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War Crimes and the Jurisdiction Maze

As in all wars the conflict in Viet Nam has resulted in numerous charges and counter charges concerning the commission of war crimes in violation of international law. The fact that war crimes are not necessarily limited to the other side has been pointed out vividly by several incidents involving U.S. personnel, including My Lai.

The purpose of this article is not to review these incidents, but to discuss whether or not the United States is in a position domestically to carry out its international obligations to prosecute war criminals under International Common Law and *The Geneva Conventions of August 12, 1949, For the Protection of War Victims.*[1]

Each of the Geneva conventions contains the common requirement that each party will undertake to enact legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the conventions which include serious war crimes.[2] The articles dealing with grave breaches are identical in the four conventions except that the enumeration of the violations of a particular convention which constitutes grave breaches varies somewhat with the subject matter of the convention.[3]

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[1] (1955), 6 U.S.T. 3114.

[2] The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring each person, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case. *Geneva Convention Relative to the Protection of Civilian Prisoners in Time of War of August 12, 1949 (1955), 6 U.S.T. 3616.*

[3] Art. 50 of the *1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1955), 6 U.S.T. 3114; Art. 51 of the *1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (1955), 6 U.S.T. 3217; Art. 147 of the *1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1955), 6 U.S.T. 3516.

These conventions entered into force with respect to the United States on February 2, 1956. Secretary of State Rusk, by letter dated August 10, 1965, notified the International Red Cross that the United States was applying the provisions of the Conventions to the hostilities in Viet Nam.[4] "Grave breaches" as used in the Geneva Conventions, do not include all war crimes. For example, the intentional killing of a noncombatant South Vietnamese civilian while engaged in a combat operation, would be a war crime under international law, but not a grave breach under the Geneva Conventions. The Conventions do not classify such offsenses as grave breaches when the victim is the national of a co-belligerent. However, if the victim were a national of North Vietnam, the offense would be a grave breach under the Conventions.[5]

Even though war crimes may not all be grave breaches under the Geneva Conventions, it has always been the policy of the United States to punish all individuals who commit war crimes in violation of international law, whether or not they are in violation of the Geneva Conventions.[6]

The mandate is clear, but is the United States in a position to provide effective penal sanctions for all war crimes? In order to answer this question it is necessary to review the various methods of prosecuting war crimes under our domestic law. The possible methods are trial by courts-martial, by federal courts and by military commissions.

Trial by Courts-Martial

While courts-martial have no part of the jurisdiction set apart under the article of the constitution which relates to the judicial power of the United States, they have an equally certain constitutional source. They are established under the constitutional power of Congress to make rules for the government and regulation of the armed forces of the United States, and they are recognized in the provisions of the fifth amendment, expressly exempting "cases arising in the land and naval forces" from the requirement of presentment and indictment by grand jury.

Servicemen on active duty with the United States Armed Forces, and who have not been separated from the service since commission of the

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[4]50 Department of State Bulletin at 447.

[5]Article 147 of the *Convention Relative to the Protection of Civilian Persons* defines grave breaches as unlawful acts committed against protected persons. A protected person, as defined in Article 4 of this Convention, does not include nationals of a co-belligerent state. Since South Viet Nam is a co-belligerent state, South Vietnamese nationals would not be considered protected persons under the convention. (1955) 6 U.S.T. 3618, 3520.

[6]Sec. 504 F.M. 27-10, Dept. of the Army, July 1956, *The Law of Land Warfare:* Principles of the Nuremberg Charter and Judgment as Formulated by the International Law Commission, 1950 U.N. General Assembly Record, 5th Session, Supp. 12 (A/1316).

offense, are subject to trial for committing war crimes, by military courts-martial. There is a serious question, however, whether civilians serving with the armed forces, or individuals who were on active duty at the time of the offense but subsequently discharged from the armed services, would presently be subject to such jurisdiction.

