

Book Review

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Book Review

ADVANCE TO BARBARIANISM. By F. J. P. Veale. Appleton, Wisconsin. C. C. Nelson Publishing Co., 1953. Pp. 297. \$4.50.

This important book is by an English lawyer who had the courage to publish it in England in 1948 at a time when it was unpopular to do so. He attacks with vigor the war trials following World War II and the indiscriminate bombings of that war. And he also attacks the silence of the press — the “historical blackout”, which prevented the public from knowing the facts.

American and English lawyers brought up in the common law ought to have a special feeling of regret for the principal one of these war trials; namely, the trial held in Nurnberg. For at Nurnberg, despite its name, an attempt was made to give the world the impression that the trial was a judicial one, but many now agree with the author that this was false. It was not only *ex post facto* but it lacked the essential element of jurisdiction. Nor was the precise nature of the alleged crimes set forth in the various cases; and the rules of evidence were openly violated.¹

What was the genesis of Nurnberg the author asks? It cannot, he submits, be put down to hot blood, for its trials and sentences were carried out in cold blood. Field Marshal Keitel was hanged at Nurnberg October 15, 1946, though hostilities had ended in 1945 (198).²

In Chapter VII, “Downfall”, the author finds the genesis in the Teheran Conference of 1943 where he states that Stalin proposed the mass murder of 50,000 leading enemies. This suggestion was in line with the Marxian ideology for “. . . When persons or classes of persons are found who cannot be fitted into such a society, they are ‘liquidated’, that is to say, put to death” (144-145). The author gives an awful example of such “liquidation”, namely, the massacre by the Soviet authorities of the Polish ruling classes in the Katyn Forest (115, 143). At Teheran, Churchill had qualms about proceeding as suggested by Stalin but apparently salvaged his conscience by having a trial. Ultimately the

¹ For example, the author says pp. 167-168 “. . . at Nurnberg it was solemnly laid down that hearsay evidence is sufficient to sustain not merely an opinion but a conviction in a court of law.”

² For the convenience of the reader, the reviewer has included page references to the text for the thoughts herein summarized.

American solution was carried out: "Mr. Stalin had his mass murder and Mr. Churchill had his trial" (142).³

Upon what legal basis were the Nurnberg trials supposed to rest? The basis was the London agreement of August 8, 1945, formulated by lawyers of the victorious powers which included ". . . comprehensive new offenses so vague and elastic that virtually anyone who had taken a prominent part on the vanquished side, whether as a general, an admiral, a civil servant, or a manufacturer of war material, could be charged with them" (154). The charges against the accused persons were not for the violation of a code of law but for "failure to comply with recognized practice" (168), and the court was specifically precluded from investigating the conduct of both sides regarding such practices. In the case of Admiral Donitz, who had been charged with waging unrestricted submarine warfare, the Court did admit evidence of an order of the British Admiralty of May 8, 1940, ordering unrestricted submarine warfare, and of the fact that the United States had waged unrestricted submarine warfare. This ruling, however, was exceptional, for in the case of Admiral Raeder, who was charged with planning and directing an aggressive war against Norway, the court refused to admit evidence that the British Admiralty was making similar plans, and Admiral Raeder was convicted of a "war crime" and sentenced to life imprisonment for doing what the British Admiralty proposed (169).

In the Nurnberg Judgment the phrase "a war of aggression" was not defined and apparently it only applied to those on the losing side, and it was said that ". . . the farce of a trial of vanquished leaders by the victors was itself an offense against humanity", and was, therefore, a war crime (176). One of those convicted of war crimes was Alfred Krupp, the German armament manufacturer who was charged with having "guilty knowledge" that the German government was employing slave labor. If America should happen to be on the losing side in a war, then many of our

³ It will always stand for history that a Justice of the Supreme Court of the United States went to Nurnberg and there appeared as the Chief Prosecutor of those charged with crimes. The late Chief Justice Stone was strongly opposed to this, expressing his views in vigorous language, "Jackson (Justice Jackson) is away conducting his high-grade lynching party in Nurnberg" and "more like a Carthaginian vengeance than appeal to the processes of the law" — Alpheus Thomas Mason, *Extra Judicial Work for Judges: The Views of Chief Justice Stone*, 67 Harv. L. Rev. 193, 210, 213 (1953). In approval of the Nurnberg trials, see: Glueck, *The Nuernburg Trial and Aggressive War*, 59 Harv. L. Rev. 396 (1946).

