

NUREMBERG AND VITORIA

URBAN VOLL, O.P.



THE WAR CRIME TRIALS in Nuremberg are a great crisis in modern history. They represent a revolution from the past, and present a challenge to the future. Not because criminals were tried and punished; that has been, and is done every day. Not because these criminals headed a nation; defeated leaders been tried and punished before this. It is the "why" of the trials, the legal basis for conducting the trials that is important. This is important because, in spite of some weak-kneed arguments used to justify the trials, they have been based on the solid rock of a great truth. This is important because that great truth, disputed and denied in modern speculation, has been shown by the very force of circumstances to be the only way out of the present labyrinth of problems. At a time when man's discoveries threaten to destroy him, this great truth rediscovered at Nuremberg offers a hope of wisdom and sanity to the jangled nerves of a war weary world.

THE JUSTIFICATION OF BERNAYS

In an article in the *Reader's Digest*, Colonel Murray C. Bernays, who, as military adviser to Justice Jackson, helped formulate the legal basis of the war crime trials, presents the justification of Nuremberg as he sees it. To those who challenge any basis in law for these trials, Colonel Bernays attempts to prove that our Government was fully justified in taking its place on the International Tribunal which tried the twenty-one Nazi war criminals. Bernays asks what was the law under which the defendants at Nuremberg were tried. His answers are not completely satisfactory. The multiplication of arguments and a certain dogmatic tone withal seem to betray a fundamental uneasiness.

More specifically, he uses several arguments which opponents of the trial could easily meet. He cites the Moscow Declaration of 1943 as sufficient warning to the Axis criminals that they would be tried by the joint decision of the Allies.¹ But this is no argument for the justice of the trials. The joint decision of the Allies might just as well have been the joint decision of the Axis. Had the Axis won the war,

¹ Bernays, Murray C., "The Legal Basis of the Nuremberg Trials," *Reader's Digest*, Pleasantville, N. Y. (February, 1946), p. 59.

the Japanese Admiral who promised to dictate the peace from the White House might similarly have used his previous promise as the basis for the punishment of American leaders. If the argument is that the Allies were in the majority (Bernays quotes Justice Jackson who says the trials represent "the will of 18 governments representing an overwhelming majority of all civilized people"² the opponents may ask whether there are instances in legal history when the majority of a jury have been wrong. But Colonel Bernays says there can be no question of a wrong decision. "It is beyond dispute," he says, "that the wars were aggressive in fact."³ But is it beyond dispute? Unquestionably beyond dispute on the part of one of the litigants. Yet at some future date, when the heat of passion has cooled, when many facts now hidden have come to light, may not history give a somewhat different verdict? A comparison of current opinion and opinion contemporaneous with the Civil War reveals quite a dichotomy about the same event.

However, it is by no means our contention that the German leaders were not aggressive. We merely wish to point out that there is a possibility of injustice on both sides, and that the fact of aggression is not obvious, as Colonel Bernays would have us believe. If it were, there would be no point to a trial. If the evidence were so overwhelming, punishment by decree would have saved a great deal of time and expense. Some of the opponents of the trial have argued that, in spite of all the legal rigamarole, that is actually what the trial was—a punishment by decree with elaborate ceremonial for publicity purposes. They base their argument on the fact that the jury was composed of those who were more than a little interested in the outcome. This is quite all right, Bernays assures us, for no jury is really impartial, inasmuch as it is always partial to justice. He says: "The addition of neutrals to the Nuremberg court would have been an *unusual* rather than a usual step."⁴ Notwithstanding Colonel Bernays, the usual procedure in any court is to pick a jury which may be reasonably absolved of prejudice in the case.

Ultimately, however, it seems that the answer of Colonel Bernays to his own question is without reference to any of the above arguments an appeal to the Hague Convention and the Kellog-Briand Pact. The Kellog-Briand Pact was more than a contract, the argument runs, it was a law. "It (the Pact) reads that the parties '*condemn* recourse to war.' Lawyers know that the word '*condemn*' has the

² *Ibid.*, p. 57.

³ *Ibid.*, p. 61.

⁴ *Ibid.*, p. 60.

connotation of criminality."⁵ If this argument is correct, (lawyers consulted had never heard of this particular meaning of the word "condemn") the law was established before the crime. But no sanction was attached to the crime by law, and it would seem that the addition of the sanction now constitutes a retroactive, and therefore invalid, addition to the law as applied to these particular breaches of the law.

