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Robert K. Woetzel

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COMMENTS ON THE NUREMBERG PRINCIPLES AND CONSCIENTIOUS OBJECTION WITH SPECIAL REFERENCE TO WAR CRIMES

ROBERT K. WOETZEL*

IN ORDER TO ARRIVE at a balanced assessment of the current applicability of the Nuremberg principles, the context in which the trials were conducted should first be examined. Nuremberg took place at a time when there was a breakdown of authority in Germany. The bases of authority were being challenged within a frame of reference of a basic conflict of values. The power preached by the Nazis provoked a strong reaction which could readily be exemplified by the current edict of youth: "Make love—not war!"

The Nuremberg principles state that an individual can be held responsible for crimes against peace, crimes against humanity, war crimes, and membership in criminal organizations. They were unanimously endorsed by the United Nations in General Assembly Resolution No. 95 (1) and reconfirmed in codified forms as of December 12, 1950.¹ They can be regarded as part of international law.

* President, Foundation for the Establishment of an International Criminal Court, Professor of International Politics and Law, Boston College. A.B., Columbia University, 1952; Ph.D., Oxford University, 1958; J.S.D., Bonn University, 1959.

¹ Principles of international law recognized in the Charter and Judgment of the International Military Tribunal at Nuremberg as formulated by the International Law Commission, June-July, 1950:

Principle I. Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

Principle II. The fact that internal law does not impose a penalty for an act

It is clear that the endorsement by the United Nations of principles applied in

which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III. The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.

Principle IV. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible for him.

Principle V. Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI. The crimes hereinafter set out are punishable as crimes under international law:

a. Crimes against peace:

(i) Planning, preparing, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

b. War Crimes:

Violations of the laws or customs of war which include, but are not 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:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Principle VII. Complicity in the commission

a war crimes trial constitutes tangible evidence that the majority of nations at that particular time recognized them as valid principles of international law.

The Constitution of the United States declares that treaties are part of the law of the land.² The Nuremberg principles were contained in the London Agreement of 1945 which set up the International Military Tribunal (IMT) that tried the major German war criminals. The agreement, which has the force of a treaty, was signed by the United States, Great Britain, France, and the Soviet Union, and acceded to by 19 other countries; it is part of the law of the land.³

While it is U.S. practice to regard the most recent law as binding according to the principle *lex posterior derogat legi priori*,⁴ no law since the London agreement conflicts with its basic provisions. In fact, U.S. leaders have time and again declared their adherence to them. The succeeding military tribunals at Nuremberg confirmed them as did the IMT for the Far East with only slight variations.⁵

The question arises to what extent the provisions of the Selective Service System

of a crime against humanity as set forth in Principle VI is a crime under international law.

² U.S. CONST. art. VI, § 2; see also DEP'T OF ARMY, FIELD MANUAL 27-10, para. 7 (1956).

³ United States v. Pink, 296 U.S. 558 (1935).

⁴ See Cook v. United States, 288 U.S. 102 (1933); Hijo v. United States, 194 U.S. 315 (1904); Foster v. Neilson, 27 U.S. (2 Pet.) 254 (1829).

⁵ R. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 226-32 (1962).

conflict with the Nuremberg principles.⁶ The IMT at Nuremberg did not deny the jurisdiction of the State to institute compulsory military service. Nor did the court consider such service ipso facto a crime. In the case of membership in criminal organizations, the court required that it be proven that an individual could be *expected* to know of its criminal character, and that he became or remained a member voluntarily.⁷ The Selective Service System has not been condemned by any official organ as in violation of international law. Nor has any agency of the U.S. Government. Membership in the U.S. armed services, therefore, does not in itself constitute an offense.

In *United States v. Levy*,⁸ it was shown that the Green Berets have engaged in activities that might be regarded as crimes against humanity, *e.g.*, such atrocities as the severing of ears, etc. It may be that participation in such actions constitutes a violation of international law according to the Nuremberg principles. This would not, however, justify resistance to the draft unless the organization in question had been branded as a criminal one. Since no such action has taken place, there is no a priori case to be made out for refusing to serve in the armed forces on grounds of these principles.

Nevertheless, an issue of conscience remains as long as a doubt exists about the possibility or necessity of committing criminal actions in the course of service.

No international organ exists at this time which could adjudicate claims against the armed forces of a country. Under the Geneva Conventions of 1949, states may take jurisdiction over war crimes according to the universal principle.⁹ Such liability has not been extended to service as such. In each case, guilt has to be proven. It would seem that an individual could be made liable for participation in criminal acts under international law, while at the same time he would have no recourse to resist being forced into such actions.

