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The Legality of Nuremberg

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THE LEGALITY OF NUREMBERG

Twenty years have now passed and still the controversy continues as to whether or not the trials at Nuremberg were in compliance with international law. Although the trials of the major war criminals are now left to the historian, they are still of great importance to the formulation of present international law and are therefore of great interest to the legal profession. Throughout the history of man war has plagued our society. At no time prior to the adoption of the Charter of the International Military Tribunal did the creation of war constitute a crime. The basic problem faced by Nuremberg was whether or not the Allies could make the creation of war a crime. In order to answer this question it must first be ascertained whether or not the Allies had jurisdiction to prescribe a mandate of this nature and, secondly, whether or not they had jurisdiction to enforce that mandate.

In 1945, and even at the present time, many international leaders and scholars adhered to a view which disposes of any possible justification for Nuremberg because of the lack of any justifiable jurisdiction. This school of thought refuses to recognize any punitive remedies for the individual authors of the war under international criminal procedure.[1] Because of an insufficient basis for its jurisdiction, these eminent thinkers believe that the prosecution of those responsible for the war was itself a violation of international law. This same conclusion was formulated by the Commission which was appointed by the Preliminary Peace Conference upon termination of the hostilities of World War I. After several months of investigation, the Commission suggested a formal condemnation of the authors of the war and the blueprinting of some effective penalties for the future.[2] However, for reasons which will be explained below, they refused to advocate any punitive measures for the individual authors of the First World War. They decided that the investigative resources of the historian were more suited for establishing the responsibility for the creation of the war than that of the judge.

Another approach to the problem, while not recognizing the availability of legitimate jurisdiction for judicial action, was to use *political* action. Legally this could have been accomplished by a conditional armistice with Germany.[3] Although this policy would have necessitated some alterations of the "unconditional surrender" agreement of the Allies, it was legally feasible. There was international precedent for this approach in

1. Jackson, *Nuremberg in Retrospect*, 35 A.B.A.J. 813 (1949).

2. *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AM. J. INT'L L. 95 (1920).

3. Glueck, *The Nuernberg Trial and Aggressive War*, 59 HARV. L. REV. 396, 398 (1946).

the exile of Napoleon.[4] While there was no doubt regarding the legality of this approach, politically it would have conceded that Germany had a legal right to refuse to submit those responsible for the war to international sanctions. While this complies with international law, it was not in compliance with the political aims of the Allies.

The great advantage of political rather than judicial action was, as has been stated previously, that the path of international precedent had already been cleared for it. As a result, this policy would not have required an elaborate legal justification.

> The Allies are under no moral or legal compulsion to "try" the Nazi culprits from whom they would exact retribution. The moral crime of these men, is not a fact that requires to be established by the judicial process. . . .
>
> These men are amenable to direct political action. . . . No simularcrum of a "trial" is required to reach our objective; the conscience of mankind would be better satisfied by the swift execution of all these malefactors than by the rhetorical pyrotechnics of Nuremberg.[5]

One very important drawback to a political or summary action is that it deprives the Allies of their prime objective in punishing those responsible for the war. As Justice Jackson has pointed out, the most important quality of the Tribunal was that it provided the prosecution with the opportunity of demonstrating to Germany and to the rest of the world that the defendants were on trial, not because they lost the war, but because they started it.[6] The Tribunal was designed to be a lesson in history, unlike that at Waterloo, which would emphasize the criminality of war so as to deter future authors of war. Its most notable significance was to take judicial jurisdiction so that the acts which were perpetrated would become crimes in the full legal context of the word.

> There is perhaps no need to recall in these pages that the Nuremberg trial represents the first time in history that legal proceedings have been instituted against leaders of an enemy nation. It is perhaps equal supererogation to state here that there are no exact precedents for the charges made by the American, British, French and Russian prosecutors that to plot or wage a war of aggression is a crime for which individuals may be punished. . . . [It] was because of these very facts that . . .

4. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 23 (1962).

5. April, *An Inquiry into the Judicial Basis for the Nuremberg War Crimes Trial*, 30 MINN. L. REV. 313, 328, 329 (1946).

