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INTERNATIONAL LAW-MILITARY TRIBUNALS FOR THE TRIAL OF WAR CRIMINALS AS INTERNATIONAL COURTS

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INTERNATIONAL LAW—MILITARY TRIBUNALS FOR THE TRIAL OF WAR CRIMINALS AS INTERNATIONAL COURTS—Petitioner, a German citizen confined in the American Zone of Occupied Germany in the custody of the United States Army, petitioned the United States District Court, District of Columbia for a writ of habeas corpus. The respondents were the Secretary of Defense and others alleged to have directory control over the jailers in Germany. The petitioner had been convicted of war crimes by Military Tribunal IV at Nuremburg, Germany. This tribunal was established by order of General Clay,¹ United States Military Governor and Zone Commander, pursuant to Control Council Law No. 10² which carried out the London Agreement and the Moscow Declaration. The tribunal was composed entirely of Americans and no other nation participated officially in the trial. The District Court dismissed the petition for lack of jurisdiction.³ On appeal, *held*, affirmed. Courts of the United States have no jurisdiction to review the findings of other than American civil or military courts. Military Tribunal IV was an international court hence its decision was not subject to review. *Flick v. Johnson*, (App. D.C. 1949) 174 F. (2d) 983, cert. den. (U.S. 1949) 70 S.Ct. 158.

The civil courts of the United States have authority to review the decisions of United States military commissions in habeas corpus proceedings.⁴ Enemy aliens may resort to habeas corpus.⁵ Since Tribunal IV was composed entirely of Ameri-

¹ General Orders, No. 21, Headquarters, European Command, April 12, 1947.

² 15 U.S. DEPT. OF STATE BUL. 862 (1946).

³ Because the prisoner was detained outside the limits of the court's territorial jurisdiction. *Flick v. Johnson*, (D.C. 1948) 76 F. Supp. 979. In *Ahrens v. Clark*, 335 U.S. 188, 68 S.Ct. 1443 (1948), which supports this proposition generally, decision was expressly reserved on cases where confinement is without the territorial limits of any district court. *Eisentrager v. Forrestal*, (App. D.C. 1949) 174 F. (2d) 961, cert. granted (U.S. 1949) 70 S.Ct. 158, holds that a district court has jurisdiction in such cases if officials having directive power over the immediate jailer are within its territorial jurisdiction.

⁴ *Ex parte Quirin*, 317 U.S. 1, 63 S.Ct. 2 (1942); *Ex parte Milligan*, 4 Wall. (71 U.S.) 2 (1866); In re *Yamashita*, 327 U.S. 1, 66 S.Ct. 340 (1946).

⁵ *Ex parte Quirin*, supra, note 4; In re *Yamashita*, supra, note 4; *Duncan v. Kahanamoku*, 327 U.S. 304, 66 S.Ct. 606 (1946).

cans⁶ and acted under the orders of the American Zone Commander it would seem that its decision was subject to review;⁷ but the court felt bound to apply the rule laid down in the *Hirota* case,⁸ i.e., United States courts have no jurisdiction to review the decisions of other than American civil or military courts.⁹ To claim jurisdiction to review the decision of a court in which foreign nations were active participants would result in embarrassment of our relations with those foreign nations. The International Military Tribunals, Far East and Nuremberg, presented this problem.¹⁰ But in the principal case the tribunal in question was composed entirely of Americans, the prosecution was entirely American,¹¹ and the court was constituted by order of the American Zone Commander. It is submitted that the prime reason for refusing to review the decisions of international courts, i.e., danger of embarrassing foreign relations, was absent. The technical argument that the authority of the court flowed from the Control Council, which is quadripartite, overlooks the fact that the order constituting the court was given by an American Army officer. It seems questionable to inquire whether the Zone Commander exercised authority as an official of an international agency, rather than as a United States officer,¹² when there was slight possibility that there would

⁶ The Honorable Charles B. Sears (retired Judge of the Court of Appeals of the State of New York), Frank N. Richman (former Judge of the Supreme Court of Indiana), and William C. Christianson (former Justice of the Supreme Court of Minnesota) sat as Military Tribunal IV.

⁷ Military Tribunal IV, in the principal case, conceived of itself as an international court. "As to the tribunal, its nature and competence: The tribunal is not a court of the United States as that term is used in the Constitution of the United States. It is not a court martial. It is not a military commission. It is an international tribunal established by the International Control Council." TRANSCRIPT OF RECORD, *United States of America v. Frederick Flick* 10975.

⁸ *Hirota v. MacArthur*, 338 U.S. 197, 69 S.Ct. 197 (1948), noted in 47 MICH. L. REV. 835 (1949).

⁹ The court did not expressly decide that the International Military Court for the Far East was an international court. For a discussion of the requisites of jurisdiction of an international tribunal over war criminals see Schick, "The Nuremberg Trial and The International Law of the Future," 41 AM. J. INT. L. 770 (1947); April "An Inquiry into the Judicial Basis for The Nuremberg War Crimes Trial," 30 MINN. L. REV. 313 (1946).

¹⁰ Creation of I.M.T. was authorized by the London Agreement, 13 U.S. DEPT. OF STATE BUL. 222 (1945). In addition to the four occupying powers nineteen other countries "adhered" to the Agreement under Article 5 and of these many sent observers and representatives to assist in the preparation of the prosecution's case at the trial. See Taylor, "The Nuremberg War Crimes Trials," No. 450 INTERNATIONAL CONCILIATION 243 (1949). I.M.T.F.E. was established by order of General MacArthur as Supreme Commander of the Allied Powers. The Tribunal was composed of nine nations. Judgment of the International Military Tribunal for the Far East, p. 6.

¹¹ The prosecution was headed by Thomas E. Erwin, Deputy Chief of Counsel, and his leading associate was Charles S. Lyon, both of New York City.

¹² The Military Governor of Germany has power to appoint military commissions. 1a MAN. MIL. GOV. AND CIV. AFFAIRS, FM 27-5 (1943); WINTHROP, MILITARY LAW AND PRECEDENTS, 2d ed., 831 et seq. (1920). Military commissions are proper tribunals to try war criminals. In re Yamashita, supra, note 4; Ex parte Quirin, supra, note 4. See also Glueck, "By What Tribunals Shall War Offenders Be Tried?" 56 HARV. L. REV. 1059 at 1063 et seq. (1943). For a general treatment of military commissions see Green, "The Military Commission," 42 AM. J. INT. L. 832 (1948).

be embarrassment to our military relations with the other occupying powers. Certainly the fact that Tribunal IV was military in character would so limit the scope of judicial review as not to interfere with military expediency.¹⁸ A holding that Tribunal IV was an international court does not appear to have been necessitated by the requirements of military policy or the demands of international cooperation.

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¹⁸ Review by the civil courts is traditionally limited to determining whether the military tribunal was acting within its jurisdiction and not violating any applicable statutes. In *re Yamashita*, *supra*, note 4; *Ex parte Vallandigham*, 1 Wall. (68 U.S.) 243 (1863); In *re Vidal*, 179 U.S. 126, 21 S.Ct. 48 (1900); *Ex parte Quirin*, *supra*, note 4; Stein, "Judicial Review of Determinations of Federal Military Tribunals," 11 BROOKLYN L. REV. 30 (1941); Note, 44 MICH. L. REV. 855 (1946).