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# SOURCES OF INTERNATIONAL LAW RELATING TO SANCTIONS AGAINST WAR CRIMINALS

Mitchell Franklin

The author, Major Franklin, is the W. R. Irby Professor of Law in Tulane University Law School; A.B., 1922, Harvard; LL.B., 1925; S. J. D., 1928. He is on leave in the armed forces of the United States. The ideas developed in this essay state the personal theory of the writer, and in no way reflect official thinking. There is a short bibliography of Anglo-American legal writing on war criminals in Wright, *War Criminals*, 39 *Am. J. Int. Law* 257, notes 1 and 2 (1945).—EDITOR.

## *Purpose of Sanctions Against War Criminals*

"A war may be lost. The most ill-fated war is never irretrievable. The worst peace is never final. But a Revolution must be won. A Revolution occurs once only."<sup>1</sup>

These are the words of Moeller van den Bruck, perhaps the best known of the popular ideologists accepted by German National Socialism. The vocation of our time in regard to the punishment of war criminals may be ascertained from this text, which was written immediately after the close of the last war. In stating the ideological nature of the war which has resulted in the occupation of the entire German *Reich*, Moeller van den Bruck makes it evident that the invocation of sanctions against National Socialist war criminals is related to the problem of the prevention of another great war.

Certainly, the war has been understood as an ideological war, not only by the National Socialists, but also by those who have vanquished National Socialism. Thus, even though Article 43 of the Annex to Hague Convention IV of 18 October 1907 imposes on the military occupants of the *Reich* the duty of:

"... respecting, unless absolutely prevented, the laws in force in the country,"<sup>2</sup>

The military government for Germany immediately on the occupation of the *Reich* "deprived of effect" certain "fundamental Nazi laws enacted since 30 January 1933," and introduced a "general suspending clause" designed to prevent the fulfillment of National Socialist ideological conceptions relating to racial, national or religious discrimination, and commanded that:

<sup>1</sup> Moeller van den Bruck, *Germany's Third Empire* (Lorimer's tr., 1934) 17. "True to his own ideas and to the old military traditions, Ludendorff conceived the armistice as no more than a momentary suspension of hostilities. This conception in no way prevented him from contemplating immediate peace, which had become a necessity, and the grave consequences it would entail." Vermeil, "Germany's Three Reichs" (Dickes' tr., 1944) 8.

<sup>2</sup> See, in general, Schwenk: *Legislative Power of the Military Occupant Under Article 43, Hague Regulations*, 54 *Yale Law J.* 393 (1945), who seems to advance a concept which might be called ideological necessity (at p. 407). See, however, the discussion of the *Volksgemeinschaft*, *infra*.

"The interpretation and application of German law in accordance with National Socialist doctrines, however or whenever enunciated, are prohibited."

The prevention of another ideological war is therefore an aim to be attained through the imposition of penal sanctions against National Socialists for crimes in fact committed by them during the present war.

Indeed, there have been four classes of war crimes in the present war. (1). There have been violations of the internal law of various states, which will be punished under the laws of the states affronted, in accordance with the Moscow Declaration of 1 November 1943. (2). There have been violations of general international law<sup>3</sup> relating to the conduct of war, which will be punished under general international criminal law, in accordance with the Moscow Declaration. (3). There have been violations of international law in fascist preparations (*Unternehmen*) for war. These crimes were committed not only against the peoples of other states, but also against certain sections of the German population itself. The validity of this class of crime derives, in part, from the concept of unjust war, and is the crime of undertaking unjust war. (4). There have been violations of general international criminal law for which punishment will be inflicted on the Germans responsible for declaring unjust war, that is, war which is illegal or historically unjust or unjustified, because it is predatory and imperialistic or violates general international law forbidding such war. The theory of the unjust war was expressed by Generalissimo Stalin as early as 1941, when he said:

"The Germans are now waging . . . an unjust war calculated for the seizure of foreign territory and the conquest of other peoples . . . the Soviet Union and its Allies are waging a war of liberation—a just war calculated for the liberation of the enslaved peoples of Europe and the USSR from Hitler tyranny."<sup>4</sup>

The Generalissimo's theory essentially became the official American theory on 8 July 1945 through the declaration of Justice Jackson, in which he criticized nineteenth century theories of international law opposed to the concept of unjust war<sup>5</sup> as

". . . a departure from the doctrine taught by Grotius, the father of international law, that there is a distinction between the just and the

<sup>3</sup> This phrase is used to describe international law which is general, not because it has the theoretical support of all states, but because it has become a general force through the strength of the five great powers which were capable of fighting against aggression. This usage therefore is intended to reflect the outcome of the San Francisco conference. Hence this meaning is the precise opposite of Kelsen's, for whom "general or common international law is customary law, valid for all states belonging to the international community." Kelsen, "Law and Peace in International Relations" (1942) 30-31.

<sup>4</sup> *The New York Times*, 7 November 1941, p. 6. c. 6.

<sup>5</sup> See Nussbaum, *Just War—A Legal Concept?* 42 *Michigan Law Rev.* 453 (1943); von Elbe, *Concept of Just War in International Law*, 33 *Am. J. Int. Law* 665 (1939). The chief theoretical defender of the theory of the just war has been Kelsen, *supra*, note 3, at p. 35.

unjust war—the war of defense and the war of aggression . . . By the time the Nazis came to power it was thoroughly established that launching an aggressive war . . . was illegal . . . It is high time that we act on the juridical principle that aggressive warmaking is illegal and criminal.”<sup>6</sup>

It is not an historical accident that both Generalissimo Stalin and Justice Jackson reflect Grotian ideas of international law; for Grotius' secularized, anti-medieval conception of natural law presupposed the historical existence and the scientific ascertainment of objective truth on which the validity of the conception of the just war depends. Therefore the conception of the just war is a break with nineteenth century subjectivism, idealism, scepticism and positivism.<sup>7</sup>

*Source of International Criminal Law:  
International Public Opinion*

The starting point for a discussion of the punishment of war criminals must be Hague Convention IV of 18 October 1907, governing the laws and customs of war on land. Although this basic text of general international law was preceded by the instructions prepared by Francis Lieber for the Union army during the American Civil War, Hague Convention IV is essentially the handiwork of modern European scholarship and as such essentially reflects the traditions of modern Roman law and of modern Romanist codification. Hence, the French text of the convention, which is the authoritative formulation, will be distorted or misunderstood, if it is conceived of exclusively in accordance with Anglo-American conceptions of legal or juridical method, and if it is conceived of without recognizing modern juristic theories concerning the role of purpose in law. Of course, Lieber himself, who had been educated at Jena, was a Romanist. Therefore, it may be said that certain military law of the United States almost for a century has been in advance of the non-military law of the United States, which is still fettered by Anglo-American prejudices against codification. In this respect, however, the army has adhered to the

<sup>6</sup> *The New York Times*, 8 June 1945, p. 4, c. 6. The Jeffersonian concept of unjust aggression is concrete and historical, not abstract. Thus Jefferson said in 1802 that the United States would not have been justified in initiating war against a “pacific” and “feeble” Spain for control of Louisiana. But an American war to seize Louisiana from imperialistic Napoleonic France would have been justified after Spain had transferred Louisiana to France, even though the war meant the bursting of a “tornado on both sides of the Atlantic.” See Jefferson's correspondence with Robert Livingston and du Pont de Nemours in April 1802.

<sup>7</sup> See Harris: *Idealism Emergent in Jurisprudence*, 10 *Tulane Law Rev.* 169 (1936). On the concept of international criminal law, which is said to derive from Bentham, see von Liszt, *Lehrbuch des Deutschen Strafrechts* (25. Auf., 1927) 123-125.

On the types of war crimes, see Article 6, Constitution of the International Military Tribunal. *The New York Times*, 9 August 1945, p. 10, c. 3. Fraenkel suggests “occupation crimes” as another type of war crime. Fraenkel, “Military Occupation and the Rule of Law,” c. 3 (1944).

tendencies toward codification reflected in the American constitution itself.

