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CRIMES AGAINST PEACE

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It may be stated without exaggeration that the London Agreement¹ and the Charter of the International Military Tribunal² which forms an integral part of this Agreement, greatly transcend in scope and importance the immediate purpose for which they were created. The Agreement was originally adopted for the trial of war criminals "whose offenses have no particular geographical location"³ and, more specifically, "for the just and prompt trial and punishment of the major war criminals of the European Axis".⁴ It was solemnly emphasized by the Allied Prosecution moreover, that the rules created by the Charter must, in the future, apply equally to nationals of the victorious Powers.⁵ Hence, it would seem that the avowed main purpose of the trial (to restrain individuals

¹ *Nazi conspiracy and aggression*, Office of U. S. Chief of Counsel for the prosecution of Axis criminality, U. S. Government Printing Office, Washington, 1946, 8 vols., vol. I, pp. 1-3.

² *Ibid.*, pp. 4-11.

³ *Ibid.*, p. 1.

⁴ *Ibid.*, Charter of the International Military Tribunal (hereinafter called "the Charter"), Article 1, p. 4. The conception of a tribunal created for the punishment of those over whom it is to sit in judgment may perhaps be considered as a regrettable inaccuracy which, however, does not necessarily reflect upon the Tribunal's impartiality.

⁵ For statements to this effect see for instance: Mr. Justice Jackson, "Summary review of the Indictment and the Charter and their legal foundations", in *The Trial of German major war criminals*, Proceedings of the International Military Tribunal sitting at Nuremberg, Germany (hereinafter called "Proceedings"), H. M. Stationary Office, London, 1946, Part I, p. 85, where it is said that "while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by any other nations, including those which sit here now in judgment . . . This trial represents mankind's desperate effort to apply the discipline of the law to statesmen who have used their powers of state to attack the foundations of the world's peace, and to commit aggressions against the rights of their neighbors."

by means of legal provisions⁶ from the perpetration of crimes against peace) cannot be achieved by the prosecuting nations if the rules have limited application.

After consultation with the Control Council for Germany, pursuant to Article 1 of the London Agreement, the first—and as it appears at present, the only—trial of the International Military Tribunal, was conducted at Nuremberg, Germany. It does not appear that official notice has been given to terminate the existence of the International Military Tribunal, nevertheless at least *de facto*, it ceased to function when the parties to the London Agreement decided to conduct further trials before their respective municipal courts, and when the resignation of the United States judges as well as the United States prosecutors was accepted by President Truman.

The legal as well as the political aspects of the Nuremberg Trial,⁷ are considered by the President of the International Military Tribunal as “unique in the history of the jurisprudence of the world” and of “supreme importance to millions of people all over the globe”.⁸ They may well give leading impetus to the development of new, revolutionary concepts, in comparison to existing rules of international law, which are likely to affect deeply the relations among states.

The most controversial, and potentially most significant phase of the trial, centers around Article 6, section a, of the Charter, which imposes “individual responsibility” for acts constituting “Crimes against Peace”. The term “Crimes against Peace” is defined by 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.”⁹ Little doubt exists that

⁶ *Proceedings, op. cit.*, p. 85, where it is stated: “I am too well aware of the weakness of juridical action alone to contend that in itself your decision under this Charter can prevent future wars. Judicial action always comes after the event. Wars are started only on the theory and in the confidence that they can be won. Personal punishment, to be suffered only in the event the war is lost, will probably not be a sufficient deterrent to prevent a war where the warmakers feel the chances of defeat to be negligible. But the ultimate step in avoiding periodic wars . . . is to make statesmen responsible to law.”

⁷ Hereinafter called “the Trial”.

⁸ *Proceedings, op. cit.*, Part 1, p. 1.

⁹ The *Indictment* lodged against the defendants, in Berlin, on October 18, 1945, gives detailed charges of the common plan or conspiracy in “Count One” which, according to the Allied Prosecution, embraces the commission of Crimes against Peace (*Proceedings, Part 1, op. cit.*, pp. 2-11). It furnishes particulars concerning these crimes in “Count Two” (*Ibid.*, pp. 11-21). The Tribunal, in its judgment, considered it convenient to discuss both counts together “as they are in substance the same” and since “the same evidence has been produced to support both counts.” (Nazi conspiracy and aggression, *op. cit.*, Opinion and Judgment, Washington, 1947 [hereinafter quoted as “Opinion and Judgment”], p. 5).

"Crimes against Peace", as stated by the U. S. Prosecution, constitute "the heart of the case", and that everything else in the Nuremberg trial, however dramatic, however sordid, however shocking and revolting to the feelings of civilized peoples, is only incidental, or subordinate to the supreme crime against peace. It is certainly true that "War Crimes" in the restricted and conventional sense of the term, as well as "Crimes against Humanity", which are the other charges against the Nazi defendants, "would have little juridical international significance, except for the fact that they were the preparation for the commission of aggressions against peaceful neighbouring peoples."¹⁰ The crime of war may therefore be considered at once the object and the parent of all the other crimes enumerated in the Charter. The Tribunal accepted this viewpoint in its judgment, by declaring that "to initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."¹¹

In support of the charges of "Crimes against Peace" the Allied Prosecution submitted that the defendants planned and initiated the chain of events leading to the Second World War, by seizing Austria and Czechoslovakia.¹² The Tribunal accepted this evidence in its verdict by expressing the opinion that "the invasion of Austria was a premeditated, aggressive step in furthering the plan to wage aggressive wars against other countries"¹³ and that the Munich Agreement, by which Czechoslovakia was forced to acquiesce in the cession of the Sudetenland to Germany, was only a first step of aggression preceding the complete seizure of Czechoslovakia.¹⁴

It would be absurd even to question the facts concerning the seizure of Austria and Czechoslovakia. A careful analysis of the Nuremberg trial, as well as of its possible future implications, can hardly ignore the attitude of the prosecuting governments toward the seizure of Austria and Czechoslovakia at the time it was accomplished. The attitude underwent important changes many months after the principal Allies had declared war on Germany. It is, for example, well to remember, in this context, that the prosecuting governments recognized the annexation of Austria without delay. As far as the United States

¹⁰ Proceedings, *op. cit.*, Part 1, p. 143.

