1954

Some Early Developments of an International Criminal Jurisdiction

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Recommended Citation

W. E. Benton, Some Early Developments of an International Criminal Jurisdiction, 8 Sw L.J. 65 (1954)
https://scholar.smu.edu/smulr/vol8/iss1/3

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FOR many years there has been much interest in the development of an international penal or criminal law, as well as the establishment of an international criminal court. The persistent search for the juridical formula is noticeable in the numerous conferences and the literature on the subject. In the words of Judge Manley O. Hudson, such indicates "the spell which the idea of an international criminal court [has] exercised on many minds." Although "European jurists have long been preoccupied with the problem of international penal law, it has largely been ignored by Anglo-American jurists. The latter have been content to allow this complicated subject to be dealt with through private international law, which they prefer to term conflicts of law, or through the processes of extradition." Nevertheless, since the termination of World War II, Anglo-American jurists, as well as jurists of other countries, have manifested a serious interest in the problem of an international penal jurisdiction.

Some of the thinking on the matter of an international criminal jurisdiction envisages a world criminal code, applicable alike to States as well as individuals, and effective in times of peace and war. Such is the nature of the proposed criminal statute ("Plan for a World Criminal Code") prepared by Professor V. V. Pella

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3 See Historical Survey of the Question of International Criminal Jurisdiction (memorandum submitted by the Secretary-General), United Nations, Lake Success, New York, 1949, hereinafter referred to as Historical Survey.
of Rumania, and published by the International Association of Criminal Law in 1935. The Plan, with some additions, was republished in 1946. The English text of the Plan may be found in the Revue Internationale de Droit Pénal, 1946, No. 3, pp. 249-262.

4 In 1937 the International Conference on Terrorism was held in Geneva. As a result of this Conference two conventions were opened for signature on November 16, 1937: The Convention for the Prevention and Punishment of Terrorism and the Convention for the Creation of an International Criminal Court. Neither of these Conventions came into force because of the failure of the States to deposit their ratifications. The General Convention of November 16, 1937, was limited to cases involving terrorism, was optional, and only included the criminal responsibilities of individuals. "Nevertheless," in the words of Professor Pella, "it marked a decisive turning-point in the history of contemporary public law. For the first time the regular rendition of international judgments in criminal cases was contemplated...." Towards an International Criminal Court, 44 Am. J. Int. L. 37, 39 (1950). For the text of the two proposed conventions see 7 Hudson, INTERNATIONAL LEGISLATION (1935-1937) 862-893.


6 The Universal Declaration of Human Rights was approved by the United Nations General Assembly in Paris on December 10, 1948. The United Nations Commission on Human Rights has, for some time, been concerned with the problem of preparing a draft Covenant on Human Rights. When the Covenant is finally approved by the General Assembly, it will be submitted to the States for ratification. Article 11(1) of the draft Covenant (as revised in 1950) appears to be based upon the existence of an international criminal code or the formulation of such a code in the future. This Article provides, "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed." A similar statement was included in Article 11(2) of the Universal Declaration of Human Rights. See James Simsarian, Proposed Human Rights Covenant, revised at 1950 Session of Commission on Human Rights, Department of State Publication 3894, reprinted from the Department of State Bulletin of June 12, 1950. Also see, by the same author, Draft International Covenant on Human Rights Revised at 1950 Session of the United Nations Commission on Human Rights, 45 Am. J. Int. L. 170 (1951). There have been some regional developments in the field of human rights. For example, the American Declaration of The Rights and Duties of Man was approved by the Ninth International Conference of American States, meeting in Bogotá, Colombia, March 30-May 2, 1948. 43 Am. J. Int. L., Official Documents, pp. 133-139 (1949). Also, the Convention for the Protection of Human Rights and Fundamental Freedoms was signed at Rome, November 4, 1950. As a result of the latter Convention, Members of the Council of Europe have taken "the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration" of Human Rights. The Convention provides for the establishment of a European Court of Human Rights (Section IV, Article 38). See 45 Am. J. Int. L., Official Documents, pp. 24-39 (1951).
of the Nürnberg Principles, preparation of a draft code of offences against the peace and security of mankind, and the establishment of an international criminal court. Thus, the question of an international penal law covers a broad field. For this reason this study will be limited, for the most part, to the early development of that phase of the criminal jurisdiction referred to in recent years as crimes against peace. The latter, as defined in the Charter of The Nürnberg Tribunal, includes the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing." This concept of criminality had an interesting development during the formative years.

On December 11, 1946, the United Nations General Assembly passed a resolution (95(1)) directing its Committee on the Progressive Development of International Law and its Codification "to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal." The International Law Commission, as successor to the Committee on the Progressive Development of International Law and its Codification, has adopted seven principles recognized in the Charter and Judgment of the Nürnberg Tribunal. Report of the International Law Commission, Second Session, June 5-July 29, 1950, 44 Am. J. Int. L., Official Documents, pp. 125-134 (1950).


