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Henry T. King Jr.

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ADDRESS

NUREMBERG AND SOVEREIGNTY*

*Henry T. King, Jr.***

IN THE MINDS OF MANY, including myself, we would have a more secure and peaceful world if there were limitations on national sovereignty that do not exist today. These would involve obligations of sovereign nations which would limit their freedom of action. They also would include nation-states not standing in the way of the direct application of international law to their nationals. This is the price we must pay for a more secure and peaceful world in which human rights are protected and individuals are held accountable for violations of international law.

After fifty years, we should evaluate how the Nuremberg proceeding dealt with the question of sovereignty and examine how this aspect of Nuremberg affects today's world.

The significance of Nuremberg was multilateral recognition (i.e., United States, U.S.S.R., France and the United Kingdom) of international human rights extending beyond the borders of individual countries. The Inter-American Commission on Human Rights and the European Court of

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** Henry T. King, Jr. is a graduate of Yale University and Yale Law School. Former U.S. Prosecutor at the Nuremberg Trials, former General Counsel of the U.S. Foreign Economic Aid Program, as well as former Chairman of the Section on International Law and Practice of the American Bar Association, Mr. King is currently serving as U.S. Chairman of the Joint American Bar Association, Canadian Bar Association, Barra Mexicana Working Group on the Settlement of International Disputes, whose recommendations for the settlement of disputes under the North American Free Trade Agreement were incorporated into the Agreement. He is U.S. Director of the Canada-United States Law Institute and Professor of Law at Case Western Reserve University School of Law where he teaches international arbitration. He is also Of Counsel to the law firm Squire, Sanders & Dempsey. Mr. King served as a member of the American Bar Association Task Force on War Crimes in the former Yugoslavia. He is a founding member of the Greater Cleveland International Lawyers Group and is a former President of the Cleveland World Trade Association. He has published over fifty articles on international law, including international business transactions, international arbitration, and Nuremberg-related topics.

Human Rights reflect the recognition of international human rights. It has been said that the European Court of Human Rights, which is at Strasbourg, France, is a direct outgrowth of Nuremberg.

Thus, Nuremberg penetrated the veil of national sovereignty to recognize individuals as having rights independent of nation-state recognition. Nuremberg held that these rights existed although the national sovereign, Germany, denied their existence. The primary Nuremberg charter and tribunal covered the existence of these rights during wartime Germany, and Control Council Law #10, which governed the subsequent proceedings, extended their existence to prewar Germany as well. The United Nations Genocide Convention of 1948 was designed to secure adherence to the international human rights recognized at Nuremberg by a worldwide network of nations. The major powers of the world have adhered to this convention, although often with reservations.

Enforcement of international human rights through the crimes against humanity court at Nuremberg was the first international adjudication of human rights extending beyond the reach of a national sovereign. A follow-up to this was the European Court of Human Rights which was founded on the premise that there are international human rights beyond the reach of national sovereigns. The Inter-American Commission on Human Rights is based on the same premise, but is weaker enforcement-wise in its rulings. Finally, the Genocide Convention is based on the premise that there are international human rights that are inviolable by national sovereigns. Through the Convention, nations pledged to honor these rights, although the United States and other countries have adopted the Convention with reservations. Nevertheless, the Genocide Convention is also weak with respect to enforcement.

EFFECT OF NUREMBERG ON INDIVIDUALS

The foregoing relates to the impact of Nuremberg on human rights. There were also international obligations of individuals which were the focus of Nuremberg. For example, Nuremberg held individuals responsible for planning, preparing, and carrying out wars of aggression. Nuremberg denied the act of state defense which would have justified such actions on grounds that they were within Nazi Germany's prerogative as a sovereign state. Nuremberg said that the individuals on trial were obligated not to plan and carry out wars of aggression despite authorization by the German state.

Thus, Nuremberg held that individuals had obligations under international law which they could not ignore despite nation-state sanction of the actions in question. For example, Nuremberg held Field Marshall Keitel, Chief of Staff of the High Command of the German Armed Forces, guilty of aggressive war under international law. Whether Keitel's actions

were legal under German law was of no account. There was a higher law — international law — applicable to his behavior. The court held that what Keitel did violated international law, and that superior orders sanctioned by Adolf Hitler, Chief of the Third Reich, were not a defense.

Moreover, Nuremberg held that, in the conduct of warfare, individuals had obligations under this higher law. It governed their behavior in the conduct of war and made them responsible for their actions. This law as applied at Nuremberg has been incorporated into the Hague and Geneva Conventions. It is important to note that army field manuals of the major powers reflect many of the Nuremberg principles. I cite for example the rules governing hostage taking.

You will hear more today about the Yugoslav and Rwandan tribunals as an extension of the Nuremberg principles and their impact on sovereignty.

EFFECT OF NUREMBERG ON STATE SOVEREIGNTY

Nuremberg impacted sovereignty in two ways. The crimes against humanity count reached behind the curtain of state sovereignty and held that individuals have international human rights which state action cannot jeopardize and that state authorization provides no cover for individuals who violate the human rights of others. The violations committed by these individuals are punishable under international law.

Nuremberg also held that individuals have obligations under international law which are over and above the obligations to the sovereign state of Germany. This is true of the crimes against peace and war crimes counts at Nuremberg. The fact that what they did was not prohibited under German law did not exonerate them from responsibility under international law. In short, it held that individuals have obligations under international law which might be contrary to state policy and that individuals can be punished internationally for violating these obligations.