But probably the best argument used by Bernays (besides the really valid one which he hints at throughout) is that the crimes committed were "constituted violations of *internal* penal laws,"⁶ which, although never deleted from the statute books, were not enforced on members of the Nazi party. Under the instrument of surrender, the occupying powers exercise all judicial authority in Germany. This argument is valid, but covers only those crimes which come directly under German penal law. Actually, the defendants are charged with other crimes, most of them referred to as crimes against humanity.

In meeting some of the arguments of the *Reader's Digest* article, it is not our intention to disprove or even weaken the legal basis for Nuremberg. We do intend to clear the ground of all specious sophistries and half truths which can be met by the critics of the trials, and show exactly where and what is the true legal basis of such an international trial. In this respect, we are in the position of the Catholic apologete who argues against the Protestant acceptance of the Scriptures, not because he rejects the Scriptures, but rather because he wants their acceptance to be put on a true and sound basis. The truth has no need of lies, and half truths and sophistries do nothing but discredit the cause they were designed to defend. Nor is it our intention to defend the conduct of the trials. Our only concern is to show that the Nuremberg trials, and any international trials of like nature, cannot be justified except under the traditional philosophy of a Law of Nations based on the Natural Law.

THE CAUSE OF THE CONFUSION

This is precisely why there has been so much confusion on the point. The modern philosophies of jurisprudence are not adequate, and their inadequacy becomes painfully apparent in the international sphere. Since Kant tried to separate the moral and juridical orders, the philosophy of law has been frankly voluntaristic. In the last analysis, this is nothing less than saying that might makes right. Hobbes was one of the foremost proponents of this legal philosophy when he

⁵ *Ibid.*, p. 62.

⁶ *Ibid.*, p. 59.

said that man is to man a wolf. Now if man is to man a wolf, and not a man, we have no business in punishing Nazi wolves. At any rate, we cannot speak of a *just* punishment of our enemies, nor can we complain that our enemies have done anything *unjust* by being wolves instead of men. Hobbes tried to escape this impossible situation by constituting the State as Leviathan, the norm of morality. Hegel went further, and considered the State the incarnation of God on earth. And this was the tenor of thoughts throughout modern philosophy. According to these ideas, and their latest development in Pragmatism, any law proposed by one having sufficient power to back it up is a good law. Might makes right. Incredible? Unheard of today? Much of the controversy between "Idealism" and "Realism" at the San Francisco Conference of the U.N.O. was on this very point. The "Realists," the Pragmatists, the proponents of the "is" philosophy, and all the other legal philosophers who regarded law as will or might are speculatively what the Nazis were in practice—advocates of brute force.

Supreme Court Justice Jackson, in speaking of the need for International Law, has this to say of such philosophers :

It is a current philosophy, with adherents and practitioners in this country, that law is anything that can muster the votes to put in legislation, or directive, or decision, and backed up with a policeman's club. Law to those of this school has no foundation in nature, no necessary harmony with the higher principles of right and wrong. They hold that authority is all that makes law, and power is all that is necessary for authority. It is charitable to assume that such advocates of power as the sole source of law do not recognize the identity of their incipient authoritarianism with that which has reached its awful climax in Europe.⁷

This, then, is the importance of the Nuremberg trials: that they have demonstrated, if not the utter untruth, then the absolute impracticality of such theories in the international sphere. Had the enemy been summarily executed, had we asserted that our might made right, Pragmatism and all the modern theories of law as force or convenience might have gone their merry way. The German barbarians would have been replaced by the barbarians of the United Nations, and the world would be tottering on the brink of chaos. It may indeed seem to many that this has happened already, but for those who think, there is a bright ray of hope shining out from Nuremberg. For however in-

⁷ Quoted by Judge Edward S. Dore, "Human Rights and the Law," *Fordham Law Review*, Fordham University, N. Y. (March, 1946), pp. 3-18. Judge Dore's essay is to be highly recommended as a lucid and scholarly presentation of the thesis that all law is derived from the Natural Law.

doctrinated with modern legal theories, however hazy on the notion of real International Law, the lawyers who formulated the basis for these trials still accepted in their hearts the higher concepts of right and wrong, the concept of the Natural Law as the basis of all positive law. And it was not only because they thought and said that there was a higher law than that in the statute books, but because to have a trial for international crimes at all, there had to be some kind of International Law. Now, there was, in fact, no International Law—at least, none that all were agreed on, none that could invoke a sanction. If the state were supreme, as Kant and Hobbes and Hegel said, how could there be? There was no Super-State, no international tribunal to which a wronged nation could appeal, no international police to punish the offenders of International Law. If, on the spur of the moment, the United Nations had made up an *ex post facto* International Law, and had constituted themselves the international policemen, judges, and executioners, without any reference to justice and right reason, they would have been no better than the hideous thing they had put down. But they did not do this. They did not invent a law, but rather rediscovered a law. And by so doing, they revived that International Law which is based on the Natural Law.

