

Winter 1972

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### Recommended Citation

Charles E. Patterson, *Principles of Nurnberg As a Defense to Civil Disobedience, The*, 37 MO. L. REV. (1972)

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## THE PRINCIPLES OF NURNBERG AS A DEFENSE TO CIVIL DISOBEDIENCE

CHARLES E. PATTERSON\*

### I. INTRODUCTION

[T]he position of a soldier is . . . a difficult one. He may . . . be liable to be shot by a court-martial if he disobeys an order, and . . . hanged by a judge and jury if he obeys it.<sup>1</sup>

Thus, the following dilemma would be forced upon the individual: *either* to obey the laws of his country and become an international criminal, *or* to obey international law and so incur predictable punishment under national law.<sup>2</sup>

The judgment of the International Military Tribunal at Nürnberg ignited a controversy which still smolders over the meaning of the principles applied by the Tribunal and their application in international and domestic law. At the core of this continuing controversy is the theory of individual responsibility for the commission of crimes against peace which was formulated in the Charter of the International Military Tribunal and applied in its judgment.<sup>3</sup> In several recent decisions in the courts of the United States this same theory of individual criminal responsibility of a citizen of the United States, arising from the alleged commission of an international crime against peace by the federal government in Vietnam, has been raised as a defense to crimes involving civil disobedience.<sup>4</sup> In order to assess this

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1. A. DICEY, *LAW OF THE CONSTITUTION* 303 (1939).

2. A. VON KNIERIEM, *THE NUREMBERG TRIALS* 45 (1959).

3. INTERNATIONAL MILITARY TRIBUNAL CHARTER art. 6. For the text of the Charter, see 59 Stat. 1546 (1945). A full text of the judgment of the Tribunal may be found in XXII TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411-589 (1948).

4. See, e.g., *Simmons v. United States*, 406 F.2d 456, 460 (5th Cir.), *cert. denied*, 395 U.S. 982 (1969); *Swallow v. United States*, 325 F.2d 97, 98 (10th Cir. 1963); *United States v. Berrigan*, 283 F. Supp. 336, 341 (D. Md. 1968), *aff'd*, 417 F.2d 1009 (4th Cir. 1969), *cert. denied*, 397 U.S. 909 (1970); *United States v. Mitchell*, 246 F. Supp. 874, 897 (D. Conn. 1965), *aff'd*, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967); *People v. Bloom, Crim. No. 951* (Cir. Ct. Mich., Jan. 28, 1966). See also *Farmer v. United States*, 149 F. Supp. 327, 328 (M.D. Tenn. 1956), *aff'd per curiam*, 252 F.2d 490 (6th Cir. 1958).

The scope of this article and cases discussed is limited to civil crimes as opposed to military crimes, and, further, limited to the so-called crime of aggressive war or crime against peace as opposed to traditional war crimes.

For a discussion of the Nürnberg defense based upon the commission of war crimes in Vietnam, see D'Amato, *War Crimes and Vietnam: The "Nuremberg Defense" and the Military Service Register*, 57 CAL. L. REV. 1055 (1969). For a compilation of publications concerning the legality of the United States' role in Vietnam, see R. FALK, *THE VIETNAM WAR AND INTERNATIONAL LAW* (1968).

"Nürnberg defense" it is necessary to examine the nature and limits of this crime against peace and the extent to which the individual may be responsible for its commission by his government; the obstacles which may arise in using it as a defense in domestic courts; and the conflict, inherent in the defense, between the theory of individual international criminal responsibility and the necessity for order in the national state.

## II. THE CRIME AGAINST PEACE AS A RULE OF CUSTOMARY INTERNATIONAL LAW

In August of 1945 the four major Allied Powers met in London and agreed to establish an International Military Tribunal for the trial of war criminals.<sup>5</sup> Article 6 of the Charter of the International Military Tribunal describes as an international crime for which there shall be individual responsibility:

Crimes against peace: Namely: planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing . . . .<sup>6</sup>

This definition envisages two separate crimes against peace, aggressive war and a war in violation of treaties and agreements.<sup>7</sup>

Numerous precedents were cited by the Tribunal to justify the conviction of individual German defendants for the commission of the crime against peace of aggressive war.<sup>8</sup> The value of these precedents is in some

5. The London Agreement was signed August 8, 1945, by the Soviet Union, the Republic of France, the United Kingdom and the United States. Agreement for the Establishment of an International Military Tribunal, 59 Stat. 1544 (1945), E.A.S. No. 472. See L. SOHN, CASES AND MATERIALS ON UNITED NATIONS LAW 858-59 (1956).

6. CHARTER, *supra* note 3, art. 6.

7. Garcia-Mora, *Crimes Against Peace in International Law: From Nürnberg to the Present*, 53 Ky. L.J. 35, 36 (1964).

8. The Tribunal listed six pacts and treaties which in its estimation established that aggressive war was an international crime. These were: (1) the General Treaty for the Renunciation of War, 46 Stat. 2343 (1928), T.S. No. 796 (the "Kellogg-Briand Pact"); (2) The League of Nations 1924 Protocol for the Pacific Settlement of International Disputes, LEAGUE OF NATIONS OFF. J., Spec. Supp. 23, at 498 (1923); (3) The Draft Treaty of Mutual Assistance of 1923, LEAGUE OF NATIONS OFF. J., Spec. Supp. 13, at 403 (1923); (4) The Hague Convention of 1907, 36 Stat. 2199, T.S. No. 536; (5) a September 24, 1927 resolution of the Assembly of the League of Nations condemning wars of aggression, LEAGUE OF NATIONS OFF. J., Spec. Supp. 54, at 155-56 (1927); and (6) a resolution by the sixth Pan American Convention condemning aggressive war, 62 BULL. PAN AM. UNION 5 (1928). I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 219-22 (1947). For more exhaustive lists of precedents for the criminality of aggressive war, see C. FRIED, THE LAW OF AGGRESSION AND CRIMES AGAINST PEACE (1946); S. GLUECK, THE NUREMBERG TRIAL AND AGGRESSIVE WAR 24-34 (1946); R. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 17-40 (1960); Glueck, *The Nuremberg Trial and Aggressive War*, 59 HARV. L. REV. 396, 408-12 (1946); Comment, *The Legality of Nuremberg*, 4 DUQUESNE L. REV. 146 (1965).

doubt,<sup>9</sup> particularly their value in demonstrating that individuals could be held liable for a crime against peace under international law at that time.<sup>10</sup> Regardless of whether the crime against peace was an established rule of international law in 1945, it most certainly became international law in 1947, in the sense of newly established treaty law.<sup>11</sup> The important question now is whether the crimes against peace as formulated at Nürnberg have matured from treaty law which binds only parties to the agreement, into a rule of customary international law which is binding upon all nations.

