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SOME PROBLEMS IN DEVELOPING AN INTERNATIONAL LEGAL SYSTEM*

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The most useful contribution that I can make to your study of international and comparative law perhaps would be to relate some of the disagreements during the Conference that framed the Agreement for the international trial of the major Nazi war leaders later held at Nurnberg. The proceedings of the Conference, held at London from June 26th to August 8th, 1945, have not yet been, but I hope soon will be, published, for a page of experience is sometimes more instructive than a volume of speculation.

This London Conference might well be likened to a comparative law clinic. Since there had been no precedent experience with international criminal trials, the lawyer of each country naturally envisioned such a trial as the image of one under his own system. The four conferring delegations thus started far apart, for they represented the maximum variations and conflicts in legal tradition, philosophy and practice existing in the Occident. The two common-law countries, Great Britain and the United States, had no substantial differences of approach to the problems. France and the Soviet Union, on the other hand, both represent the Roman or civil law tradition, but with important variations, due largely to their different derivations. Both strike their roots into Roman law; but Russia received its law, as it received its Christianity, from the Eastern Empire and Byzantium was a medium which considerably colored the doctrines it transmitted. The French not only received the Roman influence from the Western Empire, but in its long evolution French law was exposed to the in-

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fluence of all the currents which have shaped Western thought, including a virile and liberal stream of French political philosophy. The Russians during those centuries, however, lived under institutions permeated with the doctrines of absolutism and insulated from the reforms and liberalizing movements which have shaken the West. The result is a marked difference of attitude toward the administration of justice.

The American Representative was met by spokesmen from each other country who had considerable practical experience in litigation as well as learning in theory. Great Britain was represented by the Lord Chancellor and the Attorney-General. France sent a Judge of the *Cour de Cassation* and a distinguished scholar of international law, while the Soviet Union was represented by the Vice-President of its Federal Supreme Court and a leading law professor.

Their negotiations point up some of the difficulties inherent in any attempted codification of international law.

I. PROCEDURAL PROBLEMS

You will not be surprised that disagreements over procedure were more numerous and stubborn than those over substantive law. I think systems of law diverge more in methods of trial than in principles of law to be applied in decision. Then too, with lawyers practice becomes a matter of professional habit, and our habits often seem more fixed than our principles.

I make no apologies for the great proportion of conference time devoted to devising a procedure for trial. Historians have asserted that the common law developed procedurally before it did substantively and that until there was a method to adjudicate particular claims of right no general law of rights could be worked out judicially. It is not farfetched to compare the present anarchic state of international society to a primitive society which had controversies to decide long before it had legislatures to frame codes, and which began to develop decisional law only when it discovered a pathway to decision. The demonstration that an international criminal trial can be successfully conducted and that the nations can reconcile their procedures in acceptable methods of adjudication in this most delicate kind of trial may have more importance than any other feature of the Nurnberg experience.

All conferees at the outset agreed in principle that no country was entitled to insist on its own ways of trial and that we should strive to borrow from every system such devices as would amalgamate into a fair and just procedure, but also one that would be practically workable and reasonably expeditious. To this end there were concessions on all

sides. There was a strong motive to thrash out every disagreement to a complete understanding rather than to adopt some seductive formula to cover up or postpone differences, as is sometimes done to claim a temporary diplomatic triumph. But the same men who were making the agreement were going to be responsible for carrying it out, at once and in the eyes of the world—a responsibility which was very sobering. The difficulties were not due so much to lack of willingness to compromise as to that infirmity of all minds which makes it so hard to imagine an unfamiliar system or to see its merits. Patient and repetitious discussions and expositions gradually overcame most of this handicap.

The conferees brought to London contrary notions on a variety of details, such as rotation of the Presiding Judge, how to resolve a tie-vote either among judges or prosecutors, the use of Masters, the sequence of various steps of the trial, the power of the Allied Control Council for Germany to alter sentences or set aside acquittals or convictions, the place of trial, and the method of trial leading to a declaratory judgment that an accused organization was criminal in character.