6. *Statement of Chief U.S. Counsel upon Signing of Agreement*, 19 TEMP. L.Q. 169 (1945).

> the prosecution presented a challenge to itself . . . as great as to the defense.[7]

While a great burden rested on the Tribunal to justify judicial rather than political action, the catastrophic phenomena of the war and its atrocities supplied the signatory powers of the charter and the prosecution a most opportune moment in the history of man to declare that aggressive war was a crime for which the individual authors could be punished.[8] An *ad hoc* decision was obligatory in 1945 for such a declaration. Any other means of reprisal would have created the negative precedent in international law. The atrocities of the war demanded a declaration that the principles of international law considered these aggressions as a crime. So that thereafter no man could deny that the creation of war was an international crime for which punitive measures could be exercised against the individual instigator.[9]

As Justice Jackson has often stated, the greatest legal obstacle for the Tribunal was the lack of any established precedent for judicial action.[10] The Tribunal shouldered a double burden. They had the responsibility of not only trying the defendants, but also had to justify within the sphere of international law their right to do so. The Chief American Prosecutor stated it this way: While "Courts try cases . . . cases also try courts."[11] The latter part of the Tribunal's burden was of more significance to the development of international law than the former. It presented the Tribunal with the issue of whether or not the community of nations and its legal system was capable of coping with the problems of war judicially or did this legal system only permit political reprisal? If the latter is true, aggressive war is not a crime, no matter how atrocious its effects may be. It is, therefore, of the utmost importance that the charter of Nuremberg and its Tribunal be founded on principles of international law and not merely on the emotion of vengeance and the ideals of morality.

THE INTERNATIONAL MILITARY TRIBUNAL

Jurisdiction

> "Jurisdiction" . . . means the capacity of a state under international law to prescribe or to enforce rules of law. . . .
>
> Jurisdiction to "prescribe" refers to the capacity of a state under international law to make rules of law. . . . Jurisdiction to

7. 1 NAZI CONSPIRACY AND AGGRESSION, V, United States Government Printing Office (1946).

8. *Supra* note 1.

9. *Justice Jackson's Final Report to the President Concerning the Nurnberg War Crimes Trial*, 20 TEMP. L.Q. 338 (1947).

10. *Ibid.*

11. Jackson, *The Rule of Law Among Nations*, 19 TEMP. L.Q. 135, 140 (1945).

> "enforce" refers to the capacity of a state under international law to enforce a rule of law. . . .[12]

The Charter of the International Military Tribunal derived its jurisdiction to prescribe from the Kellog-Briand Pact of 1928.[13] This treaty established that war was no longer a legal recourse for effectuating national policy. Prior to the Kellog-Briand Pact, war, for whatever purpose, was a legal right of nations. There were no distinctions between just or unjust wars, or between aggressive and defensive wars. All war was legal. The Kellog-Briand Pact condemned war as an instrumentality of national policy and, as a result, outlawed all war. It did not, however, declare war to be a crime. The effect of the Kellog-Briand Pact was to give to the nations of the world the authority or the jurisdiction to effectuate the dictates of its provisions. The Kellog-Briand Pact was the excavation into which the foundation of the International Military Tribunal could be poured. Without the Kellog-Briand Pact the Charter of the International Military Tribunal lacked jurisdiction to prescribe.

The second phase in establishing legitimate jurisdiction is to acquire jurisdiction to "enforce." Prior to 1945 no nation or group of nations was in a position capable of enforcing the law as it was manifested in the Charter. At the end of World War II the Allies, as victors, were, for the first time in the history of mankind, capable of declaring aggressive war to be a crime and at the same time able to take punitive sanctions against the instigators. Prior to 1928 any declaration of this nature would have lacked jurisdiction to prescribe such a mandate. From 1928 to the end of World War II no nation could have enforced its manifestation. It was the combination of the two which finally gave the Allies jurisdiction.

There are two separate legal bases for the Charter's jurisdiction to enforce: (1) as occupiers of Germany; (2) by including the crimes of the Charter under the universality principle of jurisdiction. Both of these became possible because the Allies were victorious.

