CRIMES IN
INTERNATIONAL RELATIONS

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PREFACE

These lectures, though introduced as the Tagore Law Lectures for 1938, were actually delivered in September, 1951. Appointment for the year was made under the provisions of Rule 5-A of the Rules for the Tagore Law Professorship. There was some unavoidable delay on the part of the University in making the appointment itself and since my acceptance of the invitation my duties as a Judge of the High Court, as Vice-Chancellor of the University and as a member of the International Military Tribunal for the Far East for the Trial of the Japanese Major War Criminals kept me fully occupied in succession up to December, 1948.

Since the delivery of these lectures I have had occasion, as a member of the International Law Commission established by the General Assembly of the United Nations in recognition of the need for giving effect to article 13, paragraph 1, subparagraph (a) of the Charter of the United Nations, to participate in the efforts at bringing the International community under a rule of law by introducing measures calculated to "promote international co-operation in the political field and to encourage the progressive development of international law and its codification."

Countries having traditional respect for the rule of law would certainly welcome the establishment of this Commission. Of course it will be too much to suppose that all the problems which confront the world today are capable of solution by applying the rules of international law or by recourse to the International Court. Yet it cannot be denied that the establishment of an organ like the International Law Commission is a matter of first importance in the field both of International Law and the comity of nations.

The Commission has already earned recognition for its admirable work and indeed it has already taken up the study of various important matters.

As regards the establishment of an international criminal jurisdiction, however, very little could hitherto be effectuated.

The International Law Commission, in its third session held in 1951, completed a Draft Code of Offences against the Peace and Security of Mankind and submitted it to the General Assembly in its report on the session.

The consideration of the Draft Code was included in the provisional agenda of the sixth session (1951) of the General Assembly. In course of the discussion of this provisional agenda in the General Committee of the General Assembly, the Representative of Yugoslavia
proposed that the question of consideration of the Draft Code should be omitted from the agenda on the ground that "the Draft Code had only recently been communicated to governments and, in accordance with article 16 of the Statute of the International Law Commission, a one-year period of study should be allowed." The Representative added that, if the subject was dropped from the agenda, "the Secretary-General could be authorized to include the item in the provisional agenda of the seventh session." The Representative of the United Kingdom supported the proposal. The General Committee decided by 12 votes to none, with 2 abstentions, to recommend the exclusion of the matter from the agenda of the sixth session and its inclusion in the provisional agenda of the seventh session.

The General Assembly, on 13th November, 1951, adopted this recommendation of the General Committee regarding the postponement of the consideration of the Draft Code.

In view of this decision, the Secretary-General addressed a circular letter on the 17th December, 1951 to the Governments of the Member States in which he drew their attention to the Draft Code and invited them to communicate to him their comments or observations for submission to the General Assembly. The Secretary-General also included the consideration of the Draft Code in the provisional agenda of the seventh session (1952) of the General Assembly. Response to the above invitation came only from fourteen governments.

When the provisional agenda of the seventh session was taken up for discussion in the General Committee, the Representative of the United Kingdom stated that in the opinion of his delegation the Draft Code was not ripe for consideration by the General Assembly; that the comments received from governments should be transmitted to the International Law Commission; and that only after having considered the comments could the Commission present to the General Assembly its final recommendations in the matter. He thought that it would therefore be preferable not to include the item in the agenda of the seventh session. The General Committee accordingly decided to recommend the deletion of the item from the agenda.

The General Assembly, on 16th and 17th October, 1952, adopted the agenda as proposed by the General Committee, and the question of the Draft Code was consequently omitted. On the latter date, the President of the General Assembly made the following statement with reference to the report of the General Committee:

"... Paragraph 5 explains that the General Committee decided to recommend to the General Assembly the deletion of item 58 of the provisional agenda, 'Draft Code of offences against the peace and security of mankind'. This was done on the understanding that the matter would continue to be discussed by the International Law Commission."
The matter thus came back to the International Law Commission with comments on the draft made by the various governments and the Commission, at its Sixth Session held at Paris from the 3rd June to 28th July, 1954, took up the matter under Article 22 of its Statute which stands thus:

"Taking such comments (comments made by the various governments) into consideration, the Commission shall prepare a final draft and explanatory report which it shall submit with its recommendations through the Secretary General to the General Assembly."

The Commission prepared a final draft during this session and the said final draft comprises 4 articles which stand thus:

"DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND"

"ARTICLE 1"

"Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished.

"ARTICLE 2"

"The following acts are offences against the peace and security of mankind:

"(1) Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.

"(2) Any threat by the authorities of a State to resort to an act of aggression against another State.

"(3) The preparation by the authorities of a State for the employment of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.

"(4) The organization, or the encouragement or toleration of organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the use by such armed bands of the territory of that State as a base of operations or as a point of departure for incursion into the territory of another State, as well as direct participation in or extending support to such incursion.

"(5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State,
or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State.

" (6) The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State.

" (7) Acts by the authorities of a State in violation of its obligations under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on fortifications, or of other restrictions of the same character.

" (8) Acts by the authorities of a State resulting in the annexation, contrary to international law, of territory belonging to another State or of territory under an international regime.

" (9) The intervention by the authorities of a State in the internal or external affairs of another State, by means of coercive measures of an economic or political character, with the purpose to force its will and obtain from it advantages of any kind.

" (10) Acts by the authorities of a State or by private individuals, committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, including:

(i) Killing members of the group;
(ii) Causing serious bodily or mental harm to members of the group;
(iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(iv) Imposing measures intended to prevent births within the group;
(v) Forcibly transferring children of the group to another group.

" (12) Acts in violation of the laws or customs of war.

" (13) Acts which constitute:

(i) Conspiracy to commit any of the offences defined in the preceding paragraphs of this article; or
(ii) Direct incitement to commit any of the offences defined in the preceding paragraphs of this article; or
(iii) Attempts to commit any of the offences defined in the preceding paragraphs of this article; or
(iv) Complicity in the commission of any of the offences defined in the preceding paragraphs of this article.
“The fact that a person acted as Head of State or as responsible government official does not relieve him from responsibility for committing any of the offences defined in this Code.

““The fact that a person charged with an offence defined in this Code acted pursuant to order of his government or of a superior does not relieve him from responsibility in international law if in the circumstances at the time, it was possible for him not to comply with such order.”

In my view, at the present formative stage of the international community, even justice in matters contemplated in the draft is not possible. It will not be possible to set up any effective organ to bring the offenders to book. In this view I withheld my support from the proposed measures. My view point will appear from what I said, in course of the discussion of the matter by the Commission, in explaining my abstention from voting. I said:

“Before the Commission proceeds to vote on the entire draft I desire to tell the Commission that I would not be able to support the proposed measures. I did not participate in the discussion of the detailed articles of the suggested draft code and abstained from voting while the different provisions were being dealt with. As I have explained already, I felt some fundamental difficulties in this connection. These draft articles were adopted by the Commission under Article 20 of its Statute as far back as 1951 when I was not a member of the Commission. Since then these provisions have passed the stage contemplated by Article 21 of the Statute and have obtained the weighty considerations of the various Member States of the International Society. They have now come before the Commission once again only for the very limited purpose of Article 22 of the Statute. The scope of discussion at this stage does not admit of raising any question which might demand abandonment of the entire effort. Yet, my objections to the present draft code are of that fundamental character.

“Before indicating the exact tenure of my objection I earnestly hope my opposition will not be misunderstood by the Commission. I am not in doubt in the least as to the loftiness of the idea behind the present effort of the Commission. I fully realize that a flaming urge for justice has been the propelling force in the present effort. Systems and principles of justice are indeed the servants and instruments of the essential spirit of communal life ‘‘in so far as they extend the sense of obligation (1) from an immediately felt obligation, prompted by obvious need, to a continued obligation, expressed in fixed principles of mutual support; (2) from a simple relation between a self and one
other to the complex relations of the self and others; and (3) finally from the obligations, discerned by the individual self, to the wider obligations which the community defines from its more impartial perspective ".

"The historical period in which it has been our fate to live has indeed many scandalous stories against it. If ever it is sought to be described by these scandalous stories, a right-thinking mind will also ponder and enquire whether it had any commendable moral ideal governing and illuminating the minds of those members of the then human societies who were capable of ideals; and in that enquiry, this effort of the Commission will certainly be given a very high place.

"If, in spite of this realization of the loftiness of the idea behind the present code, I am opposing it, it is because I strongly feel that such an ideal is unrealizable at the present formative stage of the international community.

"I am opposed to the suggested code, not that the various acts dealt with therein are not wrongful and reprehensible, but because the present structure of the international community would not admit of justice in this respect. The present international organization would hopelessly be incapable of measures fostering any effective growth in the attempted direction. In spite of all the laborious elaborateness and minuteness of the several provisions any guilt under them would remain to be established and punished only by the outcome of a war. And then perhaps to them whose privilege and responsibility it would be to do "stern justice" the whole case would be too plain: the burning of many a Joan may thus only need half an hour: but several centuries would always be needed to find out the truth. In respect of most of the matters dealt with in the suggested provisions it would indeed be very true to say that every truth, however true in itself, yet taken apart from others becomes only a snare.

"Majority of the provisions suggested would not, at the present stage of organization of the international community, succeed in bruising even the heel of any real culprit, but may on the other hand, bruise the very head of the real object. In the crisis of world history in which we stand we are to move with caution.

"The economic inter-dependence of the world places us under the obligation, and offers us the possibility of enlarging the human community so that the principles of order and justice should govern the international as well as national community. We are driven to this task by the lash of fear as well as by the incitement of hope. But we cannot expect to achieve this object by one simple jump. We shall have to face all the old problems of political organization on the new level of a potential international community. Nothing would be achieved by seeking any premature escape from the guilt of history. The total fabric of the historical development facing us at the present moment is indeed the result of the interweaving of very various strands;
It will indeed be a puerile oversimplification of the problem to start with only one single thread ignoring the complex and intimate involvement in the whole historical process of the various forces which contributed to the hopeless complexity of the present international life. The obligation to build for justice might appear to have been forced upon us by the necessity of coming to terms with the rather numerous hosts which history has placed beside us. Yet in the name of building for justice we must not unwittingly build a suffocating structure for injustice. Before attempting to build we cannot avoid exploring the possibility of a structure admitting of even justice at least to a rough approximation keeping in view the possible social realities of the life for which we are seeking to provide.

"Where there is no possibility of even justice—and there is none and there cannot be any in the near future in the present case—the effort must wait. Loyalty to the sense of justice demands confidence in the possibility of its attainment."

"Waiting, in the circumstances, may not altogether be futile. History does reveal the possibility of adjustment of interests without the intervention of any superior coercive force."

In preparing these lectures I have drawn largely upon my own dissenting judgment delivered at the Tokyo Trial. The judgment has since been published by M/s. Sanval & Co. of Calcutta.

I take this opportunity of expressing my indebtedness to the various authors whom I have quoted in course of my lectures. I also wish to record my appreciation of the help rendered by Sri Balai Lal Pal, M.A., LL.M., Sri Purna Chandra Pal, B.A., Sri Nanda Lal Pal, M.A., B.L., Sri Radhashyam Sinha and Sri Amar Nath Bhattacharyya in the preparation of the manuscript as also in reading the proofs and checking the references.

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Radhabinod Pal
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CRIMES IN INTERNATIONAL RELATIONS

LECTURE 1

INTRODUCTORY

CRIMES in international relations may roughly be classified under two broad heads, (1) crimes under international law and (2) crimes against international law. Crimes under international law, such as piracy, slave trade, counterfeiting, genocide and the like, may perhaps be given the name of delicta juris gentium. These are defined by international law but are brought into the national legal systems by their respective domestic legislatures. The individuals are placed under a duty to observe these laws only if and only when their respective states enact them into the corresponding domestic systems.

If such acts are criminal it is because they are made so by the several national states for their respective national systems. They may be brought under international law for various political motives, for considerations other than that of infringement of the order, if any, established by international law. The interests of a country or of a group of countries in the combat against a given crime, material facilities for organization of such combat and the like might have been responsible for such crimes having been brought under international control. But, for this, they cannot juristically be called crimes in international relations in the strict sense.

Only crimes against international law can be real crimes in international relations. These are to be acts directed toward the deterioration, the hampering, the disruption of the social order, if any, established by international law; these are to be infringements on the bases, if any, of international association.

We shall have to see whether there is any such crime recognized by the existing international law, whether the international community as it now stands admits of introduction in it of such criminal responsibility, whether the time is ripe for the extension of international law to include juridical process for condemning and punishing such acts as may be characterized as criminal under this head.

In this sense "crimes in international relations" would presuppose an international society under rule of law, a society under rule of law to such an extent as to establish public order or security provided by law.
Further, international law would be expected to recognize the individual as its ultimate subject and maintenance of his rights as its ultimate end.

Judge Manley O. Hudson, in his treatise entitled "International Tribunals, Past and Future" published in 1941, while dealing with the question of "The Proposed International Criminal Court" in Chapter XV, says:—

"International law applies primarily to States in their relations inter se. It creates rights for States and imposes duties upon them, vis-a-vis other States. Its content depends very largely upon the dispositions of interstate agreements and upon deductions from the practices of States."

According to the learned Judge, this is why it reflects but feebly a community point of view and why the halting progress made in international organization has not facilitated its protection of community interests as such. "Historically," says the learned Judge, "international law has not developed any conception of crimes which may be committed by states. From time to time certain states have undertaken to set themselves up as guardians of community interest and have assumed competence to pronounce upon the propriety of the conduct of other states. Yet, at no time in history have condemnations of states' conduct, whether before or after the event, been generally formulated by legislation for international crimes. Only in quite recent times have official attempts been made to borrow the concept of criminality from municipal law for international purposes. In the abortive Geneva Protocol of 1921 'a war of aggression' was declared to be 'an international crime' and this declaration was repeated by the assembly of the League of Nations in 1927, and by the Sixth International Conference of American states in 1928: no definition was given to the terms, however, though the 1921 Protocol was designed to ensure 'the repression of international crimes.' At no time has any authoritative formulation of international law been adopted which would brand specific conduct as criminal, and no international tribunal has ever been given jurisdiction to find a state guilty of a crime."

Coming to the question of individual responsibility, Judge Hudson says:—

"If international law be conceived to govern the conduct of individuals, it becomes less difficult to project an international penal law. It was at one time fashionable to refer to pirates as enemies of all mankind and to piracy as an offence against the law of nations." The United States Constitution of 1789 empowered the Congress to define and punish 'piracies and felonies committed on the high seas and offences against the law of nations.' Unanimity does not obtain upon the meaning to be given to these terms, but modern opinion seems to be inclined to the view that a broad category of armed violence at sea is condemned by international law as piratical conduct, with the conse-
quence that any state may punish for such conduct and that other states are precluded from raising the objections which might ordinarily be advanced against the assumption of jurisdiction."

He then points out:

"It is in this sense that the conception of piracy as an offence against the law of nations has been seized upon, by way of analogy, for the service of other ends. Various treaties of the Nineteenth Century provided for the possibility of states punishing persons engaged in the slave trade as pirates. . . ."

The learned Judge then points out:

"Despite the employment of such analogies no authoritative attempt has been made to extend international law to cover the condemned and forbidden conduct of individuals. States have jealously guarded their own functions in the repression of crime, and differences in national and local outlooks and procedures have precluded the development of international or supranational criminal law. . . ."

He concludes the topic by saying:

"Whatever course of development may be imminent with reference to political organization, the time is hardly ripe for the extension of international law to include judicial process for condemning and punishing acts either of states or of individuals."

The Commission of Fifteen, appointed by the Preliminary Peace Conference at the close of the World War I to examine the responsibility for starting that war and for atrocities committed during its conduct, found former Kaiser Wilhelm II and other high-placed personages "guilty" of "gross outrages upon the law of nations and international good faith," but concluded that "no criminal charge" could be brought, although the outrages should be the subject of a formal condemnation by the Conference. They emphasized it to be "desirable that the future penal sanctions should be provided for such grave outrages against the elementary principles of international law." But throughout the quarter century between the two World Wars nothing was done by the nations of the world to implement this recommendation.

A prominent Russian statesman jurist, Mr. Trainin, writing very recently on "The Criminal Responsibility of the Hitlerites," points out in Chapter III of the book in course of the discussion of "the Concept of International Crime" that though the war of 1914-18 showed the great importance of the problem of the responsibility of the aggressor, juridical thought still continued to wander in formal, unrealistic abstractions. The learned jurist observes that the problem in this respect is quite different in the field of international law from that in any national system. Here in the international field "there is no experience, no tradition, no prepared formula of crime or punishment. This is a field in which criminal law is only beginning to penetrate, where the understanding of crime is only beginning to take form."
He then examines certain existing definitions and international conventions relating to certain crimes and rejects the definitions, observing that in them "the concept of an international offence as a particular kind of infringement upon the sphere of international relations disappears completely, being dissolved in the mass of crimes provided against in national laws and committed on the territory of different states."

As regards the international conventions the learned Professor points out that "the selection of this or some other crimes as the object of the provisions of international conventions is necessitated, not by theoretical considerations concerning the nature of international crime, but by various political motives, the interests of one country or a group of countries in the combat against a given crime, material facilities for organization of such combat, and other reasons of that nature." These do not help the solution of the problem now raised. "Because of their juristic nature and because of their factual significance, conventions for certain common criminal offences appear to be one of the various forms of reciprocal support for criminal law by governments having in view a realistic combat against crime. This reciprocal action of governments is not connected directly with the problem of international crimes."

Mr. Traumm points out that such international conventions do not make these crimes international crimes. Again, simply because there is no international convention relating to something, it cannot be said that this might not constitute international crime.

The learned author then takes up the League Conventions, and finds in them mere attempts at "classifying certain acts as criminal" and concludes that these also failed to "establish a concept of international crime."

He then proceeds to give his own views thus:—

1. The conception of international crime and the combating of international crimes should be henceforth constructed on the basis of:
   (a) Experience of the "Fatherland Defence War."
   (b) Principles imbued with a real solicitude for the strengthening of the peaceful co-operation of the nations.
2. An international crime is an original and complex phenomenon. It differs in quality from the numerous crimes provided for by the national criminal legislations. Crimes in national systems are connected by one common basic characteristic—they are infringements upon social relations existing within a given country.
3. The epoch when governments and peoples lived isolated or practically isolated from each other is long past:—
   (a) The capitalistic system specially developed complicated relations between nations:—
   (i) A steady international association has developed;
Despite the conflicting interests of various nations, despite the differences in patterns of the political systems of countries, this international association forms innumerable threads connecting peoples and countries and represents, in fact, a great economic, political and cultural value.

4. An international crime is an attempt against the above-mentioned achievement of human society—an international crime is directed toward the deterioration, the hampering and the disruption of these connections.

(a) An international crime should be defined as infringement on the bases of international association.

Mr. Trainin finally defines an international crime as "a punishable infringement on the bases of international association."

Mr. Trainin’s thesis seems to be that, since the Moscow Declaration of 1943, and as a result of it, a new international society has developed. To facilitate this process of development and to strengthen the new ideas, juridical thought is obliged to forge the right form for these new relations, to work out a system of international law and, as an indissoluble part of the system, to dictate to the conscience of nations the problem of criminal responsibility for attempt on the foundation of international relations.

It cannot be denied that Mr. Trainin’s is a very valuable contribution to deep juridical thinking in this respect. From what has been stated above it would be seen that the essential basis of Mr. Trainin’s thesis is that the character of international association has completely changed since the Moscow Declaration of 1943, and that it has become a society or community under the rule of law to such an extent that it can claim to have established a peaceful public order or security. It will be necessary for us to examine carefully the correctness of this assumption. The assumption more correctly is that the society or association of nations has developed into a community completely brought under the rule of law.

Hitherto we have been using the terms ‘society’ and ‘community’ as synonymous and being of the same import. In strict use, however, these terms stand for a difference fundamental in the classification of different social groups. Dr. Schwarzenberger brings out this difference in clear terms. The learned Professor defines ‘a community’ as ‘a social group in which behaviour is based on the solidarity of members, a cohesive force without which the community cannot exist.’ He says:—

"The criterion of solidarity is the decisive test in the classification of social groups, and if this bond is lacking, or is not strong enough to create the necessary cohesive force, the collective entity fulfils another function—the adjustment of diverging interests. This is the essential feature of a society. Whereas the members of a community are united in spite of their individual existence, the members of a
society are isolated in spite of their association. Neither group could exist without a cohesive force and an interdependence between members. There is, however, a decisive difference between the ties created by a community and by a society—a difference which affects the nature of the law in those groups, as the law fulfils a completely different function in each of them.

"The law which regulates the life of a community such as a family or of an organization such as the Catholic Church, generally formalizes only customary behaviour, which would be observed even without its existence; it defines the relations between members which the majority regards as substantially sound and adequate, and finds its main justification in its application to abnormal situations. It is the visible expression of common values and of relations which are as such a valid and binding reality for the greater part of the members.

"On the other hand, the law regulating the relations between the members of a society such as a joint stock company has to fulfil a different function. Its purpose is to prevent the bellum omnium contra omnes, or to make limited co-operation possible between individuals who, being anxious to maintain and improve their own positions and seeking primarily their own advantage, are therefore at the best only prepared to apply in proportion to their actual power the principle of reciprocity in their relations with each other."

As we shall see later, the international association of the present day is at best only a society as defined above by Prof. Schwarzenberger and as such does not admit of criminal responsibility. This is also substantially the view of Prof. Zimmern as we shall see later. Prof. Schwarzenberger quotes from a statement of Senor Don Salvador de Madarraga, an eminent authority on international relations, where, speaking of the existence of a world community, he says, "We have smuggled that truth into our store of spiritual thinking without preliminary discussion. We start with this preconceived idea or guess of our instinct that there exists a world community." With the intellectual honesty which is one of his main characteristics, he adds the significant words: "We moderns have not only immediately guessed or felt the world community, but begun actually to assert, create and manifest it, though we do not know yet what the world community is, what are its laws, what are its principles, nor how it is going to be built in our minds." 1

The Moscow Declaration is only a declaration that a new epoch of international life is going to begin.

The assumption that this new epoch has commenced will only mean that the 'reason' for the suggested law of crimes has come into existence. But the reason for a law is not itself the law.

The legal rule in question here is not such as would necessarily be implied in the state of facts related by Mr. Trainin so as to originate simultaneously with those facts. International relations,
even as promised by the Moscow Declaration, will still constitute a society in a very specific sense. It would be under the reign of law also in a specific sense, and, however much it may be desirable to have criminal law in such a life, such a law would not be its necessary implication.

At most Mr. Trainin has only established a demand of the changing international life. But I doubt whether this can be a genuine demand of that life and whether it can be effectively met by the introduction of such a criminal responsibility as would, under the present organisation, only succeed in fixing such responsibility upon the parties to a lost war.

We cannot ignore the fact that even now national sovereignty continues to be the basic factor of international life and that the acts that are sought to be made criminal may affect the very essence of this sovereignty. So long as submission to any form of international life remains dependent on the volition of states, it is difficult to accept any mere implication of a declaration, or even an agreement, which would so basically affect the very foundation of such sovereignty.

