

RECENT INTERNATIONAL PRACTICES

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THE realm of international practices is at the moment in a state of flux. What will ultimately arise from the present ferment, is difficult to state. Nevertheless, certain trends are daily becoming more evident. Some of these trends augur well for the future of international relationships. On the other hand there are precedents being set that may have the most unsatisfactory consequences. It is therefore fitting that an assessment of international practices be made at this time. In particular, there is need to pause a moment to examine what has happened, and what is happening, in three major fields of international affairs. I refer to the trial and treatment of war leaders, the treatment of defeated military personnel, and the treatment of defeated civilian personnel.

I. THE TRIAL AND TREATMENT OF WAR LEADERS

The determination of the judicial procedure to be followed in the trial of German and Japanese war leaders, and the process of the actual trials themselves, has progressed sufficiently far to enable one to set forth at least a rough estimate of the likely effect on the future nature of international law.

Associate Justice Robert H. Jackson of the United States, who is chiefly responsible for the formulation of the basis for the war criminal trials, wisely chose as the foundation of the prosecution's case the violation of the Briand-Kellogg Pact of 1928. According to this Pact, the signers declared in the names of their respective peoples "that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relation with one another". They further declared "that the settlement or solution of all disputes or conflicts, of whatever nature or whatever origin they may be, which may arise among them, shall never be sought except by pacific means". Justice Jackson, in presenting his case against the German leaders, maintained that this Pact could now be considered a part of international law, and that since the Germans had planned and waged a war, they had broken an international legal enactment and hence were liable to prosecution.

Many international lawyers have argued against Jackson's contentions. They have done so on various grounds. Some have urged that war has always been recognized as a "lawful act" on the part of sovereign and independent nations, and that agreements to keep the peace, while undoubtedly laudable, do not constitute enactments having the force of law. Therefore, they have argued, no country can be tried and convicted for violating a pledge which has no legal basis. Others assert that it never has been legal and never will be legal for any authority to bring individuals to judgment *ex post facto*, that is, to try individuals for actions that were considered legal at the time of their perpetration. Again, there are those who contend that there are already in existence very well defined and legal methods for the obtaining of satisfaction from a country which has done some considered wrong to another country. The making of war being a legal right of a sovereign nation which deems other ways of attaining its just ends are in vain, it is said that the rightness or wrongness of the claims of that nation is determined by the outcome of war, and that the victor is entitled to the exaction of an indemnity or the payment of compensation in the form of cession of territory. In other words, indemnity and compensation constitute the legal punishment of a nation for wrong doing; not the trial and execution of the nation's leaders. Fourthly, there are those who assert that trials of this kind now being conducted are in reality an invasion of and a limitation on national sovereignty—a condition that is not tenable since it limits the freedom of a nation state by placing an international authority over affairs which are solely that state's business.

One cannot help but feel that most of the above arguments against trying the ruling groups of a country for instigating and carrying on war are based on premises that were sound enough in bygone days, but that have become obsolete because of the vast changes that have taken place in international life since they were first adopted. Thus, to argue that the making of war has in the past been a perfectly legitimate and lawful act and is therefore still legally sanctioned is to argue that there can be no moral progress that contradicts existing law—in other words, that laws cannot be changed. But, on this basis, one might as easily argue that since primitive law, which once prescribed an "eye for an eye and a tooth for a tooth", was legally recognized in most early societies, it must still remain the basis of international relations. Such an argument is obviously absurd. No law is static. There are legal means of changing

laws, including the use of precedent, legislative review and judicial interpretation. And this, as Associate Justice Jackson maintains, is what has happened to the legality of waging war. The *Covenant of the League of Nations*, the *Briand-Kellogg Pact* and other instruments of international policy are, in fact, legal revisions in essence declaring war an illegal act.

It follows, if the above contentions are sound, that the argument that the present war crime trials are *ex post facto* no longer holds true. The act of waging war was *illegal* at the time of its perpetration on the part of German and Japanese war leaders. It is unfortunate, of course, that international jurists failed to make plain long ago that such instruments as the Briand-Kellogg Pact were considered to be binding legally, and that violation of them would be followed by prosecution. To make such a statement at this late date must appear to the accused to be extremely specious. No doubt they are of the opinion that the victorious powers are distorting the facts to fit their wishes. Such an attitude lessens the impression of the lesson that might otherwise have been learned. However, the procedure is certainly a more worthy alternative to ignoring the moral nihilism that the accused represent.