In the event that the proportions of criminality extend to genocide, an international court could be constituted to try such violations under the Genocide Convention of 1948.¹⁰ The fact that the United States and certain other countries have not ratified the Genocide Convention does not abrogate its universal character in view of the fact that it codifies existing principles of international law which were applied at Nuremberg and confirmed by the United Nations.¹¹

In *United States v. Mitchell*,¹² the court refused to decide the question whether or not the Vietnam War was in violation of the Nuremberg principles. The court-martial in *Levy* did consider evidence with regard to the claim of crimes against humanity but dismissed it as in-

⁶ Military Selective Service Act of 1967, 81 Stat. 102, 50 U.S.C. App. § 456(j) (1967).

⁷ See R. WOETZEL, *supra* note 5, at 192.

⁸ 39 Court Martial Reports 672 (1969).

⁹ *Four Geneva Conventions*, in 75 UNITED NATIONS TREATY SERIES. Nos. 970-73 [hereinafter *Four Geneva Conventions*].

¹⁰ Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260, 3 U.N. GAOR, at 174, U.N. Doc. A/810 (1948).

¹¹ R. WOETZEL, *supra* note 5, at 232 *et seq.*

¹² 369 F.2d 323 (2d Cir. 1966).

sufficient. It would seem that the tribunal was aware of the relevance of the Nuremberg principles, even though it was not convinced by the case for defense. The intentions of an accused must be considered in a criminal proceeding. It would constitute a denial of justice to exclude considerations of motivation bearing on his intentions.

Conscientious objection raises issues of moral and psychological content. It may be impossible to adjudicate disputes with regard to crimes against peace without sufficient evidence (which is difficult to obtain); but the basis on which an accused who resists Selective Service may have reached his decision would still be relevant. His ability to judge on the grounds of morality and legality as deduced from available sources, *e.g.*, press notices, etc., might be taken into account in assessing guilt. If the average person can be expected to resist certain orders which constitute war crimes and crimes against humanity, the same degree of competence must be conceded in relation to the draft.

Courts could then decide whether or not an individual might reasonably have reached the conclusion that service in the armed forces would lead him into crime so-to-speak. A German liable to being drafted into the S.S. might have thought twice about alternatives. Also, while criminal organizations like the S.S. were not branded before the act, individuals were made liable for joining or remaining voluntarily in an organization which they should have realized engaged in criminal activity.

The Nuremberg principles are relevant, therefore, to conscientious objection. For

justice to be mete out, it is necessary to take into account facts that may have motivated the individual. If by any reasonable standard it cannot be shown that available evidence worthy of consideration justifies resistance, the individual would be liable under our laws. So also would he be if he did not resist participation in criminal conspiracy or membership in a criminal organization clearly recognizable as such.

With special reference to the case of Vietnam under consideration at the present time, certain individuals have drawn attention to the atrocities U.S. personnel in Vietnam are alleged to have committed.¹³ On the other side, news reports have acquainted the public with crimes communist forces are alleged to have committed in the Hue area.¹⁴ Newspaper articles, TV newsreels, etc. are not ipso facto evidence from a legal standpoint. Too often, as Marshal McLuhan has pointed out, the medium becomes the message. But they may influence public opinion and have bearing, therefore, on motivation.

Aside from news reports, however, official pronouncements by the U.S. Government indicate a great likelihood that various crimes were committed by U.S. forces in the My Lai-Songmy area.¹⁵ The indictment of several members of the armed services

¹³ See, *e.g.*, IN THE NAME OF AMERICA (1968).

¹⁴ Los Angeles Times, Dec. 6, 1969, pt. I, at 1.

¹⁵ Los Angeles Times, Mar. 29, 1970, pt. H, at 8. *Nota bene*: the statement by Lt. Gen. William R. Peers:

I can say . . . and I feel the public is entitled to know, that our inquiry clearly established that a tragedy of major proportions occurred there on that day.

attests to a prima facie case at least as far as the government is concerned. Such evidence is weighty indeed when it comes to the formation of conscience and must be taken into consideration in assessing the plausibility and bona fide nature of a contention by a conscientious objector that he may be forced to commit crimes by allowing himself to be drafted with great likelihood of being sent to Vietnam.

Judge Wyzanski of the U.S. District Court in Boston ruled in *United States v. Sisson*¹⁶ that non-religious grounds for conscientious objection should be taken into consideration. The defense contended that Sisson had the right to object to service in the armed forces on grounds of the Nuremberg principles with special reference to the war in Vietnam. The separation of Church and State stipulated in the first amendment to the Constitution would seem to indicate that both religious and non-religious grounds for conscientious objection should be allowed.¹⁷ The defense of Nuremberg would constitute a non-religious ground.

