

# The Trials of War Criminals:

## An Experiment in International Legal Understanding

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There exists between France and America an intellectual kinship closer than commonly is recognized on either side of the Atlantic, outside of the legal profession. The American ideal of representative free government represents the convergence of two great streams of eighteenth century liberal thought. One stream flowed from France, from the advanced thinkers of its pre-revolution days, and its influence was powerful in shaping the general philosophy and structure of our Government. The other stream, of course, came from Great Britain and its contribution was predominant in the field of private law and of legal forms and procedures.

French liberal thought concerning the natural and inalienable rights of man, and the duty of governments to foster them, was communicated to America during its revolutionary period chiefly through Benjamin Franklin and Thomas Jefferson, aided by Thomas Paine who was an active agitator and pamphleteer of French new thought. Franklin had spent much time in France, had been a member of the French Academy of Sciences, and became the first diplomatic representative of our struggling new country.

Jefferson came to France to assist Franklin and was so closely in touch with French revolutionary thought that in July, 1789, he was

invited to assist in the deliberations of the National Assembly's committee to draft a constitution. He declined because he thought it might be inappropriate in view of his position as American Minister. Thus, the French influence was sponsored by men who stood and who still stand among the very highest in the affections of our people.

### Force Must Be Subordinated to Law

Agreement is nearly universal, I suppose, that mankind's hope for individual freedom, an economy of abundance, and a culture of breadth and depth and beauty, depends on maintaining the peace of the world. Agreement is undoubtedly no less complete that the maintenance of peace depends upon establishing means by which force will be subordinated to and controlled by law.

"But," the layman asks, "what law?" It is plain that world law cannot be *your law*, nor *my law*. It must be *our law*, and here it is that the pessimist urges there is no such law and that such law cannot be because the interests, traditions, and philosophies of nations are so divergent that they cannot unite in common concepts of what is legally right and wrong.

### The Experiment in International Legal Cooperation

I think that the Nurnberg trial, wholly apart from any benefits to be derived from punishing these par-

ticular Nazi war criminals, is a venture in international legal understanding and an experiment in international legal cooperation, the success of which will give real hope that common ideas of legal right and wrong may yet unite the civilized peoples of the earth. The representatives of the four nations began their work as strangers, separated by barriers of diverse traditions, of different interests, of wide divergence in legal philosophy, and of language.

During the month and a half of negotiations in London, we all found that our basic ideas of right and wrong and, hence, of what was lawful and unlawful, were not so far apart. Our greatest differences were in methods of trial and techniques for applying the law. Our mechanics were more varied than our principles. But we candidly and critically examined each other's procedures, and each discussed the various proposals in the light of his own system.

### Common Ground as to Principles and Procedures

We found it possible to reach common ground as to both principles and procedures. Certainly the result is far from perfect. But the significant thing for the legal profession is not that our Agreement contained defects. What is really significant is that we were able to agree at all. We did, in fact, produce an instrument to which twenty-two governments have signified adherence

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and which the signatories, four of the dominant governments of the world, are engaged in carrying out.

It is truthfully said that this trial is unprecedented in judicial history. That is so, and this departure from precedent by bringing defeated enemies to judgment is the thing impressed with novelty for most people. But the union of the four chief nations of the world, in a litigation before an International Tribunal is itself a really important innovation.

### Points of Agreement Outweigh Points of Difference

From working together with representatives of the three other nations from day to day on problems of law and procedure, I am strongly impressed that the number of things on which French, British, Soviet, and American law agree is much more important than the number of things on which we are in difference. I regret that the entire judiciary of the United States cannot take a sabbatical year and spend it in company with French, British, and Soviet jurists and lawyers such as those with whom I have had the advantage of working. Such a lesson in comparative law deepens one's humility about the defects of his own system, and deepens his respect for the legal systems that have evolved in different ways than his own.

### Understanding the Legal Concepts of Soviet Union

Of course, it was to be expected that the British and the Americans, both trained in the tradition of the Common Law, would be able to cooperate and to understand each other. And while the gulf between our system and the French system was greater, there was a feeling that we had so much of common tradition that we would bridge that gulf. But there was a widespread feeling—about which I may as well be candid—that we could have little basis for common understanding with the representatives of the Soviet Union.