When the Uniform Code of Military Justice was being drafted, the problem of crimes being discovered after the offender was discharged from the service, was recognized and specifically covered by Article 3(a) of the Uniform Code. This article provided that discharged servicemen might be tried by court-martial for offenses under the code committed while on active duty, when such offenses occurred beyond the jurisdiction of the United States courts, and were punishable by confinement for five years or more.[7]

Civilians committing crimes while accompanying the armed forces overseas were also subject to trial by court-martial under Article 2(10) and (11) of the Uniform Code.[8] Upon passage of this act, it appeared that all war crimes occurring outside the jurisdiction of our civil courts could be punished by the use of courts-martial. This was the position of the executive branch as stated in a letter from the Department of Justice to the Chairman of the Committee on Foreign Relations of the U.S. Senate, during hearings on the Geneva Conventions.[9]

In 1955, the United States Air Force attempted to use the jurisdiction provision of Article 3(a) to bring a former airman (Toth) to trial before a court-martial.[10] Toth had been honorably discharged from the Air Force, and had returned to his home where he was employed in a steel plant. Five months after his discharge, he was arrested by military authorities on charges of murder and conspiracy to commit murder while serving as an airman in Korea. The Supreme Court held "that Congress cannot subject civilians like Toth to trial by court-martial. They, like other civilians are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article III of the Constitution."[11] Although this case

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[7]10 U.S.C. 803.

[8]Art. 2 *Persons subject to this chapter*–

The following persons are subject to this chapter:

(10) In times of war, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: The Canal Zone, Puerto Rico, Guam, and the Virgin Islands, 10 U.S.C. 802 (10) (11).

[9]Hearing before the Committee on Foreign Relations, U.S. Senate, 84th Congress, 1st Sess., June 3, 1955, on the *Geneva Conventions for the Protection of War Victims.*

[10]United States *ex rel.* Toth v. Quarles 350 U.S. 11 (1955).

[11]*Id.* at 23.

did not involve a war crime or a treaty obligation of the United States, the result made it quite clear that the Supreme Court was going to limit drastically, court-martial jurisdiction over civilians.

The next line of cases involving trial of civilians by court-martial concerned dependents of servicemen and U.S. Government employees accompanying the armed forces overseas.[12] In these cases, the Supreme Court held that even though a treaty provides for trial of civilians by court-martial such jurisdiction cannot be allowed, since the treaty is subject to the Constitution, and trial by court-martial of civilians accompanying the armed forces overseas during peacetime does not meet the requirements of Article III, Sec. 2, or the Fifth or Sixth Amendments.

The most recent Supreme Court case involving court-martial jurisdiction is *O'Callahan v. Parker.*[13] In this case the Supreme Court held that a court-martial could not exercise jurisdiction over a serviceman charged with attempted rape, assault with intent to rape and housebreaking, when the offenses occurred in a civilian hotel in Hawaii while the serviceman was on pass. Justice Douglas, in the majority opinion, cited the cases previously discussed involving court-martial jurisdiction over civilians, and concluded that these cases "decide that courts-martial have no jurisdiction to try those who are not members of the Armed Forces, no matter how intimate the connection between their offense and the concerns of military discipline."[14]

In a recent case, *Latney v. Ignatius*[15], the U.S. Army attempted to exercise jurisdiction over a U.S. National civilian under Article 2(10) of the Uniform Code, which provides that in time of war, persons serving with or accompanying an armed force in the field are subject to trial by court-martial. In this case, a merchant seaman was found guilty of committing murder, by a court-martial sitting in Viet Nam. At the time the offense was committed, the sailor was on shore leave from a U.S. civilian-owned and operated merchant vessel docked in Danang harbor, and discharging cargo for the U.S. Forces in Viet Nam.

Upon a petition for a writ of habeas corpus, the Federal District Court upheld the court-martial jurisdiction. On appeal, however, the United States Court of Appeals for the District of Columbia Circuit reversed the lower court's judgment. The Court of Appeals conceded that there was a period of undeclared war which permitted some interventions of the war

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[12]Reid v. Covert, 354 U.S. 1 (1957); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960).