> The making of the charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. . . .
>
> The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what

12. A.L.I., RESTATEMENT OF THE LAW, THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 6 (1962).

13. 46 Stat. 2343 (1929).

> any one of them might have done singly; for it is not to be doubted that any nation has the right to set up special courts to administer law.[14]

By the Declaration of Berlin on June 5, 1945, the Allied Powers annexed Germany "until such time as they thought fit to recognize an independent German government."[15] The Occupation forces were, as a result, the legitimate government of the German state and, as such, represented the sovereign power of Germany. As legitimate sovereigns of Germany, the Allies displaced all of the municipal law of the Nazi regime which was repugnant to the standards of law, justice and individual liberty.

> It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, . . . all laws, ordinances, and regulations in conflict with the political character, institutions and constitution of the new government are at once displaced.[16]

> From the very beginning of its history this Court has recognized and applied that law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.[17]

> An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.[18]

In both their capacities as military conquerors and as the temporary German government, the Allies, according to the holding of *Ex parte Quirin*, could bring to justice all individuals who had violated the international customs of war.

According to the *Lotus*[19] case, a state can extend its criminal jurisdic-

14. *International Military Tribunal (Nuremberg) Judgement and Sentences* (1946) as reported in, 41 AM. J. INT'L L. 172, 216 (1947).

15. Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38, 50 (1947).

16. Vilas v. City of Manila, 220 U.S. 345, 357 (1911); *affirming* Alverz y Sarchez v. United States, 216 U.S. 167 (1910), and C., R.I. & P. Ry. Co. v. McGlinn, 114 U.S. 542 (1884).

17. *Ex parte* Quirin, 317 U.S. 1, 27 (1942).

18. *Id.* at 28.

19. The S. S. Lotus P.C.I.J., PUBLICATIONS, Ser. A, No. 10, 2 World Court Reports 20 (1927).

tion to include any violation unless some rule of international law forbids it. The charter adopted the universality principle of criminal jurisdiction which had been extensively utilized previously for the crime of piracy. Prior to 1945, some states had also adopted this doctrine for all offenses which threatened their internal security.[20] By applying the international standard established in the *Lotus* case, the Charter was legally justified in adopting the universality principle in order to establish criminal jurisdiction over the defendants.

THE TRIBUNAL'S PERSONALITY

The Charter which created the Tribunal was an executive agreement entered into by President Truman in his capacity as Commander-in-Chief of the Armed Forces, and the other Allied Powers, as part of the War effort. Traditionally the trial of war crimes has been placed in the hands of military authorities. The Tribunal at Nuremberg, contrary to this tradition, was composed of civilian jurists who were appointed by their respective governments. Because of this some writers have rejected the legality of the Tribunal.[21] In answer to this objection, Major Willard B. Cowles of the Judge Advocate General's Corps, Department of the United States Army said, "A military Tribunal with mixed inter-allied personnel may properly be established by the commanding general of the cooperating cobelligerent forces," and, "In the United States, the personnel of military commissions have usually been commissioned officers; there is, however, no legal objection to the use of qualified civilians."[22]

Another criticism of the Charter frequently raised is, that while labeled "an international tribunal," it was in reality an interallied tribunal. Many believe that these trials should have been postponed until such time as the International Court of Justice was prepared to take jurisdiction. Originally, the Charter was an interallied treaty creating obligations only in the parties,[23] and simultaneously endowing the entire community of nations with the right of endorsement.[24] It was a declaration by the Allies for the entire international community to reaffirm the principles of international law recorded in the Charter. The Charter was subsequently adopted and sanctioned by nineteen other nations[25] and on

20. *Supra* note 15, at 49.

21. *Supra* note 5.

22. Cowles, *Trial of War Crimes by Military Tribunals*, 30 A.B.A.J. 330, 331 (1944).

23. A.L.I., RESTATEMENT OF THE LAW, THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 142 (1962).

24. *Ibid.*

25. Denmark, Norway, Belgium, Luxembourg, The Netherlands, Poland, Czechoslovakia, Yugoslavia, Greece, Australia, New Zealand, India, Ethiopia, Honduras, Panama, Haiti, Paraguay, Uruguay, and Venezuela.