It would be idle to pretend that understanding between the Russians and the Western World is easy. For centuries legal evolution in the East and in the West has followed different courses. France, Britain, and the United States have all been influenced in varying degrees by Roman law, but our nations all received it directly or indirectly from the Western Roman empire. Russia, too, traces many concepts back to the Roman Empire. But Roman law reached the Russians by way of the Eastern empire through Byzantium, and the course of its evolution was thereby subjected to a very different influence. It was not uncommon in our conferences to find one or the other using terms of art which were not translatable. There was not only no equivalent in words, but there was no corresponding concept. These make understanding difficult, but they make conference both stimulating and profitable.

### Differences in Legal Philosophy Should Not Be Exaggerated

But I would be false to the teachings of my experience if I did not say that we western peoples, particularly in the United States, are likely to exaggerate the difference between our legal philosophy and that of the Soviet. The machinery of justice appears much more unlike than do the rules applied. Under different forms, again and again one finds the same concept of right and wrong and of fair dealing.

We men of the law must not let the very important differences between our countries in political interest and outlook and method blind us to the vast groundwork of common understanding that already exists in the law. Very great political differences there certainly are. But politics usually express interests, often very temporary ones, while a people's law is the expression of an enduring and deep-felt conviction. It is in this latter that I find deeper bases of accord between the Western and the Eastern world.

There is a superficial belief among laymen that law is all created by "the government," and that if countries differ in political policy they must also differ in their law.

We know that a vast proportion of all the "law" that is applied today in the courts of either of our countries had its real origin long before the government. Some of it is as old as the Scriptures, much of it is traceable in ancient codes, very little really added by ourselves. Sound law is neither temporary nor local.

We know that the legal concepts of the Code Napoleon have served many kinds of governments and have been exported to many lands. Indeed, they form the basic law of one of the states of the American Union today. We know that both the Common Law and the Civil Law have survived almost unaffected when governments have collapsed and new ones have taken their place, and have spread from their places of origin to be useful in different environments and with the problems of strange peoples. There is something fundamental about the basic relations between legal right and wrong which changing governments—save for the ruthless experimentation of the Third Reich—do not try to change and cannot change any more than they can change time or tide.

### International Law Cannot Prevent Clashes of Interest

I believe that in international affairs as in domestic affairs, we can from time to time discover these basic relationships which must be respected if we are to have an international order of peace and justice. I would not have you understand that I believe any system of International Law can ever come into being that will prevent different people and nations from having clashes of opposing interests. The value of domestic law is not dependent upon success in keeping citizens from having differences of opinion. Society

made orderly, not by preventing conflicts which, indeed, increase as the world becomes more complicated, but by providing peaceable means and fair rules by which civilized men will settle those conflicts. So in international affairs, those who hope to adjust affairs so perfectly that there will be no clashes of interest seem to me to be striving for the impossible.

But those who hope that we shall be able to work out slowly and painfully an International Common Law which will provide means of settling grievances and will reach and punish crimes against the peace, should find considerable encouragement in the Nurnberg trials.

### Disturbing Factors Overlook an Underlying Kinship

I am aware of a prevailing pessimism about the possibility of maintaining peace. I would not underestimate the persistence and importance of factors that make what we now call "peace" so tentative and unsta-

ble. But it is an unfortunate thing that the disturbing factors have all the drama in them, and cause all the shouting and screaming, whilst the great underlying kinship between peoples, the similarity of their notions of justice and of their aspirations for a peaceful and orderly world, pass unmentioned because there is no drama in them.

