University of Baltimore Law Forum

Volume 8
Number 2 *February, 1978*

Article 18

2-1978

Nuremberg Trials and International Law

Mary Jean Lopardo

Nuremberg Trials And International Law

by Mary Jean Lopardo

The outcome of the Nuremberg trials was a judgment which imposed criminal sanctions against specific individuals who were held personally responsible for planning and waging the Nazi war of aggression. This historic, judicial proceeding was conceived in London, England on August 8, 1945 when the United States, Great Britain, France and the Soviet Union established the International Military Tribunal for the trial and punishment of the major Axis war criminals. These four Allied powers provided a Charter which defined the constitutional and jurisdictional powers of the International Military Tribunal and the laws and procedures it was to follow during the Nuremberg trials.

Between November 20, 1945 and October 1, 1946, twenty-two Nazi war criminals were tried at Nuremberg for the following offenses as outlined in Article 6 of the Charter of the International Military Tribunal:

> (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:
>
> (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;
>
> (c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crimes within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.
> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Of the twenty-two Nazi defendants, Schacht, von Papen and Fritzsche were found not guilty on any counts; Hess, Funk, Doenitz, Raeder, von Scherach, Speer and von Neurath received prison terms ranging from ten years to life; Goering, von Ribbentrop, Keitel, Kaltenbrunner, Rosenberg, Frank, Frick, Streicher, Saukel, Jodl, Bormann and Seyes-Inquart were sentenced to death by hanging. Although only twenty-two Nazis were tried with but twelve sentenced to death, the judgment at Nuremberg exercised a tremendous impact, not only in serving as a catharsis for the world conscience, but also in setting unprecedented landmarks in international law.

The Nuremberg arena should be viewed as a milestone in the development of international law since there existed no judicial precedent for the creation of an International Military Tribunal. Also, there were no legislative guidelines mandating such action because there is no international legislative body. The innovative concepts of international law springing from the Nuremberg incident were derived basically from the sources governing all international legal principles, namely, written treaties, agreements and conventions such as the Hague Conventions of 1899 and 1907, the Kellogg-Briand Pact of 1928, the Geneva Prisoner of War, Red Cross and Protection of Civilian Conventions of 1929 and 1949; however, all of these treaties state general principles on the rules of war and remain silent as to the means of enforcement and proscribed penalties. Secondly, prohibitions common to the vast majority of penal codes employed in civilized States were utilized. Thirdly, these sources were supplemented by customary or common international legal concepts governing humanitarian views of warfare.

In essence, the Charter of the International Military Tribunal and the ensuing judgment at Nuremberg set the revolutionary precedent that a violation of international legal principles can be an international crime, even when no specific treaty provisions exist precisely defining the crime and sanctions to be applied. The International Military Tribunal greatly expanded international law by its final affirmation that individuals could be held criminally responsible for their roles in the planning and waging of a war of aggression. This result of the Nuremberg trials so impressed the United Nations that on December 11, 1946 the General Assembly affirmed a resolution officially recognizing the principles of international law as enumerated by the Charter of the International Military Tribunal and the Nuremberg judgment. Thus, the judgment at Nuremberg clarified the United Nations position for the future that international law does prohibit aggressive warfare and that a breach of this international concept can lead to serious sanctions against individual offenders.

* * *

The Nuremberg trials have been both extolled as a milestone in the development of international law and vehemently criticized as a travesty of justice. This discrepancy of opinion in assessing the principles of international justice espoused by the Nuremberg tribunal was due to the clash between radically opposed political traditions debated before and during the Nuremberg trials.

On the one hand, there existed the belief that not all is fair in war and that there is no justification for cruelty. The ruthless torture, rapine, massacres, enslavements and calculated executions committed by the Nazi henchmen in their quest for world dominance defied the laws of legitimate warfare. The victims of Nazi bestiality cried out for retribution and in

order to reestablish world law and order, justice through law was needed to punish individual malefactors for their heinous crimes against humanity. The general consensus among the major Allied Powers was that in order to salvage our heritage of justice, war criminals had to be punished to guard against future war atrocities.

On the other hand, those who opposed the International Military Tribunal claimed that justice could not be served whenever the victor tried the vanquished. The advocates of this position viewed an international trial of war criminals as a mock-trial which would end in a blood bath for seeking vengeance.

Aside from these intense, emotional gut reactions lay the main issues. At bottom level, the debate centered around two major queries: 1) whether aggressive warfare could be classified as an international crime and 2) whether particular individuals involved in the planning and execution of such a war could be prosecuted for their acts? Five salient arguments were advanced in affirmation and in negation to the above disputed questions.

