

The Governments of the United States, France, the United Kingdom and the Soviet Union concluded an agreement on August 8, 1945, in London, providing for the establishment of an International Military Tribunal for the trial of war criminals,⁷ to which nineteen other governments of the United Nations subsequently adhered. The agreement contained a charter annexed to and forming an integral part of the agreement containing various provisions for the fair trial of defendants and for the expeditious conduct of proceedings. The terms of this agreement followed in many respects the recommendations of the Commission of 1919 and were substantially adopted by General MacArthur as Supreme Commander for the Allied Powers under whose mandate the trial of Yamashita was held. General MacArthur subsequently reviewed the proceedings and approved the sentence.

The regulations governing the procedure for the trial directed that the Commission should admit such evidence "as in its opinion would be of assistance in proving or disproving the charge or such as in the Commission's opinion would have probative value in the mind of a reasonable man." It has long been recognized that military commissions are not bound by the ordinary rules of evidence, but, in the absence of statute, may prescribe their own rules so long as they "act in accordance with the principles of justice, honor, humanity, and the laws and usages of war."⁸ It was doubtless intended by Congress to adopt a different procedure in trials of Army personnel but not of enemy combatants for offenses against the customary laws of war. The "due process" clause of the Fifth Amendment had already been held by the Supreme Court not to be applicable to military trials of enemy combatants.⁹

The limitations of an editorial comment prevent an extended appraisal of a trial lasting nearly six weeks with a record of over four thousand pages and over four hundred exhibits. General Yamashita was tried chiefly for crimes against noncombatants committed on a scale so vast that the accomplishment to be hoped for as a result of the trial ought to be far removed from any mere satisfaction of vengeance or even of retributive justice but as a deterrent against similar conduct in the future.

ARTHUR K. KUHN

FREEDOM OF COMMUNICATION ACROSS NATIONAL BOUNDARIES

International lawyers would be gravely delinquent in their duties if they were not giving the most serious thought to the ways and means by which the existing rules of law may be developed and extended to meet the present crisis. Within less than five years of the establishment of the United Nations the system of collective security has broken down and a new bal-

⁷ This JOURNAL, Supp., Vol. 39 (1945), p. 257.

⁸ Charles Fairman, *Law of Martial Rule* (2nd ed., 1943), pp. 264-265.

⁹ *Ex parte Quirin*, *loc. cit.*, at p. 41.

ance of power is being contrived which it is hoped will give the protection against aggression which the organized community of nations appears to be unable to give. To say that the problem is a "political" one, outside the range of international law, is to evade the issue. For it is precisely the task of the international lawyer to reduce political problems to legal ones, and to point out the deficiencies in the law which explain the existence of a crisis such as the one through which the United Nations is now passing.

Is there an obligation on the part of every state to coöperate with the other members of the international community in an effective system of collective security? What are the conditions of such an effective system? If it should require a corresponding restraint upon the traditional sovereignty of the state, may that restraint be demanded as an essential condition of membership in the international community? Is there an obligation on the part of every state to permit freedom of communication across national boundaries to the extent necessary to assure mutual confidence between states and reliance upon the observance of the rule of good faith? Perhaps the last question is the key to the others, inasmuch as no plan for the limitation of armaments under the conditions of the present day could be successful unless accompanied by the opening of the channels of information and the maintenance of direct contacts between the people of one state and those of another.

It would be difficult to maintain that there is a specific rule of positive law obligating a state to open up its boundaries to communication with other states. The Charter of the United Nations implies relations of mutual intercourse between states and respect by each state for certain fundamental rights of man as man. But the Charter states the obligation in abstract form and leaves to each state the application of the obligation under the conditions of its own national life. The efforts now being made to formulate the terms of a convention providing for freedom of communication indicate a general belief that the abstract provisions of the Charter need to be reduced to more concrete obligations if the principle of freedom of communication is to be anything more than a promise, to be carried out at the convenience of the individual state.

But the provisions of the Charter of the United Nations do not exhaust the sources of obligation. International law is a dynamic, not a static system. It consists not merely of specific rules formulated in treaties or taking shape as a result of established usage and custom, but of general principles that are part of the heritage of Christian civilization, principles which Grotius and his predecessors regarded as part of the natural law and which we today describe as the fundamental rights and duties of states. The rule of good faith is one of these principles. So also is the rule of mutual trust in the pledged word, resulting in mutual confidence that the intentions of the state are reflected in its public declarations, both of which are corollaries of the rule of good faith. Deductions from these funda-

mental principles are valid rules of law, although it is obvious that any such deductions must not be the arbitrary decisions of an individual state but must have behind them the public opinion of the organized community of nations.

These fundamental principles of international law grow and expand in their application with the changing conditions of the international community. The invention of new instruments of destruction automatically extends the scope of the obligations entailed by the rule of good faith and its corollary, the rule of mutual confidence. Under the conditions of the present day a surprise attack can be so devastating as to give a tremendous initial advantage to the state making the attack. In turn, the possibility of such a surprise attack may create a situation of tension between nation and nation so serious as to give rise to a new obligation of maintaining open channels of communication as the necessary means of relieving the tension. Thus freedom of communication, which a century ago may have called for nothing more than trade between the ports of one country and those of another, has now come to mean direct contact between the peoples of the two countries as a means of creating mutual assurance that no sudden and unexpected attack is being planned. What could not have been demanded a century ago, when there was no urgent necessity for it, can be demanded today as an essential condition of membership in the international community and of the fulfillment of the fundamental principle of good faith.

The Charter of the United Nations, while making collective security the cornerstone of the new organization, recognizes nevertheless that the system of collective security for which it provides may not at all times function effectively, and that under such circumstances the individual members of the organization retain the right of individual self-defense or of collective defense by smaller groups. What is the scope of the measures that may be taken in such cases? Are they limited to measures by which an act of aggression may be resisted when once it has been committed, and when perhaps resistance can only be made at prohibitive cost? Or do they extend to measures by which acts of aggression may be anticipated and perhaps prevented by reason of such anticipation? It would seem that freedom of communication might properly come within such measures of preventive anticipation, and that it is therefore a right of every nation to demand it under the circumstances contemplated and an obligation of every nation to grant it. Possibly it is not too much to say that freedom of communication is the one effective measure available today of preventing the conflict to which the present competition in armaments seems to be inevitably leading. It is the tragedy of the times that it is being rejected by the government whose people would have most to gain by it.

Towards the close of the first World War President Wilson, having in mind a war which had been brought on by the arbitrary decision of irre-

sponsible monarchs, proclaimed that the world must be "made safe for democracy." The proclamation evoked in many quarters of his own country only irony and cynicism. Today, perhaps, we can see better its meaning, and can understand it in terms of national defense as well as of political idealism. The world must be made safe for democracy; for democracy with all its domestic advantages has one very serious disadvantage as against the dictatorships: it can be taken off its guard. Democracy is reluctant to submit to military discipline in time of peace; it refuses to be herded into training camps; it objects to restraints upon freedom of speech and of the press when the urgency is not apparent; it has its own ideas of the need of measures of preparedness, and it resents the burdens it must bear in the interest of defense against a possible aggressor against whom it has itself no designs of aggression. Possibly the time is now at hand when democracy will demand freedom of communication as a first step towards self-protection against dictatorships, and will demand it with a determination that will not admit of refusal, knowing that its own survival as a democracy is at issue.

C. G. FENWICK