A rule of customary international law may be shown to exist by evidence of acceptance and usage among nations which demonstrates assent to its existence as a rule of conduct.<sup>12</sup> Perhaps the greatest difficulty with custom as a source of international law is determining at what stage it may be said to be authoritative.<sup>13</sup> This difficulty is especially apparent in examining the crime of aggressive war.

The assent necessary for the establishment of aggressive war as criminal under international custom may be found from five sources. First, subsequent trials by military tribunals at Nürnberg,<sup>14</sup> Tokyo,<sup>15</sup> and numerous

9. To obtain a general idea of the complexity of this dispute and the varying opinions, compare S. GLUECK, *THE NUREMBERG TRIAL AND AGGRESSIVE WAR* 24-34 (1946), and R. WOETZEL, *supra* note 8, at 17-40, with Garcia-Mora, *supra* note 7, at 37-38, and Schwarzenberger, *The Judgment of Nuremberg*, 21 *TUL. L. REV.* 329, 344-51 (1946-47).

10. See M. GARCIA-MORA, *HOSTILE ACTS OF PRIVATE PERSONS AGAINST FOREIGN STATES* 38 (1962); S. GLUECK, *supra* note 9, at 7; A. VON KNIERIEM, *supra* note 2, at 28-64; R. WOETZEL, *supra* note 8, at 108-21.

11. G. SCHWARZENBERGER, *THE FRONTIERS OF INTERNATIONAL LAW* 204 (1962).

12. CORBETT, *CASES AND OPINIONS ON INTERNATIONAL LAW* 5 (1909). See, e.g., *The Paquete Habana*, 175 U.S. 677 (1900).

13. CORBETT, *supra* note 12, at 6.

14. Twelve later trials were instituted, beginning on October 26, 1946, to try the secondary leaders of the same classes that had been tried at the original Nürnberg trial. By a four-power agreement Control Council Law No. 10, providing for these hearings, was adopted. Allied Control Council for Germany Law No. 10, Dec. 20, 1945, 15 *DEPT STATE BULL.* 862 (1946), 13 *MO. L. REV.* 72 (1948). For discussions of this law and the subsequent tribunals, see J. APPLEMAN, *MILITARY TRIBUNALS AND INTERNATIONAL CRIMES* 139-233 (1954); A. VON KNIERIEM, *supra* note 2, at 11; R. WOETZEL, *supra* note 8, at 219-26; Fratcher, *American Organization for Prosecution of German War Criminals*, 13 *MO. L. REV.* 45 (1948) (text of law included); Taylor, *Nuremberg Trials: War Crimes and International Law*, *INT'L CONC. NO.* 450 (1949). The full reports of these trials are collected in *I-XIV TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10* (1946-49).

15. The Tokyo International Military Tribunal was instituted by the Proclamation Defining Terms for Japanese Surrender (the "Potsdam Declaration"), signed by the Japanese on September 2, 1945. See 23 *DEPT STATE BULL.* 137 (1952). The Tribunal was granted "the power to try and punish Far Eastern war criminals . . . charged with offenses which include Crimes Against Peace." *INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST CHARTER* art. 5. For the Charter and indictment of the Tokyo Tribunal, see U.S. *DEPT OF STATE, PUB. NO.* 2613, *TRIAL OF JAPANESE WAR CRIMINALS* 12 (Far East. ser. 1946). See generally J. APPLEMAN, *supra* note 14, at 237-64; KEENAN & BROWN, *CRIMES AGAINST INTERNATIONAL LAW* 1-56 (1950); R. WOETZEL, *supra* note 8, at 227-32; Horwitz, *The Tokyo Trial*, *INT'L CONG. NO.* 465 (1950).

other locations<sup>16</sup> adopted and applied the formulation of crimes against peace contained in the Charter of the International Military Tribunal in their proceedings. For example, the charter of the Tokyo-tribunal defines crimes against peace in substantially the same terms as the original Nürnberg charter.<sup>17</sup> These subsequent trials have further significance in that the number of countries participating in them, and thus accepting the concept of aggressive war as a crime against peace, was considerably expanded beyond the original four Allied Powers who participated at Nürnberg.<sup>18</sup>

A second source can be found in the provisions relating to the criminal character of aggressive war which were included in several treaties concluded after the Nürnberg judgment was rendered. The Peace Treaty with Italy, for example, obligates the Italian government to apprehend and surrender for trial "persons accused of having committed, ordered, or abetted . . . crimes against peace . . ." <sup>19</sup> Peace treaties concluded with Rumania,<sup>20</sup> Finland,<sup>21</sup> Bulgaria<sup>22</sup> and Hungary<sup>23</sup> contain similar requirements. These treaties must necessarily rely upon the Nürnberg charter for the definition and interpretation of crimes against peace.<sup>24</sup>

The constitutions of several countries make up a third source because they explicitly treat aggressive war as a crime. For instance, the Constitution of the Federal Republic of Germany provides:

Acts tending and undertaken with the intent to disturb the peaceful relation between nations, especially to prepare for aggressive war, are unconstitutional. They shall be made a punishable offence.<sup>25</sup>

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16. Apart from the proceedings at Nürnberg and Tokyo there were 2,116 known hearings before military commissions or tribunals. For a collection of these proceedings, see I-XV U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS (1947-49). See also J. APPLEMAN, *supra* note 14, at 267; Cowles, *Trials of War Criminals (Non-Nuremberg)*, 42 AM. J. INT'L L. 299 (1948).

17. INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST CHARTER art. 5.

18. The Tokyo Tribunal was composed of members from eleven nations: the United States, the United Kingdom, China, the Soviet Union, the Netherlands, Canada, New Zealand, Australia, France, India and the Philippines. R. WOETZEL, *supra* note 8, at 228. In addition to this, hearings were held in Poland, Norway and Greece. J. APPLEMAN, *supra* note 14, at 267.

19. Peace Treaty with Italy, Feb. 10, 1947, 61 Stat. 1243, T.I.A.S. No. 1648, 49 U.N.T.S. 3.

20. Peace Treaty with Roumania, Feb. 10, 1947, art. 6, para. (a), 61 Stat. 1757, T.I.A.S. No. 1649, 42 U.N.T.S. 3.

21. Peace Treaty with Finland, Feb. 10, 1947, art. 6, para. (a), 48 U.N.T.S. 203.

22. Peace Treaty with Bulgaria, Feb. 10, 1947, art. 5, para. (a), 61 Stat. 1915, T.I.A.S. No. 1650, 41 U.N.T.S. 21.

23. Peace Treaty with Hungary, Feb. 10, 1947, art. 6, para. (a), 61 Stat. 2065, T.I.A.S. No. 1651, 41 U.N.T.S. 135.

24. See Garcia-Mora, *supra* note 7, at 51.

25. BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY art. 26 (1949, as amended to 1966). Similar provisions are contained in: CONST. OF THE UNION OF BURMA § 211 (1947, amended 1959, 1961); CONST. OF THE GERMAN DEMOCRATIC REPUBLIC art. 5 (1949, as amended to 1960); CONST. OF THE REPUBLIC OF ITALY art.