First, condemnation stemmed from the legal standpoint that there existed no judicial or legislative precedent in modern history for the creation of the International Military Tribunal. Those adamantly opposed to the tribunal and its Charter asserted that it was an ad hoc creation of the four victorious Allied Powers and as such, served as a source of new law.

Those who subscribed to the concepts of the International Military Tribunal adhered to the ideological view that "It is a universal principle of jurisprudence that in cases otherwise doubtful the rule or interpretation which gives the most reasonable results (is) to be applied; and the law of nations is as much entitled to the benefit of that principle as any other kind of law." In rebuttal, it was alleged that international law is not statutory in nature, but founded upon principles of reason and justice defined in terms of treaties and assurances, with most of its principles comprising customary, unwritten rules developed over the years and accepted among civilized States. It was further stressed that international law is not a static system but a progressive one, growing as the world grows. Thus, an acceptance of the opposition's antiquated reasoning would vitiate both reason and justice.

The argument encompassing customs and traditions that have been universally accepted was buttressed by natural law philosophers dating back through the ages. St. Augustine espoused some of the earliest views on peace and war by distinguishing between just and unjust wars. "To make war on your neighbors, and thence to proceed to others, and through mere lust of dominion to crush and subdue people who do you no harm, what else is this to be called than robbery on a grand scale?" According to Augustine, only wars fought in self-defense can be considered just and no other motive is a proper one for war since the ultimate aim of a just war is the peace which it should bring between warring States.

Augustine's theories were further elaborated on by St. Thomas Acquinas in his Summa Theologica. He stated three postulates necessary for a just war: first, proper and just authority of the ruler to wage the war, second, a just cause such as self-defense and third, that peace be the objective of the war. Acquinas also asserted that "custom has the force of a law, abolishes law and is the interpreter of law. Obviously, the diabolical Fuehrer did not share such lofty ideals as he shouted, "I shall shrink from nothing . . . No so called international law, no agreements will prevent me from making use of any advantage that offers." Hugo Grotius, referred to as the father of international law, defined just and unjust wars in the tradition of his Catholic predecessors. Grotius also declared that the only just cause for war is self-defense and that the only justification for war is to promote justice. He believed that right reason is the only basis for ascertaining the proper conduct of States in relation to their dealings with other States. "The dictate of right reason which points out that a given act because of its opposition to or conformity with man's rational nature, is either morally wrong or morally necessary, and accordingly forbidden or commanded by God, the author of nature." Thus, in accord with this mode of philisophical thought, the International Military Tribunal in its final judgment at Nuremberg reiterated these views by stating that waging an aggressive war was not only an international crime, but the supreme international crime.

Second, it was frequently objected that the International Military Tribunal was in fact dispensing ex-post facto or retroactive law. The rationale behind the prohibition against ex-post facto justice is that the offender is subject to arbitrary and capricious sanctions which are fundamentally unjust, since he had no prior notice that his actions would be deemed criminal in nature. The argument offered by the critics was that, "(With) no World-State there can be no world law; and because there is no world law, there can be no world crime. An act which is not a crime is not justifiable before a judicial tribunal." It was emphasized that in the absence of

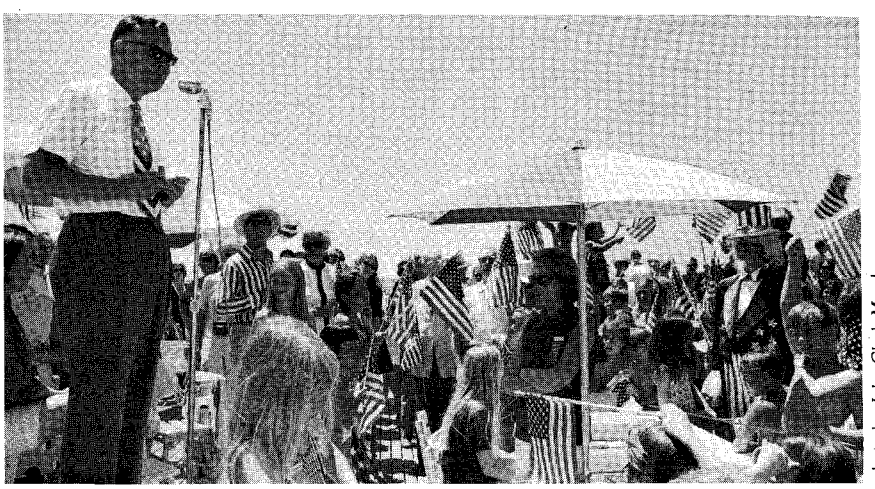

photo by John Clark Mayden

any specific, detailed codes of international penal law, prosecution of aggressive warfare as a criminal offense fell squarely within the ambit of ex-post facto justice. Republican Senator Robert A. Taft avowed this position when he asserted, "It is completely alien to the American tradition of law to prosecute men for criminal acts which were not declared to be so until long after the fact. The Nuremberg Trials will forever remain a blot on the escutcheon of American jurisprudence."

