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## Universality of Jurisdiction Over War Crimes

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BECAUSE of the mobility of troops in the present war and the practice of transferring troops from one front to another, it may well be that units of Gestapo, SS, or other German organizations, which have been charged with committing some of the worst war crimes, may have been moved from one front to another, perhaps as "flying squadrons". It may also be a fact that many, even hundreds of, members of such groups have now been captured and are prisoners of war in Great Britain or the United States. Such prisoners held by Great Britain may have committed atrocities against Yugoslavs in Yugoslavia or Greeks in Greece. German prisoners in the custody of the United States may have committed atrocities against Poles in Poland before the United States became a belligerent. Furthermore, for reasons not obvious, but none the less real, it may be that some countries will not wish to punish certain war criminals or that they would prefer that some such individuals be punished by other States. Again, the custodian State may wish to punish an offender itself rather than turn him over to another government even though a request for rendition has been made.

Because of notions of territorial jurisdiction, it is thought by some persons that, although a State may punish war criminals for offenses committed against its own armed forces during the military operations, it may not punish an offender when the victim of a criminal act was not a member of its forces, if the crime was committed in a place over which, at the time of the act, the punishing State did not have

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that solidified *de facto* control akin to sovereignty which is denominated as military occupation—that is, in terms of Article 42 of the 1907 Hague Regulations, the degree of control which exists when the authority of the hostile army has actually been established and can be exercised.<sup>1</sup>

This paper is concerned with the question whether, under international law, a belligerent State has jurisdiction to punish an enemy war criminal in its custody when the victim of the war crime was a national of another State and the offense took place outside of territory under control of the punishing State. Stated more technically, the question is whether the jurisdictional principle of universality is applicable to the punishment of war crimes.

There have been many bases of jurisdiction enunciated for the trial and punishment of alien criminals.<sup>2</sup> Pound<sup>3</sup> and the majority of the members of the United States Supreme Court<sup>4</sup> would probably put it on the basis of the "interest" of the State. But Justice Jackson of that Court doubts that "the position can long be maintained that the reach of a state's power is a by-product of an interest."<sup>5</sup> We need not, however, delve into the theory upon which jurisdiction in this broad type of case is based, because the question is one of the existence *vel non* of a limitation by international law on the legal power, or jurisdiction, of the State. If no limitation can be found under that law, States have reserved their power in the matter.

The method of approach in ascertaining the answer to the question posed is not to show that international law permits States to exercise such jurisdiction, but that it does not prohibit them from so doing. This fundamental point can best be made clear by an appreciation of the facts and law of the leading case on the jurisdiction of States under international law—the case of *S. S. Lotus (France v. Turkey)*,

<sup>1</sup> 36 STAT. (1909-1911) 2277, 2295, 2306; 2 TREATIES, ETC. (Malloy) 2269, 2281, 2288. See *infra* note 132.

<sup>2</sup> See *Jurisdiction with Respect to Crime*, Edwin D. Dickinson, Reporter, Harvard Research in International Law, 29 AM. J. INT. LAW (Supp. No. 3) 437 *et seq.*; W. E. Beckett, *The Exercise of Criminal Jurisdiction over Foreigners* (1925) 6 BRITISH YEAR-BOOK OF INTERNATIONAL LAW 44.

<sup>3</sup> Roscoe Pound, *The Idea of Law in International Relations* (1939) PROC. AM. SOC. INT. LAW 10 *et seq.*

<sup>4</sup> *Alaska Packers Association v. Industrial Accident Commission of California* (1935) 294 U.S. 532.

<sup>5</sup> Justice Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution* (1945) 45 COL. L. REV. 1, 28.

decided by the Permanent Court of International Justice in 1927.<sup>6</sup> In 1926 a collision occurred on the high seas between the French steamship *Lotus*, bound for Constantinople, and the *Boz-Kourt*, a Turkish vessel. The *Boz-Kourt* was sunk and eight Turkish passengers or crew members perished. After attending to the safety of the survivors of the *Boz-Kourt*, the *Lotus* continued her voyage to Constantinople. Following investigations by the Turkish authorities, one Demons, the officer of the watch on the *Lotus* at the time of the collision, was placed under arrest pending trial for involuntary manslaughter.

On trial Demons objected to the proceedings on the ground that the Turkish courts lacked jurisdiction. The objection was overruled. Demons was found guilty, and was sentenced to a fine of approximately \$120 and to imprisonment for eighty days. The French Government protested the action of the Turkish authorities. As a result of diplomatic discussions the two governments agreed to submit the question of Turkey's jurisdiction to the Permanent Court of International Justice. The question of law put to that Court was whether Turkey, by instituting criminal proceedings against Demons, had "acted in conflict with the principles of international law—and if so, what principles".<sup>7</sup>

In the World Court the French Government raised an issue of principle which "proved to be a fundamental one".<sup>8</sup> It contended that in order to establish its jurisdiction, Turkey must prove that a rule of international law existed allowing States to exercise its power in such cases. Turkey's position was that States may exercise jurisdiction over crime whenever the exercise of "such jurisdiction does not come into conflict with a principle of international law".<sup>9</sup> The Court held in favor of Turkey, saying that the way Turkey had stated the question was "dictated by the very nature and existing conditions of international law".<sup>10</sup> In an already classic statement, it went on to explain that:

"International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally ac-

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<sup>6</sup> Judgment No. 9, Series A, No. 10. Also in 2 HUDSON, *WORLD COURT REPORTS* 23.

<sup>7</sup> Judgment No. 9, Series A, No. 10, p. 5.

<sup>8</sup> *Ibid.* at 18.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

cepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."<sup>11</sup>

The Court also stated that in exercising jurisdiction international law leaves States "a wide measure of discretion"; that, where there is no prohibitive rule of international law, "every State remains free to adopt the principles which it regards as best and most suitable"; that "all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction"; that, "within these limits, its right to exercise jurisdiction rests in its sovereignty";<sup>12</sup> that this principle applies equally "to civil as well as to criminal cases"; that the so-called territoriality of criminal law "is not an absolute principle of international law";<sup>13</sup> that any exception to the right of States to exercise jurisdiction must be "conclusively proved";<sup>14</sup> and that, as municipal jurisprudence was divided, "it is hardly possible to see in it an indication of the existence of the restrictive rule of international law".<sup>15</sup>

This is to hold that independent States have a freedom of action in all matters not prohibited to them by the principles or rules of international law; that States are presumably free to act; and that the proponent of restriction must bear the burden of establishing the existence of a prohibitive rule of international law. France, therefore, had the burden of showing that, in respect of the offense committed on the high seas, Turkey had violated a rule of international law in assuming jurisdiction over Demons. France could not sustain the burden. The Court, accordingly, held that there was no principle of international law which precluded Turkey from instituting criminal proceedings against Demons, and that Turkey, in proceeding against him, had not acted in conflict with any such principle.

The holding is that an independent State has legal power to vest jurisdiction in its courts to hear and determine any criminal matter which is not prohibited by international law. Our subject may be stated in the same terms: An independent State has legal power to vest jurisdiction in its courts to hear and determine alleged war crimes

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<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.* at 19.

<sup>13</sup> *Ibid.* at 20.

<sup>14</sup> *Ibid.* at 26.

<sup>15</sup> *Ibid.* at 29.

unless it is prohibited from so doing by international law. In order to establish that, under international law, the principle of universality does not apply to the trial and punishment of such war crimes, it is necessary to show that States generally, as a matter of practice expressing a rule of law, have consented not to exercise jurisdiction in such cases. As independent States are involved, any such restriction must be conclusively proved, and to do this municipal law and practice must not be divided.

We turn to the inquiry whether, under these tests, national States have consented to limit their power in respect of the punishment of war crimes.

## I

The term "war criminal" is of recent origin.<sup>16</sup> The use of this new and ill-defined label does not, however, mean that the garb of a neoteric term has been thrown around newly created offenses with the expectation that a supposed term of art will carry legal consequences. All the offenses of any importance which the term war crime properly denotes are old and well-known in the law of war. War criminals are of various sorts, ranging from heads of States and top-ranking civilian officials down through the grades of the army to the private soldier; they are found among civilians, both those who do and do not accompany or serve with armies at home or in the field; they are found especially among irregular combatants and former soldiers who have quit their posts to plunder and pillage. Such persons, when acting alone or organized in bands, have been called by various names, such as banditti, brigands, buccaneers, bushwackers, filibusters, francs-tireurs, freebooters, guerrillas, ladrones, marauders, partisans, pirates, and robbers. Up to very recent times the most commonly-accepted, generic term for such persons was "brigand". The origin of jurisdiction over the war criminal must be sought in the ancient practice of brigandage, in its relations to military operations and occupation. In the history of such activities will be found the position and practice of states with regard to their power to punish such persons. We accordingly turn to a consideration of the practice of brigandism. The law governing it, both in time of peace and in time of war, is relevant.

It would be a mistake to think of brigandism as wholly a thing of the past. Moore's Digest on International Law, published in 1906,

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<sup>16</sup> It appears to have been used first by Oppenheim in 1906, 2 OPPENHEIM, INTERNATIONAL LAW 263.

contains a section on brigandage.<sup>17</sup> At the end of the last century, brigands in the Philippine Islands were so intrenched and powerful that the Spanish government was unable to eradicate them. In his Annual Report of 1900, Major General Arthur MacArthur, Commanding the Division of the Philippines, wrote:

"The bands of insurgent guerrillas are not soldiers in the true sense of the word, but it is a mistake to classify them as ladrones or armed robbers. There is considerable evidence of record to the effect that the insurgent leaders have themselves suffered at the hands of the latter, who are outlaws pure and simple. The country has suffered from this criminal class from time immemorial, which the Spanish administration was unable to suppress, as the people were not permitted to organize for self-protection. All that Spain was willing to do in the premises was to distribute the army and civil guards in such small detachments throughout the archipelago that they were entirely inadequate to the end in view. As soon as the insurgent soldier is eliminated from the problem, the extirpation of robbers from the highways will, it is believed, be easily and quickly accomplished by the systematic organization of society to hunt them down."<sup>18</sup>

Even more recently in the present century, a number of international claims have been presented by the United States for failures to suppress brigandage.<sup>19</sup> How real the matter was to the Rumanian Government in 1926 may be seen from an excerpt in the footnote, the content of which was taken from its communication to the League of Nations' committee of experts on the progressive codification of international law.<sup>20</sup>

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<sup>17</sup> 6 MOORE, *DIGEST OF INTERNATIONAL LAW* (1906) 800 *et seq.*

<sup>18</sup> Pp. 9-10.

<sup>19</sup> 5 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* (1943) 474, 476, 480, 481, 483, 546-547, 557, 655, 675, 745-746. See also index to "Bandits" in WHITEMAN, *DAMAGES IN INTERNATIONAL LAW*, Vols. 1-2 (1937); Vol. 3 (1943).

<sup>20</sup> The following remarks were made in particular relation to the topic of the pursuit of pirates: "The examination of this special case of pursuit continued by the public authorities of one State in places subject to the sovereignty of another leads us to submit to the Committee of Experts a very serious question, which doubtless does not come within the legal scope of absolute piracy but nevertheless calls for a solution on an international scale in order to prevent any possibility of inter-State disputes.

"This question is that of the bands of criminals which are organized in the territory of one State close to the frontier and, crossing the frontier, conduct their operations in the territory of a neighboring State.

"Acts of violence committed by these bands are in many respects similar to piracy.

