

*[Attached is an article written by Douglas W. Hawes on War Crimes and Crimes Against Humanity Tribunals which discusses some of the issues faced by a war crimes tribunal in Bordeaux in 1953 that tried 21 members of the Das Reich SS Panzer Division that massacred 644 men, women and children in the village of Oradour-sur-Glane. The article places that trial in the context of the Geneva and Hague Conventions, the Tribunals of Rwanda, the former Yugoslavia, Sierra Leone and the new International Criminal Court. It was written as part of a book to honor a professor (the book is a surprise) to be published in March, 2004. It derives from research by the author for a book he is writing on the Oradour trial.]*

## War Crimes And Crimes Against Humanity Tribunals

BY DOUGLAS W. HAWES

### Introduction

The world's efforts to hold individuals accountable for war crimes and crimes against humanity have been at once noble and of limited efficacy. There seems to be a will but the problem is with the way. There are proceedings today with respect to such crimes in the former Yugoslavia, Rwanda and Sierra Leone. A Spanish judge has succeeded in extraditing from Mexico a prime suspect in the Argentine genocide in which 320 Spaniards disappeared. The new International Criminal Court has recently opened for business. The US has announced it will start bringing some of its Guantánamo Bay prisoners before military commissions soon and it is considering how best to deal with the crimes against humanity of the Hussein regime in Iraq.

In the context of these events, the experience of France in its 1953 Bordeaux Military Tribunal's trial of 21 German and French-Alsatian members of the Das Reich SS Division that murdered 644 men, women and children of the village of Oradour-sur-Glane on June 10, 1944, is instructive. Before recapping the learning from that 27 day widely reported trial, a brief summary of the evolution of war crimes trials and other related important milestones prior to 1953 may be helpful. A concluding section of this paper will describe developments since 1953.

The broad subject summarized here is the question of individual accountability for acts committed under the authority of the state. Historically, with a few minor exceptions, officials carrying out government-authorized acts were immune from prosecution under domestic criminal law. International law contributed little to a solution of the

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problem because of: (1) the concept of sovereign immunity, (2) the absence of a clear basis outside of victors trying the vanquished to punish such acts in other countries, and (3) the lack of legally competent tribunals.

### Early International Developments

The first major development in modern international law prior to 1953, was the creation of the International Committee of the Red Cross in Switzerland by Jean-Henri Dunant in 1863 and the promulgation of the Geneva Conventions of 1929 concerning the treatment of wounded and sick combatants and the better known convention relative to the treatment of prisoners of war. The second was the Hague Conventions which were treaties resulting from a series of diplomatic conferences in 1899 and 1907; these treaties covered a number of issues concerning the conduct of war. In general the Geneva and the Hague conventions lacked any real sanctions except public opinion.

The third watershed was the Nuremberg Tribunal authorized in the 1943 Moscow Declaration by the US, UK, and USSR and the August 1945 London Agreement (by the same parties plus France) adopting the Charter of The International Military Tribunal (the "Charter") and the subsequent trials of Nazi war criminals. The Charter laid out the substantive and procedural principles governing the Nuremberg Tribunal. That Tribunal was given jurisdiction over major war figures who committed crimes against peace (including "initiation or waging a war of aggression"), war crimes, or crimes against humanity ("before or during the war"). Importantly, the Nuremberg Tribunal was concerned with crimes that had no specific location. It was explicitly provided that its actions would not pre-empt the jurisdiction of national courts.

Defendants were granted certain rights but also denied certain defenses. The rights granted included the right to counsel, to testify in their own behalf, to present evidence and to cross-examine witnesses. Contrary to US law (and the rules of subsequent Tribunals, viz., Yugoslavia, Rwanda, Sierra Leone and the ICC), defendants did not have the right to remain silent. The Charter also specifically negated the defenses of obedience to orders, command of law and act of state immunity. In the initial Nuremberg trial of twenty-two leading

Nazis, nineteen were convicted, 12 sentenced to death, three to prison for life and the others to prison for terms of from 10 to 20 years.