Nevertheless, it must be reiterated that Hague Convention IV will be ineffectual and distorted as a code or partial code, if it is not interpreted and administered in accordance with Romanist conceptions relating to juridical method, as well as in accordance with the purposes or goals stated in the very text of the convention itself. Earlier in the twentieth century Dean Pound introduced into American legal thought the knowledge that law is a complex conception, based on the interrelations of three constituent elements — legal precepts, legal method, and received ideas or ideals as to the purpose of law. The legal precepts are the formulations of the content of law. Popularly, they are “the” law. Moreover, these precepts differ in flexibility, depending on whether they are rules, concepts, principles or standards. Legal method refers to the professionally accepted method of thought relative to the interpretation and administration of legal precepts as well as to the disposition of unanticipated and unprovided for legal problems. The legal method of Roman law and of Anglo-American common law differ profoundly, particularly in that the former may employ legislation by analogy to decide unanticipated legal problems. The received ideals of a legal system are the historically dominant and accepted conceptions relating to the purpose of legal precepts and of legal method, so that economic, political and philosophical ideas thus assert themselves directly on the law. Therefore, like other such legal texts, Hague Convention IV must be considered as a series of precepts, subject to Roman law conceptions of juridical method, and reflecting certain goals or aims, stated or presupposed.

Thus conceived of as a work of modern Roman law, certain texts of Hague Convention IV acquire special importance. As a juridical act of general international law, the convention could have made its formulations exclusive, and thus could have precluded further development of the convention as new historical situations unfolded. However, in accordance with the traditions of Romanist private law codes, the convention rejects this outlook, and subjects the states adhering to the convention to the effect of such historical development. Thus, the preamble of the convention states that

“Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”

The formulation is particularly in the tradition of the great eighteenth century Romanist codes which did not restrict development merely in accordance with past usages ("usages established"), but takes account of the aspirations of the peoples of the world, or, more exactly, of their international public opinion, as this is understood in the eighteenth century French-Jeffersonian conception ("the laws of humanity"; "the dictates of the public conscience"), as a source of international law to be utilized in developing the convention to meet the new situations disclosed to it by the course of history. In this respect the convention accepts the theory of the Louisiana Civil Code, the only Roman law code in vigor among the American states, which, following the French *projet* of the Year VIII (1800), provides in Article 21:

"In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."<sup>8</sup>

In accordance, then, with Romanist traditions concerning legal method, gaps in Hague Convention IV, as disclosed by the course of history, explicitly are to be closed by reference to international public opinion reflecting the purposes of the convention. In precise words, democratic public opinion<sup>9</sup> has been received as a source of law through Hague Convention IV, and is translated into a force through successful belligerent action.

In consecrating the authoritative role of the public opinion of the peoples of the world as a source of general international law, the convention by no means justifies an arbitrary or subjective determination of the content of international law. On the contrary, public opinion in the eighteenth century democratic sense is the secure anchor on which to ground the development of the texts of the convention. Hence, the preamble of Hague Convention IV says:

". . . the High Contracting Parties do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders."

It is in accordance with Romanist traditions concerning legal method to suggest that international public opinion may

<sup>8</sup> See Franklin: *Brutus the American Praetor*, 15 *Tulane Law Rev.* 16 (1940).

<sup>9</sup> In Jeffersonian ideology public opinion is also the decisive force in American constitutional law. See opinion of Justice Johnson in *United States v. Hudson*, 7 Cranch 32 (1812), and Franklin: *War Power of the President: An Historical Justification of Mr. Roosevelt's Message of Sept. 7, 1942*, 17 *Tulane Law Rev.* 217, 250 (1942).

Cf. Kelsen, who says: "Some writers, abandoning the positivist view, maintain that not only custom and treaties, but also the general principles of law are to be considered as sources of international law. This doctrine is very questionable." Kelsen: *Collective and Individual Responsibility in International Law, With Particular Regard to the Punishment of War Criminals*, 31 *Cal. Law Rev.* 530, 543-544 (1943). Kelsen cites 37 *Am.J. Int. Law* 663 (1943).

justify the development or the expansion on certain occasions of the texts of Hague Convention IV and of other authoritative texts of general international law in order to control situations not in fact foreseen in the convention of 1907. In Roman law, legislative or executive texts furnish analogies from which legal development proceeds. A Romanist text may decide issues by analogy which it does not control by genuine interpretation. Even though the juridical method of Anglo-American law justifies the employment only of judicial decisions analogically, it should be evident that the juridical method of the Roman law, which prefers to use legislation analogically, is a resource of the greatest value, both in preventing arbitrary legal solutions and in permitting nevertheless further legal development in accordance with modern sources of law, such as international public opinion.

Of course international public opinion as a source of international law by no means is limited to the analogical development of the existing texts of Hague Convention IV and of similar formulations of international law. The preamble itself to Hague Convention IV distinguishes between the laws of humanity and "the dictates of the public conscience" and "usages established" (among which are the formulations of Hague Convention IV itself), giving the former a scope not limited merely to the analogical development of Hague Convention IV. In addition to this, the ideological nature of the present war, the fragmentary and XII Tablelike character of Hague Convention IV and of other written texts of international law, the urgent need for development of international law in accordance with the outcome of the conferences at San Francisco and elsewhere, demand that international public opinion be conceived of more broadly than as a mere device to develop the existing international texts by analogy. Nevertheless, great advance can be made even in accordance with the method of development of existing texts of international law by analogy.

*Source of Theory of Plural Responsibility in  
International Criminal Law*

The basic principle derived from Article 50 of Hague Convention IV by analogy provides a basis for collective penalties to be imposed on fascist war criminals. This possibility is opened up even by the inaccurate English translation of this text, which reads:

"No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible."

Even though article 50 is devoted to the recognition of plural responsibility for acts of individuals committed during a mili-

tary occupation, it also justifies by analogy a similar theoretical basis for imposing collective penalties on members of the National Socialist party, on members of the different affiliated and sympathetic "purpose" (*Zweck*) or ideological organizations or formations, on members of the different groups whose economic interest was served by National Socialism, etc. for acts which occurred even prior to the military occupation of the *Reich*.

The significance of Article 50 of Hague Convention IV may be better understood from a more accurate English translation of the authoritative French text. Article 50 is a text of Roman law, and loses its precision of meaning if its Romanist concepts are translated in terms of Anglo-American common law.<sup>10</sup> An English translation, which takes account of the Romanism of Article 50, would read:

"No collective punishment (*peine collective*), pecuniary or otherwise, shall be inflicted on populations because of individual acts (*faits individuels*) for which they cannot be considered as solidarily responsible (*solidairement responsables*)."<sup>11</sup>

The most important difference between the authoritative French text and the English translation is that "*solidairement responsables*" is translated into English as "jointly and severally" responsible instead of as "solidarily responsible."<sup>12</sup>

The criteria for solidary responsibility in the modern Roman law are set forth in Article 2324 of the Louisiana Civil Code, which is an article concerned with delictal rather than with criminal responsibility:

"He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, *in solido*, with that person, for the damage caused by such act."

<sup>10</sup> Hence, Anglo-American legal writers, who obviously have been uneasy and uncomfortable in the presence of Article 50, complain that it lacks certainty. See Garner: *Community Fines and Collective Responsibility*, 11 *Am.J. Int. Law* 511, 529 (1917); 3 Hyde, "*International Law*" (2d Rev. Ed., 1945) 1889.

<sup>11</sup> On civil solidarity in French law, see Article 1200 of the French civil code (*Code civil français*=C.civ.fr.); on penal solidarity, see Article 55 of the French criminal code (*Code pénal*=C. pén.). The French criminal law of solidarity "obeys" the civil law of solidarity, but its role is limited to responsibility for the payment of fines. Vidal, *Cours de droit criminel et de science pénitentiare* (8e éd., 1935) nos 574-576 bis; Garraud et Laborde-Lacoste, *Exposé méthodique de droit pénal* (4e éd., 1942) no 501. However, the limitation of Article 55, C. pén., to fines, does not correspondingly limit Article 50, Hague Convention IV, as the latter text applies to collective punishment "pecuniary or otherwise." Of course there are other differences. See also Article 231, StGB, and Article 830, BGB, *infra*, note 27.