"Like pirates, the members of these bands form robber communities. They are acting with the object of gain. They commit acts of violence for private ends and not for the State to which they belong. The feature that distinguishes acts of violence com-

According to Lieber, "the word Brigand, derived as it is from *briguer*, to beg, meant originally beggar, but it soon came to be applied to armed strollers, a class of men which swarmed in all countries in the middle ages".<sup>21</sup> Individuals who become brigands are usually degenerate young men, fugitives from justice, charged with murder in the communities in which they were reared. According to the chronicles, in a great majority of cases, the brigand starts his career after having killed the successful rival for the affections of a particular maid. In one way or another such persons become associated with other dangerous and criminal persons and a group is

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mitted by these bands from true piracy is that their operations are not carried on in a place subject to no sovereignty but in the territory of an individual State.

"What is to be done supposing that these bands, operating, as they almost always do, close to a frontier, are pursued by the authorities of the victim State and retire within the territory of the State from which they have come, if the authorities of the latter State are unable to continue the pursuit themselves?

"It will, of course, be far from easy to find an immediate solution for this question, because it is essential to pay due regard to the exclusive right of a State to police the territory over which it has sovereignty.

"When, however, it is a matter of international notoriety that a State is unable to exercise its police rights over bands of malefactors, the situation is very similar to that envisaged in the second paragraph of Article 5.

"It is surely arguable that if a pursuit is begun and continued to defend the social order generally and suppress such bands of evil-doers in virtue of the laws common to every country, it is an act which equally renders service to the State unable to continue the pursuit itself.

"If the strong arguments contained in M. Matsuda's report are adapted to this case, we may affirm—to echo his own words—that 'otherwise, if the State in which the band of malefactors has taken refuge could not take the necessary measures to carry through the pursuit in time, the result would be to facilitate their flight and enable them to escape punishment. In such cases, however, the right to try the malefactors devolves upon the State in whose territory they were arrested. It is the recognition due to its sovereignty.'

"We do not propose, of course, that this question should be dealt with in the present draft, though its settlement by international agreement is as much to be desired as that of the piracy question. We would go still further, and, although the situation is closely analogous to that envisaged in the second paragraph of Article 5 of the draft, we do not ask that the same solution should be provided.

"We merely propose that this problem, which is of such great importance to-day, should be submitted to the Committee of Experts for examination in view of the possibilities of grave international conflicts which may arise if a settlement is not found in the near future." L.O.N. Doc. C. 196, M. 70. 1927. V., pp. 213-214.

<sup>21</sup> Francis Lieber, *Guerrilla Parties considered with reference to the Laws and Usages of War* (August 1862) 10, printed by D. Van Nostrand, New York, 1862, for distribution in the Army, by order of the War Department; reprinted in 2 *THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER* (1881) 275 *et seq.* This paper will hereinafter be cited as "G. P." Page references are to the original 1862 print.

formed.<sup>22</sup> They band together in appreciation of the fact that numbers increase the power of attack and protection. A natural leader becomes chief, usually because of his daring. The group becomes a loose, self-constituted, armed organization, for the primary purposes of protecting itself from law enforcement agencies, and obtaining loot by armed violence. It is motivated by no public cause and its acts are authorized by no State. When it conducts "warfare" it is as a private venture. It acts essentially in its own private interest.

Brigands take over abandoned structures in remote spots, or, climate permitting, live in camps or even in tactically advantageous caves with difficult approaches. They organize their living conditions and equip themselves with mounts to enable them to have as much mobility as possible both for raid and retreat.<sup>23</sup> They gain a quantum of security by threatening arson and death to neighboring residents, or by cajoling them with offers to share in loot in return for bringing in food or information concerning potential victims who have ventured into the area for commercial, tourist, or other purposes. At times they have been protected by sharing their spoils with high government officials.

The resulting association is a small, loose, degenerate society, the members having little or no sense of allegiance to any State. In so far as they may, they have thrown off their allegiance to their States. As an ex-brigand said to MacFarlane, an historian of brigandism, they "felt themselves at war with all mankind, and they were not at peace even among themselves".<sup>24</sup>

Acts of violence are the natural consequence of such a situation. There is no other way to provide for their necessities. Discipline is usually unenforced, especially during raids, and heinous crimes of robbery and lust are correctly associated with them. They commit murder and arson, and destroy property on an extensive scale for the sheer sake of destruction. They capture persons for purposes of ransom, and they do not hesitate to kill their captives as object lessons to pecunious relatives, friends, or governments.

The essential elements of the selection of a base of operations for successful brigands is two-fold. First, the base must be near an im-

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<sup>22</sup> Giddings would probably account for it on the principle of the "consciousness of kind." FRANKLIN H. GIDDINGS, *THE PRINCIPLES OF SOCIOLOGY* (1907) 17, 127.

<sup>23</sup> Alberico Gentili said that "it was more difficult to find" the Ligurian brigands "than to overcome them." *DE IURE BELLI LIBRI TRES* (1612) Carnegie transl. 1933, 14.

<sup>24</sup> MACFARLANE, *THE LIVES AND EXPLOITS OF BANDITTI AND ROBBERS IN ALL PARTS OF THE WORLD* (London, 1837) 11.



portant trade route or highway; second, the physical conditions of the place must be such as to make their capture as difficult as possible. They have, accordingly, generally centered their activities near lines of communications in forested or rugged mountain areas.

Brigandage has flourished in nearly all countries, at one time or another, not excepting the United States. As is well known, western United States was inhabited for a time with a considerable number of brigands, popularly known as "outlaws". What Theodore Roosevelt, in his *The Winning of the West*, said of such brigandage activities in the middle west late in the Eighteenth Century applies equally to the far west during most of the Nineteenth:

"Most of the men who came to the backwoods to hew out homes and rear families were stern, manly, and honest; but there was also a large influx of people drawn from the worst immigrants that perhaps ever were brought to America—the mass of convict servants, redemptioners, and the like, who formed such an excessively undesirable substratum to the otherwise excellent population of the tide-water regions in Virginia and the Carolinas. Many of the southern crackers or poor whites spring from this class, which also in the backwoods gave birth to generations of violent and hardened criminals, and to an even greater number of shiftless, lazy, cowardly cumberers of the earth's surface. They had in many places a permanently bad effect upon the tone of the whole community . . . In the backwoods the lawless led lives of abandoned wickedness; they hated good for good's sake, and did their utmost to destroy it. Where the bad element was large, gangs of horse thieves, highwaymen, and other criminals often united with the uncontrollable young men of vicious tastes who were given to gambling, fighting, and the like. They then formed half-secret organizations, often of great extent and with wide ramifications; and if they could control a community they established a reign of terror, driving out both ministers and magistrates, and killing without scruple those who interfered with them."<sup>25</sup>

We have perhaps seen the last of brigandism in the United States in the gangsterism of the 1920's and 1930's.

Historically, brigandage has been to a large extent international in character. It is a strategical advantage to nations to have rugged mountain ranges as their borders. On such borders international lines of communication often must go through mountain passes. Such areas are, therefore, ideal for the brigand, and he has taken advantage of them. To bring into focus the importance of the international border

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<sup>25</sup> 8 THE WORKS OF THEODORE ROOSEVELT (National Edition, 1926) 106-107.

in relation to brigandage, one can hardly do better than to quote from MacFarlane. In 1837, he wrote:

"In looking over the different countries infested by banditti, it will strike us that their existence may almost be reduced to a branch of statistics and geography. Certain districts, as formed by nature, seem of themselves to suggest the trades of robbery and piracy; and where the progress of good government, civilization, prosperity, and population, have not corrected the dangerous facility, it will be found that robbers and pirates pursue their calling now, as they have done in all ages, in certain spots which offer favourable points of attack and retreat. For example, the mountainous frontier of the Neapolitan kingdom has never been free from robbers, nor the coast of Dalmatia and of Greece from pirates; they have arisen and flourished there in all ages, like natural products of the soil. . . . Frontiers generally are, of all places, the most advantageous to brigandism: it is so easy for the criminals to evade pursuit, by constantly keeping themselves (to use a military phrase) *à cheval* on the line of demarcation of the two countries, and when pursuit is hot in the one, by retreating into the other. If the frontiers are mountainous, it seems almost impossible they can be honest, until the contiguous States are both highly advanced in civilization . . . . As justice and mildness of government wean men from rapine and crime, so do tyranny and oppression drive men to them; and when, under the latter circumstances, the nature of the country is favourable, abounding in forests and mountain recesses, and touching on the confines of another State, an extensive system of brigandage will almost invariably result."<sup>26</sup>

The importance of the border locations is evident in the history of our Mexican border, and bands of freebooters have even made ready, on our northern border, to attack Canada.<sup>27</sup>

Other aspects of operations on international borders are that the bands of brigands are often made up of members of more than one nationality;<sup>28</sup> and the passing foreign trader usually has more money or goods than the local inhabitant, and the likelihood of the foreign merchant obtaining sufficient armed force to rout out the band is at a minimum. Moreover, the standing of the foreign trader in his home community is presumptively such that his family, friends, or government will be relatively more likely to hand over a sizable ransom. MacFarlane states that many members of one Italian band of brig-

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<sup>26</sup> MACFARLANE, *op. cit. supra* note 24, at 12-13, 298.

<sup>27</sup> See, e.g., 7 MOORE, *op. cit. supra* note 17, at 929-930 and citations indicated there; also BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES* (1936) 408.

<sup>28</sup> MACFARLANE, *op. cit. supra* note 24, at 115.

ands had gold watches, seals, chains, rings, and other trinkets, "which they boasted of having taken from English travellers".<sup>29</sup>

In some areas in times past, certain bands of brigands could almost qualify, under international law, as independent States. They occupied, more or less permanently, a somewhat fixed area; they were bound together under the rule of a leader; and they had various rules governing their activities, such as the proportionate sharing of spoils. They have issued passports on borders and given safe-conducts through areas occupied by other bands of brigands.<sup>30</sup> They have sometimes dressed in military fashion;<sup>31</sup> they regularly posted sentinels;<sup>32</sup> they levied contributions; and armies were sent against them.<sup>33</sup> Tacfarinas, an African brigand, had the temerity to send envoys to Tiberius; and the ex-gladiator brigand, Spartacus, invited Crassus to make a treaty.<sup>34</sup> One band called itself the "Independenti".<sup>35</sup> Brigands

<sup>29</sup> Quoted in MACFARLANE. *ibid.* at 155.

<sup>30</sup> *Ibid.* at 251-254, 263.

<sup>31</sup> McFarlane described one group as follows: "Their dress was picturesque, yet military; that of some of them was a good deal tattered, but all had blue velveteen short jackets and breeches, linen shirts, drawers, and stockings; the latter bound round with leathern thongs, which fastened on a kind of sandal; their shirts open at the neck, with the collar turned back. The waistcoat was fastened with bunches of the little silver filigree buttons common at Naples; two rows of the same buttons adorned the jacket, which was cut in the military style, and had several pockets on each side. Many of them had two coloured silk handkerchiefs fastened to their button-holes by one corner, the rest being tucked into the pockets. Round the waist they wore an ammunition belt, called here a padroncina, (or the young mistress,) made of stout leather, having slips for cartridges, and fastened in front with a silver or plated clasp. Across the left shoulder another leathern belt was slung, in which there was a case for a knife, a fork, and a spoon, some of which, the boys said, were of silver. There was besides a hanger, or *couteau de chasse*, the weapon with which most murders in this part of the country are committed, with a brass handle, ornamented with silver, or plated.