¹¹ Opinion and Judgment, *op. cit.*, p. 16.

¹² Proceedings, *op. cit.*, Part 1, pp. 211-264, Part 2, pp. 2-45 and pp. 87-125.

¹³ Opinion and Judgment, *op. cit.*, p. 21.

¹⁴ Opinion and Judgment, *op. cit.*, pp. 24-27.

is concerned, this recognition is reflected in the closure of the United States legation at Vienna, and the transfer of its diplomatic agenda to the United States Embassy at Berlin. It is reflected, also, in the American acceptance of correlated steps with regard to the Austrian legation in Washington, D. C. This recognition was consistently upheld as the public policy of the country until 1942, even after the United States had been forced to declare war on Germany. Federal Courts in naturalization proceedings, for instance, insisted that Austrians, even though they emigrated to the United States before the Annexation, had the legal status of German nationals. The recognition of Austria's seizure is exemplified also by the fact that the restrictions enforced by the United States and British governments against enemy aliens applied equally to Austrian nationals. Moreover, it is well known that a request of the Mexican government demanding that the League of Nations, (of which three of the prosecuting states were leading members), enforce the obligations under the Covenant,¹⁵ was not acted upon. As recently stated by a well known authority, these facts "would seem to negative the holding by the Nuremberg Tribunal that the planning and consummation of the annexation constituted an international crime."¹⁶ One may not be ready to interpret the passivity of the League of Nations, and the *de facto*—if not *de jure*—recognition by the prosecuting governments of Austria's seizure by Germany as politically or legally relevant. But even so, one is constrained to admit that a possible excuse with a *fait accompli* would hardly be acceptable in the case of the ill famed *Munich Agreement*, concluded between Hitler and Mussolini on the one hand, and the British and French Prime Ministers on the other; an agreement by which Czechoslovakia was left no other alternative than to cede to Germany what may, perhaps, be considered the economically most important part of her territory. Hence, if the conception is upheld that the seizure of Austria, and especially the acts of aggression preceding the complete occupation of Czechoslovakia, are crimes against peace, it would be consistent to concede that all, or (as regards Czechoslovakia) that three of the prosecuting governments participated in these criminal acts.

In the case of Poland, the International Military Tribunal held that "the war initiated by Germany against Poland was most

¹⁵ G. A. Finch, Address delivered before the Section on International and Comparative Law of the American Bar Association at Atlantic City, New Jersey, October 29, 1946, p. 8.

¹⁶ *Ibid.* See also G. A. Finch, "The Nuremberg Trial and International Law," in *The American Journal of International Law*, vol. 41 (January, 1947), pp. 20-37.

plainly an aggressive war, which was to develop into a 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."¹⁷ The acceptance of this fact, it will be interesting to observe, necessitates the conclusion that the partition of Poland, agreed upon between the governments of Germany and Soviet Russia, renders the latter a criminal participant in the commission of the supreme crime against peace. Nor should the somewhat embarrassing implication be overlooked that the U. S. Government "officially compromised with international crimes and criminals."¹⁸ It did so, first, by invoking the provisions of the Neutrality Act, not only in the case of the invasion of Poland, but also with regard to other European countries subsequently attacked and occupied by Germany, and by proclaiming at a much later date that these invasions constituted international criminal acts.

Obviously, the purpose of these few examples¹⁹ is not to imply that leading nationals of the victorious countries should be tried as war criminals, nor that the moral war guilt of Germany's political leaders has not been established beyond any doubt whatsoever. The examples are cited merely in order to demonstrate, at the outset, the political and (as shall be shown in the following) legal difficulties inherent in the novel conception of "Crimes against Peace". Although no doubt exists that the Charter of the International Military Tribunal must be considered as the law binding upon the prosecuting powers and the judges, a supreme effort was made at Nuremberg to prove that "Crimes against Peace" and individual criminal responsibility for their commission was no legal innovation of the victorious Powers, but constituted a valid rule of positive international law existing before the creation of the International Military Tribunal.²⁰ This view was shared by the International Military Tribunal which stated in its verdict, that "the law of the Charter

¹⁷ Opinion and Judgment, *op. cit.*, p. 34.

¹⁸ G. A. Finch, *op. cit.*, p. 9.

¹⁹ In the elaborate account of foreign relations leading to the events of 1939 Counsel for the Defense cited many more examples in proof of the compromising policies pursued by all, or some, of the prosecuting Powers. Great importance, e. g., was given the protocol attached to the German Soviet Pact (The Trial of German War Criminals . . . Speeches of the Prosecution at the close of the case against the individual defendants [hereinafter cited as "Closing Speeches"], p. 45). At the time this essay was written the complete text of the Nuremberg Proceedings, including the arguments of the Counsel for the Defense were not available to the writer.