<sup>12</sup> The various errors in the English translation of Hague Convention IV seem to derive from the translation in Scott, "The Hague Conventions and Declarations of 1899 and 1907" (2d. ed., 1915). See also Schwenk, *supra*, note 2, at p. 393, note 1.

Article 50 employed the word "*solidairement*" in the French texts of both 1899 and 1907. Scott, *Les conventions et déclarations de la Haye de 1899 et 1907* (1918) 124. But the English translation of 1899 translates this as "collectively" responsible. The phrase "jointly and severally" responsible was first introduced in the 1907 translation. See Scott, *supra*, 124.



In other words, the tests of solidary penal accountability for purposes of plural responsibility under Article 50, Hague Convention IV, are not only taken from the delictal rather than from the criminal law, but are extremely broad, resting either on an objective element, such as "cause" or "assistance" or on a subjective element, such as "encouragement." However, what is most to be noticed at this point is that the tests of solidary penal responsibility derive essentially from the law of delict ("tort") rather than from criminal law for the purposes of general international criminal law, as Article 50 replaces the tests of the criminal law with the tests of the delictal law so far as plural responsibility is concerned.

This conception of the role of Article 50 justifies the Moscow Declaration, announced by the late President Roosevelt, former Premier Churchill and Generalissimo Stalin on 1 November 1943, in which they said:

"... German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein . . . The above declaration is without prejudice to the case of German criminals, whose offenses have no particular geographical localization and who will be punished by joint decision of the governments of the Allies."

Indeed, the "unEnglish" phrase, "consenting part", which is not the usual language of the Anglo-American criminal law, becomes significant in relation to the essentially Romanist concept of solidary responsibility, similar to that expressed in the text of the Louisiana civil code, with its recognition of "encouragement" as a ground for collective responsibility.

*Source of Theory of Defenses in International Criminal Law*

However, the role of Article 50, Hague Convention IV, is not limited to the establishment of the plural responsibility of those who have taken a "consenting part." In advancing the theory of solidary responsibility, the purport of Article 50 does not merely replace, within criminal law itself, ideas of modern Roman criminal law concerning participation in crime (that is, "principal", "accessory", etc.) with the essentially delictal ideas of Roman law. Romanist theories of criminal participation or of criminal complicity are thus replaced by Romanist theories of participation essentially derived from the law of delict.

But in consecrating the essentially delictal theory of solidary responsibility, Article 50 also replaces the conceptions of Romanist criminal law relating to defenses — excuses and justifications — with the conceptions of Romanist delictal law relating to defenses for purposes of general international criminal law.

What this should connote is that the defense of superior order is not a valid defense in general international criminal

law, at least not in an absolute sense, because such defense need not be accepted in delictal proceedings based on solidary responsibility. There is increasing support of this position. Until 15 November 1944 the American Rules of Land Warfare provided through Article 347 that:

"Individuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanctions of their government or commanders."

However, after that date, a new text, Article 345.1, was introduced, providing:

"Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment."<sup>13</sup>

Indeed, even in England, where the defense of superior order seems to have had much support, it was not always accepted, not at least in the seventeenth century at the trials of those involved in the execution of the king; for in *Axtell's Case* <sup>14</sup> it was said that:

". . . where the command is traitorous, there obedience to that command is also traitorous."

Perhaps the earliest modern show of dissatisfaction as to the role of the defense of necessity in criminal proceedings was indicated in Article 193, fragment 28, of the Criminal Code of 1926 of the Russian Socialist Federated Soviet Republic. This text, which is part of Chapter IX, provides:

"Any act of robbery, pillage, illegal destruction of property, or violence, or any illegal taking of property under pretext of military necessity committed in respect of the population of an area of military operations entails deprivation of liberty for a period of not less than three years, with or without confiscation of property; but where there are aggravating circumstances it entails the supreme measure of social defense and confiscation of property."<sup>15</sup>

A note adds:

"Participation in military crimes by persons not mentioned in the present article entails responsibility under the relevant articles of Chapter IX of the present code."

As the defense of superior order, to no small extent, reflects theory as to the role of necessity as a defense in criminal law, the refusal of the Russians as far back as 1926 to accept the defense of military necessity from Russians accused of certain military crimes is significant. Under the basic idea of Article 50, Hague Convention IV, which substitutes the theory of

<sup>13</sup> See Pope, Book Review, 31 *Va. Law Rev.* 739, 742 (1945). To the same effect Art. 8, *Constitution of the International Military Tribunal. The N. Y. Times*, 9 August 1945, p. 10, c. 3. See general discussion in Lauterpacht; *The Law of Nations and the Punishment of War Crimes*, *Brit. Yr. Bk. of Internat. Law*, XXI, 58, 69 (1944).

<sup>14</sup> J. Kel. 13 (1660).

<sup>15</sup> The Penal Code of the Russian Socialist Federal Soviet Republic (Foreign Office tr., 1934) 75. A somewhat different translation is given in Taracuzio; *The Soviet Union and International Law* (1935) 331.

Under Article 129, MStGB, "urgent need" in such cases would be a defense, contrary to Soviet law.

delictal defenses in plural prosecutions under general international criminal law, the defense of superior order should be rejected, and it has been rejected through the formulation at Moscow of the conception of the "consenting party."

German military law also has addressed itself to the problem of the defense of superior order.

The Moscow Declaration says that war criminals will be judged and punished according to the "laws of the liberated countries and of the free governments which will be erected therein" or "by joint decision of the governments of the Allies." German law, then, will not be the basis for the punishment of war criminals, contrary to the foolish practice in the abortive trials following the last war. German law is of importance only in the trials of war criminals by some future anti-fascist German regime, or only if it can be said to correspond to international public opinion, within the meaning of the preamble to Hague Convention IV.

A basic text for the treatment of certain war criminals under German law is Article 47 of the German Military Criminal Code (*Militärstrafgesetzbuch*=MStGB) of 10 October 1940. This code of military criminal law has not been mentioned in Anglo-American theoretical discussions of war criminals, and it may be surmised that the Anglo-American legal world is unaware that the old German *Militärstrafgesetzbuch* of 1872 has been superseded. Even very recent Anglo-American discussion of German theory has been confined to the text of 1872, as if it were still in vigor. Moreover, it has been assumed that the text of the code of 1872 means what every German judge, in war or peace, says it means, as if this law were a "common law statute" in an Anglo-American jurisdiction. However, this is not the place to criticize, from the point of view of doctrine, the interpretation of the German military criminal code of 1872 by German judges in the trial of war criminals following the last war. It is sufficient to say that in modern Roman law there is no concept of judicial *stare decisis*, as this is understood in the Anglo-American legal world, and that the opinion of a particular theoretical or doctrinal writer is not, in itself, decisive.

Article 47, MStGB, text of 1940, in an important respect differs markedly from Article 47 in the version of 1872. The present text says:

"(1.) If a criminal law (*Strafgesetz*) is violated through the execution of an order in a matter pertaining to the service, the superior giving the order is alone responsible. The subordinate who obeys such an order however is punishable as a participant:

1. if he has exceeded the order given him, or
2. if he knew that the order of the superior concerned an act, which had in view (*bezweckte*) a general (*allgemeines*) or military major or minor crime (*militärisches Verbrechen oder Vergehen*).

"(2.) If the guilt of the subordinate is trivial, he may be exempted from punishment."