"Every robber had a silver heart, containing a picture of the Madonna and child, suspended by a red ribbon to his neck, and fastened with another of the same colour to his left side. Their hats had high pointed crowns, like those of Salvator Rosa's banditti, surrounded with bands of alternate red and white near the top, and a black band and buckle near the brim. He, whom the lads took for the chief, though we learned afterwards that he was not so, was distinguished by a quantity of gold lace on his jacket and pantaloons; this we concluded to be the spoil of some Neapolitan officer. They all wore large gold ear-rings with drops; and two of the youngest had each two long ringlets on each side of the face, the rest of the hair being short." *Ibid.* at 153-155.

<sup>32</sup> *Ibid.* at 153.

<sup>33</sup> *E.g., ibid.* at 149, 158.

<sup>34</sup> GENTILI, *op. cit. supra* note 23, at 22, citing Tacitus.

<sup>35</sup> MACFARLANE, *op. cit. supra* note 24, at 194-195.

have been granted amnesty even in the present century.<sup>36</sup> MacFarlane tells us that "in the earlier ages of the world many a freebooter carved his way to a throne, or to something equivalent to it; and in certain regions of the East, where barbarism has retained or renewed the vices and irregularities of antiquity even in our own days, we see heroes of the same stamp arriving at the same royal dignity."<sup>37</sup> Finally, it may be remarked that the prevalence of brigandage has often been the subject of international protest and reclamation.<sup>38</sup>

## II

A body of international jurisprudence grew up around the activities of the brigand at a very early date. A group of brigands was not a State;<sup>39</sup> war was not declared against them;<sup>40</sup> more craft was permissible in operations against them;<sup>41</sup> and persons captured by them did not become slaves during the period when the status of prisoners of war was slavery.<sup>42</sup> If a legitimate enemy, allied with brigands, issues safe-conducts to any of them, the safe-conduct need not be respected.<sup>43</sup> Capture of property by brigands did not pass title. Accordingly, the *jus postliminii* did not apply.<sup>44</sup> But a *bona fide* purchaser for value without notice from a brigand should be reimbursed.<sup>45</sup> There was a difference of opinion among jurists on the question whether a later failure to pay brigands the ransom price demanded, in consideration of release, was illegal, even if the promise was made under oath.<sup>46</sup> According to Grotius, "if any one violates a sworn or

<sup>36</sup> See opinions of Commissioners under the Convention concluded September 8, 1923, between the United States and Mexico in the case of United States (West) v. United Mexican States (1927) pp. 404-405.

<sup>37</sup> MACFARLANE, *op. cit. supra* note 24, at 276.

<sup>38</sup> BATY, *INTERNATIONAL LAW* (1909) 152 *et seq.*; 6 MOORE, *op. cit. supra* note 17, at 800 *et seq.*; 5 HACKWORTH, *op. cit. supra* note 19, at 474, 476, 483-484, 546-547, 557, 675, 745-746. See also WHITEMAN, *op. cit. supra* note 19.

<sup>39</sup> GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* (1612) Carnegie trans. 1925, p. 631, GENTILI, *op. cit. supra* note 23, at 25; ZOUCHE, *IURIS ET IUDICII FEICIALIS, SIVE, IURIS INTER GENTES, ET QUAESTIONUM DE EODEM EXPLICATIO* (1650) Carnegie trans. 1911, p. 37, 38.

<sup>40</sup> See GENTILI, *op. cit. supra* note 23, at 22.

<sup>41</sup> GENTILI, *op. cit. supra* note 23, at 143-144.

<sup>42</sup> BELLII, *DE RE MILITARI ET BELLO TRACTATUS* (1563) Carnegie trans. 1936, p. 85; GROTIUS, *op. cit. supra* note 39, at 632.

<sup>43</sup> GENTILI, *op. cit. supra* note 23, at 199-200.

<sup>44</sup> GROTIUS, *op. cit. supra* note 39, at 713; GENTILI, *op. cit. supra* note 23, at 423; ZOUCHE, *op. cit. supra* note 39, at 127.

<sup>45</sup> GROTIUS, *op. cit. supra* note 39, at 713.

<sup>46</sup> GENTILI, *op. cit. supra* note 23, at 143-144, 22.

unsworn pledge given to a brigand he will not on that account be liable to punishment among other nations. For because of the hatred of brigands the nations have decided to overlook illegal acts committed against them."<sup>47</sup> Today, States have a duty under international law to make genuine efforts to rid their countries of bands of brigands.<sup>48</sup>

Ayala (1582) pointed out that the old jurists assimilated the brigand with the pirate.<sup>49</sup> Ayala states that the reason why the jurists say that "brigands and pirates" are not denoted by the word "hostes" is that they are "the common enemy of all."<sup>50</sup> Among these, Baldus, Javolenus, Livy, Paul, Pomponius, and Ulpian put brigands in the same class with pirates.<sup>51</sup> The classical writers on international law did likewise. Gentili wrote: "So, too, it will not be understood that pirates and brigands are protected, if the enemy has received them as allies and led them with him."<sup>52</sup> Grotius, too, put pirates and brigands in the same class.<sup>53</sup> Pufendorf calls brigands pirates.<sup>54</sup> The same is true in recent times. Moore described the pirate as "a sea brigand", and stated that the *Virginius* was not a pirate because she was not committing "any acts of brigandage."<sup>55</sup> In connection with land warfare, Lieber used, indiscriminately, the terms brigand,<sup>56</sup> robber,<sup>57</sup> pirate,<sup>58</sup> and armed prowlers.<sup>59</sup> Bonfils, too, put pirates, brigands, and filibusters in the same class.<sup>60</sup>

<sup>47</sup> *Op. cit. supra* note 39, at 796.

<sup>48</sup> See 1 WHITEMAN, *op. cit. supra* note 19, at 34. See also *ibid.* at 704, 776-777, where an international claim predicated on this proposition was paid by China; also, *supra* note 36.

<sup>49</sup> AYALA, *DE JURE ET OFFICIIS BELLICIS ET DISCIPLINA MILITARI LIBRI III* (1582) Carnegie trans. 1912, p. 59.

<sup>50</sup> *Ibid.* On other disabilities of brigands and robbers under the laws of war see *ibid.* c. 2, §15 and c. 5, §18.

<sup>51</sup> See GENTILI, *op. cit. supra* note 23, at 15, 22; GROTIUS, *op. cit. supra* note 39, at 630, 713.

<sup>52</sup> GENTILI, *op. cit. supra* note 23, at 199-200; see also *ibid.* at 22 and 424.

<sup>53</sup> *Op. cit. supra* note 39, at 631.

<sup>54</sup> *DE JURE NATURAE ET GENTIUM LIBRI OCTO* (1688), Carnegie transl. 1934, p. 505.

<sup>55</sup> 2 MOORE, *op. cit. supra* note 17, at 953.

<sup>56</sup> Lieber, *Instructions for the Government of Armies of the United States in the Field*, UNITED STATES WAR DEPT. GENERAL ORDERS 100 (April 24, 1863) hereinafter cited "G. O. 100", par. 52.

<sup>57</sup> *Ibid.*, par. 82.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*, par. 84.

<sup>60</sup> BONFILS, *MANUEL DE DROIT INTERNATIONAL PUBLIC* (7th ed., 1914) §1045.

For present purposes the important rules concerning brigands are the following: Death has always been the acknowledged punishment for the brigand.<sup>61</sup> Gentili held that brigands had "withdrawn from the agreement and broken the treaty of the human race"; that they could not enjoy the law of war or "the common law of all", because "malefactors do not enjoy the privileges of a law to which they are foes"; and, that they were "the enemies of all mankind."<sup>62</sup> Zouche laid down the law in the same sense.<sup>63</sup> Grotius held the view that the power to punish such persons was derived from the law of nations: "The fact must also be recognized that kings, and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever."<sup>64</sup> Grotius held that brigands "do not belong to any state",<sup>65</sup> and, being atrocious criminals, they "can be punished by any person whatsoever."<sup>66</sup> A generation later, Zouche, in 1650, took the position generally that when "crimes are very atrocious and very plain" kings "have the right to demand satisfaction not only for wrongs done to themselves or their subjects, but also for wrongs to any person whomsoever, which are in flagrant violation of the law of nature and nations; since the power of punishing is not merely derived from civil law, but comes from natural law also."<sup>67</sup> Again, according to Pufendorf, the brigand is "an enemy of civil so-

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<sup>61</sup> Lieber, G.P., pp. 10, 11.

<sup>62</sup> *Op. cit. supra* note 23, at 22-23.

<sup>63</sup> *Op. cit. supra* note 39, at 37, 38, 127.

<sup>64</sup> *Op. cit. supra* note 39, at 504. Vattel stated that "in the interest of their common safety all Nations are warranted in repressing and punishing the first attempt to violate that law [the law of war]." VATTEL, *LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* (1758 ed.) Carnegie transl. 1916, p. 289.

Bonfils took the position that "the State which, not warned that it will have to fight troops regularly organized, is attacked on its borders, would be authorized to see in the enemy soldiers and sailors only bandits and pirates committing an aggression, and to apply to them the territorial laws enacted against brigands instead of and in place of the laws of war." HENRY BONFILS, *MANUEL DE DROIT INTERNATIONAL PUBLIC* (7th ed. 1914) §1028, (Transl.) Fauchille and Bustamante take the same position. II PAUL FAUCHILLE, *TRAITÉ DE DROIT INTERNATIONAL PUBLIC* (1921) §1028; IV ANTONIO SANCHEZ DE BUSTAMANTE Y SIVREN, *DROIT INTERNATIONAL PUBLIC* (1937) 187-188.

<sup>65</sup> *Op. cit. supra* note 39, at 794.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Op. cit. supra* note 39, at 116.

ciety, who, if he is caught, is customarily made away with like a harmful wild beast."<sup>68</sup>

In more modern times Bonfils states that "pirates, brigands, filibusters, even if they are operating as a military organization with a chain of command, are not belligerents, and the laws of war could not protect them from liability for their acts",<sup>69</sup> and Wheaton declared that the judicial power of every independent State extends to the punishment of offenses against the law of nations "by whomsoever and wheresoever committed."<sup>70</sup> In 1862 Lieber pointed out that "death is inflicted" upon the freebooter "now as in former times."<sup>71</sup> In more recent times larger bands of what earlier would have been called brigands have become known by the names of freebooters or filibusters. Freebooters acting as such in foreign countries may not successfully claim the protection of their governments.<sup>72</sup> A century ago Great Britain and France asserted the right to prevent filibustering expeditions against third States.<sup>73</sup> Great Britain refused to protest when two of its citizens were tried and executed for such activities.<sup>74</sup> The United States has refused to protest when its citizens have been tried and executed abroad by military courts for such activities.<sup>75</sup> The United States has taken the position that United States citizens who enter into such activities in foreign countries lose all right to its protection.<sup>76</sup> The United States has likewise asserted that other nations have no right to protest its action in respect of such persons.<sup>77</sup>

It was noted earlier that Rumania, in 1926, brought the subject of brigandage before the League of Nations committee of experts for

<sup>68</sup> *ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS LIBRI DUO* (1672) Carnegie transl. 1931, p. 94.

<sup>69</sup> BONFILS, *op. cit. supra* note 64, §1045. (Transl.)

<sup>70</sup> *ELEMENTS OF INTERNATIONAL LAW* (1866), Carnegie ed., 1936, p. 151.

<sup>71</sup> G.P., p. 10.

<sup>72</sup> See cases cited in 3 MOORE, *op. cit. supra* note 17, at 787-788.