(able) industrial leaders might readily be charged with war crimes under such a theory of responsibility.

It should be understood that in pre-Nurnberg days the term "war crime" was a limited legal term as defined in the military manuals of all civilized countries. It had to do with the ill treatment of prisoners, espionage, looting and similiar acts, "it was never applied to the aims and objects of those responsible for commencing a war, however indefensible these might be" (148, 176, 205, 228).

In addition to Nurnberg, a great number of other war trials were held without the attempt being made to give such trials the appearance of a judicial trial.

Field Marshal von Manstein was put on trial in England before a military court. He was in command of the German forces on the Eastern front where Communist Commandos and the civilian population were engaged in a continuous and furious struggle, atrocities being committed by both sides. The charge against him was that he knew or should have known what was taking place, although, ". . . admittedly he had no authority or power to prevent them" (223-224). At his trial the rules of evidence were ignored. The prosecution offered, together with other so-called evidence, 800 documents which took 20 days to read to the court and he was duly convicted! (231). Captain Liddell Hart, the English military author, after remarking how well von Manstein had come through such a searching examination, added: "His condemnation appears a glaring example of either gross ignorance or gross hypocrisy" (236).

Field Marshal Kesselring was convicted of war crimes before a British military court convened in Venice. He was held responsible for the shooting of certain hostages and various partisans and bandits who had been caught operating behind the German lines. Lieut-General Sir Oliver Leese, Kesselring's opponent in the field, declared that ". . . had it been his fate to have been on the defeated side, the same charges as those brought against Field Marshal Kesselring could have been established against" him. And Viscount Alexander, the allied senior commander in Italy, added that the war in Italy had been carried out fairly and ". . . as well as it could have been done" (209).

The American military trial of Yamashita, the commanding general of the Japanese Army in the Phillippines resulted in a decision that was sharply criticized by dissenting Justices of the Supreme Court as a departure from our accustomed ways of justice.⁴

⁴ In re Yamashita, 327 U. S. 1, *dis. ops.*, 26, 41 (1946).

The real conquest of the Philippines began about the time Yamashita assumed command after the great American naval victory. General MacArthur moved swiftly and the official report shows that 260,000 Japanese troops ". . . were scattered over the Philippines but most of them might as well have been on the other side of the world". A military commission of five army officers was quickly convened by order of General MacArthur to try Yamashita and he was charged with failure ". . . to control the operations of the members of his command". He was forced to trial with undue haste, being arraigned on October 9th, with the trial set for October 29th. One hundred and twenty-three alleged criminal actions of separate crimes were put in evidence by the prosecution. The rules of evidence were set aside and affidavits were frequently used. The military commission heard 286 witnesses who gave over 3,000 pages of testimony, and it convicted Yamashita and sentenced him to death.

The Supreme Court, in denying petitions for habeas corpus and certiorari, refused to check the military commission, to see if it was properly constituted, if it properly acquired jurisdiction, and whether it tried the prisoner for an offense within the laws of war. It found it unnecessary to consider what due process might require in other situations because the rulings on evidence and mode of conducting the proceedings were subject only to military review.

Justice Murphy, though fully acknowledging that atrocities had been committed, wrote a dissenting opinion, in which he was joined by Justice Rutledge who also wrote a separate dissenting opinion. Justice Murphy said:

"In all this needless and unseemly haste there was no serious attempt to charge or to prove that he committed a recognized violation of the laws of war. He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge."⁵

⁵ *Ibid.*, 28.

As the Justice well said, read against the background of military events in the Philippines subsequent to October 9, 1944, the charges amount to this:

"We, the victorious American forces, have done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, your ability to wage war. In those respects we have succeeded. . . . And now we charge and condemn you for having been inefficient in maintaining control of your troops during the period when we were so effectively besieging and eliminating your forces and blocking your ability to maintain effective control . . . We will judge the discharge of your duties by the disorganization which we ourselves created in large part. Our standards of judgment are whatever we wish to make them."⁶

The Supreme Court had it in its power in *Yamashita's* case to check the military authorities and to assert and uphold the principles of justice on which our American system and government rest. It was a glorious opportunity to give to the Eastern peoples a concrete example of American law and justice as distinguished from the crude and revolting practices of the East. We shall never cease to regret that this opportunity was missed.