In Plato's *Republic* Socrates and Glaucon discussed what acts should be forbidden in a quarrel or disorder between Greek States. Socrates suggested that such quarrels should be conducted solely with a view to reconciliation; that friendly correction should be the objective rather than the enslavement or destruction of one or more of the parties involved. "And as they are Hellenes themselves they will not devastate Hellas, nor will they burn houses, not even suppose that the whole population of a city—men, women, and children—are equally their enemies, for they know that the guilt of war is always confined to a few persons and that the many are their friends. And for all these reasons they will be unwilling to waste their lands and raze their houses; their enmity to them will only last until the many innocent sufferers have compelled the guilty few to give satisfaction." A similar view was expressed by Polybius when he declared, "The purpose with which good men make war is not to destroy and annihilate the wrongdoers, but to reform and alter the wrongful acts; nor is it their object to involve the innocent in the destruction of the guilty...." At least some of the early philosophers thought in terms of punitive action which could be taken against those individuals who made war. It will be noted that responsibility was confined to a "few persons." It was not a collective or State responsibility. Such a concept of "war guilt," which constitutes a vital part of an international criminal jurisdiction, was formulated long before the termination of World Wars I and II.

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11 Socrates and Glaucon were of the opinion that only a fight between Hellenes and barbarians should be called a war; "but when Hellenes fight with one another we shall say that Hellas is then in a state of disorder and discord, they being by nature friends; and such enmity is to be called discord." *Republic* (The Modern Library, Jowett's trans.) Bk. V, 470, pp. 198-199.

12 *Id.*, Bk. V, 471, pp. 199-200.

The ancient College of Fetials (*Collegium Fetialium*), which conducted Roman relations with foreign nations performed a variety of sacerdotal (priestly), diplomatic, and judicial functions. Among the more important judicial functions was the determination of whether or not a war was a just war. Not only did the fetials consider the legality of the preliminary proceedings, but also made a determination whether or not there existed a just cause for war. The decision of the fetials in this matter had a great influence on the action taken in the Senate.

The doctrine of the “just war” (*iustum bellum*) was recognized by Roman Law. Therefore, to conduct this type of war certain specific rules and ceremonies had to be followed—for such war

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14 The *Magister Fetialium*, a permanent functionary, presided over the College of Fetials. The latter, as guardian of the *ius fetiale*, was composed of twenty priests. Their term of office was for life, unless they committed a serious offence against the Senate and people. The *Pater Patratus*, who was elected by his colleagues, served as "chief of the fetials" or their spokesman when members of the College were sent abroad on diplomatic missions, or for negotiating the extradition of offenders, and for declaring war.

15 Other functions performed by the College of Fetials were as follows: (1) "In their priestly capacity they presided over the expiatory sacrifices and the performance of solemnities that were incidental to the commencement of war, the establishment of peace, the conclusion of treaties, and other interstatal affairs of importance" (2 Coleman Phillipson, *op. cit.* supra note 13, at 326). (2) If Rome wished to register a complaint or demand against another State, such was formulated and presented by the fetials. According to the *ius fetiale*, Rome was prohibited from waging war until an attempt had been made to secure a peaceful settlement of the issue. (3) The fetials were employed to declare war and conclude peace, as well as negotiate treaties of friendship and alliances. (4) International claims which Rome had against foreign States, or claims by the latter against Rome, fell within the province of the fetials. (5) The latter negotiated the extradition of foreigners to stand trial in Rome, as well as the delivery of Roman citizens which had offended foreign States. (6) The fetials could give their opinion in regard to whether or not treaty-rights had been violated, and if so, they could demand restitution. (7) "They also took cognizance of offences committed against ambassadors, and investigated the transgressions of the generals with respect to the sponsiones they made with the enemy without the sanction of their government" (id. at 328).

16 In the early period the vote of the senatorial majority in favor of war was considered final, but from about the beginning of the Fifth Century B.C. the question had to be considered by the *Comitia Centuriata* or Assembly of the people, and if they approved, it became a *Lex Centuriata*. Upon the approval of war by both the Senate and Assembly of the people, the fetials were dispatched to the Roman frontier, and issued a formal declaration of war.
was a legal institution involving both rights and duties.\textsuperscript{17} According to Professor Oppenheim, Roman Law recognized four just causes of war, namely: "(1) violation of the Roman dominions; (2) violation of ambassadors; (3) violation of treaties; (4) support given during war to an opponent by a hitherto friendly State."\textsuperscript{18} Even in the case of a just cause for war, the resort to armed force was only justifiable after satisfaction had been demanded and refused. In case of refusal, war was formally declared by a varying number of fetials proceeding to the Roman frontier, and there, after making a formal declaration of war, hurling a spear into the enemy's territory. Such action symbolized the existence of hostilities.

