Ex-post-facto principle
Fair Trial
by
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It must be expected that, at a certain moment, the defense counsels will challenge the legality of certain aspects of the trial on grounds other than those concerning the general competence of the Court (which objection has already been rejected by the Court on the basis of Art. 3 of the Charter.)

2

One of the main objections against the trial has been that punishment of the accused, on certain counts at least, would violate the principle of the non-admissibility of ex-post-facto laws. A decision of the Court declaring such acts punishable would violate this principle, since they were not considered crimes at the time of their commission and, therefore, allegedly not be punishable now.

The consideration of this objection by the Court would run counter to the explicit provision of Articles 3 and 6 of the Charter. According to Art. 3 the tribunal cannot be challenged by the defendants, which means that they cannot question its competence insofar as it is based on the Charter. Art. 6 of the Charter declares all the acts enumerated there crimes and specifically provided that they be considered crimes although the signatories were well aware of the fact that they were perpetrated prior to the enactment of the Agreement. Obviously, the cumulative effect of Articles 3 and 6 of the Charter is to exclude the possibility that the tribunal could be entitled to consider the objection on ex-post-facto laws.

The proponents of the theory of the applicability to this case of the principle of non-admissibility of ex-post-facto legislation think in terms of the general domestic criminal legislation of certain countries which have such laws either by constitution or by usage.

However, a law can be challenged on such grounds before the Court only where the judge is competent to state in this objection because ex-post-facto laws.
legislation is declared non-penetrable by the basic laws of the country or by constant judicial practice (in countries with a common law system).

Both are to be treated as something which exists here and not the written or common law. Furthermore, this principle is everywhere of relative importance only, i.e., where it is based on a constitutional provision.

(for instance, in the United States) a law amending the Constitution could not construe any act which, at the time of commission, was not an original statute book. If it has its roots in judicial practice, any law can dispose with it. For instance, in England where the bills against ex-post-facto legislation are deeply embedded in the common law, the parliament, by virtue of its supreme power, may pass (according to all authorities on this subject) such laws at any time. Many of the most modern written constitutions (among them the Czechoslovak Constitution of February 29, 1920; the Polish Constitution of 1921; the Yugoslav Constitution of June 29, 1921; the Belgian Constitution, as amended in 1921) confine themselves to the general statement that no penalty shall be established or enforced except by virtue of a law (Belgium) or that punishment can be dealt only by law and applied only to the acts for which the law provides and prescribes such punishment (Yugoslavia). Obviously, even if the original code of the country provides for the usual application of nulla poena sine lege, any ordinary law of those countries may prescribe punishment for acts deemed criminal at the time when the law is enacted, although they were committed prior to the effective day of the law.

It is also being overlooked that the principle of prohibiting ex-post-facto laws is the corollary to the existence of an exhaustive penal code which usually provides for all probable cases of crimes and its purpose is to safeguard the innocent individual against the tyranny of the state which could otherwise make punishable any dozens action on the part of its citizens.
The reason for the existence of this principle lies in the fear of tyrannical legislation and is to be found in countries which had to free themselves from foreign yoke (United States) or own despotic government (England, France, Germany after the First World War). On the contrary, nations which created their own democratic government did not find necessary to bind it by such rules. Furthermore, these safeguards against ex-post-facto laws can and have never been intended as a guarantee against violation of vital interests of the community, especially those new circumstances appear which could not have been foretold and written into the penal code before they happened. This is especially true of turbulent acts that happened during and before this war, acts which the modern civilized mind, used to the reign of law and decency, could not have foreseen. "The diseases of the quiet past are inadequate to the stormy present...as our ease is new, so must we think anew and act anew."

(Alphonse Karr, Message to Congress, December 1, 1862). In fact, countries which have to deal with the new phenomena evolved during this war, did not hesitate to enact legislation against collaboration and similar acts which formally would seem to violate the above mentioned rule. The provision of the Moscow Declaration that the criminals will be judged in accordance with the laws of the free governments which will be established in the various regions formerly under Soviet occupation clearly indicated the possibility and necessity of new legislation.

In certain cases the principle of retroactivity has even found explicit, statutory recognition, as for instance in the admissibility of analogies in criminal law (Denmark introduced it in 1930's) or in the right of the Courts to punish socially dangerous behavior (the Russian penal code of 1906; British courts made use of such a possibility as late as in 1935).

Since the I.W.W. was established by a decision of four powers (of which at least two do not have rule) acting in the interest of all the United Nations to which a score of others (with varying rules on this question) have signified their adherence, the objection out of ex-post-facto legislation...
could be of no importance even if it could serve its purpose in other grounds.

The trial takes place in Germany. According to the act of unconditional surrender and the "Declaration Regarding Defeat of Germany and Assumption of Supreme Authority by Allied Powers" dated September 20, 1945, the supreme power is exercised there by the four commanders-in-chief of the Big Four. There can, therefore, be no doubt that the territory and all persons found there are subject to military administration by foreign countries. This fact is being totally overlooked in considering the problem of law applicable.

It is generally recognised (and this principle has been held by the I.C.C. Supreme Court) that military tribunals are simply a portion of the military power of the Executive and constitute no part of the judiciary established by the Constitution. Military jurisdiction exercised in time of war outside of the boundaries of the state, which established it, can, therefore, obviously not be subject to the rules created for ordinary domestic criminal jurisdiction. Thus, even if the principle of the non-application of ex-post-facto laws is to be found in a given country, it refers not to military jurisdiction. The I.C.C. is, no doubt, a military court.