THE TRUE BASIS OF NUREMBERG

Thus, as Reverend Doctor Edmund A. Walsh, S.J. said, "It (Nuremberg) is not merely a trial of 21 individuals, but a powerful affirmation of the ethical and moral foundations of international law."⁸ By these trials, our government placed the natural or moral law above the authority of any government. Colonel Bernays, in the article mentioned above, hints at this. "Our government," he says, "had to be satisfied that we should be doing *true justice* before the proposed course could be agreed upon."⁹ What is true justice if not conformity to the moral law? Bernays calls this moral law "traditional law of undisputed force . . . settled principles of law (which are) . . . by common and universal acceptance . . . so clear that nobody will raise any question about it."¹⁰ He speaks of it as "the decent opinion of mankind before which our Founding Fathers brought their case."¹¹ He quotes the Hague Convention which states that: "in cases not specifically provided for, the touchstone is to be 'the rule of the prin-

⁸ Walsh, Rev. Dr. Edmund A., S.J. from an interview given to the NCWC, Friday, July 19, 1946. Published in "The Catholic Register."

⁹ Bernays, *op. cit.*, p. 57. Italics mine.

¹⁰ *Ibid.*, p. 58-59.

¹¹ *Ibid.*, p. 63.

ciples of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”¹²

If the expressions of this article are unfortunately clouded with other arguments, Justice Jackson, when he speaks for himself, is quite clear on the issue involved. He said in opening the case: “I am not disturbed by the lack of judicial precedent for the inquiry we propose to conduct.”¹³ Why is he not disturbed? Because “the war criminals are being tried pursuant to recognized law. True, what is happening in Nuremberg is revolutionary. But it is not a revolution in the law. It is a revolution in law enforcement.”¹⁴ In the first statement, the Justice said he had no precedent. In the second, he spoke of recognized law. What recognized, international law exists? Justice Jackson’s description of the Charter of the Tribunal contains the answer: “an organic act which represents the *wisdom, the sense of justice* and the will of 18 governments representing an overwhelming majority of all civilized people.”¹⁵ The wisdom, the sense of justice that is common to all men of good will and common sense can be nothing other than the Moral Law.

LAW OF NATIONS

What is this Moral or Natural Law? St. Thomas taught that it is “divine law revealed through natural reason.”¹⁶ It is “a participation of the eternal law in the rational creature.”¹⁷ Thinking men have observed that all things are regulated by some kind of law. The stars in the heavens are charted on their course; the minerals in the earth supply the deficiencies of plant life; the brute animals unerringly follow a plan of life. Man is a part of this planned universe, and as a part, must follow the law of the whole. Yet man occupies a place that is unique. He fulfills the law of nature, the law of his nature, *freely* so that, if he should so choose, he may pervert his nature and thus destroy himself. But the point is that natural law is so deeply rooted in the heart of man that he need only conform to his nature to fulfill the natural law. There are, however, degrees of comprehension of the natural law as there are degrees of common sense and good

¹² *loc. cit.*

¹³ *Ibid.*, p. 64.

¹⁴ *Ibid.*, p. 59.

¹⁵ *loc. cit.*, italics mine.

¹⁶ Pegis, (tr.) *Basic Writings of St. Thomas Aquinas*, New York, Random House, 1945, v. 2., p. 748 *et seq.*

¹⁷ *Ibid.*

will among men. In order that the more general principles of the natural law might be carried out, the civil law, a more accurate determination of the principles of the natural law, was embodied in statutes and the customs of the land. Although there is no well defined international society, it became obvious that the various nations that made up the international society must be bound by the same natural law that bound men in their intra-national dealings. The principles of the natural law as applied to international relations has been called the Law of Nations.

Nevertheless, it must be admitted that the relations of men and the relations of nations are not always simple things. While the principles of the natural law will usually be admitted, their application to concrete instances requires some thought. And since there was some imperfection, if not in the natural law itself, in man's comprehension of it, the natural law found its perfection in Christian revelation. For the law of the Gospels did not contradict, but rather confirmed the dictates of the moral law, while going higher to the law of charity. As Western Christianity began to cover the face of Europe, the concept of Christendom, a family of nations governed by the same laws of good and evil that bound men, began to take hold. An International Law that was based on the natural law was the common rule in international dealings. Whatever may be said of the departures from that law (and as long as there are men, laws will be broken) the general procedure among the nations of Europe was based on Christian principles.