December 11, 1946, by the United Nations in resolution No. 95(1) which declared:

> The General Assembly, recognizing the obligations laid upon it by Article 13 . . . Taking note of the Law of the Charter of the Nuremberg Tribunal of August 8, 1945, for the prosecution and punishment of the major war criminals; (1) reaffirms the principles of the international law recognized by the Charter of the Nuremberg Tribunal (of August 8, 1945), and the Judgment of the Tribunal; (2) Directs the Assembly Committee on the Codification of International Law created by the Assembly's resolution . . . to treat as a matter of primary importance the formulation of the principles of the Charter of the Nuremberg Tribunal and the Tribunal's Judgment in the context of a general codification of offences against the peace and security of mankind or in an International Criminal Code.[26]

Through the endorsement of the Charter by the international community, the Allies became the agent of all nations by ratification. As a result, the Tribunal abandoned its interallied personality and acquired the legal status of an international tribunal.

NUREMBERG'S LAW

Due to the lack of precedent, the law of the Charter and the Tribunal needed explicit definition and elaborate justification.

> (a) 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; . . .[27]

Legally, this aspect of the Charter is considered by many to be the most objectionable; for it not only declared aggressive war a crime, but it also declared that it was one for which the Nazis could be punished. The critics believe that it was, therefore, an *ex post facto* declaration violating the principles of *crimen sine lege* and *nulla poena sine lege praevia*. The issue is whether it was *ex post facto* law, and if it was, was it illegal?

One source of international law is treaties. Prior to the outbreak of World War II many nations of the world had bound themselves to treaties for the purpose of eliminating war in the future. Germany and the other Axis Powers are not excluded from this group. The Kellog-

26. *Supra* note 4, at 15.

27. Charter of the International Military Tribunal, 59 Stat. 1546, 1547 (Oct. 8, 1945).

Briand Pact of 1928[28] was signed by all the Axis Powers. Its Preamble states:

> Deeply sensible of their solemn duty to promote the welfare of mankind; . . . persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples should be perpetuated; . . . convinced that all changes in their relations with one another should be sought only by pacific means . . . thus uniting civilized nations of the world in a common renunciation of war as an instrument of their national policy; . . .

In the text of the Treaty:

> Article I: The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations to one another.
>
> Article II: The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.[29]

In the Judgment of the International Military Tribunal, Secretary of State Stimson is quoted as having said in 1932:

> War between nations was renounced by the signatories of the Kellog-Briand Treaty. This means that it has become throughout practically the entire world . . . an illegal thing. Hereafter, when nations engage in armed conflict, either one or both of them must be termed violators of this general treaty law. . . . We denounce them as law breakers.[30]

Walter Lippman said "Unless this pact (Kellog-Briand) altered the legal status of wars of aggression, it has no meaning at all and comes close to being an act of deception."[31]

Scelle stated: "La doctrine est généralement d'accord pour admettre que le recours à la guerre d'aggression constitue un crime international."[32]

The Hague Convention of 1899[33] and 1907 and the Geneva Conven-

28. *Supra* note 13.

29. *Ibid.*

30. *Judgement of the International Military Tribunal Against Major Nazi War Criminals and Criminal Organizations*, 20 TEMP. L.Q. 168, 212 (1947).

31. Lippmann, *An Historic State Paper*, 19 TEMP. L.Q. 157, 158 (1945).

32. SCELLE, PRÉCIS DE DROIT DES GENS, Deuxieme Partie, 47 (1934).

33. 32 Stat. 1803 (1902); 36 Stat. 2277 (1910).

tion of 1927,[34] entered prior to the Kellog-Briand Pact, recognized the fact that the possibility of future war did exist and agreed to some rules of conduct for that eventuality. This, however, in no way affects the conclusion that aggressive war is a crime, but merely recognizes that wars will occur.