Most important, in considering the application of the ex-post-facto principle to this case, it must be realised that we deal here not with domestic but with international criminal law, since the accused are arraigned before an international tribunal. The difference between international and domestic criminal law consists not only in jurisdiction (courts) and law (legal maxims) but mainly in the scope and the character of their application. Not all acts considered criminal in domestic legislation are, or must at any time be considered criminal on the international level and vice versa, although the latter may be inspired by the former. Domestic criminal law is created by a single-purposed organisation — the state — to be applied (except the military jurisdiction described above) against its residents for punishable acts of
one person against another or the community and its main task is to maintain the status quo in all spheres of life. International criminal law can
emanate only from a loose conglomeration of states with various systems and
practices — the society of nations — and the purpose is to punish individuals
who act against the interests of this society, which changes from time to time
in composition, character and view.

Contrary to the day-to-day normal international relations involved in
the interchange of goods and similar things and the peaceful disputes among
nations which long ago created international law and jurisdiction in such
fields, no authoritative attempt has been made to extend international law
to cover the condemned and forbidden conduct of individuals. This means that
there exists at this time no written international penal code which prescribes
what acts are considered international crimes and no regular international
criminal courts. The notion of sovereignty has restricted up to this time the
feasibility of applying criminal sanctions in international relations (except
in cases of piracy) to such breaches events as war and their aftermath which
supply not only the punishable acts but also the machinery for punishment (in
the acts following the close of war). The non-existence of such a code makes
it by itself impossible to apply its corollary — the prohibition of ex-post-
 facto laws. Furthermore, international penal law can, under the existing
circumstances, evolve only in the case-by-case way, i.e., whenever the
necessity arises to apply criminal sanctions, the society of nations creates
the necessary preconditions and the penal law applicable. Many of the best
law systems of the world have been created in this manner. In the same way,
the lack of ordinary international criminal jurisdiction forces the states
concerned to create ad-hoc courts. It has been generally assumed that in
creating an ad-hoc tribunal, states are free to stipulate what law shall
apply: otherwise, because of the absence of law applicable, such tribunals
could not function at all. It has also been generally recognized that all
these law operate retrospectively, for only fictitiously could it be said that
all acts found to be criminal upon trial were criminal when committed.
Therefore, the principle of ex-post-facto laws could not be applied to international penal law, as it exists today, even if other rules would have mitigated for its application.

In sum, domestic and international criminal law are of different characters: the first is usually static, the second essentially dynamic; the first governed by strict rules, the second is by far more flexible and is adapted to the necessities of its specific purpose; the first set in advance for years to come, the second applied to the specific case. It is, therefore, impossible to apply rules of domestic law to cases of international jurisdiction and consideration of previous precedent is out of order here.

It may be true that the number of cases involving international criminal jurisdiction were small in the past. This is not an argument against its application, but the consequence of its specific evolution and a sign of the extraordinary character of the acts committed by the accused who have acted, by their misconduct, the clock proceeds back and have acted in such a way in a world which was unprepared to anticipate such deeds. Similar, although much less extensive, acts after the First World War served similar reactions and action.

The treaties of peace at that time set a precedent in affirming the principle of individual responsibility in international relations (see Articles 237-230 of the Versailles Treaty and similar provisions of other treaties). Art. 227 of the Versailles Treaty, in this part, explicitly provided for the assignment of William the Second for a "supreme offense against international morality and the sanctity of treaties," which was doubtless not an act declared criminal by written international law before that time. Art. 230 of the Treaty of Sèvres went further and stipulated the international responsibility of all persons responsible for "offenses committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1918," although the victims of the measures undoubtedly were Turkish citizens.
at the time of massacre, and an international rule existed in 1941, according to which persons committing wrong to own citizens could be arraigned before an international court. According to the same article, the Allied Powers reserved to themselves the right to designate the tribunal which shall try the persons so accused; this provision implied the possibility of establishing an ad-hoc tribunal. Both Articles created in fact and in law the same rules as were embodied in the Agreement and Charter of the ICTT. It is true that for certain reasons the quoted rules were not applied, but this is irrelevant from the legal point of view: they show how international criminal responsibility is being created and also demonstrate that the rules created by the ICTT Agreement are, in essence, nothing but the application of existing precedents, which were and should have been known to the accused. The defendants can not claim that the provisions of the Agreement concerning the law applicable violate international laws; on the contrary, they are in perfect agreement with its principles and precedents.

II

Fair trial and due process of law have sometimes been accepted to embrace a number of general privileges and immunities allowed persons charged with criminal action. Actually, however, "fair trial" means that which is a fair trial in contemplation of law, namely a trial as the law secures to the party. The Charter, therefore, accurately describes in Art. 16 the rules of trial, which the law applicable to their case assures to them, without such enumeration there would have been no clear fair trial rules at all, since international criminal law has not evolved such provisions and those existing in the various countries are of such different nature that none of them could be applied, even if it were permissible to do so. Obviously, the tribunal could not, on the basis of Art. 13 of the Charter (i.e. by its power to draw up rules of procedure) change or enlarge the rules of fair trial to cover anything more than stipulated in Art. 16. If the tribunal were permitted to do so, the
signatories of the Agreement would not have inserted in the Charter a specific Chapter X dealing with "fair trial," but would have permitted the Court to act on its own discretion on the basis of Art. 12. In addition, according to Art. 12, none of the rules of procedure may be inconsistent with the provisions of the Charter; every deviation from Art. 12 would, therefore, violate the Charter and its Article 12.