The incorporation of the concept of crimes against peace into the domestic law of these states is strongly indicative of the degree of its acceptance as a rule of conduct.

Another source providing valuable proof of international assent, in terms of sheer numerical strength, is the actions of the United Nations since the Nürnberg trials. On December 11, 1946, the United Nations General Assembly unanimously adopted a resolution reaffirming the principles of the Nürnberg judgment and the Charter of the International Military Tribunal.<sup>26</sup> To further express its approval of the legal principles of Nürnberg, the General Assembly, in 1947, requested the International Law Commission to formulate a "Draft Code of Offences Against the Peace and Security of Mankind."<sup>27</sup> The resulting Draft Code affirms the criminality of aggressive war, but it has substantially increased the range of acts which may incur responsibility for crimes against the peace. Article 1 of the Draft Code provides generally that "[o]ffences against the peace and security of mankind as defined in this Code, are crimes under international law, for which the responsible individuals shall be punishable."<sup>28</sup> Included in the list of offenses are: acts of aggression, any threat to resort to an act of aggression, and the employment of armed forces against another state.<sup>29</sup> The expansion of the Nürnberg formulation in the Draft Code has led to the comment that the Code is innovatory rather than declaratory of existing law.<sup>30</sup> However, the bases of the Draft Code were clearly taken from Nürnberg and, therefore, it would seem to be persuasive evidence of international acceptance of aggressive war as an international crime.

A final source is the writings of commentators in the field.<sup>31</sup> Although there is some disagreement, a majority of scholars would seem to consider the crime against peace of aggressive war to be a rule of customary international law.<sup>32</sup> There are, however, reservations on the part of many writers arising from the lack of precise definition of the elements and limits of the crime.<sup>33</sup>

11 (1947, amended 1953, 1963); CONST. OF JAPAN art. 9 (1946); CONST. OF THE REPUBLIC OF KOREA art. 4 (1948, as amended to 1962); CONST. OF THE PHILIPPINES art. 2, § 3 (1935, amended 1940, 1946). The texts of these and other constitutions can be found in I-IV A. PEASLEE, CONSTITUTIONS OF NATIONS (rev. 3d ed. 1965).

26. G.A. Res. 95 (i), U.N. Doc. A/236, at 1144 (1946).

27. G.A. Res. 177 (II), U.N. Doc. A/505, at 1280 (1947).

28. Int'l L. Comm'n, Draft Code of Offences Against the Peace and Security of Mankind art. 1, 5 U.N. GAOR, Supp. 9, U.N. Doc. A/1858, at 10-14 (1951) [hereinafter cited as Draft Code].

29. Draft Code, art. 2, paras. 10-11.

30. Garcia-Mora, *supra* note 7, at 50.

31. The Paquete Habana, 175 U.S. 677, 700 (1900); Hilton v. Guyot, 159 U.S. 113, 163 (1895).

32. See, e.g., S. GLUECK, *supra* note 9, at 5. But see Garcia-Mora, *supra* note 7, at 38.

33. See J. STONE, AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION (1958); R. WOETZEL, *supra* note 8, at 170; Garcia-Mora, *supra* note 7, at 54; Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, 1 INT'L L.Q. 153 (1947); Schwarzenberger, *supra* note 9, at 344-51.

It would appear from the foregoing evidence of acceptance and usage by the international community that this crime against peace is an established rule of customary international law. However, doubts still remain as to whether it has been defined with sufficient clarity to be a truly authoritative rule. The provisions of the "Draft Code of Offences Against the Peace and Security of Mankind" would seem to dispel many of these doubts with the caveat that this Code has not as yet been accepted by the community of nations.

### III. THE THEORY OF INDIVIDUAL RESPONSIBILITY FOR CRIMES AGAINST PEACE

In response to the claims of the German defendants that, as individuals, they could not be held responsible for the commission of the crime of aggressive war, the International Military Tribunal said:

[I]nternational law imposes duties and liabilities upon individuals as well as upon states . . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.<sup>34</sup>

In the past the general practice of international law has been that only states had rights and duties under that law.<sup>35</sup> But, on occasion, the individual has been recognized as responsible for international criminal actions. For example, pirates have traditionally been regarded as committing a crime against the law of nations,<sup>36</sup> and it was an accepted principle by 1945 that individual members of belligerent forces are criminally responsible for violations of the international law of war.<sup>37</sup> In these precedents and in the less well established theory of liability of heads of state for war making, as exemplified by the proposed trial of Kaiser Wilhelm under the Versailles Treaty,<sup>38</sup> the International Military Tribunal had some basis for extending the principle of individual responsibility to the crime of aggressive

34. XXII TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 465-66 (1948).

35. W. BISHOP, INTERNATIONAL LAW 265 (1962).

36. See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161-62 (1820); 2 J. MOORE, INTERNATIONAL LAW 951 (1906).

37. W. BISHOP, *supra* note 35, at 837-38.

38. Article 227 of the Versailles Treaty provided for the "public arraignment" of the German Kaiser "for a supreme offense against international morality and the sanctity of treaties." This attempt failed when the Kaiser fled to the Netherlands which refused to extradite him. For the Report of the Commission of the Versailles Conference, see 14 AM. J. INT'L L. 95 (1920). See also W. BISHOP, *supra* note 35, at 838; R. WOETZEL, *supra* note 8, at 31.