The most valuable contribution of Mr. Trainin in this respect is his view of the place of criminal responsibility in international life. He rightly points out that piracy, slavery and the like that have hitherto been included in the international system as crimes cognizable by international law are really not international crimes in the correct sense of the term. Both Mr. Trainin and Judge Manley O Hudson point out that the selection of these or some other crimes and their being brought under international control could not have changed their character. Such introduction only might have provided a common combat against a given crime, might have only provided material facilities for organization of such common combat. "Because of their juristic nature and because of their factual significance, conventions for certain common criminal offences appear to be one of the various forms of reciprocal support for criminal law by governments having in view a realistic combat against crime. This reciprocal action of governments is not a loss of practical attributes, but it is not connected directly with the problem of international crimes."

It is rightly said that the conception of criminal responsibility in international life can arise only when that life itself reaches a certain stage in its development. Before we can introduce this conception there, we must be in a position to say that that life itself is established on some peaceful basis; international crime will be an infringement of that base, a breach or violation of the peace or pax of the international community.

But the whole difficulty is about an acceptable meaning of the term 'peace' in this context, as also about the true nature of the international society as it stands at present.
The question of introduction of the conception of crime in international life requires to be examined also from the viewpoint of the social utility of punishment. At one time or another different theories justifying punishment have been accepted for the purpose of national systems. These theories may be described as (i) Reformatory, (ii) Deterrent, (iii) Retributive and (iv) Preventive. "Punishment has been credited with reforming the criminal into a law-abiding person, deterring others from committing the crime for which previous individuals were punished, making certain that retribution would be fair and judicious, rather than in the nature of private revenge, and enhancing the solidarity of the group by the collective expression of its disapproval of the law-breaker." Contemporary criminologists give short shrift to these arguments. I would, however, proceed on the footing that punishment can produce one or the other of the desired results.

So long as the international organization continues at the stage where the trial and punishment for any crime remains available only against the vanquished in a lost war, the introduction of criminal responsibility cannot produce deterrent and preventive effects.

The risk of criminal responsibility incurred in planning an aggressive war, for example, does not in the least become graver than that involved in the possible defeat in the war planned.

I do not think anyone would seriously think of reformation in this respect through the introduction of such a conception of criminal responsibility in international life. Moral attitudes and norms of conduct are acquired in too subtle a manner for punishment to be a reliable incentive even where such conduct relates to one's own individual interest. Even a slight knowledge of the processes of personality-development should warn us against the old doctrine of original sin in a new guise. If this is so even when a person acts for his own individual purposes, it is needless to say that when the conduct in question relates, at least in the opinion of the individual concerned, to his national cause, the punishment meted out, or criminal responsibility imposed by, the victor nation can produce very little effect. Fear of being punished by the future possible victor for violating a rule which that victor may be pleased then to formulate would hardly elicit any appreciation of values behind that norm.

In any event, this theory of reformation in international life need not take the criminal responsibility beyond the State concerned. The theory proceeds on this footing that if a person does a wrong to another, he does it from an exaggeration of his own personality, and this aggressiveness must be restrained and the person made to realise that his desires do not rule the world but that the interests of the community are determinative. Hence punishment is designed to be the influence brought to bear on the person in order to bring to his consciousness the conditionality of his existence and to keep it within its limits. This
is done by the infliction of such suffering as would cure the delinquent of his individualistic excess. For this purpose, an offending State itself can be effectively punished. Indeed, the punishment can be effective only if the delinquent State as such is punished.

In my opinion it is inappropriate to introduce criminal responsibility of the agents of a state in international life for the purpose of retribution. Retribution, in the proper sense of the term, means the bringing home to the criminal the legitimate consequences of his conduct, legitimate from the ethical standpoint. This would involve the determination of the degree of his moral responsibility, a task that is an impossibility for any legal tribunal even in national life. Conditions of knowledge, of training, of opportunities for moral development, of social environment generally and of motive, fall to be searched out even in justifying criminal responsibility on this ground in national life. In international life many other factors would fall to be considered before one can justify criminal responsibility on this retributive theory.

The only justification that remains for the introduction of such a conception in international life is revenge, a justification which all those who are demanding introduction of criminal responsibility in international relations are disclaiming.

It may be contended that indignation at a wrong done is a righteous feeling and that that feeling itself justifies the criminal law.

It is perhaps right that we should feel a certain satisfaction and recognize a certain fitness in the suffering of one who has done an international wrong. It may even be morally obligatory upon us to feel indignant at a wrong done.

But it would be going too far to say that a demand for the gratification of this feeling of revenge alone would justify a criminal law. In national systems a criminal law, while satisfying this feeling of revenge, is calculated to do something more of real ethical value and that is the real justification of the law. Though vengeance might be the seed out of which criminal justice has grown, the paramount object of such criminal justice, however, is the prevention of offences by the menace of law.

The mere feeling of vengeance is not of any ethical value. It is not right that we should wish evil to the offender unless it has the possibility of yielding any good. Two wholly distinct feelings require consideration in this connection. The one is a feeling of moral revulsion and is directed against the crime. The other is a desire for vengeance and is directed against the criminal. To revenge oneself is, in truth, but to add another evil to that which has already been done, and the admission of it as a right is, in effect, a negation of all civil and social order, for thereby are justified acts of violence not regulated by nor exercised with reference to the social good. There are few who
in modern times assert the abstract rightfulness of a desire for vengeance.

I am not unmindful of the view expressed by Fitzjames Stephens wherein he asserts the rightfulness of vengeance. "The infliction of punishment by law," says Stephens, gives definite expression and a solemn ratification to the hatred which is excited by the commission of the offence, and which constitutes the moral or popular, as distinguished from the conscientious, sanction of that part of morality which is also sanctioned by the criminal law. The criminal law thus proceeds upon the principle that it is morally right to hate criminals and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it." "I think it is highly desirable," he continues, "that criminals should be hated. that the punishments inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it."

Though apparently this seems to indicate as if Stephens defends the desire for vengeance as ethically proper, on a careful examination of the thought thus expressed by him it would be found that what he really has in mind is that feeling of indignation which we justly feel at the commission of a wrong rather than the feeling of revenge pure and simple. If from his thought the belief in the possible educative or preventive value of punishment is eliminated, then the sentiment hardly justifies the law. Indignation arises on the commission of the wrong act. The justification of the law is its preventive capacity. If in an organization this prevention is not at all possible, the justification for its introduction there is absent: the organization is inapt for the introduction of criminal punishment.

In the feeling of indignation, the element that really matters much for the community is the expression of disapprobation. This disapproving feeling prevails primarily against the act; but of necessity it extends also to its author. The question is what is the possible and proper method of expressing this disapproval. In my opinion, at the present stage of the international society, the method that would necessarily depend on the contingency of a war being lost, and that would be available only against the vanquished, is not what can be justified on any ethical ground. There are other available methods of giving expression to this disapprobation and in the present stage those other methods of expressing world opinion should satisfy the international community.

According to Mr. Trainin, before the present World War, "the policy of aggressive imperialistic supremacy, a constant threat to peace, a policy systematically giving ample scope for the use of force in the sphere of international relations, naturally could not contribute to the development and strengthening of international law as a system
of rules protecting the liberty, independence and sovereignty of nations."

''But,'' Mr. Tramin says, ''it would be a serious mistake to draw the general conclusion from this fact that the introduction of the problem of international criminal law was inopportune or fruitless: This would be to disregard the difficulty and complexity of international relations.''

According to him, even before the Second World War there were two ''tendencies of the historical process,''—one being the collision of imperialistic interests, the daily struggle in the field of international relations and the futility of international law—the tendency reflecting the policy of the aggressive nations in the imperialistic era and the other, just a parallel and opposite to the former, being the struggle for peace and liberty and independence of nations, a tendency in which is reflected the policy of a new and powerful international factor—the Socialist State of the todiers, the U.S.S.R.

Thus there was some scope for the introduction of the conception of criminal law in international life in view of the second tendency named above.

This tendency, says Mr. Tramin, has been given extraordinary scope and enormous power by the Second War. The nations have now agreed that they ''respect the right of all nations to choose their own form of government and will strive to attain complete co-operation among all nations in the economic field in order to guarantee a higher standard of living, economic development and social security.''' He refers again to the Moscow Declaration of October 30, 1943, as having confirmed this solemnly. It is not very clear, but it seems that Mr. Trainin takes this solemn resolve on the part of the great powers as establishing the base of the international life and consequently as supplying the basis of criminality in the international system. He says: ''Just as earlier, in the period of full play of imperialistic plundering, the weakness of international legal principles hindered the development of a system of measures to prevent the violation of international law, now on the contrary, the strengthening of the laws which are the basis of international relations must consequently lead to the strengthening of the battle against all the elements which dare, through fraud, terror or insane ideas, upset international legal order.'''

It seems Mr. Trainin here takes the Moscow Declaration as establishing an international association completely under the reign of law and consequently making any breach of its peace criminal. In this view all wars will be crime unless they can be justified on the strength of the right of private defence as in the national systems.

In another place Mr. Trainin gives credit to the capitalistic system for developing complicated relations between individual nations. From this, according to him, a steady international association has developed. ''Despite the conflicting interests of various nations, despite the
difference in patterns of the political systems of countries, this international association forms innumerable threads connecting peoples and countries and represents, in fact, a great economic, political and cultural value. An international crime, according to Mr. Trainin, is an attempt against the association between countries, between peoples, against the connections which constitute the basis of relations between nations and countries. An international crime is said to be one which is directed toward the deterioration, the hampering and the disruption of these connections.

We shall later examine the character of the so-called international community as it stands now.

We shall see that still it is simply a co-ordinated body of several independent sovereign units and certainly is not a body of which the order or security could be said to have been provided by law.

By saying this, I do not mean to suggest any absolute negation of international law. It is not my suggestion that the observance of the rules of international law, so far as these go, is not a matter of obligation. These rules might have resulted from the calculation that their observance was not incompatible with the interest of the state. Yet, their observance need not be characterized as the result of such calculation. A state, before being a willing party to a rule, might have willed thus on the basis of some such calculation, but after contribution of its "will", which is essential for the creation of the rule, it may not retain any right to withdraw from the obligation of the rule thus created: the rule thus exists independently of the will of the parties. It is of no consequence that in coming into existence it had to depend on such will. Yet, simply because the several states are thus subjected to certain obligatory rules, it does not follow that the states have formed a "community" under a reign of law. Its order or security is not yet provided by law. Peace in such a community is only a negative concept—it is simply a negation of war, or an assurance of the status quo. Even now each state is left to perform for itself the distributive function. The basis of international relations is still the competitive struggle of states, a struggle for the solution of which there is still no judge, no executor, no standard of decision. There are still dominated and enslaved nations, and there is no provision anywhere in the system for any peaceful readjustment without struggle. It is left to the nations themselves to see to the readjustment.

Even a pact or a covenant which purports to bind the parties not to seek a solution of their disputes by other than pacific means contains no specific obligation to submit controversies to any binding settlement, judicial or otherwise. It is a recognized rule of international life that in the absence of an agreement to the contrary, no state is bound to submit its disputes with another state to a binding judicial decision or to a method of settlement resulting in a solution binding upon both parties. This is a fundamental gap in the inter-
national system. War alone was designed to fill this gap—war as a legitimate instrument of self-help against an international wrong, as also as an act of national sovereignty for the purpose of changing existing rights independently of the objective merits of the attempted change. Even when a pact is made to renounce war the gap is left almost unobserved and certainly unprovided for. The basis of a society so designed is not that peace which means public order or security as provided by law and of which an infringement becomes a crime. For a community thus designed, the conception of crime is still premature.

We have seen how jurists are struggling to base their hopes on the Moscow Declaration of 1943 whereby, according to them, the nations have now agreed that they respect the right of all nations to choose their own form of government. These hopes, however, are not yet realized in actual life; and if that is to be the basis of introducing real criminal responsibility in international relations, the time is yet to come.

In our quest for international law we must always remain alive to the fact that the association or society with which we are dealing may not be like the present-day national societies brought completely under the rule of law; perhaps we are dealing only with an inchoate society in a stage of its formation. It is a society where only that rule has come to occupy the position of law which has been unanimously agreed upon by the parties concerned. Any new precedent made carelessly will have a grave potentiality. Any misapplication of a doubtful legal doctrine here will threaten the very formation of the much coveted society of nations, will shake the very foundation of any future international society. History shows that it is a field where man pays dearly for mistakes.

Law is a dynamic human force only when it is the law of an organized society; when it is to be the sum of the conditions of social co-existence with regard to the activity of the community and of the individual. Law stems from man's reasonableness and from his innate sense of justice. But what is that law? And is international law of that character? We shall see later that it is not so.

A national society, from the very circumstances of its origin and development, is aware of the bearing of the interests of its own members upon the universal objects of general humanity, and is thus bound to regard other national societies not only as entitled to rights equal with its own, but as supplementing itself. A national state cannot therefore seek any absolute seclusion or strive after an absolute self-sufficiency. In this sense, from the very moment of the origin of national states, international society also came into existence. This also accounts for the circumstance that the period of national states is also marked by the development of the system of international law.
Yet it is difficult to say that this international society is "a society under the reign of law" as we now understand the expression to mean in relation to national societies. States cannot as yet be said to recognise the rule of law in their mutual relations: they do not as yet recognise a law-giving authority with coercive power. The 'rule' or the 'reign' of law essentially expresses the coercive power of the authority recognised as the supreme law-giver in a community. It denotes order and organized power. Even after the formation of the League of Nations or of the United Nations Organization we have only a co-ordinated group of states with their sovereignty intact. It is still only a system of international co-operation.

There has no doubt been, since the outbreak of the Second World War, a feeling on the part of many writers that there should be some restatement of the fundamental principles of international law in terms of international life.

At the same time it must be said that this is yet to happen. The international organisation, as it now stands, still does not indicate any sign of abrogation of the doctrine of national sovereignty in the near future.

The Atom bomb during the Second World War, it is said, has destroyed selfish nationalism and the last defence of isolationism more completely than it razed an enemy city. It is believed that it has ended one age and begun another—the new and unpredictable age of soul.

"Such blasts as levelled Hiroshima and Nagasaki on August 6 and 9, 1945, never occurred on earth before—nor in the sun or stars, which burn from sources that release their energy much more slowly than does Uranium." So said John J. O'Neill, the Science Editor of New York Herald Tribune. "In a fraction of a second the atomic bomb that dropped on Hiroshima altered our traditional economic, political, and military values. It caused a revolution in the technique of war that forces immediate reconsideration of our entire national defence problem."

Perhaps these blasts have brought home to mankind "that every human being has a stake in the conduct not only of national affairs but also of world affairs." Perhaps these explosives have awakened within us the sense of unity of mankind, the feeling that—

"We are a unity of humanity, linked to all our fellow human beings, irrespective of race, creed or colour, by bonds which have been fused unbreakably in the diabolical heat of those explosions."

All this might have been the result of these blasts. I am not, however, sure if the atom bombs have really succeeded in blowing away all the pre-war humbugs: we may be just dreaming. It is yet to be seen how far we have been alive to the fact that the world's present problems are not merely the more complex reproductions of those which have plagued us since 1914: that the new problems are not
merely old national problems with world implications, but are real world problems and problems of humanity.

Perhaps the situation is that the nations of the international group are living in an age of transition to a planned society.

But that is a matter for the future and perhaps is only a dream.

The dream of all students of world politics is to reduce the complex interplay of forces to a few elementary constants and variables by the use of which all the past is made plain and even the future stands revealed in lucid simplicity. Let us hope it is capable of realization in actual life.

National sovereignty is, even now, the very basis of the so-called international community. States are not only parties but also judges and executors in their own cases in relation to certain matters. The dangers of a too rigid application of the doctrine of national sovereignty and of the principles of "self-determination" are not even now fully appraised. It is still considered better to run the risk of sacrificing the directing influence of any central authority than to allow its operations to be extended to the sphere of the internal activity of states.

The division of mankind into national states dates from the time when the idea of a World Empire had disappeared and all the States confronted one another independently and without supreme authority.

The division was perhaps indispensable: its justification had been that the members of the different states could develop their qualities and talents without being hindered by the contradictory views and endeavours of others who might be dominated by an entirely different view of life. Such a national formation is of special value, because it is the only way in which a uniformly gifted national group can develop its own life, its own talents and abilities to the utmost. It is the vocation of a national society to develop thoroughly every capability inherent in any people and its justification is its affording an opportunity for the profitable employment of everyone's activity everywhere.

Yet the national state cannot be considered so definite and perfect a policy amongst the societies as to form the utmost boundary of their development. Every class of the population has its own onesidedness; it will remain stationary on a certain plane of education and knowledge unless it receives impulses from without and feels the influence of foreign images and ideas: so that a constant exchange between its own development and the assimilation of, and adaptation to, external ideas takes place. In this way nations have developed and are developing interstate communities.

The federation of mankind, based upon the external balance of national states, may be the ideal of the future and perhaps is already pictured in the minds of our generation. But until that ideal is realized, the fundamental basis of international community, if it can
be called a community at all, is and will continue to be the national sovereignty.

International organization has not as yet made any provision for full realization of this very essence of national sovereignty. Its realization is left to the power of the national state. There has not as yet been any organization for real international peace. Peace, hitherto, has been conceived of only as negation of war and nothing more.

It cannot be denied that the need of the world is the formation of an international community under the reign of law or, more correctly, the formation of a world community under the reign of law in which nationality or race should find no place. In an organization like this it would certainly be most conducive to the benefit of the community as a whole and to the necessity of stable and effective legal relations between its members to introduce criminal responsibility in order to chastize effectively subversive activities. But until then it serves no useful purpose. When the fear of punishment attendant upon a particular conduct does not depend upon law but only upon the fact of defeat in war, law really adds nothing to the risk of defeat already there in any war. If law is not to function at all unless the violating party succeeds in violating the law effectively and then is overwhelmed by power or might, it is difficult to see any necessity for law to exist.

The function of law is to regulate the conduct of parties by reference to rules whose formal source of validity lies in the last resort, in a precept imposed from outside.

Within the community of nations, this essential feature of the rule of law is constantly put in jeopardy by the conception of the sovereignty of states which deduces the binding force of international law from the will of each individual member of the international community.

The inquiry involved in the consideration of the question raised before us is at the very start confronted with the doctrine of sovereignty. The same doctrine confronts us in our inquiry as to the question of limitation of the function of law in the settlement of international disputes.

The theory of the sovereignty of states may reveal itself in international law mainly in two ways:

First, as the right of the state to determine what shall be for the future the content of international law by which it will be bound;

Secondly, as the right to determine what is the content of existing international law in a given case.

As a result of the first:

1. A state is not bound by any rule unless it has accepted it expressly or tacitly;

2. In the field of international legislation, unanimity and not mere majority is essential.
The second aspect connotes that the state is to be the sole judge of the applicability of any individual rule to its case.

So long as the states retain this right in respect of any rule, the rule, in my opinion, does not become law in the ordinary sense of the term. Even if we choose to give it the name "law", it will only be so in a specific sense, and its violation leads us nowhere. Its violation does not become a crime for the simple reason that none but the alleged defaulter can say whether it has been violated.

We should repeat that in order to introduce the conception of crime in international life, it is essential that there should be an international community brought under the reign of law.

The expressions "International Law" and "International Community" are both used in relation to the existing international life only in some specific sense.

No doubt there is such a community in a sense, but to say that it is a community under the reign of law in the sense in which the civilized world understands the expression in relation to national societies is only to extend the meaning of both "law" and "community" so as to enable them to cover some strange fields.

Apart from the domain regulated by expressly accepted international obligations, there is no international community. As these obligations exist only in the limited sphere of the expressly recognized partial community of interests, the individual interests of each state must always remain the guiding consideration.

Modern international law was developed as a means for regulating external contacts rather than as an expression of the life of a true society.

Maine, writing before the necessity for an international constitutional system became evident, uses harsh language. He calls it an eighteenth century superstition, "a superstition of the lawyers' seized upon and promulgated by philosophers, in their eagerness to escape from what they deemed a superstition of the priests."

It is the misfortune of the international lawyers, not their fault, that the confusions and perplexities of our time should have excited false hopes and led to a revival of superstition and even to the promulgation of what may not unfairly be described as "substitute religions in legal wrappings."
LECTURE II

CHARACTER OF INTERNATIONAL LAW

The two questions, the character of international law and that of international society, are so inter-related that it is difficult to speak of the one without at the same time bringing in the other. In examining these two questions, therefore, repetition would be unavoidable. Yet we shall approach them separately and shall take them up for separate consideration even at the risk of repetition. As we have seen above these two matters would have a very important bearing on the question before us.

The question which we shall now take up for our consideration is the character of international law,—whether the so-called international law can be described in terms of "Rules of Law," and, assuming that it can be so described, whether the reign of law imposed by it would be comprehensive enough to admit of introduction of criminal responsibility in international life.

According to Oppenhein, a rule is a rule of morality, if by common consent of the community it applies to conscience and to conscience only; whereas, on the other hand, a rule is a rule of law, if by the common consent of the community it will eventually be enforced by external power. Though not generally recognized, this distinction may be taken to represent roughly the meaning of a rule of law.

According to some jurists the difference between national and international law is only a relative one. The difference consists in the degree of centralization or decentralization. National law is relatively centralized legal order. International law, compared with national law, is a more decentralized legal order; it presents the highest degree of decentralization occurring in positive law. It is, however, pointed out that a higher degree of centralization can be achieved by international law. Courts, administrative organs, and even legislative organs can be established by international treaties. As a result of such centralization it is possible to approach the structure of a universal legal community.

The question, however, is not what is possible by further efforts but whether in reality there is any legal community in this field, either universal or partial. The question is whether it is admissible to interpret the actually existing international order as an international legal community.

The first question to be answered is whether the norms of international law are really law in the same sense as national law,—
whether the so-called international law can be described in terms of "rule of law."

A rule of law, according to Professor Kelsen,³ is "a hypothetical judgment making a coercive act,—forcible interference in the sphere of interests of a subject,—the consequence of a certain act of the same or another subject." "The coercive act which the rule of law provides as the consequence is the sanction; the conduct of the subject set forth as the condition is characterized as 'illegal', it is delict." "The coercive act is either a delict, a condition of the sanction and hence forbidden, or a sanction, the consequence of a delict, and hence permitted." According to Professor Kelsen, this alternative is an essential characteristic of the coercive order called law.

It cannot be denied that in international relations a particular conduct of a State may be considered illegal, contrary to international law, and, therefore, a violation of international law. The international law as it now exists provides a system of norms, *within a limited sphere*, prescribing a certain conduct for States *within that sphere*. If a State without a specific reason recognized by international law behaves otherwise within that sphere, its conduct is considered contrary to international law. In this sense there is a delict in international law within that sphere.

But the question is whether even within such a limited sphere this can be said to be a delict in the specifically juristic sense, that is, whether there is also a sanction prescribed by international law, a sanction directed against the State responsible for the delict.

Even taking 'sanction' in its widest possible meaning, taking it to mean the obligation to repair the wrong,—the illegally caused damage,—it is at least doubtful whether such a substitute obligation is provided by general international law as an automatic consequence of the delict or only the result of a treaty concluded between the State affected by the delict and the State responsible for it. Professor Kelsen recognizes that even if this substitute obligation were provided by general international law as an automatic consequence of the delict it would not have been a sanction. "Only the consequence of not fulfilling this substitute obligation would constitute a true sanction."

"The specific sanction of a legal order can only be a coercive act, a coercive act provided by the legal order for the case where an obligation is violated, and, if a substitute obligation is also established, for the case where this substitute obligation is also violated."