As for the argument that the trial of a nation's leaders is an invasion of national sovereignty, one cannot here enter into the pros and cons of the legality or the necessity of a limitation of national sovereignty. Sufficient it is to say that there are very powerful arguments for a limitation of national sovereignty, and that more and more people are becoming convinced that aggressive nationalism must be curbed in some manner. Hence the war crimes trials are following a generally recognized trend. Moreover, one can argue that although irresponsible national sovereignty has been to date recognized as the legitimate right of a nation, there is no reason to argue that such sovereignty is justified now or in the future.

Two other arguments—perhaps more cogent than those previously mentioned—have also been put forward against the holding of war crimes trials. One is that the trials are not entirely impartial. The contention is that the whole affair is but a case of the victor sitting in judgment over the vanquished. In short, that the cards are stacked against the defendants from the beginning. The prosecutors are members of the victorious powers. The judges likewise are members of the victorious nations, and may be biased according to their national allegiance. Consequently the interpretation of points of law may be biased

and the discretion used in allowing witnesses for the defence to appear may not be altogether free from prejudice. So the argument runs.

Again, it is sometimes maintained by students of international relations that the *Briand-Kellogg Pact*, while it may be considered a part of international law, is aimed merely at outlawing "aggressive" war since, according to the Pact, a country has the right to go to war in self-defence or to uphold the obligations entered into through treaties prior to the signing of the Pact. But aggressive war, it is argued, is all but impossible of accurate definition.

"However unfortunate it may be, there seems to be no way of doing anything about the crimes against the peace and against humanity except that the victors judge the vanquished. The scale of their attack leaves no neutrals in the world." Such was Justice Jackson's answer to the criticism that the war crimes trials were but a case of victor judging vanquished. It seems to the writer, however, that it is unfortunate that the machinery of the Court of International Justice was not used as the instrument before which the German and Japanese war leaders were brought to trial. True, the court was a part of the League of Nations and was dissolved when the League was dissolved, but it seems that the war crimes court might have been constituted along the lines of the old court. The old court was composed of fifteen judges and four deputy judges, chosen for nine year terms by the majorities in the Council and Assembly of the League. Now, the war crimes court might have been set up on similar lines by the United Nations Organization. In fact, the United Nations Organization now has just such an international court of justice. This court, being truly international in character, would have obviated the charge that the victors are sitting in judgment over vanquished. True, as Justice Jackson commented, the scale of the attack made by the accused renders it extremely difficult to find any neutral. However, the chances of securing an impartial judgment would have been enhanced by adopting the suggested procedure. Furthermore, the existing practice will no doubt make it more difficult to seek adequate procedures in the future. A procedure once established, is not lightly dismissed.

As for the charge that "aggressive" war is too difficult to define, it is undoubtedly true that the term "aggression" lacks a clear cut definition. Anyone who is aware of the political, social and economic causes of war will appreciate the reason for this

however. But there is no reason why a definition of "aggression" should not be attempted. Some form of definition is certainly needed. For, if a nation and its leaders are to be tried for instigating aggressive war, one must know with a high degree of exactitude for what they are being tried. Otherwise there will be no uniform procedure from one case to another, and the very indefiniteness of the nature of the charge of aggression will lead to future temptation on the part of those daring enough to challenge international authority with the hope of limiting the definition sufficiently to suit their own ends.

The trial and treatment of war leaders, then, has set many precedents to be placed on the credit side of the ledger as far as the future of international practices is concerned.

1. It has established the fact that the instigation and waging of an aggressive war is a criminal act liable to lead to trial and punishment;
2. It has established the fact that international law has declared aggressive war a criminal act and hence an illegal act;
3. It has created a precedent for bringing the rulers of a country to the bar of international justice for offences against international morality;
4. It has created a method of placing a limitation on irresponsible national sovereignty which can be used to curb future international irresponsibility.

On the debit side of the ledger may be placed the following:

1. The failure to define "aggressive" war with sufficient clarity to be used as guide in possible trials of the future.
2. The failure to try war leaders before an international court rather than the court or courts of the victorious countries.