Embedded in the fetials' demand for satisfaction or justice (\textit{res repetere}), in the event Rome had a grievance against a foreign State, was the early concept of an international criminal jurisdiction. For example, "In 320 B.C. envoys were sent to the Samnites to demand the surrender of the author of the war which the latter had waged against Rome."\textsuperscript{19} The Romans, like the Greeks, were aware of such concepts as "acts of aggression" (especially when committed against Roman territory), and the doctrine of "criminal liability." In other words, a punitive war could be waged in order to punish those guilty of such acts of aggression.

It is true that the fetiale procedure, as a means of determining the existence of a just cause for war, did reflect certain weaknesses. For example, Rome was not only a party to the dispute, but also judge of its own cause. Also, it may have been that at times the

\textsuperscript{17} If the analogy is not carried too far, the proceedings preliminary to war did approach the procedure evolved for ordinary actions at law consisting of a demand and deposit, formal notice, reply, oral pleadings, determination, and final settlement.


\textsuperscript{19} 2 Coleman Phillipson, op. cit. \textit{supra} note 13, at 332 (Liv. VIII. 39).
College of Fetials was under the complete domination of the Roman Senate—exercising little or no independent power. Furthermore, that part of the fetial procedure concerned with the formalities preliminary to a declaration of war was, on occasion, dispensed with by the Romans, or used by the latter as cover for waging an unjustifiable war. Nevertheless, the ancient College of Fetials, the Ius Fetiale, and the Fetiale Procedure made a rather significant contribution to the development of international law. The doctrine of the "just war" had a profound influence on the Catholic School of International Law, Hugo Grotius, and other writers in the field of international jurisprudence.

Hugo Grotius (1583-1645), Christian Wolff (1679-1754), and Emmerich de Vattel (1714-1767) gave serious consideration to penal offences committed by states and individuals. They were influenced by the doctrine of the "just" and "unjust" cause of war which had been popularized previously by certain representatives of the Spanish-Catholic School of International Law, notably Francisco Vitoria (1480-1546), Francisco Suárez (1548-1617), and Balthasar Ayala (1548-1584). Hugo Grotius, the founder of modern international law, observed, "Authorities generally assign to wars three justifiable causes, defence, recovery of property, and punishment."

Also, the maltreatment of envoys was considered by the distinguished scholar as a just cause for war. Furthermore, "wars are justly waged against those who treat Christians with cruelty for the sake of their religion alone...[and] against those who show impiety toward the gods they believe in." His list of the unjust causes of war was summarized in:


Id., Bk. I, Ch. II, § II (2), p. 55.

Id., Bk. II, Ch. XX, § XLIX, p. 517.

Id., Bk. II, Ch. XX, § LI, p. 521.
Grotius definitely believed a State could commit a criminal act. Such state crimes reflect the influence of the just and unjust war concept. Acts which he considered state crimes include the following:


24 Among the unjust causes of war were the following: "[1] the fear of something uncertain . . . fear with respect to a neighboring power is not a sufficient cause, [2] Another such cause is advantage apart from necessity, [3] the refusal of marriage, when there is a great abundance of marriageable women, [4] the desire for richer land, [5] to claim for oneself by right of discovery what is held by another, [6] the desire for freedom among a subject people, [7] the desire to rule others against their will on the pretext that it is for their good, [8] title to universal empire which some give to the Emperor, [9] title to universal empire which others give to the Church, [10] the desire to fulfil prophecies, without the command of God, [11] the desire to obtain something that is owed by an obligation not strictly legal but arising from some other source (id., Bk. II, Ch. XXII, pp. 546-556), [12] Wars . . . against those who are unwilling to accept the Christian religion (id., Bk. II, Ch. XX, § XLVIII, p. 516), [and] [13] Wars . . . against those who err in the interpretation of the Divine Law; as is proven by authorities and examples" (id., Bk. II, Ch. XX, § L, p. 518).


26 Id. at 74, 75 (112). Also, "A state is held committing a crime if its population begins to abolish the idea that there is a divinity having a care for the affairs of men, worships evil spirits known as such, shows impiety towards the gods they believe in, worship their gods with the shedding of innocent blood, sins against nature, acts with impiety towards their parents, feeds on human flesh, kills their guests, practises piracy." Id. at 75 (113).
The most serious state crimes, according to Grotius, were those which endangered the whole society of mankind. For among "crimes that form of injustice is prominent which disturbs the public order and therefore harms the greatest number. Next in importance comes the injustice which affects individuals."\(^{27}\)

One of the justifiable causes for waging war, as noted above, was to inflict punishment on a State which had committed an injustice or criminal act. In other words, a State had the right to wage a punitive war, because "wars are usually begun for the purpose of exacting punishment."\(^{28}\) This right to punish state crimes dominated Grotius' thinking. "Here lies the culmination of Grotius' book; this is the summit which his reasoning tries to reach."\(^{29}\) Nevertheless, Grotius warned that war should not be undertaken rashly, even for just causes.\(^{30}\)

One of the difficult problems which confronted Grotius involved

\(^{27}\) *Op. cit. supra* note 20, Bk. II, Ch. XX, § XXX (1), pp. 495, 496.