Another often cited precedent is the treatment of Napoleon Bonaparte who was declared an outlaw by the Allied Powers and, subsequently, sent to the island of St. Helena. This use of this incident as a precedent for Nürnberg has met with much criticism. See, e.g., R. WOETZEL, *supra* note 8, at 23.

war. However, as pointed out by one of the subsequent Nürnberg tribunals in the "High Command Case," the novelty of such an extension was clear:

For the first time in history individuals are called upon to answer criminally for certain violations of international law. Individual criminal responsibility has been known, accepted, and applied heretofore as to certain offenses against international law, but the Nürnberg trials have extended that individual responsibility beyond those specific and somewhat limited fields.<sup>39</sup>

Although there has been considerable criticism since Nürnberg,<sup>40</sup> this principle has become inextricably tied to the concept of crimes against peace, and has been adopted as a central feature of the United Nations' "Draft Code of Offences Against the Peace and Security of Mankind."<sup>41</sup>

The International Military Tribunal was followed by 12 subsequent Nürnberg tribunals, each made up of a separate panel of American civilians.<sup>42</sup> The decisions of these tribunals are not all consistent with those of the International Military Tribunal.<sup>43</sup> However, three distinct elements necessary for the conviction of an individual for a crime against peace have emerged from the judgments of the original and subsequent Nürnberg tribunals. First, there must be *actual knowledge* that a specific aggressive war was being planned or waged. This is borne out by the statement of one of the subsequent tribunals in the "Ministries Case":

Obviously, no man may be condemned for fighting in what he believes is the defense of his native land, even though his belief be mistaken. Nor, can one be expected to undertake an independent investigation to determine whether or not the cause for which he fights is the result of an aggressive act of his own government. One can be guilty only where knowledge of aggression in fact exists, and it is not sufficient that he have suspicions that the war is aggressive.<sup>44</sup>

Secondly, the individual must have taken a part in the planning, preparation, initiation or waging of the aggressive war.<sup>45</sup> The degree and character

39. United States v. Von Leeb, XI TRIAL OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 509 (1948) (Case 12—the "High Command Case").

40. Authorities cited note 10 *supra*.

41. Draft Code, at 4. See Garcia-Mora, *supra* note 7, at 48.

42. See note 14 *supra* and authorities cited therein.

43. T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 85-86 (1970).

44. United States v. Von Weizaecker, XIV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 337 (1948) (Case 11—the "Ministries Case"). See also J. APPLEMAN, *supra* note 14, at 225; Lumb, *Individual Responsibility for Aggressive War: The Crime Against Peace*, 3 U. QUEENS L.J. 333, 351 (1959).

45. Participation was required for liability under both counts of planning and waging the war. See XXII TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 467-68 (1948).



of the participation required is in some doubt, since civilians from various occupations as well as military men were included in those convicted.<sup>46</sup> However, the tribunals seemed to require an affirmative involvement, and to reject any theory of negative criminality by which a person could be prosecuted for his failure to prevent the planning and waging of an aggressive war.<sup>47</sup> Third, and perhaps most important, it was emphasized that the individual must have held a sufficiently high position to exert some influence on planning and policy.<sup>48</sup> The theory underlying individual responsibility is that in reality it is the individual who acts and not that abstract entity, the state.<sup>49</sup> Therefore, it would seem to follow that only those who can in fact influence the actions of the state should be held responsible for its aggressive actions. As it was put in the "High Commands Case:"

Anybody who is on the policy level and participates in the war policy is liable to punishment. But those under them cannot be punished for the crimes of others. The misdeed of the policy makers is all the greater in as much as they use the great mass of the soldiers and officers to carry out an international crime; however, the individual soldier or officer below the policy level is but the policy maker's instrument . . . .<sup>50</sup>

The importance of this and the other elements will become clearer in the consideration of the use of the "Nürnberg defense" in the courts of this country.

Another important aspect of individual responsibility is the rejection at Nürnberg of the defense of superior orders. Article 8 of the Charter of the International Military Tribunal states that

[t]he fact that the defendant acted pursuant to order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment.<sup>51</sup>

46. Defendants Frich, Von Neuroth and Rosenberg, all civilians, were convicted of crimes against peace. For an illustrative table of convictions and sentences, see W. BISHOP, *supra* note 35, at 358.

47. This is especially true where the individual lacked actual knowledge of the aggressive plans of the government and occupied a position below the policy making level. See *United States v. Krupp*, IX TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 1448 (1948) (Case 10—the "Krupp Case").

48. *Id.* at 457.

49. P. JESSUP, A MODERN LAW OF NATIONS 18 (1948). See XXII TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 565-66 (1948).

50. *United States v. Von Leeb*, XII U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 69 (1949) (Case 12—the "High Command Case").

51. CHARTER, *supra* note 3, art. 8; Allied Control Council for Germany Law No. 10, art. II, § 4 (b), Dec. 20, 1945, 15 DEP'T STATE BULL. 862 (1946), 13 Mo. L. REV. 72 (1948).

This provision was intended to affect primarily those civilians and members of the military who were attempting to escape liability for the commission of conventional war crimes. However, article 8 was also applied to defendants accused of crimes against peace who attempted to avoid liability by pleading the overriding orders of Hitler as a defense.<sup>52</sup> It is the rejection of this defense, which was also subsequently rejected as a defense in the domestic laws of most states,<sup>53</sup> which gives rise to the claims of those raising the "Nürnberg defense" that they are bound by an international and domestic duty to disobey their government.<sup>54</sup>

#### IV. THE "NURNBERG DEFENSE" IN THE COURTS OF THE UNITED STATES

The defense, as it has been formulated, consists of two separate components. First, the United States Government is committing the crime of aggressive war. Second, under the principles established at Nürnberg an individual citizen may be criminally responsible under international law if he aids his government in the commission of this crime. Therefore, he is under a duty to disobey the orders of his government which in any way relate to this crime.<sup>55</sup>

It is suggested that a court, in order to properly assess the value of this defense in any case must ask two parallel questions. Is there in fact a crime against peace being committed by the government? And second, is the act which the defendant has refused to perform, resulting in the charge against him in the domestic court, one which would make him individually liable under international law for the commission of this crime against peace? It is within the context of these two questions that the applicability of the "Nürnberg defense" must be viewed.

##### A. *The Commission of the Crime by the Government*

In determining whether a crime against peace is being committed by the government, a court should first answer a basic question concerning its competence: Has the customary international crime of aggressive war been incorporated into the law of the United States? The International Military Tribunal insisted, without stating its reasons, that international law pre-

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52. See XXII TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 466 (1948).

53. Great Britain and the United States were two examples of this change. R. WOETZEL, *supra* note 8, at 118. For the present United States provision on superior orders, see U.S. DEPT OF THE ARMY, THE LAW OF LAND WARFARE ¶ 509 (FM 27-10, 1956).

54. The theory is that since obedience to superior orders is no defense to charges of crimes against peace, one is under a duty to disobey any orders which would lead to the commission of such crimes. See Brief for Plaintiff at 10, *Farmer v. United States*, 149 F. Supp. 327 (M.D. Tenn. 1956), *aff'd per curiam*, 252 F.2d 490 (6th Cir. 1958).