II. THE TREATMENT OF DEFEATED MILITARY PERSONNEL

Precedents are being set not only for the trial and treatment of war leaders, but also for the treatment of defeated military personnel—precedents that are of the utmost importance for the future of the rule of law in international affairs. It has become an accepted practice to use war captives to rebuild devastated areas of countries subjected to the destruction of

war, and even to use them in countries untouched by actual physical ravishment, on the ground that those who have destroyed must rebuild that which they have destroyed. Russia, never bound by the Geneva Convention, has transported some three million Germans to that country to labour for her; France has demanded and succeeded in obtaining some 750,000 German prisoners of war; Britain has some 250,000 working for her; and the United States and Canada have both adopted the same practice of making use of defeated enemy personnel in time of peace. Is such a practice conducive to the rule of law? Is it a moral advance upon previous practices?

In warfare there have been four stages in the moral evolution of the treatment of male captives. In the earliest stage the male prisoners were all slaughtered without the slightest compunction. In the next stage they were kept as chattel slaves. In the third stage they and their families were made economically dependent castes or classes subject to the conqueror. It has been only since the time of Grotius that a more humane attitude towards male captives has become part of the moral conscience of western civilization. As Hobhouse pointed out in his great *Morals in Evolution*, "Grotius expressed the profound ethical truth that the rights and duties of men are not circumscribed by the limitations of positive law or of revelation, but rest on certain universal attributes of humanity . . . By resting rights and duties on human nature as such, it gets below the distinction of compatriot and foreigner . . . Once grant that the enemy does not cease to be a man, to whom as a man certain primary duties are owing, and we have a principle which undermines the whole structure of the earlier ethics of warfare. As a human being possessed of human rights, the enemy comes under the ordinary civilized conception of justice. He cannot fairly be punished for the delinquencies of his nation. Grant, what every belligerent assumes, that his own cause is just and that of the opponent indefensible; grant that this is proved to the full satisfaction of the military conscience by the verdict of the god of battles, still it is only the hostile government that is in fault. The citizen of the conquered country, even the soldier of the beaten army is not in fault. He has merely done his duty as a patriot, and to make him suffer either in person or property for the delinquencies of his government would be to apply the barbaric principle of collective responsibility."

Such was the ethical belief in regard to male members of

an enemy nation—until 1939. Then Germany, ignoring the call of the more humane moral conscience, turned back to the concept of chattel slavery of a more barbarous time. Foreign "slave labor" was imported by the hundreds of thousands to toil in the factories and mines of the Third Reich. And the practice thus established has continued in other countries in time of peace.

Now, what is important about this business of using prisoners of war in this manner is that *in pursuing such a policy a precedent is being established which will be cited in the case of future wars and which could have the most unfortunate of consequences on ourselves, our children or our grandchildren.* It may be presumptuous to suggest that our people may in a time as yet unforeseen find themselves facing the consequence of this new attitude towards defeated military personnel, but a glance at the pages of history certainly ought to cause one to pause a moment in deep and serious thought on the question.

It is of course argued that treating defeated military personnel in such a fashion is based on justice. Now, there are certain well defined theories of justice, chief of which are the theory of retributive justice, the theory of preventive justice and the theory of curative justice. To which of these three theories does the contemporary treatment of defeated military personnel appeal? And how effective is the device in attaining its goals?

Actually the idea of taking defeated enemy males to rebuild devastated areas appeals to all three theories of justice. It is considered a just means of retribution for injury done; a repayment for loss incurred. Reparations, it is argued, were tried previously, but they did not work. Therefore why not try a method over which there is far more control? Again, treatment of this nature is considered to be preventive. It will isolate the habitually dangerous from a further outbreak of aggression, and it will act as confinement in a prison does for the individual criminal. It will put the mischief maker out of harm's way. Furthermore, it will help to limit the reproduction of a warlike tribe when male and female are thus separated.

In the third place, such treatment is believed to teach the defeated enemy a "lesson." "That will show them the error of their ways," it is explained. Likewise, it will cause the enemy civilian to suffer and thereby teach him a "lesson" at the same time.

On the surface there appears to be a certain degree of cogency in such arguments as these. Retribution, for instance, is frequently morally justifiable. It is allowed in western civilization in civil cases where damage of one kind or another has been incurred. It is only right that a person should compensate for injury done another. Again, it is the opinion of criminologists and sociologists alike that the only solution to the problem of incorrigible criminals is permanent incarceration.