The Nuremberg Charter defined crimes against humanity as requiring a link to crimes against the peace (aggressive war) or war crimes. However, in its rules (Control Council Laws) it, and certain of its judgments, avoided any requirement of linkage to war although the Tribunal took no clear position on the matter.

### Important Issues Addressed by the 1953 Bordeaux Military Tribunal

Among the legal issues addressed and the rulings made by the 1953 Bordeaux Military Tribunal were:

1. **When does an ordinary soldier have a duty to disobey an order of a superior because the act would constitute a crime against humanity?** The guilty verdicts for all the defendants except one (he proved he was not there) including two death sentences demonstrate that the six military judges and the civilian President agreed with the prosecutor that war has certain rules and if an officer breaks them by ordering a soldier to commit what is manifestly a crime against humanity, the soldier not only can but must refuse to obey such order. While there might be issues as to what is manifestly a crime against humanity in certain circumstances, putting 450 women and children in a church and blowing it up did not raise such an issue. My own view is that the standard adopted by the Bordeaux Tribunal is correct even though probably impractical in application in most real life instances. However, it is an ideal worth holding up to mankind and might even give a simple soldier the courage to raise an objection to dissuade an officer or government official from ordering a crime against humanity.

2. **Is duress an absolute defense?** Thirteen of the French-Alsatian defendants were *incorpore de force* (forcibly conscripted into the Das Reich after Germany annexed Alsace and the Moselle Department of Lorraine in 1940). Failure to report for conscription, desertion or disobedience of an order were punishable not only by the death of the young men but by deportation of family members to concentration camps. Counsel for these defendants strongly argued duress as a defense. Indeed, their counsel argued that as *incorpore de force* they were victims of a war crime and not criminals (the Gauletier

Wagner of Alsace had been convicted by a French court of a war crime and sentenced to death based in part on such conscription). While the duress argument was not successful in avoiding convictions, it did appear to have influenced two of the seven judges since the decisions as to those defendants were 5-2 (under the procedure applicable in this Tribunal a vote of only 4-3 for conviction would have resulted in acquittal) while unanimous as to those for whom that defense was not available. Five days after the guilty verdicts the legislature in effect reversed the Tribunal by granting all 13 of such defendants amnesty in the interests of national unity which of course infuriated the families of the victims and their supporters. Being *incorpore de force* should not, I think, be an absolute defense. At best it should be considered in mitigation of punishment.

**3. Are defendants in war crimes tribunals entitled to a presumption of innocence?** The Law of Collective Responsibility under which the defendants were tried (until it was eviscerated by the legislature during the trial) reversed the French criminal law presumption of innocence recognized in the Declaration of Human Rights in the preamble to the French Constitution (but considered as a part thereof), by providing that if a person was a member of an organization found criminal by the Nuremberg Tribunal (which the Waffen-SS and thus the Das Reich had already been), he was obliged to prove he did not participate in the crimes alleged and did not support them morally, thus reversing the presumption of innocence. The prosecutor in effect acknowledged the point and the Judges agreed that notwithstanding the absence of a presumption of innocence the prosecution would have to demonstrate individual culpability thus avoiding the French constitutional issue. The concept of a presumption of innocence in criminal matters is so fundamental and widely accepted there should be no variance from it in my view.

**4. Are reprisals against civilians as a military strategy outlawed by the rules of war?** It was clear from the testimony elicited at the trial that the German military command in general and the Das Reich in particular had adopted reprisals against civilians as a specific military strategy (the Das Reich formula was 10 French for each German killed and three for each one wounded) in order to discourage Resistance activity and public support

therefor. Although the President of the Tribunal characterized the Das Reich as "That group of thieves and assassins" the Tribunal made no specific ruling on the issue of reprisals as such. However, as noted above, the Nuremberg Tribunal had classified the Waffen-SS as a criminal organization certainly in part on the basis of its reprisals against civilians. The issue of reprisals is a complicated one, but suffice it to say here that the cumulative effect of the 1949 Geneva Conventions and the Additional Protocol I of 1977 is to prohibit reprisals against prisoners of war and civilians.