\(^{28}\) *Id.*, Bk. II, Ch. XX, § XXXVIII, p. 502.


\(^{30}\) For example, "In one of Christ's parables it is said that, if a king has to strive in war with another king, he will first sit down, as is the custom of those who take counsel seriously, and will weigh within himself whether he who has ten thousand soldiers can be a match for an enemy who leads twice that number. If he sees that he will not be a match for his adversary, before the foe comes within his borders he will send an embassy with instructions to arrange a peace. . . . If, from the moral point of view at any rate, the matter under consideration seems to have an equal effectiveness for good and for evil, it is to be chosen only if the good has somewhat more of good than the evil has of evil. [Quoting Aristides.] 'When the good is less than the evil, it is better to give up the good.' . . . [Again quoting Aristides.] 'Whenever fear is greater than hope, why is it not right to take precautions?' . . . As Aristides rightly says, it is the custom to save the ship by casting out the cargo, not the passengers. . . . [war is not to be waged on such a pretext [to exact penalties] against him whose forces are equal to our own. For, as in the case of a civil judge, he who wishes to avenge crimes by armed force ought to be much more powerful than the other party. . . . [According to Augustus] war ought not be undertaken save when the hope of gain was shown to be greater than the fear of loss. [Quoting Scipio Africanus and Lucius Aemilius Paulus.] 'One should not fight unless a supreme necessity or a most favourable opportunity should be presented.' Such an opportunity will be found particularly when there is hope that the matter may be settled by inspiring fear and on the strength of reputation, with little or no risk. [For, according to Pliny] 'he subdued by fear, which is the most excellent kind of victory.' *Op. cit. supra* note 20, Bk II, Ch. XXIV, pp. 567-577. Also, "wars which are undertaken to inflict punishment are under suspicion of being unjust, unless the crimes are very atrocious and very evident, or there is some other coincident reason." *Id.*, Bk. II, Ch. XX, § XLIII (3), p. 508.
the question of punishment for state crimes. In short, where must responsibility be located? Also, what type of punishment should be exacted? Grotius believed that criminal sanctions could be applied to a State guilty of a public crime. "Here again . . . he applied a close parallelism between individuals and states."  

... For the punishments of individuals and of a community are different. Just as death is at times the punishment for individuals, so "the death of a state is its dissolution", and such dissolution takes place when the civil body is dissolved. . . .  

If now a state in this way ceases to exist, the right of enjoyment therein . . . is terminated as though by death. As a punishment, individuals are reduced to slavery. . . . Similarly, too, a state suffers political slavery in being reduced to a province. Individuals lose their property by confiscation. In like manner it is customary to take from a state also what belongs to it as a whole, its fortifications, naval arsenals, ships of war, arms, elephants, public treasure, and public lands.  

On the other hand, it is unjust for individuals to lose their private property because of a wrong done by the community without their consent . . . .  

Furthermore, in the words of Grotius,  

Subjection as a result of crime arises also without consent, whenever a person who has deserved to lose his liberty is by force brought under the power of him who has the right to exact the penalty . . . .  

In this way individuals can be brought under private subjection . . . ; and also peoples can be brought into public subjection for a public crime. But there is a difference in this respect, that the servitude of a people is naturally lasting, since the succession of the parts does not prevent it from remaining one people. On the other hand the penal servitude of individuals does not pass beyond the persons themselves, because the crime attaches to the person of the criminal.  

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At this point the important question arises, whether punishment may be exacted always for the crime of a community. It seems that such punishment may be exacted so long as the community exists,

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33 Id., Bk. II, Ch. V, § XXXII, p. 259.
because the same body remains, although composed of changing elements...\textsuperscript{34}

Therefore, Grotius believed that the society of mankind could not become a reality unless States were given the right to apply coercion—especially armed coercion—against a State or States guilty of an act of injustice. A State was obligated to observe certain rights and duties in its relations with other States; otherwise the law of mankind would be violated.

Grotius ignored—and would have rejected—the more modern doctrine according to which a corporate body cannot commit crimes... nor is he aware of the more modern doctrine that crime does not exist but for a previous legislative provision. ... But he taught that a wrong is not to be deemed a crime unless for serious arguments; and he carefully examined how, and when, and why states... can deserve punishments, and what punishments may be applied\textsuperscript{35}...

Again, States, as well as individuals, may transgress the penal law.

Therefore, unjust nations, as well as their unjust leaders and soldiers, could be punished, because the law of mankind was binding upon both individuals and nations. In regard to individual punishment Grotius declared that

those persons are bound to make restitution who have brought about...

[an unlawful] war, either by the exercise of their power, or through their advice. Their accountability concerns all those things, of course, which ordinarily follow in the train of war; and even unusual things, if they have ordered or advised any such thing, or have failed to prevent it when they might have done so.

