**The Nuremberg Trial and International Law**

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# THE NUREMBERG TRIAL AND INTERNATIONAL LAW *

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Retribution for the shocking crimes and atrocities committed by the enemy during World War II was made imperative by the overwhelming demands emanating from the public conscience throughout the civilized world. Statesmen and jurists realized that another failure to vindicate the law such as followed World War I would prove their incapacity to make progress in strengthening the international law of the future.[1]

It is not necessary to review the steps which led to the verdict of Nuremberg. They have been given full publicity. These observations will accordingly be confined to the indictment and the judgment upon it.[2]

All the crimes for which punishment was asked and administered are defined in the Charter establishing the International Military Tribunal.[3] The agreement for the Charter [4] is an executive agreement in the signing of which the American representative was the agent of the President of the United States acting in his capacity as Commander-in-Chief of the armed forces. The indictment and the verdict must be read and construed within the limits of the Charter. The Tribunal expressly held that the provisions of the Charter were binding upon it as the law to be applied to the case.

It will tend to clearer presentation of the subject to follow a logical instead of the numerical order of the charges in the indictment.

Count 3 charges War Crimes in violation of the laws and customs of war. These are defined to include, but not limited to, "murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."

No substantial objection lies to the trial of such war crimes, to the judgment, or to the execution of the sentences. The laws and customs of war,

* Revised, enlarged, and annotated version of an address delivered at Atlantic City, N. J., Oct. 29, 1946, before the Section of International and Comparative Law of the American Bar Association, as Chairman of the Committee on Punishment of War Criminals.

[1] See the author's "Retribution for War Crimes," in this JOURNAL, Vol. 37 (1943), p. 81.

[2] The complete official text of the judgment is printed below, pp. 172–333. It gives all the relevant facts.

[3] Printed in this JOURNAL, Supplement, Vol. 39 (1945), p. 258.

[4] Same, p. 257.

including those of military occupation, are well established in international law. They are enacted in national legislation, codified in military manuals, incorporated in binding international conventions, and affirmed by the immemorial practice of states thus becoming a part of the common law of war. It is accepted international law, conventional as well as customary, that a belligerent has authority to try and punish individuals for crimes which constitute violations of the laws and customs of war, as well as of the laws of humanity, when such persons fall within his power.[5]

Objections from military sources that it is not legal to punish military and naval officers who, it is said, are merely following the orders of their superiors, cannot be well taken. In spite of any rules to this effect contained in military manuals, the law does not permit anyone to commit with impunity a crime prohibited by military or any other law upon the plea of *respondeat superior*. Limits are placed upon the application of this rule, taking into consideration the justice of the charge in each case.[6] Moreover, it should not be overlooked that the maxim *respondeat superior* works in two directions. If a subordinate successfully pleads the rule the liability for the commission of the crime is not extinguished but is transferred to the superior who issued the order. The military and naval officers convicted at Nuremberg were found upon the evidence to be personally responsible for the signature or issuance of orders that violated the laws and customs of war. Had their contention that they acted upon the orders of Hitler been accepted as a valid defense, the rule *respondeat superior* would have served merely as a *reductio ad absurdum* for the purpose of frustrating the law. Upon such a theory it would have been impossible to punish anyone for the crimes of this war. All the perpetrators charged with offenses might have made the same defense, and the arch criminal, Hitler, by committing suicide, made it impossible to inflict punishment upon this earth.

Technical objections that might be raised to the legality of the Tribunal on the ground that it was an international military tribunal instead of a strictly national one, or similar objections raised to the competence of civilian judges to preside over a military tribunal, were sufficiently answered by Major Willard B. Cowles while he was in the Judge Advocate General's Department of the United States Army. In an article published in June, 1944, he wrote: "A military tribunal with mixed inter-allied personnel may properly be established by the commanding general of cooperating cobelligerent forces," and "In the United States, the personnel of military commissions have usually been commissioned officers. There is, however, no legal objection to the use of qualified civilians."[7]

[5] Case of the German Saboteurs, *Ex parte* Quirin (1942), 317 U. S. 1; this JOURNAL, Vol. 37 (1943), p. 152. See "Universality of Jurisdiction over War Crimes," by Willard B. Cowles, in *California Law Review*, Vol. 33 (1945), pp. 177–218.

[6] See the author's editorial "Superior Orders and War Crimes," in this JOURNAL, Vol. 15 (1921), p. 440.

[7] "Trial of War Criminals by Military Tribunals," in *American Bar Association* Journal, Vol. 30, No. 6 (June, 1944), p. 330.

We therefore conclude that no question of *ex post facto* legislation or punishment was involved in the proceedings at Nuremberg on Count 3 of the indictment, and that they were legally adapted to the vindication of accepted principles of international law.

Count 4 of the indictment charges Crimes Against Humanity. These were defined in the Charter as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." Such acts are closely related to war crimes and in most cases trial would be upon the same evidence. However, where crimes against humanity may not for any reason be cognizable as war crimes, the governments of the Allied Powers now in military occupation of Germany have jurisdiction to punish such crimes; otherwise, they would go unpunished. With the unconditional surrender of Germany, its government went out of existence as a sovereign state and its sovereignty is now held in trust by the condominium of the occupying powers. On this point, the Nuremberg Tribunal held: "The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world."[8] The International Military Tribunal was established after consultation with the Allied Control Council which exercises supreme authority in Germany.