It is, however, some consolation to note that *Yamashita* was represented by able and resourceful American lawyers who did all they could do to prevent this act of vengeance determined by the military commission while the blood was still hot from the Japanese atrocities; and further that the Court rejected what Mr. Justice Murphy labeled "the obnoxious doctrine . . . to the effect that restraints of liberty resulting from military trials of war criminals are political matters completely outside the area of judicial review"⁷ and did review the jurisdiction and authority of the military commission.

During the 18 months which followed the termination of hostilities, no less than 24,000 war trials in various parts

⁶ *Ibid.*, 34.

⁷ *Ibid.*, p. 30. In approval of the Supreme Court's action in the *Yamashita* case, see Fairman, *The Supreme Court On Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case*, 59 Harv. L. Rev. 833 (1946), concluding "The Supreme Court, wisely it is believed, has left the responsibility with the executive branch of the Government". A. Frank Reel, one of the able lawyers who defended *Yamashita*, has written a book, "The Case of General *Yamashita*", reviewed by Mark DeWolfe Howe in 63 Harv. L. Rev. 1285-87 (1950).

of Europe are said to have taken place and such trials continued for more than five years (202). To Americans with knowledge of what happened to our men in Korea held by the Chinese Communists, it is surely the height of irony to note that the Chinese Communists have indicated an intention in due course to subject some of their prisoners to war trials "in accordance with the principles established by the international military tribunals of Nurnberg and Tokyo"! (296).

Discussing bombing, the author finds that strategic bombing was first conceived by the British Air Ministry as far back as 1936 and was made official by its decision of May 11, 1940, which resulted that night in the attack of "18 Whitley bombers on railway installations in Western Germany". The author attacks this action as being "the first deliberate breach of the fundamental rule of civilized warfare that hostilities must only be waged against the enemy combatant forces" (121, 122).

With every desire to take a humane position, I cannot agree with the author's view if the raid, in fact, was designed to cripple the enemy's system of transportation. Justice Jackson, the Chief Prosecutor at Nurnberg, explained much later that it was decided at Nurnberg not to prefer charges of bombing against the Germans because of the difficulty of determining "the military necessity" of such bombing by both the allied and the German airmen (175, 190). This again represents the double standard of the trials and leaves us with no standards. The public had been led to believe that Hitler had begun terrorist bombing, such as the bombing of Coventry, but the author says the facts are conclusive that such bombings were begun by the British in 1940; the facts being withheld from the public until 1944.

And here we come to the frightful bombing of Dresden by 2,000 heavy bombers, British and American, on the night of February 13, 1945. There is no evidence that this bombing was a military necessity; and the English Air Marshal, Harris, apparently attempted to shift the blame for it (130). The author described it for what it was, "... a wanton act of savagery" after the issue of war had been decided (167), though it may have accelerated by a short time the Russian advance (134). The famous old city of Dresden was virtually destroyed. The dead have been estimated at a quarter of a million people and the burning of the bodies of these poor unfortunates, many being women

and children, took weeks to accomplish. The Associated Press representative at Supreme Headquarters in Paris said the "allied war chiefs" had decided "to adopt deliberate terror bombing" of German populated centers in the manner of the Dresden raid (135).⁸

In September 1944 at Quebec, Roosevelt and Churchill sanctioned the infamous Morgenthau Plan involving the destruction of all industrial plants in Germany and the flooding of the Ruhr Mines. Roosevelt's cheerful acceptance of the Morgenthau Plan shows that he felt no compunction at the idea of reducing by systematic looting and sabotage a prosperous industrial state of 80 million inhabitants to a defenseless and poverty stricken agricultural community (146, 153, 162). This plan of Morgenthau's, if put into practice, would have been a variation of Stalin's "scorched earth" policy and the author views acceptance of it by an American President as being not pleasant to contemplate (121).⁹

But, comparing our present position, we have had for sometime accumulated a stock of atomic bombs and the Russians apparently are gaining on us in this respect. Taking a lead from the Germans who started to put their war production plants under ground too late, we must suppose the Russians have accomplished their objective. If the Russians begin a war by bombing, what can we do in order to survive? President Eisenhower, a humane man, made a speech at the United Nations, December 8, 1953, in which he set forth a plan to try to solve some of the problems of the atomic age, but in that speech he said that if an atomic attack was launched against us, ". . . the retaliation capabilities of the United States are so great that such an aggressor's land would be laid waste!"