There are indeed no coercive acts provided by general international law as the consequence of international delicts. Reprisals and war are the two coercive acts, perhaps permitted by the present state of international relations. But it is difficult to characterize them as provided by the legal system as the consequence of such delicts. It is only permitting self-help, and this again without providing any other help at all.
Professor Kelsen, however, takes the view that these reprisals and wars might constitute the required sanctions and that any war which does not have the character of a sanction is forbidden by international law.

In order to support the view that these reprisals and wars can be said to be "sanctions" provided by general international law, Professor Kelsen likens international law to primitive law, and the legal order imposed by it, to the primitive legal order. The learned Professor says "In its technical aspects, general international law is a primitive law, as is evidenced among other ways by its complete lack of a particular organ charged with the application of the legal norms to a concrete instance. In primitive law, the individual whose legally protected interests have been violated is himself authorized by the legal order to proceed against the wrong-doer with all the coercive means provided by the legal order. This is called self-help. Every individual takes the law into his own hands Blood revenge is the most characteristic form of this primitive legal technique. Neither the establishment of the delict nor the execution of the sanction is conferred upon an authority distinct from the parties involved or interested. In both these aspects the legal order is entirely decentralized. There is neither a court nor a centralized executive power. The relatives of the murdered person, the bereaved, must themselves decide whether an avenging action should be undertaken, and if so, against whom they should proceed. Nevertheless, in a primitive community the man avenging the murder of his father upon one whom he considers to be the murderer is himself regarded not as a murderer but as an organ of the community. For by this very act he executes a legal duty, a norm of the social order constituting the community. It is this norm which empowers him, and him only, under certain circumstances, and under these circumstances only, to kill the suspected murderer . . . . . . A social order which has not progressed beyond the principle of self-help may produce a state of affairs leaving much to be desired. Nevertheless it is possible to consider this state a legal state, and this decentralized order a legal order. For this order can be interpreted as an order according to which the coercive act is a monopoly of the community, and it is permissible to interpret the primitive social order in this way because the individuals subjected to this order themselves interpret it in this way."

Professor Kelsen infers from the above that general international law, characterized by the legal technique of self-help, can be interpreted in the same manner as a primitive legal order characterized by the institution of blood revenge. In this way the learned Professor thinks that the so-called international law can be regarded as law in the same sense as national law.

With due respect, we must not forget that the so-called international society of the present day is not composed of primitive
elements, and, I believe, it may reasonably be expected that none of the members submitting to this so-called international order would itself interpret it with reference to this primitive view of legal order. Nothing is more firmly established than the principle of the maxim "judex non potest injuriam sibi datum punire": 'a judge cannot punish an injury done to himself.' A judge belonging to a victorious nation having both 'salem sapientiae' (salt of wisdom) and 'salem conscientiae' (salt of conscience) in requisite quantity for his national courts has failed to inspire confidence in the minds of the vanquished in their trials set up by the judge's own nation as a victor.

Such an international order may satisfy the requirements of juristic classification; but none in this twentieth century would call it a legal order under the reign of law. Even if one feels gratified in introducing 'blood-revenge' as sustainer of that order, none in this twentieth century would take such blood-revenge to be the criminal law. While taking to these revenging steps none would venture to think that thereby 'only one thing is being made to stand out clear for all men to see, namely that the moral conscience of the world is thereby reasserting the moral dignity of the human race'.

Even if, in this world submerged in an inflation of words and meaningless symbols, we agree, for the sake of economy in expression, to accept a national society indulging in blood-revenge to be a society under the reign of law even in respect of the peace of the society, we shall not be justified in naming such 'blood-revenge' in international relations as law. In a national society there will always be persons other than the alleged murder and the relations of the murdered seeking blood-revenge. There will at least be the possibility of a sort of disinterested opinion as to who is the possible murderer. In international relations of the present day, however, even this possibility of disinterested opinion is excluded for all practical purposes after the development of power-blocks, regional groups and the like. For all practical purposes the entire international world is divided into two antagonistic groups. Any proposed introduction of blood-revenge or the like may only give a dangerous weapon in the hands of the ultimately successful group.

Let us take as an example of proposed criminal act the aggressive war and any preparation for such war. Nations while making preparations for war would never think or admit that they are making such preparation for aggressive purposes. We know how statesmen in very high positions during the Second World War were claiming openly a very wide and extensive right of self-defence. President Roosevelt speaking on the 27th May, 1941, gave his view of self-defence in the following terms: "I have said on many occasions that the United States is mustering its men and its resources only for the purpose of defence—only to repel attack. I repeat that statement now. But we must be realistic when we use the word 'attack'; we have to relate it to the lightning speed of modern warfare... First, we shall actively
resist wherever necessary and with all our resources, every attempt by Hitler to extend his Nazi domination to the Western Hemisphere, or to threaten it. We shall actively resist his every attempt to gain control of the seas. We insist upon the vital importance of keeping Hitlerism away from any point in the world which could be used and would be used as a base of attack against the Americas. . . . . We in the Americas will decide for ourselves whether and when and where our American interests are attacked or our security threatened. We are placing our armed forces in strategic military position. We will not hesitate to use our armed forces to repel attack." Every nation, for itself and for the nation which it likes, would take self-defence in such an extensive sense, while at the same time it would never appreciate its opponent's similarly wide definition. In order to make aggressive war a crime in international life, it would be necessary for us to hold that, whether or not a measure taken by a State was in self-defence, the decision of the State concerned would not be final. But the difficulty in making this matter thus justiciable at the present stage of the international society lies in the fact that the ultimate decision would in that case necessarily lie with the successful contestant who, of course, had all along viewed his opponent's acts as aggressive and not in self-defence. The application of the rule which we are now seeking to introduce will thus necessarily be in the hands of the opponent who would happen to be the victor in case of an ultimate clash, and who could never appreciate its defensive character. We can well imagine what will be the consequence. In my opinion, while serving no useful purpose, it would be introducing a disintegrating principle in the international system, bringing in disruptive forces of hatred and distrust and farther retarding the peaceful relations in that life.

Westlake in his "Chapters on the Principles of International Law" says:

"International rules ought to be made with due care that they shall not restrict liberty more than is necessary, that they shall be suited to the cases which most commonly arise, and that reciprocity in their application shall be possible. It is no reason for not applying a rule that a different one would have been better suited to the particular case.

"In matters transcending the state tie, and so far as a rule founded on the consent of a society is wanting, the men who guide the action of states have only to obey their consciences. The want of a rule to define the action allowable does not exclude all action. The largest field for application of this principle is in dealing with states or populations not having the civilization necessary for forming part of the international society, but the principle is sometimes applicable between states included in that society.

"The obligation of international rules on the conscience, even when they have once been founded on a general consensus, is subject
to exception, as is the obligation of state law on the conscience. And in the former department the conscience will have a somewhat greater latitude than within a state, because there is no international legislature, and diplomatic agreements for the change of a rule can with difficulty be made to compromise so large a number of states as to prove that the general opinion has been changed: wherefore an international rule can rarely be changed otherwise than by its ceasing to be followed and general approval being given to such change of practice, of which some state must set the example. Hence it is not a conclusive, though a strong, argument against a state that it has itself applied the rule of which it resists the application. It would be contrary to the moral nature of man that he should be fettered, absolutely and permanently, by any external rule.

"When a state is confronted by a rule which it deems to be bad, either originally or because it has become bad through a change of circumstances, it ought to take into account the greater or less evil which always results from violating known rules, and, if it decides to violate the rule in question, it ought as far as possible so to act that a better rule may be framed on the precedent. Neither in violating a rule nor in acting where a rule is wanting, is a state at liberty to consider only particular case, without reference to the conduct which would be best suited to the cases which most commonly arise."

These are mostly matters as to what a State ought to do, and are really appeals to the conscience of the state concerned. We shall see later how some of these recommendations operate in the actual life of the international society. For the present we may just take up, by way of illustration, the operation of the maxim *clausula rebus sic stantibus* as invoked by the different powers in international relations. The circumstances under which a party to a multiparticle treaty may reasonably claim the right to be no longer bound by its provisions are doubtless complicated and sufficiently various to give a salutary warning against the danger of attempting to lay down dogmatic rules in this respect. A multiparticle treaty involving several undertakings breeds obligations of each contracting party. "The conduct of any one, if fairly to be deemed a substantial breach of the agreement, may serve in a particular case to excuse another from heeding a specified undertaking closely entwined with the conduct of a party that was seemingly contemptuous of the arrangement. Again the design of the contracting parties may have been that certain of their undertakings should cease to be operative if conduct incompatible therewith were indulged in by any one of them." In these circumstances the principle seems to be just and reasonable that one party to a treaty does not have the right to terminate its treaty obligation unilaterally merely by invoking the operation of the doctrine, *rebus sic stantibus*. It may indeed be reasonable to expect that a party who seeks release from a treaty on the ground of a change of
circumstances should have no right to terminate the treaty unilaterally and that recognition that the doctrine is applicable should be sought either from the parties to the treaty or from some competent international authority. The practice of treaty-making through multipartite arrangement of large import would really serve no good purpose, if a single contracting power may, on the strength of his own unilateral judgment, treat lightly the carefully devised undertakings once jointly decided to be for the common weal. The well-being of the international society would not be promoted by the securing of such a right to a single contracting power. Of course, it does not imply that treaties must at all hazard be preserved, still less that excuses for its non-observance necessarily lack weight or should be ignored. It is, however, entirely consistent with the maintenance of amicable relation between such States that any one or more of the parties to a multipartite arrangement should seek and obtain an impartial determination of the alleged changes.

The doctrine, however, has not always been so understood. On August 9, 1911, President Roosevelt proclaimed that the "International Load Lanes convention" of 1930 was no longer binding on the United States "for the duration of the (then) present emergency." He based this unilateral suspension of the treaty on "changed conditions" which, he said, had conferred on the United States "an unquestioned right and privilege under approved principle of international law" to declare cessation of the treaty operation. The President's proclamation was made on the advice of the then Acting Attorney General, Francis Biddle, who had informed the President that "it is a well established principle of international law, rebus sic stantibus, that a treaty ceases to be binding when the basic conditions upon which it was founded have essentially changed. Suspension of the convention in such circumstances is the unquestioned right of a state adversely affected by such essential change." This is how "any obligation of international rules on the conscience" operates in the present international life.

Elsewhere Professor Westlake 6 says: "When international law is claimed as a branch of law proper, it is asserted that there is a society of states sufficiently like the state society of men, and a law of the society of the states sufficiently like state law, to justify the claim, not on the ground of metaphor, but on the solid ground of likeness to the type." In order to see whether or not there is a society of States of the above type Professor Westlake refers to the following facts:

(1) The general opinion of States approves certain rules, not as expressing conduct to be recommended without being enforced, like telling the truth or being charitable, but to be enforced by such means as exist.

(2) The conduct directed by those rules is in fact generally observed by States, and that, not as freely choosing it in each instance,
but as obeying the rules; not necessarily from fear of enforcement, 
but at least from the persuasion that the rules are law.

(3) Such observance so greatly promotes the tranquillity of the 
world that a duty of observance, correlative to the benefit enjoyed, 
is laid in conscience on States, at least in ordinary cases. There 
are rare cases in which it is right to disobey even the law of the 
land with a view to bringing about its amendment, but where the 
contact between a number of individuals is close, as it is between 
States, settled rules, even though not the best, are at least provisionally 
better than none.

From these facts Dr. Westlake concludes that "states live 
together in the civilized world substantially as men live together in 
a state, the difference being one of machinery, and we are entitled to 
say that there is a society of states and a law of that society, without 
going beyond reasonable limits in assimilating variant cases to the 
typical case.

The ultimate appeal is still to the conscience of the States and 
really it is to the conscience only. The terms ‘law’ and ‘society 
under the reign of law’ when used in relation to international 
association may be used rightly and properly; but still they are used 
only in a specific sense. International law is ‘law’ in the sense that 
a great number of its rules are generally observed.

According to Dr. Winfield a rule is part of international law if:

1. It is based upon customs, that is, observed by states 
generally;
2. It is embodied in a law-making treaty;
3. It is in accordance with the rules of justice and general 
principles of law.

The Permanent Court of International Justice is directed to 
decide cases according to international conventions, international 
customs, and the general principles of law. Examples of such general 
principles are that reparation shall be made for breach of engagement 
or that a litigant cannot take advantage of his own wrong.

What is of vital consequence in introducing these general 
principles as a source of international law is that they give nations 
an ideal towards which they should work, and any conceivable ideal 
of good is better than none at all.

The elements of ideals are indeed universal in human nature. 
They rest upon the inherent wants of man, manifested in his desires. 
The consciousness of being able to satisfy such desires, coupled with 
the hope of success derived from previous favourable experience, 
supplies a requisite in the construction of ideals. When these 
elements are transfigured by means of abstraction and imagination, 
we obtain ideals. Objectively speaking, the ideal is always relative, 
and its general practical value lies less in itself than in the incentive 
it affords to the heightening of human efforts. Through the agency
of the ideal the aim becomes a motive, and in the midst of exertion to which it urges us on, our abilities become invigorated by exercise, our experience expanded and our knowledge increased. No matter how gradual, a change is thus sure to be produced in the constitution of man and this change again will have reaction upon the ideal.

Article 38 of the Statute of the Permanent Court of International Justice gave the sources of international law in the following hierarchical order:

"1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

"2. International custom, as evidence of a general practice accepted as law;

"3. The general principles of law recognized by civilized nations.

"4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

"This provision shall not prejudice the power of the court to decide a case ex aequo et bono if the parties agree thereto."

Professor Huber says: "International law, the structure of which is not based on any superstate organization, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations."

The Permanent Court of International Justice in the famous Lotus case observed: "International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or in usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to achievement of common ends. Restrictions upon the independence of states cannot therefore be presumed." The principle of independence of States is accepted by the Permanent Court as a fundamental principle of international law.

According to Hall "International law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the law of his country and which they also regard as being enforceable by appropriate means in case of infringement."

Hall notices two principal views as to the nature and origin of these rules:
1. There exists an absolute right capable of being discovered: these rules are only an imperfect attempt to give effect to that absolute right.

2. The rules are simply a reflection of the moral development and the external life of the particular nation which are governed by them.

According to the first view a distinction is to be drawn between international right and international positive law. International right is the logical application of the principles of right to international relations and is capable of furnishing the rule by which states ought to be guided. International law, of course, would consist in the concrete rules actually in use. These will possess authority so far only as they are in disagreement with international right.

According to the second view, the existing rules are the sole standard of conduct or law of present authority. Changes and improvements in these rules can be effected only through the same means by which they were originally formed.

Hall points out that as between these two views the majority of the writers appear to hold to the former. Of them however a considerable number, while thinking that positive international law derives its force from absolute right, refer to positive law itself as the only evidence of what is right. Thus "international usage and the facts of modern state life return by a by-road to the position which they occupy in the second view."

Hall himself accepts the second view as correct. He feels that (1) it is doubtful if an absolute right applicable to human relations exists; (2) assuming that such absolute right exists, it is doubtful if its dictates can be sufficiently ascertained.

But putting aside all questions of doubt as above stated, Hall urges two objections against the view both of which seem to be fatal.

The first is that it is not agreed in what the absolute standard consists. With some it is the law of God, with others it is the law of nature inductively reached, by others it is erected metaphysically.

"Law in modern civilized States presents itself as being imposed and enforced by a superior invested with authority for that purpose; to individuals, therefore, it is inmaterial whether they agree with their neighbours as to the speculative basis of law; they have not to reason out for themselves the rules by which they intended to be governed; the law is declared to them by a competent authority and conscientious persons are moved to obedience so soon as the order in which law is conveyed is communicated to them. States, on the other hand, are independent beings, subject to no control, and owning no superior; no person or body of persons exists to whom authority has been delegated to declare law for the common good: a state is only bound by rules to which it feels itself obliged in conscience after reasonable examination to submit. If therefore states are to be
subject to anything which can either strictly or analogically be called law, they must accept a body of rules by general consent as an arbitrary code irrespectively of its origin, or else they must be agreed as to the general principles by which they are to be governed.”

The second objection is, that even if a theory of absolute right were universally accepted, the measure of the obligation of a State would not be found in its dictates, but in the rules which are received as positive law by the body of States. The legal obligations will not be defined by mere moral ideas. An absolute standard of right might be useful as presenting an ideal towards which law might be made to approach. It can never, however, be regarded as a test of the legal value of existing practices.

Coming to the question whether international law constitutes a branch of true law, Hall points out that the proper scope of the term "law" transcends the limits of the mere perfect examples of law. In this view, in spite of its imperfections it is a branch of true law specially in view of the two broad facts that it is habitually treated as law, and that a certain part of what is at present acknowledged to be law is indistinguishable in character from it. "That they lie on the extreme frontier of law is not to be denied; but on the whole it would seem to be more correct, as it is certainly more convenient, to treat them as being a branch of law than to include them within the sphere of morals."

I shall quote extensively from Professor Zumern's "League of Nations and the Rule of Law" in which he very ably and truly characterizes international society.

"For anyone", says Professor Zumern, "trained in the British tradition, the term International Law embodies a conception which is, at its best, confusing and at its worst exasperating. It is never law as we understand it, and it often, as it seems to us, comes dangerously near to being an imposter, a simulacrum of law, an attorney's mantle artfully displayed on the shoulders of arbitrary power."

"A satisfactory political system, in British eyes, is the offspring of a harmonious marriage between law and force. . . . It is the essence of what we call British Constitutionalism. By it is ensured working of two processes, separable in theory for the analysis of the political scientist, but inextricably blended in practice, the observance of the law, or, to use the language of post-war controversy, 'sanctions' and 'peaceful change'. Thus the judge, the legislator and the executive throughout its range, from the Prime Minister to the policeman, form interdependent parts of a single system.

"This constitutional system does not function because it is wound up from outside or impelled from above. Its driving force is supplied from within. It derives its validity from consent; and its energy is constantly renewed and refreshed by contact with public
opinion. It is the popular will which the legislature is seeking to embody in appropriate statutes. It is the popular will which the judge is engaged in interpreting and the policeman in enforcing. All these are performing what is felt to be social function. They are adapting the organization of the state, which is the most continuous and potent agency of social service in the community, to the permanent and changing needs of society.

"Seen as a part of this larger whole, law may be defined as social habit formulated into regulations. When these regulations, or any part of them, are felt to be anti-social, no longer in accordance with the general sentiment of the day, or even repugnant to it, they are changed. Thus the notion of law and the notion of change, so far from being incompatible, are, in fact, complementary. The law is not a solid construction of dead material, a fixed and permanent monument, it is an integral part of a living and developing society created and transmitted by men..............

"Turn now to international law, what do we find? A situation almost exactly the opposite of what has just been described.

"To begin with, where are we to look for the rules and obligations of international law? We shall not find them embodied in the habits of the will, still less in the affections, of a society.

"International law, in fact, is a law without a constitution. And since it is not grounded in a constitution it lacks the possibility of natural growth. Unconnected with a society, it cannot adjust itself to its needs. It cannot gather itself together by imperceptible stages into a system..............

"The reason for this is very simple. The rules of international law, as they existed previous to 1914, were, with a few exceptions, not the outcome of the experience of the working of a world society. They were simply the result of the contacts between a number of self-regarding political units—stars whose courses, as they moved majestically through a neutral firmament, crossed one another from time to time. The multiplication of these external impacts or collisions rendered it mutually convenient to bring their occasions under review and to frame rules for dealing with them."

Indeed this is where the international law stands even now and will stand unless and until the political units agree to yield their sovereignty and form themselves into a society.

Perhaps it is high time that the world powers realized the need for a wider social consciousness and succeeded in devising practical solutions for the problems involved in the material interdependence of the modern world. I also believe with Professor Lauterpacht[11] that it is high time that international law should recognize the individual as its ultimate subject, and maintenance of his rights as its ultimate end. "The individual human being—his welfare and the freedom of his personality in its manifold manifestations—is the ultimate
subject of all law. A law of nations effectively realising that purpose
would acquire a substance and a dignity which would go far toward
assuring its ascendancy as an instrument of peace and progress."
This certainly is to be done by a method very different from that of
introduction of primitive blood-revenge.

An international organization of the kind recommended by
Dr. Lauterpacht would not permit a dominating foreign power to
claim its dealings with the dominated nation as its "domestic affairs"
outside the jurisdiction of the organization.

International society indeed has not yet reached a stage beyond
what is depicted by Professor Zimmern. Even after the formation
of the League of Nations we had only a group of co-ordinated states
with sovereignty intact.

People learned from the war only to substitute the notion of
organic association between independent, self-governing and co-
operatively minded peoples. The League of Nations "while morally
a great effort of faith was administratively a great effort of
decentralization."

It was simply a system of international co-operation.

"The high contracting parties in order to promote international
cooperation and to achieve international peace and security by the
acceptance of obligations not to resort to war, by the prescription of
open, just and honourable relations between nations, by the firm
establishment of the understandings of international law as the actual
rule of conduct among governments and by the maintenance of
justice and a scrupulous respect for all treaty obligations in the
dealings of organized peoples with one another, agreed to this
Government of the League of Nations. 2 No international community
of any higher order came into being.

The League showed particularly scrupulous regard for national
sovereignty and laid special emphasis on such sovereignty by adopting
the principle of unanimous vote. National sovereignty and national
interest continued to play the fundamental part in this organization.

Even the post-war United Nations Organization has not
advanced the position further. Perhaps this Organization was the
outcome of a response to the need for a new international unity. But
like its predecessor, the League of Nations, this new body has
resulted in becoming not an instrument for levelling national
antagonisms but a stage on which such antagonisms could find
political expression. The world as before lies shattered in fragments
and seems farther than ever from finding its way to any new wholeness.
All the moods and conflicting interests of nationalism are aggravated
rather than lessened. If the nations are talking of peace, their peace
is peace on their own terms, and these are only the terms of power. 13
As we shall see later, the principal post-war activity of the powers has
been the carving out of spheres of influence or decisive control, and
this they are doing in the name of security. The Powers are still in search of a *modus vivendi* capable of lasting only a few years; they are in search of a new and precarious balance of power permanent only in instability; and secure only in the certainty of future collision.

It will indeed be somewhat out of place to review the views of the various international jurists as to the applicability of the term "law" to what is known as international law. I believe I have sufficiently indicated the different shades of view held in this respect. Very recently Professor Fenwick has presented an elaborate review of the entire situation up to the present moment with unequalled lucidity. We may profitably turn to what the learned Professor says on the point.

Professor Fenwick, in giving the nature and scope of international law, made the following pertinent observations:

"Beginning with the great treaties of Osnabruck and Munster of 1648 new rules of international law came into being as the result of what have been called 'law-making treaties.' To speak of these treaties as 'international legislation' is perhaps giving to the agreements of a small group of powers too universal a character. But while the various conferences and congresses during the two hundred years succeeding the Peace of Westphalia were not in any sense open meetings of the whole community of nations, they prescribed rules which, by reason of the influence of the parties, became in time the law for Europe and for the world. During the last quarter of the nineteenth century the great conventions which established the Red Cross organization, the Telegraph Union, the Universal Postal Union, and other institutions could be said to be the initial steps in a process of 'international legislation,' which took definite shape at the Hague Conferences of 1899 and 1907. But while these conventions bore an analogy to the statutes of municipal law, *they were only binding upon the signatory powers*, so that the process of law-making by general convention differed in that respect from laws enacted by national legislatures by majority vote and binding upon the majority and minority alike."