[13]395 U.S. 258 (1969).

[14]*Id.* at 267.

[15]416 F.2d 821 (CA DC-1969).

power under which Article 2(10) was enacted, but they held that there was not sufficient connection between the civilian and the military to apply the war power in this particular case. In this respect, the court pointed out, the accused was employed by a private shipping company, and was in no closer proximity to the armed forces than a seaman living on his ship and under the discipline of his civilian captain, who had been granted shore leave while waiting for the ship to turn around.[16]

From the court's opinion, it appears that jurisdiction under the Uniform Code might have been upheld by the Court as an appropriate war power if the civilian had actually been accompanying the armed forces in a combat situation. Such a holding would still not settle the question of jurisdiction over the individual who had returned to the United States, and resumed a full civilian status before his involvement with the offense was discovered, as in the Toth case. Consequently, even though court-martial jurisdiction might attach under certain conditions, it is not the answer to the overall war-crime jurisdiction problem.

Trial by Federal Courts

At present, except for certain offenses against the United States itself, such as treason, espionage, fraud against the Government, and larceny of Government property, wrongful acts committed by civilians in foreign countries (which would be crimes if committed in the United States), do not violate laws of the United States, and cannot be punished by the United States Federal civilian courts.

There have been several bills introduced in Congress designed to fill this void.[17] None of these bills up to this time has achieved the concurrence of the military departments, and the endorsement of Congressional committees, necessary for passage. But, even if such legislation were passed, there are many inherent problems in attempting to use the Federal courts to punish war crimes.

First, foreign countries are very jealous of their sovereignty, and in most instances would not allow a foreign civilian court, not connected with the military, to hold trials in their country. Second, if the trial were held outside the area where the war crime occurred, the problem of obtaining foreign witnesses and producing other evidence would, in some instances, be most difficult. Third, it would be more appropriate to try all individuals charged with committing war crimes by the same type of court, rather than U.S. civilians by Federal civilian courts, and U.S. servicemen and prisoners of war by courts-martial.

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[16] *Id.* at 823.

[17] H.R. 4225, 91st Congress (1969). S. 3189, 91st Congress (1969).

In this respect, the Geneva Conventions provide that prisoners of war can be sentenced validly only if the sentence is pronounced by the same courts, according to the same procedures as in the cases of members of the armed forces of the detaining power.[18] Another factor to consider is that if such legislation were passed now, subjecting U.S. Civilians committing war crimes to the jurisdiction of the Federal courts, it is very doubtful that jurisdiction could be maintained over former servicemen who have been accused of committing war crimes in Viet Nam.

It is clear that retroactive alterations of a forum, or the transfer of a class of criminal cases from the cognizance of one type of civilian court to another, does not violate the prohibition against ex-post-facto laws;[19] but any statute which operates to remove a defense may be applied only with respect to offenses committed after the date of the statute's enactment.[20] If any offenses which have occurred in Viet Nam may presently be tried by another forum within the civilian legal system, authorizing trial by a district court might not be ex-post-facto, but since such jurisdiction did not previously exist in the civilian courts, the statute is very likely to fail as to such defendants, because it acts to deprive them of a legal defense which existed at the time of the actions for which they now are to be tried.[21] The many problems associated with attempting to make war crimes triable by Federal civilian courts would not make such a procedure advisable if a better method is available.

Trial by Military Commission

The Constitution confers upon Congress the power "to define and punish offenses against the law of nations." The Constitution also empowers Congress to "declare war and raise armies," which in turn authorizes the employment of all necessary and proper agencies for the prosecution of the wars. The military commission is simply an instrumentality for the more efficient execution of the war power vested in Congress and the power vested in the President as Commander-in-chief of the armed forces. Congress has specifically recognized the right of military commissions to exercise jurisdiction over offenses in violation of the laws of war.[22] Hence, in our military law, the distinctive name of military commission has been adopted for the exclusively war-court which is a distinct tribunal from the court-martial. Congress has delegated to the President the authority to

[18]Article 102, *Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949* (1955) 6 U.S.T. 3394.