Even under the older code of 1872, Heinrich Dietz, the important German military jurist, said that

"MStGB does not know blind soldierly obedience,"<sup>16</sup> and under the new code of 1940 the jurist of the same name says:

". . . however, according to German military criminal law, there is no unquestionable, blind obedience; the racial eminence and the state of education of the German soldier class require obedience based on perception (*sehenden Gehorsam*)."<sup>17</sup>

In the last stages of the war, it is recalled that newspapers reported that the *Führer* expressly gave the lower ranks of the German army power to disobey higher ranking officers under conditions of impending defeat, when the stability and survival of the German fascist regime was in question because of the probable disloyalty of certain sections of the army. This power of the subordinate to disobey the superior command is admitted by National Socialist military jurists. Thus, in his discussion of Article 47, MStGB, Rittau says that the subordinate need not obey the command of the superior if it affects: "his honor, his respect, his military position, his soundness, his life, his economic being . . ."<sup>18</sup>

Indeed, from an historical point of view, it seems that it is chiefly in the United States, the classic land of individualist theory, that the defense of superior command has been supported as an absolute defense. But elsewhere it has been perceived that this absolutism defeats its very purpose under circumstances of attempted *coup d'Etat*. Like all inflexible conceptions, the theory of the absolute defense of superior command thus becomes a contradiction. Hence, German military legal theory seems to have provided itself with means of escape from the effects of the absolute defense of superior command. The contradictions in absolutist notions of the defense of superior order are also shown in the apparent refusal of National Socialist jurists to recognize the defense of superior order when the war crime is committed by a military subordinate of an army with which Germany is engaged in war. Thus, Rittau writes that prisoners of war in German prison camps may be punished for:

". . . the common war crimes committed on the command of an officer, such as plundering, rape, mistreatment of civil population."<sup>19</sup>

<sup>16</sup> Dietz, *Militärstrafrecht und Militärstrafverfahren*, in Holtzendorff-Kohler, *Enzyklopädie der Rechtswissenschaft* (7.Auf., 1914) V, 207, 221.

<sup>17</sup> Dietz, *Wehrmachtdisziplinarstrafordnung vom 6 Juni 1942* (1943) 49.

<sup>18</sup> Rittau, *Militärstrafgesetzbuch* (4.Auf., 1943) 104.

<sup>19</sup> Rittau, *supra*, note 18, at p. 221.

It has been shown that English law, under the revolutionary conditions of the seventeenth century, also rejected the absolute defense of superior command.<sup>20</sup>

However, in this matter French legal theory has been most conscious, coherent and honest in supporting a relativist conception of the defense of superior order. In their discussions of *l'ordre de la loi et commandement de l'autorité légitime* French jurists advance the relativist theory of reasoned obedience (*obéissance "raisonnée"*), according to which the military inferior may "resist" an illegal order. This conception is contrary to the absolutist theory of passive obedience (*obéissance "passive"*), which refuses the subordinate "the faculty of discussion." Moreover, there is in France an "intermediate" theory, which legitimates the refusal of obedience to a command, the illegality of which is "certain, evident (as well as the command to commit a crime, a delict, etc.)"<sup>21</sup>

Huguency, who adheres to a theory of responsibility for "evident illegality," discusses the problem of the responsibility of the military inferior who has been commanded to commit a *coup d'Etat*. He insists particularly on the increased responsibility of the intermediate officer, such as a colonel, because of his greater opportunity to "appreciate the illegality of the act" pertaining to the attempted seizure of state power.<sup>22</sup> Huguency invokes Napoleon, who favored imposing penal responsibility on inferiors who obeyed illegal orders "to give up their arms and to receive chains."<sup>23</sup>

This material, taken from National Socialist and French and English sources, thus seems to impair Kelsen's justification "from a military point of view" of the defense of superior order and of Article 347, Rules of Land Warfare.<sup>24</sup> However, Article 347 has been since veered about through the introduction of Article 345.1 into the Rules of Land Warfare.<sup>25</sup>

Despite their glorification of the intellectual independence of the German soldier, German military legal theorists and judges, when they are thinking in terms of the submission of the military subordinate to the commands of the German regime in power, long since seem to have "sapped" (in Jeffer-

<sup>20</sup> See note 14, *supra*.

<sup>21</sup> Garraud et Laborde-Lacoste, *supra*, note 11, at no 93. See also Vidal, *supra*, note 11, at nos 186-188, who says that a military person "has the right and the duty to refuse obedience when the illegality of the act which is commanded to him is evident." The basic text in French law is Article 327, C. pén.; see also Article 205, *Code de justice militaire*.

<sup>22</sup> Huguency, *Traité théorique et pratique de droit pénal et de procédure pénale militaires* (1933) no 334.

<sup>23</sup> Huguency cites *Mémoires de Napoléon*, VIII, 272.

<sup>24</sup> Kelsen, *supra*, note 9, at p. 556.

<sup>25</sup> See *supra*, note 13. See Art. 89 of the Brazilian *Projet* of 1943 for a military Criminal Code. *Projeto de código penal militar in Arguero de direito militar*, I, 175 (1943).

son's use of the word) Article 47, MStGB. Although this is true in regard both to the text of 1872 and that of 1940, the military jurist Schwinge, discussing the 1872 version of this article, said as recently as 1936:

"Article 47—without doubt miscarrying in text and legally-politically most highly assailable — is one of the most obscure dispositions of MStGB."<sup>26</sup>

However, the changes introduced into the 1940 version of MStGB worsen even more seriously than Schwinge had suggested in 1936 the "legal-political" position of National Socialist war criminals. But even under the old MStGB Schwinge's alarm was justified, particularly as to members of organizations which avowedly had illegal objectives, such as "purpose" (*Zweck*) or ideological formations. Such persons were put in perilous position under Article 47, MStGB, even as it had been undermined by German military jurists; for the effect of their "sapping" merely seems to have been that of validating the defense of superior order for German soldiers or functionaries who were not organized in "purpose" or ideological groups. This is because the 1872 text of paragraph (1) 2, Article 47, MStGB, unequivocally imposes responsibility on those subordinates who "knew" that the superior "had in view" (*bezweckte*) a crime, and hence on those persons who belonged to organizations destined to fulfill illegal "purpose" or ideology.

This theory as to the significance of the text of 1872 is sharpened by the effect of the analogy of Article 50, Hague Convention IV, which makes participants responsible solidarily. As Article 50 rests on a delictal rather than on a penal basis, Article 830 of the German Civil Code (*Bürgerliches Gesetzbuch*=BGB), which is a delictal text, thus becomes relevant:

"If several persons have caused any damage by an act committed in common, each is responsible for the damage. The same rule applies if it cannot be discovered which of several participants has actually caused the damage.

"Instigators and accomplices are in the same position as joint-doers."<sup>27</sup>

In their discussion of paragraph (1) 2, Article 47, MStGB, which in this respect remains unaltered in the 1940 version, National Socialist military jurists have maintained that the "knowledge" test in that formulation virtually had the effect of justifying the defense of superior order. In essence, they have said that actual knowledge of the illegality of the command rarely can be proved, particularly since knowledge of the illegality of the military command must be determined in rela-

<sup>26</sup> Schwinge, *Militärstrafgesetzbuch* (1936) 100. Schwinge's subsequent writings, which are known to exist, are not available to this writer.

<sup>27</sup> This translation is from Wang, "The German Civil Code" (1907) 182. See also note 11, *supra*; and Article 840, BGB.

tion to the presuppositions and circumstances under which it was issued as well as in relation to the intention of the superior making the command. These are illusive or subjective elements, these jurists in effect have said, which rarely can be known to the military inferior. Hence the latter in practically all instances lacks "knowledge," and cannot be held guilty of obeying the illegal command. However, even if this questionable interpretation of Article 47, MStGB, is accepted as regards German soldiers who did not belong to the National Socialist party or its organized "purpose" formations, it is without importance as regards those war criminals who belonged in fact to the National Socialist party, or to National Socialist "purpose" or ideological organizations. As to such persons, paragraph (1) 2, Article 47, MStGB, buttressed by Article 830, BGB, wipes out the defense of superior order because they do have, by virtue of the fascist aims of the National Socialist organizations to which they belonged, the requisite "knowledge." The concept of the "consenting party", as stated in the Moscow Declaration, thus might be described as a paraphrase of this effect of Article 47, MStGB.

*Source of Particular Crimes in International Criminal Law*

In that it vastly increased the source of particular war crimes, the 1940 text of paragraph (1) 2, Article 47, MStGB, makes the position of National Socialist war criminals much more insecure than it had been under the text of 1872. Thus Schwinge would have found the 1940 formulation of Article 47, MStGB, even more "legally-politically assailable" than the wording which had alarmed him in 1936. The difference between the effect of the text of 1872 and that of 1940 is that the new formulation comprehends general international criminal law, unlike the version of 1872.