When the Christianity that had inspired such a world order was attacked by the Protestant Rebels, the world order itself was attacked. Statism began to rise, and with it, in order to justify it, when it was not heralding it, the neo-Pagan philosophies that we have already discussed appeared. The most elemental and basic ideas of right and wrong were entirely ruled out in international affairs.

Today, the modern internationalist is quite annoyed when the religious press insists on justice in international relations. He reasons that these simple people, unversed in the complicated machinery of international law, which he has made his life work, are quite naive in their demands. One moral philosopher answers this objection by saying:

The moralist holds that the machinery is not of *first* importance. He is interested more in the question of what makes machinery work and stop working. Moreover, the religious world has seen a good machine (the League) ruined for lack of the moral spirit among its leaders with

which alone it could function truly. . . The spirit of an organization matters more than the machinery. Without a foundation of elementary ethical principles, clearly stated, and accepted by all parties concerned, no machinery or international constitution will be worth the time and labour spent in drafting it.¹⁸

VITORIA

Nevertheless, the objection of the internationalist still holds some weight. The religious leader, the moral philosopher does not ordinarily possess sufficient information on international affairs to apply moral principles to them. But that by no means excludes the extraordinary moral philosopher. Such a man was Francisco de Vitoria, who faced four centuries ago the problem the Nuremberg jurists now face. One of his biographers has this to say of his position in International Law :

In the study of International Law, Francisco de Vitoria deserves a prominent place. Primarily a moralist, he visualized the whole field of international relations within ethical boundaries, and urged upon the rulers to act in accordance with what is morally right. He enunciated principles which are right both in the light of Ethics and in the code of laws, being therefore legally binding to those concerned in the mutual dealings of states. This is important because . . . it was necessary that International Law in its beginning should not be divorced from Ethics. . . . No science may be disassociated from morals. Law, being a dictate of reason, cannot in reality contradict morals, which is the code of principles to which human acts must conform.¹⁹

And this is Vitoria's greatness: "theologian and jurist, philosopher and humanist, his superiority to all internationalists is that he was above and beyond everything a moralist."²⁰

HIS TEACHINGS

Granted that the Nuremberg trials have demonstrated the absolute necessity of a moral approach to international problems, granted even that Vitoria had this approach to the international problems of his day, what has Vitoria to do with Nuremberg? If Vitoria is seen in the light of his "On the Indians," he has little or nothing to do with Nuremberg, for that work deals with an abnormal situation in the

¹⁸ Beales, A. C. F., *The Catholic Church and International Order*, Harmondsworth Middlesex England, Penguin Books, 1942, p. 16.

¹⁹ Munoz, O.P., Honorio, *Vitoria and the Conquest of America*, Manila, University of Santo Tomas Press, 1938, p. 39.

²⁰ Rios, O.S.B., Romanus, "Francisco de Vitoria and His *Relectio de Jure Belli*," *The Dublin Review*, January, 1941, p. 37.

world of his time, that is, the discovery of the New World. But if Vitoria is seen in the light of his "On the Law of War," he has everything to do with Nuremberg, for in this, the literary masterpiece of international law, Vitoria lays down the general principles to be applied to the normal state of nations. No eulogy of Vitoria or his work will demonstrate so well his pertinency to modern times as a selection of passages relative to the Nuremberg trials from his work. Nevertheless, it should be kept in mind that these are only small portions of a work that must be seen in its entirety to be appreciated.

First of all, Vitoria asks whether it is licit to punish our enemies, after we have won a war. He answers positively.

Even a defensive war could not be waged satisfactorily were no vengeance taken on enemies who have done or tried to do wrong. For they would only be emboldened to make a second attack, if the fear of retribution did not keep them from wrong. . . . For there would be no condition of happiness for the world, nay, its condition would be one of utter misery if oppressors and robbers and plunderers could with impunity commit their crimes and oppress the good and innocent, and these latter could not in turn retaliate on them.²¹