However, against these arguments must be set the fact that defeated military personnel, considered from a moral point of view, may not occupy a position similar to that of the individual criminal within a given society. As was previously pointed out, the adoption of the principle of requisitioning a defeated enemy for forced labour, no matter how worthy the cause, will lead to indiscriminate use and is in fact an example of the moral retrogression of our age. By all means exact reparations, if it is felt justified; by all means curb potentially dangerous militarism. But do so by methods that do not violate the more enlightened moral conscience. Long and painful has been the climb to the comparatively humane treatment of a beaten foe. Is the world now to have to begin the heart-trending struggle anew?

There is another practice that is of great moment to the rule of law in international affairs. It is proposed to declare the *Sturm Abteilung* (SA) organization comprising some 500,000 members, the Elite Guard of some 800,000 members, the Security Police (SD) of some 3,000 members, the Gestapo of some 50,000 members, and the Leadership Corps of some 600,000 members, criminal organizations. This would mean that approximately 2,000,000 members of these organizations will, as the Associated Press puts it, "automatically be guilty in varying degrees of war crimes."

Let us be absolutely clear upon the significance of this proposal. *Such a procedure would establish the principle that membership in an organization is sufficient evidence of guilt to warrant punishment. In other words, the precedent would be established that individuals collectively are to be held guilty for the delinquencies of single individuals who are members of an association or organization. In short, in taking such a step the theory of collective responsibility would be reintroduced into civilized society.* This, as in the case of the treatment of defeated military personnel, is an example of the moral bewilderment of our times.

It is pertinent to note in this connection that, as Hobhouse pointed out, it is in primitive societies that "responsibility is collective and therefore vicarious. Sometimes the whole family of the offender is destroyed with him. Sometimes any relation may suffer for him vicariously. John, who has done the deed, being out of reach, primitive vengeance is quite satisfied with the life of Thomas, his son, or brother or cousin. Just as in the blindness of warfare the treacherous act of an enemy is generalized and perhaps avenged in the next battle by a retaliation which does not stay to ask whether it is falling on the innocent or the guilty, so in the primitive blood feud. The wrong done is the act of the family or the clan to which the aggressor belongs, and may be avenged on any member of that family or clan."

Hobhouse gave many instances of this collective responsibility. "On the Gold Coast," he stated, "the relatives of a sorcerer are slain or enslaved along with him . . . Among the North American Indians, the family and the whole tribe were held responsible for a murder committed by one of them. In Anglo-Saxon law it was possible for a family to be enslaved for a theft of the father." He continued: "The principle of collective responsibility has always been maintained in the Far East, in China, in Korea, and under the influence of Chinese civilization in Japan, while it is noteworthy that for political offences the parents and the children might be punished under French law down to the time of the Revolution . . . *It is in fact . . . only the rise of the free individual as the basis of the modern state which does away with this principle, so fundamentally irreconcilable with the strictly ethical notion of justice.*" In other words, it is only recently that the western world has consented to the higher principle of individual responsibility—but that stage has been reached. Must the world slip back now?

All this is not to say that the members of the various organizations ancillary to the military forces should not be tried and punished for deeds for which they are responsible. Certainly anyone involved in such bestial actions as the treatment meted the Buchenwald and Belsen concentration camp prisoners is deserving of the most severe penalties. However, it is a principle of modern justice that individuals brought before the bar of justice *should be brought there as individuals, should be charged as individuals, with specific crimes, and should be condemned as individuals on the basis of clear-cut and definite criminal acts.* The specious argument that to try an entire organization of individuals in this manner would be too hard.

take far too long and prove too complicated is no mitigation of the moral deterioration revealed in the proposed actions. It is but an admission of loss of moral fibre. What is in essence another Taf Vale decision has no place in the annals of international law.