In the League of Nations it was expressed:

> The Assembly,
> Recognizing the solidarity which unites the community of nations; Being inspired by a firm desire for the maintenance of general peace; Being convinced that a war of aggression can never serve as a means of settling international disputes and is, in consequence, an international crime. . . .[35]

As a result of the Kellog-Briand Pact and the opinions of international dignitaries and scholars, the jurisdiction to prescribe the law of Nuremberg was developed. Although aggressive war had not yet been transmuted into a crime, the period between the wars furnished a fertile field for this occurrence. As a consequence of Kellog and the international consensus which was derived from it, aggressive war came to be considered by custom an international crime.[36]

Custom of states is another of the long-recognized sources of international law. Many longstanding principles of international law were developed out of customs recognized and adhered to by the community of nations.

> International law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties or agreements between nations and of accepted customs. But every custom has its origin in some single act, and every agreement has to be initiated by the action of some state. Unless we are prepared to abandon every principle of growth for International Law, we cannot deny that our day has its right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law. International Law is not capable of development by legislation, for there is no continuously sitting international legislature. Innovations and revisions in International Law are brought about by the action of governments designed to meet a change in circumstances. It grows, as did the Common-law, through decisions reached from time to time in adapting settled principles to new situations.[37]

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34. 47 Stat. 2021 (1932).

35. *Records of the Eighth Ordinary Session of the Assembly*, LEAGUE OF NATIONS OFFICIAL JOURNAL 155 (Special Supp. No. 54, 1927).

36. *Supra* note 3.

37. Report of June 7, 1945 from Justice Robert H. Jackson, Chief of Counsel for the

Out of the custom which originated in the Kellog-Briand Pact the element of illegality was attached to the act of war. In order for it to constitute a crime the element of punishment had to be suffixed to the illegality of the act. By 1945 this was possible. The Charter was the culmination of the law commenced in the Kellog-Briand Pact. It was a declaration of what the law had germinated into since the termination of World War I. The legal evolution had advanced to a state wherein it was possible to fulfill the dreams of the signatories of the Kellog-Briand Pact by 1945. Out of the war itself came the opportunity to declare war a crime. Through the instrumentality of the *ad hoc* decision at Nuremberg the seeds planted in 1928 sprouted into full blossom so as to inform the entire community of nations that aggressive war is a crime and was so since the Kellog-Briand Pact. The law of the Charter did not become law in 1945, for it had been law since 1928. An analogous circumstance occurs every time a common law court renders an *ad hoc* decision that an act, which had heretofore not been prosecuted, was a crime. Few would argue that this would be *ex post facto*.[38] The Charter did no more than this.[39]

However, even if it is conceded that the law of the Charter was *ex post facto*,

> There is no rule of general customary international law forbidding the enactment of norms with retroactive force so called *ex post facto* laws. But . . . it is a principle of criminal law recognized by most of the civilized nations that no punishment must be attached to an act which was not legally punishable at the moment of its performance.[40]

The doctrine of *ex post facto* is intended as a *rule of justice* to protect against retroactive legislation. If, however, no injustice is in fact committed, there is no violation of the principle.[41] It therefore becomes necessary to determine if in fact an injustice has been perpetrated. On numerous occasions during the war, both President Roosevelt and Prime Minister Churchill had warned those on trial that they would be punished for their acts.[42] On January 13, 1942, the governments of Belgium, Czechoslovakia, Free France, Greece, Luxembourg, Netherlands, Norway, Poland and Yugoslavia declared that the instigators of the war would be tried and punished as criminals for their acts.[43] There is no

United States in the Prosecution of Axis War Criminals, reprinted in, 39 AM. J. INT'L L. 178, 187 (Supp. 1945).

38. Stimson, *The Nuremberg Trial: Landmark in Law*, 25 FOREIGN AFFAIRS 179 (1947).

39. *Supra* note 3.

40. Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CALIF. L. REV. 530, 543 (1943).

41. Biddle, *The Nurnberg Trial*, 33 VA. L. REV. 679 (1947).

42. *Supra* note 4, at 3.

43. *Ibid.*

doubt, therefore, that the defendants had received formal notice that their activities were criminal prior to the enactment of the Charter. The elements of adequate forewarning and certainty and the other basic requirements of fairness and due process were thus present prior to the declaration of the Charter.[44] Justice demands no more than basic fairness and due process. One can thus conclude that no rule of justice was violated by the Charter and even if the Charter was *ex post facto* it violated no principle of international law when it declared aggressive war to be an international crime.