Even after victory has been won and redress obtained and peace and safety been secured, it is lawful to avenge the wrong received from the enemy and to take measures against him, and exact punishment from him for the wrongs he has done. In proof of this be it observed that princes have authority not only over their own subjects, but also over foreigners, so far as to prevent them from committing wrongs, and this is by the law of nations and of the whole world. Nay, it seems to be by natural law also, seeing that otherwise society could not hold together unless there was somewhere a power and authority to deter wrongdoers and prevent them from injuring the good and innocent. Now, everything needed for the government and preservation of society exists by natural law, and in no other way can we show that a State has by natural law authority to inflict pains and penalties on its citizens who are dangerous to it. But if a State can do this to its own citizens, society at large can do doubt do it to all wicked and dangerous folk, and this can only be through the instrumentality of princes. It is, therefore, certain that princes can punish an enemy who has done wrong to their State, and that after a war has been duly and justly undertaken, the enemy are just as much within the jurisdiction of the prince who undertakes it as if he were their proper judge. Confirmation hereof is furnished by the fact that in reality peace and tranquillity, which are the end and aim of war cannot be had unless evils and damages be visited upon the enemy in order to deter them from like conduct in the future.²²

²¹ Vitoria, O.P., Francisco de, *De Indis et de Jure Belli Relectiones* (tr. John Pawley Bate), Washington, Carnegie Institution, 1917, p. 167.

²² *Ibid.*, p. 172.

Vitoria argues for his principles from Scripture, from the Fathers, from the example of saintly and illustrious men, and from reason. He goes into great detail on some particulars, and answers the objections that might be lodged against his doctrine. It would be impossible here to answer all the possible objections that the opponents of the Nuremberg trial might make against the application of these principles to the trial. One example may suffice. The opponents of the trial argued that the defendants had in no way agreed to keep the contract of international law, and therefore were not bound to any International Law, whether expressed as at the Hague Convention, or tacit.

The Law of Nations does not only derive its force from human contract, but also has the force of law. For the whole world which is, in a way a single commonwealth, has the power to make laws which are equitable and applicable to all alike; and such are the precepts to be found in the Law of Nations. . . Any one kingdom has not the right to refuse to be bound by the Law of Nations: for it has been *established by the authority of the whole world.*²³

In Canon 3 of his Summary, Vitoria emphasizes the spirit in which the punishment of a nation is to be carried out. He points out that it is only the leaders who are to be punished. In the present unfortunate state of affairs, many overwrought imaginations have tried to extend the war crime trials to the entire German nation. Vitoria's well balanced and calm judgment could serve as an admirable antidote to such a spirit of vengeance and recrimination.

The conqueror must use his victory with Christian moderation and equity, remembering that he is acting as a judge between two states, the one injuring, the other injured. Hence he must give his verdict in the spirit not of an accuser but of a judge, making reparation indeed to the injured state, but inflicting the least possible harm on the guilty state, limiting the punishment, as far as may be, to the truly guilty—and this especially because among Christian peoples the whole guilt usually rests with the rulers. Subjects are in good faith when they fight for their rulers, and it is most iniquitous that the follies of kings should, as Horace wrote, be paid by their people.²⁴

These are the eminently sane and sound principles which Vitoria lays down. They speak for themselves. Some may perhaps question their applicability to modern problems on account of different concepts of state and world order, but a closer study will reveal that any need

²³ Vitoria, *De Potestate Civili in Francisco de Vitoria and His Law of Nations* by James Brown Scott. Oxford, Clarendon Press, 1934, p. xc.

²⁴ Vitoria, *De Jure Belli*, p. 187.

for change in Vitoria's principles is purely accidental. Vitoria's appeal to the Law of Nations is the same appeal that the Nuremberg jurists made to justify their procedure. And for this reason, despite the fact that many modern jurists regard him as a scholastic antique of the origins of international law, Vitoria's spirit hangs over Nuremberg. That spirit is a challenge and a promise. The appeal to the Law of Nations at Nuremberg must not be a transitory thing used to justify an action, but a return to the solid foundation on which a new international order can be built. Now that men have released the mysterious energy of the atom, mankind cannot continue to depend on force instead of morality. Unless the wisdom of the international lawmakers accepts the challenge of Nuremberg, the thing science has raised up will, like Frankenstein, turn on its maker to destroy him. But if the nations remember that there is a higher law than that of force, out of the ashes of a chaotic world will rise the phoenix of a just and peaceful world order.

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- a) works of other authors published by Vitoria.
- b) works of Vitoria published by others.
- c) works of Vitoria kept unpublished.

To the first group belong:

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- 2) *Sermones Dominicales* of Pedro Covarrubias, O.P.—1520.
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- 3) *Commentarios a la Secunda Secundae de S. Tomas*. Ed. prep. por P. Vincente Beltran de Heredia, O.P. Salamanca, 1932-1935. 5 vols.
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