There could be no more sacred trust than that of upholding the law against primitive and barbarous acts of inhumanity which shock the conscience of all civilized peoples and are forbidden by divine as well as human command. The circumstance that such acts may have been permitted or required by Nazi law either within Germany or in the countries invaded by the enemy is no bar to punishment of them by the military authorities of the Allies now in control of the government of Germany. They are not bound to respect the laws of the defeated enemy which are repugnant to their principles of law, justice, and individual rights.

> It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to an-

[8] See "The Legal Status of Germany according to the Declaration of Berlin," by Hans Kelsen, this JOURNAL, Vol. 39 (1945), p. 518, and "The Legal Status of Germany," by Egon Schwelb, in same, Vol. 40 (1946), p. 811. For General Eisenhower's proclamation establishing military government in Germany and vesting supreme legislative, judicial, and executive authority in the Supreme Commander of the Allied Expeditionary Forces, see "American Military Government Court in Germany," by E. E. Nobleman, in same, p. 803.

> other . . . all laws, ordinances, and regulations in conflict with the political character, institutions and constitution of the new government are at once displaced.[9]

The Charter specifies that the International Military Tribunal shall have jurisdiction of crimes against humanity committed *before or during the war* and whether or not such crimes were in violation of the domestic law of the country where perpetrated. This broad jurisdictional clause was included for the obvious purpose of punishing acts committed by Nazi Germany against her own citizens in the course of persecutions on political, racial or religious grounds before the war started. There is no rule of international law, customary or conventional, by which such acts committed before the commencement of hostilities can be punished by the subsequent military occupants. The prosecuting governments were unable to establish the contrary of this statement of the law. On this point in the indictment the Tribunal held: "To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal." After considering the evidence and the arguments, the Tribunal held further "that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter. But," continued the Tribunal, "from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and in so far as the inhumane acts charged in the indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity." It is not clear from the reasoning of the Tribunal, in view of its previous holding that it was bound by the Charter as the law of the case, why it felt free to disregard the express terms of the Charter on this particular definition.

All of the defendants who were convicted were found guilty on one or both of Counts 3 or 4 charging War Crimes and Crimes Against Humanity, except one who will be referred to later. The sentences imposed fitted either one or both of these crimes. The Herculean efforts of the prosecuting governments in rounding up the culprits and collecting the evidence against them merit the universal applause they have received. The fair treatment of the prisoners by the judges and the justice of their decision deserve the approval of the legal profession throughout the world. The ground lost in

[9] Supreme Court of the United States in Vilas *v.* City of Manila (1911), 220 U. S. 345, affirming Alvarez y Sanchez *v.* United States, 216 U. S. 167, and C. R. I. & P. Ry. Co. *v.* McGlinn, 114 U. S. 542.

the strengthening of international law by the failure to execute the penalty clauses of the Treaty of Versailles was recovered.

Had the indictment ended here, the trials and judgment would rest upon solid legal principles and practice. Conviction upon additional charges of doubtful legal validity added nothing to the satisfaction of retributive justice already meted out on Counts 3 and 4. Its contribution to the strengthening of international law is limited to an unprecedented decision by a military tribunal of the victors, trying captured enemies which it is hoped will institute a new custom establishing the juridical principle that aggressive war-making is illegal and criminal.

Novel precedents purposely designed to change existing international law are not new in the practice of nations. One of them came before a great English jurist during the Napoleonic Wars when France set up prize courts in neutral territory. Lord Stowell, then Sir William Scott, speaking for the British High Court of Admiralty, held:

> Now, it having been the constant usage, that the tribunals of the law of nations in these matters shall exercise their functions within the belligerent country; if it was proved to me in the clearest manner, that on mere general theory such a tribunal might act in the neutral country, I must take my stand on the ancient and universal practice of mankind, and say that as far as that practice has gone, I am willing to go, and where it has thought proper to stop, there I must stop likewise.
>
> It is my duty not to admit (he continued) that because one nation has thought proper to depart from the common usage of the world, and to meet the notice of mankind in a new and unprecedented manner, that I am on that account under the necessity of acknowledging the efficacy of such a novel institution, merely because general theory might give it a degree of countenance, independent of all practice from the earliest history of mankind.

Speaking of the growth of international law from principle to practice, Lord Stowell commented that

> A great part of the law of nations stands on no other foundation; it is introduced, indeed, by general principles, but it travels with those principles only to a certain extent; and, if it stops there, you are not at liberty to go farther, and to say, that mere general speculations would bear you out in a further progress.[10]

The invocation of principles of doubtful legality in the punishment of the Nazi defendants may lay the entire proceedings open to challenge by future generations of Germans. Hitler's amazing rise to political power received its initial impetus and was successful primarily because of his attack upon the "war guilt clause" improvidently inserted for political rea-

[10] (1799) 1 C. Rob. 135; Hudson, *Cases on International Law* (1936), p. 1395; Scott, *Cases on International Law* (1922), p. 1070.

sons in what he called the *Versailles Diktat*. The clause affirmed that World War I was imposed "by the aggression of Germany and her allies."[11]

The defendants were charged in Count 1 with the Common Plan or Conspiracy to commit the other crimes charged in the indictment. Count 2 charged the defendants with Crimes Against Peace which were defined in the Charter as "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." These two charges will be considered together as they were so considered in the judgment of the Nuremberg Tribunal.

