



make Indians overnight, or over a period of two generations, into good, hard working, saving, investing, Christian families. It takes a longer period of time to transform "uncivilized" society into what we view as civilized society. Yet it was expected that in fifty years the Indians would acquire the trappings of a civilization that it took non-Indians five hundred years to acquire. How could this not fail? Likewise, native people in the rural communities of Alaska existed in 1971 at the economic, social, and cultural stage in which Indians down here existed in the last century, and yet they were expected to make a leap from that level of societal and cultural development, in twenty years, up

to a corporate society. It will not work. It can't work. The land will pass from native ownership and be lost once again.

In the late 1800s a Menominee tribal chief came to Washington, D.C., to conduct business relating to the loss of Indian lands. He was given by the officials in Washington the modern-day suit of that time—top hat, cutaway coat, and vest—and he put it on. And the chief who looked so impressive and dignified in his buckskins, moccasins, and feathers, now looked ridiculous. And he looked at himself, and he said, "This is the way the white man's law fits the Indian." It doesn't.

—Franklin Ducheneaux

The Legacy of Nuremberg

Forty years ago, on September 30, 1946, the trial of the major war criminals of the Third Reich came to a close in the ruined city of Nuremberg. It is a commonplace that the trial was an "historic" occasion, that it left a legacy for future generations. The men who conceived and conducted the trial understood it that way; they intended it to be epoch-making and viewed their own words and deeds (not, perhaps, without a touch of self-aggrandizement) through a reverse telescope from the eyes of a distant and more pacific age.

It is impossible for us to read accounts of the Nuremberg trial without realizing that it signifies something much different to us than it did to those who conceived it. For us, Nuremberg is a judicial footnote to the Holocaust. It stands for the condemnation and punishment of genocide, and its central achievement lies in recognizing the category of *crimes against humanity*: "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population . . . or persecutions on political, racial or religious grounds . . . whether or not in violation of the domestic law of the country where perpetrated." For those who conceived the trial, on the other hand, its great accomplishment was to be the criminalization of aggressive war, inaugurating an age of world order. For this reason, its decisive legal achievement lay in recognizing the category of *crimes against peace*: "planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances. . . ."

This idea that Nuremberg was to be the Trial to End All War seems fantastic and naive forty years (and 150 wars) later. It is also a dangerous and mistaken idea that has done much to vitiate the real achievements of the trial, in particular the condemnation of crimes against humanity. The Nuremberg Charter incorporates an intellectual confusion, leaving us, as we shall see,

with a legacy that is at best equivocal and at worst immoral.

Aggression and Sovereignty

At neither the Nuremberg nor the Tokyo trials was the crime of aggression defined. But in 1974 the United Nations offered the following definition: "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State. . . ." Though it was not until 1974 that aggression was linked explicitly with the violation of sovereignty, this definition is clearly in the spirit of Nuremberg. But what, then, is sovereignty?

The concept was formulated in the early modern era, the era in which the nation-state began to emerge in Europe. It signified that there is only one ultimate source of law in a state, namely the state's sovereign. From this follows the notorious doctrine of *act of state*, which exempts sovereigns from legal liability for their depredations against other states, on the theory that prosecution of the sovereign of one state by the court of another state amounts to one state's exercising jurisdiction over another.

Historically, the doctrine of sovereignty was formulated to secure the dominance of secular authority over the Church; the doctrine, however, had the additional consequence that so-called "natural law"—constraints on the content of law ascertainable by reason alone—had no place in the theory (since in practice the Church claimed the right to announce natural law—despite the fact that it was supposed to be a matter of reason and not revelation). Nothing constrained the sovereign: from the fact that he was the sole lawmaker it followed that he was the highest lawmaker as well. There are no domestic legal standards according to which he himself can be held responsible, unless these are self-imposed. Conjoined with the act-of-state doctrine, this



*The defendants
in the dock*

conclusion implies that sovereigns are liable under neither domestic nor international law: that "the king is above the law."

It was this doctrine that Article 7 of the Nuremberg Charter assaulted: "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." By making even sovereigns legally liable for their deeds, Article 7 denies that the sovereign is the sole source of law in his state; it thus denies the doctrine of sovereignty itself.

Similarly with Article 8: "The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility. . . ." By criminalizing acts that are legal according to the positive law laid down by the sovereign, Article 8 thus denies that the sovereign is the sole source of law for his subjects.

And similarly with Article 6(c), which outlaws crimes against humanity even when committed by a state against its own subjects and "whether or not in violation of the domestic law of the country where perpetrated." Article 6(c), the most enduring moral achievement of Nuremberg, is irreconcilable on its face with the classical doctrine of sovereignty. Together with Articles 7 and 8, then, it perforates or even destroys the doctrine in the name of "humanity" and individual responsibility toward it.

This is an important achievement, and nothing to regret. As Robert Jackson, the chief prosecutor at Nuremberg, pointed out, the act-of-state and superior-orders doctrines taken together would imply that no one could be held responsible for the crimes the Tribunal was trying: the former would exempt those exercising sovereign authority, while the latter would exempt their subjects. Yet it would be a moral absurdity (and political impossibility) to punish nobody for Auschwitz. The plain fact of the matter is that the Third

Reich was a criminal state in every moral sense that the word "criminal" possesses, and the law had to reach those who carried out its crimes.