<sup>73</sup> "The Governments of Great Britain and France have issued orders to their naval commanders on the West India station to prevent, by force if necessary, the landing of adventurers from any nation on the island of Cuba with hostile intent." Second Annual Message of President Fillmore, Dec. 2, 1851, 5 RICHARDSON, *MESSAGES AND PAPERS OF THE PRESIDENTS* (1908) 113, 117.

<sup>74</sup> 3 MOORE, *op. cit. supra* note 17, at 787.

<sup>75</sup> 5 RICHARDSON, *op. cit. supra* note 73, at 113, 115.

<sup>76</sup> 3 MOORE, *op. cit. supra* note 17, at 788.

<sup>77</sup> See the Amelia Island case as set forth in MOORE, *op. cit. supra* note 17, Vol. 1, at 42, 76, 173, 175; Vol. 2, at 80, 406.

the progressive codification of international law. We should not overlook the following statement made by it at the same time:

"The fact that hitherto certain acts of violence which are universally criminal and have been classed as piracy have almost always been committed on the high seas does not mean that piracy is primarily maritime in character. Besides the high seas, there are also unowned territories, and though, of course, they are always becoming rarer, they still exist; and until some State acquires exclusive sovereignty over them, every State, in virtue of the principles described above, will naturally have a theoretical right of punitive jurisdiction over them. Supposing, for example, that a band of brigands in some unowned territory attacks and plunders a convoy or caravan and escapes capture by its victims, what is the difference from the legal point of view between piracy on the high seas and pillage in unowned territory? Although certain publicists maintain that in such cases the right of suppression may only be exercised by the State to which the victim belongs, or by the States bordering on the unowned territory, this theory is undeniably quite arbitrary and is not founded on any of the principles now underlying the application of criminal law. If the act was committed in unowned territory, it is universally punishable in virtue of the same principles as those which make piracy on the high seas universally punishable. It would therefore be most desirable to substitute for the term 'high sea' the words 'place not subject to the sovereignty of any State.' By adopting this suggestion, which is based on the actual legal notion and specific characteristic of piracy (i.e., the fact that it is universally punishable), the Committee of Experts might succeed in drawing up a draft convention which would cover a wide field and would be of great importance in the future as regards acts of piracy which may be committed in the upper regions of the air."<sup>78</sup>

It may be of considerable importance in this connection to note the following facts: The communication of Rumania to the League is dated November 20, 1926.<sup>79</sup> The Committee of Experts was in session in March, 1927, and its report to the Council is dated April 2, 1927.<sup>80</sup> At the same time as it was sitting in Geneva, the Permanent Court of International Justice at the Hague had the *Lotus* case before it,<sup>81</sup> but the Committee of Experts did not have the benefit of the judgment in that case, because it was not handed down until September 7th, five months later. If the Committee had had the decision in

<sup>78</sup> L.O.N. Doc. C. 196. M. 70. 1927 V, pp. 204-205.

<sup>79</sup> *Ibid.* at 196.

<sup>80</sup> *Ibid.* at 1, 7.

<sup>81</sup> It was seised on Jan. 4, 1927, 2 HUDSON, WORLD COURT REPORTS 20.



that case before them the suggestion of the Rumanian Government might have been considered more seriously.

It is well known, in Wheaton's words, that "pirates being the common enemies of all mankind, and all nations having an equal interest in their apprehension and punishment, they may be lawfully captured on the high seas by the armed vessels of any particular State, and brought within its territorial jurisdiction, for trial in its tribunals."<sup>82</sup> The line between the pirate and brigand is sometimes difficult to draw. The American buccaneer and filibuster combined both the pirate and brigand, and the term freebooter covers both types of activities. In 1823 the United States, Great Britain, and Spain were engaged in suppressing piracy in the Caribbean area. In the face of superior force the pirates took to the land. J. Fenimore Cooper, in his *History of the Navy of the United States of America*, informs us that "the retreat of the pirates from the sea was soon followed by their appearance in a similar dangerous character on land. In the neighborhood of Matanzas they were especially bold and alarming, roaming over the country in large bands, fully armed, and plundering and murdering the unprotected inhabitants."<sup>83</sup>

Both brigandism and piracy stem from the fundamental fact of the lack of governmental control in the areas of their operations. Often the area, in a real sense, is a "place not subject to the sovereignty of any State." As regards the probable impunity from punishment, the conditions under which both piracy and brigandage have grown and flourished are essentially the same. Like the brigand on land, the pirate operates along sea trade lanes; he is equipped for attack and escape; and the high seas, in and of themselves, are places where the enforcement of law is difficult. In times past, law enforcement on the high seas has been highly inefficient or completely lacking.

By contrast with the law of piracy, during the past two centuries the practice of States with regard to the punishment of brigands has not been considered to any extent in the literature of international law.<sup>84</sup> This may possibly be accounted for by the relative decline of brigandage, yet the amount of piracy has also declined. Be this as it may, the foregoing evidence shows that brigands have been classed

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<sup>82</sup> *Op. cit. supra* note 70, at 162.

<sup>83</sup> Vol. 3, p. 25.

<sup>84</sup> This may account for the public reaction in this country against General Andrew Jackson for his trial and execution of the British subjects Arbuthnot and Ambrister during the Indian incursions into Georgia from Spanish Florida in 1817 and 1818. But the British Government did not protest their execution.

with pirates from at least the sixteenth century, and that the legal consequences of acts of brigandage and of piracy, so far as concerns jurisdiction, were the same. The idea of outlawry runs through all the comentaries.<sup>85</sup> The basis of this point of view may have been that brigands attack nationals of all States indiscriminately if they happen to come within the area of their operations; and that, as travel increased their practices were harmful to the interests of all States, inasmuch as the nationals of all States were potentially threatened.

It is interesting to note that it may well be that the origin of the law of piracy is to be found in the law of brigandage. Grotius tells us that brigandage was illegal even before piracy. He pointed out that "the scholiast on Thucydides notes that, at the time when it was considered legitimate to plunder at sea, the Greeks refrained from murder and raids by night, and from the seizure of the cattle of ploughmen."<sup>86</sup>

Basically, war crimes are very similar to piratical acts, except that they take place usually on land rather than at sea. In both situations there is, broadly speaking, a lack of any adequate judicial system operating on the spot where the crime takes place—in the case of piracy it is because the acts are on the high seas and in the case of war crimes because of a chaotic condition or irresponsible leadership in time of war. As regards both piratical acts and war crimes there is often no well-organized police or judicial system at the place where the acts are committed, and both the pirate and the war criminal take advantage of this fact, hoping thereby to commit their crimes with impunity.

### III

We have seen that brigandage grows and flourishes in direct proportion to the lack of political order and adequate law enforcement, and that brigands engage in their crimes primarily because the conditions in which they operate afford them impunity from the forces of law and order. These conditions which exist in certain areas in times of peace are extended in the chaotic conditions attendant upon war. Brigandage grows in amount when countries are in upheaval and political conditions are unstable. In wartime both civilians and members of the armed forces fall into brigandage.

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<sup>85</sup> "To pursue the outlaw and knock him on the head as though he were a wild beast is the right and duty of every law-abiding man." 1 POLLOCK AND MATTLAND, *THE HISTORY OF ENGLISH LAW* (2d ed. 1911) 476.

<sup>86</sup> *Op. cit. supra* note 39, at 631.

The application of the law of brigandage has not been restricted to peacetime, and for good reason. Brigandage is a thriving by-product of war. During military operations degenerate civilian elements are afforded an unusual opportunity to commit all sorts of crimes with reasonable hope of impunity;<sup>87</sup> and, as the privateer may become the pirate, so the regular soldier may turn to brigandage. Under war conditions the deserter from his post has irrevocably broken his allegiance and is very much aware of it. Such persons lapse into the condition of the brigand with great rapidity. Where discipline is lax, such bands, large and small, grow up almost spontaneously. They have most of the characteristics of peacetime brigands, but their marauding acts increase in degree and viciousness. One typical activity of the small wartime band is to lie in wait and attack small, isolated detachments of soldiers in order to plunder them of the guns, ammunition, food, and other property they are carrying. Another is, at night, after the battle, to prowl on the battlefield robbing the dead and wounded, and to finish off wounded who have enough strength to resist their plundering. In this connection it may be noted that as recently as 1929 it was felt necessary to insert a provision in the Red Cross Convention to the effect that after every engagement the belligerent in possession of the battlefield shall take measures to protect the wounded and dead "from robbery and ill-treatment."<sup>88</sup>

Since the essence of brigandage is the use of armed force without a genuine public cause, brigands, when captured, have often attempted to rationalize their criminal activities as having patriotic motives. They often asserted that they were legitimate guerrillas, not marauders.<sup>89</sup> Lieber made the following interesting comment on this practice:

"It is different if we understand by guerrilla parties, self-constituted sets of armed men, in times of war, who form no integrant part of the organized army, do not stand on the regular pay-roll of the army, or are not paid at all, take up arms and lay them down at intervals, and carry on petty war (guerrilla) chiefly by raids, extortion, destruction, and massacre, and who cannot encumber themselves with many prisoners, and will therefore generally give no quarter.

"They are peculiarly dangerous, because they easily evade pursuit, and by laying down their arms become insidious enemies; be-

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<sup>87</sup> "The man who in civilization is merely sullen and bad-tempered becomes a murderous, treacherous ruffian when transplanted to the wilds". Theodore Roosevelt, *The Winning of the West*, 8 THE WORKS OF THEODORE ROOSEVELT (National Edition, 1926) 106.

<sup>88</sup> Art. 3, 47 STAT. (1931-1933) 2074, 2083; 4 TREATIES, ETC. (Trenwith) 5209, 5214.

<sup>89</sup> See, e.g., MACFARLANE, *op. cit. supra* note 24, at 254; 276-277.

cause they cannot otherwise subsist than by rapine, and almost always degenerate into simple robbers or brigands. The Spanish guerrilla bands against Napoleon proved a scourge to their own countrymen, and became efficient for their own cause only in the same degree in which they gradually became disciplined. The royalists in the north of France, during the first Revolution, although setting out with sentiments of loyal devotion to their unfortunate king, soon degenerated into bands of robbers, while many robbers either joined them or assumed the name of royalists. Napoleon states that their brigandage gave much trouble, and obliged the Government to resort to the severest measures."<sup>90</sup>

The type of band which has sprung up during most wars, even until recently, is illustrated by the following excerpt from the opinion of the United States Army confirming authority in 1901 in the military commission case of *United States v. Dreu*:

"The evidence clearly shows that his [the accused's] general plan of operation was to visit a house in the night time, assault and abuse the husband and wife and threaten them with death to induce them to produce their money and other valuables. Possessed of these, the band would then depart, taking their victims with them to their camp. Here their prisoners were subjected to further indignities, whipped, put in the stocks and made to suffer until some of them made further discoveries of the hiding places of their money, which the band would then send for and secure. The reason given by members of the band for these crimes was that the people robbed and maltreated were 'Americanistas.' Whether or not this was a mere pretext for acting the part of ladrones is not material, the fact being that their methods were no whit different from those of the vilest robbers and thieves. That as leader the accused was responsible for and was actually present and took part with his followers in committing these offenses there is no reasonable doubt."<sup>91</sup>

During war, when army discipline is lax, either during military operations or occupation, a state of affairs will almost certainly arise

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<sup>90</sup> Lieber, G.P., pp. 18-19. "But when guerrilla parties aid the main army of a belligerent, it will be difficult for the captor of guerrilla-men to decide at once whether they are regular partisans, distinctly authorized by their own government; and it would seem that we are borne out by the conduct of the most humane belligerents in recent times, and by many of the modern writers, if the rule be laid down, that guerrilla-men, when captured in fair fight and open warfare, should be treated as the regular partisan is, until special crimes, such as murder, or the killing of prisoners, or the sacking of places, are proved upon them; leaving the question of self-constitution unexamined." *Ibid.* at 20.