The gravemen of the charges against the defendants under Counts 1 and 2 rests upon two premises: (1) that aggressive war has been outlawed by the Community of States, and (2) that acts committed in planning or waging of such a war are now international crimes for which individuals may be criminally punished. It should be carefully noted that neither the definition in the Charter of the International Military Tribunal nor the judgment of the Tribunal requires as elements of Crimes Against Peace that War Crimes or Crimes Against Humanity be associated with them.

In taking up the consideration of these charges, the Tribunal calls attention to the fact that

> The Charter defines as a crime the planning or waging of war that is a war of aggression or a war in violation of international treaties. The Tribunal has decided that certain of the defendants planned and waged aggressive wars against twelve nations, and were therefore guilty of this series of crimes. This makes it unnecessary to discuss the subject in further detail, or even to consider at any length the extent to which these aggressive wars were also "wars in violation of international treaties, agreements or assurances."

The Tribunal proceeds to consider the matter further with the explanation,

> But in view of the great importance of the questions of law involved, the Tribunal has heard full argument from the prosecution and the defense, and will express its view on the matter.

What follows in the Tribunal's judgment on these charges is, consequently, *obiter dictum* and the value of the views expressed on the questions of law involved will be measured accordingly in the future development of international law.

[11] This clause was part of Art. 231 of the Treaty of Versailles and should not be confused with Art. 227 which publicly arraigned the German Kaiser "for a supreme offense against international morality and the sanctity of treaties," or with Art. 228 which provided punishment by Allied military tribunals of acts "in violaton of the laws and customs of war." See the author's editorial entitled "The settlement of the reparation problem," in this JOURNAL, Vol. 24 (1930), p. 339.

It cannot be denied that beginning with the establishment of the League of Nations the concept of preventing aggressive war has been growing. This is shown in the unratified Geneva Protocol of 1924; in resolutions passed by international conferences such as the Assembly of the League of Nations in 1927, and the International Conference of American States in February, 1928; by the conclusion of treaties such as the Pact of Paris for the Renunciation of War in 1928, and the Argentine Anti-War Treaty of 1933; and by the series of non-aggression pacts concluded in 1932 and 1933 by Soviet Russia with Afghanistan, Czechoslovakia, Estonia, Finland, Latvia, Persia, Poland, Roumania and Turkey. All such efforts deserve the utmost praise, sympathy, and support, for it is obvious that the prevention of aggression as a breach of the international peace must be the foundation stone upon which the whole structure of international order will have to stand in the future or it will be built upon sand as in the past.[12] But unratified protocols can not be cited to show acceptance of their provisions and resolutions of international conferences have no binding effect unless and until they are sanctioned by subsequent national or international action; and treaties of non-aggression that are flagrantly disregarded when it becomes expedient to do so can not be relied upon as evidence to prove the evolution of an international custom outlawing aggression.

The Nuremberg judgment contains an historical narrative of events upon which the Tribunal founds its conviction of the defendants of planning and engaging in aggressive war. This the Tribunal holds to be the "supreme international crime." Obvious omissions from this recital make it difficult to accept it as an impartial historical document. Moreover, the Tribunal failed to take into consideration or give due weight to the attitudes of the prosecuting governments toward the same events at the time they took place. For example, the prompt recognition of the annexation of Austria by Germany, and the failure of the League of Nations to act upon a protest filed by the Mexican Government demanding that the obligations of the Covenant be enforced at that time, would seem to negative the holding by the Nuremberg Tribunal that the planning and consummation of the annexation was part of an international crime.

In the matter of the German aggression upon Czechoslovakia, its initiation was celebrated by an agreement between the aggressors and some of the present prosecuting powers. Was it any less justifiable or legal for Great Britain and France to compel Czechoslovakia to consent to Germany's initial aggression in September, 1938, than it was for Germany six months later to obtain Czechoslovakia's consent under duress to the liquidation of the remainder of her territory? Professor Quincy Wright referred to the earlier agreement (that of September, 1938) as "the Dictate of Munich" comparable to "the Dictate of Versailles." He maintained

[12] See the writer's letters in *The New York Times* of Oct. 22 and Nov. 12, 1944, urging specific provisions to this end in the Charter of the United Nations then under public discussion.

that the Munich Agreement was made in violation of the legal obligations of Great Britain and France as well as other Powers:

> France and Great Britain, instead of aiding to preserve the territorial integrity of Czechoslovakia as they were bound to do under the Covenant, . . . joined with Italy and Germany in demanding that Czechoslovakia give to Germany in less than a fortnight practically everything the latter had asked. It would appear that the action of the four Powers should be characterized not as peaceful change, but as intervention which, according to "Historicus," is "a high and summary procedure which may sometimes snatch a remedy beyond the reach of law." [13]

If the aggression against Czechoslovakia was an international criminal act, then all the participants in the Munich Agreement were equally guilty.