The 1940 text makes the subordinate responsible for committing

"a general (*allgemeines*) or military major or minor crime,"

whereas the 1872 text merely made the subordinate responsible for the commission of

"a civil (*bürgerliches*) or military major or minor crime."

The transformation of the adjective "civil" (*bürgerliches*) into the adjective "general" (*allgemeines*) between 1872 and 1940 is not a mere reflection of National Socialist ideas of form of legal redaction. The word "civil" is a proper correlative to the word "military", and it meant this in the text of 1872, so that the old text of Article 47, MStGB, comprised all "civilian" and military crimes. However, the phrase "civil" law also connotes the private law, or the law obtaining in civil society (in the eighteenth century sense), as in the phrase "civil code" (*Bürgerliches Gesetzbuch*). In this sense "civil" indicated a

distinction between private and public law, a distinction to which National Socialism is antagonistic, for in National Socialist legal theory the distinction between public and private law must be obliterated: private law must become public law. The change from "civil" to "general" thus in part accomplishes the important National Socialist legal aim of interpenetrating types of law, the result of which is that Article 47, MStGB, now refers to all situations, military or civilian, "public" or "private," internal ("domestic") or external ("international"), so far as they are crimes under German law, including international undertakings, such as Hague Convention IV, having the force of law in the *Reich*.

With more precision, it may be stated that the effect of the change from "civil" to "general" is to submit individuals subject to the German *Militärstrafgesetzbuch* of 1940 directly to the effect of general international criminal law, at least so far as German internal law is concerned. Thus, Germany sought to fulfill its duties under Article 1, Hague Convention IV, in which the ratifying states agree to

"issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land . . ."

and under Article 3, Hague Convention IV, in which the ratifying states agree that

"A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay indemnity. It shall be responsible for all acts committed by persons forming part of its armed forces."

The effect of the substitution of the word "general" in the National Socialist sense, for the word "civil," becomes, then, that of making German individuals directly responsible, at least in German courts, to texts of international validity having the force of law in Germany. Germany itself makes individuals subject to the *Militärstrafgesetzbuch* of 1940 directly responsible to the texts of general international law as received within Germany at least for the purposes of the German courts and German administration.

However, this does not exhaust the great import of the reception of the word "general" into Article 47, MStGB. The new language not only makes German individuals passive subjects of general international criminal law at least within German courts, but it also subjects them to the effects of the historical development of general international criminal law. It accepts certain of the results of the preamble of Hague Convention IV, which consecrates the development of international law in response to international public opinion; and accepts that method of development, at least in part, as a general principle of German military justice. Article 47, MStGB, version of 1940, subjects individuals not only to punishment for vio-



lation of criminal legislation ("*Strafgesetz*" in the language of Article 47), but also to punishment for acts punishable by analogy to such penal legislation. Article 47, MStGB, therefore now punishes violation of criminal legislation ("*Strafgesetz*") and "an act (*Handlung*), which had in view a general or military major or minor crime." The latter includes crimes by analogy. Articles 1 and 2, MStGB, are the basis for this.

The legal method of Article 2 of the German Criminal Code (*Strafgesetzbuch-StGB*), as introduced in 1935, thus becomes the legal method of Article 47, MStGB.<sup>28</sup> According to Article 2, StGB, punishment may be inflicted for an act which "deserves penalty according to the basic principles (*Grundgedanken*) of criminal legislation (*Strafgesetz*) and according to the healthy feeling of the race (*gesundes Volksempfinden*)." Stripped of its National Socialist goal (*Zweck*), as expressed in the irrational fascist formula "*gesundes Volksempfinden*", Article 47, MStGB, thus opens up the entire German "general" and military criminal law for exploitation and development against fascist war criminals.

Shorn of the goals and ideals received from National Socialism,<sup>29</sup> Articles 1 and 47, MStGB, and Article 2, StGB, thus correspond very much to the effect of the preamble of Hague Convention IV of 18 October 1907, which, as has been shown,<sup>30</sup> provides that in "cases not included in the Regulations" "the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

Much has been said against punishment by analogy, and the antagonism to such punishment goes back to the French Revolution. In 1808 Article 21 of the Louisiana Civil Code, which was a redaction of the French *projet* of the Year VIII (1800), restricted the process of development by analogy to civil cases. In 1812 the Supreme Court in *United States v. Hudson*<sup>31</sup> held that there should be no penalty without a text, even in a legal regime where the uncodified common law obtained. This case must be maintained as a principle of American constitutional law (not merely as an interpretation of a particular statute)

<sup>28</sup> Schwinge, *supra*, note 26, at pp. 4-5; Rittau, *supra*, note 18, at p. 59.

<sup>29</sup> Military government legislation, such as quoted in the first part of this essay, has accomplished this. Such texts as Article 2, StGB, have also been overcome by military government legislation.

<sup>30</sup> See second part of this essay.

<sup>31</sup> See *supra*, note 9. France, of course, has been the classic land requiring punishment based on a text. But this has not excluded analogical development of certain texts of the penal code. Thus, the law of excuses or justification was developed from Article 327, C. pén. See Garraud et Labore-Lacoste, *supra*, note 11, at no. 94.

because criminal proceedings are not among the "cases in law and equity" arising under the constitution, to which the judiciary power constitutionally pertains in the absence of congressional legislation. Conceived of in this fashion, the opinion of Justice Johnson contradicts *Marbury v. Madison* and the theory of judiciary supremacy, for declarations of constitutionality also are not "cases in law and equity." Hence *United States v. Hudson* is a basic Jeffersonian determination.

Nevertheless the text of the constitution of the United States, unlike the preamble of Hague Convention IV, is not a text of general international criminal law. Certainly those Anglo-American jurists who have clamored that there should be no crime without a text have not been renowned as adherents of the codification, criminal or civil, which would have created the necessary texts. They have not criticized the history of the development of Anglo-American criminal law, which until recently has been based on judicial decision. Nor have they condemned the retroactive elements in such a judicial system. They have not assailed the use of standards or of general clauses in modern criminal legislation, although punishment under such legislation functions almost exactly as does development of penal texts through analogy. Nor do they perceive the fairness of "objectifying" as much as possible "the laws of humanity and the dictates of the public conscience" referred to in the preamble of Hague Convention IV by tying criminal adjudication to the more secure base of developing grounds for decision out of existing legislation, as contrasted to the "subjective" results frustrating and subverting international anti-fascist public opinion, attainable under a "free" conception of "the laws of humanity and the dictates of the public conscience." Certainly, the penal code of 1926 for RSFSR, under which many war criminals evidently will be prosecuted, accepts this outlook. for Article 16 says that:

"Where a socially dangerous act has not been expressly dealt with in the present code, the basis and limits of responsibility in respect thereof shall be determined in conformity with those articles of the code which deal with the crimes most closely resembling it."<sup>32</sup>

Finally, something must be said of the role of Article 4 of the German constitution of 1919 (*Verfassung des Deutschen Reichs*=DV) in connection with Article 47, MStGB. This provided:

"The generally recognized rules of international law apply as binding integral parts of the law of the German *Reich*."

This text was a development from Article 6.2 of the Constitution of the United States, but it is evident that the scope of the German text is greater than that of the American constitution, for, unlike the American formulation, which speaks only of the

<sup>32</sup> See *supra*, note 15. C/f Schlesinger; Recent Developments in Soviet Legal Theory; 6 *Modern Law Rev.*, 21, 33 (1942).

effect of treaties, the German article includes both "written and unwritten international law", including the "Hague conference decisions."<sup>33</sup>

Article 4 of the German Constitution of 1919 is important for at least two reasons. In the first place, under Article 4 it is not necessary to insist that National Socialist war criminals be adjudged exclusively in accordance with a formally written text, such as the German Criminal Code. A regime, similar to that of the Anglo-American criminal law, which was based on judicial decision, could be the basis for the punishment of such persons. Certainly under Article 4 it becomes possible to convict war criminals in accordance with the "general" criminal law; as established in Article 47, MStGB, which consecrates a regime based both on the "written" law, national and international (such as Hague Convention IV and other texts of general international law), and on the "unwritten" law, national and international (such as the unwritten developments from Article 2, StGB, Article 1, MStGB, and the preamble to Hague Convention IV). In other words Article 4 of the German Constitution accomplishes in a constitutional text what Article 47, MStGB, accomplishes in a specific way in a military penal text. The Weimar text and the National Socialist text can both be aimed at war criminals.<sup>34</sup>

In the second place, Article 4 of the German constitution makes individuals and organizations, other than the German state itself, passive subjects of international law, at least in German courts. German theorists recognize this readily. Thus, Poetzsch-Heffter wrote in 1928:

"The importance of article 4 lies therein that the generally recognized rules of international law in the future bind not merely the *Reich* as the subject of international law, but on the contrary the German authorities and citizens directly."<sup>35</sup>

And Anschütz said:

". . . international law now affects individuals and state organs (above all the courts) directly and without formal authorization and obligation . . ."<sup>36</sup>

Hence, both Weimar and Berchtesgaden contribute to the punishment of war criminals.