²⁰ See for instance Mr. Justice Jackson, in Proceedings, *op. cit.*, Part I, p. 78: "The validity of the provisions of the Charter is conclusive upon us all, whether we have accepted the duty of judging or of prosecuting under it, as well as upon the defendants who can point to no other law which gives them a right to be heard at all." The assertion that the London Agreement rendered all provisions of the Charter binding on the accused is highly questionable and will be dealt with later in this essay.

is decisive, and binding upon the Tribunal. . . . The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal . . . 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."²¹ In support of this theory the prosecution submitted that numerous non-aggression treaties concluded before 1939, treaties to which Germany was a signatory, are conclusive proof of a generally accepted international custom according to which a war of aggression is a crime for the commission of which its perpetrators may be held individually responsible. While admitting the difficulty of defining the exact meaning of the term, "war of aggression",²² it was stated that "the very minimum consequence of the treaties making aggressive war illegal, is to strip those who incite or wage it of every defence the law ever gave, and to leave war-makers subject to judgment by the usually accepted principles of the law of crimes."²³ It was maintained also by the U. S. prosecution that illegal wars are acts of "piracy and brigandage", and that "the principle of individual responsibility for piracy and brigandage, long recognized as crimes punishable under International Law, is old and well established."²⁴ The British prosecution tried to keep strictly within the legal aspects of the problem by analyzing the merits of the various treaties violated by Germany. It emphasized the view of the British Government that "the Tribunal will apply to individuals, not the law of the victor, but the accepted principles of international usage . . .", and stated that "aggressive war had become, (in virtue of the Pact of Paris and the other treaties and declarations" submitted in evidence by the prosecution), "illegal and a crime beyond all uncertainty and doubt."²⁵ These "self evident" findings of the prosecution, it appears, are primarily based on the Pact of Paris which (according to popular notions) prohibits war as an instrument of national policy without qualification. Hence, it was not only proposed that recourse to war in

²¹ Opinion and Judgment, *op. cit.*, p. 48.

²² Mr. Justice Jackson, in Proceedings, *op. cit.*, Part I, p. 81: "It is perhaps a weakness in this Charter that it fails itself to define a war of aggression. Abstractly, the subject is full of difficulty and all kinds of troublesome hypothetical cases can be conjured up."

²³ *Ibid.*, p. 81.

²⁴ *Ibid.*, p. 82. This comparison, it ought to be emphasized, is legally meaningless since it is impossible to consider the waging of illegal war as falling within the scope of the generally accepted definition of piracy *juris gentium*. The latter "in its original and strict meaning, is every unauthorized act of violence committed by a private vessel on the open sea against another vessel with intent to plunder." (Oppenheim, International Law, vol. 1, §272).

²⁵ Sir Hartley Shawcross, in Proceedings, *op. cit.*, Part 2, p. 54.

violation of this Pact is illegal, but that "there is no difference between illegality and criminality in a breach of law of civilised life."²⁶ Refuting emphatically the arguments advanced by counsel for the defence that international law does not attribute criminality to states, and still less to individuals, the British Chief Prosecutor exclaimed that the adherence to such an out-dated theory would reduce international law to an absurdity. Hence, the "inescapable conclusion"²⁷ drawn from the renunciation, prohibition, and condemnation of illegal war as expressed in these treaties, and especially in the General Treaty for the Renunciation of War concluded on August 27, 1928, is that the prosecuting powers responsible for the Charter of the International Military Tribunal, "refuse to reduce justice to impotence by subscribing to the outworn doctrines that a sovereign State can commit no crime and that no crime can be committed on behalf of the sovereign State by individuals acting in its behalf. . . . If this be an innovation, it is an innovation long overdue—a desirable and beneficent innovation fully consistent with justice, fully consistent with common sense and with the abiding purposes of the Law of nations."²⁸ As may be noted from the foregoing the British Prosecution did not hesitate to admit that some provisions of the Charter might be considered as innovations, or to quote directly, as "wise and far reaching" measures of "international legislation". Great care, nevertheless, was taken to stress, time and again, the point that "International law had already, before the Charter was adopted, constituted aggressive war a criminal act."²⁹ The Government of the Soviet Socialist Republics, through the mouth of its Chief Prosecutor, found it expedient to justify its case legally against the defendants primarily with the assertion that "in the International field the basic source of law and the only legislative act is a treaty, an agreement between States." Since the London Agreement is an international treaty, "signed by the four countries which acted in the interests of all freedom-loving nations", it was conjured that the Charter of the International Military Tribunal "is to be considered an unquestionable and sufficient legislative act, defining and determining the basis and the pro-

²⁶ Sir Hartley Shawcross, in *Closing Speeches*, *op. cit.*, p. 54.

²⁷ Sir Hartley Shawcross, in *Proceedings*, *op. cit.*, Part 2, p. 55.

²⁸ Sir Hartley Shawcross, in *Proceedings*, *op. cit.*, Part 2, p. 55. As far as the Prosecution's appeal to "common sense" and "justice" is concerned it may be well to remember that these concepts refer to moral and not to purely legal concepts. They cannot be defined precisely.

²⁹ *Ibid.*, p. 56.

cedure for the trial and punishment of major war criminals.''³⁰

It is, perhaps, not quite precise to call a treaty a legislative act, since the latter term presupposes the existence of a legislative body, and since an *international* legislature as part of an international government is non-existent. Apart from the use of this terminological ambiguity, it would seem that the legal value of the definition presented on behalf of the Soviet Government might have been enhanced by stating clearly that—according to existing rules of international law—the London Agreement and the Charter attached to it created rights and obligations only with regard to its signatories. Nazi Germany never consented to the London Agreement.³¹ On the basis of the latter the International Military Tribunal, therefore, must be considered as an inter-allied court.³² More serious attention, however, should be given to the argument, put forward in support of the Tribunal's jurisdiction, according to which the London Agreement and the Charter constitute, a legislative act of the four prosecuting Powers binding upon Germany—at least by later implementation. This opinion is based on the Potsdam Declaration, according to which the whole legislative and executive power previously exercised by the legitimate German Government of Grand Admiral Doenitz has been taken over, without any restriction, by the governments of the occupant States, i.e., the United States of America, the Union of Soviet Socialist Republics, the United Kingdom, and the Provisional Government of the French Republic.³³ Germany as an independent State does not exist. It has been replaced by the joint sovereignty of the occupant powers which have established a *Condominium* over the German territory and the German population. This *Condominium* is exercised by the Control Council at Berlin, composed of the Commanders in Chief of the Four Powers. No doubt, therefore, exists that the whole legislative, judicial and executive rights formerly possessed by the German Government are vested in the Control Council. This means that the four powers represented on the Control Council and the original signatories of the London Agreement, establishing the

³⁰ B. A. Rudenko, Chief Prosecutor for the Union of Soviet Socialist Republics, in *The Trial of German major war criminals . . . Opening Speeches*, H. M. Stationery Office, London, 1946 (hereinafter referred to as "Opening Speeches") p. 136. See also *Proceedings*, *op. cit.*, Part 6, p. 166.