Finally, the Tribunal holds that "the war initiated by Germany against Poland on September 1, 1939, was most plainly an aggressive war which was to develop in due course into the war which embraced almost the whole world and resulted in the commission of countless crimes both against the laws and customs of war and against humanity." The Tribunal's account of the events leading up to the aggression against Poland omits reference to the vitally important part played by Soviet Russia both before and after the fact. The judgment refers to the non-aggression pact signed by Ribbentrop and Molotov on August 23, 1939, only in connection with the war which Germany started against Soviet Russia on June 22, 1941. The terms of that pact, the circumstances under which it was signed, and the conduct of Russia as well as of Germany immediately following its signature lead to a strong presumption that it was made in anticipation of a joint attack on Poland by both signatories.[14] In view of the commitments of Great Britain and France to come to the assistance of Poland and of other facts recited in the Nuremberg judgment, there seems good reason to believe that Germany would not have launched her attack on Poland without having first obtained Soviet Russia's signature to the pact of August 23, 1939. Sixteen days after Germany invaded Poland on September 1, 1939, Soviet forces also entered Poland, in violation of the non-aggression pact between those two countries, and on the same day the Soviet Government informed the Polish Ambassador that "the Polish state and its government have in fact ceased to exist." Eleven days later, on September 28, Ribbentrop and Molotov entered into another agreement partitioning all of Poland between them.[15] If the *dictum* of the Nuremberg Tribunal that the aggression against Poland constituted an international criminal act for which the per-

[13] "The Munich Settlement and International Law," this JOURNAL, Vol. 33 (1939), p. 12 at pp. 28–29.

[14] For the text of the Russo-German pact of Aug. 23, 1939, see this JOURNAL, Vol. 35 (1941), Supplement, p. 36.

[15] For these and additional facts concerning Soviet Russia's aggression against Poland, see editorial entitled "The Polish Boundary Question," by Lester H. Woolsey, in this JOURNAL, Vol. 38 (1944), p. 441.

petrators were individually liable is good law, then there follows an irrefutable implication that Soviet Russia and its officials were *participes criminis*.

The attitude assumed by the Government of the United States with reference to the character of the war upon Poland, as well as the wars upon the other European states that were successively invaded, was shown by its official action in issuing on each of those occasions the usual proclamation of its neutrality. These proclamations recited that the United States "is on terms of friendship and amity" not only "with the contending Powers," but "with the persons inhabiting their several dominions." [16] They stated the law and official position of the United States and were legally binding not only on the Government but on all American citizens, courts, and officials. To maintain retroactively that these invasions were international criminal acts involving personal responsibility is to suggest that the United States officially compounded international crime with international criminals. The United States continued to recognize the Government of Germany as legitimate, to receive its diplomatic representatives at Washington, and to accredit American diplomatic representatives to Berlin.

We are not urging the untenable proposition that all criminals of a class must be punished, or none at all; nor do we overlook the lack of jurisdiction by the Nuremberg Tribunal under its Charter to try and punish anybody but enemy nationals. Our criticisms are directed to the retroactive effect of the dictum of the Tribunal that certain acts not treated as criminal by the prosecuting governments at the time they took place were subsequently transformed into crimes or conspiracies against peace for which *ex post facto* punishment is now legally justifiable.

The charge of Crimes Against Peace is a new international criminal concept. It was not envisaged in the warnings issued by the Allies before hostilities ended nor made a part of the original terms of reference to the United Nations War Crimes Commission established in London during the war.[17] It may be traced to the influence of Professor A. N. Trainin, of

[16] See the first proclamation of the President proclaiming the neutrality of the United States after the outbreak of the war over Poland No. 2348, Sept. 5, 1939, 54 *U. S. Statutes at Large*, Pt. 2, p. 2629; this JOURNAL, Supplement, Vol. 34 (1940), p. 21. Identical proclamations were issued as additional countries became involved, on Sept. 8 and 10, 1939, April 25, May 11, June 10, and Nov. 15, 1940. They are all published in the same volume of the *Statutes at Large*, pp. 2643, 2652, 2699, 2704, 2707, 2764.

[17] For the text of Allied statements on this subject, see the author's "Retribution for War Crimes," cited above, note 1, and Manfred Lachs, *War Crimes*, London: Stevens & Sons; 1945, pp. 94–98. In Dr. Lachs' collection of texts there is an *aide memoire* of the British Government issued August 6, 1942, stating that "in dealing with war criminals, whatever the Court, it should apply the laws already applicable and no special *ad hoc* law should be enacted" (p. 95). This seems to refute the argument that because the defendants were duly warned that they would be tried for war crimes, they were estopped from pleading the *ex post facto* character of the provisions of the London Agreement of August 8, 1945, enacting a special *ad hoc* law on the subject of crimes against peace.