Where do we stand today in the inheritance of Nuremberg? The Nuremberg trial was meant to establish emphatically and definitively that the rules of public international law should and do apply to individuals. As the Nuremberg tribunal held, "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." Nuremberg also reflected the conviction that the protection of human rights was too momentous a matter to be left entirely to nation states.

Convinced that the lessons of Nuremberg must be memorialized and that human rights should be guaranteed by explicit international law provisions, the General Assembly of the United Nations in 1948 voted for the precepts of the Universal Declaration of Human Rights. The Declara-

tion sets forth many rights. For example, it includes rights to life, liberty, and security of person, to "equal protection of the law," to "fair trials," to ownership of property, and to "freedom of thought, conscience and religion." The Universal Declaration is not binding, but as President Reagan noted in 1983, "the Universal Declaration remains an international standard against which the human rights practices of governments can be measured." Some feel that, by now, it is part of customary international law.

Over and above the Universal Declaration, the United Nations has drafted more than thirty human rights conventions and issued as many human rights declarations and resolutions. In 1948, the Genocide Convention was proposed under United Nations auspices for adoption by individual nations. The Convention adopted the basic thrust of the crimes against humanity count at Nuremberg and made it applicable in peacetime as well as wartime. Most major nations of the world have adhered to the Convention, but many with reservations. The Convention has no effective means of enforcement, so its effect is primarily symbolic.

EUROPEAN HUMAN RIGHTS LAW

The founders of European human rights were, of course, in part motivated by the reminder of Nazi Germany. The European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in Rome on November 4, 1950. As of December 1992, some twenty-seven European countries had ratified or subsequently accepted the convention. The substantive rights protected in many instances parallel those recognized at Nuremberg, such as the right "not to be subjected to torture or to inhumane or degrading treatment or punishment" and the right to "liberty and security of person." The European Convention on Human Rights established an effective form of legal machinery to enforce these rights through two special human rights institutions, a Commission and a Court. Private parties, with the consent of their sovereign, can petition the Commission for decisions on alleged violations of human rights or a complaint may be filed by one state on behalf of individuals who are nationals of another state. The Commission can try to dispose of the matter. However, if that is unsuccessful, parties involved will have recourse to the Court to decide the matter. Member states that are affected are bound to comply with the decision.

INTER-AMERICAN HUMAN RIGHTS COMMISSION AND COURT

This is a less successful counterpart of the European Commission and Court. The Inter-American Commission may investigate alleged violations of human rights and issue reports. The Inter-American Commission can issue advisory opinions on matters submitted to it by state

parties to the Convention. The Inter-American Commission has handled a few cases for adjudication. The United States is not party to the Convention.

On the obligation side of the ledger, two developments are worthy of note. First, on May 25, 1993, the United Nations, through a resolution, established a court to hear cases involving war crimes committed by individuals in the former Yugoslavia. The court is now in session at the Hague and cases are being developed for presentation to it. The defendants are individuals, and the fact that they were obeying superior orders is not a defense. State sovereignty has been penetrated to bring these individuals to trial. This is a clear inheritance of Nuremberg and the charges parallel the war crimes and crimes against humanity counts at Nuremberg. A similar tribunal is being established to try individuals for war crime offenses in Rwanda.

Second, in 1991 the International Law Commission of the United Nations drafted a code of offenses against the peace and security of humankind which was designed to hold individuals responsible for Nuremberg-type crimes. In May 1993, the International Law Commission drafted a statute for a proposed international court to try individuals who have committed offenses against the peace and security of humankind.

CONCLUSION

In retrospect, I believe that Nuremberg was the most impressive moral advance to come out of the War, and I remain optimistic that we lawyers can draft provisions that keep the principles of Nuremberg alive.

Nuremberg was a vision for a better future, but it was a bit ahead of its time. The world moves slowly when dealing with matters of extreme sensitivity, such as sovereignty. We should view Nuremberg today as it was viewed then — part of an evolving process which involves limitations on the pristine concept of national sovereignty.

We should always be mindful of the United Nations General Assembly's unanimous acceptance in December 1946 of those principles involving limitations on national sovereignty, namely that aggressive war is a crime, that there are crimes against humanity, that orders from superiors are not a defense against commission of these crimes, and that even heads of state are responsible for their actions under the law.

On the human rights front, Nuremberg is a beacon on which we can always rely to direct our future. To achieve our goal in this area, we will increasingly have to pull back the curtain of sovereignty which prevents the concept of international human rights from becoming a reality in many areas of the world.

As for individual responsibility for offenses against international law, we can be encouraged by the existence of the tribunal at the Hague

charged with trying individuals for the commission of war crimes in the former Yugoslavia. We can also be encouraged by the existence of the drafts prepared by the International Law Commission relating to crimes against the peace and security of humankind, and the draft of a statute establishing such a court. Let us hope that they become the subject of serious discussion in international fora throughout the United States and the world.

To summarize, Nuremberg has given us a blueprint for a better world in which men and women throughout can live in peace and security and with dignity. My earnest hope is that sooner, rather than later, we recognize our common interest in ensuring that the vision of Nuremberg becomes a reality.