³¹ The legal significance of Control Council Law No. 10 which, retroactively, gives effect to the London Agreement to the extent to which it is applicable to the German territory is being discussed in the following.

³² For a detailed review see F. B. Schick, "War criminals and the law of the United Nations", in *Toronto Law Journal*, January, 1947.

³³ H. Kelsen, "The Legal Status of Germany According to the Declaration of Berlin" in 39 *American Journal of International Law* (1945), p. 518.

International Military Tribunal at Nuremberg, are the same. Therefore it would have been possible for the four powers, desirous of prosecuting alleged German major war criminals, to create a competent German court and to promulgate the law to be applied by this court, by means of a legislative act of the Berlin Control Council. Such a procedure, however, was not chosen. The London Agreement by which the International Military Tribunal was established is an inter-allied treaty and not a legislative act promulgated by the Control Council. In this Agreement the Signatories declare expressly that they are "acting in the interests of all the United Nations." Moreover, the Charter of the International Military Tribunal, which forms an integral part of this Agreement provides in Article 1, not only for the trial of Germans but of major war criminals of all European Axis countries. Obviously, the Control Council has legislative authority only with respect to the territory over which, in accordance with the Potsdam Declaration, the occupant Powers exercise their *Condominium*; it can certainly not promulgate laws binding upon other European Axis countries such as, for instance, Italy, which never ceased to have its own, national government. It would seem inconsistent, therefore, to maintain that the London Agreement is also, or implies, a legislative act of the Control Council binding upon Germany. The International Military Tribunal, in its judgment, expressed the same opinion, declaring that "the making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered."³⁴ It is not stated, one will observe, that the creation of the Charter constitutes a legislative act of the Berlin Control Council. It is true that the latter, by means of Control Council Proclamation No. 1 and Control Council Law No. 10³⁵, gave, with regard to Germany, retroactive effect to the terms of the London Agreement and the Charter of the International Military Tribunal; but it did not establish either of them. It is noteworthy, however, that Control Council Proclamation No. 1 and Control Council Law No. 10 show the legally correct pattern by which a

³⁴ Opinion and Judgment, *op. cit.*, p. 48.

³⁵ Control Council Law No. 10, Punishment of persons guilty of war crimes, crimes against peace and against humanity, in The Department of State Bulletin, vol. 15 (November 10, 1946), p. 862, where it is stated that: "In order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto . . . the Control Council enacts as follows:

Article 1

The Moscow Declaration . . . and the London Agreement . . . are made integral parts of this law. . . ."

For Control Council Proclamation No. 1 see *ibid.*, p. 859.

tribunal competent to try the alleged German war criminals could have been established at the outset.

The French prosecution added few new thoughts to the previously mentioned ideas, except that it reiterated the validity of a doctrine which, it appears, had its origin with an eminent French writer who tried in 1918, to justify legally the then proposed trial of Germans accused of having resorted to aggressive war.³⁶ This doctrine it may be observed, was simply applied to the Briand-Kellogg Pact which intended to deprive its signatories of the right to have recourse to war "for the solution of international controversies" or as an "instrument of national policy." Hence, it was asserted by the French prosecution that since Germany crassly violated the Pact of Paris of which it was a signatory, thus waging an illegal war, all acts committed during this war cease, *ipso facto*, to have the juridical character of legitimate acts of warfare. They became "purely and simply common law crimes."³⁷ The opinion, then, was advanced that since recourse to war implies "preparation and decision," those who "knowingly took recourse to it, though they had power of choosing a different path * * * must, indeed, be considered the direct instigators of the acts qualified as crimes."³⁸ This renovated doctrine was restored to vigor and life by the French prosecution. It was their difficult task to defend the international validity of the provisions of the Tribunal's Charter for the writing of which it had, indeed, assumed little responsibility. The doctrine, it ought to be emphasized, does not constitute a valid rule of international law; it has never been supported by the practice of states.³⁹

An interesting sidelight illustrating, perhaps, the doubts as to the validity of the above doctrine, may be found in the declaration of the French prosecution: "the statute of 8th August [i.e., the London Agreement and the Charter of the Tribunal] only established a jurisdiction to judge what was already an international crime, not only before the conscience of humanity, but also according to International Law, even before the Tri-

³⁶ Louis Renault, "De l'application du droit pénal aux faits de guerre," in *Revue de droit international public*, vol. 25 (1918), pp. 5-29, where the writer advances the doctrine that acts of warfare, although criminal in their character are not punishable under international law only if the war itself during which these acts are committed is not waged in violation of international law.

³⁷ François de Menthon, Chief Prosecutor for the French Republic, in *Opening Speeches*, *op. cit.*, p. 104.

³⁸ *Opening Speeches*, *op. cit.*, p. 105. See also *Proceedings*, *op. cit.*, Part 4, p. 351.