> (b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;[45]
>
> The principle that the individual soldier who commits acts in violation of the laws of war, when these acts are at the same time offenses against the general criminal law, should be liable to trial and punishment, not only by the courts of his own State, but also by the Courts of the injured adversary in case he falls into the hands of the authorities thereof, has long been maintained. . . .[46]

On many occasions in the past, war crimes have been prosecuted.[47] Several noted examples are the trial and execution of Henry Wirz for the crime of killing Union prisoners of war during the American Civil War,[48] and the imprisonment of a handful of German officers after the First World War.[49] For some time prior to the declaration in the Charter the customs of war had been established. It is beyond the scope of this paper to compare the established customs with the enumerated crimes of the Charter, although they do correspond.

Another source of international law for the punishment of war crimes can be found in the many treaties that were entered into prior to the outbreak of hostilities in 1939. The most universally known of these are the Hague Agreements of 1899 and 1907[50] and the Geneva Agreement of 1927.[51]

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44. Snyder, *It's Not Law—War Guilt Trials*, 38 KY. L.J. 81 (1949).
45. *Supra* note 27.
46. GARNER, 2 INTERNATIONAL LAW AND THE WORLD WAR 72 (1920).
47. *Supra* note 17; and, *In Re* Yamashita, 327 U.S. 1 (1946).
48. *Op. cit. supra* note 4, at 26.
49. *Id.* at 30.
50. *Supra* note 33.
51. *Supra* note 34.

During the war, the United States Supreme Court[52] held that a belligerent state (The United States) could punish combatants for violations of the customs of war as part of the law of nations. The Court based its decision on the Customs of War and not on treaties. There was, therefore, little doubt that war crimes were properly indictable under international law.

> (c) CRIMES AGAINST HUMANITY: namely, murder extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[53]

"After the beginning of the war . . . these inhumane acts were held to have been committed in execution of the war, and were therefore crimes against humanity."[54] In reality, therefore, the Tribunal did not enforce this clause of the Charter, but instead incorporated Crimes Against Humanity into Crimes Against War. Thus, there is no real international legal problem as to this clause of the Charter.[55] Those acts committed prior to 1939 were not at issue.[56] This did not deter the Tribunal because most of the atrocities against humanity were committed during the war, i.e., genocide, pillage, murder of prisoners, and other similar acts.

Responsibility

Article 6.

> The Tribunal . . . shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations. . . .

Article 7

> The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8.

> The fact the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility. . . .[57]

52. *Supra* note 17.
53. *Supra* note 27.
54. *Supra* note 41, at 694.
55. *Ibid.*
56. *Ibid.*
57. *Supra* note 27.

Generally, international law does not punish the individual criminal. Rather, it imposes sanctions on the violating state and the individual subjects of the state as a collective body. Thus, there is a collective responsibility and not individual responsibility.[58] There are, however, some noted examples of crimes carrying individual responsibility. Some of these crimes are piracy, breach of a blockade, carriage of contraband, and illegitimate warfare.[59]

One of the main obstructions for imposing individual responsibility has been the act of state doctrine. Many eminent thinkers believe the charter violated this doctrine. In its traditional formulation, the doctrine precludes the court of one nation from inquiring into the validity of the public acts of another sovereign power.[60] This includes acts of individuals committed under the authority of the sovereign state which are imputed to the sovereign.[61] The ultimate result of the application of the act of state doctrine is the relinquishment of individual responsibility in lieu of state or collective responsibility. In the field of international criminal law, this precludes the utilization of judicially enforced punishment on either the individual criminal or upon the nation to whom he has imputed responsibility. Any international judicial sanction against a state by another state would be contrary to the principles of sovereignty.[62]

