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The Limitations of Sovereignty from Nuremberg to Sarajevo

*Henry T. King, Jr.**

Growing up as a small boy in Connecticut in the 1930's, I profited from Sunday night dinner sessions at which my father discussed with us the major issues of the day. One of these discussions in the early 1930's dealt with the question of how do we stop wars? Father raised the question and then asked us if we had any thoughts on the answer. A long silence ensued, which was unusual because we were a voluble family. Finally, father supplied his own answer which ran as follows: "The people don't want wars. It is their leaders who start them. To stop wars you have to punish the leaders."

I have thought about that discussion a great deal both then and afterwards. I had heard a great deal from father and others about the horrors of World War I. I hoped, as the posters put it, that "They (the heroes of World War I) shall not have died in vain." Still father's question was an intriguing one and I wondered whether his answer was the right one. I knew that other approaches had not worked.

The question was one that stayed with me and ironically enough became one of the ruling passions of my life. So much so that by early in 1946, I had become one of the U.S. prosecutors at Nuremberg.

The interim had seen the coming and going of Adolf Hitler. Hitler had convinced the German people that their destiny and security lay with expanded international and domestic German sovereignty. "Lebensraum" or living space was the order of the day in Hitler's Germany as he led the country into World War II with the attack on Poland and subsequent aggressions culminating in the attack on Russia. Hitler's invasion of Russia reached its zenith in December 1941 at the outskirts of Moscow where his armies were stalemated. Thereafter and particularly after the German surrender at Stalingrad in February 1943, it was pretty much all downhill for Hitler's legions culminating in the near obliteration of Germany by the Allies. In the later ruins of shattered Germany, the German people realized that their security was not to be identified with expanded sovereignty and domination.

After the surrender of the German armies, the question then to be faced by the Allies was what to do with the German leaders who had participated with Hitler in his attempts to expand German control and sovereignty over the entire European continent. Most of Europe lay

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devastated because of Hitler's aggression. This destruction had been carried out in the name of the German state. Some of the acts committed were condoned by German law but were clearly contrary to international law. Could that higher law be used to bring the Nazi leaders to justice? Secretary of War, Henry L. Stimson thought so, and he prevailed over British leaders and U.S. Secretary of the Treasury, Henry Morgenthau who wanted the key Nazis summarily executed. But ultimately the answer to the question of whether a trial was feasible lay with Justice Robert H. Jackson who was commissioned on May 2, 1945 by President Truman to plan for the trial of the major Nazi war criminals.

To appreciate the importance of Jackson's mission I think an excerpt from his first progress report of June 7, 1945 to President Truman is pertinent. In his progress report he wrote:

We are put under heavy responsibility to see that our behavior during this unsettled period will direct the world's thought towards a firmer enforcement of the laws of international conduct so as to make war less attractive to those who have governments and the destinies of peoples in their power.

Jackson's plan, which was agreed to after very tough negotiations with the UK, France and Russia, was to identify three types of crimes for which the Nazis would be tried. These were; 1) crimes against peace, i.e. the planning, preparation, initiation and waging of wars of aggression; 2) war crimes — crimes in violation of the laws or customs of war; and 3) crimes against humanity, for example, murder and ill treatment of civilians for racial, religious or political reasons *in connection with any other crime within the tribunal's jurisdiction whether or not in violation of the domestic law of the country where perpetrated*. A fourth crime was added - namely, participation in a common plan or conspiracy to commit any of the first three crimes. The crimes were set forth in the so-called London Charter of August 8, 1945, which also provided that the fact that actions were carried out as heads of state or responsible officials was no defense; nor was there to be recognized the defense of superior orders of a government or of a superior.

It should be noted that the German armies surrendered unconditionally to the Allies on May 8, 1945. There was no sovereign German government with which they dealt in the surrender arrangements. Since the surrender was unconditional, the Allies could set its terms and all the rules under which they would govern Germany at will. This meant that they were perfectly right in dictating the terms under which the Nazi leaders would be tried, including the provision that the official positions of defendants as head of state or holders of high government office, were not to free them from responsibility or to mitigate their punishment; nor was the defense of orders from an official or superior (i.e. Adolf Hitler) to be recognized although under certain circum-

stances it might be considered in mitigation of punishment. This meant that the defendants could not hide behind the cloak of German sovereignty in justifying their crimes.