The learned Professor then gives an account as to how the establishment of the League of Nations gave an impetus to the development of international legislation by means of law-making conventions and how in the result the multipartite law-making conventions doubled and tripled in extent. This legislative machinery of the international society was however found to be far from adequate during the period between the First World War and the Second. One great drawback of this machinery was its dependence upon the uncertainty of ratification by the separate states. It was however not any defect in the machinery itself which prevented the adoption of an adequate body of law. "*The obstruction*" says Prof. Fenwick,
"came from the fact that the leading powers themselves were unwilling to submit their rivalries to a rule of law. Each state insisted upon being free to determine its own line of conduct. Side by side with the actual economic interdependence of states created by the complex web of international commerce and finance there existed a condition of economic competition in which the struggle for control over the raw materials of industry, for the trade of foreign markets, for concession in undeveloped countries, and for other special advantages defied regulation. Within these fields international relations were practically lawless; and it was to be expected that states which found themselves at a disadvantage in the struggle should resort to whatever ways and means were available to defeat their competitors. International law contained not even the most elementary rule against unfair trade practices. Such efforts as were made from time to time to bring order out of economic anarchy were doomed to failure by reason of the inability of the parties to find their national interest in the common welfare of the whole community."

No doubt a vast number of lesser international interests were brought within the law and the rules relating to them were on the whole faithfully observed. But upon closer examination it was not difficult to see that the interests regulated by these rules were not the determining factors of national policy, they were not the "vital national interests" which states withheld from agreements to arbitrate, they were not the "matter of policy," the decision of which states reserved for themselves individually. The facade of the international system was imposing, but the foundations were weak."

"Down to the eve of the first World War," Prof. Fenwick says, "little progress had been made in establishing the responsibility of the international community as a whole for the settlement of disputes by peaceful procedures." Numerous treaties had been entered into for the peaceful settlement of international disputes, but one and all contained exceptions which made it possible for the parties to evade the obligation of peaceful settlement if they wished to do so. Failing settlement of the dispute by such optional methods, each party might insist upon the correctness of its own interpretation of the law, and when further negotiations resulted in a deadlock the last resort might be a declaration of war on the part of the claimant state or the sullen acquiescence of the weaker part in the position taken by the stronger. When the final test came, each nation was the judge in its own case."

A covenant of the League of Nations no doubt sought to introduce the principle that in a community life peaceful settlement of disputes is the responsibility of the community and that a community must make its collective judgement prevail as against the arbitrary judgement of the individual member. The provisions in the covenant, however, failed to produce the desired effect in view of the requirement
that the vote of the Council must be unanimous if it was to have the
effect of restraining a state from having recourse to war.

One imposing multipartite convention of the period is the Pact
of Paris of 1928. The renunciation of war as an instrument of
national policy was solemnly declared by the Kellogg-Briand Pact of
1928.

This pact was signed on the 27th August, 1928. In its Article
2 no doubt there was this provision that "'the high contracting parties
agree that the settlement or solution of all disputes or conflicts of
whatever nature or of whatever origin they may be, which may arise
among them, shall never be sought except by pacific means." But
unfortunately the acceptance of the pact by the several powers was
subject to such reservations as ultimately to render it almost nugatory
in so far as it might have been designed to prevent breach of world
peace by war. One very important reservation was the right of self-
defence. On this question of self-defence Kellogg declared that the
right of self-defence was not limited to the defence of territory under
the sovereignty of the State concerned, and that under the treaty, each
State would have the prerogative of judging for itself what action the
right of self-defence covered and when it came into play, subject to
the risk that this judgment might not be endorsed by the rest of the
world. "'The United States,'" it was declared, "'must judge......
and it is answerable to the public opinion of the world if it is not an
honest defence; that is all." Indeed Dr. Launepacht rightly pointed
out: "'It is not the right of self-defence which threatens to introduce
the principal element of disintegration into the general treaty for the
renunciation of war. The possible element of this integration lies in
the assertion that recourse to self-defence is not amenable to judicial
determination."' The reservation as understood by the world powers
was not only the right of self-defence but also the right of each State
to determine for itself whether or not its action is in self-defence.
This right of self-defence was declared by the great powers in such wide
terms that after that reservation very little remained of the pact.
Professor Fenwick is right in saying that the only effect of the pact in
the final result would be that its breach would affect the public opinion
of the world. Mr. Stimson, the Secretary of State of United
States of America in 1929, declared that "'Its efficacy depends solely
upon the public opinion of the world and upon the conscience of those
nations who signed it.'" Briand also made similar declarations while
welcoming the first signatories of the pact.

Considerations relevant for the determination of the legal
character of rules of conduct obtaining in society are:

1. That only through final ascertainment by agencies other
than the parties to the dispute can the law be rendered
certain; it is not rendered so by the ipse dixit of an interested
party. Such certainty is of the essence of law.
2. That it is essential for the rule of law that there should exist agencies bearing evidence of or giving effect to the imperative nature of law. No matter how created, a rule in order to be a law must continue to exist in respect of the subjects of the law independently of their will.

The pact as explained by the signatory powers and as understood and accepted by the parties thereto would not stand these tests. The obligation of the pact remained dependent on the will of the states inasmuch as it was left to these states themselves to determine whether their action was or was not in violation of the obligation purported to be undertaken by the pact.

Keeping in view the normal functions of law in a national society under the reign of law, the objects of the system of international law, if it has succeeded in establishing a society under the reign of law for the international world, would be at least the following three, namely,

1. To keep the peace among states;
2. To regulate peaceful international relations;
3. To regulate war once it has broken out.

In order to introduce criminal responsibility it is necessary that a society must reach the stage of development in which it can claim to have achieved the first of the above three objects. But it is exactly in this respect that the so-called international society was found wanting.

"The dominant conception of national law, that the protection of the rights of the individual member, is to be obtained by the co-operative action of the community establishing common agencies of justice, simply did not enter into the Code of International Law." Further the renunciation of war as an instrument of national policy could be no more than a pious aspiration when the Code of International Law failed to include the very interest in the name of which States had long been in the habit of resorting to war.

Indeed even after all these developments war remained the \textit{ultima ratio}, the last argument in an international controversy, and it remained dependent on the decision of the claimant and remained to be waged by its own armed force.

Such a system which left the defence of a nation's rights to its unaided strength can hardly be given the name of "rule of law."

According to Professor Fenwick "the development of international law into a stronger legal system competent to maintain peace and to promote justice in the relation of states lies on the one hand in the acceptance of certain fundamental principles not hitherto adequately recognized, and on the other hand in a more effective organization of the international community."

The Charter of the United Nations was directed to that end, and it was to be expected that whatever practical advances might be made in the development of international law in the immediate future would
be made within the circle of the United Nations. For this purpose Prof. Fenwick attaches great importance to:—

1. The principle of the collective responsibility of the United Nations for the protection of each of its members against acts of aggression;

   (a) Exclusion of the possibility of neutrality in the sense of an attitude of legal indifference to the rights or wrongs of a particular controversy;

2. Making absolute the obligation to settle disputes by pacific means allowing for no exception or qualifications;

3. The provision whereby the members of the United Nations pledge themselves (Article 2) to co-operate in the solution of problems of an economic, social, and humanitarian character and to promote respect for an observance of human rights and fundamental freedom for all.

The recent post-war happenings in Asia, particularly in Korea, however, have disappointed everybody.

The developments there on closer scrutiny seem only to remind one of what Senor de Madariaga once said "'Readers of Don Quixote may remember the meeting between the Knight and the Squire and a Brigand in the vicinity of Barcelona. The Knight and his Squire observed that the virtues of justice were indispensable even in an association of brigands; for the head of the brigands was bound to administer justice and equity in distributing the spoils of brigandage. If the virtues of justice and association are found indispensable even amongst brigands, we can hope that they will gradually raise the standards of nations which have so far behaved like collective brigands.'"

If the standards of nations are at all rising they are rising only to introduce some sort of justice and equity in distributing the spoils of brigandage or in helping the brigandage itself.

The Charter of the United Nations no doubt introduces comprehensive provision for the Pacific settlement of disputes and effective measures for the enforcement of the law against the possible aggressor. The Security Council is given wide power in these respects. At the same time both these functions of the Security Council are subject to the veto-power of any one of the five permanent members. The exercise of this power brings the whole machinery to a stop, leaving only perhaps the traditional right of self-defence leading to war. What is more important for our present purpose is the provision in respect to the adaptation of new rules of law. The powers of the general assembly in this respect are limited to recommendations only. It can be made law only by multipartite convention subject to the individual ratification of the separate States as before. Further it may be noticed that the Charter itself proclaims as the first of its principles that the organization is based on the principle of the sovereign equality of all its members.
I have already given my estimate of the progress in this direction that can be expected to result from this organization. There has, no doubt, been a good deal of shifting in terminology. But all this refining and redefining and altering of functional names seems to be the mere pursuit of the process by which 'madhouses' have become refined into 'mental hospitals' and 'retreats.'
LECTURE III

CHARACTER OF INTERNATIONAL COMMUNITY

It has already been pointed out that even those who think that time is ripe enough for introducing criminal responsibility in international relations, start with the assumption that international society has reached a stage when it can be said to have developed into a community under the reign of law. Indeed it is essential that a society should reach that stage before it can take upon itself the function of administering criminal law. But is it a correct assumption that international society has reached that stage?

Dr. Lauterpacht in "The Functions of Law in the International Community", while discussing the completeness of the legal system as a general principle of law, asserts that the international community is ex hypothesi a community under the rule of law. Professor Kelsen also takes the same view: only he likens the community to a primitive society and views the rule of law imposed by the present-day international system as the primitive rule of law, or "the rule of law" in the sense in which a primitive society countenancing 'blood-revenge' and other acts of self-help was a society under the rule of law.

Mr. Trainin of Russia ascribes to the Moscow Declaration of 1943 the responsibility for having brought the society completely under the reign of law. According to him, this Moscow Declaration of 1943 is to be accredited with constituting new jural relations between the member states of the international society as also with having introduced a new process of development. To facilitate this process of development and to strengthen the new ideas, Mr. Trainin urges that juridical thought is obliged to forge the right form for these new relations. He considers that introduction of criminal responsibility for attempts on the foundation of international relations is one such form.

It has been seen how other international jurists could not accede to this proposition. Senor Don Salvador de Madariaga, an eminent authority on International Law, condemns this assumption in the strongest possible terms and characterizes it as "an act of smuggling something into our store of juridical thinking." "We moderns," the learned jurist says, "have not only immediately guessed or felt the world community but begun actually to assert, create, and manifest it, though we do not know yet what the world community is, what are its laws, what are its principles, nor how it is going to be built in our minds."
We have already seen how other jurists view this so-called international community only as a group of co-ordinated states with their sovereignty intact. We must not fail to keep in view the correct significance of the theory of sovereignty of states in international relations.

Dr. Friedmann\textsuperscript{9} who "combines encyclopaedic knowledge with analytic subtlety, and has the ability of raising the world of law from the level of craftsmanship to that of art and philosophy," while reviewing the question of "state sovereignty, international order and the rule of law," observes how the doctrine of absolute state sovereignty has occupied the field from the very early days. He points out how the early writers state the principle ruthless and without compromise. In the nineteenth century a certain restraint is noticeable as liberal and constitutional ideas grow. Modern totalitarian doctrines revert to an uncompromising re-statement of the older doctrine adapted to modern circumstances. The nineteenth century, while witnessing the triumph of the sovereign national state, also brought increasing international contacts, and thus made it more than ever necessary to establish international law on a firm basis. But the question of legal supremacy, the juristic corollary to the political choice between an international society of sovereign and warring states and an international community, with authority over national states, remained to be solved. The predominant view was that international law differed fundamentally from municipal law as the former regulated relations between equal and sovereign states \textit{without authority and power of enforcement}. Various attempts at a theoretical and political compromise between the sovereignty of the national state and the respect due to international law are discernible during the period.

Jellinek attempts a solution by the \textit{doctrine of self-limitation} of the state. As is pointed out by Dr. Friedmann,\textsuperscript{4} "while comparatively stable social and political conditions prevail, this doctrine can give the comfortable illusion of having it 'both ways.' But any crisis, any conflict between state interest and individual right on the one hand, and state sovereignty and international order on the other hand, makes a choice inevitable. In such a case, Jellinek's theory is bound to come down on the side of state sovereignty; . . . . . . Only considerations of ethics or, more frequently of balance of power and political tactics, may impose restraint but not the law."

Triepel attempts a solution by seeking the validity of international law in the fact that the agreements made between states merge into an objective body of conventions, which states are then no longer free to repudiate. Anzilotti seeks to save the validity of international law by the universal recognition of the principle of \textit{pacta sunt servanda}. "Both theories go some way towards recognizing a legal value superior.
to the will of states but shrink from facing the full implication of a limitation of national sovereignty by international authority."

Del Vecchio asserts that real sovereignty can exist only if each state recognizes the existence of others as equal. In order however to meet the actual collision between national sovereignty and international law he takes to the argument that legal systems may have different degrees of "positivity," meaning different degrees of effectiveness.

Kaufmann considers the binding force of international law as incompatible with state sovereignty and declares for the latter.

Dr. Friedmann observes that "the bitter experience of the working of the League Covenant has shown the profound practical importance of a clear alternative between a national and international legal order and lent new emphasis to this seemingly theoretical controversy. For the League Covenant was the very embodiment of the theories of Jellinek, Anzilotti and other dualists—an attempt to establish international law, without touching the foundations of national sovereignty and the power of the national state."

The alternatives really are international order or international anarchy. Legal sovereignty of the state is incompatible with the existence of an international legal order. As is pointed out by Dr. Friedmann, every legal order must claim universality. "It cannot admit an empty space. If a state, claiming to be sovereign, refrains from ordering all human relations everywhere, if it allows matters to be left without regulation or to be regulated by another state, this means merely that, for technical reasons or lack of power, it does not actively exercise its right of sovereignty, not that it ceases to claim sovereignty. Theoretically, equality of states can only be conceived from the point of view of a superior authority. Even if states cease to have any contact with each other, the most that can be said is that the theoretical supremacy of each over others would not lead to any collision in the world of politics. As long as there are international relations in peace or war, the absence of conflict is juristically merely an accident. Each international relation, whether at present regulated or not, must be subject either to an international legal rule or to the conflicting laws of different states. Compromise between the national and international sovereignty is thus impossible, although it may be good politics sometimes to appease national susceptibilities."

As I have already pointed out, the theory of State sovereignty in this field as at present existing reveals itself in two ways:

First, as the right of the state to determine what shall be for the future the content of international law by which it will be bound:

Second, as the right to determine what is the content of the existing international law in a given case concerning itself.
As a result of the first:

1. A state is not bound by any rule unless it has accepted it expressly or tacitly;

2. In the field of international legislation, unanimity and not mere majority is essential.

The second aspect connotes that the state is to be the sole judge of the applicability of any individual rule to its case.

We shall see later that even the bitter experience of the working of the League Covenant failed to bring home any better lesson. Even the United Nations Organization finds the states in the same unyielding position in this respect. Even now nationality, national states, and national sovereignty predominate in the field of international relations.

I shall not attempt to investigate what motley mixture of groups of interest and what other factors co-operated in stirring into life nationality, the principle and uniting tie of the present-day national states.

Suffice it to say that the Sovereign State which is inspired in our democratic age by the spirit of Nationality has divided with the Industrial System the allegiance of the modern world. The spirit of Nationality has been characterized by an eminent historian as "a sour ferment of the new wine of Democracy in the old bottles of Tribalism." Professor Toynbee says: "The idea of our modern Western Democracy has been to apply in practical politics the Christian intuition of the fraternity of all Mankind; but the practical politics which this new democratic idea found in operation in the Western World were not oecumenical and humanitarian but were tribal and militant." It may be that in exhibiting this characteristic the modern Western politics are not exceptional. Bergson pointed out that parochialism is a normal feature of human social groups, from the most primitive to the least imperfectly civilized. The learned philosopher suggests that this parochialism, and the militancy between different parochial groups, is not only normal but is even in a certain sense natural.

Whatever that may be, the modern Western Democratic idea is indeed an attempt to reconcile the above two conflicting spirits and to resolve the two diametrically opposite forces. The spirit of Nationality, we are told, is the psychic product of this political tour de force. Professor Toynbee defines this spirit as one "which makes people feel and act and think about a part of any given society as though it were the whole of that society." According to him, "Internationalism and Nationalism, rather than Industrialism and Democracy, are the two forces which have exercised dominion de facto over the Western Society in our age: and, during the century that ended about A.D. 1875, the Industrial Revolution and the contemporary emergence of Nationalism in the Western World were working together to build up Great Powers, each of which claimed to be a universe in itself."
The state of mind engendered among the people of the community which constituted great powers was gradually shared by the communities of lesser calibre. All national states, from the greatest down to the least, put forward the same claim to be enduring entities, each sufficient unto itself and independent of the rest of the world. The deep human impulse to feel life as a whole attached itself to particular nations and not to the larger society of which these nations were members.

Down to about 1875, the two dominant institutions of Industrialism and Nationalism were working together to build up Great Powers. After 1875, however, they began to act in opposite directions—"Industrialism increasing the scale of its operation beyond the compass of the greatest of the Great Powers and feeling its way towards a worldwide range, while Nationalism percolating downwards, began to implant a separate consciousness in people of so small a calibre that they were incapable not only of forming Great Powers but even of forming minor states possessed of full political, economic and cultural independence in the established sense of these terms." 7

The general war of 1914-18 brought to the surface a tendency which had been at work for nearly half a century before its outbreak. By the end of the war the stage had ceased to be dominated by the Great Powers with their pretensions to be universes in themselves, and the characteristic community of the new age is that of states whose independence is limited on one or other plane. "In the new world even the surviving Great Powers are dwarfed in the economic sphere by the worldwide scale on which Industrialism has now come to conduct its operations. All states alike are feeling less and less able to stand by themselves economically and are either kicking violently against the pricks by pursuing militant monetary and tariff and quota and migration policies or else are turning for assistance to the technical organizations of an international scope which are being built up round the secretariat of the League of Nations and the International Labour Office at Geneva. Finally, all but the strongest or the most recalcitrant states are also beginning to feel the same lack of self-sufficiency on the political plane and are displaying a readiness (which would have been inconceivable in 1914) to accommodate their sovereign independence to some form of international limitation and control such as is implied in the Pact of Paris for the Renunciation of War as an instrument of National Policy." 8

These multiple tendencies can be summed up in a single formula: "In the new age, the dominant note in the corporate consciousness of communities is a sense of being parts of some larger universe, where, in the age which is now over, the dominant note in their consciousness was an aspiration to be universe in themselves." 9

6-1809 B.
We are already alive, in our generation, to two new challenges to which we have been exposed by the triumph of Democracy and Industrialism in the current meaning of these terms.

The economic system of Industrialism, which means local specialization in skilled and costly production for a world-market, demands the establishment of some kind of political world-order as a framework for the operation of Industrialism on its indispensable worldwide scale. In general, both Industrialism and Democracy demand from Human Nature a greater individual self-control and mutual tolerance and public spirited co-operation than the human social animal has been apt to practise, because these new institutions have put an unprecedentedly powerful material 'drive' into all human social actions.

These challenges, of course, are very recent. It is not yet possible to discern what response to them is forthcoming. Any response to them that may be on foot must ex hypothesi still be in a very rudimentary stage. We can, therefore, look for nothing more definite than inklings which may turn out to be false scents.

The spirit of Nationality, no doubt, has to a great extent an isolating effect in this respect. Yet a national society is not necessarily antagonistic to any development in this direction. Nay, on the contrary, it may very well constitute a condition precedent to such organization by helping a thorough development of every inherent capability of a people as also by guiding healthy competition. Indeed competition may, without thus, only add to the dissensions between classes and nations, instead of affording an opportunity for the profitable employment of everybody's activity elsewhere. Properly guided, it is capable of solving in the world of material wants the problem of securing the recognition of a sphere answering the absolute right of the individual.

The interest of nationality, whilst affording, on the one hand, an opportunity for the assertion of every kind of human faculty, contains, on the other, elements which circumscribe its scope. The material limits to the interests of local contiguity are, in case of the interest of nationality, replaced by spiritual limits—the influences which obstruct united development.

The national state certainly cannot be considered so definite and perfect a policy for the society of nations as to form the utmost boundary of their development. Yet it cannot be denied that it is at least as permanent a sphere and as valuable in itself as any of the others answering their respective interests. It is its vocation to develop thoroughly every capability inherent in any people.

If the federation of mankind is the ideal of the future as is invariably pictured in the minds of the present generation, it is as yet conceived only as based upon the external balance of national states. Of course the national selfishness developed from the circumstances that have hitherto attended national self-preservation as well as the disposi-
tion for encroachment and greed consequent upon it, as well, too, as the inequality of nations in strength and culture, make such a solution hardly appear probable in any near future.

Very recently Sir Harold Hartley, F.R.S., while speaking of "Man's use of energy" raised a new hope in this direction. He observed how the rapid interchange of persons and ideas had brought the world together into a much more closely integrated unit. It has quickened the senses and the nerve fibres of nations and given them a new awareness of events, a new world consciousness which in due time must show their inescapable community of interests.

Sir Harold pointed out how it was only a century since man first understood the full import of the world energy and its significance as the driving force of life itself. It had been man's use of energy that shaped so largely the material progress of human race.

Turning to man's progress in the art of living, to the environment he had created for himself, Sir Harold pointed out how this involved an ever-increasing call for energy. Energy is the multiplier of human effort; but the effects of energy were not found in comfort and productivity alone.

After pointing out the sufficiency of world's reserve energy Sir Harold very rightly emphasized that this was but a poor consolation for the countries that had few. The unequal distribution of energy sources would make its transport of increasing importance in the future.

Sir Harold then gave the most fascinating account of the possibility of transmitting electric power over long distances by high voltage direct-current. By that means it should be possible to transmit large blocks of energy economically perhaps a thousand miles by underground or submarine cables and thus to link consuming centres with new and distant sources of hydro-electric power.

There was thus the possibility of linking distant lands thereby securing a better balance between capacity and requirements by taking advantage of the seasonal variations in capacity and diversity of demands. Such a scheme would offer an opportunity for the world to share in co-operation without raising the delicate problems of supranational authority.

Turning to the story of nuclear energy, Sir Harold said that it showed what could be done if science were used lavishly with all the resources of the modern world to penetrate Nature's secrets. Now came the task of using our great store-house for the good of men.

But once more we saw how hard it was to be creative, compared with the ease with which man could destroy. With the world's need of energy it would be a tragedy if the fear of complication from nuclear piles were to delay in any way the immediate development of the more conventional and better sources of energy.
We have already seen how jurists, statesmen and politicians held out hopes during and after the Second World War that the happenings during the war had destroyed completely selfish nationalism and the last defence of isolationism, that the nations had sincerely agreed that they respect the right of all nations to choose their own form of government, that the war had ended one age and begun another,—the new and unpredictable age of soul,—and that the nations had fully realized that we are a unity of humanity linked to all our fellow human beings, irrespective of race, creed or colour, by bonds which have been fused unbreakably in the diabolical heat of atomic explosions. One jurist statesman repeatedly referred to the Moscow Declaration of 1943 and cherished the hope that the said declaration had already developed a new era of this character.