<sup>33</sup> Anschütz, *Die Verfassung des Deutschen Reichs* (7.Auf., 1928) 46-47.

<sup>34</sup> On the limits set to Article 4, DV, see Anschütz, *supra*, note 33; Bühler, *Die Reichsverfassung vom 11 August 1919* (3.Auf., 1929) 44; Giese, *Verfassung des Deutschen Reiches vom 11 August 1919* (7.Auf., 1926) 57; Article 68, DV.

<sup>35</sup> Poetzsch-Heffter, *Handkommentar der Reichsverfassung vom 11 August 1919* (3.Auf., 1928) 94.

<sup>36</sup> Anschütz, *supra*, note 33, at p. 47. Anschütz says that Article 4, DV, thus "nationalizes" international law. See *infra*, note 42, on the relationship between "nationalization" of international law and Kelsen's "intermediate" national stage of international law.

*Source of Theory of Passive Subjects of International Criminal Law*

Thus, the misgivings that Schwinge felt in 1936 as to the "textual" and "legal-political" correctness of Article 47, MStGB, version of 1872, should have been increased by Article 47, MStGB, redaction of 1940, and by Article 4 of the German constitution of 1919; for the effect of these formulations was to make individuals and groups, other than the *Reich* itself, unqualified passive subjects of international criminal law, at least in the German courts and in German administration. From here it is but a step to treat individuals and groups as unqualified passive subjects of international criminal law in other national courts and even to establish international courts for invoking sanctions against such passive subjects of international law. This step can be taken through the theory of the unjust war, through the preamble of Hague Convention IV and through the analogy of Article 50, Hague Convention IV, relating to the imposition of collective penalties. It must be determined whether this conclusion is supported or prevented by other texts.

It is a platitude to say that only states are the active and passive subjects of international law.<sup>37</sup> As Kelsen puts it in this connection

"The collective responsibility of a State for its own acts excludes, according to general international law, the individual responsibility of the person who, as a member of the government, at the command or with the authorization of the government, has performed the act,"<sup>38</sup>

and

"Since the demand to punish the war criminals aims at individual responsibility of the persons who by their conduct have performed the crimes, it seems impossible to satisfy this demand on the basis of general international law."<sup>39</sup>

Kelsen dismissed the situation of the pirate as "exceptional";<sup>40</sup> and hence this passive subject of international law has not been used as the basis for productive or analogical reasoning, although it has been shown that the preamble of Hague Convention IV justifies analogical development to realize the demands of international public opinion.

Nevertheless, it must be indicated that the category of the war criminal is established through Article 3, Hague Convention IV:

"A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay indemnity. It shall be responsible for all acts committed by persons forming part of its armed forces."

<sup>37</sup> Manner: *The Legal Nature and Punishment of Violence Contrary to the Law of Nations*, 37 *Am.J. Int. Law* 406, 407 (1943); see Heilborn, *infra*, note 57.

<sup>38</sup> Kelsen, *supra*, note 9, at p. 540.

<sup>39</sup> Kelsen, *supra*, note 9, at p. 534. See also Kelsen: *General Theory of Law and State* (1945) 355.

<sup>40</sup> Kelsen, *supra*, note 9, at p. 534.

Kelsen's reasoning in this situation seems to be that

"... international law obliges the States, whose subjects have, as members of their own armed forces, violated the laws of warfare to punish the criminals; and general international law authorizes the belligerents to punish an enemy subject who has fallen into the hands of their authorities as prisoner of war for having violated, prior to his capture, the laws of warfare."<sup>41</sup>

But

"By obliging the States to punish their own war criminals and by authorizing the States to punish the enemy war criminals, international law provides, at least indirectly, for punishment of war criminals. It leaves to national law to specify the penalty. . . ."<sup>42</sup>

However, the text of Article 3 does not purport to exclude individuals and organizations as passive subjects of general international criminal law, "directly" or "indirectly." It recognizes the legal category of the war criminal, and introduces the question of indemnity or of reparation for such war crimes. In effect it establishes a regime of suretyship, as it does not exclude the possibility of imposing reparatory sanctions against war criminals in accordance with the law of suretyship. Furthermore, it does not exclude the possibility that the war criminal shall be treated as a passive subject of general international criminal law. It does not exclude, moreover, the possibility of imposing "direct" plural criminal responsibility on the offending state and on the war criminal himself.

As Article 3 consecrates the concept of the war criminal in general international law, it is difficult to suggest that the punishment of the war criminal is absolutely qualified in the manner indicated by Kelsen, whose theory seems to permit the wrongdoing state to shield the war criminal by omitting punishment or by providing for trivial punishment. It is difficult to believe that Article 3 merely introduced a regime of imperfect and of natural obligations,<sup>43</sup> as these were understood in

<sup>41</sup> Kelsen, *supra*, note 9, at p. 553. On Kelsen's theory of "general international law," see *supra*, note 3.

<sup>42</sup> Kelsen, *supra*, note 9, at p. 554. See also, *supra*, note 36, discussing the "nationalizing" effect of Article 4, DV. "The application of national law to the war criminal is at the same time execution of international law. The national law is an intermediate stage made necessary by the State constitution authorizing the courts to apply only norms created by the lawmaking organ of the state. If no such constitutional restriction exists, or if according to the constitution, international law is considered part of the national law, a direct application of the international rules of warfare by the courts of the State is possible. Since, however, these rules do not specify the punishment, an act of national law determining the penalties for war crimes is always necessary if these crimes do not constitute at the same time ordinary crimes according to the criminal law of the State." Kelsen, *supra*, note 9, at p. 555. This limitation must immediately be rejected for the punishment of war criminals who have instituted unjust war. See also Schwartzberger, "International Law and Totalitarian Lawlessness" (1943) 59-60.

<sup>43</sup> Thus, Article 1, Hague Convention IV, provides that "The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations . . ." Kelsen's theory, as quoted, that the offending state is to fix the penalty for war crimes can become a negation of the conception of general international criminal law and of Article 1. In thus overcoming Hague Convention IV this.

eighteenth century private law. As to this, Article 56, Hague Convention IV, which develops Article 3, seems to hold decisively to the contrary, for it provides that the seizure, destruction or wilful damage done by war criminals to national, cultural or religious monuments

“. . . is forbidden, and prosecution is obligatory (*interdite et doit être poursuivie*).”<sup>44</sup>

The enforcement of this text certainly was not left to the will of the offending state, particularly since many of the states adhering to the convention of 1907 recognized no crimes except those consecrated in codes, rejected the theory of crimes by analogy, and even excluded immediate reference to international law in internal judicial activity. The latter was true of Germany, which did not permit its courts, unlike the United States, to refer directly to international texts before the reception of Article 4 of the Weimar constitution of 1919.

It should be noted that National Socialist military jurists have not hesitated to assert their own power to make individuals passive subjects of international criminal law. Thus, in discussing Article 158, MStGB, which deals with prisoners of war detained by Germany, Rittau says that it is disputed whether such prisoners may be punished for

“. . . acts committed before the capture . . . according to Fuhse, the position seems to leave nothing but natural (or “moral”) obligation. See Articles 1757, 1758, Louisiana Civil Code. Indeed, Kelsen’s limitation, as quoted, interposes in effect a potestative condition (or “illusory” promise), which would make general international criminal law subject to the volition of the offending state. See Article 2034, Louisiana Civil Code. But, on the contrary, Hague Convention IV must be fulfilled in good faith through the intervention, if need be, of the states offended. Otherwise Article 1 is worthless. The reasoning of Articles 2037, 2040, 2042, 1901, of the Louisiana Civil Code, is applicable.