³⁹ Hans Kelsen, *Peace through law*, Chapel Hill, 1944, p. 94, where this prominent author, after a careful legal analysis of Renault's original opinion considers this doctrine as "untenable".

bunal was established.”⁴⁰ Quite consistently, therefore, the question was asked: if it is not contested that a crime has really been committed, is it possible to contest the competence of the International Tribunal to judge it? It is exactly at this point that the Chief Prosecutor of the French Republic saw himself constrained to expose the existing rule of international law, applicable to this aspect of the case. “International responsibility,” he stated, “normally involves the collective State as such, without in principle exposing the individuals who have been the perpetrators of an illegal act. It is within the framework of the State, with which an international responsibility rests, that, as a general rule,⁴¹ the conduct of the men who are responsible for this violation of International Law may be appraised.”⁴² If the legal responsibility for the violation of the Briand-Kellogg Pact is collective in character, and if it must be imputed to the German state, it would seem inconsistent to maintain that illegal warfare is the condition of *individual* criminal sanctions under existing general international law. An illegal act, to be sure, is not necessarily a crime. But even if the legally hazardous theory is upheld that the violation of the Pact of Paris and of other treaties constitutes an international crime, it still would be necessary to maintain that such violations are only imputable to the state on whose behalf they were committed; hence, the sanctions must be directed against the injuring state. It is precisely in conformance with this rule that the declaration of war by the Allies against Germany can be legally justified since war is the sanction *par excellence* which may be attached to such violations.

The International Military Tribunal, in its discussion of the law of the Charter, relied primarily on the Briand-Kellogg Pact. The solemn renunciation of war as an instrument of national policy involves, in the opinion of the Tribunal, 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 committing a crime in so doing.”⁴³ The Court rejected the objections of counsel for the Defense that the Pact of Paris does not permit construing its violation as a *crime*. The Court referred to the practice of military tribunals which, for many years past “have tried and punished

⁴⁰ Opening Speeches, *op. cit.*, p. 105.

⁴¹ The qualification in the above-cited statement obviously refers merely to a few, specific war crimes in the restricted sense of this term, such as war treason and espionage. The captor state may punish individuals with death for the commission of these acts, even if the latter constitute so-called acts of state.

⁴² Opening Speeches, *op. cit.*, p. 105.

⁴³ Opinion and Judgment, *op. cit.*, p. 50.

individuals guilty of violating the rules of land warfare" laid down in the Hague Convention of 1907, although the latter "nowhere designates such practices as criminal."⁴⁴ The Tribunal, therefore, deduced that "those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention."⁴⁵

De lege ferenda, the judgment of the International Military Tribunal, according to which recourse to illegal war constitutes the commission of a crime for which its perpetrators are individually responsible, is of far-reaching importance. *De lege lata*, the judgment does not correspond with the rules of general international law. The Hague Convention of 1907, it is to be observed, was but declaratory of customary international law. Furthermore, this Convention was implemented by means of national legislation, especially in the form of the various military codes still in existence. However, it would seem untenable to assert that the practice or the municipal laws of the signatories to the Pact of Paris, rendered recourse to "aggressive war"⁴⁶ an individual criminal offense. The Pact of Paris, it is important to note, contains no provision referring to aggressive war. In fact, a suggestion made by M. Briand to insert in the wording of the Pact the term, "renunciation of wars of aggression," was rejected by Secretary of State Kellogg.⁴⁷ Nor is it possible to find in the Pact any stipulation referring to individual criminal responsibility, or, as a matter of fact, to any sanction. The meaning of the provision contained in the Preamble of the Pact, 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," apart from the fact that the provision does not constitute a legally binding obligation, does not refer to criminal sanctions against individuals. It was carefully interpreted during the discussions of the International Law Association at its meeting in Budapest in September, 1934. There, agreement prevailed that the Signatories of the Pact considered this clause as applying to a modification of the rights and duties of neutrals in favor of the injured state, and to the detriment of the state resorting to war in violation of the Pact.⁴⁸ There is hardly any doubt that this was the generally accepted interpretation of the Pact. It is,

⁴⁴ *Ibid.*, p. 50.

⁴⁵ *Ibid.*, pp. 50-51.

⁴⁶ Opinion and Judgment, *op. cit.*, p. 50.

⁴⁷ G. A. Finch, *op. cit.*, p. 10.

⁴⁸ International Law Association, *38th Report* (1934), p. 66. See also H. Lauterpacht, "The Pact of Paris and the Budapest Articles of Interpretation," in *Transactions of the Grotius Society*, vol. 20 (1935), pp. 178-202.

for example, exactly on the basis of this interpretation that the U. S. Government justified the modification of its traditional policy of neutrality early in 1941. "Secretary of State Hull and Secretary of War Stimson maintained that, as the neutrality of the United States was the most vital benefit to the violators of the Pact, the benefit should be denied to them in accordance with the Pact."⁴⁹ And it is in accordance with this interpretation that the United States abandoned its traditional policy of neutrality when enacting the Lend-Lease Act on March 11, 1941.

Even more difficult to square with the rules of existing international law is the opinion expressed in the judgment of the International Military Tribunal according to which the "international history" preceding the Pact of Paris supports the Court's view that the violation of the Pact is a crime.⁵⁰ In evidence of this international history preceding the conclusion of the Pact of Paris, the Court cited the *draft* of a Treaty of Mutual Assistance sponsored in 1923 by the League of Nations. It stipulates, in Article 1, "that aggressive war is an international crime." The *Preamble* to the Geneva Protocol of 1924 which after "recognizing the solidarity of the members of the international community," declared that "a war of aggression constitutes a violation of this solidarity, and is an international crime." The meeting of the Assembly of the League of Nations on September 24, 1927, unanimously adopted a *declaration* concerning wars of aggression. The *Preamble* to this declaration reads as follows:

"The Assembly: Recognizing the solidarity which unites the community of nations;

Being inspired by a firm desire for the maintenance of general peace;

Being convinced that a war of aggression can never serve as a means of settling international disputes, and is in consequence an international crime * * *";

Finally the Court cited the unanimous *resolution* on February 18, 1928, at the sixth (Havana) Pan-American Conference, which declared that "a war of aggression constitutes an international crime against the human species."⁵¹ These glittering declarations of good intentions and the recurring emphasis on the, unfortunately not existent solidarity uniting the community of nations, are very impressive. However, it would seem legally

⁴⁹ G. A. Finch, *op. cit.*, p. 10.