But let us see how much of all this was only a dream and how much a reality. Let us see if the atom bombs have really succeeded in blowing away any of the pre-war humbugs. Let us see how many dominated countries the victor powers have liberated after the war from foreign domination and how much bliss of freedom and peace these liberated countries are being allowed to enjoy.

We may begin with Korea whose liberation was solemnly declared at the Cairo Conference of 1943.

We now know that the war's end brought to Korea neither real freedom nor any substantial promise of it. "Instead it brought partition. The country was crudely cut into two at the arbitrarily chosen line of the 38th parallel North Latitude. Korea north of that line was occupied by Russia. Korea south of that line was occupied by America. The Northern Zone was controlled by the Russian Head Quarter set up in Heijo, subject to Russain Command in Mukden and thence to Moscow. The Southern Zone was controlled by the American Head Quarter set up in Seoul, subject to MacArthur in Tokyo and then towards Washington. The distance between Seoul and Heijo, a bare 100 miles on the ground, was no shorter than the distance between Washington and Moscow. It was greater, in fact, because there was some communication between Washington and Moscow, while Heijo and Seoul might have been on two different planets. Between them no trains ran, no radio sparked, no voices passed. This was not merely partition. It was dismemberment."

We hear so much of Southern Koreans and Northern Koreans. But we are not as yet told who decided on this partition, when and where; and how long this is going to last. All that the Koreans know is that the Russians entered the country from the North and the Americans swept into it from the South and both stopped at the 38th parallel. There is reason to believe that "Korea was part of the price paid by Roosevelt at Yalta for Stalin's promise to enter the war against Japan."
This reminds us of another similar event which took place during the first General War of 1914-18 and which has been narrated by Professor Toynbee thus: "We may also reflect upon a conversation which took place between a British statesman and a Persian visitor some time after the peace-settlement which followed the General War of 1914-18. The Persian was saying that he could not understand how the British Government, which he acknowledged to be intrinsically honourable and liberal-minded, had brought itself to pursue in Persia, from A.D. 1907 onwards, a policy which he could only describe as a cynical sacrifice of the rights and welfare of an innocent, friendly, and defenceless country on the altar of the Anglo-Russian entente. The British statesman, who had been largely responsible for the policy and who was of a frank, straightforward disposition, admitted to his visitor that Persia had been deliberately sacrificed; 'but,' he added, 'the British policy which you criticise was not pursued by us in a cynical frame of mind. In matters of statesmanship, choices are usually limited; and in this case, with only two alternatives before us, we were simply choosing the lesser of two evils; the risk of allowing Russia to destroy the independence of Persia rather than the risk of seeing Russia remain neutral or even take the German side in the then imminent event of a European War. If, seven years later, Germany had started the Great War with Russia as an ally or indeed as a neutral, she would certainly have won the war; and that would not only have been the end of the British Empire, it would have been the end of Civilization. When Civilization was at stake, how could we act otherwise than we did? Put yourself in our place, and answer me with your hand on your heart.'"

"At this the Persian, who had at first been mildly puzzled and aggrieved, completely lost his temper. His heart burnt within him and a torrent of denunciation issued from his lips: 'Your policy was infinitely more wicked than I had suspected! The cynicism of it is beyond imagination! You have the effrontery to look me in the face and tell me complacently that you have deliberately sacrificed the unique treasure which Persia preserves for Humanity—the priceless Jewel of Civilization—on the off-chance of saving your worthless Western Society from the catastrophe which its own greed and pugnacity were inevitably bringing upon its head! Put myself in your place, indeed! What should I have cared, and what do I care now, if Europe perish so long as Persia lives!'

Professor Toynbee narrated this story in order to show how egocentric illusion still had the mastery over the Western mind and how on the political plane the illusion projected as 'patriotism' can be the last refuge of a scoundrel as well as the last infirmity of a noble mind.

The terms of the secret deal at Yalta were not known to the world. But when after the end of the war the American, British
and Russian Foreign Ministers met in Moscow in December "the Korean problem was written off—to the outraged astonishment of the Koreans—with a vague proposal of five-year trusteeship which left the partition intact." Thereafter whatever might have been done in this respect was not aimed at hastening Korean independence but at establishing, if possible, a Russian-American modus vivendi in Korea.

An interesting account of what was done by these two magnanimous Powers after the end of the war is given by Harold Isaacs in the following lines:

"The quality of 'self-determination' for Koreans was cynically underlined at the Soviet-American Commission meeting which began in Seoul on March 23, 1946. The Commissioners were all Russian or American military men. They agreed magnanimously that representatives of Korean Democratic political parties may attend the commission meetings by special invitation upon mutual agreement of the two chief commissioners. The sessions were conducted in English and Russian, and all documents were to be in those two languages. Any incidental proclamations to the Korean people, it was noted in an official communiqué, would of course be translated into Korean."

Mr. Isaacs rightly points out how the partition has been utterly ruinous for the Koreans. "On that artificial boundary line, Korean hopes for freedom and independence were hung like a ragged scare-crow on barbed wire. By it this little country was economically and politically hamstrung." Taken as a whole, Korea is a relatively rich land capable not only of feeding itself but of growing an export surplus. It was industrially developed to a degree that surprised American economic intelligence officers. No doubt this development had contributed heavily to the strengthening of Japanese economy. But had Korea been given the real right of self-determination, it might now readily turn these resources and assets to the use and benefit of Korean economy. The partition however ruined this prospect. "For northern Korea has two-thirds of the country's coal including all the industrial important bituminous, all its extensive resources of hydroelectric power, all its chemical, iron, and steel plants, and the great bulk of the mining and timber industries. Southern Korea, on the other hand, is the country's rice bowl. Its rich crops feed the north. In addition the south, aside from machine tool and ship-building facilities, has most of the lighter industries: textile, electric parts and equipments, airplanes and automobile assembly plants. The effective use of these economic resources in Korea is dependent entirely upon the integration of the country, the free movements of railroads, goods and people." Under Japanese rule, Korea functioned as an integrated economic unit. Under the victor powers after Japan's defeat the country has been cut in two and promptly paralysed.

This is the type of 'liberation' that came to the Koreans as a result of the benevolent Moscow Declaration of Mr. Trainin.
Korea’s misfortune seems to be its geography. Its unhappy lot is to be a country occupying a crucial corner of the cockpit of Asia.

It had been a strategic crossroads for centuries, trampled by contending Chinese, Russian, Japanese, and more recently American, armies. The Japanese saw it as a pistol aimed at them from the mainland; the Chinese, as the historic bridgehead for Japanese penetration into their country; the Russians, as a threat to Vladivostok; the Americans, as a key point in the noose of “containment” with which they hoped to choke off any further expansion of Communism.

Pretexts were not wanting for giving Korea this type of “liberation.” After partitioning Korea the Americans would say that “Koreans would be ripe for freedom only when they had shown that they could unify themselves.” But Koreans very rightly want to learn to rule themselves by ruling themselves. All Korean parties and groups demand the withdrawal of all foreign troops from their land, and they all mean it passionately.

But the Koreans are only “Gooks” in “this new and unpredictable age of soul.” The world now knows what is happening in Korea and why. In view of the facts and figures that Mr. I. F. Stone has been able to gather from authoritative American sources and disclose in his book entitled “The Hidden History of Korean War,” it is difficult to avoid the fatal conclusion that the Korean war is “a war which some Americans have needed in order to uphold their way of life.” It looks very much as though . . . . the action of the United States Government had been determined primarily on the basis of a very able and very quiet intrigue by a few strategically placed persons in Washington, an intrigue which received absolution, forgiveness and a sort of public blessing by virtue of war hysteria . . . .”

“No one really seemed to know just how the United States had been drawn into the Korean War, but as it continued, there was less and less doubt as to who wanted to stop it and who wanted to continue it. Chiang Kai-shek and Syngman Rhee, its principal political beneficiaries in Asia, still wanted it to continue. John Foster Dulles and Governor Dewey were campaigning for broader American involvement in the Far East, along the lines of the Pacific Pact that Chiang had long been urging. Truman and Acheson were their prisoners, sometimes eagerly, sometimes hesitantly, as in a sense the whole American economy had become the prisoner of war fever and war addiction.”

Mr. Stone tells us: “Truman always said he wanted peace. Why was he becoming alarmed over its approach? He did not want war. But unfortunately and at the same time he did not want peace and in a sense could not afford peace.”

“While the arms race and the attendant inflation were ruining America’s allies, American leadership was still gripped by dread of the consequences of peace upon the economy. This dread was dictating
the actions of the politicians and business leaders. An economy accustomed to ever larger injections of inflationary narcotic trembled at the thought that its deadly stimulant might be shut off." "

Truman wanted something which was neither war nor peace. McArthur wanted war. Indecision made Truman at best an irresolute superior, at worst a passive collaborator in MacArthurism.

Stone's book in its fortyeight chapters deals factually with such provocative matters as the role of John Foster Dulles; how the stage was set; how the United Nations was stampeded: MacArthur's blank cheque; MacArthur's secret plan; peace alarums; anti-peace offensive; atrocities to the rescue, weird statistics, the carefully-timed release during the truce talks of atrocity figures, being "the sheer statistical slapstick understandable enough if the purpose was merely to stir up hate and upset peace talks."

"An almost hysterical fear of peace made itself felt when the shooting stopped on November 28, 1951, the day after agreement on a ceasefire line, the day when Red troops played volleyball within range of U.N. trenches. There was an almost frantic reaction from Key West, where the President was vacationing. Truman showed himself more insistent even than General Van Fleet that the fighting in Korea must continue until every last item in the interminable negotiations had finally been thrashed out. Again there were new political obstacles. The day the negotiators finally agreed on a ceasefire line, Eisenhower in Rome was pleading with the North Atlantic Council for a speed-up in Europe's rearmament. The Wall Street Journal, which had been carrying on an admirable fight for a saner foreign policy, dryly underscored the difficulty in an editorial on Korea and Rome: 'It is understandable that peace in Korea, or even talk of peace, should make people—in the United States as well as Europe—less eager to sacrifice civilian standards for arms..........if there is peace in Korea the position of the United States as the prime mover of European defence will be more difficult—and much more costly.' "

'Cry Korea' is another first-hand account of the Korean tragedy. " The tide of war augmented by Napalm bombs, phosphorus and rockets and a tremendous weight of artillery, ebbed and flowed over the whole heart of Korea, both North and South, and with this the civilian tragedy grew to staggering proportions. It is still growing. Hundreds of thousands are homeless. Millions have been killed. "From the old Naktong river line to the Yalu river, Korea, North and South, has become a refugee heap of humanity, of towns and villages reduced to rubble and ashes, of roads crumbled to dust, of railways smashed, of harvests and homes burned, burned and burned again. On the frozen roads, the frozen rivers and the frozen seas, can be seen the pitiful human tide month after month seeking the sanctuary

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which is only to be found in death." And all this must happen because America needs them.

"The dominant trend in American political, economic, and military thinking was fear of peace. General Van Fleet summed it all up in speaking to a visiting Filipino delegation in January, 1952: "Korea has been a blessing. There had to be a Korea either here or some place in the world." In this simple-minded confession lies the key to the hidden history of the Korean War."

And all this is being done shamelessly in the name of "liberation" of the Koreans.

I do not know if even after all this the conventional picture of the American in Asia as "the picture of a well-meaning blunderer" can still persist. I do not know how the myth could grow that the American role in Asia had been "the role of disinterested benevolence." As has been pointed out by Mr. Isaacs, "there is not much philanthropy in the record of American affairs in Asia, or in China, which has been the principal sphere of American interest. Even the missionary Colleges and hospitals have been investments; and the American missionaries themselves, like those of earlier comers, have been unavoidably bracketed with the interests of trade and national position."

Is it now difficult to perceive what "a broad streak of deliberate hypocrisy runs through this conventional picture?"

The myth is in the main an unsubstantial dream filled with unrealized images. Their post-war domes have completely punctured this myth. "The new and unpredictable age" ushered in has not certainly been the age of soul! All hopeful feelings have long been dissolved!

Let us take the case of Indonesia again and let us see how Mr. Trainin's Potsdam Declaration or the noble war aims of the Allied Powers operated there at the end of the war.

Indonesians thought that the liberating forces were coming and they thought that they must use the language which would be understood by their liberators. They asserted "we are fighting for government for the people, by the people, of the people. We are fighting for our inalienable right to life, liberty, and the pursuit of happiness. Give us liberty or give us death." The occupying forces were the British who thought that it would be a simple matter to see the Dutch reinstalled. It may be remembered that before surrender Japan gave the Indonesians a sort of independence. The Indonesians had been summoned by the Japanese to form a committee for the purpose. A committee was formed and on August 17, 1945, three days after Japan's surrender the committee took into its own hands the authority that had fallen away from the Japanese conquerors. The Indonesian people proclaimed and established the independent Republic of Indonesia. The Dutch thought that they had been
benefactors of the Indonesian people and were eager to go back to their old role of benefaction. The Indonesian people however seem not to have shared in the general admiration for the way the Dutch hitherto ruled their rich possessions. "The history of Dutch rule, in fact, parallels in capacity and in some ways exceeds the record of British and French exploitation in neighbouring colonial areas. The Dutch started, as the British did in India, with nearly two centuries of armed conquest and outright looting. From 1602 to 1800 the Dutch East India Company paid recorded dividends at the rate of 18 per cent a year and reaped a golden harvest of hundreds of millions of guilders besides in unreported plunder. The Company, like its counterpart in British India, served the purpose of swelling the primary accumulation of capital at home. It also effectively destroyed native Javanese and Sumatran commerce, shipping, ship-building and drove the entire population back to simple agricultural pursuits. Early in the nineteenth century, the Dutch introduced the 'culture system,' a programme of forced cultivation of the most profitable export crops: sugar, coffee and indigo. This system eventually resulted in a series of famines which reduced the population of some parts of Java by more than half."

It will be useless to recapitulate here the whole history of exploitation of the people of Indonesia by the Dutch. The history really followed the familiar colonial pattern: "an economy of wealth and ultra-comfort for a narrow segment of the people of the exploiting nation and an economy of poverty, illiteracy and backwardness of the colonial mass." We have this account that in 1936 Europeans in the Indies, comprising 0.5 per cent of the population, received 65 per cent. of the total income. The Indonesians whose country Indonesia was and who constituted 97.5 per cent. of the population received 20 per cent. of the income. The rest went to the other foreigners. The European community of Dutch India lived in conspicuous comfort amid all the profound poverty of the Indonesians.

Indonesian nationalism stirred into organized life only forty years ago. "The Dutch, of course, countered it with heavy handed suppression, spaced by rare and limited concessions. The Japanese were welcomed in Indonesia. The effects of Japanese conquest and occupation cut deeper, went farther, and produced more direct political consequences in Java than perhaps anywhere else in Japanese-conquered Asia." Whatever the Japanese might have done, there can hardly be any doubt that they helped create the conditions which made independence a practical possibility when Japanese power collapsed.

Whatever that may be, the Potsdam Declaration of 1943 or the declared war aims of the Allied Powers must have meant liberation of these Indonesians as well from foreign domination. At least if the
new post-war world order was intended to be of the pattern understood by Mr. Truman and similar other jurists and statesmen, freedom of Indonesians could not be denied. But it appears that the Dutch had previously been given signed assurances that they would be allowed to reassume domination of the East Indies as soon as they were recaptured. "When the islands still lay within the American military sphere, this assurance was written into an agreement signed by General MacArthur and Hubertus Van Mook at Tacloban, Leyte, on December 10, 1944. When the last-minute changes in Allied arrangements were made at the Potsdam Conference, the Indies were transferred to the British sphere. A similar agreement was thereupon signed by the British and Dutch Governments on August 26, 1945."

The British troops began landing on September 29. They were welcomed by the Indonesians as their liberators. Batavia was quiet when they arrived but soon the Indonesians were made to feel that Indonesia was being liberated for the Dutch and not for Indonesians. The trouble commenced. The liberators did not hesitate to utilize Japanese troops kept under arms. These Japanese troops were ordered into action against the Indonesians. The liberators in admiration exclaimed "The Japanese are magnificent!"

"British fighter-bombers were constantly in action, using rockets and 500-pounds bombs." The Indonesians lacked bombs and rockets: they only owned knives and with these knives they wanted to gain freedom.

"The Indonesian Nationalists appealed, by radio and by direct messages, to Truman, to Stalin. They received no replies. They appealed to the United Nations. They received no sign of recognition. They appealed to the conscience of the world. Nothing happened to halt the undeclared war in Java. They protested to Washington over the British use of American weapons and equipment in Java. Washington promptly asked the British if they would not please remove the American insignia and the initials 'USA' from their fighting gear. Neither did that stalwart action in the spirit of the Atlantic Charter halt the war in Java! The Indonesians waited for the 'Four Freedoms' to manifest themselves, by a miracle or by a sign. But they waited in vain. They finally had to stop scanning the skies for the harbingers that never came."

The story given of Indonesia does not indicate much awakening of humanity in the post-war world. At least the post-war international society seems to stand where it was before the world war. Of course we cannot deny that every mouth is now filled with high-sounding slogans.

Freedom of Indo-China also followed the same line or rather a much worse line, perhaps because there was the charge of Annamite collaboration with the Japanese. But even assuming that this charge was as well founded and fully established as the charge of French
collaboration with the Japanese, the Annamite demand that they do not want to be mastered by anybody would not lose its force and would not justify the post-war Anglo-French use of Japanese troops and weapons against them.

The only conclusion which one can draw from all these stories is that even now in the international world a people would get just as much freedom as it is strong enough to fight for and a dominating power would give the dominated people only as much freedom as it can be forced to yield to the people by the people. All the talk about self-determination does not take us beyond this. There is no sign of the international association organizing itself more rationally, pooling its resources and its needs, and federating its races, nations, and cultures. Up to the present moment there is no sign of any new structure on a new foundation.

It is truly said that “it is a paradox of advancement that if Necessity be the mother of Invention, the other parent is Obstinacy.”

The hope lay in man’s new understanding of Nature’s processes, in his more efficient use of her resources, in the growing recognition of the dependence of one nation upon another, and above all, in the sincere realization that we are a unity of humanity irrespective of race, creed or colour and that even a Korean or an Annamite may rightly claim self-determination and might not have been ordained only to contribute to the prosperity of the chosen people of God.

Indeed high hopes were entertained that in the post-war world the only problems would be for science and engineering and however much did they present a challenge to the science and engineering of our time, their solution would not be impossible now that men’s mind ceased to be bent on quest of power. Their orderly solution only required a knowledge of the conditions and needs of each country, on a survey of its natural resources, its human geography, its economic structure and its capacity to produce and consume.

But the post-war behaviour of the Powers seems completely to belie any such hope. As yet we find no indication in such behaviours that the two world wars have succeeded in awakening within us any sense of unity of mankind,—any feeling that we are a unity of humanity, linked to all our fellow human beings, irrespective of race, creed, colour and strength, by any unbreakable bonds. Even now everywhere we find hankering after power. All the moods and conflicting interests of Nationalism seem aggravated rather than lessened. “The principal post-war activity of the ruling politicians of the world has only been the carving out of spheres of influence of decisive control, the cynical buffetting of peoples, governments, territories, in the interests of broad and conflicting patterns of power.”

Perhaps, under the insidious influence of the spirit of an outgoing age, we have fallen victims to what Professor Toynbee terms “Apathetic Fallacy”: If it is necessary for us to be on our guard against
the 'Pathetic Fallacy' of imaginatively endowing inanimate objects with life, it is equally necessary to take care that we do not fall victims to the inverse fallacy of treating living creatures as though they were inanimate.

There seems to be little hope till the human challenge from the older generation can be overcome. Or some sufferer triumphant shall have to serve as a pioneer.

A progress in the direction of any unification of the international world would require as a necessary condition that some vital interest constituting a common and universal tie should be raised as a leading one above the interest of nationality.

There seems to be represented in our days only one such interest of which the influence is already felt: I mean the interest of universal intercourse, trade, and commerce, and of extensive economical considerations which renders it possible for not only the luxurious wants of particular classes but also human need to be supplied as fully, quickly, promptly and easily as possible,—the interest which renders it possible for labour to be turned into the most productive channels, and its results placed where they can satisfy the most general, most urgent, and most immediate wants.

Certainly a national society realizing these conditions, and organizing in conformity with such an economical vital interest, would present itself as one capable of satisfying and embracing much larger spheres of peaceful co-operation than any society that has hitherto figured in history. Commerce and trade which have hitherto been the constant instigators and attendants of either open warfare or merely the means of selfish oppression and of amassing wealth at the cost of others would, under such circumstances, become the instruments by which all class privileges would be abolished. The employment of the factors of production in the interest of the individual nation would lose its selfish character if it is possible to bring about just and definite reconciliation between the interests of the nations, the public interest representing in reality the sum total of the individual national interests.

The organization of the vast economical society of the suggested type, however, depends upon manifold agencies, such as have had as yet no opportunity at any place or time to display their full effect. It is, therefore, hardly possible to weigh the internal value and mutual influence of such agencies. Nor is it possible to forecast with any certainty the manner in which the balancing of these agencies would be effected: during the process of consolidation of such a society, the inclination of men and their capacity for discipline and organization would necessarily undergo a change. At present we can only point out those aims and formations in which the new vital interest has hitherto manifested itself. Even as to these it is not possible to estimate them in their full import, since we are compelled to look at them solely in the light of their relations to the present-day national society.
At present these movements may be observed within two spheres,—namely, within the national sphere and, outside it, within the sphere of international intercourse.

The movements which we usually characterize as "socialistic" and which in their higher forms of to-day differ from similar earlier movements resembling them in outward appearance only, offer these special features:

1. they do not emanate solely from the needy classes; nor
2. exclusively confine themselves to the task of establishing a mechanical division and equal distribution of wealth; but
3. strive
   (a) to attain, before everything else, the absolute certainty and reliability of the means of livelihood and development of the individual; and
   (b) to secure that the various human activities, harboured by the society, shall not be merely afforded an equal shelter in an aimless and formal manner, but be harmoniously directed towards a common aim.

It may further be noticed that whilst formerly agitations of the kind rested their hopes of success simply upon some measure of violence direct in its action, within the national sphere itself, and upon the reduction to equality of the various classes of society through external pressure, and maintained at the same time as against foreign peoples the fierce attitude inspired by lust of conquest and greed of plunder, these movements now take into consideration the situation and circumstances of all the members of the various spheres which, from an economical point of view, are perceived to react upon each other, and regard as well the degrees of the various capabilities, as their claims, consequent upon the greater or lesser importance of the duties to be performed.

Another field for the operation of the agencies, which gives an impulse to the formation of a more general economical society, is brought to view in a series of institutions, extending in principle beyond the limits of the national state. By way of example we might name the principle of civil equality generally recognized in our age between foreigners and the citizens of any state, the right of free emigration and settlement, the international regulation of criminal law, the creation and development of means of universal communication on the strength of international treaties, etc., etc.