This contention was negated by the assertion that all those charged with war crimes had fair warning that wars of aggression, without the justification of self-defense, had universally been held contrary to international law via treaties, agreements and assurances among nations, even though specific sanctions had not been delineated. To hold otherwise would render nugatory such treaties as the Hague Conventions of 1899 and 1907, The Kellogg-Briand Pact of 1928, and the Geneva Prisoner of War, Red Cross and Protection of Civilian Conventions of 1929 and 1949. It was pointed out that it could hardly be unjust to punish those who waged an aggressive war in defiance of such treaties and assurances to keep peace, but that it would be unjust to allow such an injustice to go unpunished.

Particularly relied upon were the provisions of the Paris-Peace Pact of 1928, more commonly referred to as the Kellogg-Briand Pact, which bound sixty-three signatory nations, including Germany. This Pact stated, "the High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international disputes and renounce it as an instrument of national policy in their relation with one another." Although this Pact did not specify penalties for violations or assign personal liability to violators, a strict interpretation of this document implied that waging an aggressive war was in express violation of its mandates and outlawed as such. Consequently, it was cited repeatedly to reaffirm the argument that aggressive war was a recognized criminal concept in the international legal system.

Third, critics called attention to the fact that charging Germany with waging an aggressive, illegal war was a deprivation of her right of national sovereignty. Primary emphasis was placed on the recognized international principle that no State has jurisdiction over the acts of another State. This stance was propounded by all who accepted the jurisprudence of legal-positivism as evinced by the philosopher, John Austin. This school of thought maintained that it was inherently unjust for any State to subjectively assert that another State had waged an unjust war of aggression. "Positivism tends to assume that the Sovereign State is the only subject of international law; that it is under no obligation except those which it has accepted by valid agreement or clear acquiescence in a general custom; that such obligations are to be narrowly construed under the theory that consent to qualifications of sovereignty cannot be assumed; and that consequently concrete obligations cannot be implied even from formal consent to general principles."

This allegation was belied of its validity since the International Military Tribunal was not trying the State as such but only individual citizens of the State. Although it was conceded that Sovereign States could not be subjected to foreign jurisdiction without their consent, it was asserted that no such principle applied to individuals and that the International Military Tribunal exercised jurisdiction only over German citizens and not over the State of Germany. The Charter of the International Military Tribunal established its jurisdiction by reasoning that all States had authority to set up tribunals to try persons within their custody for war crimes if those crimes threatened its security. Since any of the party States to the Charter could exercise such jurisdiction on an individual basis, they could exercise it collectively as well. Furthermore, Germany had unconditionally surrendered to the Allies, giving these States the right to exercise power over her provided they applied the basic principles of justice which the victor must observe toward the occupants of an annexed State.

Fourth, opponents urged that the doctrine of Act of State cloaked State officials with immunity for crimes committed in the name of the State. The Act of State dogma prohibited the punishment of individuals for actions committed on the command or approval of the State, because such individuals' actions were imputed to the State. Therefore, the opposition held that responsibility for the actions of individuals rested upon the State as an entity, and not upon the individuals who were accorded the status of 'instruments' of the State.

This doctrine was renounced on the ground that it was a fallacious premise. The first argument advanced was that historically, heads of State and officials had been held criminally responsible for initiating and waging wars of aggression. Two notable examples were the cases of Frederick the Great and Napoleon Bonaparte. Frederick the Great was held to answer to the Imperial Crown under threat of banishment for his alleged breach of the peace by his invasion of Saxony. Also, Napoleon was outlawed as an enemy and disturber of the peace by the Imperial Crown of France and banished by decree to St. Helena. So, historically, heads of State had been held accountable for resorting to aggressive warfare.

An even more persuasive argument was that it was intrinsically unjust to punish a State as a whole for the wrongdoings of particular individuals, while allowing the malefactors to escape punishment due to an archaic, legalistic technicality. Also, in order to be effective, sanctions must operate against individuals and not States. Thus, realistically, the Act of State doctrine was not viable. The International Military Tribunal strongly believed that international law imposed duties upon individuals, as well as upon States. Therefore, when crimes against international law are committed by individuals, only their punishment can serve as a deterrent in the enforcement of international legal principles. Article 7 of the International Military Tribunal so stated, "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."