⁵⁰ Opinion and Judgment, *op. cit.*, pp. 51-52.

⁵¹ Opinion and Judgment, *op. cit.* pp. 51-52

untenable to accept draft-treaties, protocols, recommendations and resolutions which never became legally binding and which were continuously violated, as evidence that the Pact of Paris is declaratory of an already existing principle of international law, according to which "resort to a war of aggression is not merely illegal, but criminal." The facts, it appears, rather prove that the existing treaties of non-aggression, including the Briand-Kellogg Pact as well as the various declarations and resolutions, were continuously, and flagrantly, violated. "Thus it happened," declares the former Secretary of State, Mr. Henry L. Stimson—whose interpretation of the Pact is quoted by the International Military Tribunal in support of the latter's judgment,"⁵² that in the ten years which began with the invasion of Manchuria, the principles of the Kellogg Pact were steadily under attack, and only as the danger came slowly home to each of them individually, did the peace-loving nations take action against aggression."⁵³

In view of the importance attached, especially in some American circles, to the maxims *nulla poena sine lege*, *nulla poena sine crimine*, *nullum crimen sine poena legali*, and to the *ex post facto* principle which is closely related to this doctrine in its effects, the Allied Prosecution, as well as the Tribunal, found it necessary to counter in greater detail the objections raised by Counsel for the Defense, with the above doctrines. The gist of these objections, it appears, may be summarized as follows: even if one accepts without qualifications the theory that resort to war in violation of the Briand-Kellogg Pact and other treaties is illegal; and even if one were prepared to admit that illegal and criminal are terms with substantively the same meaning; one has still to concede that, prior to the creation of the International Military Tribunal, no law existed providing for individual criminal responsibility for the commission of the acts enumerated in the Charter as "Crimes against Peace." The main effort of the prosecuting Powers to meet this challenge with legal arguments was made at the close of the case against the individual defendants by the Chief Prosecutor for the United Kingdom.⁵⁴ Relying greatly, it appears, on the opinion of an American criminologist⁵⁵ the Allied Prosecution declared that "the only innovation which this Charter has introduced is

⁵² *Ibid.*, p. 50.

⁵³ Henry L. Stimson, "The Nuremberg Trial: Landmark in Law," in *Foreign Affairs*, vol. 25 (January, 1947), p. 182.

⁵⁴ See for instance Sir Hartley Shawcross, in *Closing Speeches*, *op. cit.*, pp. 57-59.

⁵⁵ Sheldon Glueck, *War Criminals, their prosecution and punishment*, A. A. Knopf, New York, 1944, and by the same author: *The Nuremberg trial and aggressive war*, A. A. Knopf, New York, 1946.

to provide machinery, long over-due, to carry out the existing law; and there is no substance in the complaint that the Charter is a piece of *post facto* legislation, either in declaring wars of aggression to be criminal, or in assuming that the State is not immune from criminal responsibility.”⁵⁶

As regards the assertion that the creation of individual criminal responsibility for the commission of “Crimes against Peace” is undoubtedly a retroactive act, the prosecution referred to cases of piracy, breach of blockade, or espionage in order to prove that the individual “can be made responsible under International Law.”⁵⁷ Furthermore, the prosecution pointed to Article 4 of the Weimar Constitution which provided that the generally recognized rules of international law are an integral part of German Federal Law. The effect of this constitutional provision, it was therefore deduced, can be only that the rules of international law are binding upon individuals. It would seem that the analogy with regard to acts for which general international law has established direct individual responsibility, is ill chosen since it is legally untenable to assert that this analogy applies to “Crimes against Peace.” Nor is it of legal value to invoke the Weimar Constitution in this respect, since individual criminal responsibility for illegal resort to war is, beyond any doubt, no generally recognized rule of international law. Germany, at least, never recognized such a rule; hence it is impossible to consider it as “generally” accepted. It is, therefore incorrect, if not misleading, to interpret Article 4 of the Weimar Constitution as establishing individual criminal responsibility for the commission of “Crimes against Peace.”⁵⁸

A far more convincing rejection of the arguments raised by the Defense in this matter may be found in the judgment of the International Military Tribunal which, in essence, refers to the basically moral concept of justice underlying both the *ex-post facto* principle and the doctrine *nulla poena sine lege*. “Occupying the positions they did in the government of Ger-

⁵⁶ Sir Hartley Shawcross, in Closing Speeches, *op. cit.*, p. 57.

⁵⁷ *Ibid.*, p. 58.

⁵⁸ According to Article 59 of the Weimar Constitution the *Reichstag* had the power of impeaching the Reich President, the Reich Chancellor and the Reich Ministers before the *Staatsgerichtshof* for having violated the law. This provision, however, ceased to be valid after the Nazi régime had been established. Hence, while Germany's alleged resort to illegal war may be considered as a violation of German law even after the accession to power by the Nazi régime, no sanction was provided constituting the individual responsibility of the members of government guilty of such violation. For an excellent analysis of the *ex post facto* rule see Hans Kelsen, “The rule against *ex post facto* laws and the prosecution of the Axis war criminals”, in *The Judge Advocate Journal*, vol. 2 (Fall-Winter 1945), pp. 8-12 and p. 46.