55. This defense is most clearly formulated in the Brief for Plaintiff, *Farmer v. United States*, 149 F. Supp. 327 (M.D. Tenn. 1956).

cedes national law.<sup>56</sup> In *Farmer v. United States*,<sup>57</sup> the first case in which the "Nürnberg defense" was raised, the defense relied upon the statement by the International Military Tribunal that "the very essence of the Charter is that individuals have rights which transcend the national obligations of obedience"<sup>58</sup> to justify the proposition that the international law established at Nürnberg is directly applicable in American courts without any formal incorporation.<sup>59</sup> While such a proposition may be acceptable in those countries whose constitutions contain provisions specifically incorporating international law into the domestic law,<sup>60</sup> its acceptability is far from settled in the United States. As one writer has put it:

That an act is illegal under international law does not necessarily imply that an act is also illegal under national law, especially under national criminal law.<sup>61</sup>

The courts of this country have taken a similarly hesitant attitude toward the question of incorporation. The Constitution, in article I, section 8, specifically provides that Congress has the power "to define and punish . . . Offenses against the Law of Nations."<sup>62</sup> This power could well be read to mean that in the absence of such definition by Congress the international rule should be regarded as not adopted into the law of the land and therefore not applicable to an American court.<sup>63</sup> With regard to international custom in general such a reading has not been given to this clause.<sup>64</sup> In fact, the courts of the United States would seem to be more in accord with the statement of Chief Justice Gray, in *The Paquete Habana*,<sup>65</sup> that

56. XXII TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 466 (1948). See A. VON KNIERIEM, THE NUREMBERG TRIALS 44 (1959).

57. 149 F. Supp. 327 (M.D. Tenn. 1956), *aff'd per curiam*, 252 F.2d 490 (6th Cir. 1958).

58. XXII TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 466 (1948).

59. See Brief for Plaintiff at 8, *Farmer v. United States*, 149 F. Supp. 327 (M.D. Tenn. 1956).

60. See CONST. OF FRANCE art. 55 (1958, as amended to 1963); BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY art. 25 (1949, as amended to 1966); CONST. OF THE GERMAN DEMOCRATIC REPUBLIC art. 5 (1949, as amended to 1960); CONST. OF THE REPUBLIC OF ITALY art. 10 (1947, amended 1953, 1963); CONST. OF THE REPUBLIC OF KOREA art. 5 (1948, as amended to 1962); CONST. OF THE PHILIPPINES art. 2, § 3 (1935, amended 1940, 1946). These provisions generally provide that international law is to be treated as the law of the land.

61. Kelsen, *supra* note 33, at 157.

62. U.S. CONST. art. I, § 8. See *United States v. Arjona*, 120 U.S. 479 (1887); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820).

63. L. ERADES & W. GOULD, THE RELATION BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW IN THE NETHERLANDS AND IN THE UNITED STATES 278 (1961). The authors point out that

there never was any express jurisdiction granted to apply the whole of customary international law both as it was and as it was to become. Nor was that law expressly incorporated as a whole.

64. *Id.*

65. 175 U.S. 677 (1900).

[i]nternational law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.<sup>66</sup>

However, the customary rules of international law adopted by this sort of judicial incorporation have usually been either customs which were established in the English common law prior to the adoption of the Constitution<sup>67</sup> or well-defined and relatively unquestioned rules of a non-criminal nature.<sup>68</sup> The crime of aggressive war fits neither of these categories. Where the customary rule involves individual criminal liability, there has been a tendency since the early nineteenth century to look for some statutory authority emanating from Congress' exercise of its power to define and punish international offenses.<sup>69</sup> An example of this trend is the Supreme Court's decision in *Ex parte Quirin*.<sup>70</sup> In *Quirin* the Court relied heavily upon congressional incorporation by statute of the laws of war in upholding the conviction of German saboteurs.<sup>71</sup> This reliance upon congressional definition by the courts evidences a willingness to read article I, section 8 as requiring specific incorporation by an act of Congress of international crimes for which there may be individual responsibility, as opposed to other customary rules. Modifying the rigidity of such an interpretation is Congress' capacity to define by reference to customary international law as was found sufficient in respect to piracy in *United States v. Smith*.<sup>72</sup> This would permit reference to a customary punishment, but it would not allow the punishment of such a crime on the grounds of international custom alone.

Despite the absence of incorporation by congressional action it would appear that the Tribunal's concept of the crimes of aggressive war and war in violation of international agreements has been incorporated by treaty. The Constitution declares that treaties are a part of the law of the land.<sup>73</sup> The London Agreement of 1945 which contains the formulation

66. *Id.* at 700.

67. This is predicated upon the so-called "necessary reception" theory. See *Ware v. Hilton*, 3 U.S. (3 Dall.) 199, 281 (1796); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793); *Talbot v. The Commanders & Owners of Three Brigs*, 1 U.S. (1 Dall.) 95 (1784). See also W. BISHOP, *supra* note 35, at 73; L. ERADES & W. GOULD, *supra* note 63, at 275.

68. See, e.g., *Rose v. Himely*, 8 U.S. (4 Cranch) 241 (1808); *Church v. Hubbard*, 6 U.S. (2 Cranch) 187 (1804); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801). See also L. ERADES & W. GOULD, *supra* note 63, at 279-89.

69. See *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816); *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812). These cases arose out of a desire for statutory definition of crimes generally in the federal courts. L. ERADES & W. GOULD, *supra* note 63, at 248-49.

70. 317 U.S. 1 (1942).

71. *Id.* at 29.

72. 18 U.S. (5 Wheat.) 153 (1820).

73. U.S. CONST. art. VI, cl. 2.

of crimes against peace was signed by the United States and has the force of a treaty.<sup>74</sup> Consequently, the crimes as defined in that document have become a part of the law of the land. However, even where incorporation by treaty has occurred, some courts have preferred to defer recognition of novel criminal formulations pending definitive congressional legislation.<sup>75</sup>

Assuming incorporation, a second problem which may preclude a court from considering the question of whether the government is committing the crime of aggressive war is the lack of a recognized definition of the term "aggressive war." One of the major assumptions of the International Military Tribunal was that aggressive war was a well-defined concept.<sup>76</sup> In accordance with this assumption, the Tribunal failed to include a definition of aggression in its judgment.<sup>77</sup> As a result, the crime of aggression remains today "a most vague and general concept not yet defined nor described by any international instrument."<sup>78</sup> Some publicists in the field of international law have suggested that the absence of definition is beneficial, reasoning that a definition might be subject to arbitrary interpretation and abuse no matter how carefully it is drafted.<sup>79</sup> This fear is basically a recognition of the fact that there is no proper international legal procedure to review alleged acts of aggression.<sup>80</sup> Taken in this context, vagueness has some merit. However, when transferred to domestic courts the absence of a definition raises problems in the consideration of the "Nürnberg defense."