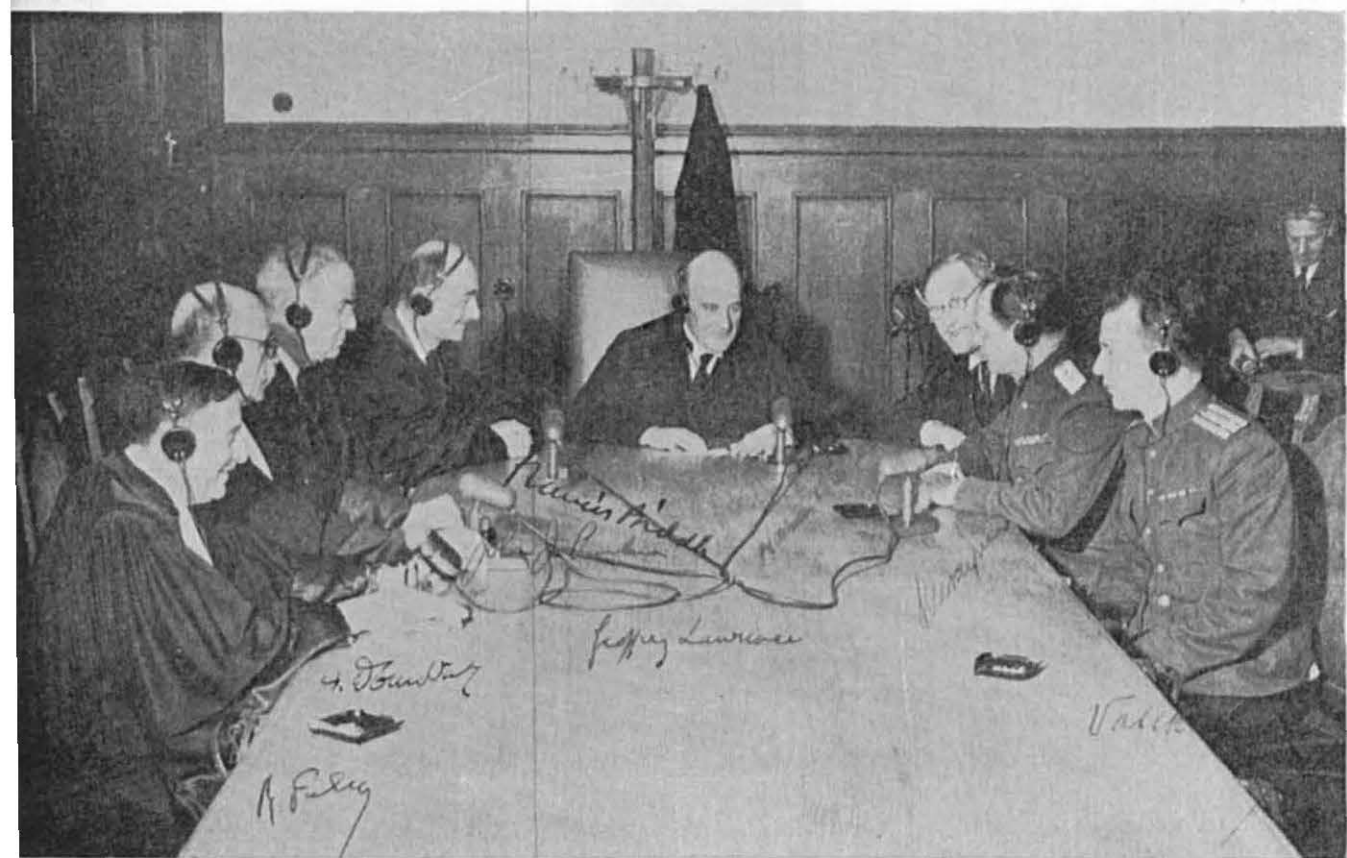
Of course, we know that the maintenance of free and just government in any country is a task that requires constant vigilance, constant reworking of old concepts in the light of new conditions. It calls also for calm and steady statesmanship in the law.

### The American Bar Is Deeply Interested in France

The American Bar and the American people take the deepest interest in the struggle of France to repair its family life, its economy, and its legal system from the disasters of the war and occupation. We

are greatly complimented at the interest which the French Bar and French statesmen are taking in the judicial and constitutional systems of the United States in connection with framing the new French Constitution. Without the least belief that we have perfected a model system, we still think you will find our American experiment instructive because, after all, it is a transposition to a new Continent of ideas which our forefathers borrowed in no small part from yours.

The American lawyers have the greatest admiration for the spirit of resistance to injustice and to oppression which has characterized so many French lawyers, a spirit which did not perish and could not be conquered. It gives us assurance that the springs of liberal thought which were so inspiring to our forefathers have not gone dry. We are confident that in our time also, France will make strides in the evolution of justice under law which will again be the inspiration of mankind.



The International Military Tribunal in the Conference Room.