Thus also generals are responsible for the things which have been done while they were in command; and all the soldiers that have participated in some common act, as the burning of a city, are responsible for the total damage. In the case of separate acts each is responsible for the loss of which he was the sole cause, or at any rate was one of the causes.\textsuperscript{36}

Furthermore,

guilt will pass from the highest authority to those subject to it, if those

\textsuperscript{34} Id., Bk. II, Ch. XXI, § VIII (1), p. 535.
subject to it have consented to crime, or if they have done anything by order or advice of the highest authority which they could avoid doing without committing wrong. . . .

Guilt, however, attaches to the individuals who have agreed to the crime, not to those who have been overmastered by the votes of others. . . .\(^{37}\)

Grotius was of the opinion “a participation in punishment” resulted “from a participation in guilt.”\(^{38}\) Thus, the rule of “superior orders” would not provide an adequate defense for those committing a criminal act which resulted from the execution of an order coming from higher levels.\(^{39}\)

Christian von Wolff, a German scholar of the Eighteenth Century, “strove for an organic, strictly scientific exposition of international law.”\(^{40}\) Like Grotius, he was greatly concerned with the doctrines of the “just” and “unjust” war. In regard to the latter he declared, “. . . he who wages an unjust war is a robber, an invader, and a bandit,”\(^{41}\) while “a just cause of war between nations arises only when a wrong has been done or is likely to be done.”\(^{42}\) Using the scientific approach he classified just wars.\(^{43}\)

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\(^{37}\) Id., Bk. II, Ch. XXI, § VII (1) and (2), pp. 534, 535.

\(^{38}\) Id., Bk. II, Ch. XXI, § IX, p. 537.

\(^{39}\) Most of the Nazi defendants invoked the rule of “superior orders.” For a detailed examination of the responsibility for executing a superior order see Trial of Nikolaus van Falkenhorst, 6 WAR CRIMES TRIAL SERIES (London: William Hodge & Co., E. H. Stevens, 1949).

\(^{40}\) FRIEDERICH VON MARTENS, Völkerrecht (German trans. by Bergbohm, Berlin, 1882-1883) 160.


\(^{42}\) Id., Ch. VI, § 617, p. 314.

\(^{43}\) Wolff’s classification of just wars was as follows:

“Since there are only three just causes of war, namely, (1) reparable wrong, (2) irreparable wrong, and (3) threatened wrong, which have the threefold purpose which is aimed at in a legal war, namely, (1) the attainment of one’s own or that which ought to be one’s own, (2) the establishing of security, (3) the preventing of threatened danger or the warding off of injury; undoubtedly there are three kinds of just war, which are distinguished by their different purposes. Therefore, since that is a defensive war in which the third is aimed at, a punitive war in which the second is aimed at, it remains for us to give a name to the war also in which the first purpose is aimed at, and this war it has seemed best to call a vindicative war in imitation of the vindication of one’s property.”

Id., Ch. VI, § 620, p. 316.
This point of view and method is reflected in his attitude concerning the punishment of States and individuals that have committed criminal acts.

Wolff believed criminal sanctions could be applied to States, although the degree or extent of punishment was somewhat different from that described by Grotius. For Wolff, the parallelism between individual and state punishment was not so close. For example, Wolff declared that

nation is bound to nation for the penalty for a wrong, in so far as satisfaction is to be given for the wrong. For it is self-evident that there is no place here for penalties, either capital, or those affecting the person, or those which consist in infamy, such as are inflicted in a state by the sovereign upon those committing crime, but only for those which consist in payment and therefore have the character of a fine. Therefore, infamy does not attach to these penalties as to civil penalties. . . .

Thus, a fine or reparations, which were charged to the nation as a whole, could be inflicted upon a State for injury resulting from the use of unjust force. Again in the words of Wolff,

Those things which are done in war by unjust force are charged to the nation as a whole, and not to the individuals as individuals. Therefore, although we assume that the act of the corporate body deserves punishment, nevertheless, since no one can be punished for the act of another, and since any one of those who share the punishment with each other is punished for his own act, by which he concurs in the act of another, individuals cannot submit to that punishment which the corporate body deserves. . . . Therefore, although an unjust belligerent may be a robber and a brigand, and robbery and brigandage may be chargeable to the nation which the ruler of the state represents, nevertheless on this account it is not to be said that any one of the individual persons is guilty of robbery and brigandage. . . . [N]ations cannot be punished for using unjust force in war in the way in which it is customary for robbers and brigands to be punished or as has been introduced by a positive law. By the right to punish provision is made for security in the future, and from this purpose in the existing cir-

\textsuperscript{44} Id., Ch. VII, § 789, p. 408.
cumstances is to be determined how much is allowable to attain that purpose.\footnote{Id., Ch. VII, § 814, pp. 421-422. Wolff was able to conclude that “... those are too hasty in their judgment who confuse the individuals of the corporate body with the corporate body, the penalties allowed by the law of nature of nations with the penalties decreed by positive law against robbers and brigands, and who make the different methods of concurring in the act of another identical with the act itself. Grotius with his keenness seems to have sufficiently distinguished them, although he has not fully explained all the details.” \textit{Ibid.}}

Nevertheless, Wolff did admit that

war properly speaking may not be engaged in except by those who by force seek their right against another, those who seek for war as an end in itself cannot be said to wage war, but they practice brigandage, and are to be compared to robbers whose malice extends to the farthest limit. Therefore, the right to punish them belongs to all nations, and by this right they can remove from their midst those fierce monsters of the human kind, consequently they have the right to punitive war [in order to establish security]....