A word about the Nuremberg court. The International Military Tribunal was not a military court-martial and it was certainly no ordinary court. It was a high level tribunal with jurists of great distinction. It covered crimes which were massive and had no particular location. The International Military Tribunal was, among other things, concerned with the international laws of war and not the laws of any particular nation. Violations of these laws are war crimes. The International Military Tribunal's activity replaced individual trials in individual countries which would have been very fragmented. Indeed, it was a remarkable collective effort by the nations involved.

Justice Robert Jackson's opening statement for the United States of America of November 21, 1945 gives us a sense of the importance of what was transpiring at Nuremberg when he said:

The privilege of opening the first trial in history for crimes against the peace of this world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated; so malignant; and so devastating that civilization cannot tolerate their being ignored because it cannot survive their being repeated. That four great nations flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgement of the law is one of the most significant tributes that power ever paid to reason.

The primary charge at Nuremberg was preparing, initiating, and waging wars of aggression. This dealt with wars in violation of Germany's treaty obligations to other countries. And the Nuremberg Court landed hard on those who were the object of this charge. In its holding, the tribunal held implicitly that the exercise of Germany's sovereignty did not support the wanton destruction by Germany of other states through wars of aggression, particularly where Germany's treaty obligations said otherwise. It held that those who schemed to extend Germany's sovereignty beyond the limits of international law were guilty of major international crimes and that these crimes together with crimes committed in the course of Germany's aggressions warranted the supreme penalty - death (by hanging).

And all the Nuremberg defendants found that - they were to be judged - not by the law of the sovereign state of Germany, but by a higher law - international law - whose principles were superior to Hitler's German law. They found that they could not hide behind the curtain of German sovereignty in attempting to excuse their crimes and that the more enduring principles of international law were to determine their fate. In other words, they found that they were to be judged as individuals and that they would be punished as individuals for what

they did in violation of international law. The cloak of German sovereignty could not protect them from this responsibility.

In sum, while the Nuremberg law did not outlaw the right of sovereign nations to declare and carry out defensive wars, it did hold illegal and condemn aggressive wars, and it held that the Nazi wars of aggression were beyond the bounds of international law. Nuremberg further held that those Nazi officials who during World War II carried out Hitler's orders calling for violations of the laws and customs of war were guilty of war crimes and crimes against humanity. It further found that conformance with the municipal law of Nazi Germany was no justification for their actions.

So the core of the holding at Nuremberg was that the sovereign rights of a nation state (i.e. Germany) no longer included the initiation planning and waging of wars of aggression. In addition, the Nuremberg holding states that the responsible officials of a state which did so were punishable under international law.

Nuremberg further held that the local municipal law of the sovereign state of Germany provided no cover for individuals who, in the course of a war of aggression, violated international rules governing the conduct of warfare. In sum, Nuremberg held that where Hitler's orders violated international law, those who carried them out were responsible and punishable under international law. Conceptually, this indeed meant a severe, but very realistic limitation on the sovereignty of the German state.

The Nuremberg principles were endorsed by the United Nations on December 11, 1946 and the principles inherent in the crimes against humanity count at Nuremberg were implemented and extended by the United Nations Convention on Genocide which was adhered to by many nations excluding until fairly recently, the United States. The adoption of this convention was resisted for many years on sovereignty grounds by certain members of the United States Senate, but eventually, under much political pressure, the U.S. Senate ratified the convention, albeit with some emasculating provisions.

In the early 1950's, there began a drive by some U.N. members to codify the Nuremberg principles and to implement them on a permanent basis. This project has been carried out by the U.N.'s International Law Commission which has endeavored to develop a code of crimes against the peace and security of mankind and to draft provisions for an international criminal court. Some countries have thrown their weight behind this project, but others, including the United States, up until the current administration, have dragged their feet feeling, perhaps, that a code in place and fully implemented, might be used to punish their own national officials. The International Law Commission is continuing these efforts, but progress in this area is glacial because many nations do not want to cede elements of their sover-

eignty to make for a more secure world. To be effective, such a code must apply to all nations and their leaders alike.