The latter subject took a great deal of conference time and the method adopted was in general that advocated by the United States. I am bound, on reflection and in the light of events, to say that the procedure to declare organizations criminal was one of the most troublesome and least useful features of the Nurnberg trial. At the time it was adopted, no other plan for dealing with the membership of these lawless groups by the occupation authorities had been promulgated. When the Control Council adopted a "Denazification Law" it reached most of the membership of these organizations by a method which proved simpler and swifter, although in its penalties it was probably more severe and indiscriminating, than the procedure adopted by the London Conference.

The most basic conflict, which bred many lesser ones, concerned the function and independent character of the international tribunal to be set up. The Soviet Representative, in keeping with the Soviet philosophy of the nature of courts, early in the Conference said bluntly: "The fact that the Nazi leaders are criminals has already been established. The task of the tribunal is only to determine the measure of guilt of each particular person and mete out the necessary punishment—the sentences."

This conception of the court as a body bound by the declaration of the heads of the allied governments as to the issue of guilt was unanimously rejected by the other three powers, and the Soviet delegation finally, but reluctantly, accepted the principle that the tribunal

should independently decide the whole issue of guilt. I have never doubted their good faith in accepting and in trying to apply this theory at the trial, but their failure to grasp its full import brought up the same issue in many guises.

The Soviet concept of the function of the court in the criminal trial is not that of an arbiter of an adversary proceeding. Indeed the Soviet Representative criticized our criminal procedure on the ground that the trial tended to become a mere contest of skills—a criticism that we must admit has more than a little justification. They look upon a court as an agency of organized society, not to be passive while lawyers or parties control the case, but actively to conduct the inquiry as well as to pronounce judgment. Reasoning from this concept as embodied in their own law and practice, the Soviet delegation envisioned a trial with the following features: First: The prosecutors would prepare an indictment or “accusation” which would include a dossier of evidence—every statement of a witness and every document—and hand it over to the court and a copy to each defendant. They considered that this reduced the scope and probability of contest and also that it is more fair to a defendant than to withhold knowledge of the evidence from him until he is in court. There is much to be said in favor of this view. Second: In the words of the Soviet Representative: “The Tribunal’s task will not be so terribly complicated because all the material is before it, the defendant will be called, the witnesses will be called, and the task of the Tribunal will be simply to check whether all the evidence against the accused person is sufficiently valid and valuable and whether the witnesses are sufficiently trustworthy and in sufficient number. If the defendant asks to call further witnesses, it will be the business of the Tribunal to decide whether they shall be called or not.” Third: The court itself would conduct the case while the prosecutors’ function would be extremely subordinate. For example, the Soviet Representative suggested: “Let us admit the possibility of a case where the accused first admits his crime and then in open court denies and says he never committed the crime and was not even on the spot when it was committed. At first the Tribunal will again interrogate the accused by reminding him of his own admission of the crime, then call witnesses who will prove he was at the particular spot and had committed the crime, and also present all available documents. It is quite possible that after that the accused will be compelled to admit his crime.”

In all of these matters the Soviet after long discussion of our own system yielded, although they pointed out that the procedure outlined in the international Agreement “is contrary to the Soviet

legislation on this subject" and said, "We decided to accept it simply because that is the usual procedure in England and the United States and therefore it is more widely known."

However, when we came to frame an indictment, the Soviet lawyers clung to their belief that it should contain a complete statement of all evidence to prove a crime against the accused, while we of the common-law school thought it should simply charge the crimes we intended later to prove. The French and German practices would more nearly accord with the Soviet than with our own and it is for this reason that the indictment contained a recital of much detail that would not be considered appropriate in an American or a British indictment.

The problem as to what rules of evidence should guide the Tribunal caused little disagreement, but it would have done so had the British and American Representatives urged adoption of common-law rules of evidence. Continental lawyers generally regard them with varying degrees of abhorrence. Since they were devised mainly to control jury trials, we saw no reason to urge their use in an international trial before professional judges. We settled, therefore, upon one simple rule: that the Tribunal "shall admit any evidence which it deems to have probative value." This, of course, vests considerable discretion in the Tribunal and it does not lead to formal consistency of decision. For example, affidavits made by persons who were not available for cross-examination were sometimes received in evidence and sometimes rejected. The reason is that admissibility was determined by whether in the light of the circumstances of the statement and its contents and all other relevant factors the particular statement, even in the absence of the test of cross-examination, had probative value on the point for which it was offered. The merit of this rule was that any argument as to admission of evidence was focused on the value of what was proffered rather than upon some formality concerning it.