<sup>91</sup> General Orders 8, Division of the Philippines, Jan. 10, 1901 (hereinafter cited, G.O.—Div. Phil.)

similar to brigandage. In some wars the condition has developed to such an extent that the brigand and the regular were hardly distinguishable. There is a classical description of such a state of affairs in Gindely's *History of the Thirty Years War*, too long for reproduction here, which merits special mention.<sup>92</sup>

Brigandage does not cease when military operations end. It has sometimes grown in extent. Conditions following the wars of the French Revolution were well summed up in an article in the *Monthly Review* in April 1828:

"The wars of the French revolution had raged for years, during which time the States bordering on the Rhine were continually overrun by troops, French and German; the fields had been ravaged, the cottages pillaged and burnt, the cattle carried away, forced contributions in money and kind exacted; most of the landholders and farmers became ruined, and the poorer class of labourers and artisans were absolutely starving, and these, as a last desperate resource, began thieving—some for the mere object of supporting existence; others, animated by a principle of revenge against their armed oppressors. Of the latter sort was the notorious band of Pickard, in Belgium. The political state of the country favoured their impunity. The little German governments, ecclesiastical and secular, into which it was parcelled under the old system, had been either suppressed by the French, or were allowed to drag on a precarious existence, powerless and detached from the former imperial confederation. In one part the French laws had superseded the German, but were not yet consolidated and enforced, and the subordinate agents of justice had become remiss in their duties, from the contagious example of general disorder into which society was thrown. Mechanics of all trades, vagrants, pedlars, strolling musicians, labourers, woodmen, Jews, formed the first band of robbers that appeared on the right or German side of the Rhine, as early as the years 1793-4."<sup>93</sup>

It has often been the task of the military occupant to suppress brigandism.<sup>94</sup> The present Allied Military Government (A.M.G.) will probably be no exception. As this is written, a case of brigandage is reported among foreign workers in Germany who have been liberated

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<sup>92</sup> Vol. II, pp. 389-398.

<sup>93</sup> Cited in MACFARLANE, *op. cit. supra* note 24, at 257.

<sup>94</sup> See MACFARLANE, *op. cit. supra* note 24, *passim*. Speaking of the writer of a little volume, *LETTRES SUR LES CALABRES, PAR UN OFFICIER FRANÇAIS*, MacFarlane states that the author "had not been there three days, before he found the whole of a French soldier's business there to be a chase after robbers; and, indeed, with a few short intervals of repose, the whole of the three years was spent in hunting brigands." *Ibid.* at 63.

by Allied occupation.<sup>95</sup> It will be surprising indeed if, by the time this article appears, there have not been press reports of a number of instances of brigandage in Germany.

#### IV

Because of such reasons as the foregoing, the legal concept of brigandage has been carried into the criminal activities which take place in time of war and of military occupation. It has been well said that "the killing of enemies in war is in accordance with the will of the State that makes war . . . only in so far as such killing is in accordance with the conditions and limitations imposed by the law of nations."<sup>96</sup> Any other killing, whether by regular soldier or civilian is, therefore, unlawful.

The application of the law of brigandage in time of war has been very broad. If anything it has been too extensive as the following instances will show: The Napoleonic forces threatened to treat a German *levée en masse* "as brigands—that is to say, not to treat them as prisoners of war if captured."<sup>97</sup> On October 3, 1865, the "Emperor" Maximilian decreed that all supporters of the Mexican republican government (Juarists) taken with arms should be treated as bandits.<sup>98</sup> Lieber noted in 1862 that it was sometimes stated that one who "assails the enemy without or against the authority of his own government, is called, even though his object should be wholly free from any intention of pillage, a brigand, subject to the infliction of death, if captured."<sup>99</sup> He illustrated the point as follows:

"When Major von Schill, commanding a Prussian regiment of huzzars, marched, in the year 1809, against the French, without the order of his government, for the purpose of causing a rising of the people in the North of Germany, while Napoleon was occupied in the South with Austria, Schill was declared by Napoleon and his brother, *a brigand*, and the King of Westphalia, Jerome Bonaparte, offered a

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<sup>95</sup> An Associated Press Report, by Wade Werner, March 29, 1945, stated that "The first 48 hours after the German army fled from Darmstadt was a field day for liberated aliens who broke into houses, obtained weapons and began requisitioning clothing and supplies. They took shoes from German women in the streets. The workers broke open railway cars, including one loaded with morphine and other medical supplies."

<sup>96</sup> *Germany v. Dithmar and Boldt*, Leipzig (1921) 16 AM. J. INT. LAW 721.

<sup>97</sup> Lieber, G.P., p. 15.

<sup>98</sup> WINTHROP, *MILITARY LAW AND PRECEDENTS* (2d ed. 1896, 1920 reprint) 798, note 62.

<sup>99</sup> G.P., p. 10.

reward of ten thousand francs for his head. Schill was killed in battle; but twelve young officers of his troop, taken prisoners, were carried by the French to the fortress Wesel, where a court-martial declared them prisoners of war. Napoleon quashed the finding, ordered a new court-martial, and they were all shot as brigands."<sup>100</sup>

Lieber commented on this action by pointing out that Napoleon's action was not cited by him "as an authority in the law of war; he [Napoleon] and many of his Generals frequently substituted the harshest violence for martial usages. The case is mentioned as an illustration of the meaning attached to the word Brigand in the Law of War, and of the fact that death is the acknowledged punishment for the brigand."<sup>101</sup> The following year (1863), in General Orders 100, Lieber declared that "no belligerent has the right to declare that he will treat every captured man in arms of a levy *en masse* as a brigand or bandit."<sup>102</sup>

Perhaps as nice a statement as can be found among the early writers, on the extreme breadth of the law of brigandage in the law of war, is the following by Gentili, written in 1612:

"Those who do not have such a [public] cause are not properly enemies, even although they may have armies and wage war with some success, and although they conduct themselves as soldiers and commanders and meet the attack of commanders and opposing legions.

"He is an enemy who has a state, a senate, a treasury, united and harmonious citizens, and some basis for a treaty of peace, should matters so shape themselves. Cicero with absolute accuracy applied this distinction against the followers of Antony, treating them as brigands; while Charles Martel said of the Saracens, that because they roved about in great numbers and had leaders, camps, and standards, they were none the less brigands, since they had no motive for war. 'It is the motive which everywhere renders things effective', and our learned men also advance this same opinion with regard to those roving Saracens."<sup>103</sup>

The sense of the term "enemy", as used by Gentili, was of enemy persons who had the rights of prisoners of war upon capture.

The terms "partisan" and "guerrilla" are loosely used. Not all partisans or guerrillas are without the rights of prisoners of war. The

<sup>100</sup> *Ibid.* at 10-11.

<sup>101</sup> *Ibid.* at 11.

<sup>102</sup> Par. 52, G.O. 100, Apr. 24, 1863.

<sup>103</sup> *Op. cit. supra* note 23, at 25.

proper distinction appears in an act of Congress approved July 2, 1864, which described the punishable guerrillas as "guerilla marauders".<sup>104</sup> It is the class of guerrillas who do not operate in accordance with the laws of war and who resort, or plan to resort, to marauding which is assimilated to the brigand. Yet, it is safe to say that all classes of irregular participants in war have been held to be subject to treatment as if for brigandage.

The following statements, made during the nineteenth century, represent the legitimate limits in the law of war with regard to acts of brigandage, or, as they are now called, war crimes. It may be interesting to the reader to note the effect of substituting the twentieth century term "war criminal" where the word brigand or its equivalent, appears:

*Halleck*: "It will, however, readily be admitted that the hostile acts of individuals, or of bands of men, without the authority or sanction of their own government, are not legitimate acts of war, and, therefore, are punishable according to the nature or character of the offense committed. The taking of property by such forces, in offensive hostilities, is not a belligerent act authorized by the law of nations, but a *robbery*. So, also, the killing of an enemy by such forces, except in self-defense, is not an act of war, but a *murder*. The perpetrators of such acts, under such circumstances, are not enemies, legitimately in arms, who can plead the laws of war in their justification, but they are robbers and murderers, and, as such, may be punished. Their acts are unlawful; and, when captured, they are not treated as prisoners of war, but as criminals, subject to the punishment due to their crimes. Hence, in modern warfare, partizans and guerilla bands, such as we have here described, are regarded as outlaws, and, when captured, may be punished the same as free-booters and banditti."<sup>105</sup>

*Lieber*: "Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates."<sup>106</sup>

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<sup>104</sup> (1863-1865) 13 STAT. 356.

<sup>105</sup> HALLECK, INTERNATIONAL LAW (1861) 386-387.

<sup>106</sup> G.O. 100, par. 82.



"The armed prowler, the so-called bushwhacker, is a simple assassin, and will thus always be considered by soldier and citizen; and we have likewise seen that the armed bands that rise in a district fairly occupied by military force, or in the rear of any army, are universally considered, if captured, brigands, and not prisoners of war."<sup>107</sup> "Armed prowlers, by whatever names they may be called, or persons of the enemy's territory, who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war."<sup>108</sup> "The soldier who detaches himself from his troop and commits robbery, naturally accompanied in many cases with murder and other crimes of violence [is a brigand]. His punishment, inflicted even by his own authorities, is death."<sup>109</sup> "But when guerrilla parties aid the main army of a belligerent, it will be difficult for the captor of guerrilla-men to decide at once whether they are regular partisans, distinctly authorized by their own government; and it would seem that we are borne out by the conduct of the most humane belligerents in recent times, and by many of the modern writers, if the rule be laid down, that guerrilla-men, when captured in fair fight and open warfare, should be treated as the regular partisan is, until special crimes, such as murder, or the killing of prisoners, or the sacking of places, are proved upon them; leaving the question of self-constitution unexamined.

"The law of war, however, would not extend a similar favor to small bodies of armed country people, near the lines, whose very smallness shows that they must resort to occasional fighting and the occasional assuming of peaceful habits, and to brigandage. The law of war would still less favor them when they trespass within the hostile lines to commit devastation, rapine, or destruction. Every European army has treated such persons, and it seems to me would continue, even in the improved state of the present usages of war, to treat them as brigands, whatever prudential mercy might decide upon in single cases."<sup>110</sup> "All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offence.

"A soldier, officer or private, in the act of committing such vio-

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<sup>107</sup> G.P., p. 20.

<sup>108</sup> G.O. 100, par. 84.

<sup>109</sup> G.P., p. 10.