The issue is whether incidents like My Lai were part of a plan in which an individual might expect to become enmeshed, *regardless* of official condemnation. It has been alleged that the so-called "search and destroy" strategy involved methods of warfare condemned as criminal under international law; and furthermore, that My Lai was only one among many outrages.¹⁸ The fact that high officers of

the Americal Division have been indicted on various charges emanating from the My Lai incident might lend credence to the charge that it was tolerated. In any event, an average person might reasonably question the legality of certain operations in Vietnam and refuse to become implicated on the grounds of the Nuremberg principles.

The character of the war, whether or not it is international, is irrelevant. If the war has international implications, as the U.S. maintains with regard to the involvement of North Vietnam, the laws of war apply including the Geneva Conventions of 1949.¹⁹ On the other hand, if it is held to be a civil war, the Conventions provide a minimum set of obligations for such situations.²⁰ Civilian victims of war crimes who are nationals of states maintaining diplomatic representation in the states whose nationals are the alleged criminals are not "protected" by the Convention according to Article 4.²¹ This is no objection since the Convention is *part* of the law of war and does not abrogate other instruments of international law like the Nuremberg principles according to which the kind of actions alleged to have been committed at My Lai may be considered as crimes against humanity.²²

No confusion should, therefore, be possible in the mind of the average observer

Responsibility—A Legal Memorandum, TRANSACTION, Jan. 1970, at 39-40.

¹⁹ See *Four Geneva Conventions*.

²⁰ *Id.*

²¹ See *Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, in *Four Geneva Conventions*.

²² See note 1 *supra*.

¹⁶ 297 F. Supp. 902 (D.C. Mass. 1969).

¹⁷ U.S. CONST. amend. I; see also *Welsh v. United States*, 90 S. Ct. 1792 (1970).

¹⁸ Falk, *Songmy War Crimes and Individual*

as to the applicability of standards of international law which proscribe such actions. The fact that insufficient information about the laws of war might have been circulated would make the State liable for shirking its obligations under the Geneva Conventions, but would not be an excuse for an individual accused of violations. Nor would the defense of Act of State or superior orders, when moral choice was possible. The nature of guerilla warfare in Vietnam would have bearing only insofar as the question of moral choice was involved. Military necessity or "Kriegsraison" would be no defense, according to Nuremberg. Neither would the fact that the enemy had committed similar offenses or *tu quoque*.²³

The mention in the codified Nuremberg principles of the necessity of taking into account moral choice would seem to indicate that a dimension essential for the arriving at a conclusion in cases of conscientious objection, namely the examination of belief, according to provisions of the Selective Service Act of 1969, is part of international law. The defense of superior orders must be related to whether a person had reasonable grounds to believe that an order was unlawful, in order to arrive at a moral choice before determining if it was indeed possible to implement it. In that sense, conscientious objection may derive some protection from the Nuremberg principles which by implication demand moral choice

in cases involving violations of the laws of war.

A special problem arises when a person wishes to become a conscientious objector after he has been inducted into the armed services. Voluntarily *remaining* a member of a criminal organization makes a person liable, according to Nuremberg. A person may choose to become a conscientious objector upon observing actions which reasonably appear to him to be violations of international law. Options would seem to be mandatory both under military law which incorporates the international laws of war, and according to the Nuremberg principles. A person has the right and obligation to exercise his moral choice regardless of superior orders. A change of status should always be possible.

Finally, it must be remembered that regardless of the bestial character of war, the laws of war attempt to salvage whatever humanitarian restraint is possible under such conditions.²⁴ While war of one kind or another may continue, and there have been over one hundred armed conflicts since the end of World War II alone, Nuremberg represents a milestone on the road to universalization of concern with crimes that may be committed. The fact that the Geneva Conventions apply universal jurisdiction to war crimes is evidence of international concern with the universal

²³ For discussion see R. WOETZEL, *supra* note 5. See also the judgment by Col. P. Wondolo in the general court-martial of 1st Lt. James B. Duffy. It was ruled that he could not be considered innocent on the ground that he was following policy laid down by superior officers. Los Angeles Times, Mar. 29, 1970, pt. B, at 2.

²⁴ This is so regardless of the legal character of the war, and whether or not it is a war of aggression which is difficult to determine. Conscientious objection usually does not involve participation at a level of responsibility constituting crimes against peace. For discussion see Woetzel, *supra* note 5, at ch. 6. Ordinary soldiers are not punishable.

maintenance of the humanitarian restraints of war. They apply not only to interstate relations but to relations between a government and its citizens in cases of armed conflict not of an international character.

The nature of the argument regarding conscientious objection goes to the roots of our moral convictions. Nuremberg lights the way to greater moral awareness in a world community dedicated to the proposition of uniform civilized standards. The

choice is never between national or personal survival and a course which involves crimes against international law; it can only be between lawful conduct of military operations on the one hand, and anarchistic violence which is a threat both to moral values and military discipline, on the other. Far from weakening national defense, it is the highest patriotic and human duty to resist the latter lest the nation fall prey to the shame and ignominy of barbarism.