many," so declared the Court, "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. * * * To assert that it is unjust to punish those who, in defiance of treaties and assurances, have attacked neighboring states without warning is obviously untrue; for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. * * * On this view of the case alone, it would appear that the maxim has no application to the present facts."⁵⁹ It might, perhaps, be added that neither one of the above-mentioned municipal law principles constitutes a rule of positive international law, since it would be impossible, indeed, to prove that these doctrines are expressive of a general practice accepted as law, or that they represent the general principles of law recognized by civilized nations. Quite apart from Article 2 of the German Criminal Code, as amended on June 28, 1935 (R. G. B. No. I, 839), the Criminal Codes of the Russian Socialist Federative Soviet Republic of 1922 and 1926, for example, do not recognize the rule against *ex post facto* legislation. Article 58 (13) of the Code of 1926 expressly provides punishments for "any act or active struggle against the working class or the revolutionary movement of which any person was guilty while in a responsible or secret post (i.e. agent) under the Czarist regime, or with any counter-revolutionary government during the period of the civil war;" that is to say, for acts which were performed long before the code came into force and were, at that time, no crime at all. The youthful notion that the *ex post facto* rule, since it has been incorporated into the United States Constitution, is a generally accepted principle of law certainly is not supported by these examples. The sincere objections to the Nuremberg Trial raised on account of the *ex post facto* rule, particularly in the United States, therefore, are legally without basis; they are morally unfounded since, as stated by a leading American authority: "the infliction of an evil which, if not carried out * * * as a reaction against a wrong, is a wrong itself. The non-application of the rule against *ex post facto* laws is a just sanction inflicted upon those who have violated this rule and hence have forfeited the privilege to be protected by it."⁶⁰

Far more serious are the implications for the future con-

⁵⁹ Opinion and Judgment, *op. cit.*, p. 49.

⁶⁰ Hans Kelsen, "The rule against *ex post facto* laws and the prosecution of the Axis war criminals," *op. cit.*, p. 46.

tained in the argument, ably presented by the Defense, that, according to international law, every state may resort to war in self-defense, and that international law accords every state the right to decide for itself whether such a war is waged in self-defense.⁶¹ It does not seem that much attention was given to this point in the judgment of the International Military Tribunal. The Allied Prosecution, however, answered this question carefully by admitting the validity of this principle but by pointing out that it does not apply to the facts of the case before the International Military Tribunal.⁶² The assertion that Germany acted in self-defense against the threat of Communism was rejected as absurd by the prosecution. As far as the general application of the principle in question is concerned the prosecution pointed out that the right of self-defense, particularly with regard to the reservations made with it in the Pact of Paris, "does not impair the capacity of a Treaty to create legal obligations against war."⁶³ The right of self-defense, quite to the contrary, means that a state "in the first instance" has the right to decide whether there is danger in delay and whether immediate action to defend itself is imperative. But, so continues the argument of the prosecution, the state "acts at its peril" since the state is "answerable if it abuses its discretion, if it transforms 'self-defense' into an instrument of conquest and lawlessness * * *"⁶⁴ In the absence of any international agency or court with compulsory jurisdiction competent to decide whether the right of self-defense may be invoked, the interpretation advanced by the Allied prosecution, in fact, amounts to the admission that it is the right of the victor to decide whether or not the vanquished resorted to war in self-defense; or can anyone expect that the vanquished would be permitted to sit in judgment over the victor? To be sure, this question, as far as the future is concerned, does not lose in actual value by referring, as was done by the prosecution, to Article 51 of the Charter of the United Nations.⁶⁵ This Article, it will be noted, permits the use of the "inherent right of individual or collective self-defense" only "if an armed attack occurs against a Member of the United Nations * * *." However, the provision qualifying the right of resort to force in self-defense, does not change the fact that, in the final analysis, only the vanquished is "answerable" to the victor for the abuse

⁶¹ See for instance Professor Jahrreiss as quoted in *Closing Speeches*, *op. cit.*, p. 23.

⁶² *Ibid.*, p. 23.

⁶³ *Ibid.*, p. 56.

⁶⁴ *Closing Speeches*, *op. cit.*, p. 56.

⁶⁵ *Ibid.*

of this "natural right." This is so because the original decision under the Charter of the United Nations, as to whether or not such an armed attack has occurred, rests with the state invoking the right of self-defense, and also because effective review of this original decision is impossible in all those cases where action of the Security Council for the maintenance of international peace and security is blocked by the use of the so-called veto power. Hence, the somewhat embarrassing conclusion that final judgment with regard to the "just" use of the "inherent right of individual or collective self defense" will, for all practical purposes, be exercised by the victor, is supported also by Article 51 of the United Nations' Charter.

It goes beyond the scope of this analysis to discuss the legal merits and political implications of certain more technical and specialized problems raised very eloquently by counsel for the defence. The Allied prosecution, to be sure, could simply have referred to the constitutional law of the Charter when rejecting pleas made under the *act of state* theory or the doctrine *respondeat superior*.⁶⁶ It is to the merit of the Allied prosecution that an attempt was made to prove that such objections are not founded in prevailing international law.⁶⁷ The International Military Tribunal, it is interesting to note, rejected, in its judgment, the validity of the *act of state theory* by declaring that "he who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of State if the State in authorizing action moves outside its competence under international law."⁶⁸ As regards the plea of superior orders the Court opined that an order "to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality . . .". The true test, it was emphasized, "is not the existence of the order, but whether moral choice was in fact possible."⁶⁹

There is one final observation which arises from the attitude of the prosecuting nations taken with regard to the future effects of the Nuremberg Tribunal. It is extremely doubtful whether the establishment of individual responsibility for new international delicts such as "Crimes against Peace" can have

⁶⁶ For an analysis of these questions see F. B. Schick, "War criminals and the law of the United Nations," in *Toronto Law Journal*, January 1947. See also the article of the author in the *American Journal of International Law*, vol. 41 (October, 1947), pp. 770-794, entitled "The Nuremberg Trial and the International Law of the Future."