<sup>110</sup> *Ibid.* at 20.

lence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior."<sup>111</sup>

*Wheaton*: "The horrors of war would indeed be greatly aggravated, if every individual of the belligerent States was allowed to plunder and slay indiscriminately the enemy's subjects, without being in any manner accountable for his conduct. Hence it is that in land wars, irregular bands of marauders are liable to be treated as lawless banditti, not entitled to the protection of the mitigated usages of war as practised by civilized nations."<sup>112</sup>

*Attorney General Speed*: "War prosecuted according to the most civilized usage is horrible, but its horrors are greatly aggravated by the immemorial habits of plunder, rape, and murder practiced by secret, but active participants. . . . These banditti that spring up in time of war are respecters of no law, human or divine, of peace or of war; are *hostes humani generis*, and may be hunted down like wolves. Thoroughly desperate and perfectly lawless, no man can be required to peril his life in venturing to take them prisoners—as prisoners, no trust can be reposed in them. But they are occasionally made prisoners. Being prisoners, what is to be done with them? If they are public enemies, assuming and exercising the right to kill, and are not regularly authorized to do so, they must be apprehended and dealt with by the military. No man can doubt the right and duty of the military to make prisoners of them; and being public enemies, it is the duty of the military to punish them for any infraction of the laws of war. But the military cannot ascertain whether they are guilty or not without the aid of a military tribunal."<sup>113</sup>

From these writings of the last century, it is plain that what is now called the "war crime" is the same type of offense as was formerly styled act of wartime brigandage. An epitome of the transformation from nineteenth to twentieth century terminology, as well as

<sup>111</sup> G.O. 100, par. 44.

<sup>112</sup> *Op. cit. supra* note 70, at 379.

<sup>113</sup> (1865) 11 Ops. A. G. 297, 307.

"A species of armed enemies whose employment in a military capacity was not and could not be justified were the so-called 'guerrillas' of our late civil war. These were persons acting independently, and generally in bands, within districts of the enemy's country or on its borders, who engaged in the killing, disabling and robbing of peaceable citizens or soldiers, in plunder and pillage, and even in the sacking of towns, from motives mostly of personal profit or revenge. Not being within the protection of the laws of war, they were treated as criminals and outlaws, not entitled upon capture to be held as prisoners of war, but liable to be shot, imprisoned, or banished, either summarily where their guilt was clear or upon trial and conviction by military commission. Numerous instances of trials, for 'Violation of the laws of war,' of offenders of this description, are published in the General Orders of the years 1862 to 1866." WINTHROP, *op. cit. supra* note 98, at 783-784.

an expression of punishment in the general interest, is contained in the following provision of the current British Manual of Military Law. After setting forth various classes of war criminals, the pertinent part of the Manual states:

"The fourth class of war criminals consists of marauders. These are individuals, either civilians or soldiers, who have left their corps, who follow armies on the march or appear on battlefields, either singly or in bands, in quest of booty, and rob, maltreat or murder stragglers and wounded, and pillage the dead. . . . Their acts are considered acts of illegitimate warfare, and the punishment takes place in the interest of either belligerent."<sup>114</sup>

The object of the emphasis, which has been placed herein on irregular participants, is to bring out the connection between the past and the present, so far as the jurisdiction and substantive law is concerned. It is not meant to be suggested that war crimes committed by members of regularly organized units are any less amenable to such jurisdiction or laws than the marauder, even if carrying out a war-time, government policy. In this connection the current United States Field Manual on the Rules of Land Warfare sets forth the following illustrative list of principal offenses punishable as war crimes if committed "by armed forces":

"Making use of poisoned and otherwise forbidden arms and ammunition; killing of the wounded; refusal of quarter; treacherous request for quarter; maltreatment of dead bodies on the battlefield; ill-treatment of prisoners of war; breach of parole by prisoners of war; firing on undefended localities; abuse of the flag of truce; firing on the flag of truce; misuse of the Red Cross flag and emblem and other violations of the Geneva Convention; use of civilian clothing by troops to conceal their military character during battle; bombardment of hospitals and other privileged buildings; improper use of privileged buildings for military purposes; poisoning of wells and streams; pillage and purposeless destruction; ill-treatment of inhabitants in occupied territory."<sup>115</sup>

The war criminal of today, whether of low or high rating or rank, whether a political or military official, whether a regular or an irregular, in law, is the so-called war brigand of former times, in respect of punishment, and as to jurisdiction,<sup>116</sup> to which we now turn.

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<sup>114</sup> MANUAL OF MILITARY LAW 1929, Amendments (No. 12) Jan. 1936, par. 448.

<sup>115</sup> Par. 347.

<sup>116</sup> This broad assimilation has been held to apply to all persons in the somewhat indefinite class known as those who do not have the rights of prisoners of war. The

## V

As noted earlier Grotius, Wheaton, and others took the position that States have the right to punish not only violations of international law which caused injuries against themselves or their nationals, but also offenses which did not directly affect them, when serious enough.<sup>117</sup> In punishing brigands in the past, courts were no more concerned about the nationality of the victim or exact jurisdictional lines than were the western *posses* in this country a century ago in dealing with outlaws. Certainly the western vigilantes paid no special attention to nice questions of territorial jurisdiction, or to the nationality of the victims.

The jurisdiction exercised by United States military courts has always been personal, not territorial, even as to members of the United States forces.<sup>118</sup> The same is true of United States military commissions, which are the United States tribunals which try war crimes. In the military commission case of *United States v. Hogg et al.*, decided in 1865, the reviewing authority made the following statement, pertinent to that case:

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"Military courts are not restricted in their jurisdiction by any territorial limits. They may try in one State offenses committed in

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phrase—the rights of prisoners of war—in this sense means those individuals who, upon capture, may not be tried and executed as irregulars. The problem of drawing the line has been perennial. It was not settled in any satisfactory manner until the Hague Conference of 1899, and was slightly modified in 1907. The law today is contained in Articles 1-3 of the Fourth Hague Convention of 1907, which provide as follows:

"Article 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army'.

"Article 2. The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

"Article 3. The armed forces of the belligerent parties may consist of combatants and noncombatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war." (1909-1911) 36 STAT. 2277, 2295-2296; 2 TREATIES, ETC. (Malloy) 2269, 2281-2282.

<sup>117</sup> *Supra*, notes 62-70 and related text.

<sup>118</sup> See Col. Archibald King, *Jurisdiction over Friendly Armed Forces* (1942) 36 AM. J. INT. LAW 539, 555 and source material cited there.

another, and may try in the United States offenses committed in foreign parts, and may try out of the United States offenses committed at home. They have to do only with the person and the offense committed; all else is simply a matter of convenience, or witnesses, of the means of assembling a court, etc."<sup>119</sup>

The Supreme Court of the United States, in the case of *Coleman v. Tennessee*, has taken the same position. This case arose while the Federal forces were in military occupation of Tennessee in 1865. While plundering, Coleman committed a murder against a member of the civilian population "under circumstances of great atrocity". In holding that only the law of war, and not the laws of Tennessee, was applicable to the case, the Court said that, if Coleman had been captured by the enemy forces after committing the offense, he might have been subjected to trial and punishment by order of their commander, and that if this had been done "there would have been no just ground of complaint, for the marauder and the assassin are not protected by any usages of civilized warfare".<sup>120</sup> Where allies are involved, perhaps the most impressive single expression of this principle, as applied to cobelligerency, is found in the Italian Penal Military Code, War Time, of May 6, 1941. It provides that the law of war is applicable to military and civilian members of the enemy's armed forces whenever an offense against that law is committed against the Italian state, an Italian citizen, "or against an allied state or a subject thereof".<sup>121</sup>

The following are representative statements concerning jurisdiction of persons for violations of the laws of war. Like the foregoing excerpts, they speak of persons and offenses. There is no suggestion of any territorial limitation on jurisdiction: The Oxford Manual of the Institute of International Law on the Laws of War on land (1880), after the substantive rules are stated, provides: "If any of the foregoing rules be violated, the offending parties should be punished, after a judicial hearing, by the belligerent in whose hands they are."<sup>122</sup> Hall: A belligerent possesses "the right of punishing persons who have

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<sup>119</sup> 8 REBELLION RECORDS, Series II, 674, 678. To the same effect, *United States v. Gurley* (1864) 7 J. A. G. Record Book 360, 365.

<sup>120</sup> (1878) 97 U.S. 509, 519.

<sup>121</sup> §13, bk. I, tit. I, supp., *Gazzetta Ufficiale*, No. 107. (Transl.)

<sup>122</sup> Introduction to Part III—Penal Sanctions, Carnegie transl., in DOCUMENTS RELATING TO THE PROGRAM OF THE FIRST HAGUE PEACE CONFERENCE, Pamphlet Series No. 36, p. 59.

violated the laws of war, if they afterwards fall into his hands."<sup>123</sup> Oppenheim: "In contradistinction to hostile acts of soldiers by which the latter do not lose their privilege of being treated as lawful members of armed forces, war crimes are such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders."<sup>124</sup> Dickinson, Hyde, and Finch, reporting to the American Bar Association on the trial and punishment of war criminals, have recently stated that "it has long been an accepted principle of international law that a belligerent may punish with appropriate penalties members of the enemy forces within its custody who have violated the laws and customs of war."<sup>125</sup> The current United States Basic Field Manual on the Rules of Land Warfare states that "individuals and organizations who violate the accepted laws and customs of war may be punished therefor."<sup>126</sup> The British Manual of Military Law states that "charges of war crimes may be dealt with by military courts as the belligerent concerned may determine".<sup>127</sup> Flory, in his work on *Prisoners of War*, states generally that prisoners of war "having committed violations of the laws of war prior to their capture and not tried by their state of origin were, and are, subject to trial and punishment by the detaining state."<sup>128</sup> Brierly has recently stated that jurisdiction over war crimes "has no territorial basis, and it may therefore be exercised without any reference to the *locus delicti*".<sup>129</sup> Glueck too states that "the jurisdictional question presents little difficulty, because the territorial principle does not govern military tribunals in time of war."<sup>130</sup> The Lord Chancellor (Viscount Simon), on October 7, 1942, stated in the House of Lords: "I take it to be perfectly well established inter-national Law that the laws of war permit a belligerent commander to punish by means of his military courts any hostile offender against the laws and customs

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<sup>123</sup> INT. LAW (8th ed.) 495.

<sup>124</sup> 2 OPPENHEIM, INT. LAW (6th ed., Lauterpacht, 1940) §251, p. 451.

<sup>125</sup> Proc. Section of Int. and Comparative Law, Am. Bar. Assn. (1942-1943) 58, 60; also in (1943) AM. J. INT. LAW 663, 665.

<sup>126</sup> Changes No. 1, Nov. 15, 1944, FM 27-10, par. 345.1.

<sup>127</sup> *Op. cit. supra* note 114, par. 449.

<sup>128</sup> (1942) p. 90.

<sup>129</sup> *The Nature of War Crimes Jurisdiction*, 2 THE NORSEMAN, No. 3, May-June 1944.

<sup>130</sup> *By What Tribunal Shall War Offenders be Tried?* (1943) 56 HARV. L. REV. 1059, 1065.

of war who may fall into his hands wherever be the place where the crime was committed."<sup>131</sup>

## VI

We turn now to actual practice, particularly some adjudicated cases where jurisdiction has been assumed by military tribunals in cases where the victim was not a national of the punishing state, and where the offense took place in territory over which the military forces of the punishing state, at the time of the offense, did not have that control which results from the establishment of a status of military occupation. In some of the cases we could wish for more facts; in others they are quite sufficient. They will, however, be set forth in chronological order rather than in any arrangement based upon supposed importance. Before proceeding, however, we should refresh our recollection that, under the law of war, territorial jurisdiction, in the case of military occupation, is not vested in the occupant until the authority of the hostile army has actually been established and can be exercised.<sup>132</sup>

1. General Orders No. 372, issued by Major General Winfield Scott on December 12, 1847,<sup>133</sup> recited that "the highways of Mexico, used, or about to be used, by the American troops, being still infested, in many parts, by those atrocious bands called *guerilleros* and *rancheros*, who, under instructions from the late Mexican authorities, continue to violate every rule of warfare observed by civilized nations, it has become necessary—in order to insure vigor and uniformity in the pursuit of the evil—to announce to *all* the views and instructions of general headquarters on the subject." The order stated further that these bands "are equally pests to unguarded Mexicans, foreigners and small parties of Americans, and ought to be exterminated." Every American post in Mexico was, accordingly, instructed daily to push detachments or patrols "as far as practicable" in order to "disinfest" their respective neighborhoods. Such persons falling into the hands of American troops were promptly to be reported to commanding officers, who were to order a Council of War without delay for their trial "under the known laws of war applicable to such cases".