Two Problems with Sovereignty

It is an unhappy fact of human existence that we never forget how to commit a crime once we have been taught. The Third Reich may well be the first state whose criminality was virtually its defining feature; it will not be the last. In this regard, the framers of Nuremberg understood very well the importance of their endeavor. Since the Nazis had set dark precedent for criminal states, had invented new forms of evil-doing, had made the unthinkable real (after which it is only a matter of time until it becomes routine), it was necessary to restructure our moral imaginations in order to fortify ourselves for a world of criminal states. If this meant exploding time-honored propositions and concepts, then so be it.

The trouble was that the propositions and concepts reflected a political reality—the system of nation-states—that no one was prepared to condemn. And so, just at the moment Articles 6(c), 7, and 8 of the Nuremberg Charter undermined the doctrine of sovereignty, Article 6(a) fortified it by making aggressive war—violation of sovereignty—a crime.

This proved in the event to be a moral problem even more than a conceptual one. If the law is to be anything humane, it must guide our moral imaginations; and since it is now imperative that our moral imaginations include the awareness of criminal states, the law must also include the awareness of criminal states. For this reason alone, the classical doctrine of sovereignty, which acknowledges the authority of criminal states, is no longer feasible. And so, Article 6(a)—which protects the sovereignty of all states, even criminal states, so long as they do not launch wars—should be seen as a mistake.

In any case, the doctrine of sovereignty bears little

relevance to the modern world: it is an old-European concept, meant for nation-states—literally, states whose boundaries correspond with those of homogeneous linguistic and cultural communities. Outside of Atlantic Europe, and particularly in the Third World, we find at best limited correspondence between states and homogeneous communities. For this reason, “statist” politics implies perpetual ferment and instability, as contending ethnic or tribal groups vie with each other for control of the apparatus of sovereignty.

Article 6(a) is Eurocentric in another way as well. The European nation-states (and the United States) exercised economic and often political control over much of Asia, Africa, and Latin America, and at Nuremberg this state of affairs was assumed by all to be fitting and uncontroversial. (It is startling to our ears to hear Jackson refer to the acquisition of colonies as a “legitimate objective” for Germany.) By criminalizing any breaches of sovereignty, Article 6(a) criminalized anti-imperialist struggle as well. This was noted by Justice Pal in his famous dissenting opinion in the Tokyo war-crimes trial: “I am not sure if it is possible to create ‘peace’ once for all, and if there can be status quo which is to be eternal. At any rate in the present state of international relations such a static idea of peace is absolutely untenable. Certainly dominated nations of the present day status quo cannot be made to submit to eternal domination only in the name of peace.” Pal is not attacking a straw man, for in his opening address at Nuremberg Jackson had stated: “Our position is that whatever grievances a nation may have, however objectionable it finds the status quo, aggressive warfare is an illegal means for settling those grievances or for altering those conditions.”

Statism Versus Human Rights

These theoretical confusions and practical misfortunes are, unhappily, an enduring legacy of Nuremberg. Articles 6(c), 7, and 8 are founding documents of the modern human rights movement, and of that form of politics that favors intervention on behalf of human rights, even when violations occur within the boundaries of sovereign states. Article 6(a), however, has been a major moral enemy of the human rights movement, inasmuch as attempts at sanctions or interventions against human rights offenders are inevitably denounced as violations of their sovereignty. It is the tension between statism and human rights that renders the legacy of Nuremberg equivocal; the human rights movement and human rights violators are vying for the contested legacy of Nuremberg.

Jackson saw this point all too clearly. To arguments that humanitarian intervention in a country’s internal affairs was a traditional legal principle that would be contravened by Article 6(a), he countered that non-intervention was sacred to Americans, who had no intention of letting other countries interfere in our own policies of racial discrimination: “It has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another govern-

ment are not ordinarily our business; that is to say, the way Germany treats its inhabitants, or any other country treats its inhabitants, is not our affair any more than it is the affair of some other government to interpose itself in our problems. . . . We have some regrettable circumstances at times in our own country in which minorities are unfairly treated.” Jackson, in other words, argued for subverting Article 6(c) to Article 6(a) partly in order to enclose American human rights violations within a wall of state sovereignty. By contrast, the other horn of the Article 6 dilemma was seized by Thurgood Marshall and his colleagues in the NAACP in their brief in *Morgan v. Virginia*, a transportation desegregation case: they argued that Americans had not spilled their blood in a war against “the apostles of racism” abroad only to permit its flourishing at home.

Let me be clear: I am not claiming that Articles 6(a) and 6(c) are logically or legally contradictory. They can be reconciled simply by making an exception to the doctrine of sovereignty when crimes against humanity are at issue: one allows humanitarian intervention in a sovereign state’s affairs, but only when the humanitarian issue has risen to the horrific level of crimes against humanity.