**5. Are minors subject to being tried by military tribunals?** Four of the French-Alsatians and one German defendant were only 17 years old at Oradour. Their counsel objected to the jurisdiction of the Tribunal claiming they should be tried by a juvenile court, which claim was rejected by the Tribunal on the grounds that there was no such limitation in the military justice system (only in the criminal law). With child combatants a more and more common occurrence this is a difficult issue. The solution reached in the Sierra Leone Special Court discussed below seems reasonable.

**6. Does the general criminal law principle of non-retroactivity apply to war crimes or crimes against humanity?** Criminal law since at least Roman times has recognized that it is unjust to punish an individual for an act that was not a crime when the act was committed (*nulla poena sine lege*). In Bordeaux, counsel for the defendants objected on retroactivity grounds to them being tried under the Law of Collective Responsibility which was passed in 1948 (over four years after Oradour) specifically to permit the trial of the French-Alsatians members of the Das Reich who were not reachable under the earlier French war crimes statutes which only applied to foreigners. In the event, during the trial, the Law of Collective Responsibility was first amended by the legislature to exempt French citizens (such as the Alsatians) and then to eliminate altogether the provision relating to collective responsibility. The Court's response was that it was relying on customs of war and the French penal code and not on the eviscerated law. International law on war crimes and crimes against humanity is sufficiently developed that when it is incorporated either expressly or implicitly in national law or the law of an international tribunal, the issue of retroactivity should not arise.

7. **The right to a prompt trial.** While the fact that the trial in Bordeaux took place nearly nine years after the event and over seven years after the end of the war in Europe, was not raised as a defense by counsel, the President of the Tribunal several times criticized the delay. The issue has been raised relative to the Guantánamo prisoners of the US and if legitimate reasons for the delay are not present, it is a form of injustice.

8. **The right to remain silent.** The French criminal and military justice systems are basically inquisitorial. In the Bordeaux trial, in conformity with that system, the President of the Tribunal conducted the interrogation of the defendants (as well as the witnesses). Counsel did not raise any issue about self-incrimination or whether the defendants had the right to refuse to answer any questions. However, at one point one of the defendants when asked who committed a certain act, asked if he had to answer the question. The President responded that, "You are the master of your defense, free to decide if you want to remain mute or if you want to respond with the truth." Decisions of the European Court of Human Rights in the 1990s interpreting the European Convention on Human Rights of 1950 in certain appeals from French courts have found implicit in the presumption of innocence a right to silence (see, e.g. Arrêt Funke, February 25, 1993, Serie A, n°256-A). The right against self incrimination from which the US right to remain silent derives is embodied in the US Constitution (the Fifth Amendment).

#### Major Developments Since 1953

Important developments since 1953 include the creation of the Yugoslavia, Rwanda and Sierra Leone international tribunals. After investigation of the atrocities, the UN Security Council passed resolutions declaring the situation in the former Yugoslavia a threat to international peace and that individuals should be held responsible. In 1993, the Security Council by resolution created the Yugoslavia Tribunal sitting principally in The Hague. The task of the Tribunal was to prosecute individuals for war crimes, genocide and crimes against humanity committed in the former Yugoslavia after January 1, 1991.

The protections provided for the defendants included: (1) the presumption of innocence, (2) the right to counsel of defendant's choice, (3) the right to remain

silent (a departure from Nuremberg), and (4) the right to cross-examine witnesses. Unlike the Nuremberg and Bordeaux Tribunals, the Yugoslavia Tribunal cannot try defendants *in absentia* (although it can indict and issue arrest warrants). One important and somewhat controversial practice of the Yugoslavia Tribunal was to grant anonymity to prosecution witnesses in view of the continuing dangerous situation in the area (the US and other countries protect some witnesses by giving them new identities).

The Rwanda Tribunal followed a similar pattern to the Yugoslavia Tribunal: Security Council resolutions and investigations. The jurisdiction of the Yugoslavia Tribunal was extended to Rwanda rather than creating a new one. Unlike French practice, these Tribunals permit plea bargaining which has in fact been usefully employed along with a strategy to pick off the lesser ranked defendants first and use their testimony against the more important targets. Recently a serious controversy has arisen over the attempt by the prosecutor to charge the current Tutsi Government leaders with reprisals (over 30,000 Tutsi civilians killed).