It has been suggested that the examples of "aggressive wars" cited by the Tribunal could be used to fashion a practical standard.<sup>81</sup> However, the Tribunal never explained why these conflicts could be described as aggressive and a court would be faced with questions of historical analysis such as determining why the International Military Tribunal considered the conflict between Germany and Norway an aggressive war<sup>82</sup> while the invasion of France was not.<sup>83</sup> It is apparent that the concept of aggressive

74. WOETZEL, *Comments on the Nuremberg Principles and Conscientious Objection with Special Reference to War Crimes*, 16 CATHOLIC L. 257, 258 (1960).

75. *See The Over The Top*, 5 F.2d 838 (D. Conn. 1925); *United States v. Ekenstam*, 7 U.S.C.M.A. 168, 21 C.M.R. 294 (1956). *But cf. United States v. Kearney*, 2 Extraterr. Cas. 665 (U.S. Ct. for China 1923).

76. Garcia-Mora, *Crimes Against Peace in International Law: From Nürnberg to the Present*, 53 KY. L.J. 35, 38 (1964).

77. R. WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* 159 (1960); Garcia-Mora, *supra* note 76, at 38.

78. Garcia-Mora, *supra* note 76, at 38. *Cf. T. TAYLOR, supra* note 43, at 98.

79. J. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 330 (1954). *Cf. Finch, The Nuremberg Trial and International Law*, 41 AM. J. INT'L L. 36 (1947); Sohn, *The Definition of Aggression*, 45 VA. L. REV. 697 (1959).

80. *See J. STONE, supra* note 79, at 326.

81. *Cf. R. WOETZEL, supra* note 77, at 238.

82. XXII TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 452 (1948).

83. *Id.* at 429-58. In discussing wars of aggression by Germany, the Tribunal mentions neither the conflict with France nor that with Great Britain.

war has not reached that level of precision and certainty which is required in criminal law. In the absence of an authoritative definition in international law, satisfactory proof of the commission of this crime against peace would be impossible in all but the most flagrant cases.

B. *For Which Acts May Individual Responsibility Be Imposed?*

An essential question for a court faced with the "Nürnberg defense" is whether the act which the individual is asked to perform is one which would incur individual responsibility for a crime against peace. An answer to this question may be found in an examination of the facts of some of the cases in which the defense has been raised.

In *People v. Bloom*,<sup>84</sup> the court ruled that the "Nürnberg defense" was irrelevant to a charge of criminal trespass arising out of a "sit-in" at a local selective service office. Defendants had argued that the United States was engaged in criminal aggression in Vietnam, and that the principles established at Nürnberg placed upon them a duty to make a "moral choice" as to whether to disassociate themselves from the government's action or to suffer the consequences of international liability.<sup>85</sup> Although this argument was offered primarily to demonstrate the sincerity of the defendants' protest,<sup>86</sup> it exemplifies a common misinterpretation of the principle of individual responsibility. The defendants in *Bloom*, as ordinary citizens, were in no position to have a direct influence on governmental policy.<sup>87</sup> The prosecution before the International Military Tribunal expressly limited its indictment to those who had played major roles in the planning or waging of the war.<sup>88</sup> A second error in the defendants' argument in *Bloom* is that it construed the Nürnberg judgment as espousing a theory of negative criminality, *i.e.*, that the individual citizen would be liable if he merely failed to protest the actions of his government. In *United States v. Krauch*, a later tribunal denied this implication, saying:

Under such a construction the entire manpower of Germany could, at the uncontrolled discretion of the indicting authorities, be held to answer for waging wars of aggression.<sup>89</sup>

This tribunal decided that there must be some "practical limitation" upon criminal responsibility and set that limit at those responsible for the formulation and execution of national policy.<sup>90</sup>

84. Crim. No. 951 (Cir. Ct. Mich., Jan. 28, 1966).

85. Brief for Defendants at 11, *People v. Bloom*, Crim. No. 951 (Cir. Ct. Mich., Jan. 28, 1966).

86. *Id.* at 12.

87. See *United States v. Von Leeb*, XII U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 69 (1948) (Case 12—the "High Command Case").

88. See R. JACKSON, *THE NUREMBERG CASE* 33, 36 (1947).

89. *United States v. Krauch*, X U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 38 (1948) (Case 6—the "Farben Case").

90. *Id.*

In *Farmer v. United States*, the Government sued to recover assessed income taxes. The defendant did not rely upon any theory of negative criminality, but urged that his payment of taxes constituted participation in the waging of aggressive war.<sup>91</sup> While civilians were indicted at Nürnberg for "waging" aggressive war, the payment of federal income taxes would appear again to fall far short of high level participation in the waging of the war. In fact, financial or economic aid alone by private citizens was thought to be an insufficient basis for responsibility by the tribunal in the *Krauch* case.<sup>92</sup> For instance, the tribunal excluded such related individual activities as "the farmer who increased his production of foodstuffs to sustain the armed forces, or the housewife who conserved fats for the making of munitions."<sup>93</sup>

The defendant in *United States v. Mitchell*<sup>94</sup> claimed that submission to induction into the armed forces would constitute participation in the waging of an aggressive war.<sup>95</sup> While the court ruled this defense irrelevant on other grounds,<sup>96</sup> it is certain that the theory of individual responsibility for aggression does not include the ordinary soldier or officer.<sup>97</sup> It may be argued that the soldier may run a much higher risk of liability for ordinary war crimes than the civilian. However, he does not possess the position of high responsibility within the armed forces which the tribunals considered necessary for criminal liability for aggression. In short, he lacks standing to raise the defense.

It is interesting in considering the acts that may incur responsibility that the "Draft Code of Offences Against the Peace and Security of Mankind" differentiates between the liability of a private citizen and the responsibility of the authorities of the state.<sup>98</sup> In doing so the Draft Code goes beyond the Nürnberg precedent which is exclusively concerned with the individual responsibility of those acting for the state.<sup>99</sup> With respect to the crime of aggression, a private citizen may be liable for conspiracy to commit aggressive acts or complicity in the commission of aggression by his government.<sup>100</sup> The use of the term "complicity" would seem to en-

91. Brief for Plaintiff at 8, *Farmer v. United States*, 149 F. Supp. 327 (M.D. Tenn. 1956).

92. *United States v. Krauch*, X U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 38 (1948) (Case 6—the "Farben Case").

93. *Id.*

94. 246 F. Supp. 874 (D. Conn. 1965), *aff'd*, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967).

95. Brief for Defendant at 10, *United States v. Mitchell*, 246 F. Supp. 874 (D. Conn. 1965).

96. 246 F. Supp. at 899.

97. See *United States v. Von Leeb*, XII U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 69 (1949) (Case 12—the "High Command Case").