the Institute of Law of the Moscow Academy of Sciences, who, in 1944, published a book entitled *Ugolovnaya Otvetstvennost Gitlerovtzev.* An English translation was published in London under the title *Hitlerite Responsibility Under Criminal Law.*[18]

In his book Professor Trainin stated that Soviet Russia's punishment of the master Axis criminals would not be limited by traditional legalisms. The reason for the poor success of previous attempts by the "capitalist countries" to establish international criminal law was, he says, that "the object in reality was not to fight real international crime, but to organize a peculiar kind of united criminal front against the Soviet Union." This, he adds, "is far from accidental. Its origins lie in the general character of international juridical relations during the epoch of imperialism."[19] Mr. Robert H. Jackson, Chief Counsel of the United States, in his report to President Truman on June 7, 1945, preceding the signature of the Charter, uses almost identical language: "The legal position which the United States will maintain," he reported, "being thus based on the common sense of justice, is relatively simple and non-technical. We must not permit it to be complicated or obscured by sterile legalisms developed in the age of imperialism to make war respectable."[20] Two months later, on August 8, 1945, Mr. Jackson and Professor Trainin, as the representatives of their respective governments, signed the Charter for the Nuremberg Tribunal. A year before, in 1944, Professor Trainin had proposed in his book the immediate codification of international crimes including "crimes against peaceful relations between nations." Some of his definitions were prescribed for the Nuremberg Tribunal in its Charter. Personal guilt for crimes against peace is imputed by him not only to members of the armed forces and of the government, but to propagandists, capitalists and industrialists. It was no doubt due to the influence of these views that charges were brought against some of the defendants. The acquittal of two of them was protested by the Russian judge on the Tribunal.

The crux of the argument by which it is sought to establish personal responsibility for crimes against peace center around the Pact of Paris for the Renunciation of War. In accepting this argument, the Nuremberg Tribunal held as follows:

> In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are

[18] This translation was in the possession of the American representatives who negotiated the agreement for the Charter of the International Military Tribunal. See "Background and Highlights of the Nuremberg Trials," by Sidney S. Alderman, in *I. C. C. Practitioners' Journal,* November, 1946, p. 106. A comprehensive review of the original Russian edition appeared in the *American Bar Association Journal* for July, 1945.

[19] Trainin, work cited, p. 11.

[20] *Department of State Bulletin,* Vol. XII, No. 311 (June 10, 1945), p. 1076.

> committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the pact.

The Pact itself makes no distinction between aggressive, defensive, or other kinds of war but renounces all wars. Secretary of State Kellogg in the negotiations with France preceding the signature of the act definitely declined to accede to the French proposal that the Pact be limited to the renunciation of "wars of aggression." He argued that if the proposed Pact "were accompanied by definitions of the word 'aggressor' and by expressions and qualifications stipulating when nations would be justified in going to war, its effect would be very greatly weakened and its positive value as a guaranty of peace virtually destroyed." He reinforced his point of view by stating that "from the broad standpoint of humanity and civilization, all war is an assault upon the stability of human society, and should be suppressed in the common interest." [21]

The Pact does not mention sanctions for its enforcement other than the statement in the preamble that "any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this treaty." This provision, it will be noted, is not imperative but conditional in the discretion of each signatory. In identic notes submitting the draft treaty to the other signatories, Secretary of State Kellogg stated that the preamble "gives express recognition to the principle that if a state resorts to war in violation of the treaty, the other contracting parties are released from their obligations under the treaty to that state." [22] Both by the preamble and Secretary Kellogg's interpretation, any action which might result from a violation of the Pact was to be directed against the violating government. Personal criminal responsibility was not stipulated nor even impliedly suggested.

In the years immediately following its conclusion, the meaning of the Pact became the subject of discussion in other countries. When the British Government signed the Optional Clause of the Statute of the Permanent Court of International Justice in 1929, it published a memorandum explaining its view of the position created by the acceptance of the Covenant of the League of Nations and the Pact of Paris:

> The effect of those instruments, taken together, (the British Government maintained) is to deprive nations of the right to employ war as an instrument of national policy, and to forbid States which have signed them to give aid or comfort to an offender. As between such

[21] Note to the French Ambassador, Feb. 27, 1928. Publication of the Department of State entitled *Notes Exchanged Between the United States and Other Powers on the Subject of a Multilateral Treaty for the Renunciation of War*, Washington, Government Printing Office, 1928.

[22] Identic notes of June 23, 1928, same, p. 33.

> States, there has been in consequence a fundamental change in the whole question of belligerent and neutral rights.[23]

Upon receipt of the British memorandum, Hon. Henry L. Stimson, who had succeeded Mr. Kellogg as Secretary of State, made public a statement in which he denied that this British argument applied to the position of the United States as a signatory of the Kellogg-Briand Pact. "As has been pointed out many times," he emphasized, "the Pact contains no covenant similar to that in the Covenant of the League of Nations providing for joint forceful action by the various signatories against an aggressor. Its efficacy depends solely upon the public opinion of the world and upon the conscience of those nations who sign it." [24]