It should be noted that Wolff believed an unjust war violated the “law of humanity.”\footnote{Id., Ch. VI, § 627, p. 319.} The latter found expression in the writings of Vattel, and later provided one of the bases for the conviction of the war criminals following the termination of World War II. Also he declared that

one is not bound to obey a ruler who commands what is contrary to the law of nature, nor does an evil deed cease to be such for the reason that it is done by the order of a ruler, nor does illegal obedience take from another a right gained because of the wrongful act.\footnote{Id., Ch. VI, § 758, p. 391. Also “those ... are not to be excused who knowingly defend the unjust cause of their ruler, and confirm his mind in error.” \textit{Id.}, Ch. VII, § 891, p. 456.}

Again, the rule of “superior orders” could not be invoked as a defense if the action was contrary to the law of nature.

Emmerich de Vattel (1714-1767), the disciple of Wolff, brought the doctrines of the latter, “with certain modifications,
into the domain of practical life." According to Vattel "the purpose or lawful object of every war" was "to avenge or to prevent an injury." Therefore, the three-fold objects of lawful war were: "(1) to obtain what belongs to us, or what is due to us; (2) to provide for our future security by punishing the aggressor or the offender; (3) to defend ourselves, or to protect ourselves from injury, by repelling unjust attacks. The first two points are the object of offensive war, the third is the object of defensive war." Like his predecessors, Vattel enumerated the types of unjust wars. Furthermore,

Nations which are always ready to take up arms when they hope to gain something thereby are unjust plunderers; but those who appear to relish the horrors of war, who wage it on all sides without reason or pretext, and even without other motive than their savage inclinations, are monsters, unworthy of the name of men. They should be regarded as enemies of the human race, just as in civil society persons who follow murder and arson as a profession commit a crime not only against the individuals who are victims of their lawlessness, but against the State of which they are the declared enemies. Other nations are justified in uniting together as a body with the object of punishing, and even of exterminating, such savage peoples.

As noted above, Vattel declared that one of the objects of lawful war was "to provide for our future security by punishing the aggressor or the offender." In other words, a punitive war for such purpose was a just war. This raised the question of the location of guilt — in the nation as a whole or its ruler. This problem, which has been the subject of much debate, did

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51 For example, "if a Nation takes up arms when it has not received an injury and when it has not been threatened, it wages an unjust war. . . . Pretexts [as grounds for war] . . . War undertaken solely for gain . . . Nations which make war without cause, and without apparent motives . . . [a defensive war waged to resist a nation waging a just war]." . . . Id., Bk. III, Ch. III, §§ 27, 32-35, pp. 244-246.
52 Id., Bk. III, Ch. III, § 34, pp. 245, 246.
not prove a difficult one for Vattel. In the words of the great Swiss writer,

He [the sovereign who wages an unjust war] is answerable for all the evils and all the disasters of the war. . . . He is guilty towards the enemy, whom he attacks, oppresses, and massacres without cause; he is guilty towards his people, whom he leads into acts of injustice, whom he exposes to danger without necessity or reason—towards those of his subjects who are ruined or injured by the war, who lose their lives, their property, or their health because of it; finally, he is guilty towards all mankind, whose peace he disturbs and to whom he sets so pernicious an example. . . .

He who does an injury is bound to repair it, or to give just satisfaction if the evil is irreparable; he is even bound to submit to punishment, if that be necessary as an example, or as an assurance to the injured party or to human society of his future good conduct. Such is the plight of a prince who carries on an unjust war. He must restore whatever he has taken, and send back at his own expense the prisoners; he must indemnify the enemy for the harm he has done and the losses he has caused; he must relieve families that have suffered, and repair, if possible, the loss of a father, a son, or a husband.63

After establishing the multi-guilt of the Prince, who wages an unjust war, as well as considering the nature of the punishment to be inflicted, Vattel presented some basic questions in regard to the ability of the Prince to repair or give just satisfaction for his misdeeds. Here again one observes the practical approach.