⁶⁷ See for instance Closing Speeches, *op. cit.*, pp. 58, 137-138, 140, 151-152.

⁶⁸ Opinion and Judgment, *op. cit.*, p. 53. As stated in the foregoing this opinion does not reflect a rule of positive international law.

⁶⁹ Opinion and Judgment, *op. cit.*, p. 54.

any deterrent effects on those who actually are in a position to decide upon the resort to illegal war. Interests of a political nature and the expectance of victory will certainly play a far more decisive role in the calculations of these persons than the remote possibility of having to answer for their acts before an international court. Assuming, however, that these political leaders would, when deciding to go to war, consider the consequences of possible defeat, it does not follow that even the threat of capital punishment could change or even influence their decisions. It is well known that the death penalty has not prevented individuals from committing murder; nor has it restrained patriotic soldiers from volunteering to commit acts of war treason and espionage in spite of the severe sanction attached to them, if only by so doing they could hope to help the cause of their own country. Even more problematical is the assertion that the London Agreement "is a basic charter in the international law of the future", that its law as well as "the judgment such as has been rendered shifts the power of the precedent to the support of these rules of law", and that "no one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute law—and law with a sanction."⁷⁰ To begin with, the stipulations of the London Agreement and the Charter of the International Military Tribunal do not apply to nationals of the prosecuting Powers. The Charter, in its very first Article, declares that only the "major war criminals of the European Axis" fall under its provisions. Moreover, no court exists competent to administer the law of the Charter to nationals of the victorious Powers. It is theoretically quite possible to assume that such a court could be created in the future by international treaty. In this instance, the law of the Charter and the judgment of the International Military Tribunal could not be considered as binding in the sense of a legal precedent upon the signatories of such a future treaty, since the latter would have to define anew the law binding upon the court. One may, of course, hope that all, or most of the victorious Powers as well as other nations will enact municipal laws giving effect to the principal provisions of the defunct Charter of the International Military Tribunal. Hope, to be sure, is always part of youthful inspiration. In this certainly remote case it might be possible to show that the Charter was used as a pattern for such national

⁷⁰ Justice Robert H. Jackson, in "Prosecution of major Nazi war criminals, Final report to the President from Supreme Court Justice Robert H. Jackson," in *The Department of State Bulletin*, vol. XV (October 27, 1946), p. 774.

legislation; given these circumstances it would be legally correct to maintain, after sufficient time has elapsed, that these in effect identical municipal laws are evidence of the existence of an international custom. In the meantime it is well to observe that the Charter of the United Nations and the Statute of the International Court of Justice contain no provisions whatsoever which by any possible stretch of imagination would permit the interpretation that the victorious nations and their associates have accepted the principle of individual criminal responsibility for the violation of international obligations, and especially for resort to unauthorized war. In fact, even the idea of *collective* enforcement measures on behalf of the United Nations, as presented in Chapter VII of the United Nations Charter, still awaits its implementation under Article 43 of this Chapter. Even then it will be impossible to apply these collective sanctions⁷¹ as provided for in Articles 41, 42 and 45 to permanent Members of the Security Council which, except for China, are identical with the prosecuting powers of Nuremberg. It would seem even more difficult to speak under these circumstances of "the historic precedent set at Nurnberg . . .".⁷² One might consider it morally imperative, however, that the United Nations, and especially the prosecuting powers, implement the solemn promises made at Nuremberg. Indeed, the serious warning expressed by the Chief Prosecutor for the United States should be heeded that "no one of the prosecuting nations can long depart from these standards in its own practice without inviting the condemnation and contempt of civilization."⁷³ To put this admonition differently, the time has come to affirm the main principles of the Nuremberg Charter by incorporating them into the law of the United Nations or, if this procedure should prove impossible at present, to propose measures through the medium of the General Assembly to be taken by each Member of the United Nations in order to give effect to the principles proclaimed at Nuremberg. To be sure, a first step in this direction was taken by the General Assembly which, by a resolution of December 11, 1946 directed its *Committee on the Progressive Development of International Law* "to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offenses against the peace

⁷¹ For an analysis see F. B. Schick, "The Nuremberg Trial and the International Law of the Future," *op. cit.*, pp. 793-794.

⁷² "Reply of President Truman to Justice Jackson" in *The Department of State Bulletin*, vol. XV (October 27, 1946), p. 776.

⁷³ Robert H. Jackson, Address at the University of Buffalo, in *The New York Times*, October 5, 1946, p. 4.

and security of mankind, or of an international criminal code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.”⁷⁴ This Committee, in a report published on June 17, 1947 decided, however, not to undertake the actual formulation of the Nuremberg Principles since this would “clearly be a task demanding careful and prolonged study.” The Committee concluded by a majority “that it was not called upon to discuss the substantive provisions of the Nuremberg Principles, and that such a discussion would be better entrusted to the International Law Commission . . .”⁷⁵ It may finally be noted that the Representatives for Egypt, Poland, the United Kingdom, the Union of Soviet Socialist Republics, and Yugoslavia rejected a majority decision of the same Committee recommending that the implementation of the principles of the Nuremberg Trial and its judgment “may render desirable the existence of an international judicial authority to exercise jurisdiction over such crimes.”⁷⁶ At present, it would seem that only the French government has taken preliminary positive steps by submitting, on May 15, 1947 a memorandum concerning a draft proposal for the establishment of an international court of criminal jurisdiction, and on May 27, 1947 a memorandum concerning draft texts relating to the Principles of the Charter and Judgment of the Nuremberg Tribunal.⁷⁷

⁷⁴ United Nations Journal No. 58 (Supplement A), p. 470.

⁷⁵ Doc. A/AC.10/52, 17 June 1947.

⁷⁶ *Ibid.*

⁷⁷ Doc. A/AC.10/34.