In September, 1934, the International Law Association, a private body, in its meeting at Budapest, adopted articles of interpretation of the Pact. The interpretation of these distinguished international law experts does not contain the remotest suggestion of criminal action against individuals for the violation of the Pact. They expressed the view that in case of a violation the other signatories would be justified in modifying their obligations as neutral states so as to favor the victim of the aggression against the state making war in violation of the Pact. This interpretation was relied upon in part in support of the modification of the attitude of the Government of the United States early in 1941 from that of traditional neutrality to the furnishing of official aid to the countries whose defense was considered necessary to the defense of the United States. Mr. Robert H. Jackson, then Attorney General of the United States, vigorously defended what he said was "the declared policy of the Government of the United States to extend to England all aid 'short of war' ", while "at the same time it is the declared determination of the Government to avoid entry into the war as a belligerent." [25] This change of policy did not take place until eighteen months after what the Nuremberg Tribunal says was the "supreme international crime" of aggressive war had been consummated. Even then the United States Government disclaimed any intention of taking direct action against the aggressors.

Earlier attempts were made in the United States to implement the Pact of Paris by legislation which would have authorized the Government to discriminate between the belligerents in future war, but all such attempts completely failed and resulted in the passage of more rigid laws to preserve the neutrality and peace of the United States. In January, 1933, during the aggression of Japan upon China in violation of the Nine-Power Treaty, the

[23] Misc. No. 12 (1929), Cmd. 3452; this JOURNAL, Supplement, Vol. 25 (1931), pp. 89–90.

[24] Statement of Hon. Henry L. Stimson made public Dec. 30, 1929, printed in this JOURNAL, Supplement, Vol. 25 (1931), p. 90, note.

[25] Address before the Inter-American Bar Association, Habana, Cuba, March 27, 1941. This JOURNAL, Vol. 35 (1941), pp. 348–359.

Covenant of the League of Nations and the Pact of Paris, Secretary of State Stimson recommended that Congress "confer upon the President authority in his discretion to limit or forbid, in coöperation with other producing nations, the shipment of arms and munitions of war to any foreign State when in his judgment such shipment may promote or encourage the employment of force in the course of a dispute or conflict between nations." [26] No Congressional action was taken upon this recommendation, but two years and a half later Congress passed the Neutrality Act of August 31, 1935, placing an embargo on the export of munitions of war to every belligerent state, in derogation of the accepted principle of international law that neutral persons may engage in contraband trade at their own risk. This law was put into effect by President Roosevelt in the war of Italy upon Ethiopia, which was plainly aggressive.[27] The Neutrality Law of 1935 was of a temporary character. It was replaced by permanent legislation in the Neutrality Act of May 1, 1937. This Act continued the embargo on the shipment of arms, ammunition, and implements of war to all belligerents and added a "cash and carry" provision covering the export of other materials to all belligerents.[28]

Such was the state of our legislation when the war in Europe started by the invasion of Poland on September 1, 1939. Three weeks later, on September 21, President Roosevelt sent a message to Congress requesting the repeal of the embargo and a return to the "historic foreign policy" of the United States based on the "age-old doctrines of international law," that is, "on the solid footing of real and traditional neutrality," which, according to John Quincy Adams "recognizes the cause of both parties to the contest as *just*—that is, it avoids all consideration of the merits of the contest." [29] In requesting this legislation, President Roosevelt not only did not suggest discrimination between the belligerents but expressly disclaimed it. He said to Congress,

> You will all remember the long debates on the subject of what constitutes aggression, on the methods of determining who the aggressor might be, and, on who the aggressor in past wars had been. Academically this may have been instructive. . . . But in the light of problems of today and tomorrow responsibility for acts of aggression is not concealed, and the writing of the record can safely be left to future historians.[30]

[26] This JOURNAL, Vol. 31 (1937), p. 76, note.

[27] Act of Aug. 31, 1935, 49 *U. S. Stat. at L.*, Pt. 1, p. 1081; Proclamations Nos. 2141–2142, Oct. 5, 1935, the same, Pt. 2, pp. 3474–3476. Also in this JOURNAL, Supplement, Vol. 30 (1936), pp. 58 and 65.

[28] 50 *U. S. Stat. at L.*, Pt. 1, p. 121. This JOURNAL, Supplement, Vol. 31 (1937), p. 147.

[29] Secretary of State J. Q. Adams to Mr. Gallatin, May 19, 1818. Moore, *International Law Digest*, Vol. VII, p. 860.

[30] Congressional Record, Vol. 85, Pt. 1, pp. 10–12. This JOURNAL, Supplement, Vol. 34 (1940), p. 37–38.

Congress promptly complied with the President's urgent request and passed the Neutrality Act of November 4, 1939. This Act repealed the embargo on the export of munitions and substituted a prohibition against American vessels or citizens entering or passing through combat areas. It was made unlawful for any American vessels to carry passengers or cargoes to any belligerent state, and the exportation of any articles or materials was forbidden until all right, title and interest in them had been transferred to some foreign government or agency. It was also made unlawful for American citizens to travel on any vessel of a belligerent state.[31] These provisions remained the law of the United States, binding upon all of its citizens, courts, and officials until the passage of the Lend-Lease Act of March 11, 1941, which ended this country's status of traditional neutrality.

