base for most explosives were also produced. Most defendants were direct participants in these activities. Thus they contributed in a large measure to the ability of Germany to wage aggressive war. Laying aside the question of the effect of the dominating dictatorship and the fact that the Nazi party maintained a supervisor or observer in each Farben plant, the majority of the tribunal considered, as decisive, the general responsibility of the citizens of a nation at war, in the following passages quoted from the judgment.

"There remains the question as to whether the evidence establishes that any of the defendants are guilty of 'waging a war of aggression' within the meaning of Article II, 1, (a) of Control Council Law No. 10. This calls for an interpretation of the quoted clause. Is it an offense under international law for a citizen of a state that has launched an aggressive attack on another country to support and aid such war efforts of his government, or is liability to be limited to those who are responsible for the formulation and execution of the policies that result in the carrying on of such a war?"

"It is to be noted in this connection that the express purpose of Control Council Law No. 10, as declared in its Preamble, was to 'give effect to the terms of the Moscow Declaration of 30 October 1943, and the London Agreement of 8 August 1945, and the charter issued pursuant thereto.' The Moscow Declaration gave warning that the 'German officers and men and members of the Nazi Party' who were responsible for 'atrocities, massacres, and cold-blooded mass executions' would be prosecuted for such offenses. Nothing was said in that declaration about criminal liability for waging a war of aggression. The London Agreement is entitled an agreement 'for the prose-

cution and punishment of the major war criminals of the European Axis.' There is nothing in that agreement or in the attached Charter to indicate that the words 'waging a war of aggression,' as used in Article II, 1, (a) of the latter, were intended to apply to any and all persons who aided, supported, or contributed to the carrying on of an aggressive war; and it may be added that the persons indicted and tried before the IMT may fairly be classified as 'major war criminals' insofar as their activities were concerned. Consistent with the express purpose of the London Agreement to reach the 'major war criminals,' the Judgment of the IMT declared that "mass punishments should be avoided.' "

"To depart from the concept that only major war criminals —that is, those persons in the political, military, and industrial fields, for example, who were responsible for the formulation and execution of policies—may be held liable for waging wars of aggression would lead far afield. Under such circumstances there could be no practical limitation on criminal responsibility that would not include, on principle, the private soldier on the battlefield, the farmer who increased his production of foodstuffs to sustain the armed forces, or the housewife who conserved fats for the making of munitions. Under such a construction the entire manpower of Germany could, at the uncontrolled discretion of the indicting authorities, be held to answer for waging wars of aggression. That would, indeed, result in the possibility of mass punishments."

"There is another aspect of this problem that may not be overlooked. It was urged before the IMT that international law had theretofore concerned itself with the actions of sovereign states and that to apply the Charter to individuals would amount to the application to *ex post facto* law. After observing that the offenses with which it was concerned had long been regarded as criminal by civilized peoples, the high Tribunal said: 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.' The extension of punishment for crimes against peace by the IMT to the leaders of the Nazi Military and Government was, therefore, a logical step. The acts of a government and its military power are determined by the individuals who are in control and who fix the policies that result in those acts. To say that the government of Germany was guilty of waging aggressive war but not the men who were in fact the government and whose minds conceived the plan and perfected its execution would be an absurdity. The IMT, having accepted the principle that the individual could be punished, then proceeded to the more difficult task of deciding which of the defendants before it were responsible in fact."

"In this case we are faced with the problem of determining the guilt or innocence with respect to the waging of aggressive

war on the part of men of industry who were not makers of policy but who supported their government during its period of rearmament and who continued to serve that government in the waging of war, the initiation of which has been established as an act of aggression committed against a neighboring nation. Hitler launched his war against Poland on 1 September 1939. The following day France and Britain declared war on Germany. The IMT did not determine whether the latter were waged as aggressive wars on the part of Germany. Neither must we determine that question in this case. We seek only the answer to the ultimate question: Are the defendants guilty of crimes against peace by waging aggressive war or wars? Of necessity, the great majority of the population of Germany supported the waging of war in some degree. They contributed to Germany's power to resist, as well as to attack. Some reasonable standard must, therefore, be found by which to measure the degree of participation necessary to constitute a crime against peace in the waging of aggressive war. The IMT fixed that standard of participation high among those who lead their country into war."