On one matter a conflict was compromised by adopting both the Continental and our own practice. Under Soviet law, as under French and German law, the defendant may not testify in his own behalf under oath. That was also at one time the rule at common law and is still the rule in some American states. Under the Continental practice, however, the defendant is entitled at the conclusion of all proceedings, and before judgment, to make an unsworn statement which does not subject him to cross-examination. We felt that no trial would be regarded as fair in Great Britain and the United States which refused the defendants the right to testify for themselves under oath. Our Continental associates felt that no trial would be regarded as fair in Germany, France or the Soviet Union which denied the

defendant his right, traditional with them, to make this final statement. We had sufficient confidence in the strength of our case on the documents so that all agreed to allow the Germans both privileges, and most of the defendants testified for themselves and also made final statements.

Experience proved that in these compromises practicability was not sacrificed to theory. So experienced an advocate as Mr. Justice Birkett, who sat at Nurnberg as one of the British judges, again and again expressed surprise and satisfaction at the workability and fairness of the simple procedure and rules of evidence improvised by the London Agreement for this first international criminal trial. The amalgamated procedure worked smoothly in spite of the friction incident to a prosecution conducted by lawyers from four nations against defendants and defense counsel of a fifth nation, and the necessity of working at all times simultaneously in four languages. In fact, less time was devoted to bickering over procedure and admissibility of evidence than usually is the case in a criminal trial under established procedure in the courts of this Country. I would not pretend that there were not difficulties and disagreements which on some days seemed almost insuperable. But I think we demonstrated that the ideas of fair legal procedure embodied in the most widely differing of legal systems are not too irreconcilable to be merged into a fairly acceptable procedure for the conduct of international causes of the most delicate character. In this respect our efforts have been put to the test and I think it not too much to claim that they have been vindicated.

II. SUBSTANTIVE LAW PROBLEMS

The substantive law provisions of the London Agreement are of more controversial character and unfortunately cannot be submitted to such a pragmatic test.

The most far-reaching and, in its application to the facts, the most novel feature of the American proposal for trials, as I see it, was the principle of individual accountability to international law and authority. This appeared inconsistent with traditional notions of sovereignty in the sense of the absolute right of a state, without restraint or responsibility, to resort to any measures, including war, to advance its own interests. If individuals, acting under the authority of the German Government, may be punished because those acts offended international commitments or violated international rights, it is obvious that the sovereignty of the German state over its own citizens was subject to important qualifications. And when the four dominant nations of the earth assert that international law imposes

qualifications on the sovereignty of the German state, it ought to follow that they acknowledge or accept similar limitations on their own sovereignty. Of course, it can be argued that Germany had unconditionally surrendered—whatever that means. But the London Agreement was neither expressly nor by implication predicated upon or limited to rights acquired under the surrender. Its implication is that international law pierces national sovereignty to the extent that in the interest of international order and peace it imposes some limits on the acts which states may authorize or immunize. As Professor Jessup has well pointed out, it is indispensable to development of an effective modern law of nations that it lay obligations upon living individuals as well as upon that abstraction known as the state.

The learned and astute German counsel attacked as *ex post facto* chiefly this concept rather than the provision that aggressive war is a crime, which most American critics have attacked. Whether the failure of American critics—particularly the political ones—to assail this recognition of individual responsibility is because they do not understand its implications, or because they approve abandonment of the old concept of absolute sovereignty, I cannot be sure. But there is no convincing evidence on which those who have attacked the trials in the political arena can be accused of possessing information, not to mention understanding.

It may strike serious students of these events as strange that this basic feature of the American proposal was accepted and approved by all delegations, not only without dissent but even without discussion.