⁸ The American bombing of Hiroshima with the atomic bomb killed 70,000 people, and though Japan's defeat was then inevitable, the author here accepts that the purpose was to save the lives of American soldiers (31). However, SOROKIN, in his "RECONSTRUCTION OF HUMANITY" (Beacon Press, 1948) deplors our use of the bomb at Hiroshima.

⁹ As an American, this reviewer resents the author's implication that civilized warfare is not for us in this country because of our early experience in fighting savage Indians. In the Valley of Virginia where this reviewer's family lived during the Civil War, the conduct of the Federal officers was generally correct though depredations were made by the soldiers. However, towards the end of the war Sheridan raided the valley and destroyed the grist mills in order to prevent the food supply from reaching the Confederate Army. It is regrettable to find from BRUCE CATTON'S, *A STILLNESS AT APPOMATOX* (Doubleday & Co., 1953), that it was Lincoln's policy to destroy civilian property and there came, too, the burning of Columbia, South Carolina, and the wanton destruction of Sherman's march to the sea.

Early in his book the author makes a plea for a return to the civilized concept that warfare should be the concern only of the armed combatants engaged (65). This was a decided change for the better which finally developed in Europe. The effect of religion in mitigating the harshness of war was not felt for some time, the Thirty Years' War having been a war of religion in which "15 million people perished by violence, starvation or disease". The author says that the decision to limit and civilize war was a pragmatic one; yet I cannot help but believe that the influence of Christianity finally made itself felt and that also there was at least a spark of chivalry involved (61, 62). Pragmatic reasons most assuredly would suggest outlawing atomic weapons, but the threat of their use is imminent unless a strong ethical concept comes forward to forestall them.

In Chapter X, "Orwellian Warfare", the author suggests that with the advent of mass industry, labor cannot be kept employed in ordinary business production and that modern rulers must have wars (cold or hot) to prevent unemployment and to continue their control. President Roosevelt, he says, found that in 1938 the New Deal had not helped unemployment for there were still more than 10 million unemployed; and it is possible, the author suggests, that he was the first statesman in history to see that unemployment could be more readily solved in a modern state by the adoption of a war economy (272, 273). Acceptance of such materialistic philosophy bodes ill for the future, but hope may be held for movement of the minds of men toward the Christian, or other non-material ideals, as the only salvation of the world from self-destruction.

In conclusion the author does not question the motives of the non-Russians who took part in the Nurnberg trials, but he does question their wisdom in undertaking so impossible a task. "Should it not have been obvious from the outset that such appalling miscarriage of justice as the conviction of Admiral Raeder and such undignified evasions of the issues as that which took place in regard to the Katyn Forest Massacre charges would follow naturally and inevitably from the conditions laid down by the Charter?" (XV).

What defense has been made of the trials? Sir Hartley Shawcross, Chief British Prosecutor at Nurnberg, on March 28, 1951, asserted that at Nurnberg ". . . certain great principles were for the first time laid down" (245).¹⁰ But the

¹⁰ Cf. footnote 3, *supra*, article by Glueck.

author contends persuasively that no principles whatever can be found from what took place at the trial which, in fact, amounted to no more than the infliction of vengeance on the losing side (165, 174). And ". . . revenge," Churchill has said, "of all policies is the most pernicious" (261). And Viscount Maugham, formerly the English Lord Chancellor, said of the Nurnberg trials, "The Tribunal never purported to lay down principles for all mankind" (255).

The logical result of such proceedings will be to make the leaders of the side which appears to be losing more desperate. These leaders will include not only the military leaders of such side but also the heads of industrial plants which produce war materials and, indeed, the political leaders of the losers as actually took place in the trial and execution of Premier Tojo of Japan after a trial which lasted 417 days (204).

If such trials are to be had in the future, the author concludes that they should surely be conducted by an international tribunal which can consider the "war crimes of both sides" (264).

Many Americans like Chief Justice Stone,¹¹ were critical of the war trials and our participation in them. The late Senator Robert A. Taft, one of America's ablest and most respected statesmen, was an outspoken critic of Nurnberg.

All lawyers imbued with the spirit of fairness and justice which pervades the common law should read this provocative book. While to some, it may seem excessive in its castigation of all that occurred in the past war trials,¹² to others it will stand as a shocking revelation of the "Advance to Barbarism" that occurred during and after World War II. It is an unpleasant but vivid warning of things to come unless this advance is halted and forced into retreat.

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¹¹ See footnote 3, *supra*.

¹² See Review by Schmidt, 22 Ford. L. Rev. 320 (1953).

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