Here it will be recalled that when the U.S. took the initiative to establish the Nuremberg tribunals, its policy promised that the new international standards would apply to all nations equally.

Justice Jackson put it best:

We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.

It should be pointed out that there are two aspects of this endeavor - namely, agreement on a code of international criminal conduct which would define offenses against the peace and security of mankind and the crafting of a means of enforcement of such a code through an international criminal court. As evidence of some progress in this area, I do want to note that in 1991 the International Law Commission did come up with a first draft of a code of crimes against the peace and security of mankind. Further, a meeting of the commission in May 1993 dealt with the structure of an international court and the International Law Commission has come up with a draft for such a court which, pursuant to a U.N. General Assembly resolution, has been circulated to the U.N.'s member states for comment.

In 1990, Saddam Hussein and his military leaders engaged in a war of aggression against Kuwait. In the course of this aggression, war crimes and crimes against humanity were carried out on a significant scale. The parallels to what the Nazis had done from 1939 to 1945 were indeed apparent to the Nuremberg prosecutors, myself included. Meeting in Washington on March 23, 1991, we called for a trial of Saddam Hussein and his cohorts by an international tribunal established under UN auspices. Such a trial would have had available much televised evidence to support war crimes charges against Saddam. Hearings were held on this initiative by the Senate Foreign Relations Committee, but nothing came of them because of inaction by the executive branch which had earlier called for the trial and punishment of Iraqi leaders at the time the UN coalition went to war with Iraq. Ironically, Iraq's civilian population has become the main victim of both economic sanctions and missile attacks while its leader, who is allegedly responsible for every war crime in the book, remains head of Iraq's government and has gone unpunished for all the destruction he wrought.

In retrospect, it seems to me that a golden moment was lost in which a blow for peace and security could have been taken to secure a better world. The UN and the U.S. were victorious in the Gulf War against Iraq. We could have taken Saddam Hussein into custody had we wanted to prolong the war by perhaps a few days. Alternatively, we

could have tried him *in absentia* as we did Martin Bormann at Nuremberg, and shown him for what he is before the eyes of the world. But we did nothing; we left him in office to cause more trouble in the world. The trial of Saddam would have reinvigorated the Nuremberg principles and the world would have been better for it. Some critics feel that the reluctance of the Bush Administration to push for a trial of Saddam and Co. was based on a concern that we would expose our leaders to similar trials in the future. I do not think this concern is realistic, but if it was a factor, we should know the reasons why.

On May 25, 1993, a more encouraging development on this same front took place; the United Nations Security Council passed a resolution calling for the establishment of a war crimes tribunal to try persons charged with war crimes in the former Yugoslavia. While this *ad hoc* tribunal can only deal with crimes committed after January 1, 1991, its creation may be a stepping stone to a permanent court. I am currently serving as a member of a special ABA committee which is advising on the implementation of the resolution. The UN resolution leaned heavily on the definitions of war crimes and crimes against humanity as set forth in the Nuremberg Charter and Judgment. Like the International Military Tribunal Charter, it excludes the superior orders defense. It also specifies punishments for such crimes. Many of the Nuremberg trial procedures were incorporated into the UN Resolution. The UN Resolution itself specified extradition, where possible, as a means of getting jurisdiction over suspected war criminals. However, the Resolution did not deal effectively with the question of how sovereign states could be forced to turn their leaders over for trial by an international tribunal, and it does not propose to try these leaders *in absentia*. The newly released rules of the tribunal seem to indicate that the tribunal will rely on support from the UN Security Council in its efforts to get jurisdiction over suspected war criminals.

The Yugoslavia tribunal will deal only with charges that are parallel to the war crimes and crimes against humanity counts at Nuremberg and not with crimes against peace (presumably because of *ex post facto* concerns).