In the light of this legislative history of the official attitude of the Government of the United States toward the interpretation of the Pact of Paris for the Renunciation of War, it is impossible to accept the thesis of the Nuremberg Tribunal that a war in violation of the Pact was illegal in international law on September 1, 1939, and that those who planned and engaged in it were guilty of international criminal acts at the time they were committed, or at the date of signature of the Charter of the International Military Tribunal at London on August 8, 1945, or on October 1, 1946, the date of the judgment of the Nuremberg Tribunal.

The Budapest articles of interpretation of the Pact of Paris were cited in support of the lend-lease legislation. It was argued that as the neutrality of the United States was the most vital benefit to the violators of the Pact, that benefit should be denied to them as expressly allowed by the Pact. However, it is one thing to justify a change of policy by the government from neutrality to non-neutrality as a logical interpretation of provisions included within the Pact. It requires an attenuated legal conceptualism to go farther and deduce *dehors* the written instrument personal criminal liability for non-observance of the Pact never before conceived of in international law as attaching to violations of treaties regulating state conduct.

The Nuremberg Tribunal denied that the maxim *nullum crimen sine lege, nulla poena sine lege* has any application to the present case. It said:

> Occupying the positions they did in the Government of Germany, the defendants, or at least some of them, must have known of the treaties signed by Germany outlawing recourse to war for the settlement of international disputes. They must have known that they were acting in defiance of international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case then, it would appear that the maxim has no application to the present facts.

In support of this statement no references are cited to law, international conventions, court decisions or customs showing that individuals had there-

[31] 54 *U. S. Stat. at L.*, Pt. 1, p. 4. This JOURNAL, Supplement, Vol. 34 (1940), p. 44.

tofore been criminally punishable in an international judicial forum for crimes against peace such as those charged.[32]

The conviction of the defendants of Crimes Against Peace under Counts 1 and 2 was therefore undoubtedly *ex post facto* as that principle is understood and applied in the United States.[33] When construing the clauses of the Constitution of the United States prohibiting *ex post facto* legislation, Chief Justice Marshall defined an *ex post facto* law as "one which renders an act punishable in a manner in which it was not punishable when it was committed." [34] The Nuremberg Tribunal, recognizing the weakness of its reasoning, buttressed its position by falling back upon the Charter creating the Tribunal. "The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime. Therefore," continued the Tribunal, "it is not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement." But the Charter being an international legislative act is itself subject to the same objection against *ex post facto* legislation. In the view of the Tribunal, "The Charter is not an arbitrary exercise of power on the part of the United Nations. It is the expression of international law existing at the time of its creation and to that extent is itself a contribution to international law." That is undoubtedly a correct view so far as the charges of war crimes and crimes against humanity are concerned.

War itself is the ultimate legal procedure against disturbers of the international peace, and from time immemorial nations have taken summary action against enemies who have fallen into their hands and who are not punishable according to law. The imprisonment of Napoleon without trial by agreement of his captors is the most outstanding modern example. The right is founded upon reasons of moral and political justification. Upon

[32] Art. 227 of the Treaty of Versailles, referred to by the Nuremberg Tribunal, publicly arraigned the German Kaiser "for a supreme offence against international morality and the sanctity of treaties." It directed the special tribunal, which was never in fact constituted, to be guided in its decision "by the highest motives of international policy." It avoided any reference to law, national or international.

The writer's attention has been called to the article by Mr. Georg Schwarzenberger on the so-called Breisach War Crime Trial of 1474. This involved the trial of Sir Peter of Hagenbach, the Governor of the fortified town of Breisach on the Upper Rhine. He had been installed by Duke Charles of Burgundy to take possession of the town after it had been pledged to Charles by the Archduke of Austria as financial security. The charges were in the nature of war crimes or crimes against humanity and did not involve crimes against peace as charged at Nuremberg. *Manchester Guardian,* Sept. 28, 1946.

[33] For a discussion of the maxim *Nulla poena sine lege* in the United States and various other countries, see article by Jerome Hall in the *Yale Law Journal,* Vol. 47, No. 2 (December, 1937).

[34] Fletcher *v.* Peck, 6 Cranch 138. A fuller definition was given by the Supreme Court in Calder *v.* Bull, 3 Dallas 386.

the same grounds the Allied and Associated Powers in 1919 agreed to try the German Kaiser for starting World War I. Holland's refusal to extradite him because he was regarded as a political fugitive and therefore not legally extraditable was all that prevented adding the Kaiser as another important precedent to that of Napoleon. The principal allies in World War II agreed at Moscow on November 1, 1943, that the major enemy criminals "will be punished by the joint decision of the governments of the Allies." When appointing the American judges, President Truman was particularly anxious "that no disagreement should arise among the four great nations who on August 8, 1945, had signed the London Agreement and Charter providing for the trial, formulating the law and establishing the practice." [35] The sentences imposed by the Nuremberg Tribunal under Counts 1 and 2, including life imprisonment for Hess who was acquitted of the legal charges of War Crimes and Crimes Against Humanity, may be unquestionably approved as morally justifiable political acts.