98. M. GARCIA-MORA, HOSTILE ACTS OF PRIVATE PERSONS AGAINST FOREIGN STATES 39 (1962).

99. See J. BOWELT, SELF-DEFENSE IN INTERNATIONAL LAW 266 (1958).

100. Draft Code, art. 2, para. 12.

visage a much broader range of liability than that laid down at Nürnberg. However, the comments to the Draft Code clearly show that as to individuals, such as the defendants in the three cases examined, criminal liability would never arise:

In including "complicity" in the commission of any of the offenses defined in the preceding paragraphs among the acts which are offenses against the peace and security of mankind, it is not intended to stipulate that all those who contribute, in the normal exercise of their duties, to the perpetration of offenses against the peace and security of mankind could, on that ground alone, be considered as accomplices in such crimes. There can be no question of punishing as accomplices in such an offense all the members of the armed forces of the State or the workers in war industries.<sup>101</sup>

This comment would seem to indicate that although the Draft Code purports to enlarge the sphere of responsibility for aggressive war, it actually coincides quite closely with the thinking of the American tribunals which conducted the subsequent proceedings at Nürnberg. In the absence of express guidelines it is reasonable to assume that the Code must rely upon the criteria of high position and policy-making function in establishing the lower limits of responsibility. Therefore, it is evident that a person who seeks immunity from domestic prosecution for acts of civil disobedience under the principles established at Nürnberg must satisfy the court that he occupies an influential policy making position within the state.

### C. *Rejection of the Nürnberg Defense by American Courts*

In spite of the very real issues raised by incorporation of the principles of Nürnberg into domestic law, at least where the individual occupies the prerequisite position of influence upon national affairs, the courts of this country have been quick to eschew any competency to adjudicate whenever the defense has been raised.

In the *Farmer* case, the Court of Appeals for the Sixth Circuit rejected possible individual liability for the United States Government's commission of the crime of aggression in the Korean conflict as a defense to a suit to recover assessed federal income taxes.<sup>102</sup> The court refused to consider the defense on the ground that

[t]he claims set forth in the complaint . . . involved political and governmental questions which are confided by the Constitution to the legislative and executive branches of the government and over which the courts have no jurisdiction.<sup>103</sup>

101. Int'l L. Comm'n, Report, 6 U.N. GAOR, Supp. 9, U.N. Doc. A/1858, at 13 (1951).

102. *Farmer v. United States*, 252 F.2d 490 (6th Cir. 1958), *aff'g per curiam* 149 F. Supp. 327 (M.D. Tenn. 1956).

103. 252 F.2d at 491.



The same approach was followed in *United States v. Mitchell*,<sup>104</sup> *Swallow v. United States*,<sup>105</sup> *United States v. Berrigan*,<sup>106</sup> and *United States v. Sisson*.<sup>107</sup> However, in *Sisson*, the court, assuming the defense had been raised by one who had standing to do so, broadened the penumbra of the political question doctrine by finding that such questions could not be answered with regard to the Vietnam conflict because "[a] domestic tribunal is incapable of eliciting the facts during a war and . . . it is probably incapable of exercising a disinterested judgment."<sup>108</sup>

This judicial candor, refreshing though it may be, points up the reluctance of the courts to consider questions of executive criminal responsibility arising in the context of a war. The political question doctrine has consistently been invoked to foreclose judicial re-examination of the foreign policy decisions of the Executive.<sup>109</sup> The claim of defendants who have raised the "Nürnberg defense" that an aggressive war was in progress in Korea or in Vietnam reflects upon the power of the President operating under his constitutional powers as Commander-in-Chief. Among the presidential powers, the command of the armed forces is the least susceptible to judicial re-examination,<sup>110</sup> and the courts have rarely made inroads upon it.<sup>111</sup> Even the claim that substantive individual rights guaranteed by the Constitution have been denied has been largely ineffective against the Executive.<sup>112</sup> If the political question approach is followed, as precedent suggests, the individual raising the "Nürnberg defense" will find himself in an ambiguous position. He may be able to prove that he is liable under international law if he does not disobey the orders of his government, but he may be prevented from proving the prerequisite of that liability, criminal aggression on the part of his government. A clear and unequivocal incorporation of crimes against peace into the law of the United States would force a reconsideration of the political question doctrine in this area. If the executive action is in fact criminal, then the considerations which have prompted judicial restraint in the past, *i.e.*,

104. 246 F. Supp. 874 (D. Conn. 1965), *aff'd*, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967).

105. 325 F.2d 97 (10th Cir. 1963).

106. 283 F. Supp. 336 (D. Md. 1968), *aff'd*, 417 F.2d 1009 (4th Cir. 1969), *cert. denied*, 397 U.S. 909 (1970).

107. 294 F. Supp. 515 (D. Mass. 1968).

108. *Id.* at 518.

109. *Chicago & S. Air Lines, Inc. v. Waterman S.S. Co.*, 333 U.S. 103 (1948); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415 (1839); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829). See Carrington, *Political Questions: The Judicial Check on the Executive*, 42 VA. L. REV. 175 (1956); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966).

110. Carrington, *supra* note 109, at 195.

111. In two similar cases the Supreme Court has held that the President could not provide for the trial of civilians by military tribunal in areas not within the theatre of military operations. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

112. See *Korematsu v. United States*, 323 U.S. 214 (1944).

fear of embarrassment of the Executive and lack of political acumen in the judiciary,<sup>113</sup> would disappear. Absent a complete reconsideration of the separation of powers concept,<sup>114</sup> however, a retreat from the political question doctrine's present position in the area of international military policy would appear unlikely.

Surprisingly, the standing of the defendant to claim that he may be liable for the acts of the government in committing crimes against peace has rarely formed the basis for rejection of the "Nürnberg defense" despite the fact that none of the defendants in *Bloom*, *Farmer*, *Mitchell*, *Swallow*, *Berrigan* and *Sisson* occupied a position of sufficient national influence. While the court in *Berrigan* held that the defendants lacked standing, the court's opinion was founded upon the fact that the defendants had not been called to serve in the armed forces and were not directly involved in the government's actions in Vietnam.<sup>115</sup> While this reasoning may be applicable to a defendant who refuses military service because he may be liable, should he accept service, for the commission of war crimes in Vietnam,<sup>116</sup> it is inappropriate where the defendant raises the possibility of liability for crimes against peace. However, the *Berrigan* opinion coupled with an increasing use of the concept of standing to reject justiciability in related areas would appear to forecast a greater popularity of that mode of rejection.<sup>117</sup>

#### V. THE INDIVIDUAL AND THE CONFLICT BETWEEN NATIONAL ORDER AND INTERNATIONAL PEACE

The fundamental issue, as seen by those defendants who have raised the "Nürnberg defense," is the relation between the desire for order within the state and the goal of international peace. The cases discussed above point to the conflict which results when opposing national and international responsibilities are imposed upon the individual. The defendants believe that the theory of individual responsibility has created duties which "transcend the national obligations of obedience," and that acceptance of the application of this theory to all individuals is necessary to world peace. It is contended that the international duty provides immunity from the national duty of obedience where the individual believes that aggression

113. See Carrington, *supra* note 109, at 187-88.

114. In a related area the Supreme Court has indicated that it would be unwilling to enter into the discussion of foreign policy questions on the basis that the constitutional separation of powers prevents this consideration by the courts. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

115. *United States v. Berrigan*, 283 F. Supp. 336, 341 (D. Md. 1968).