There was, however, serious division of opinion as to the definition of "Crimes against Peace" which threatened at times to break up the Conference.

The first written proposal submitted by the United States to the other powers defined as elements of this crime: "Invasion by force or threat of force of other countries in violation of international law or treaties"; "initiation of war in violation of international law or treaties"; "launching a war of aggression"; "recourse to war as an instrument of national policy or for the solution of international controversies." A draft submitted by the British delegation contained substantially the same features.

Of course everyone recognized, as Sir David Maxwell Fyfe said, that this definition would involve "different schools of thought as to whether that is an existing offense against international law." But while many times revised in form, neither the British nor the American delegation ever receded from its substance and they were at no time during the Conference in any fundamental disagreement concerning it.

The French delegation later proposed this definition :

“The Tribunal will have jurisdiction to try any person who has, in any capacity whatsoever, directed the preparation and conduct of :

“i) the policy of aggression against, and of domination over, other nations, carried out by the European Axis Powers in breach of treaties and in violation of international law ;

“ii) the policy of atrocities and persecutions against civilian populations ;

“iii) the war, launched and waged contrary to the laws and customs of international law ;

and who is responsible for the violations of international law, the laws of humanity and the dictates of the public conscience, committed by the armed forces and civilian authorities in the service of those enemy Powers.”

The French explained their position to be “the same as others who have proposed drafts” of definitions. Professor Gros said, “We tried to cover exactly the same ideas but to build from a different basis.” He was troubled as to whether the mere launching of a war of aggression, standing by itself, was a crime against international law as theretofore declared although it was a breach of treaty calling for indemnity. However, he felt that if “we start from the bottom, say that there have been indisputable crimes and go up the line of responsibility to the instigator of the war,” we would be on a sound basis. At one point Professor Gros said with some insight, “the Americans want to win the trial on the grounds that the Nazi war was illegal, and the French people and the people of the occupied countries just want to show that the Nazis were bandits.” The difference seems to come to this: We regarded a war of aggression as criminal *per se*; the French regarded it as criminal only when it is a means by which other long-recognized crimes are committed. The French delegation was entirely willing to modify the definition to make it one of general application rather than just a crime if carried out by the Axis Powers.

But the real, and from our viewpoint the uncompromisable, difference appeared when the Soviet delegation, after nearly a month of conferring, brought forth and insisted upon the following proposed provision :

“The Tribunal shall have power to try any person who has in any capacity whatever directed or participated in the preparation or conduct of any or all of the following acts, designs or attempts namely :

“a) Aggression against or domination over other nations carried out by the European Axis in violation of the principles of international law and treaties;

“b) Atrocities against the civilian population including murder and ill-treatment of civilians, the deportation of civilians to slave labour and other violations of the laws and customs of warfare;

“c) Waging war in a manner contrary to the laws and customs of warfare including murder and ill-treatment of prisoners of war, wanton destruction of towns and villages, plunder and other criminal acts;

and who is therefore personally answerable for the violation of international law, of the laws of humanity and of the dictates of the public conscience, committed in the course of carrying out the said acts, designs or attempts by the forces and authorities whether armed, civilian or otherwise, in the service of any of the European Axis Powers.”

The rest of the conference was largely devoted to overcoming Soviet insistence on this definition in substance. Our objection to the proposal was that it would declare a war of aggression a crime only when perpetrated by the Axis Powers. The American position was constant and uncompromising that it would be stultifying to define a crime as such only when our enemies committed it and leave the inference that it was no crime when committed by others. We regarded armed aggression as a crime, no matter by whom instituted, and wanted that condemnation of every such aggression clearly set out. Perhaps we were overcautious about this, for at one time all of the other delegations were ready to accept the Soviet definition in order to reach some agreement. But we were prepared to break up the conference without agreement rather than to accept a definition so conditioned. In the end the Soviet yielded and the Conference, while limiting the jurisdiction of the Tribunal to the trial of Axis war criminals, adopted the following definition of “Crimes against Peace”.

“. . . planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;”

It would have been logical that a document which made such aggression a crime, should define “aggression.” Critics have pointed to the absence of such a definition as a defect. The omission has an interesting history.