Eleven judges have been named to the Yugoslavia war crimes tribunal. Rules of procedure have been agreed upon and monies appropriated for this operation. But, thus far, no indictments have been filed and no suspected criminals have been apprehended for trial. Delays have resulted from the resignation of the first designated prosecutor, the attorney general of Venezuela, whose successor is in the process of being named. In prosecuting war crimes, the tribunal will apply only those rules of international humanitarian law which are part of customary law. The rules of international humanitarian law applicable to armed conflict are embodied in the 1949 Geneva Convention for the protection of war victims; the 1907 Hague Convention on the Laws and

Customs of War on Land; the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; and the category of "crimes against humanity" which was first recognized in the charter and judgment of the Nuremberg tribunal.

The statute of the international tribunal covering war crimes in the former Yugoslavia confers personal jurisdiction over natural persons (Article 6) and territorial jurisdiction over the territory of the former Yugoslavia. Article 7 establishes individual responsibility for committing crimes and also for aiding and abetting. It also limits the defense of superior orders to consideration in mitigation of punishment. Articles 9 and 16 establish jurisdiction of the tribunal concurrent with national courts but, at the same time, grant the tribunal a right to request national courts to defer to the tribunal. The tribunal will have two trial chambers made up of three judges each and an appeals chamber made up of five judges.

In addition to adopting the Nuremberg approach on the superior orders defense, the UN Resolution on War Crimes in the former Yugoslavia also provided that the fact that actions were carried out as heads of state or responsible government officials was no defense. But unlike Nuremberg, it did not authorize the trial of defendants *in absentia*, but required that they be tried in their own presence.

This tribunal is at the moment in recess but developments at the Hague bear watching. On an encouraging note, we should not forget that a number of the Nuremberg principles (i.e. those relating to the taking of hostages) have been incorporated into the army field manuals of the major military powers. These field manuals govern the conduct of warfare by their armies and in them we see rules of sovereign states in a sensitive area coinciding with Nuremberg as a backdrop and as a cohesive force for a parallel approach. Thus, national attitudes have been influenced and altered constructively by the Nuremberg proceedings.

The belief that sovereignty brings security is an illusion in today's world. The German citizens who bought Adolf Hitler's argument that an expanded sovereign German Reich would be synonymous with greater security were forever disillusioned when they saw German cities obliterated and their homes and those of others destroyed. When Germany rose phoenix-like from the ashes of destruction, she became a power in the drive to establish a European community in which she and her traditional enemy France, became important partners. They surrendered considerable sovereignty to make the institutions of the European Community work. And they have worked extremely well. There is no talk of war today between France and Germany and, probably, there never will be again. This is because both powers exchanged some sovereignty for a new system of security in which Germany and France became partners rather than enemies.

At the same time, it is important to note that the thrust of some of the Nuremberg principles which affect sovereignty are incorporated into the German (federal) constitution. For example, the federal constitution states that sovereign powers may be transferred by legislation to international institutions. Additionally, Article 25 states that the general rules of international law shall form a part of and take precedence over federal rights and duties for inhabitants of the federal territory. Finally, Article 26 provides that activities tending to disturb the peaceful relations between nations and especially the preparation for aggressive war shall be unconstitutional and shall be subject to punishment.

Perhaps other countries might well follow Germany's lead in this regard. In the larger world we have not been able to create parallels to the European Community security system on a worldwide basis. But there are some signs of progress. After the giant step taken at Nuremberg, the UN Resolution on the trial of the war criminals in the former Yugoslavia is a step in the right direction as are the efforts of the UN's International Law Commission, but much more needs to be done to ensure real and lasting progress. Such efforts have to have the full support of the United States which is still the most important power in the world. Now more than ever we should take a leadership role at the U.N. in the drive to establish an international criminal court which would apply a code of crimes against the peace and security of mankind. Not only should we support efforts to define such crimes, but we should be concerned with how suspected offenders could be brought to the bar of justice and tried for such crimes. The question of how to get jurisdiction over such offenders and to implement their punishment needs particular attention but I think these goals are reachable.