In *The Schooner Exchange v. McFaddon and Others*,[63] Justice Marshall, speaking for the Court, held that the act of state doctrine exists by virtue of an implied license of recognition of the acts of a state by the other states in the community of nations. And, while not explicitly stating it, he inferred that the doctrine has no application in wartime. His understanding of the doctrine was that it existed by mere implication and, as a result, could be dissolved by a contrary expression by a recognizing state. War, by its very nature, would destroy any implication of consent and, as a result, the doctrine is not applicable during this period. The reasonable inference derived from the act of war is the absence of any consensual relationship between the two nations involved. For example, if states A and B are at war and C, the agent of A, confiscates a private vessel from a national of state B, can it be reasonably inferred that state B without a contrary declaration recognizes this as a legitimate exercise of the sovereign power of state A? There is little doubt that in peacetime the act of state doctrine would apply in such a situation, but in times of war it is not only doubtful, and at most ideal-

58. *Supra* note 40, at 533.

59. *Ibid.*

60. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

61. Glueck, *The Nuernberg Trial and Aggressive War*, 59 HARV. L. REV. 396 (1946).

62. Oetgen v. Central Leather Co., 246 U.S. 297 (1918); Underhill v. Hernandez, 168 U.S. 250 (1897).

63. 7 Cranch 116 (1812).

istic, to infer that state B would consent to the acts of the state to which she was presently engaged with in armed conflict.

Many international authorities feel that the act of state doctrine has no application to acts which violate international law.[64] The state, like a corporation, is a fictitious entity, able to act only through its agents. It is thus argued that the agents of a state's scope of authority extends only to acts within international law and that acts outside the law are *ultra vires* of the state and, therefore, the act of state doctrine has no application. Courts can thus pierce the sovereign veil of the state and attach individual responsibility to the agents of the state in the same manner that agents of corporations are responsible.

The weight of the recent *Sabbatino*[65] case is to the contrary of this position. It can be argued, however, in criminal cases that there is a presumption that "the sovereign" will not "avow himself an accomplice or abettor of his subject's crime and draw upon his community the calamities of foreign war."[66]

> [It] is an universal principle of jurisprudence that in cases otherwise doubtful the rule of interpretation which gives the most reasonable results to be applied; and the law of nations is as much entitled to the benefit of that principle as any other kind of law.[67]

Using the reasonable interpretation and that which will lend a greater hand to the work of justice, the dilemma of whether or not the act of state doctrine applies to crimes against peace and crimes against war, it must be concluded that it does not and that, in fact, it never has applied and that nonapplication of the doctrine was not an *ex post facto* declaration.

Aside from the act of state doctrine, there still exists the issue of whether or not the sanctions of international law are enforceable against individuals as well as states. To a great degree the answer to this problem is to be determined by the nature of the crime involved.[68] One noted example, as has been shown above, where international law is applicable to the individual is the crime of piracy which utilizes the universality principle of jurisdiction. The defendant indicted for that crime loses the protection of his own state[69] by his act because of the nature of the

64. *Supra* note 61; Biddle, *supra* note 41; 1 WHARTON, A DIGEST OF INTERNATIONAL LAW OF THE UNITED STATES 67. *Contra*, Banco Nacional de Cuba v. Sabbatino, *supra* note 60.

65. 376 U.S. 398 (1964).

66. 1 BLACKSTONE, COMMENTARIES * 68.

67. Pollock, *The Sources of International Law*, 2 COLUM. L. REV. 511, 514 (1902).

68. *Supra* note 40.

69. OPPENHEIM, 1 INTERNATIONAL LAW § 272 (8th ed. 1962).

crime which threatens the security of the open seas to all nations. The same reasoning can be applied to the crimes of the Charter.

Ex parte Quirin has often been used by the advocates of the Charter as evidence of individual responsibility for international war crimes. The only difficulty with the utilization of this case as precedent is that it is distinguishable from the situation which confronted the Nuremberg Tribunal by the fact that in *Quirin* the defendants were indicted for a municipal crime and not an international one. There are, however, some noted examples where national courts have punished individuals for international crimes.[70] There appears to be little difficulty in applying international law to individuals through the facility of incorporation of international law into municipal law by the national courts. But whether or not international law, standing on its own, can be enforced against individuals is still an open question. Much of this controversy evolves on the solidification of the role that international law partakes in its relationship to municipal law. At present there are many schools of thought on this controversy, three of which are: (1) they are exclusive of each other; (2) international law must be incorporated into municipal law; (3) international law is superior to municipal law.