Granting for the purpose of discussion the soundness of the Nuremberg dictum that individuals may now be punished for violations of treaties in the absence of express agreement to that effect, what progress have we made in the suppression of aggressive war? Fear of death has never deterred warriors in the past; it will not deter them in the future. A sanction which cannot be applied until hostilities are brought to a successful end and the personal offenders are in the custody of the victors is not one adapted to the prevention of war. In fact, it anticipates the occurrence of war. We must not lull the world into a false sense of security by making exaggerated claims concerning the verdict of Nuremberg. The Nuremberg Tribunal was a military tribunal. The authority of its decision as a precedent in time of peace is doubtful. Moreover, there exists no peacetime international court endowed with competence to carry on the work of the Nuremberg Tribunal.

The governments which have assumed responsibility for the executions at Nuremberg, if they wish to make good their assertions that the prosecutions for crimes against peace were not political punishment of the vanquished by the victors but were intended to establish international law applicable to all future offenders, should proceed to take action to make good these pretensions. Good faith and the preservation of the future peace of the world require them to do so.

The United Nations should make the Nuremberg principles and procedures applicable to all future aggressors without distinction as to their enemy or friendly character.[36] An International Court of Justice is al-

[35] Judge Biddle's report to the President cited below, footnote 36.

[36] Ten days following this suggestion at Atlantic City on Oct. 29, the Hon. Francis Biddle, American Judge on the Nuremberg Tribunal, submitted his report to President Truman on Nov. 9, 1946, in which he said:

"The conclusions of Nurnberg may be ephemeral or may be significant. That depends

ready in existence at The Hague to which might be delegated such functions and jurisdiction of the Nuremberg Tribunal as might seem appropriate to the principal judicial organ of the United Nations.

These proposals will no doubt be met with the same objection that Mr. Kellogg made to the outlawry of aggression in 1928, namely, that it is difficult and dangerous to attempt to define aggression in advance. The same position was assumed by the United States in 1945 when the Charter of the United Nations was drafted at San Francisco. The story is officially told in the report to the President by Secretary of State Stettinius, Chairman of the United States Delegation. He said:

> One of the most significant lines upon which debate concerning the liberty of action of the Council proceeded, was that which concerned the proposed inclusion in the Charter of provisions with respect to determination of acts of aggression. Various amendments proposed on the subject . . . offered a list of sharply-defined eventualities (such as invasion of, or attack on, another state, interfering with its internal affairs, etc.) in which the Council would be bound to determine by formula not only the existence of aggression but also the identity of the aggressor. These proposals also implied that in such cases the action of the Council would be automatic. The United States Delegation, believing that the acceptance of such a concept was most undesirable, played an active part in opposing the amendments.[37]

Consequently, the United Nations Charter leaves the determination of aggression to the Security Council in each case as it arises. No criteria are provided for reaching decisions and the Great Powers would have a veto over them.

An indefinable act cannot be prohibited in advance unless we are willing to acknowledge our constitutional heresy with respect to *ex post facto* legislation. A perfect definition to meet every possible future contingency is not required. One drawn from the lesson of Nuremberg would supply a good start. Another might apply to the use of atomic weapons and other scientific instruments of mass destruction, the outlawry of which is vitally necessary to safeguard not merely the future peace but civilization itself.

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on whether we now take the next step. It is not enough to set one great precedent that brands as criminal aggressive wars between nations. Clearer definition is needed." He suggested that the time is opportune "for advancing the proposal that the United Nations as a whole reaffirm the principles of the Nurnberg Charter in the context of a general codification of offenses against the peace and security of mankind." Such action, he said, "would perpetuate the vital principle that war of aggression is the supreme crime."

In acknowledging receipt of Judge Biddle's report, President Truman on Nov. 12 wrote to him that "the setting up of such a code as that which you recommend . . . deserves to be studied and weighed by the best legal minds the world over. It is a fitting task to be undertaken by the governments of the United Nations." *Department of State Bulletin*, Vol. 15, No. 386 (Nov. 24, 1946), pp. 954–957.

[37] Department of State *Publication* No. 2349, *Conference Series* No. 71, p. 91.

The Government of the United States assumed the heaviest responsibility for the organization and conduct of the Nuremberg trial. It should not allow the slow processes of international agreement to defeat its sincerity of purpose. When President Washington and Secretary of State Thomas Jefferson declared neutrality to be the national policy of the United States, Congress promptly enacted the Neutrality Law of 1794 to give legal effect to the Government's policy. The Act defined offenses against neutrality, conferred jurisdiction upon the courts of the United States to try and punish them, and prescribed the penalties to follow conviction. Is there any sound reason why we should not now follow that precedent and enact national legislation defining and prescribing punishment for crimes against international peace? Surely the preservation of international peace is as much the concern of the Congress at the present day as the preservation of neutrality was in 1794 and for 150 years thereafter. Congressional action is necessary again to give effective support to the President's policy because in the United States the power to declare war as well as to define and punish offenses against the law of nations resides in the Congress by express provision of the Constitution. The time is ripe for the United States to assume the leadership in initiating the outlawry of aggressive war by making crimes against international peace punishable in national as well as in international courts. The judgment of Nuremberg makes that course imperative and points the way.