But how shall he repair so many evils? Many are of their nature irreparable. And as for those for which an equivalent may be offered in satisfaction, from what source will the unjust belligerent draw in order to compensate for his acts of violence? The private property of the Prince would be insufficient for the purpose. Is he to give away that of his subjects? It does not belong to him. Shall he sacrifice the national domain, and make over a part of the State? But the State is not his patrimony (Book I, § 61), and he may not dispose of it at will. And although the nation is responsible, to a certain extent, for the acts of its ruler, still, apart from the fact that it would be unjust

63 Id., Bk. III, Ch. XI, §§ 184 and 185, p. 302.
to punish the nation directly for offenses of which it is not guilty, this responsibility exists only towards other nations, which may look to it for redress (Book I, § 40; Book II, §§ 81, 82). Consequently the sovereign may not force it to bear the penalty of his unjust acts, nor despoil it in order to make amends for them. . . . Weigh all these matters, ye rulers of Nations, and when you have come to see clearly that an unjust war leads you into endless misdeeds which it is beyond all your power to repair, perhaps you will be less ready to engage in one.\textsuperscript{54}

Vattel believed that only the sovereign could be held responsible for the damage or injury resulting from an unjust war. He rejected the view of Grotius, since the rule of “superior orders” could be invoked as a defense for inferiors who carried out an order of a superior. Vattel declared:

The restoration of conquests, prisoners, and of property which can be given back in kind presents no difficulty when the injustice of the war is recognized . . . . But as regards repairing the damage that has been done, are the generals, officers, and soldiers bound in conscience to make good the wrongs which they have done, not of their own will, but as instruments in the hands of their sovereign? I am surprised that so rational a thinker as Grotius should decide without qualification in the affirmative.\textsuperscript{55} His view is only tenable in the case of a war so clearly and unquestionably unjust as not to admit the supposition of any secret motive of state policy which might justify it—a case hardly possible where States are concerned. On all occasions open to doubt, the Nation as a body, the individual citizens, and above all the military, should submit their judgment to those who govern, to the sovereign; their duty to do so arises from the essential principles of political society and of government. What would authority amount to if, at every step taken by the sovereign, his subjects could weigh the justice of his motives? If they could refuse to march to a war which did not seem to them to be just? Indeed, it often happens that prudence will not allow the sovereign to make known his motives. It is the duty of subjects to presume that his motives are just and wise, so long as the evidence to the contrary is not clear and convincing. When, therefore, in this spirit of submission they have given their assistance to a war which afterwards proves to have been unjust, the

\textsuperscript{54} Id., Bk. III, Ch. XI, § 186, pp. 302, 303.

\textsuperscript{55} De Jure Belli Ac Pacis Libri Tres, Ch. X.
sovereign alone is guilty, and he alone is under obligation to repair the wrong done. The subjects, and especially the military, are innocent; they have done no more than obey, as was their duty; and they are only called upon to give up what they have taken in such a war, since they hold it without lawful title. . . . Government would be impossible if every public official insisted upon examining and thoroughly understanding the justice of the commands given him before executing them. But if, for the good of the State, subjects must presume that the orders of the sovereign are just, they are not responsible for them.  

The conflict between Grotius and Vattel concerning "superior orders" was resolved in the Draft Code of Offenses Against the Peace and Security of Mankind formulated by the United Nations International Law Commission in 1951. ("The fact that a person charged with an offense defined in this Code acted pursuant to order of his Government or of a superior does not relieve him from responsibility, provided a moral choice was in fact possible to him", Article IV, Draft Code).

The writings of Vitoria, Grotius, Wolff, Vattel and others helped to establish the notion of the illegality of aggressive war rather than its criminality in the sense of penal law. Nevertheless, the moral and juridical aspirations of jurists and commentators, howsoever noble, "are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." It is in this spirit that the "teachings of the most highly qualified publicists of the various nations" may be considered "as subsidiary means for the determination of rules of law" (Article 38 (d), Statute of The International Court of Justice). In short, recognition of the illegality of aggressive war by many of the early writers did not create a rule of law. Hence the jurists and statesmen of the Twentieth Century were confronted with the difficult task of translating the concept into positive law.


57 The Paquete Habana, The Lola, 175 U. S. 677, 700 (1900).
The concept of aggressive war, as well as the right to take punitive action against those who wage such a war, has been in the process of development for many centuries. During the formative years the principle was interwoven with the doctrine of the just war (bellum iustum). The latter was in the nature of "a reaction against a wrong, a procedure either in tort (restitution, reparations, guarantees) or in criminal law (punishment, sanctions)." Such a doctrine was of "Catholic origin, anchored in natural law, [and] a theological, ... [rather than] a legal concept." Yet, "International law, or the law that governs between states," as Mr. Justice Cardozo put it, "has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the 'imprimatur of a court attests its jural quality'." Many rules of positive law were, at their inception, based upon theology or natural law.

In the Roman Period the College of Fetials and Senate would decide whether or not a just cause for war existed. Upon the successful termination of the war Rome determined the nature and extent of the punishment to be assessed, either against the defeated nation as a whole or against the authors of the war. In either case Rome was not only a party involved, but also judge of her own cause. Also one of the major deficiencies of the natural law was that the determination of the justice of the cause was left to the rulers themselves who were expressly recognized as judges in their own cause. In fact, little effort was devoted to devising criteria and means by which a more impartial judgment could be obtained. Likewise in the modern period, the victorious State or States are judge of their own

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69 Ibid.
cause. In all criminal prosecutions, whether at the local or international level, criminals are apprehended, tried and punished by the victor — the latter being represented by the power of the individual State or international community. Nevertheless, a valid technique must be found for determining when an act of aggression has been committed by a State.