It is beyond our purpose to speculate here as to what degree of excellence or perfection such a purely economical organization may attend and how far it can help the realization of harmony of universal peace. All that is necessary for us to realize is that a society of this character is not an impossibility. Such a society will know no distinction of class, race, religion and nationality and will lose sight of place or boundary. It will afford the possibility of satisfying the entire
character of International Community

aggregate of the spheres of universal human interest within its own periphery, and will thus render definitely triumphant the highest imaginable end of combined activity,—namely, the harmony of universal peace.

The moment of the organization of a society at which it presents itself as independent, dominant, and capable of asserting its own conditions of life by force, forms a distinct phase in the process of association. At that stage it properly becomes law-creating and law-maintaining society which proclaims and asserts the conditions of its existence in connection with its own conduct and that of its members through commanding permissive and prohibitory rules. In order to find a place within such a society, the several members must adapt themselves to the spheres marked out to them by the society, with due regard to their respective strength and to the degree of importance of their respective aims, as well as to its own principles of law. No doubt even when this phase is reached, there may still continue the antagonism between the endeavours of every member to realize, as fully as possible, its fundamental principle and the efforts of the society to assert its vital interests, which form the central principle and common tie. But the contest arising therefrom would then be limited by the regulations of the law of the society. The society at this stage can properly be said to be one completely under the reign of law.

The notion of a society or community under the reign of law and that of a mere association of the type of international society of the present day, may perhaps be best visualized if we define the former as "a condition of the structure reconciling the rivalries, securing internal peace and lasting quiet, and as setting definite limits to the various spheres of power within its bounds," and the latter as "descriptive of a state of things brought about by the conflicts carried on for the purpose of accomplishing various vital objects; conflicts, during which every individual and social sphere endeavours to extend its rule as far as possible over others, and to use others for its own purposes, and strives to increase its own personal power by appropriating the force of others." 26

A society under the rule of law as above characterized and the order created by it, in point of fact, may never be complete and final in themselves, nor need they ever represent that regulation of absolute value which should entirely accord with the capacities and merits of the totality of its members. The undue preponderance of particular individuals and circles can hardly be entirely eliminated. Such undue preponderance might be founded upon the march of historical development, or upon some momentary advantage, and would necessarily contain elements of injustice and of further changes and dissensions. Yet every such society, to the extent of its being definitely established and provided with a fixed sphere, would be in a position to moderate selfish activity,—the activity of its members drawn to separate
interests,—and adapt it to the circumstances of their social existence. Indeed at this stage the influence of moral and economical agencies upon the relations of their members will be strictly defined by the law adapted to the dominant conception of the proper interest of the society and sanctioned by it in its ruling capacity.

The essential difference between the international society under rule of law and the international society as it now stands is that whilst the ties of the present society and the interests and sentiments insuring their maintenance are of a purely voluntary, internal and moral character, the ties of the society under the rule of law would be expected to be consolidated by its organized power, and the stability of its order would be secured by external force.

I have already pointed out the considerations relevant for the determination of the legal character of rules of conduct obtaining in a society: These are:

1. That only through final ascertainment by agencies other than the parties to the dispute and not by mere *ipse dixit* of an interested party, can the law be rendered certain: Such certainty is of the essence of law.

2. That it is essential for the rule of law that there should exist agencies bearing evidence of or giving effect to the imperative nature of law.

The law’s external nature may express itself either in the fact that it is a precept created independently of the will of the subject of the law, or that, no matter how created, it continues to exist in respect of the subjects of the law independently of their will.

It may be that even these tests would not mean an absolute negation of international law. The observance of the rules of international law, so far as these go, is certainly a matter of obligation. These rules might have resulted from the calculation that their observance would not be incompatible with the interest of the state concerned. A state before being a willing party to a rule might have thus willed as a result of some such calculation on its part. But after contributing its will, which is essential for the creation of the rule, it may not retain any right to withdraw from the obligation of the rule thus created. The creation of the rule thus might have been the result of some interested calculation: its observance, however, need not be characterized as the result of such calculation, and it may certainly exist independently of the will of the parties: It is of no consequence that in coming into existence it had to depend on such will.

Yet, simply because there are certain obligatory rules prevailing in international society and generally observed by the conscientious members of that association, it does not follow that the states have formed a community under the reign of law in the fullest sense of the term. Its ‘order’ or ‘security’ is not yet provided by law. Peace
in such a community is only a negative concept—it is simply a negation of war, or an assurance of the status quo, however unjustifiable that status quo might otherwise have been and however ignominious and wrongful its origin might have been. Even now each state is left to perform for itself the distributive function. The basis of international relations is still the competitive struggle of states, a struggle for the settlement of which there is still no judge, no executor, no standard of decision. There are still dominated and enslaved nations, and there is no effective provision anywhere in the system for any peaceful readjustment without struggle. Even a pact or a covenant which purports to bind the parties not to seek a solution of their disputes by other than pacific means contains no specific obligation to submit controversies to any binding settlement, judicial or otherwise. The basis of a society so designed is not that peace which means public order or security as provided by law and of which an infringement becomes a crime.

For our present purpose the international law still suffers from another infirmity. We have already seen how Judge Hudson pointed out that if international law could be conceived to govern the conduct of individuals, it might become less difficult to project an international penal law. But even now international law creates rights for states and imposes duties upon them, vis-a-vis other states. National sovereignty still continues to be the fundamental basis of international organizations. Even in the post-war organizations after the Second World War national sovereignty retains its position unimpaired in this respect. No doubt after the Second World War international law is concerning itself to a certain extent with the interests of the individuals. Indeed it is high time that international law should recognize the individual as its ultimate subject and maintenance of his rights as its ultimate end. "The individual human being—his welfare and the freedom of his personality in its manifold manifestations—is the ultimate subject of all law. A law of nations effectively realizing that purpose would acquire a substance and dignity which would go far toward assuring its ascendancy as an instrument of peace and progress." If international law can really do that, then certainly it can also think of controlling the individual acts by introducing criminal responsibility in the system.

But as yet international society certainly has not proceeded in this direction. The post-war measures for defining fundamental rights would be considered later. It would suffice to observe here that steps hitherto taken in this direction may justly be characterized as completely illusory.

It must be remembered that recognition of the individual human being as the ultimate subject of international law would mean a fundamental change of very grave consequences and would involve fundamental changes in the behaviour of present-day powers. An
international organization of this kind would not permit a dominating foreign power to claim its dealings with the dominated nation as its domestic affairs outside the jurisdiction of the organization. It would not allow the organization or any of its member powers to help a state as against the individual members of that state even on the pretext of opposing the spread of the menace of any particular offending ideology. It would not, for example, permit the organization to persist in supporting a Chiang Kai-shek against the Chinese people. It may be remembered that any pretext based on the supposed menace of the spread of Communism would be out of place in such an organization specially in view of the fact that after having recognized U.S.S.R. as a member of that organization, Communism has become a possible legitimate ideological basis of a state. There will also be great difficulties in supporting the post-war activities of the victor powers in many of the Asiatic countries such as Korea, Indonesia, Indo-China and others.

From all this we cannot resist the conclusion that as yet international society has not made any progress towards making the individual the ultimate subject of international law. The state still intervenes with its sovereignty intact between the individual and the international system. Keeping in view the full significance of introducing the individual as the subject of international law we cannot lightly infer any progress in this direction from a few isolated illusory instances.

If the so-called international society has not yet reached the phase suitable for the introduction of the criminal law in it, is it at all approaching such a phase? Is such a society in formation? The international world cannot with impunity minimize the importance of caution required in planning a transition and the high cost of vengeance which is likely almost to be prohibitive at this stage.
LECTURE IV

PROCESS OF POST-WAR DEVELOPMENT OF INTERNATIONAL SOCIETY

The Moscow Declaration of 1943 relied on by Mr. Trainin as founding a fully developed international community and "dictating to the conscience of nations" the necessity of introducing criminal responsibility for attempts on the foundation of international relations was released on 1st November, 1943. The entire text of the declaration stands thus:—

"The Governments of the United States of America, the United Kingdom, the Soviet Union and China:

united in their determination, in accordance with the Declaration by the United Nations of January 1, 1942, and subsequent declarations, to continue hostilities against those Axis powers with which they respectively are at war until such powers have laid down their arms on the basis of unconditional surrender;

conscious of their responsibility to secure the liberation of themselves and the peoples allied with them from the menace of aggression;

recognizing the necessity of ensuring a rapid and orderly transition from war to peace and of establishing and maintaining international peace and security with the least diversion of the world's human and economic resources for armaments;

jointly declare:

1. That their united action, pledged for the prosecution of the war against their respective enemies, will be continued for the organization and maintenance of peace and security.

2. That those of them at war with a common enemy will act together in all matters relating to the surrender and disarmament of that enemy.

3. That they will take all measures deemed by them to be necessary to provide against any violation of the terms imposed upon the enemy.

4. That they recognize the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving states, and open to membership by all such states, large and small, for the maintenance of international peace and security.

5. That for the purpose of maintaining international peace and security pending the re-establishment of law and order and the inaugurating of a system of general security, they will consult with one
another and as occasion requires with other members of the United Nations with a view to joint action on behalf of the community of nations.

6. That after the termination of hostilities they will not employ their military forces within the territories of other states except for the purposes envisaged in this declaration and after joint consultation.

7. That they will confer and co-operate with one another and with other members of the United Nations to bring about a practicable general agreement with respect to the regulation of armaments in the post-war period."

The last recital in the preamble and paragraphs 1 and 4 to 7 of this Declaration alone can be said to have any bearing on the question of development of international society. No doubt there is ample expression of realization by the declarant powers of the need for a new international unity. The United Nations Organization was the result of their supposed response to this need. Beyond this, this declaration by itself did nothing else: it only helped the formation of a new bloc of powers.

One special feature of this declaration, having some bearing on the question of progress in the formation of international community, is the fact that the new bloc of powers was being formed of states based on conflicting ideologies. We may remember that the United States of America could not free itself of the fear associated with the U.S.S.R. until November 16, 1933. In November 1919, President Wilson declared: "We cannot recognize, hold relations with or give friendly reception to the agents of a government which is determined and bound to conspire against our institutions, whose diplomats will be the agitators of dangerous revolts, . . . ." Secretary of State Hughes also charged the U.S.S.R. with "the continued propaganda to overthrow the institutions of this country." In 1923 he said: "What is most serious is that there is conclusive evidence that those in control at Moscow have not given up their original purpose of destroying existing governments wherever they can do so throughout the world." Secretary Kellogg in 1928 issued a statement characterizing the U.S.S.R. as "a group which hold it as their mission to bring about the overthrow of the existing political economy and social order throughout the world and to regulate their conduct toward other nations accordingly." According to him even "a recognition of this Soviet regime has not brought about any cessation of interference by the Bolshevik leaders in the internal affairs of any recognizing country. . . ." "Indeed, there is every reason to believe," says Secretary Kellogg, "that the granting of recognition and holding of discussions have served only to encourage the present rulers of Russia in the policy of repudiation and confiscation as well as in their hope that it is possible to establish a working basis, accepted by other nations whereby they can continue their war on the existing political and social order in other countries."
The United States could get over this feeling against Russia only in 1933 when it accorded recognition to the U.S.S.R. as a state.

It is however not very surprising that alliances between strange bedfellows sometimes take place in international life. In international relations alliances and counter-alliances are not necessarily based on ideological uniformities and differences. As has been pointed out by Dr. Schwarzenberger,¹ "in a system of power politics the over-riding strength of the need to define relations of friend and enemy according to such impersonal principles of what may be called 'bad neighbour policy' can be gauged from cases in which interests of power politics and ideological fronts seemed to clash." The most superb refutation of the doctrine of ideological fronts would be seen in the alliance between the democratic states and the U.S.S.R. as also between the U.S.S.R. and Germany. These experiences ought to offer a warning against over-estimating the importance of ideological differences and uniformities in the international sphere.

In the present case the Moscow alliance was the outcome of the war-time need.

The war's end showed how these alliances dissolved at once and brought the beginning of a new pattern, not of peace, but of conflict. "In this real world, in Asia and in Europe, the principal post-war activity of the ruling politicians has been the carving out of spheres of influence or decisive control, the cynical buffeting of peoples, governments, territories, in the interests," not of international peace, but of conflicting patterns of power.² This, indeed, seems to be the natural consequence of an ever present conflict endangering peace both in national and international life. The desire and struggle of man for a law which is impartial and objective is, indeed, as old and persistent as the desire of those who hold the power to free themselves from such rule and use the law as an instrument of domination. As is pointed out by Dr. Friedmann" "in actual history the latter tendency has been much more successful; for all law is administered by man, and the most objective principle of law becomes tainted by the purposes of those who administer it. Thus many controversies fought out under the name of such principles as State Supremacy, the Rule of law, or the Natural Rights of the Individual have, in fact, been struggles between rival organisations and interests for power."

We are told that the object of all this post-war struggle is 'security.' But certainly it cannot be international security, it cannot be the promised inauguration of a system of general security. "The so-called "security zone" extended by Russia across Eastern and Central Europe, across the plains of Manchuria and out to the Kuriles in Northern Pacific bulges outward until it meets the rival 'security zones' coveted or defended by Britain and the United States. The American pressure for a string of Pacific
bases for decisive control in East China through the Kuomintang Government, for transformation of Japan into a docile puppet, for creation of secure and friendly Asiatic outposts, similarly extends until it reaches the gray and uncertain border areas where American interests confront Russian interests.'

This is the picture of the post-war progress towards the formation of international community under the reign of law which is presented by the post-war behaviour of the world powers: This is how the declarant powers are demonstrating to the world the sincerity of their solemn declaration that they recognized "the necessity of ensuring a rapid and orderly transition from war to peace and of establishing and maintaining international peace and security with the least diversion of the world's human and economic resources for armaments!" This is how these big powers are giving effect to their solemn undertaking of "united action" for the organization and maintenance of peace and security." One wonders whether these powers still claim that whatever they are doing, they are doing "for the purpose of maintaining international peace and security," are doing so on behalf of the community of nations and that, after consulting with one another!

Mr. Trainin read into these declarations promises and prospects of freedom for all. At the end of the war "for a fleeting time the mirage of freedom acquired sharp lines and colors;" "it seemed almost real" in some places. It however lasted barely for days. Many hitherto dependent nations in course of a few days after the war "descending from the clouds" had to land "with a rough jolt." We can take the instance of Korea. At the Cairo Conference in 1943 the powers had promised Korea its independence "in due course." We have seen the type of liberation that has befallen the Koreans.

War's end belied all hopes entertained by the world from the solemn declaration of the allied war aims. Out of the war every one hoped to see the emergence of some kind of world unity and peace, some kind of world order based on a new consciousness of unity of humanity, irrespective of race, creed or colour. High hopes were entertained of the inauguration of "a new and unpredictable age of soul" wherein there will be no dominated country, wherein selfish nationalism would find no place and wherein every nation would respect and help the realization of the right of all nations to choose their own form of government. War's end however only brought in aggravated conflicts. The international society stands as before in the same state in which it could offer no manner of renewal or readjustment except through death and destruction. Everywhere aggravated political and social pressures collide and tangle in pain, anger and frustration. The world lies shattered in fragments and seems farther than ever from finding its way to any new wholeness. Conflicts continue and it seems the war itself was only an episode, a great and convulsive episode in those continuing conflicts. The war really settled nothing: it only
substituted one power's attempt to gain supremacy in the place of another's. A billion dominated people must still keep on struggling, as they struggled before to win even a semblance of political freedom. The process of spoliation which started more than two centuries ago when the Western powers reached out aggressively for the wealth of the East, and whereby all but a tiny fraction were condemned to live in degrading poverty and primitive backwardness on a continent rich with land and wealth, with all human and material resources, still continues: the conflict between the powers still continues to win the position of this spoliator. The powers are starting all over again, ending one bloody cycle, beginning another. It does not appear that they really want to build a new world structure on a new foundation. One wonders if human nature essentially is really so hopeless as to render impossible any organization of the world more rationally, pooling its resources and its needs, federating its races, nations and culture:—Is there nothing which can inspire in them a creative effort in this direction?

In order to see what the leading powers of the world have been doing in this direction since the Second World War we should start with the Atlantic Charter of 1941.

The Atlantic Charter was really a declaration of "certain common principles in the national policies" of Great Britain and the United States. But the declarants based their hopes on them for a better future for the world.

The declarations were the following:

1. Their countries seek no aggrandisement, territorial or other;
2. They desire to see no territorial changes that do not accord with the freely expressed wishes of the people concerned;
3. They respect the right of all people to choose the form of Government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them;
4. They will endeavour with due respect for their existing obligations, to further the enjoyment by all states, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity;
5. They desire to bring about the fullest collaboration between all nations in the economic field with the object of securing for all improved labour standard, economic advancement and social security;
6. After the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want;
7. Such a peace should enable all men to traverse high seas and ocean without hindrance;

8. They believe that all the nations of the world, for realistic as well as spiritual reasons, must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea, or air armaments continue to be employed by nations which threaten, or may threaten, aggression, outside of their frontiers, they believe, pending the establishment of a wider and permanent system of general security, that the disarmament of such nation is essential. They will likewise aid and encourage all other practical measures which will lighten for peace-loving peoples the crushing burden of armaments.

These were mere declarations of certain principles of national policy of Great Britain and the United States of America. It may however be observed that these indicated very important changes in their national policies and, if sincere, would certainly go a great way towards the establishment of the world peace.

This declaration was released to the Press on August 14, 1941. British policy hitherto seems always to have been to secure a British World Order. Indeed the whole conception of the English-speaking people of the evolution of human affairs from a distant past towards a distant future hitherto has been that the future should belong to the English-speaking people, and that other nations would be fulfilling their destined function in history by ministering to the divinely appointed advancement of the English-speaking people.

"In securing a free hand for British business ability to work with the world for its field, British statesmanship had employed diverse policies for dealing with different parties. In the domain of primitive societies and of Oriental civilization, it had caught vast territories and populations within the fold of the new world order by the old method of military force . . . . . . On the other hand British statesmanship was deliberately light-handed in dealing with the new nations which were being called into existence by European civilization overseas. The policy was to humour their political susceptibilities in order to win the lion's share of their foreign trade."  

The British governing class did not always pursue the policy of securing for itself, through force of arms, any monopoly of political powers. The wide British military conquest in India was the exception and not the rule. Elsewhere, "confronted with the potential obstacle which local political sovereignties offered by their mere existence to the establishment of a world order, the British . . . . deliberately refrained from making a frontal attack on an antiquated political position which British Statesmanship confidently expected to turn by the automatic progress of a sweeping economic advance on a worldwide front. In their march towards their objective of an economic world order, the
British boldly left their political flank exposed, with the intention of ultimately rendering the forces of Local Sovereignty impotent by ignoring them for the time being . . . . . . For the immediate future, British statesmanship trusted in its ability to keep the peace by the exercise of British diplomacy invisibly supported by British sea power. In the further future, it looked forward to a time when the gossamer network of economic relations, which British trade and industry and finance were quietly and busily weaving round the world, would have been woven so thick and strong that the giant of local sovereignty would wake up, too late to find himself fast bound, hand and foot, as Gulliver woke to find himself the prisoner of the Lilliputians."

In order to emphasize the importance of the principles now enunciated and declared as the principles of Anglo-American policies it would be better if we notice here what happened when Japan felt the need of economic expansion. Japan always had one imperious and never-ceasing national problem to solve: the problem of providing additional means of livelihood on a rising standard of living, year by year, for a rapidly increasing population. This problem was the ceaseless concern of Japanese statesmanship, though in different phases of Japanese policy solution was sought on different lines. For nearly a decade since the time of the Washington Conference of 1922, such a solution was attempted by the tactics of commercial expansion and political good neighbourliness. This had been the policy of Shidehara, much praised by the international world. This meant acquiring for Japan an increasing share in an increasing aggregate turnover of international trade. Their peaceful pursuit in this respect by following the Shidehara policy had however been frustrated, may be, by inhuman forces beyond human control; but rightly or wrongly, the Japanese statesmen ascribed this frustration also to human forces beyond their control. The four English-speaking countries with seaboard on the Pacific did not appear to them to be sympathetic to their peaceful aspiration. When Japan came on the field there had already been the Anglo-American economic world order leaving no space for expansion to any new power, and those pioneer powers would not admit any partner. Indeed, from its very nature this did not admit of any sharing with others without at the same time diminishing its value. Yet "it was almost inevitable that the British feat imposing a British economic system upon the world should sooner or later evoke energetic reaction of a disruptive tendency—partly in negative resistance to the British pressure and partly in positive emulation of the British achievement."

In fact an endeavour on the part of any other party to take steps to hold its own against the dominant partner in the system in order to secure for itself some share of the freedom and the wealth and the power which were at once the cause and the effect of the Anglo-American hegemony, was logically fated to defeat its own ends; "for the coveted freedom and wealth and power of the classic
themselves to some form of international limitation and control. We do not know as yet whether this indicates any sincere inclination towards a progress in the direction of unification of the international world even in this economic field. Commerce and trade, as we all know, have hitherto been the constant instigators and attendants of either open warfare or the means of spoliation. Perhaps these would to a certain extent lose their selfish character if it is possible to bring about just and definite reconciliation between the interests of the nations. But even now the post-war world has not indicated any substantial inclination towards curbing this national selfishness. Even now we hear of one nation destroying its surplus production of foodstuff to keep up the price while other nations are starving for want of food. Even now it has been possible for observers with an urbane and compassionate view of humanity and having access to authoritative American sources to arrive at the fatal conclusion that "the Korean War is a war which some Americans have needed in order to uphold their way of life." "It looks very much as though.......the action of the United States Government had been determined primarily on the basis of a very able and very quiet intrigue by a few strategically placed persons in Washington, an intrigue which received absolution, forgiveness and a sort of public blessing by virtue of war hysteria." 11

Clauses 4 and 5 of the Charter are at least a lip response to the world’s genuine problem. This response ex hypothesi is in a very rudimentary stage. We can therefore look for nothing more definite than mere inklings which, let us hope, may not in the long run turn out to be false scents.

The parties to the Charter hoped to see established a peace after the final destruction of Nazi tyranny and it seems the final destruction of Nazi tyranny was considered by them as capable of firmly establishing security. Nazi tyranny has been crushed in a fashion unduplicated in history. Why then do we still hear of menace to security? The post-war behaviour of the declarants sufficiently establishes that even these peace-loving powers can be menaced by each other and certainly this is a permanent menace standing in the way of world unity. The declarants thought that disarmament of the aggressor nations will lighten, for peace-loving peoples, the crushing burden of armaments. They forget however that they themselves were a menace to each other. The disarmament of the aggressor powers is now complete but this has not in the least lightened for the peace-loving peoples the crushing burden of armaments. Leadership in countries looked upon by the world as leading powers seems to be gripped by dread of the consequences of peace upon their economy. This dread is suspected to be dictating the actions of the politicians and business leaders. "An economy accustomed to ever larger injections of inflationary narcotic trembles at the thought that its deadly stimulant may be shut off." 12
In international society "a greater power is a country which has at its disposal more than an average amount of powers (military, political, economic and financial) and, furthermore, is willing to use this power in order to maintain or improve its own position in international society." Beginning from the Paris Conference of 1856, whenever any attempt at regulating any military matter has been made, the attitude of the various powers has always been intimately correlated to their respective existing or prospective strength in that respect. They have always been moved by a narrow utilitarian motive. Every power favoured disarmament of its possible opponent; every power disliked diminution of its own special strength. "The Lion looked the Eagle in the eye and said, 'we must abolish talons.' The Eagle looked squarely back into the lion's eyes and said, 'we must abolish claws.' The Bear was for abolishing everything except universal embraces." 13

Indeed, pending a more perfect world organization and union shown to be capable of preventing war, no nation will give up any means effective to secure the ends of the war. We are told that if the countries having the atom bomb can expect to keep the technique of the atom bomb secret, it would hardly be reasonable to expect them to forego this advantage any more than it would be to expect them to make public any other plan of military defence and the military advantage derived from superior research or administrative organization. The frightful efficiency of the bomb, in spite of the consequent indiscriminate destruction of civilian life and property, offers an advantage, which, we are told, would not be foregone simply on "the sentimental humanitarian objections." 14 The incidental civilian loss and suffering, we are told, is also of military advantage in that it weakens the enemy's morale.