116. See D'Amato, *War Crimes and Vietnam: The "Nuremberg Defense" and the Military Service Resister*, 57 CAL. L. REV. 1055 (1969).

117. See Schwartz & McCormack, *The Justiciability of Legal Objections to the American Military Efforts in Vietnam*, 46 TEX. L. REV. 1033 (1968); Velvel, *The War in Vietnam: Unconstitutional, Justiciable, and Jurisdictionally Attackable*, 16 KAN. L. REV. 449 (1968).

is being committed by his government.<sup>118</sup> On the other hand, the state may well interpret such a contention as an invitation to anarchy since it is destructive of the basis for the existence of the state, *i.e.*, the maintenance of internal order.

The defendants' interpretation of the meaning of individual responsibility for criminal aggression and the conflict this theory produces appears to be improper for three reasons. First, the International Military Tribunal, by applying individual responsibility to only the policy formulators of the state, did not intend to create a principle of civil disobedience. As a later tribunal clearly indicated in the "Ministries Case," the individual's obedience to the internal order of the state could not, standing alone, incur liability for crimes of aggression by the state.<sup>119</sup> There are two probable reasons for the prosecution of only those who acted for the state: (1) The policies formulated by these agents became in fact the acts and policies of the state, and it was the actions of the state which the International Military Tribunal was created to punish,<sup>120</sup> and (2) those individuals in a position to influence directly the policies of the state had access to the real facts of the situation out of which the aggressive actions arose. In view of any government's concern with popular support for its actions, such facts behind those actions as are released to the ordinary citizen will be cast in the most favorable light.<sup>121</sup> In this context, it is senseless to propose that the ordinary citizen disobey his government since he would be unable to come to any accurate decision as to the legality of his government's policies.<sup>122</sup> Furthermore, if he does reach a conclusion he is unable to influence the direction of the objectionable policies. Therefore, when the tribunals spoke of disobedience, they were referring only to dissent by the policy makers to the proposed aggressive policies, not disobedience by the populace to those rules that regulate the internal order of the state.

A second indication that the International Military Tribunal did not intend to create international duties which conflict with the duties of the ordinary citizen is the reluctance of that Tribunal to hold responsible the individual who is incapable of making a moral judgment as to the nature of the government's policies. In the original judgment the

118. Brief for Defendant at 12, *United States v. Mitchell*, 246 F. Supp. 874 (D. Conn. 1965); Brief for Plaintiff at 8, *Farmer v. United States*, 149 F. Supp. 327 (M.D. Tenn. 1956); Brief for Defendants at 13, *People v. Bloom*, Crim. No. 951 (Cir. Ct. Mich., Jan. 28, 1966).

119. See *United States v. Von Weizaecker*, XIV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 435, 463 (1948) (Case 11—the "Ministries Case").

120. Garcia-Mora, *supra* note 76, at 48.

121. J. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 328 (1954). The author takes a very dim view of the future of individual liability due to the individual's subjection to "nationalized truth" as opposed to objective facts.

122. *Id.* at 329.

International Military Tribunal said: "The true test . . . is not the existence of the order, but whether moral choice was in fact possible."<sup>123</sup> This attitude would appear to be predicated upon a recognition of the fact that even the heads of state may be rendered incapable of making an objective judgment by the ties of nationalism and patriotism. Clearly, the less well-informed citizen would have little if any opportunity to make an objective judgment. This indicates that the Tribunal took into account those forces which bind the state together, and was reluctant to impose responsibility where these forces tended to prevent the making of moral judgments upon government conduct. Therefore, there is no basis for insisting that resistance to these forces is a duty under the principles of Nürnberg.

A third criticism of the theory that the principle of individual responsibility should take precedence over the ordinary citizen's duty of national obedience is that the resultant conflict must be fought out at the individual's expense. If an individual makes a moral judgment concerning his nation's policies and finds them aggressive, he is faced with the prospect of obeying international law in order to avoid responsibility for aggression, and facing possible punishment under national law for disobedience.<sup>124</sup> This would appear to be an extremely harsh choice, and it is doubtful that the average individual would choose to obey international law.<sup>125</sup> The threat of punishment under national law is a present one, while the possibility of punishment under international law is remote. In addition, whereas national law can provide protection to the individual who chooses to disobey international law, the converse is not true.<sup>126</sup> Therefore, if, as it would appear, the average individual would choose obedience to national law in preference to international law, the principle that the international duty takes precedence over national duties is without force.

It is clear that when the principles of Nürnberg are properly applied, they provide no defense to acts of civil disobedience such as those occurring in the cases in which the defense has been raised to date. It is also evident that neither the charter nor the judgment of the International Military Tribunal intended to supplant national obedience in all cases. Rather, the thrust of Nürnberg is to obtain the obedience of the state to international law by looking through the abstraction of the state and holding those who in fact direct the actions of the state responsible for those actions.

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123. XXII TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 466 (1948).

124. A. VON KNIERIEM, *THE NUREMBERG TRIALS* 45 (1959).

125. J. STONE, *supra* note 121, at 328; A. VON KNIERIEM, *supra* note 124, at 47.

126. A. VON KNIERIEM, *supra* note 124, at 46.

VI. CONCLUSION

The claim that the concept of aggressive war with its attendant theory of individual responsibility has become a customary rule of international law may be, at present, correct. Moreover, it can be assumed that this rule has become a part of the law of the United States. However, the lack of a precise definition for the crime, and the unwillingness of the courts of this country to undertake unnecessary criticism of the foreign policy decisions of the Executive prevent its acceptance as a defense to civil disobedience at present. It remains to be seen, however, whether the courts will continue to refuse to hear the defense when raised by an individual with standing, *i.e.*, one who formulated or directly influenced the policies of the government. A consideration of the "Nürnberg defense" in such circumstances would go far toward the elimination of the nation-state concept and perhaps foster, by example, the emergence of the Rule of Law on a supernational level.