The weakness in Kelsen’s theory may be shown by illustrations. Thus, certain serious offenses of general criminal law may be punished only by military arrest for six weeks. Article 29, MStGB. Moreover, prosecution by the all-important military legal functionary, the *Gerichtsherr*, is not compulsory for most military offenses. Article 47 of the Decree on War Criminal Procedure of 17 August 1938 (RGBl 1939 I, 1457 (*Kriegsstrafverfahrensordnung* = *KStVO*)). See also Rittau, *supra*, note 18, discussing Article 1, MStGB.

<sup>44</sup> The English translation of Article 56 reads “. . . is forbidden, and should be made the subject of legal proceedings.” Cf. *supra*, note 12. But Article 46, Hague Convention IV, is translated as “Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected (*doivent être respectés*).” Article 54, Hague Convention IV, is translated as “Submarine cables . . . must likewise be restored (*devront également être restitués*) and compensation fixed when peace is made.”

*French legal usage of the verb devoir.* [“Agreements] . . . must be performed (*doivent être exécutées*) with good faith” (Article 1134, C.civ.fr., as translated in Article 1901, Louisiana Civil Code). “The payment must be made (*doit être fait*) to the creditor . . .” (Article 1239, C.civ.fr., as translated in Article 2140, Louisiana Civil Code). “If he who has received *bona fide* has sold the thing he is bound to restore (*il doit restituer*) only the price of the sale” (Article 1380, C.civ.fr., as translated in Article 2313, Louisiana Civil Code). “He to whom property is restored must refund (*doit tenir compte*) to the person who possessed it . . .” (Article 1318, C.civ.fr., as translated in Article 2314, Louisiana Civil Code).

answer is in the affirmative, under the presupposition that penal prosecution is permissible under Articles 3 *et seq.*, StGB (old text), Articles 160, 161, MStGB, while von Verdrosz represents the conception that on principle every Detaining State may punish crimes committed abroad by enemy soldiers after their capture, also common war crimes committed on the command of an officer, such as plundering, rape, mistreatment of civil population."<sup>45</sup>

Even if the qualification on the punishment of war criminals suggested by Kelsen is accepted, it may be swept aside after the military occupation of the offending state. In that situation Article 43, Hague Convention IV, becomes decisive:

"The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore, and ensure, as far as possible, public order and life (*l'ordre et la vie publics*) while respecting, unless absolutely prevented, the laws (*lois*) in vigor in the country."<sup>46</sup>

Article 43 is a provision dealing with the duty of the military occupant to reestablish and assure public order and life. This obviously makes it possible for the occupant to employ the law of the occupied state in regard to criminal acts committed after the occupation. But it also seems to make it the duty of the occupant to punish violations of criminal law committed before the occupation, for that is an aspect of the reestablishment or restoration (*rétablir*) and assurance or ensurance (*assurer*) of public order and public life.

Certainly Article 47, MStGB, which makes it an offense to violate the "general" laws of the *Reich*, includes violations of general international criminal law as accepted in the *Reich*. However, even without Article 47, MStGB, the word "*lois*" in Article 43, Hague Convention IV, is broad enough to include German treaty responsibilities. It is true that the word "*lois*" has the narrow sense of "statutes", but it is a word which also has the broad sense of "law in general"; and the latter is the meaning which would include responsibilities under general international criminal law. In short, *loi* in the context of Article 43, is as broad as *droit*, just as *Gesetz* may be as broad as *Recht*, and *lex* as broad as *ius*. In countries, such as France, where a code is the general type of law, *loi* tends to supersede *droit* as a general expression for law.

It may be suggested that Article 43 is inapplicable because the basis of the power of a military occupant is occupation (Article 42, Hague Convention IV), and hence should begin and end with the beginning and termination of occupation. However, this is not what Article 43 says.

<sup>45</sup> Rittau, *supra*, note 18, at p. 220.

<sup>46</sup> Before discussing Article 43, it is proper to point out that the English translation of this text is not exact in several respects. In particular, it should be stated that the phrase "public order and life" has been translated as "public order and safety," which is an unjustified limitation of the scope of Article 43. See Schwenk, *supra*, note 12, and *supra*, note 44.

Article 43 establishes three principles: (1). The occupying power may introduce his law of military government, in whole or in part, subject to the restrictions of general international law set out in Articles 43-56, Hague Convention IV. (2). The occupying power may retain "the laws in vigor in the country," in whole or in part. (3). The occupying power may perform acts of fulfillment or administration, or, perhaps, exercise the powers of a *syndic* in relation to the internal legal system. The power of punishment for prior violations of general international criminal law is thus within "the authority of the legal power" which has "in fact passed into the hands of the occupant."

Therefore, it is not necessary to use Article 47, MStGB, to discover the passive subjects of international criminal law. Hague Convention IV itself created the basis for punishing criminals under general international criminal law when Article 43 was formulated and accepted. The only prerequisite for such punishment is occupation of the offending state under Article 42 and seizure of the persons who had violated general international criminal law.

Something must be said of the impact of this theory of power over war criminals, that is, over persons as passive subjects of international criminal law, on territorial theories of criminal law.

Evidently territorial conceptions of law must be qualified if individuals are thus made passive subjects of international law. The legal basis for the imposition of sanctions against such passive subjects of international law thereupon derives from physical control of the offender, and justification for his punishment under general international criminal law. This system should function smoothly under the regime established at San Francisco by which the maintenance of peace is entrusted to the five most powerful members of the grand alliance.

The National Socialists themselves had impaired the conception of territorial sovereignty through their racial and imperialistic ideas, which supported a personal theory of jurisdiction. It is not important to discuss Article 3 (2), StGB, as formulated by the National Socialists. But more important is Article 1 of the Decree on Special War Crimes of 17 August 1938 (*Kriegssonderstrafrechtsverordnung* = KSSVO)<sup>47</sup> which provided that

- "(1.) The German Criminal Code also obtains for all persons who are subject to the Military Criminal Code [MStGB].  
 "(2.) The criminal law obtaining for them is to be applied to these persons also at the time when they commit the offense abroad."

<sup>47</sup> RGBl 1939 I, 1455.



It is not surprising that the military jurist Dietz, who said that "The criminal law fundamentally should apply for all criminal acts, which a German commits at home or abroad (formerly territorial, now the personal principle . . .),"<sup>48</sup>

adds that "the soldier carries his code with him."<sup>49</sup>

Therefore, the military jurist Rittau, in discussing the control of German prisoners of war in the prisoner of war camps of the United Nations, does not hesitate to write that

"... for German prisoners of war the relationship of superior and inferior continues to endure even in enemy prisoner of war camps—in relation to the German Criminal law (see Article 1, KSSVO)."<sup>50</sup>

Considering that their law tended to make Germans passive subjects of international law through Article 47, MStGB, the National Socialists make a mockery of Kelsen's belief that it is improper to require soldiers to "know" general international criminal law, even though they may be expected to "know" their own national criminal law; for the National Socialists have abolished the distinctions on which Kelsen's criticism of those who would punish fascist war criminals seems to depend.

#### *The National Socialist Volksgemeinschaft As a Subject of International Law*

It has been indicated that a resource of those antagonistic to the punishment of German war criminals has been Article 3, Hague Convention IV. On the contrary, the real question is whether Article 3 has any relevance in fixing the limits of the power to punish German war criminals.