[19]Duncan v. Missouri, 152 U.S. 377 (1894).

[20]Beszell v. Ohio, 269 U.S. 167 (1952).

[21]United States v. Starr, 27 F. Cas. 1296 (No. 16, 379) (C.C.D. Ark. 1846).

[22]10 U.S.C. 821 (1956).

prescribe the procedure, including modes of proof, in cases before military commissions.[23]

The military commission was first utilized by the United States in 1847 during the occupation by our forces of a portion of the territory of Mexico.[24] They have been used by the United States in each conflict since the Mexican War, and have been recognized by the United States courts as a common law court on numerous occasions. In a case involving World War II war crimes, General Yamashita, the Japanese commander in the Philippines, was convicted and given a death sentence by a United States military commission. The Supreme Court, in upholding the jurisdiction of the military commission, stated that:

> the extent to which the powers to prosecute violations of the law of war shall be exercised before peace is declared rests, not with the courts, but with the political branch of the Government.[25]

In the case of *Madsen v. Kinsella*[26] the Supreme Court specifically upheld the constitutionality of the military commission for meeting urgent governmental responsibilities related to war. In this case, a U.S. citizen-dependent accompanying the military occupation forces in Germany, was tried and convicted by an occupation court in 1950 for murdering her husband, a U.S. Army officer. The Supreme Court stated that these courts "derived their authority from the President as occupation courts or tribunals, in the nature of military commissions, in areas still occupied by United States troops."[27] The Supreme Court further pointed out that occupation courts for Germany had less of a military character than a court-martial. Civilian judges with substantial legal experience were appointed to the bench. The rights of individuals were safeguarded by a Code of Criminal Procedure dealing with warrants, summons, preliminary hear-

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[23]Art. 36. *President may prescribe rules*—

(a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter. 10 U.S.C. 836 (1956).

[24]By M.G.O. 20 of February 19, 1847, issued from the Headquarters of the Army at Tampico, it was announced that "assassination, murder, poisoning, rape, or the attempt to commit either malicious stabbing or maiming, malicious assault and battery, robbery, theft, the wanton desecration of churches, cemeteries, or other religious edifices and fixtures . . . whether committed by Mexican or other civilians in Mexico against individuals of the U.S. military forces, or by which individuals against other such individuals or against Mexicans or civilians . . . should be brought to trial before military commission. WINTHROP'S MILITARY LAW AND PRECEDENTS, Second Edition, 1920, p. 832.

[25]*In Re* Yamashita, 327 U.S. 1, 13 (1946).

[26]343 U.S. 341 (1952).

[27]*Id.* at 357.

ings, trials, evidence, witnesses, findings, sentences, contempts, review of cases and appeals.[28]

Jurisdiction over U.S. nationals by the same type of tribunal has recently been upheld by the United States Court of Appeals for the District of Columbia, in the case of *Rose v. McNamara*[29] which arose in Okinawa where a U.S. citizen was convicted of a criminal charge of evading income taxes by a military-government court. In sustaining jurisdiction, the court pointed out that the court procedure required grand-jury indictment and petit-jury trial. With respect to the defendant's claims that her constitutional rights were violated (unless tried in an Article III Court), the court stated that the power of the President, in the conduct of governmental business of international consequences, has traditionally been viewed by the courts as broad, and that the Supreme Court has consistently recognized the extensive power of the President to set up special tribunals in occupied foreign lands to try American citizens.

It is difficult to see the legal distinction used by the courts in upholding jurisdiction over civilians by military commissions, while denying such jurisdiction to courts-martial. The key to this distinction appears to be the "civilianization" of the military commission, which specifically provides for indictment, and for trial either by petit jury or by experienced civilian judges. Throughout the cases involving courts-martial jurisdiction, there runs a thread indicating a basic distrust of the Military Justice System.