The Sierra Leone Special Court was established pursuant to a UN Security Council resolution and a January, 2002, agreement with Sierra Leone to try "those who bear the greatest responsibility" for crimes against humanity. It is a hybrid tribunal, staffed by local and UN international personnel. Two of the three trial judges and one of three appeal judges are appointed by the UN Secretary General with Sierra Leone appointing the rest. There is an international prosecutor along with local lawyers. The rules of procedure and evidence are the ones of the Rwanda Tribunal.

One of the issues in the Bordeaux discussed above, proved to be difficult in Sierra Leone process as many of the worst atrocities were committed by 16 and 17 year olds and younger. The compromise reached in the treaty with Sierra Leone was that soldiers who at the time were under the age of 15 will not be prosecuted, while those who were under the age of 18 will not go to jail if convicted.

The creation of the Permanent International Criminal Court (ICC) occurred at the UN Diplomatic Conference in Rome in 1998. In contrast to the Yugoslavia, Rwanda and Sierra Leone Tribunals that were

created by Security Council resolutions, the ICC was authorized by convention (i.e. a treaty). The Tribunal was inaugurated on March 12, 2003, without the presence of the US which had signed the convention under the presidency of Bill Clinton (along with 138 other nations, 91 of which have to date ratified the treaty). The Bush administration has withdrawn, regrettably in the author's view given its general commitment to the rule of law, expressing fears that its citizens could be prosecuted on politically motivated grounds (Russia and China are also not participating). The US has pressured mostly smaller countries like Albania to sign agreements exempting each other's citizens from prosecution (over 30 countries already have signed up).

The concept of "universal jurisdiction" as applied to war crimes and crimes against humanity has been developing somewhat in parallel with these international tribunals. This concept holds that any state can try officials of any other state for offenses deemed serious in international law no matter where they occurred. "Universal jurisdiction" began as a means to fight piracy and slave trading which were acts that took place on the high seas beyond any state's jurisdiction. In Belgium this principle was carried to the extreme, prior to the law's amendment in August, 2003, that no Belgium nexus was required. Under pressure from the US and other NATO allies, that law was changed to limit jurisdiction to such crimes where either the victim or the suspect is or was a citizen or long-time resident of Belgium.

Spain's activist Judge Baltasar Garzon has been investigating the fate of 320 Spanish citizens during the "dirty war" in Argentina from 1976 to 1983. In June of this year, the Mexican Supreme Court ruled that an Argentinean, Ricardo Cavallo, who was in custody in Mexico for unrelated reasons could be extradited to Spain at Judge Garzon's request to be tried for genocide and terrorism in that "war". Previously, Garzon's request to the UK to extradite General Pinochet for crimes against 100 Spanish citizens in Chile was granted by the UK courts but the Government sent Pinochet back to Chile instead on health grounds. Interestingly, an 18th Century U.S. law, the Alien Tort Statute, incorporates the "law of nations" into US law for the specific purpose of giving US federal courts jurisdiction over civil actions by an alien for a tort committed in violation of the law of nations or a treaty of the US. In a 1980 case (*Filartiga v.*

*Pena-Irala*) the Second Circuit Court of Appeals found jurisdiction under this statute over a claim by an alien against an official of his own government for the torture slaying of plaintiff's son. Subsequent cases, however, have greatly limited the application of this law based on a concern that the US courts could be flooded with such claims with no real nexus.

Universal jurisdiction based on a country's laws and requiring a proper nexus to the victim or suspect can play a useful supplementary role to the international tribunals and in particular the ICC to deal with crimes not within a tribunal's jurisdiction either because committed before the tribunal's jurisdiction starts or because they involve countries such as the US, Russia and China who have not joined the ICC. If a particular country, such as Spain, has a strong interest in pursuing such crimes because they involved her citizens, there is perhaps a greater likelihood of effective action than with a tribunal such as the ICC that has only a somewhat attenuated political backing. On the other hand, even if there is a proper nexus, there is certainly a risk to respect for law if any country can try any other country's citizen under the trying country's particular view of the applicable law especially were the suspect's country, for reasons of national policy or otherwise has granted amnesty or immunity to the suspect. The advantage of the ICC (in cases where it has jurisdiction) over *ad hoc* prosecutions such as Spain's is that it is applying a clear, uniform and widely accepted international standard.