The early American proposals made no effort to provide standards for determining what made a war one of aggression. Nor did any other delegation propose consideration of the subject.

During the Conference the Soviet delegation suggested that "it is quite possible that the accused would like to become the accusers in the course of the trial" and suggested provisions to exclude propaganda. The American delegate ventured the opinion that the best way to exclude such counterattacks would be to narrowly define "aggression" so as to confine the issue to the actual attack, and suggested consideration of definitions used in non-aggression pacts to which the Soviet Union was already a party. The idea was coldly received. Perhaps the reference to the Soviet non-aggression treaties was not exactly tactful.

The American delegation nonetheless, at a later session, proposed for the purposes of the trial the following definition of "aggression":

"An aggressor, for the purposes of this Article, is that state which is the first to commit any of the following actions:

"(1) Declaration of war upon another state;

"(2) Invasion by its armed forces, with or without a declaration of war, of the territory of another state;

"(3) Attack by its land, naval, or air forces, with or without a declaration of war, on the territory, vessels, or aircraft of another state;

"(4) Naval blockade of the coasts or ports of another state;

"(5) Provision of support to armed bands formed in its territory of another state, or refusal, notwithstanding the request of the invaded state, to take in its own territory, all the measures in its power to deprive those bands of all assistance or protection.

"No political, military, economic or other considerations shall serve as an excuse or justification for such actions; but exercise of the right of legitimate self-defense, that is to say, resistance to an act of aggression, or action to assist a state which has been subjected to aggression, shall not constitute a war of aggression."

The British indicated agreement. The French thought the definition could be better left to the Tribunal. But the Soviet were adamant in the position that it was not within the competence of the conference to define "aggressor." Happily, the captured documents demonstrated that the attack on Poland was so calculated and blatant an aggression, by any permissible formula, that the omission caused no serious em-

barrassment, and the incident is significant only for the light it may throw on other problems.

III

On an abstract or casual comparison, the legal systems of the world appear a chaotic mass of basic materials out of which to fashion acceptable international law concepts. But when applied to concrete and specific problems, the conflicts even between our own and the Soviet system do not appear so inherently irreconcilable. And where other systems diverge from our own, there is no reason to presume that what seems best for us is also for all times and all places superior to what has been worked out by the experience of others. The fundamental harmonies among systems of law are much more impressive to me than their discords.

My limited experience leads me to expect international law to advance somewhat after the method of the common law, that is, by providing rules from time to time to deal with concrete situations, rather than by a miracle of codification which will hand us down a collection of universally applicable abstract rules.

I am sure that in 1938 the United States, Great Britain, France and the Soviet Union could not have agreed on the London Charter, or on any other method of trial or standards of guilt to apply to future hypothetical aggressors. Nor could they, in my opinion, do so today. But in 1945 they faced a known and concrete situation, in which they had little conflict of interest or purpose. Moreover, the common-law countries had a definite advantage in that we had captured the most notorious prisoners and the most incriminating documents. While we were in a position to hold a trial of our own with no help from the Soviet, they could hold only a very secondary one without us. And we often declared our purpose to go it alone unless a satisfactory agreement for international trials could be reached.

The result was an agreed statement of law and procedure, signed by four powers and adhered to by nineteen others, and now embodied in a judicial precedent. That it could be improved in the abstract, I am confident. That in the present state of international affairs it will be improved, I am doubtful. Apart from the bitterness which now blinds and divides all international councils, we no longer have the advantages that were ours in 1945; nor are the governments under the pressure to get along with a project to which the heads of state were committed, which made them all amenable to reason then. Moreover, codification, even among good friends trained in the same tradition, is not without difficulties of its own. Wide differences

which can never be bridged in abstract statement will yield to some formula before a concrete situation.

So I think we should not cultivate too many hopes for an early and satisfactory body of written international law. But we should take advantage of every opportunity to deal with international controversies by the adjudicative or arbitral techniques. In this way we will enlarge and expand the world's experience in using these orderly and reasonable processes, fashion an increasing body of decisional and customary international law, and encourage the law-abiding habit among nations.