Once the trial is turned over to civilian oriented courts, even though they are under military jurisdiction, the courts have been much more lenient in their attitude toward jurisdiction. In any event, from the holdings of these cases, there is a legal basis for the President to establish an executive-court system with the sole responsibility of handling war crimes. The constitutionality of these courts would be based upon the war power under domestic and international common law, and through the President's authority as Commander-in-Chief of the armed forces.

Conclusion

The United States is presently in a position to conduct trials, and adequately to punish all war criminals including U.S. civilians, through the use of the military commission. In view of the stress placed by the courts on the civilian nature of the military commission, in cases in which jurisdiction over cilvilians has been upheld, the commission should be especially created by the President to exercise this war-power authority. There would

[28] *Id.* at 358–359.

[29] 375 Fed. 2d 924 (1968), *cert. denied*, 389 U.S. 856 (1969).

not be a problem of ex post facto application, as jurisdiction already rested with the military commission.

The rules of procedure promulgated by the President should include the right to indictment by a proceeding patterned after the federal grand-jury proceedings, and a right to choice of trial before a panel of experienced civilian judges, or by a jury drawn from U.S. nationals residing in the area.

Article 36 of the Uniform Code of Military Justice gives the President statutory authority to establish such a procedure for military commissions.[30] Such rules would have to provide for mandatory jury duty on the part of U.S. nationals residing in the area in which the commission is sitting. Article 47 of the Uniform Code provides for the procurement of witnesses before the military commission with appropriate penalty procedures in case the witness fails to comply with such service.[31]

The responsibility for prosecuting these cases should be placed upon The Judge Advocate General of the branch of the armed services involved. The accused should be provided with counsel at government expense, from the point of initial interrogation. In addition, he should be allowed to retain counsel of his choice at his own expense. As a part of the procedure, the accused should have a right of appeal to an appellate court which would be independent from the trial court. In this regard it would be advisable to establish a two-tier appellate proceeding, similar to the Federal court system, with the final appellate court being the United States Court of Military Appeals, which is prepared to handle this type of case on appeal.

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[30] *Supra*, note 23.

[31] Art. 47. *Refusal to appear or testify* –

(a) Any person not subject to this chapter who –

(1) has been duly subpoenaed to appear as a witness before a court-martial, military commission, court of inquiry, or any other military court or board, or before any military or civil officer designated to take a deposition to be read in evidence before such a court, commission, or board;

(2) has been duly paid or tendered the fees and mileage of a witness at the rates allowed to witnesses attending the courts of the United States; and

(3) Willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which that person may have been legally subpoenaed to produce; is guilty of an offense against the United States.

(b) Any person who commits an offense named in subsection (a) shall be tried on information in a United States district court, or in a court of original criminal jurisdiction in any of the Territories, Commonwealths, or possessions of the United States, and jurisdiction is conferred upon these courts for that purpose. Upon conviction, such a person shall be punished by a fine of not more than $500, or imprisonment for not more than six months or both.

(c) The United States attorney, or the officer prosecuting for the United States, in any such court of original criminal jurisdiction shall, upon the certification of the facts to him by the military court, commission, court of inquiry, or board, file an information against and prosecute any person violating this article.

(d) The fees and mileage of witnesses shall be advanced or paid out of the appropriations for the compensation of witnesses. 10 U.S.C. 84 (1956).

This executive court system would not neet to be staffed at all times. It would be sufficient to establish its framework so that it could be staffed during periods of armed conflict. These courts should exercise jurisdiction over all war crimes for which the United States has responsibility, to see that adequate punishment is imposed. This would exclude courts-martial from exercising jurisdiction in any case involving a war crime. Besides establishing a uniform system for handling war crimes, there would be a specific benefit with regard to Viet Nam, since former servicemen charged with the commission of war crimes could be brought before these courts and could not escape punishment through lack of a forum for trial.