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But I am asking about the *legacy* of Nuremberg. That means: the potential of its principles for growth and development, for extension and precedent-setting, for adaptability to changed political circumstances, for underlying moral commitments that are not so much the logical implications of the principles as they are their “deep structure.” Ronald Dworkin speaks of precedents exerting a “gravitational force,” and we must ask what the gravitational force is of reconciling Articles 6(a) and 6(c) in this fashion.

Article 6(a) tells us that we cannot intervene in the affairs of a sovereign state on behalf of human rights until—here Article 6(c) enters the picture—the violations rise to the level of horror of crimes against humanity. That means that in each case we must indulge in a grotesque and blood-curdling calculus of murder, torture, and enslavement to determine which clause of Article 6 controls. This is the price we pay for making Article 6 consistent.

If, on the other hand, we abandon the attempt to reconcile Articles 6(a) and (c), we must choose one of them. The choice of 6(c) is a fecund one: when the condemnation of crimes against humanity is allowed to de-

velop as a principle of law and morality, it flowers into the politics of human rights. For the condemnation of "inhumane acts committed against any civilian population" and "persecutions on political, racial or religious grounds" need not be restricted to Holocaust-size events in its gravitational force. It extends to human rights violations in general.

By contrast, Article 6(a), as Justice Pal predicted,

flowers into a deification of the status quo and allows the notion of state criminality to slip through its conceptual net. The choice between the two should not be a difficult one.

—David Luban

This article is condensed and adapted from David Luban's paper, "The Contested Legacy of Nuremberg."

Adultery

According to a 1980 survey in *Cosmopolitan*, 54 percent of American wives have had extramarital affairs; a study of 100,000 married women by the considerably tamer *Redbook* magazine found that 40 percent of the wives over 40 had been unfaithful. While such surveys are, to some extent, self-selecting—those who do it are more likely to fill out questionnaires about it—sexual mores have clearly changed in recent years. Linda Wolfe, who reported the results of the *Cosmopolitan* survey, suggests that "this increase in infidelity among married women represents not so much a deviation from traditional standards of fidelity as a break with the old double standard." Studies show that men have always strayed in significant numbers.

Yet 80 percent of "COSMO girls" did not approve of infidelity and wished their own husbands and lovers would be faithful. Eighty-eight percent of respondents to a poll taken in Iowa in 1983 viewed "coveting your neighbor's spouse" as a "major sin." It seems that while almost nobody approves of adultery, men have always done it, and women are catching up.

The increase in female adultery doubtless has to do with recent and radical changes in our attitudes toward sex and sexuality. We no longer feel guilty about enjoying sex; indeed, the capacity for sexual enjoyment is often regarded as a criterion of mental health. When sex itself is no longer intrinsically shameful, restraints on sexual behavior are loosened. In fact, we might question whether the abiding disapproval of infidelity merely gives lip service to an ancient taboo. Is there a rational justification for disapproving of adultery which will carry force with everyone, religious and non-religious alike?

Trust and Deception

Note first that adultery, unlike murder, theft, and lying, is not universally forbidden. Traditional Eskimo culture, for example, regarded sharing one's wife with a visitor as a matter of courtesy. The difference can be explained by looking at the effects of these practices on social cohesiveness. Without rules protecting the lives, persons, and property of its members, no group could long endure. Indeed, rules against killing, as-

sault, lying, and stealing seem fundamental to having a morality at all.

Not so with adultery. For adultery is a *private* matter, essentially concerning only the relationship between husband and wife. It is not essential to morality like these other prohibitions: there are stable societies with genuine moral codes which tolerate extra-marital sex. Although adultery remains a criminal offense in some jurisdictions, it is rarely prosecuted. Surely this is because it is widely regarded as a private matter: in the words of Billie Holiday, "Ain't nobody's business if I do."

However, even if adultery is a private matter, with which the state should not interfere, it is not a morally neutral issue. Our view of adultery is connected to our thoughts and feelings about love and marriage, sex and the family, the value of fidelity, sexual jealousy, and exclusivity. How we think about adultery will affect the quality of our relationships, the way we raise our children, the kind of society we have and want to have. So it is important to consider whether our attitudes toward adultery are justifiable.

Several practical considerations militate against adultery: pregnancy and genital herpes immediately spring to mind. However, unwanted pregnancies are a risk of all sexual intercourse, within or without marriage; venereal disease is a risk of all non-exclusive sex, not just adulterous sex. So these risks do not provide a reason for objecting specifically to adultery. In any event, they offer merely pragmatic, as opposed to moral, objections. If adultery is wrong, it does not become less so because one has been sterilized or inoculated against venereal disease.

Two main reasons support regarding adultery as seriously immoral. One is that adultery is an instance of promise-breaking, on the view that marriage involves, explicitly or implicitly, a promise of sexual fidelity: to forsake all others. That there is this attitude in our culture is clear. Mick Jagger, not noted for sexual puritanism, allegedly refused to marry Jerry Hall, the mother of his baby, because he had no intention of accepting an exclusive sexual relationship. While Jagger's willingness to become an unwed father is hardly mainstream morality, his refusal to marry, knowing that he did not