III. THE TREATMENT OF DEFEATED CIVILIAN PERSONNEL

The treatment of defeated civilian personnel is based largely on the theory of curative justice. Furthermore, the principle is supported that the best form of curative treatment is suffering in kind, the argument being that since the population had no experience of the suffering they inflicted on others, and since suffering in kind produces a change of heart, some form of retaliation is imperative. Thus, a prominent American Senator urges that two Japanese be killed for every American killed in war. Sir Ernest Hooton demands the permanent banishment and segregation of the entire German male population from Germany to prevent the reproduction of Germans, as the Germans had done with the various nationalities of Europe. Certain vocal groups propose the economic dismemberment of Germany as Germany attempted to dismember her neighbours.

Let us once more turn to Hobhouse to see how this theory of curative justice stands in the light of the development of the moral conscience. Hobhouse argued that "at the close of a war, even if territory is annexed, there should be no confiscation of property or loss of personal rights." "Some thinkers," Hobhouse continued, "sum the matter up in the formula that civilized war is 'a relation of a state to a state, not of an individual to an individual,' and if this is rejected by good authorities as carrying legal consequences which they are unwilling to admit, *it may be accepted in ethics as practically defining the modern attitude.*" Hobhouse admitted, however, that "the right of the stronger to impose what terms he pleases, and if necessary to push his demands to the point of utter annihilation of his enemy as an independent power, has been almost as generally admitted."

Which of these principles outlined by Hobhouse ought one to choose? The adequacy of the methods used can be judged only in light of their ethical import and of their effectiveness in securing desired ends. But now which of these methods secures the desired end—the cure of the enemy population of the drive to war?

The researches of modern psychology have revealed to us the reactions of mankind to certain types of external pressure, and accordingly one must go to psychology for an answer. In the first place, it is a law of human behavior that habits and attitudes, the non-material aspects of culture generally, are handed down from generation to generation as a form of social heredity. It is also a psychological law that habits, attitudes and beliefs become so fixed in the mind-stuff of the individual that scarcely any form of pressure will completely change or eradicate them. In the third place it is a psychological fact that attempts to change forcibly a given pattern of habits, attitudes and beliefs meets with continually increasing opposition and resentment. In the fourth place, it is a definite law of human behavior that the individuals of a particular culture consider their habits, attitudes and beliefs are right and just, and see in those cultures that differ from their own wrong and injustice. The attitude of moral tolerance is not an attribute of the human family. Finally, men always display response actions which they feel will preserve them as individuals and as a well integrated community and inhibit those responses they feel will lead to suffering and annihilation.

Now, if these well established psychological laws are applied to a study of the situation under consideration, it becomes apparent immediately that punishment in kind, far from producing a change of heart, meets with opposition resulting from a fixed set of habit-belief patterns, and creates a sense of injustice in minds that tend to hold firmly to the conviction that their beliefs are invariably just. No man will freely admit that what he has done has been done wrongly. Individuals resort to all manner of rationalization to escape the consequences of actions that have gone awry.

To cure the habits and beliefs of defeated civilian personnel, it is necessary first to adopt the same attitude towards the individuals concerned as is adopted in our more enlightened treatment of the criminal. To modern sociologists and criminologists the criminal is a sick individual in need of constructive retraining and an environmental situation that will release habits into social channels. The same is true of a community of individuals. The problem is to construct an environment where, as long as the actions of the members of the community flow in the accepted direction, no repression results and no hardships occur. In this way, since, as was stated previously, individuals display response reactions that will aid in the preservation of themselves and

their community, stimulus-response patterns of a social nature are acquired in place of anti-social stimulus-response patterns. An environment must be provided in which social acts will be rewarded with a satisfactory life-equilibrium and in which anti-social acts will be rewarded with a lack of a satisfactory life-equilibrium. It must be remembered that war, like everything else men do or suffer, is the outcome of definite conditions—psychological, physical, personal or social, and the task is to remove those conditions, not to visit punishment in kind upon groups or communities which, in the nature of things, cannot be justly blamed for their actions.

Of the moral import of the infliction of suffering in kind, little need be said. It is, in the first place, contrary to the civilized concept of the dignity and sacredness of the individual personality, and contrary likewise to the belief that man as man has human rights and certain primary duties owing him. It is also morally destructive of the individuals who inflict the suffering. It has a dehumanizing and rebarbarizing effect on the actors. No man can cruelly treat another, whether mentally or physically, without himself in the long run becoming indifferent to the worth of the individual personality. Curative punishment that is vindictive in essence is therefore as unsound morally as it is as a practical means of effecting a cure.