The adaptation of the third school of thought would facilitate a justification for the Charter. This, however, does not appear to be necessary. Placement of individual responsibility for the crimes of the Charter can be categorized with those crimes, like piracy, which threaten the security of the community of nations. In fact, the crimes of the Charter pose a greater threat than piracy. The perpetration of these crimes, therefore, demands individual responsibility.

NUREMBERG'S ROLE IN INTERNATIONAL LAW

International law is still in the developmental stage. Out of necessity, it must develop by meeting problems as they arise on an *ad hoc* basis; otherwise, that which we call international law can never mature into a system of law capable of keeping order in the community of nations. There is no international legislature, nor is there, at present, a need for one.[71] In our ever-changing world, there would be little value in legislating against future problems which may never materialize. On the other hand, when the proper time and the proper case present themselves, international courts should approach the problem on an *ad hoc* basis.

A refusal to act for lack of established precedent under these circumstances would stagnate the development of international law and in due course of time mythologize international law. Like all law, international

70. See, Republica v. DeLongchamps, 1 Dall. 111 (1784).

71. Stone, *On the Vocation of the International Law Commission*, 57 COLUM. L. REV. 16 (1957).

law must meet the realities of its time in order to have any value to man. In order to meet the realities of its time, it must continually readjust its principles to meet the needs of society.

The Twentieth Century is confronted with a constant struggle between the individual state's demand for sovereignty and the need for a world community of nations. International law, to a great degree, is weakened by the constant pressure of this struggle. It is the intermediary between these two diverse realities; being the servant of two masters each of whom is trying to be independent of the other but each of whom is dependent on the other for its existence. This dilemma accentuates the need for an international legal system which is capable of adjusting at the proper time in order to meet the demands of both masters.

As international law has not yet reached maturity, it is too early for it to deprive itself of a realistic existence by hard and unmaneuverable principles of law. President Wilson, who was quoted by Justice Jackson, said in 1919:

> International law . . . has perhaps sometimes been a little too much thought out in the closet. International law has—may I say it without offense?—been handled too exclusively by lawyers. If I were to add to his statement, I should say, It has been handled—and not from any fault of their own—by a too exclusive group of lawyers.[72]

The problem is that in the past international law has been "bogged down" with sophisticated legalistic principles which have outlived their justification. As a result, international law has been slow in developing. If it is to mature beyond its present state, it must be founded on the principles of reason and justice so that it can satisfy the demands of the realistic world in which it exists.

The law of Nuremberg is a realistic approach to international law based on principles of reason and justice. The Charter was a unification of the common and civil law traditions[73] manifesting the legal position of the community of nations. It denied the validity of certain outmoded principles of law and created, in lieu of them, a new order of international law furthering reason and justice.[74] Under this new order of international law, the brute realities of a situation can be faced by applying that law which will attain the most effective solution for the sake of justice. The effect of this new order will be a readjustment of international law so that it can effectively cope with the problems of the Twentieth Century and the ensuing centuries.

72. Jackson, *The Rule of Law Among Nations*, 19 TEMP. L.Q. 135, 137 (1945).

73. Jackson, *Nuremberg in Retrospect*, 35 A.B.A.J. 813 (1949).

74. Ehard, *The Nuremberg Trial Against Major War Criminals and International Law*, 43 AM. J. INT'L L. 223 (1949).

At the dawn of the Twentieth Century, four immovable principles obstructed the development of international law:[75] (1) state sovereignty has no limitations; (2) all war is legal; (3) individual instigators of war are immune from responsibilities by the act of state doctrine; (4) obedience to orders is a defense to individual responsibility. Each of these principles was either modified or invalidated by the Charter and the Tribunal. Aggressive war is no longer a necessary evil. As a result of the Charter and the Tribunal, it is an international crime for which the individual authors are held responsible. The law of Nuremberg is a denial of those principles of law which contradict the norms of reason and justice, and the creation of a new order which is capable of confirmation and adjustment to those norms for all times.

F. Regan Nerone

75. *Supra* note 73.