So, in today's world the challenge my father laid down so many years ago remains to be met. Some progress has been made, but it is not definitive and much needs to be done to make the world free from aggressive wars and crimes committed during these aggressions. Basically, sovereign states must submit themselves to a general rule of law which would prohibit aggressive wars and punish those leaders who start and carry them out. The key here is sovereignty and how much we are willing to relinquish to make the world a safer and more secure place.

I am an idealist. As Edwin Dickinson, the great internationalist said some years ago:

History teaches that without ideals there can be no progress, only change. The stars that guide you may never touch with your own hands, but following them you will reach your destiny.

I think that we have to keep our eyes on the stars. I believe we all have to tithe a bit for future humanity in an endeavor to create a more secure world in which the rule of law prevails. This has been my life-long

dream and I have devoted most of my waking hours to it.

There is an old Andalusian song which is sung in Flamenco taverns which runs as follows:

They say that a day
has twenty-four hours.
If it had twenty-seven
I would love you three hours more.

On a personal level I would phrase it for me this way:

They say that a day
has twenty-four hours.
If it had twenty-seven
I would work for a more
secure world three hours more.

SUMMARY

At Nuremberg, for the first time in history, men who had abused power in violation of international law were held to answer in a court of law for crimes committed during war in the name of their nation state. Most of the crimes against humanity as described in the Nuremberg indictment and subsequent trial were committed by authority of the law of Nazi Germany. The thrust of the indictment was that the decrees of Hitler in Nazi Germany - binding as they were under German law, were the source of major crimes committed by the defendants. But the Nuremberg court found that this was only during the war and only relating to acts concerned with the carrying out of the war. It did not relate to crimes committed in times of peace. The acts had to relate to war crimes or aggressive war. Otherwise the concept of national sovereignty in this case would have been totally disregarded.

Individuals were held responsible at Nuremberg for initiating and waging aggressive war and for atrocities connected with or in execution of war. (Nuremberg established a minimum standard of conduct for individuals).

Dr. Jahreiss, German defense counsel for Alfred Jodl, summed up very succinctly what was happening when he said, "What the prosecution is doing when in the name of the world community as an entity it desires to have individuals legally sentenced for their decisions regarding war and peace, is destroying the spirit of the state."

The answer in previous years had been the defense of sovereignty upon which Jahreiss had based his defense. But the IMT held that the Kellogg-Briand Peace Pact swept away whatever justification that might have been asserted by government leaders as the responsible heads of state on the ground of sovereignty.

The theory of individual responsibility for initiating and waging an aggressive war can also be related to the personal responsibility of gov-

ernment leaders, for crimes against humanity. The tribunal said in its decision, "Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." And further, the tribunal said that individuals who have committed criminal acts under international law cannot shelter themselves behind their official positions in order to be free from punishment in appropriate proceedings. The very essence of the IMT Charter was that individuals have international duties which transcend their national obligations of obedience imposed by individual states.

But Nuremberg also meant that an individual charged with a crime under international law is entitled to a fair trial. And Albert Speer, a leading defendant at Nuremberg, told me shortly before he died that he thought that the Nuremberg proceedings were fair and that justice was done at Nuremberg. Indeed, the Nuremberg ground rules were fair to both prosecution and defense alike and many of those involved have commented favorably on the balance shown by the Nuremberg Tribunal in conducting the proceedings and in rendering its judgment in an extremely tight time frame. Yes, justice was indeed done at Nuremberg.

TWO FINAL COMMENTS:

1. What we are really concerned about here is finding a balance between the recognized right of a society to its independence and the right of the international community to prevent criminal behavior carried out in the name of nation states. In essence, we are talking about state sovereignty and its limits. What Nuremberg says is that state sovereignty does not excuse international criminal behavior or prevent justice from prevailing.

2. We, and future generations, should never be permitted to forget that Adolf Hitler's massive aggressions carried out for the purpose of extending the sovereignty of the German state finally resulted in the near obliteration of Germany from the face of the earth, and that the post war agreements made by Germany to limit its sovereignty to make the European Community a workable reality have brought peace, prosperity and security to the German people to a degree never achieved before. This is a lesson of history which should always be with us.