"The defendants now before us were neither high public officials in the civil government nor high military officers. Their participation was that of followers and not leaders. If we lower the standard of participation to include them, it is difficult to find a logical place to draw the line between the guilty and the innocent among the great mass of German people. It is, of course, unthinkable that the majority of Germans should be condemned as guilty of committing crimes against peace. This would amount to a determination of collective guilt to which the corollary of mass punishment is the logical result for which there is no precedent in international law and no justification in human relations. We cannot say that a private citizen shall be placed in the position of being compelled to determine in the heat of war whether his government is right or wrong, or, if it starts right, when it turns wrong. We would not require the citizen, at the risk of becoming a criminal under the rules of international justice, to decide that his country has become an aggressor and that he must lay aside his patriotism, the loyalty to his homeland, and the defense of his own fireside at the risk of being adjudged guilty of crimes against peace on the one hand, or of becoming a traitor to his country on the other, if he makes an erroneous decision based upon facts of which he has but vague knowledge. To require this of him would be to assign to him a task of decision which the leading statesmen of the world and the learned men of international law have been unable to perform in their search for a precise definition of aggression."

"Strive as we may, we are unable to find, once we have passed below those who have led a country into a war of aggression, a rational mark dividing the guilty from the

innocent. Lest it be said that the difficulty of the task alone should not deter us from its performance, if justice should so require, here let it be said that the mark has already been set by that Honorable Tribunal in the trial of the international criminals. It was set below the planners and leaders, such as Goering, Hess, von Ribbentrop, Rosenberg, Keitel, Frick, Funk, Doenitz, Raeder, Jodl, Seyss-Inquart, and von Neurath, who were found guilty of waging aggressive war, and above those whose participation was less and whose activity took the form of neither planning nor guiding the nation in its aggressive ambitions. To find the defendants guilty of waging aggressive war, would require us to move the mark without finding a firm place in which to reset it. We leave the mark where we find it, well satisfied that individuals who plan and lead a nation into and in an aggressive war should be held guilty of crimes against peace, but not those who merely follow the leaders and whose participations, like those of Speer, 'were in aid of the war effort in the same way that other productive enterprises aid in the waging of war.' (IMT Judgment, volume 1, page 330)."

Tribunal No. VI was an American tribunal. The case tried before it, was instituted by the Chief Counsel for War Crimes pursuant to the authority of Executive Order No. 9547 issued by President Truman, January 16, 1946, which authorized the Chief Counsel to proceed against axis adherents, other than those tried by the IMT, before United States Military or Occupational Tribunals. The members of the tribunal were appointed as war crimes judges by the President of the United States and assigned to the trial of the Farben case by General Lucius D. Clay, American Military Governor. The Chief Counsel was a Brigadier General in the United States Army. His assistants, though not all American citizens, were employed and paid by the War Department. The Marshal of the court and his assistants were American army officers. No other nation had a voice in who should be tried. Military Government Ordinance No. 7 vested in the Chief Counsel the exclusive power to determine the persons to be tried by the tribunals. As a courtesy to our allies the Chief Counsel invited other governments to send observers to the trials. Of a number of observers who appeared from time to time the Russians were most constant in their attendance. They made copious notes and took photographs of the tribunal in action as well as defendants, witnesses, and court attendants.

Broad rules of procedure were set forth in Control Council Law No. 10 and Military Government Ordinance No. 7. The

tribunal sought to apply those rules in a manner consistent with the basic principles of a fair trial within the concept of Anglo-American criminal law. These principles, the majority of the tribunal felt, included the burden of proof of the prosecution, the rule of reasonable doubt, immunity from compulsory self-incrimination, and the right of a defendant to interrogate witnesses who testified against him either from the witness stand or through ex parte affidavits, the use of which was provided by Military Government Ordinance No. 7. Cross-examination was lengthy and consumed much time. Our burden in this regard was somewhat lightened by referring the cross-examination of a number of affiants to commissioners who certified the transcripts to us to be read and considered in connection with the affidavits.

In this article, it has been possible to touch upon only the major issues of the trial. These I believe will have some significance in the future development of international criminal law. Hon. Francis Biddle, the American judge on the International Military Tribunal has said, "War is now no longer seen as a romantic adventure, but as a degrading crime, a crime which cannot be permitted if life itself is to continue. And the only alternative to war is the acceptance and development of a universal law based on the necessity of living together in peace."† He proposed the codification of an international criminal law. I urged a similar step in a press interview before leaving Nurnberg. I repeat it here.

The growth of law is the result of calm and deliberate codification and the precedent of judicial decisions. It is a process of development and interpretation. The General Assembly of the United Nations has adopted a resolution directing a codification of offenses against peace and the security of mankind. The success of that effort will have a marked effect on the prospects of peace throughout the world. The greatest stumbling blocks to the just administration of international criminal law are the desire of the victor to sit in judgment on the vanquished and the temptation to tarnish justice with vengeance. The hand that holds the scales of justice can be steadied by an international code that not only defines crimes against peace and humanity but also outlines the basic principles of a fair trial and just punishment, and the procedure by which these may be accomplished.

† 33 Virginia Law Review 696 (1947).

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