In spite of all the high-sounding wishes the nations are not in a mood to lighten the crushing burden of armaments. Indeed in the actual circumstances of the present-day world, even collective security means only a system of military alliance opposed to another system of military alliance. The first system calls itself something high-sounding; the second is nominated in advance the aggressor. The preparation continues to be for war and it must be so, so long as the international society fails to offer any manner of renewal or readjustment except through death and destruction. A Nazi tyranny may be destroyed; but the mutual menace will continue: the prospects of achieving a just settlement at the end of a League War are no better than at the end of any other kind of war.

The Atlantic Charter was proclaimed on August 14, 1941. After the entrance of the United States into the war the principles of the Charter were incorporated into the Declaration by the United Nations of January 1, 1942. In October 1943, the Foreign Ministers of the United States, Great Britain and Russia met in Moscow and adopted a series of declarations; the first of which proclaimed that they recognised
the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving states, and open to membership of all such states, large and small, for the maintenance of peace and security. Then came the conference of the Three Powers held at Dumbarton Oaks in Washington. This conference gave a series of proposals for the establishment of a general international organization, which were then submitted to the members of the United Nations for their consideration. Early in February, 1945, a conference of the Big Three met at Yalta in Crimea and there it was agreed that a conference of the United Nations should meet at San Francisco on April 25, 1945, to prepare the Charter of an organization along the lines proposed at Dumbarton Oaks. The Conference met as planned and gave the Charter of the United Nations on June 26, 1945. The Charter was then submitted to the signatory states for formal ratification in accordance with their respective constitutional procedure. Annexed to the Charter was the statute of the International Court of Justice, based upon the statute of the then existing Permanent Court of International Justice and forming an integral part of the Charter. The Charter came into effect on October 24, 1945.

Before coming to the Charter it may be profitable to notice its predecessor, the Covenant of the League of Nations, brought into being with similar objectives after the First World War. We have seen, while examining the character of international law, that at least prior to the First World War the essential weakness of the system lay in the fact that it operated effectively only within a limited field of international relations leaving a very wide area to the free decision of the individual sovereign states. If international law at all operated effectively, it did so only within an extremely limited field of international relations. The vital issues of what the nations regarded as concerning their national security were never allowed to be brought within that field. Even the fundamental economic issues upon which the leading nations believed their prosperity to depend were outside the field.

During the First World War and obviously under its pressure many noble ideas of developing international relations occurred to the statesmen and jurists of the world. They began to discuss ways and means by which future wars might be prevented through the collective action of the several states. At the close of the war a great experiment was attempted in this direction and the result was the Covenant of the League of Nations.

The covenant gave as its object the promotion of international co-operation and achievement of international peace and security. The contracting parties hoped to realize this object "by the acceptance of obligations not to resort to war," "by the prescription of open, just and honorable relations between nations," "by the firm establishment
of the understandings of international law as the actual rule of conduct among governments," and "by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another." All this however was only pious hope. There was a sort of guaranty of mutual protection against acts of aggression. Articles 10 and 11 of the Covenant contained the relevant provisions in this respect. Articles 10 to 16 of the Covenant are given here for the sake of convenience of reference:—

**Article 10**

The members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

**Article 11**

1. Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary-General shall on the request of any Member of the League forthwith summon a meeting of the Council.

2. It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.

**Article 12**

1. The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or *judicial settlement* or to enquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators *or the judicial decision* or the report by the Council.

2. In any case under this Article the award of the arbitrators *or the judicial decision* shall be made within a reasonable time, and the report of the Council shall be made within six months after the end of the dispute.
CRIMES IN INTERNATIONAL RELATIONS

ARTICLE 13

1. The Members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration or judicial settlement, and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration or judicial settlement.

2. Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration or judicial settlement.

3. For the consideration of any such dispute, the court to which the case is referred shall be the Permanent Court of International Justice established in accordance with Article 14, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them.

4. The Members of the League agree that they will carry out in full good faith any award or decision that may be rendered, and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto.

ARTICLE 14

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

ARTICLE 15

1. If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration or judicial settlement in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. Any party to the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary-General, who will make all necessary arrangements for a full investigation and consideration thereof.
2. For this purpose the parties to the dispute will communicate to the Secretary-General, as promptly as possible, statements of their case with all the relevant facts and papers, and the Council may forthwith direct the publication thereof.

3. The Council shall endeavour to effect a settlement of the dispute, and if such efforts are successful, a statement shall be made public giving such facts and explanations regarding the dispute and the terms of settlement thereof as the Council may deem appropriate.

4. If the dispute is not thus settled, the Council either unanimously or by a majority vote shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto.

5. Any Member of the League represented on the Council may make public a statement of the facts of the dispute and of its conclusions regarding the same.

6. If a report by the Council is unanimously agreed to by the Members thereof other than the Representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report.

7. If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.

8. If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.

9. The Council may in any case under this Article refer the dispute to the Assembly. The dispute shall be so referred at the request of either party to the dispute, provided that such request be made within fourteen days after the submission of the dispute to the Council.

10. In any case referred to the Assembly, all the provisions of this Article and of Article 12 relating to the action and powers of the Council shall apply to the action and powers of the Assembly, provided that a report made by the Assembly, if concurred in by the Representatives of those Members of the League represented on the Council and of a majority of the other Members of the League, exclusive in each case of the Representatives of the parties to the dispute, shall have the same force as a report by the Council concurred in by all the members thereof other than the Representatives of one or more of the parties to the dispute.

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CRIMES IN INTERNATIONAL RELATIONS

ARTICLE 16

1. Should any Member of the League resort to war in disregard of its covenants under Article 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

2. It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.

3. The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimize the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League.

4. Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon.

By Article 10 the Members undertook an obligation to preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. Article 11 provided that any war or threat of war, whether immediately affecting any of the Members of the League or not, was to be a matter of concern to the whole League. Acts of aggression after this would at least theoretically be a matter of concern to the organization as such. With such an organization even blood-revenge would develop beyond its primitive stage and would really be an act of the community. It may be noticed that though self-help was not absolutely barred by the subsequent articles of the Covenant it was narrowly restricted.

It could be expected that after this guaranty of mutual protection against acts of aggression the Law of Neutrality during belligerency would be very much affected. But the post-war behaviour of the leading powers in this respect belied this expectation. The prophecy proved true that "once war has broken out, nations will consult their own interests whether to fight
or remain neutral; they will not permit any international agreement to dictate their course of action."

Dr. Schuener of Vienna examined the practice of nations with regard to neutrality since 1928, and the result of his examination was presented before the Fortieth Conference of the International Law Association held at Amsterdam in 1938. The learned Professor traced the development of neutrality first since the foundation of the League of Nations up to 1928 and then since the Kellogg-Briand Pact. For the first period he considered how much regard the several nations paid to the Articles of the League Convention and summed up the result thus:

"In practice . . . all the states have acted during this period as though the law of neutrality had continued to exist."

He then cited instances in support of this view. Coming to the second period Dr. Schuener found "that the governments since 1928 have in their treaties as well as in their political declarations and actions accepted the point of view that neutrality in its traditional sense is not incompatible with the obligations of the members of the League and of the signatories of the Briand-Kellogg Pact of Paris. A number of governments have not hesitated to declare themselves neutral, to undertake obligations to remain neutral . . ."

Though not decisive, this throws some light on the question as to what changes took place amongst nations in their practical regard for all these provisions in the Covenant. Nations do not seem to have considered war against any member as being a matter of concern to the whole League. At least they preferred to recognize belligerent rights even in the case of a war in violation of the Pact of Paris. Both the U.S.A. and the U.K. entertained this view of the incidents of belligerency attaching to such a war. On February 27, 1938, Sir John Simon, discussing in the House of Commons the embargo on the shipment of arms to China and Japan, spoke of Great Britain as a "neutral government," and of the consequent necessity of applying the embargo to China and Japan alike. So at that time Japan's war in China was not considered to be an illegal thing.

No doubt U.S.A. was not a member of the League. But it signed the Pact of Paris.

As has been pointed out by Mr. Finch: "

1. In January 1933, during the alleged aggression of Japan upon China in violation of the Nine Power Treaty, the Covenant of the League of Nations and the Pact of Paris, Secretary of State, Mr. Stimson, recommended that Congress "confer upon the President authority in his discretion to limit or forbid, in co-operation 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." 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.

2. This law was put into effect by President Roosevelt in the War of Italy upon Ethiopia.

3. The Neutrality Act of 1935 was of a temporary character. It was replaced by permanent legislation in the shape of the Neutrality Act of May 1, 1937. This Act continued the embargo on the shipment of arms etc. to all belligerents . . .

4. 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 U. S. 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."

Mr. Finch points out that in the light of this legislative history of the official attitude of the government of the U. S. toward the interpretations of the Pact, it is impossible to accept the thesis that a war in violation of the Pact was illegal in international law on September 1, 1939.

"Neutrality legislation which has been enacted in the U. S. A. from time to time since the Pact of Paris, seems to indicate that both Congress and the President believe that the U. S. A., though a signatory of the Briand Kellogg Pact, can also remain neutral. American neutrality legislation is the result of a lively difference of opinion. On the one hand, it was claimed that the United States ought to draw, from the notion that neutrality is no longer compatible with the new international law, the logical conclusion that the exportation of arms, munitions and war materials to the aggressor should be forbidden. In February, 1929, Senator Capper brought in a resolution to forbid the exportation of arms and munitions to any country which the President declared had violated the Kellogg Pact. The resolution was rejected." This is taken from Dr. Schuener's report placed before the Amsterdam Conference of 1938 already referred to. It throws a good deal of light on the question now raised. Incidentally this seems also to indicate that at least this powerful state did not consider war in violation of the Pact an illegal thing. In any other view such a strong power would have to be taken to be so unscrupulous in its international behaviour as to openly help the doing of an illegal thing. The prospect
of profits from the sale of arms alone could not have been responsible for such behaviour in such a big power.

Many well-known authors are also of opinion that the traditional law of neutrality has lost none of its validity as a result of the Covenant or the Pact.

Judge J. B. Moore writing in 1933 says: "As a lifelong student and administrator of international law, I do not hesitate to declare the supposition that neutrality is a thing of the past is unsound in theory and false in fact. There is not in the world today a single government that is acting upon such supposition. Governments are acting upon the contrary supposition, and in so doing are merely recognizing the actual fact."

On February 27, 1933, Sir John Simon, discussing in the House of Commons the embargo on the shipment of arms to China and Japan, spoke of Great Britain as a "neutral government" and of the consequent necessity of applying the embargo to China and Japan alike.

This is how the guaranty of mutual protection contained in the Covenant was respected by the League Members.

The League of Nations was characterized by Aldous Huxley as a League of Society organised for war. According to him "in the actual circumstances of the present day, collective security means a system of military alliances opposed to another system of military alliances. The first system calls itself "the League"; the second is nominated in advance "the Aggressor."

Remembering that the League of Nations was only a league of a few of the nations, the so-called 'collective security' organized by it only meant threat of combined force of these powers against the 'aggressor.' But it might well be expected that "the League and the Aggressor will be two well-matched sets of allied powers" and threats never frighten the determined.

We need not proceed to discuss here the reason why the League of Nations failed to attain its objective of international peace by means of the system of collective security. Suffice it to say that the League hopelessly failed to help the development of international society into a community competent to maintain peace and to promote justice in the relations of the member States. The organization proved hopelessly ineffective. We might recall to our memory at this stage that the United States never became a member of the League and the League thus only became a League of some of the nations of the world. There was this lack of universality of membership.

It was generally expected that the powers profited by this experience of failure and the United Nations Charter is the product of this experience. The Charter, we are told, accepts certain fundamental principles essential for the development of international community, but not hitherto adequately recognized. The organization of international community by the Charter was expected to be effective.
It was expected that whatever practical advances might be made in the development of international law in the immediate future would be made within the circle of the United Nations.

We shall presently examine how far this expectation is borne out by the behaviour of the member nations. One thing only seems to have been scrupulously followed by the Nations: whatever they proceed to do they would never forget first of all to express their lip respect to the Organization. Perhaps the Charter's words are being made to serve to justify their desires, to rationalize their self-seeking efforts.

The Charter certainly would compare favourably with the Covenant of the League of Nations, at least in the following respects:

1. The United States is a member of the new Organization.
2. The principle of collective responsibility for the protection of its Members against acts of aggression is now accepted in more explicit terms.
3. Neutrality does no longer seem possible.
4. The obligation to settle dispute by pacific means is now absolute allowing no exception or qualifications.
5. The Members undertake to co-operate in the solution of problems of an economic, social, humanitarian character and to promote respect for and observance of human rights and fundamental freedom for all.
6. The Charter introduces more comprehensive provisions for the pacific settlement of disputes and more effective measures for the enforcement of law against possible aggressor:

(a) The functions and powers of the Security Council are given in Chapters V to VIII and XI of the Charter.

(b) (i) The Council is given the right to intervene in order to bring the parties to a controversy to agree upon the terms of settlement.

(ii) The Council may also *suo motu* decide upon measures to maintain peace including the use of armed forces.

For our present purpose the provisions defining the powers and functions of the Security Council are the most important. Both these powers however are subject to the veto power of any one of the five Permanent Members. Article 27 of the Charter in its clause 3 provides:

"Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting."

It is obvious that exercise of this veto power may cause a breakdown of the whole machinery. It may further be noticed that the Members of the United Nations did not *ipso facto* submit to the
jurisdiction of the International Court of Justice. Their acceptance of the jurisdiction even in legal disputes is still optional.

Even for the United Nations Organization, however, universality of membership cannot be predicated. Article 4 of the Charter provides that membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations. The admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council and it seems that the recommendation of the Security Council will always be subject to the exercise of the veto power. Indeed what has happened since the establishment of the United Nations amply indicates that the United Nations Organization is not yet the community of nations.

Even the Powers who were the original parties to the United Nations Organization could not feel secure under its protection and it is notorious how regional arrangements and power-blocs succeeded the Organization in rather unseemly haste. We may refer here to the Treaty of Dunkirk, dated the 4th March, 1947, the Brussels Treaty of 17th March, 1948 and the North Atlantic Treaty of the 4th April, 1949. We might also mention the Rio de Janeiro Inter-American Treaty of reciprocal assistance of 2nd September, 1947, in this connection.

It is beyond our purpose to examine whether the United Nations Organization was only a "Midsummer Night's Dream of San Francisco" or whether the subsequent treaties were "the calm, clear acceptance of realities of the present day." All that is necessary for us to notice here is that these arrangements for collective self-defence would take the international world back again to the primitive stage wherein blood-revenge would again stand permitted in its primitive form. The group would decide for itself whether the act offending it is or is not aggressive and would take action on its own decision.

No doubt this is the clear acceptance of the realities of the present day and certainly no nation can afford to be ignorant of the world in which it must have its being. But this is not the way to world unity,—this is not the way to that "new unpredictable age of soul" so much talked of after the atom blast.

This is only another "League of Nations" more extensively organized. But even now 'the League' and 'the Aggressor' will be two well-matched sets of allied powers; even now "the collective security" is only "a system of military alliances opposed to another system of military alliances." Even now the prospects of achieving a just settlement at the end of a League War are no better than at the end of any other kind of war.

As has been very aptly put by Prof. Toynbee, "the United Nations Organization may fairly be described as a political machine for
putting into effect the maximum possible amount of co-operation between the United States and the Soviet Union—the two great powers who would be the principal antagonists in a final round of naked power politics. The present constitution of the U. N. represents the closest degree of co-operation that the United States and the Soviet Union can reach at present. This constitution is a very loose confederation, and the presiding genius of Chatham House, Lionel Curtis, has pointed out that political associations of this loose-knit type have never proved stable or lasting in the past."

The United Nations Organization after the World War of 1939-45 is in the same stage as the United States after the War of Independence. In either case, during the war, a strong common fear of a dangerous common enemy held a loose association of states together. The existence of this common enemy was like a life-belt keeping the association afloat. When the common enemy has been removed by defeat, the association that was launched on his account has to sink or swim without the unintended but most efficacious aid which the common enemy's existence provided. In such post-war circumstances a loose confederation cannot long remain in its original state; sooner or later it must either break up or be transformed into a genuine and effective federation.

A federation, in order to be a lasting success, seems to require a high degree of homogeneity between the constituent states.

We expected a sort of world federation, a sort of superstate capable of creating confidence in every mind of its just protection.

Almost co-extensive with the human social existence there has continued a conflict between the desire and struggle of man for an impartial and objective law and the desire of those who from time to time happen to wield the ruling power to free themselves from such a rule of law and use the law as an instrument of domination. The copious literature on the subject of formation of the state has, to no inconsiderable extent, been caused by a desire to hide the essentially political character of the question behind legal argument. In point of fact, there has hardly ever been a proposition in public law which has given rise to more vehement disputes than this question, nor one to which practical consequences of a wider bearing have been attributed.

As long as the question of formation of the State arises only in connection with mere internal struggle, as was the case through all antiquity, it need attract comparatively little attention here for our present purpose. From the moment, however, an antagonism between the notion of sovereign national state and that of international society arises, the inquiries are to be instituted with regard to the inherent rights or to the derivative and mediate nature of the state. This would invest the question of the origin of the authority of a state with extraordinary importance.
Further, since at least the origin of the U.S.S.R. the question of co-ordination of different social systems in one international order has given rise to new problems. It has now become a most difficult question whether international law should be regarded as essentially bound to certain general principles of internal order which are characteristic of the majority of the member states or whether it is to be interpreted as a "system neutral" so as to include in its framework any social structure without in any way limiting the national freedom of the members of the international society in the matter of choice of social foundations.

The gravity of this new difficulty would be apparent if we realize the extent to which there has been want of agreement on the basic concepts which are essential for the normal functioning of an organization we are hoping to establish.

The basic concepts which are not only essential for the understanding and observance of the purposes and principles of the organization, but are also of importance in determining mutual relations among the member states themselves are those of state, law and sovereignty. Unfortunately there has been fundamental disagreement on each one of these concepts among the members of the organization. It will be out of place here to proceed to outline the Soviet variation of these three concepts and assess how far responsibility for the failure of the organization is to be shouldered only by the Soviet.

We are not here concerned with the merits or demerits of the different theories thus propounded. Soviet Russia is there, with such fundamentally different conceptions of state, law and sovereignty. In spite of this, world peace should not be an impossibility.

The character and extent of the new difficulty would be apparent if we refer to a few of the hitherto generally accepted principles of international life. The right of aliens to possess and deal with property and the inviolability of such property except for public purposes and then only on payment of full compensation by the State have hitherto been the recognized principles of international law. As is pointed out by Dr. Schlesinger "'the underlying assumption in this respect has been that the desire of a state to abolish certain kinds of private property in general is not a legitimate public purpose and that adequacy of compensation ought to be judged, not by the standards which the state in question deems right in dealing with its own subjects, but by the standards accepted by states which differ from its fundamental outlook on social issues.'" This assumption really involves another, namely, that the standard of right and duty which the majority members have hitherto prescribed for themselves in their domestic affairs is the universal just standard or that certain standards of municipal order provide the only sound basis for the economic intercourse upon which international life is to rest. It is next to impossible that

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states would readily accept the theories of one side in the great economic disputes and it seems the conflicting theories are almost irreconcilable.

Reconciliation is suggested by Dr. Schlesinger by introducing a distinction between a state qua social institution and a state qua subject of International Law. A state qua social institution may be only an instrument of class-rule as is asserted by the Marxists. But a state qua subject of International Law in its international relations purports to act on behalf of all the classes. Dr. Schlesinger thinks that it is not difficult to demonstrate that the identification of class and state broke down where the state, whatever its class structure, acted in the name of all classes. We are not here concerned with the merits or demerits of the different theories propounded for solving the difficulty. All that we need point out here is that without a satisfactory solution of the new problem no development of international community is possible.

It will be pertinent in this connection to enquire what reasons from time to time have been assigned for the limits and moral preponderance of public power, as contrasted with the claims of individual liberty and of private aims,—how the question of the origin of human communities has been sought to be solved and how the origin of their concentrated consciousness and capacity for action was sought to be accounted for.

We shall start with that conception of the state according to which it was derived directly from the will of individual men. In connection with this conception the discussion of the origin of the state presented itself, besides, as the solution of the problem how it was that such consciousness and force could spring from the will and consent of the individuals so as to exceed, not only in the matter of quantity, but also of quality, the combined consciousness and force of all the individuals.

The conception of the origin of the state prevailing throughout the whole of the Middle Ages and through the greater part of our own age has been invariably connected with some metaphysical proposition accepted as an a priori truth. The proposition that every individual has an absolute value and purpose of his own, and is consciously free, on the one hand, and, on the other, the conception of the divine institution of the order of the world and of its embodiment in some certain external organism, were received as indubitable fundamental doctrines. As a consequence, the problems concerning the formation of self-consciousness of the community as well as touching the sources of authority presented themselves in a metaphysical garb, and their solution involved the reconciliation of some seeming logical contradictions.

Indeed history can give us no direct answer to the question of the origin of the state. For it is impossible to draw inferences concerning movements which took place before the life of the state began from the changes occurring in the life of a state; history itself cannot explain backward beyond the existence of the state.
New states had, it is true, arisen, and are continually arising before the eyes of history, but they are invariably formed from the elements of antecedent states, and under the influence of existing institutions having the characteristics of a state.

The notion of the state, and the directness of its powers, become clearly defined and highly perfected, whenever the constitution of the body of the state no longer permits the arraying of the material forces against each other, and, in lieu thereof, substitutes rules more and more general in nature, rules which refer not only to single action and individual aims, but embrace general conduct and permanent interest. Differentiation as to the dominant organism takes place at the same time that the interest of the society or community becomes distinguished from individual private interests. The consciousness of the state with respect to its own circumstances, its activities and its aims, increases uniformly with the growth of the consciousness of its own members with regard to their relations to the state.

It will be beyond my purpose to review here the various theories of the origin of state. I would only notice here the conception of the state of nature and a few of the contractual theories of the origin of state.

The writers on the contract theory proceeded on the assumption of a supposed state of nature. Some assumed the state of nature to be imperfect and replete with ills; others took it to be contented and happy. The dismal or the cheerful view of the state of nature was taken according as the theorists occupied the standpoint of absolutism, or, at all events, that of the overwhelming importance of the sovereign power, or assumed the task of vindicating the supremacy of the people. The ready reception of either of these views was, however, influenced also by other circumstances with which we are not much concerned here.