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<sup>131</sup> Parliamentary Debates, House of Lords, Vol. 124, No. 86 (Oct. 7, 1942), p. 578.

<sup>132</sup> See *supra* note 1. "The authority for military government is the fact of occupation. Not a mere temporary occupation of enemy's country on the march, but a settled and established one. Mere invasion, the mere presence of the hostile army in the country, is not sufficient. There must be a full possession, a firm holding, a government *de facto*." WINTHROP, *op. cit. supra* note 98, at 799.

<sup>133</sup> General Scott's Orders, 1847-1848 (bk. no. 41½), The National Archives.

The Councils of War were to consist of not less than three officers. Satisfactory evidence that such a prisoner, at the time of capture, actually belonged to any party or gang of known robbers or murderers was deemed to establish a violation of the laws of war. Upon such proof a Council of War might condemn to death, or sentence an accused to not exceeding fifty lashes.

While the emphasis in this order is on the protection of United States troops, it was recognized that such bands were equally pests to unguarded Mexicans and foreigners as well as to Americans. Quite apart from the question of whether or not the brigands had committed murder or robbery upon United States troops, the stated jurisdiction of the Council of War was to condemn to death, on satisfactory proof that the accused was a member of a party of known robbers and murderers. It may be noted that the order apparently looks not to places where military occupation had been established, but to areas where operations were still being carried on. Thus it speaks of Mexican highways used, "or about to be used", and states that United States posts are to push detachments, or patrols "as far as practicable." This is an assertion, under the laws of war, of power by military commanders to punish crimes in unoccupied areas by foreigners against foreigners.

The case of the *United States v. Garcia*, tried by such a Council of War, will illustrate the exercise of jurisdiction under this order. The accused, Garcia, was charged with "belonging to a band of robbers or guerrillas." It was specified that he was captured by an armed party of American troops in the vicinity of San Martin, Mexico, on February 28, 1848, in the vicinity of, and among the known haunts of robbers; that he ran from the Americans, and was taken only after a long and hard chase; that he was armed with shotgun and sword; that he had no authority to carry arms; that he would give no account of why he was armed, or when he procured them; and that he was in company with two other armed Mexicans, believed to be robbers, who also fled and escaped. On the trial Garcia was found guilty, and sentenced "to receive fifty lashes on his bare back well laid on".<sup>134</sup>

2. In 1864 an enemy soldier murdered several persons in enemy territory beyond the United States military lines. He was thereafter captured by the United States forces. The Judge Advocate General was asked whether the prisoner of war might be tried by a military commission. He held that a military commission would have juris-

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<sup>134</sup> File FF 215, Courts-martial Records, The National Archives. For other cases see *ibid.* file nos. FF18 and EE608.



diction over such an enemy soldier irrespective of "whether such crime were perpetrated within or beyond the ordinary field of occupation of our Armies".<sup>135</sup>

The next five cases arose during the insurrection period in the Philippine Islands after the Spanish-American War. On March 12, 1902, the Judge Advocate General of the United States Army declared that the military commissions, "as well as provost courts, which have been held in the Philippine Islands since our troops landed there, are war tribunals, and the fact of their institution amounts, in itself, to evidence of the existence of war in those islands".<sup>136</sup>

3. The facts of the case of *United States v. Dacoco et al.*<sup>137</sup> are as follows: During the third week of November, 1900, upon the approach of a troop of United States cavalry toward the pueblo of Asingan, in the province of Pangasinan, the Presidente and others fled to the barrio of Cocalditen where they hid in a deserted house. Three days later, while there, they were attacked by a band of about sixty armed outlaws. Some of the refugee party escaped. None of the rest had since been seen, and there was satisfactory evidence that they had been murdered. Two members of the band were subsequently captured and tried by military commission for murder. They were found guilty and sentenced to be hanged. The confirming authority commuted the sentences to life imprisonment at hard labor.

4. The case of *United States v. Lomabao* appears to be a case of the same sort, but the record does not conclusively establish the fact. Contrary to careful military practice at that time the specification significantly omits the usual phrase that the place was occupied by United States troops or under United States military government, saying merely that the acts took place "in time of insurrection" and in a "theater of military operations". A witness who made his escape was asked: "When you made your escape did you attempt to seek assistance from your friends?" The witness replied: "After I escaped I saw there was no one pursuing me and I went right straight to the village and reported to the Presidente." The secretary to the Presidente testified that the Presidente prepared a preliminary investigation (*diligencia*) in judicial proceedings. There is no suggestion in the record of the case that United States troops were available to pursue

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<sup>135</sup> 8 J.A.G. Record Book, 529.

<sup>136</sup> J.A.G. Ord No. 12184, Mar. 12, 1902, p. 12.

<sup>137</sup> G.O. 92, Div. Phil. Sept. 20, 1900, General Courts-Martial Records No. 24951, hereinafter cited "CM—."

the marauders. The case was one of exceptional atrocity. The general order recites the facts as follows:

"In the foregoing case of *Moices Lomabao*, native, it appears from the evidence that an armed body of ladrones, about thirty in number, entered the barrio of Namipitan at night and taking four men and a woman by force and violence from their homes, disappeared with them; that, after search was made for the captives, the bodies of all but the woman were, three days later, found shockingly mutilated and decaying in death. It further appears that the accused was active and cruel in taking captive these unoffending people, and that no motive, other than robbery and a savage delight in taking life, appears to explain this act of wholesale murder."<sup>138</sup>

Lomabao was sentenced to be hanged.

5. The facts of the case of *United States v. Versosa et al.*<sup>139</sup> are as follows: Early in April, 1900, one Tito Balisilisa, a Filipino, was staying in Balangbang, Zambales, Luzon, not yet occupied by the United States troops. He was "making preparations for changing his place of residence to Dasol which was occupied by American troops."<sup>140</sup> During the night, about April 10, 1900, a band of about ten "outlaws", under the leadership of Versosa, armed with bolos, a rifle, and a pistol, surrounded his house at Balangbang. Threatening to burn it, they compelled Balisilisa to come out. While attempting to escape, he was shot by members of the band who, thereupon inflicted many bolo wounds on him, resulting in immediate death. Five alleged members of the band later came into custody of the United States forces and were tried by a military commission. All were found guilty and sentenced to be hanged.<sup>141</sup>

6. On November 17, 1899, the pueblo of San Carlos in the Province of Pangasinan, Luzon, had no effective government and the United States forces had not yet occupied the locality. On that date a band of armed Filipino "outlaws" kidnapped and later murdered one Eduardo [*sic.*] Ferrer, a native Filipino. Later four members of the band came into the custody of the United States forces and were

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<sup>138</sup> G.O. 133, Div. Phil., Dec. 1, 1900, CM 20888.

<sup>139</sup> G.O. 136, Div. Phil., Dec. 5, 1900, CM 24058.

<sup>140</sup> G.O. 136, at p. 2.

<sup>141</sup> The death sentence was confirmed as to two; commuted to twenty years at hard labor for two others, because they had voluntarily surrendered to the military authorities and one had influenced others to surrender; and the findings and sentence of the fifth accused was disapproved because the evidence was too weak and inconclusive to connect him with the crime.

tried before a military commission, in the case of *United States v. Ferrer et al.*<sup>142</sup> They were found guilty, and each sentenced to be hanged. The confirming authority confirmed the sentences but commuted them, for each accused, to life imprisonment at hard labor.

7. From 1896 to 1898, prior to the Spanish-American War of 1898, a Philippine revolution took place against the authority of Spain. During the course of that revolution the Philippine forces captured a large number of Spanish soldiers, whom they held as prisoners of war. In 1900, although United States forces occupied Manila and Northern Luzon, a large area of Southern Luzon was under the *de facto* sovereignty of the Philippine Insurgents. It had never been occupied by the United States forces. In that year the United States forces on Luzon proceeded south from Manila to take over the area.

The particular facts of the war crime case of *United States v. Braganza*<sup>143</sup> which arose at that time are well summarized as follows in the opinion of Major General Chaffee, Military Governor of the Philippines, who was the confirming authority of the military commission which later tried the case:

The accused was one Major Francisco Braganza of the Philippine army. He "had been a lieutenant of police of San Fernando and recently appointed a major in the insurgent forces. That at Minalabag, a party, by roll-call, of one hundred and seventy-three Spanish prisoners, were delivered to him for the ostensible purpose of being conducted to a place of greater security from the approaching American troops. It appears that from high sources of authority, among the insurgent chiefs, the most stringent orders had been given to prevent their rescue by the Americans.

"At the time the accused took charge of these prisoners, they were footsore, weary and half-starved; their hurried marching and large number apparently overtaking the available means of support which the presidentes of the pueblos through which they passed, had at their ready disposal.

"Apprehension of the sudden appearance of the American troops caused confusion and disorder among the guard and police, which composed the escort under the orders of the accused, who, on the 23rd day of February, 1900, the morning following the day he assumed charge of the escort, proceeded to have the arms of his prisoners bound at the elbows with cords drawn across their backs, so as to render them comparatively helpless. This was the first act of unmis-

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<sup>142</sup> G.O. 120, Div. Phil., June 13, 1901.

<sup>143</sup> G.O. 291, Div. Phil., Sept. 26, 1901; CM 30036; G.O. 346, Div. Phil., Nov. 10, 1901.

takable indignity imposed upon the prisoners, who, up to this time, had been treated with some kindness. Knowing the habits of the people in whose hands they were, to bind and make helpless one doomed to death, the prisoners must have readily interpreted its sinister meaning. The next act of the accused was to cause the prisoners to be searched for money and valuables and to appropriate the lion's share to himself. The prisoners were then told off in detachments of ten men, more or less, with a suitable guard placed over each. They were then conducted to the rice fields, a short interval being preserved between the detachments. At a preconcerted signal, the blowing of a whistle by accused, the guards fell upon their victims and slaughtered them with daggers, bolos, clubs and spears; the accused standing by, encouraging, directing and urging on the barbarous assault.

"Those of the victims, who were strong enough, bound as they were, made a break for liberty and accused ordered them pursued and killed. On the following morning it was reported to accused that thirty of the escaped prisoners had been recaptured at Lupi, whereupon he proceeded there, ordered them bound, conveyed to the woods, and again the scenes of the preceding day were enacted. Returning to Lupi, accused found another party of his recaptured victims and these, in turn, were bound and led to death. . . .

"From official records it appears that about one-half of the prisoners escaped and, after devious wanderings under cover of the tropical vegetable growth and wooded lands, in small parties and after much suffering, finally reached safety within the American lines."

Braganza was later captured by the United States forces. He was put on trial before a United States military commission and sentenced to be hanged. Three general charges were made against him, together with detailed specifications apprising him of the exact nature of the charges. The style of the general charges is worth noticing as it indicates clearly the law which was being applied. It was not Philippine law, not Spanish law, not United States law, but the international law of war. The general charges read *verbatim* as follows: Charge I—"Murder in violation of the laws of war." Charge II—"Violation of the laws of war." Charge IH—"Robbery, in violation of the laws of war."