National Socialism itself answers this question. General international law of the nineteenth century presupposed that a state (usually on geographical grounds) "accepted" its members. It may be assumed that the presupposition of state acceptance reflected eighteenth century ideas of social contract. The corollary of this was that other states were excluded from simultaneous acceptance of the same members. National Socialism, however, repudiated the concept of acceptance, and set itself up, not only as a form of aggression and war against other states, but as a form of war against certain members of the German state itself. National Socialism waged two kinds of war against members of the German state: it conducted absolute war against German Jews, and relative war against the members of the different political parties which reflected the anti-fascist interests of different sections of life in the Weimar republic. The war against the German Jews was absolute, because it was a war of extinction. The war against the members of the anti-fascist political parties was relative, because it was a

<sup>48</sup> Dietz, *supra*, note 17, at p. 31.

<sup>49</sup> Dietz, *supra*, note 17, at p. 31. Cf. Kelsen, *supra*, note 9, at pp. 557-558.

<sup>50</sup> Rittau, *supra*, note 18, at p. 223.

war intended to worsen the position of the supporters of those parties in German society, and yet to win the political consent of the supporters of those parties to National Socialism. The racial concept of the *Volksgemeinschaft*, which was the ideological weapon employed by National Socialism in its wars in the German interior, therefore became the basis for organized German social life. It is worthwhile to pursue the effects of the theory of the *Volksgemeinschaft*, even though National Socialist responsibility for crimes against Germans also derives from the undertaking to commit an unjust war, that is, from an undertaking in the sense of Article 87, StGB, which connotes responsibility even for less than a successful effort to wage illegal war.

Because of the racial concept of the *Volksgemeinschaft* it is impossible to separate the inner wars of National Socialism from its outer wars. It is the expression of the aggressions of German fascism. From seventeenth and eighteenth century French and English thought, Hegel had received into Germany the idea of civil society, with its system of wants. On this system of human wants in civil society rested the state, which was constituted, Hegel said, because the satisfaction of wants in society was unequal. The theory of wants in civil society has been and continues to be the fundamental sociological conception of the states fighting National Socialism. But in reactionary Prussia it was believed that Hegel had fatally compromised the idea of the state, and German theory assumed the task of finding a new foundation for politically organized society. This meant that both civil society and the state had to be overcome, and the disunity subdued and replaced by a spiritual unity. This ideal unity is attained through the racial *Volksgemeinschaft*. This conception is the upsidedown way of expressing the National Socialist justification for waging war both within and without Germany.

The *Volksgemeinschaft*, or the racial community, therefore, was a form of war against the state as presupposed by such texts as Article 3, Hague Convention IV, and by general international law. As Vermeil, describing National Socialism appropriately in Kantian terms, says:

"The Nazi state is therefore, to employ a philosophic term, the *phenomenon* in relation to this noumen, which is the soul of the race."<sup>51</sup>

The German state presupposed by international law in theory was either abolished or was absorbed in the higher unity of the idealistic *Volksgemeinschaft*. As the *Volksgemeinschaft* or racial community superseded the classic state as the subject of international law, "it may be asked," as Vermeil does, "what is the exact relation between Race (*Volke*) and State (*Staat*)?"

<sup>51</sup> Vermeil, *Doctrinaires de la révolution allemande* (1938) 263. See Harris, *supra*, note 7.

Is it the Race or the State that engenders law? For Gürke the only State that exists is the racial state. This alone is a 'subject' of international law."<sup>52</sup>

This does not mean that National Socialism is helpless in the present period. Disguised National Socialism or its successor may be expected to raise aloft both the banners of the *Rechtsstaat*<sup>53</sup> and of "classic" international law during the period of military occupation of the *Reich*, with the view of supporting theories of internal and external law favorable to it. Indeed, even at the peak of National Socialist power, in which *Volks-gemeinschaft* became the subject of international law, National Socialism also exploited classic theories when it was advantageous to do so. As Vermeil says:

"... Nazism decried the contradiction and deliberately maintained it. It set itself to recognize international law and at the same time to minimize it."<sup>54</sup>

There are weapons, then, which National Socialist war criminals may attempt to seize. Article 3, Hague Convention IV, may be supposed to be such a weapon. But under National Socialist theory itself, racial Germany has not been the state presupposed in Article 3. Germany of the *Volks-gemeinschaft* only masked itself, when it was convenient to do so, as the state envisaged in Article 3.

The National Socialist regime, although it was a political regime, may be described as a *Scheinstaat* or as an *état simulé*. In modern Roman law there is the concept of simulation—simulated act, lent-name, person interposed, disguised act, *contre lettre*—in which an apparent or ostensible situation is negated or altered by the true state of affairs.<sup>55</sup> National Socialism represents such a simulation. It claimed to be a subject of classic international law, when it was suitable; but at the same time law obtained, treating German Jews as aliens by forcing them to fly the flag of aliens, or "uniting" the party with the state.

Indeed, National Socialist Germany was a masquerade. The *Volks-gemeinschaft* was an improvisation, concealing the warfare of the National Socialist party and its adherents not only against the world, but against the interests of the German people. Instead of abolishing the classic state and replacing it with the fictitious racial community, the National Socialist party disguised itself as that racial community and on occasion as the German state. It has been the fashion in the highest circles of the United Nations to denounce National Socialists as "pirates," "brigands," etc., etc., and such descriptions were literally

<sup>52</sup> Vermeil, *supra*, note 1, at pp. 346.

<sup>53</sup> See the forthcoming essay, Franklin, *On the Jurisprudence of National Socialism*, in "Interpretations of Legal Philosophy: Essays in Honor of Roscoe Pound."

<sup>54</sup> Vermeil, *supra*, note 1, at p. 346.

<sup>55</sup> Articles 116, 405, BGB; Articles 1321, 911, 1099, C.civ.fr.; Articles 2239, 1754, Louisiana Civil Code. Cf. the shielding role of the Anglo-American trust.

and precisely correct. Thus Justice Jackson, in announcing his plans to punish war criminals said:

"Early in the Nazi regime, people in this country came to look upon the Nazi government as not constituting a legitimate state pursuing the legitimate objective of a member of the international community. They came to view the Nazi as a band of brigands, set on subverting within Germany every vestige of a rule of law which would entitle an aggregation of people to be looked on collectively as a member of the family of nations. Our people were outraged by the oppressions, the cruelest forms of torture, the large-scale murder, and the wholesome confiscation of property which initiated the Nazi regime within Germany. They witnessed persecutions of the greatest enormity on religious, political and racial grounds, the breakdown of trade unions and the liquidation of all religious and moral influences. This was not the legitimate activity of a state within its own boundaries, but was preparatory to the launching of an international course of aggression and was with the evil intention, openly expressed by the Nazis, of capturing the form of the German state as an instrumentality for spreading their rule to other countries."<sup>56</sup>

Article 3, Hague Convention IV, should not then be a fetter on the punishment of fascist war criminals. On the contrary, the modern Romanist concept of simulation eliminates the relevancy of this text, in this context, for through the doctrine of simulation National Socialism is perceived to be nothing but a political party organized for and waging war, masked as the mystical *Volksgemeinschaft* or even as the very state which the *Volksgemeinschaft* purported to overcome.

Paul Heilborn, the German jurist, once wrote:

"The state is older than international law. It presupposes the concept of the state and the difference between the state and the communal group (*Kommunalverband*) as given . . . International law recognizes as persons only states, not groups (*Verbande*) within the state."<sup>57</sup>

If Heilborn is corrected by pointing out that individuals or groups may be passive subjects of international criminal law, the desperate position of National Socialists at the present moment may be understood. The National Socialist apparatus should be punished, not only for beginning an unjust war, for waging an unjust war unjustly, but also for preparing unjustly for unjust war and for waging unjust war against Germans in preparation for unjust war.

There are, then, two ways through which National Socialist war criminals become responsible under general international criminal law. One of them derives from the preamble of Hague Convention IV, the other derives from the conceptions of National Socialism itself, deprived of National Socialist dissimulation and illusions concerning itself.

<sup>56</sup> *Supra*, note 6, at p. 4, cc. 4, 5. See Glueck, "War Criminals" (1944) 128; Cowles: *Universality of Jurisdiction Over War Crimes*, 33 *Cal. Law Rev.* 177 (1945). See first part of this essay.

<sup>57</sup> Heilborn, *Völkerrecht*, in Holtzendorff-Kohler, *Enzyklopädie der Rechtswissenschaft*, (7.Auf., 1914) V, 481, 499-500.