

Nuremberg Has Not Failed—Yet



Paul Stephanus

By BRUNO V. BITKER.

MILWAUKEE — Burke Marshall's positive assertion "that the Nuremberg experiment has failed" may be an understandable reaction of revulsion against the Mylai incident and frustration at the Calley verdict. But to dismiss the principles of Nuremberg because of these feelings is to invite a reversion to what, in the early years of this century, were regarded as acceptable legal doctrines concerning war.

Essentially these doctrines were that a sovereign nation could use war at any time as an extension of its foreign policy without any restraint; whatever the heads of state or the military leaders did in furtherance of national policies were "acts of state" making the individual actors immune from personal accountability and finally,

obedience to orders of a superior relieved an individual of responsibility.

Whatever doubts may have existed as to applicable international law prior to World War II were resolved through the adoption of the Nuremberg principles. Crimes against peace, war crimes and crimes against humanity were thereby recognized as crimes under international law. This disposed of the claim that as an act of state the crime was excusable. Nuremberg also provided that if the accused was the head of state, or a responsible government official, he was not thereby free from personal responsibility. Further, said Nuremberg, 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."

In 1946, while the Nuremberg case was in process, the United States Supreme Court recognized the doctrine of individual responsibility in the Yamashita decision. It held the Japanese general responsible for atrocities upon civilians by soldiers under his command even though he may not have ordered or known of the acts. Two justices, Murphy and Rutledge, dissented because they considered the trial unfair. Aware of the significance of the Yamashita decision, Justice Murphy felt compelled to comment as to the personal responsibility doctrine, that under the Court's opinion "no one in a position of command in the army, from sergeant to general, can escape those implications."

The Calley verdict evokes reactions of all sorts. It makes for strange alliances based on entirely conflicting reasons. But none of them would justify abandoning the great advance in international law flowing from Nuremberg. The point in history has not been reached where it can be said that "the Nuremberg experiment has failed." Indeed, the Calley case itself has not run its course. We may yet witness verdicts against others with more brass than a lieutenant's single bar.

It was asserted at the time of the Nuremberg trials by a small but respectable minority that the prosecution was a flagrant example of "ex post facto" liability, and that the whole proceeding was unjust because only sovereign states and not individuals were recognized in international law. If these objections had any validity then certainly they do not now.

In the manner in which international law historically develops, the Nuremberg principles may now be considered imbedded into that general classification. As for the United States, it is committed to Nuremberg by its support of the London agreement and the charter creating the Nuremberg Tribunal, and by its participation in the trials in Germany and in Tokyo.

Whether we are prepared to face the consequences of the concept of personal responsibility, and the other principles, may become major issues before the American people. If we refuse to follow the logical steps wherever in good sense they lead, then, and only then, can we say that Nuremberg has failed.

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