The substantive and procedural provisions of the ICC are very similar to that of the Yugoslavia, Rwanda and Sierra Leone Tribunals. However, the ICC can only bring actions if individual countries are unwilling or unable to prosecute war crimes, genocide or major human rights violations. In any event, the Court's jurisdiction applies only to crimes committed after July 1, 2002, the official start of the Court.

The procedures proposed by the Department of Defense (DOD) for the military commissions (a term the DOD seems to prefer to "tribunals") to try prisoners at Guantánamo Bay have stirred opposition by, among others, the *New York Times* (editorial August 22, 2003), the American Bar Association, and the 11,000 member National Association of Criminal Defense Lawyers. The latter took the position that (Opinion dated August 2,

2003) “it is unethical for a criminal defense lawyer to represent a person accused before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation”. A particular bone of contention is the DOD’s rule permitting lawyer-client communications to be monitored for “security and intelligence purposes” albeit any information derived there-from will not be used in proceedings against the accused. Moreover, the Opinion pointed out that there is a long tradition of zealous defense of unpopular defendants dating from before the independence of the US. John Adams, later President, provided a vigorous and successful defense of a British officer accused of killing civilians in the Boston massacre of 1770. Another telling point they make is that if US trials of terrorists or others accused of crimes against humanity do not meet either domestic US or international standards, US soldiers and other citizens will be at greater risk under the judicial systems of other countries.

After strong protests by the respective Prime Ministers of the UK and Australia, the US has agreed with those countries that as to their citizens in the first group of six proposed defendants no charges that could result in the death penalty will be lodged and that US legal counsel for the defendants may be assisted by lawyers of those countries.

In March of this year, a federal appeals court ruled (*Odah v. US*) that the Guantánamo prisoners could not challenge their detention there because the US has no jurisdiction over the base. The US occupies Guantánamo under a perpetual lease from Cuba which gives the US the right to exercise complete jurisdiction and control but the US in turn recognizes the ultimate sovereignty of Cuba. That decision, if not reversed on appeal by the US Supreme Court, would presumably effectively mean the US courts would have no jurisdiction over the military trials there either.

The US government’s thinking on the process by which the crimes against humanity committed by the Hussein regime will be judged is far less advanced. The US appears to have ruled out submitting such cases to the ICC or any other kind of UN related or, indeed any US tribunal. The choice seems to be to find sufficient

Iraqi jurists not tainted by association with the Hussein regime. Perhaps they could be assisted by international law experts, as in Sierra Leone.

### **Concluding Thoughts**

The daily exceptional media coverage of the Bordeaux trial and legislative resolution certainly served to sensitize France and much of the western world to the Das Reich atrocities at Oradour-sur-Glane, albeit from the point of view of the victims families and their supporters, the end result was a travesty. Because of the amnesty voted by the legislature, the fact that no officers were brought to justice at that trial (one SS officer was tried and convicted in 1983 in East Germany), the relatively lenient sentences apart from the two death penalties (soon pardoned in the name of European unity), and the little prison time served, Oradour sent back its medals and the plaque presented by General De Gaulle and posted large placards at the entrances to the ruins of the village which has been preserved as a memorial, showing a list of the Deputies that had voted for the amnesty.

Perhaps the scales of justice in the current and future tribunals will present a similar picture: world focus on the crimes but punishment not sufficiently severe and too many perpetrators not brought before the tribunals. Nonetheless, if these tribunals are to have any serious impact, it is of great importance that they dispense justice in a manner consistent with world standards of fairness. Who can doubt the moral rightness of the international effort to hold individuals accountable for war crimes and crimes against humanity. While these tribunals, along with the sensible application of the concept of “universal jurisdiction” as effected by Spain’s Judge Garzon, represent modest efforts in the face of the continuing violence and the inhumanity of man, they merit the support of all peoples. The hope is that such efforts will convince future generations that there is justice in this world