In the Twentieth Century the international community has been more concerned with peace and security than philosophical discussions concerning what constitutes a "just" or "unjust" war. Since the termination of World War I considerable effort has been made to convert the earlier theory of aggressive war into a rule of positive law. For example, numerous treaties have been concluded which outlaw aggressive war. Also the principle was included in the Charter of the Nuremberg Tribunal as "Crimes Against Peace" (inter alia, the "initiation or waging of a war of aggression..."), and has been incorporated in the Draft Code of Offences Against the Peace and Security of

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61 Treaty for the Renunciation of War (Aug. 27, 1928); the Anti-War Treaty of Non-Aggression and Conciliation (signed at Rio de Janeiro, Oct. 10, 1933); the Act of Chapultepec (March 8, 1945); the Inter-American Treaty of Reciprocal Assistance (Sept. 2, 1947); the Charter of the Organization of American States (signed at Bogotá, April 30, 1948); Charter of the United Nations (Art. 2, ¶ 4); and the draft Declaration on Rights and Duties of States, prepared by the International Law Commission, Art. 9. "A comparison of the law of the [UN] Charter with classic International Law," according to M. A. Verdross, "shows that one of the great innovations of the Charter is the prohibition of resort to force for the solution of international disputes. It is true that the Covenant of the League of Nations abolished, in principle, the right of States to be judges in their own cause. It did not, however, oblige its Members to renounce resort to war in all cases. A step forward was taken by the Pact of Paris of 1928 generally known as the Briand-Kellogg Pact, which imposed an obligation upon States not to resort to war as an instrument of national policy. It did not, however, forbid military reprisals. The first general provision expressly forbidding States to resort to force in their international relations is therefore Art. 2(4) of the Charter. It obliges the Members of the Organization to abstain not only from the use of force, but also from the threat of force, in their international relations." "Guiding Notions Concerning the Organization of the United Nations," lecture delivered at The Hague Academy of International Law, Summer, 1953. "In neither instrument is war declared to be illegal. The Charter, however, makes a large advance over the Covenant by omitting the word 'war' and forbidding the use of force by a state in a manner inconsistent with the purposes of the Organization (art. 2, par. 4, and ch. VII)." Clyde Eagleton, Covenant of the League of Nations and Charter of The United Nations: Points of Difference, 13 Dept. State Bull. 263, 266 (No. 321, Aug. 19, 1945).

62 Art. 6 (a).
Mankind. This development represents, in a sense, the crystallization of the earlier notion of the illegality of aggressive war. Furthermore, as a result of the cooperative arrangements established under the League of Nations and the United Nations Charter, the older doctrine of a just war (the right of a State to wage a punitive war against an unjust aggressor) has been replaced by the doctrine of a legal war—a war which may be necessary to maintain international peace and security.

Notwithstanding recent trends in the law, there are some that contend that States are the only proper subjects of international law. Therefore, it is argued that since the law provides no sanctions for individual offences, the authors of such offences cannot be proper subjects of the law. This view, which is based upon a rather fine distinction between proper subjects and objects of law, does not represent a realistic approach to the problem. Nations are composed of individuals; and the latter are, either directly or indirectly, affected by the law. In short, “The final object of the law of nations is not the protection of the impersonal interests of juridical entities termed states, governments, or sovereigns. It is the protection of the ordinary common interests of ‘peoples’.” Hence, the International Law Commission provided in Article I of The Draft Code of Offences Against the Peace and Security of Mankind that “[o]ffences against the peace and security of mankind, as defined in this Code [including acts of aggression, among other crimes], are crimes under international law, for which the responsible individuals shall be punishable.” Additional sanctions for individual offences may be incorporated into the law in the future. If such be the trend in the law, the latter may evolve into a world code as the States draw

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63 Art. 2.
64 Philip Marshall Brown, The Legal Effects of Recognition, 44 Am. J. Int. L. 617, 618 (1950). According to the Nuremberg judgment, “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.” 1 Trial of the Major War Criminals Before the International Military Tribunal (Nuremberg, 1947) 223.
closer together or possibly unite within a world federal system. Regardless, the law envisages a close interrelationship between the nation as such and those that live within its jurisdiction.

Despite the continuous development of an international criminal law over the centuries, the law, as yet, may not be classified as a mature law. If compared with established standards of national or local penal law, the international criminal law may be considered an instrument of pioneer justice. In a sense, "these are pioneer days in world law." This is particularly true in the field of penal law. International criminal law, as it has developed to the present, "is very much in the state that common law was in Blackstone's time." Yet considerable progress has been made in the development of the law.

65 Comment, Genocide: A Commentary on the Convention, 58 Yale L. J. 1142, 1157 (1949).
SOUTHWESTERN LAW JOURNAL
Published quarterly by the Southern Methodist University Law School and the Southwestern Legal Foundation.
Subscription price $4.00 per year, $1.50 per single copy.

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