All the criminal acts to be discussed in the next two cases took place in Vera Cruz, Mexico, before 3:00 p.m. on April 22, 1914. It is important to know whether the United States was in military occupation of that city before that time. At 11:30 a.m. on April 21, 1914, United States Marines landed at the port of Vera Cruz, Mexico.<sup>144</sup>

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<sup>144</sup> The facts of this paragraph concerning the occupation of Vera Cruz are taken from manuscript copies of the reports of Rear Admiral F. F. Fletcher and Brigadier

During the afternoon a United States man of war silenced "the firing coming from the Naval Academy, the Market Building nearby, from a barge alongside the custom house wharf, and from a small frame house near Sanitary Pier". By 5:00 p.m. about a thousand marines were ashore in the port area. At 6:00 a.m. the next day (April 22) United States ships shelled the city proper. At 8:00 a.m. Rear Admiral F. F. Fletcher issued a proclamation to the Alcalde, the Jefe Politico, and the citizens of Vera Cruz that it had become necessary for the United States naval forces to "assume military control of the customs wharves of Vera Cruz". He stated that it was desired that the civil officials of Vera Cruz "continue" in the peaceful pursuit of their occupations. At the same hour the United States forces commenced an advance to take the entire city. As the marines advanced through the streets "they were met by heavy rifle and machine gun fire from houses, hospitals, church steeples, hotels, and the Military Barracks". During the afternoon of April 22 a line of defense was set up "against a possible attack from a threatening force beyond the sand-hills". During the night, and morning of the next day (April 22-23), there was occasional shooting at the United States forces. By "the 24th there were signs of returning confidence, many stores were opened and more people appeared on the streets". On the night of the 24th, shooting at the United States forces broke out again from rooftops and places of concealment in three sections of the city. On April 25, Fletcher proclaimed to the people of Vera Cruz that "the naval forces of the United States which are under my command have occupied temporarily the city of Vera Cruz". On April 26 he declared "martial law", among other reasons, "to prevent further sniping at our patrols". At 2:00 p.m. April 27 the United States flag was raised over the port of Vera Cruz and the Division Headquarters at the Terminal Hotel. On April 28th "practically all the shops were open, street cars running, and people going about their usual vocations." On that day General Funston arrived with troops and took command. On April 30, Mexican troops were destroying the railway three miles west of Vera Cruz. On April 30 Funston's forces "occupied the immediate suburbs of the city, and extended his lines to include El Tejar, about 9 miles distant, where the main source of fresh water supply for the city is located." On May 1, the Secretary of War directed the

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General Frederick Funston; the General Orders of the United States Expeditionary Forces, Vera Cruz, 1914; War Dept. Annual Reports, 1914; the Foreign Relations of the United States for 1914; and the Mexican Herald of Vera Cruz.

discontinuance of Admiral Fletcher's civil government, and the establishment of "a purely military government." On May 2, by direction of the President, Funston announced himself as military governor; proclaimed the existence of a military government; and stated that "the Government hereby established will continue the system which the people of Vera Cruz are accustomed to in so far as is consistent with military control."

Except to observe that before 3:00 p. m. of April 22 Vera Cruz was not under the military occupation of the United States, for the purposes of the two cases now to be discussed, we need not attempt to decide the exact date when the United States forces, within the law as expressed in Article 42 of the Hague Regulations, had actually established the authority of the United States as a military occupant.

8. About 1:00 p. m., April 22, a Mexican was killed while attempting to prevent another Mexican, one Miguel Robles, from beating a woman. Miguel's father, Luis Garcia Robles, was present at the time of the killing. After the killing Miguel fled and was not apprehended. On May 22, General Funston ordered the appointment of a military commission. On May 28 Luis Garcia Robles was arraigned before it, as Case No. 1, on the charge of murder.<sup>145</sup> His defense counsel pleaded specially to the jurisdiction of the commission, on the ground, among others, that military government (counsel erroneously spoke of it as "martial law") was not established at the time the crime was committed. From the arguments on the plea, the following extracts are of interest:

*Defense counsel:* "At the time the crime was committed, this City was not under martial law, nor did martial law exist thereafter until it was proclaimed by Admiral Fletcher on the 28th day of April, six days thereafter. . . . This offense was surely committed before martial law was proclaimed in the town in which the crime was committed."<sup>146</sup>

*Judge Advocate:* "The civil courts have been suspended. The mere fact that they are not now functioning, that no civil courts have been appointed by the commanding general of the occupying forces, is sufficient. As to the constitution of the military government here it is believed that the fact is well-known to the members of the Commission that the Commanding General was appointed Military Governor of Vera Cruz; that the President intimated that it was not wise

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<sup>145</sup> United States v. Robles, G.O. 7, June 8, 1914, United States Expeditionary Forces, Vera Cruz, CM 85775.

<sup>146</sup> R. 4.

to continue a civil government here under the present conditions, and for that reason he appointed a new, or military, governor to supersede the civil governor that had been appointed by Admiral Fletcher. Thus he manifested, beyond the shadow of a doubt, that a military government had been duly constituted. Such being the case military law existed, and there is no reason whatsoever why a military commission subsequently convened to try an offense that was previously committed should not have full jurisdiction in the premises."<sup>147</sup>

The commission overruled the plea to its jurisdiction.<sup>148</sup> On the merits, the accused pleaded, and was found not guilty of the charge, and was, accordingly, acquitted. The evidence showed that Robles' son, rather than he, was guilty of the murder. The acquittal was approved by the reviewing authority (General Funston) and Robles ordered released from confinement.<sup>149</sup>

9. The following Vera Cruz case is of more interest because the facts, on the merits, constitute a typical war crimes case. As Case No. 2, it was tried under the same order of General Funston, and by the same members of the military commission. The jurisdictional question having been decided in Case No. 1 (Robles), it was not again raised by defense counsel. The facts of the case, *United States v. Balan*,<sup>150</sup> may be summarized as follows: When the United States invaded Vera Cruz on April 22, 1914, the convicts in one of the Vera Cruz prisons were armed with Mexican military rifles, issued ammunition, and sent into the streets of the city to fight the advancing United States Marines. Three of these ex-convicts, dressed in civilian clothes, instead of taking part in the *levée en masse*, went about among the civilian population of Vera Cruz threatening immediate death, committing robbery, attempting murder, and assaulting with intent to rape. These criminal activities took place between noon and three o'clock on the afternoon of April 22nd, while the Marines were advancing through Vera Cruz, before the occupation was established. One of the three ex-convicts, Fileberto Balan, was later arrested by the United States forces and tried by military commission. He was found guilty of the various acts stated above and sentenced to be confined at hard labor for eighteen years. The sentence was reduced to fifteen years by the confirming authority.

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<sup>147</sup> R. 12.

<sup>148</sup> R. 13.

<sup>149</sup> R. 51, 53.

<sup>150</sup> G.O. 8, Hq. United States Expeditionary Forces, Vera Cruz, Mexico, August 13, 1914, CM 87017.

10. Professor A. Mérignhac states that on February 26, 1915, a French military tribunal sitting at Rennes, France, condemned to death a German soldier who was a member of a band which had committed acts of pillage and arson, and which had killed wounded soldiers on the battlefield. All the acts charged were committed, not in France, but in Belgium.<sup>151</sup>

In order to find the practice of the United States as evidenced in the foregoing United States cases, it was necessary to conduct considerable research into unpublished military records of the United States. There has been no opportunity to do similar research in the archives of other governments. These cases show that when it is a matter of doing justice in places where ordinary law enforcement is difficult, or suspended, the military tribunals of the United States and France have acted on the principle that crime should be punished because it is crime. They have had no concern with ideas of territorial jurisdiction. As these principles have presumably been dominant with the military establishments of other civilized governments, and as it is likely that similar situations have occurred in their wars, research in their archives would presumably produce similar results.

No evidence has been found that any of the decisions just discussed were the subject of protest by the governments of the accused persons. Certain it is that in none of these United States cases is there any evidence of a consciousness on the part of the courts of any duty not to assume jurisdiction.<sup>152</sup>

## VII

The contents of this paper may be summarized as follows: The States of the world have jurisdiction to try and punish any war criminal unless prohibited from so doing by international law. Whether or not any such prohibition exists is to be found in the practice of States in relation to the trial and punishment of such offenses. Until the present century war criminals, whether regular members of armed forces, irregular combatants, or marauders, had usually been called brigands. The origin of the law governing war crimes is in the law of brigandage. Accordingly, the principal evidence of the pertinent practice of states is to be found in relation to the trial and punishment of brigands. Brigandism, even in time of peace, may not

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<sup>151</sup> *De La Sanction Des Infractions Au Droit Des Gens* (1917) 24 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 1, 35.

<sup>152</sup> On the significance of such omissions, see the *Lotus* case, *supra* note 6, at 28-29.



properly be dissociated from petty warfare. Brigandism is international in character and still exists. The brigand and the pirate are identified so far as jurisdiction under international law is concerned. Actual practice shows that the jurisdiction assumed by military courts, trying offenses against the law of war, has been personal, or universal, not territorial. The jurisdiction, exercised over war crimes, has been of the same nature as that exercised in the case of the pirate, and this broad jurisdiction has been assumed for the same fundamental reason.

It is not being suggested in this paper that there is an international obligation to try and punish such offenses, or that a custodian government should punish a war criminal if another government has a primary interest in punishing him. This is a study of the legal power to punish such persons when, for some reason, he would otherwise go unpunished. The doctrine of *forum non conveniens* should, of course, be applied by States in these cases. But, while the State whose nationals were directly affected has a primary interest, all civilized States have a very real interest in the punishment of war crimes. "The unpunished criminal is itself a menace to the social order."<sup>153</sup> And an offense against the laws of war, as a violation of the law of nations, is a matter of general interest and concern. War crimes are now being especially recognized as of general concern to the United Nations, which States, in a real sense, represent the civilized world. Although the nationals of only a comparatively few of the thirty-three United Nations have been subjected to German atrocities, in the Moscow Declaration the three allied powers stated that they spoke in the interest of every member of the United Nations.<sup>154</sup> In 1943 Lord Atkin truly said that "the conscience of the whole civilized world has been aroused by these barbarities, and surely we are all concerned in seeing that the criminals should be brought to justice." In his view, war crimes "are offenses against the conscience of civilized humanity."<sup>155</sup> Likewise, a committee of the American Bar Association, consisting of Edwin D. Dickinson, Chairman, and George A. Finch and Charles Cheney Hyde, reporting to the Section of International and Comparative Law of that Association in 1943, took the position

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<sup>153</sup> W. E. Beckett, *op. cit. supra* note 2, at 58.

<sup>154</sup> Dept. of State Bulletin, Nov. 6, 1943, pp. 310, 311.

<sup>155</sup> London-Times, Dec. 30, 1943.

that most war crimes in the present war have been committed "against the security of the United Nations."<sup>156</sup>

In the light of practice, and the basic principle and tests enunciated by the Permanent Court of International Justice in the *Lotus* case, it is clear that, under international law, every independent State has jurisdiction to punish war criminals in its custody regardless of the nationality of the victim, the time it entered the war, or the place where the offense was committed.

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<sup>156</sup> Proc. Section of Int. and Comparative Law, Am. Bar Assoc. (1942-1943) pp. 58, 60; (1943) 37 AM. J. INT. LAW 663, 665.