Fifth, those who condemned the Charter of the International Military Tribunal claimed the doctrine of Superior Orders was a complete defense to individual criminal responsibility; since those charged with war crimes were only acting in obedience to the orders of their military superiors. By definition, the Superior Orders doctrine shielded individuals from personal liability when they acted under the compulsion of a command given by their superiors. It was insisted that a rejection of the Superior Orders doctrine would wage havoc between the relations of a soldier or government official to his State. Anarchy might result if the individual placed his duty to the world community ahead of obedience to his government and set himself up as the judge of his obligations superior to the judgment of his government.

This final contention was dismissed as anathema to universal standards of humanitarian behavior which transcended the duty of obedience to national laws. As St. Thomas Acquinas stated, "Man is bound to obey secular rulers to the extent that the order of justice requires. If such rulers . . . command things to be done which are unjust, their subjects are not obliged to obey them. . .". The argument against the Superior Orders doctrine was one dictated by reason. The Nazi leaders had followed orders which were so barbarous and patently unlawful that they must or should have realized that their actions violated all humanitarian concepts ever espoused in international treaties or developed through custom on the laws of warfare. Clearly, whenever the illegality of an individual's actions are so blatant to him, an order from a superior cannot exculpate his guilt. Additionally, there was a large realm of freedom of choice open to the Nazi assassins; they did not obey due to justifiable fears of severe punishment or brutal execution. On the contrary, the voluminous records kept by the Nazi butchers, stating with meticulous precision their various tortures and slaughters, resembled progress reports. These incriminating documents were ostensibly kept by the Nazi leaders to prove their loyalty to Hitler. Undoubtedly these detailed manuscripts were preserved in order to insure future opportunities for political advancement once Germany won the war. To permit such calculated and well documented depravity to evade punishment because of the technical, outdated doctrine of Superior Orders was inherently unreasonable. An acknowledgment of the Superior Orders doctrine could only serve as an obstruction to world order and peace. As Holland, the prominent twentieth century author stated, "Individuals offending against the laws of war are liable to such punishment as is proscribed by the military code of the belligerent into whose hands they may fall, or, in default of such codes, then to such punishment as may be ordered in accordance with the laws and usages of war, by a military court." Accordingly, Article 8 of the Charter for the International Military Tribunal stated, "The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

* * *

Individual Nazi criminals were held responsible for their actions because, realistically, no good can result from the punishment of an entire State for its conduct during wartime. Such punishment of a State only sustains deep feelings of hostility, which later may be used by a ruthless leader to reunite the State in seeking revenge by waging aggressive war. This is precisely what occurred as a repercussion of the unsound reparation policies punishing Germany after World War I. In essence, the Germans felt the Treaty of Versailles was a cruel, humiliating peace and Hitler skillfully played upon this national grievance in appealing to the people's sympathies.

The psychological effect of such grisly mass extermination, impressed upon the world the need to firmly resolve the issue of aggressive warfare by setting a precedent cautioning future leaders that they would never again be able to transgress international law by such an unholy conquest. Retrospectively, the lack of strength of the League of Nations, exhibited by its failure to enforce international responsibilities, and the timidity of individual States to oppose outright aggression, leads to the inescapable conclusion that the only viable means of deterrence is the specific designation of aggressive warfare as a criminal, punishable offense against international law.

The Revision of The Maryland Annotated Code

by Walter R. Hayes, Jr.

After you safely wend your way to the sanctuary of clean air and free breathing on the west side of our library, your gaze will no doubt fall from time to time on the Md. Annotated Code. Next to these tomes, a new creature is breeding, shedding basic black for a brighter coat of maroon. No, this is not a case of reverse discrimination. What lies before you is the revised edition of the Annotated Code of Maryland.

Article III, section 17 of the Md. Constitution of 1851, required the legislature "to appoint 2 commissioners learned in the law, to revise and codify the laws of this state". From this decree was born the code of 1860.

In 1886 another bulk revision of the code was ordered by the legislature. This code was adopted by chapter 74, Acts of 1888 as the "Code of public laws and code of public local laws of this state, respectively, in lieu of and as substitute for all public general law and public local law of this state in force on the first Wednesday of January in the year 1888". It is this endeavor which is housed in the black volumes of the Annotated Code. It contains 101 articles, which are, according to the revisors' manual, "arranged alphabetically with little apparent effort