The essential features, however, of any conception of the state of nature consist in this: that the individuals in a condition of nature were always independent, free, and not connected by any tie with each other except that of blood, and yet were invariably invested with the same mental qualities which individuals in a society possess as a heritage of historical development.

We need not stop here to point out the contradiction contained in the last proposition. Nor need we enquire how it is that it struck no one as being strange that the transition from the state of nature to that of society was accounted for by a mere contractual agreement. It is however tremendously important that we should know precisely what are the theories which the existing national states still believe and follow. A knowledge of this alone can place us in a position to predict, though roughly, how in a given set of circumstances they will act. We must avoid every approach that only points to the eclectic opportunism of power politics. The philosophical assumptions underlying the
different peoples and governments of the contemporary world cannot be ignored for our present purposes. We must all be equipped with an intellectual realism grounded in a philosophical, economic and political theory which defines what we stand for, if we are not prepared to waste our power and influence in the contemporary world.

The so-called democratic countries of the contemporary world are still led by the Lockean, Humean, Jevonean philosophy, interspersed with the Church of England or Roman Catholic or Aristotelian philosophical assumptions, which underlie the traditional French and Anglo-American Democracies. Soviet Russia follows the Marxian philosophy as expounded by Lenin.

According to Locke the condition of nature is not identical with that of war, but the latter may very easily arise from it, and the avoiding of this is a great reason why men should leave the condition of nature and enter society, where every member is no longer his own judge, but the community becomes the fixed, permanent, and impartial judge, and the common judge of all, in conformity with rules equal with regard to every body. The protection of property forms specially an object of uniting into a state, for without it the maintenance of peace would be impossible, the state of nature being in this very respect most defective in affording such protection. Whenever, then, the mass of men, by the consent of every man, formed the community, it formed at the same time the community into a body possessing the power to act as one body, which means nothing else but the rule of majority. According to Locke a second contract was not at all necessary to establish the state. It was Locke’s philosophy which prepared men in Great Britain as well as in the United States, after giving expression to their own opinions, to accept the verdict of the majority and which so modified their theory of religious values as to lead them to regard toleration, not merely toward other Protestant sects and even toward Roman Catholic Christians, but also toward all other religious faiths, as a positive good. As George Trevelyan writes, “Locke’s argument that Toleration was not merely politically expedient but positively just and right, became generally accepted as the Eighteenth Century went on.”

According to Locke, every one, in agreeing with others to form a state under a common government, assumes the obligation towards every other member of that society to accept the determination of the majority, and to recognize it as final. Although men, in becoming members of the state, yield up the equality, liberty, and executive power which belongs to them in a state of nature, and place them into the hands of the society, to the end that they shall be used for the good of that society, yet as this is done by every one with the intent of better guarding himself, his liberty and his property, the society or state formed by men can never extend further than the common weal. Hence, whoever is invested with the sovereign power of the state is bound
to rule in accordance with fixed and permanent laws, which being declared and known to the people, must be administered through an impartial and upright judiciary; and is not permitted to employ the power of the community within the state except for the purpose of executing the law, and, without the state, merely to punish injuries done to it, or to defend it against foreign attacks.

It seems that Locke identifies the sovereign power with its depositary, the ruler, and finding it reasonable that the power of the latter should be limited, looks upon the sovereign power itself as limited and thus confounds the limits of the rights of the supreme power with the conditions of the expediency of asserting it.

Rousseau's Social Contract consists in this that every one enlists his person and all his strength in the service of the community under the supreme direction of the general public will and enters into the body of the whole as its inseparable component element. From this social contract arises the sovereign power or the sum of the whole, in which every one has, so to say, covenanted with himself, and is therefore bound in two directions, namely, as a member of the sovereign power with regard to the particular individuals, and as a member of the state with regard to the sovereign power. But the sovereign power, as such, cannot, under any circumstances, be bound with regard to any one.

This doctrine of the sovereignty of the people rendered the theory of Rousseau attractive, not because it had been satisfactorily proved, but because he replaced the notion of the state, a notion which had well nigh merged into that of the ruler, by the notion of the nation, and insisted upon the absoluteness of the aim of the state as being the public aim.

The practical and immediate effect and importance of ideas do not depend upon their truth: at least not upon the sense in which they were conceived as truths by their authors and propagators, but upon their aptitude for being able to express wants felt by some large groups of men.

It may be noticed here that this confusion of the sovereign power with the ruler is not without practical significance. As soon as there is government some men have more power than others and we know what love of power means. Very soon although primitive impulses towards social co-operation still exist they are immensely reinforced by the power of the government to punish those who disobey it. Soon only a minority at the top of the social scale need any psychological mechanism towards social cohesion: the rest, the majority, the mass merely obey. It does not matter that large parts of the population become unhappy so long as this condition of wide-spread suffering does not prevent the prosperity of the state, so long as it leaves unimpaired the enjoyment of life by the holders of power.
This is roughly the theory prevailing in the democratic world as to how an association develops into a state. It is not surprising that there every one is expecting the formation of an international society in the same manner by the contractual agreement of the several national states. Circumstances may supply motives to the several national states for thus uniting into a society. Such circumstances, however, would only supply motives for the unification.

But necessity is only the mother of invention; the other parent is obstinacy.

Indeed ""strait is the gate and narrow is the way that leadeth unto life, and few there be that find it.""
LECTURE V

INTERNATIONAL CO-OPERATION AND REGIONAL ARRANGEMENTS

The text of the Charter of the United Nations emerged from the San Francisco Conference in a very different form from that envisaged in the Dumbarton Oaks Draft Proposals. From the San Francisco Conference the Charter emerged as a document containing 111 articles as compared with the 26 articles of the Covenant of the League of Nations. The United Nations had not been in existence very long before its practice showed that there were a number of hidden difficulties which had not been previously envisaged. Many of the articles were found to be ambiguous. Some of them could be interpreted in more than one way within the scope of the recognized rules of international law with regard to treaty interpretation. The lack of goodwill on the part of the various delegations produced various interpretations directed to justifying a particular line of action. In addition confusion was soon worse confounded by the disunity between the Big Powers. It will be beyond my purpose to bring in all these details. All these features of the Charter have been admirably examined by Professor Kelsen in the light of history and drafting and of the rules of international law concerning the interpretations of treaties in his book entitled "The Law of the United Nations" published under the auspices of the London Institute of World Affairs.

The Organization undertook the function not only of settling the international disputes of its members but also of bringing about adjustment of situations not having the character of dispute but which might lead to a breach of the peace. Such adjustments or settlement of disputes and situations are to be brought in conformity with the principles of justice and international law. Besides these, the organization prescribed for itself other functions the purpose of which was to prevent the breach of peace by promoting international co-operation in the various fields. It provided for such co-operation in the economic, social, cultural and educational fields as also in the political field.

International co-operation would ordinarily express the idea that it is a co-operation of states based on an international agreement in the international field. In the Charter, however, the expression seems to have been used in a wider sense to include co-operation in the national field as well.

In the political field the various provisions of the Charter concerning, for example, human rights seem to establish a function of the organization for co-operation in the field of national politics, since, as
we shall presently see, it is in the first place national legislation by which these rights are to be guaranteed. There are provisions for assisting in the realization of human rights promoting international co-operation in the several fields. Indeed if the various provisions made in respect of international co-operation in the several fields were only realized in practice, the organization would not go in vain. But that is beside the point for our present purposes. This international co-operation would not change the character of the international society for the present purpose so as to offer an appropriate field for international penal law.

In a recent address, Ambassador Warren R. Austin, Chief of the United States Mission to the United Nations, discussed proposals to transform the United Nations into a "World government" whose laws shall govern individuals as well as states. He asked: "What will be the dividing line between the jurisdictions and judicial powers of the world government and the several states? Is it as simple a problem as that of the United States, which required a civil war, and repeated judicial decisions, to determine?" He answered these questions as follows: "We should pause in contemplation of the risk of seeking to establish any world government now. We must deal with the world we have and the tools we have." He was persuaded by experience that such an agreement cannot be had "at this time or within the predictable future."

If the Organization of United Nations has failed to found a new society on a new basis as was hoped by the world, the reason seems to be that the world powers failed to grasp clearly and firmly the fact that the problem before them was essentially a new world problem, and not merely the old local problem with world significance made more complex. They forgot that the problem before them did not mean simply some change here and there in view of the difficulties experienced during war. The problem involved drastic, radical change of the whole structure of human society. "It is not a matter of smoothing out the jagged edges of self-expanding spheres of influence but of abolishing such spheres altogether. It is not a matter of adjusting boundaries or economic barriers but of levelling them. It is not a matter of creating a euphemistic system of 'trusteeship' to cloak colonial and strategic expansion but of ending once and for all the whole colonial system and any form of sujediction of one people by another." Indeed it is a matter of the whole context of society. It is a matter of transforming the world and the way we all live in it.

That the nations are not inherently incapable of facing a problem like this becomes apparent from what they could do during the war and under its pressure. To summon the strength needed to beat down the adversary, the nations in effect could transform their own
economic systems. With the war's end, however, the framework of common effort fell to pieces and it became obvious that the war had not been fought to liquidate national economic power. On the contrary every effective action taken was in the direction of restoring the previous condition of national and international anarchy. "The best, by act and by pressure, that they could produce out of the cataclysm of the war was the United Nations Organization. Yet the United Nations, like the League of Nations before it, is barely even an acknowledgment that the world must function on a unified basis or not at all. It is a crude expedient, resting essentially on the old ideas, the old practices, the old premises, the old leaderships. Even more barefacedly than the League and with fewer reservations, the United Nations leaves the fate of the mass of the weak in the hands of the few strong. It is at best a mild check on rapacity, at worst a thin cloak for it. It is a mirror of our world, not an instrument for changing it." 

The real problem is again relegated to the background. Ego-centric national interest again occupies the field and chokes off the growth of the world political economy. "The decisive foreground is occupied by all the mutual and well-grounded fears, military preparations, and manoeuvres, threats and counter-threats, weapons and counter-weapons, struggle for spheres of influence and power over strategic materials and territories." 

In the current reality, some amount of lip-service is no doubt duly paid to various noble objectives, but they remain remote from the sphere of action. The powers in the meantime show sufficient awareness of the implications of this reality. "Amid talk of disarmament and 'control' of sources of atomic energy, the United States has gone on making atom bombs. It is spending billions to develop even newer and more terrible weapons. It is seeking networks of strategic bases in both oceans and is openly exploring the requirements and conditions of future war across the polar ice cap. Russia, on its part, has swallowed up huge territories and yoked millions of people to its totalitarian machine. It has stripped conquered lands and goods and machinery. It has expanded its military power, cynically established its total political control over neighbouring countries. It seeks feverishly to overcome the American atomic advantage and in expectation of being able to do so, it leans threateningly across the borders of Turkey, Iran, and Manchuria. While all this goes on, all talk of peace, security, stability—to say nothing of human freedom—is ephemeral nonsense. Europe continues to suffocate under its crazy-quilt patchwork of outworn national and economic barriers and Asia is condemned to more sterile and inconclusive strife." 

The Senate of the United States felt this 'reality' and proceeded to advise the President to pursue six objectives, of course within the framework of the United Nations Charter. The Senate resolution in this
respect is often called "the Vandenbergh Resolution," the text of which covers the following matters:—

(1) Voluntary agreement to remove the veto from all questions involving pacific settlements of international disputes and situations and from the admission of new members.

(2) Progressive development of regional and other collective arrangements for individual and collective self-defence in accordance with the purposes, principles and provisions of the Charter.

(3) Association of the United States, by constitutional process, with such regional and other collective arrangements as are based on continuous and effective self-help and mutual aid, and as affect national security.

(4) Contributing to the maintenance of peace by making clear its determination to exercise the right of individual or collective self-defence under Article 51 should any armed attack occur affecting its national security.

(5) Maximum efforts to obtain agreements to provide the United Nations with armed forces as provided by the Charter, and to obtain agreement among member nations upon universal regulation and reduction of armaments under adequate and dependable guaranty against violation.

(6) If necessary, after adequate effort toward strengthening the United Nations, review of the Charter at an appropriate time by a General Conference called under Article 109 or by the General Assembly.

This important advice on foreign policy developed in close cooperation with the Department of State. Three of its provisions proposed some reform of the United Nations: the other three related to the development of regional and other collective self-defence arrangement, the right to which was reserved by Article 51 of the United Nations Charter.

The United Nations Charter, it is thus obvious, could not inspire much confidence in the minds of the American people and we are told that the American people, the Committee on Foreign Relations, the Senate and the Congress were all showing their deep concern over the strengthening of the security of the North Atlantic Area as a factor in the national security and well-being of the United States. "The overwhelming Senate votes on the United Nations Charter and the Rio Pact, together with the passage of the Foreign Aid Act of 1947, the program of assistance to Greece and Turkey, and the Foreign Assistance Act of 1948, were tangible evidence of that concern. On June 11, 1948, the Senate passed Vandenbergh Resolution by a vote of 64 to 4, and conversations were begun the following month with the Brussels Treaty Powers and Canada to consider what further steps might be taken with respect to the security of the North Atlantic Area."

In October 1948, the conversations resulted in the agreement that a treaty providing for a collective defence arrangement within the
framework of the Charter was necessary. The North Atlantic Treaty was accordingly negotiated and signed on April 4, 1949, by the representatives of Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, United Kingdom and the United States of America. The text of the Treaty is divided into 14 articles:—

**Article 1**

The Parties undertake, as set forth in the Charter of the United Nations, to settle any international disputes in which they may be involved by peaceful means in such a manner that international peace and security, and justice, are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations.

**Article 2**

The Parties will contribute toward the further development of peaceful and friendly international relations by strengthening their free institutions, by bringing about a better understanding of the principles upon which these institutions are founded, and by promoting conditions of stability and well-being. They will seek to eliminate conflict in their international economic policies and will encourage economic collaboration between any or all of them.

**Article 3**

In order more effectively to achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack.

**Article 4**

The Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence, or security of any of the Parties is threatened.

**Article 5**

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter of the
United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

ARTICLE 6

For the purpose of Article 5 an armed attack on one or more of the Parties is deemed to include an armed attack on the territory of any of the Parties in Europe or North America, on the Algerian Departments of France, on the occupation forces of any Party in Europe, on the islands under the jurisdiction of any Party in the North Atlantic area north of the Tropic of Cancer or on the vessels or aircraft in this area of any of the Parties.

ARTICLE 7

This Treaty does not affect, and shall not be interpreted as affecting, in any way the rights and obligations under the Charter of the Parties which are members of the United Nations, or the primary responsibility of the Security Council for the maintenance of international peace and security.

ARTICLE 8

Each Party declares that none of the international engagements now in force between it and any other of the Parties or any third state is in conflict with the provisions of this Treaty, and undertakes not to enter into any international engagement in conflict with this Treaty.

ARTICLE 9

The Parties hereby establish a council, on which each of them shall be represented, to consider matters concerning the implementation of this Treaty. The Council shall be so organized as to be able to meet promptly at any time. The Council shall set up such subsidiary bodies as may be necessary; in particular it shall establish immediately a defence committee which shall recommend measures for the implementation of Articles 3 and 5.

ARTICLE 10

The Parties may, by unanimous agreement, invite any other European State in a position to further the principles of this Treaty and
to contribute to the security of the North Atlantic area to accede to this Treaty. Any State so invited may become a party to the Treaty by depositing its instrument of accession with the Government of the United States of America. The Government of the United States of America will inform each of the Parties of the deposit of each such instrument of accession.

ARTICLE 11

This Treaty shall be ratified and its provisions carried out by the Parties in accordance with their respective constitutional processes. The instruments of ratification shall be deposited as soon as possible with the Government of the United States of America, which will notify all the other signatories of each deposit. The Treaty shall enter into force between the states which have ratified it as soon as the ratifications of the majority of the signatories, including the ratifications of Belgium, Canada, France, Luxembourg, the Netherlands, the United Kingdom and the United States, have been deposited and shall come into effect with respect to other states on the date of the deposit of their ratifications.

ARTICLE 12

After the Treaty has been in force for ten years, or at any time thereafter, the Parties shall, if any of them so requests, consult together for the purpose of reviewing the Treaty, having regard for the factors then affecting peace and security in the North Atlantic area, including the development of universal as well as regional arrangements under the Charter of the United Nations for the maintenance of international peace and security.

ARTICLE 13

After the Treaty has been in force for twenty years, any Party may cease to be a party one year after its notice of denunciation has been given to the Government of the United States of America, which will inform the Governments of the other Parties of the deposit of each notice of denunciation.

ARTICLE 14

This Treaty, of which the English and French texts are equally authentic, shall be deposited in the archives of the Government of the United States of America. Duly certified copies thereof will be transmitted by that Government to the Governments of the other signatories.
The object of all this, the world is told, is "security." One might ask: security against whom and against what? It may not be out of place to point out that there is now no power worth the name other than the declarants of the high-sounding policies proclaimed during and after the war and other than the members of the United Nations. The aggressors, Japan and Germany, have been crushed to an extent sufficient to exclude the possibility of their being in the near future a menace to the security of the world again. Even if we were to assume that new world conditions will give them the chance to rebuild and regain their war-making capacity, it is obvious that they can do so only as the instruments of this or that great power and that again not possibly before decades have passed. Obviously then the world's peaceloving powers themselves have now become a menace to each other.

We are told that the security measures are really guided by considerations of prudence. By way of illustration we may refer to the justifying explanations of, say, America's policy against Russia.

Amongst the world powers there were profound differences of opinion as to Russia's interests and intentions. Mr. Lippmann* points out this difference thus: "There are those who hold that the Russians will for a long time to come be absorbed in the internal development of their vast country, and that the Soviet Union will be very nearly as self-centred as was the United States during the nineteenth century. This is one hypothesis. There is no way of proving that it is correct."

"The other view, of course, is that Soviet Russia is an aggressive state which in various combinations fuses the ambitions of the Tsarist Empire with the projects of the Third International. There is no way of proving that this hypothesis is incorrect."

But, observes Mr. Lippmann, a foreign policy ought not to be based on a blind choice between two unprovable hypotheses. Prudence requires that a state should be prepared for all the eventualities that can reasonably be anticipated. This, he says, is the elementary rule of prudence in statecraft.

It may not be out of place to mention here that somehow Russia was not considered to be a thoroughly safe neighbour for the rest of the world since her adoption of the Communist ideology. Even now it is believed that "before Russia can have a correct ideology and thereby become a thoroughly safe neighbour for the rest of the world, certain unjustified portions of her Marxian philosophy must be dropped." One is said to be "the determinism of her dialectic theory of history and the application of this dialectic to nature itself, rather than merely to theories of nature." "The essential point in the error is the supposition that the negation of any theory or thesis gives one and only one attendant synthesis." . . . But "nobody has the right to affirm with dogmatic certainty that he is giving expression either to the nature of the historical process or to the dialectic achievement of greater and greater good, when he selects a given utopian social hypothesis such
as the traditional communistic theory and forthwith proceeds to ram it down the throats of mankind in the name of the determinism of history." "

Whatever that may be, the whole world once suffered from the terror of Communism and Communistic development. It seems that even today, in spite of all the declarations of noble sentiments by the United Nations, of which union the U.S.S.R., the United States of America and the United Kingdom are the principal parties, the world has not been able to free its mind of this terror, real or fancied. All these preparations are really against the apprehended menace of the U.S.S.R.

Messrs. Heindel, Kalijarvi and Wilcox, Staff Members, Senate Foreign Relations Committee, commenting on the Atlantic treaty, observed: ""The Treaty is a product of the free-world struggle against Imperialistic, militant Communism." This reminds us of the Anti-Commintern Pact for which Japan was charged with aggressive preparation. The learned staff members named above go on observing: ""There is a real need for the Pact. The United Nations was to provide the world with security against war, but during the last four years it has been frustrated again and again by the studied use of the veto power, and a general unwillingness on the part of the Soviet Union to co-operate, especially in matters which concern security and stability. The world as a consequence is beset with uneasiness and insecurity which retard all efforts to rehabilitate civilization from the ravages and damages of World War II."

This would at once disclose the hollowness of the talk of world unity. It goes without saying that if on one side there is this preparation in the name of 'security,' there will be counter preparation of equal magnitude on the other side. of course, in the name of the same self-defence and world peace. Peace herself is sure to get confounded.

It must have been observed that both the Vandenberg Resolution and the North Atlantic Treaty show due respect to the United Nations. The resolution says that whereas peace with justice and defence of human rights and fundamental freedom require international co-operation through more effective use of the United Nations, therefore "the Senate reaffirmed the policy of the United States to achieve international peace and security through the United Nations . . . ." and for this purpose the United States Government is advised to pursue the following objectives "within the United Nations Charter." Regional and other collective arrangements are some of these objectives and these are for "self-defence," "effective self-help" and "maintenance of peace." The parties to the Treaty also began by reaffirming "their faith in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all people and all governments."
The language of the Treaty was careful enough to express that it was conceived within the framework of the Charter and remains subordinate to the machinery of the United Nations. The Treaty is purported to be founded upon Article 51 of the Charter which runs thus:—

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

Articles 3 and 5 of the Treaty provide for mutual military assistance. Of course, the obligation of the Articles would extend only to cases of defence. It may however be mentioned in passing that the Tri-partite Pact which was considered to be a stage in the preparation for aggression was also only a military alliance of this type. For comparison it will be convenient to have that Pact here. The Pact ran thus:—

"We, the governments of Japan, Germany and Italy, under the common belief that the first essential for lasting peace rests only upon enabling every nation to have contentment and peace, being lotted to a certain sphere of activity of her own, have made it our fundamental principle to establish a new order for co-prosperity of its own race, in Great Asia and Europe, and to maintain the same; and have reached the decision to co-operate and co-assist each other in carrying out this basic fundamental in each respective field; and further, the governments of these three nations to be willing to extend their co-operative hands over all nations willing to endeavour in realisation of the same idea in any part of the world; and in hope of the realization of our final object of establishing lasting peace, the governments of Japan, Germany and Italy have hereby entered into the following agreement:—

"Article I. Japan shall recognize and respect the leadership of Germany and Italy for establishment of new order in Europe.

"Article II. Germany and Italy shall recognize and respect the leadership of Japan for establishment of new order in Great Asia.

"Article III. Japan, Germany and Italy shall agree to co-operate with one another in carrying out the aforementioned policy: and, further, if and when any one of the signatories be attacked by any third power not presently engaged in the present European war, or the China Incident, the other two shall aid her in any way political, economical or military."
CO-OPERATION AND REGIONAL ARRANGEMENTS

"Article IV. In order to effect this alliance, a joint specialized committee, composed of representative members appointed by each power of Japan, Germany and Italy, shall meet as early as possible.

"Article V. Japan, Germany and Italy shall confirm that the above stated articles of this alliance have no effect whatsoever on the present existing political relation between each or anyone of the signatories with Soviet Union.

"Article VI. This alliance shall become effective on the day of signature and shall remain in force for the period of 10 years.

"Upon demand of any of the signatories before expiration of the term, the signatories will confer over its renewal."

These alliances in international life are entered into to fulfil certain important functions. "They are the compensation for an imaginary or real inferiority of a state as compared with a rival power."

An alliance certainly may be an openly or secretly avowed aggressive combination. Its purpose may also be the maintenance of the existing state of affairs. Such alliances are also designed to compensate the feeling of isolation, fear and insecurity on the part of a state. Sometimes through alliances it may be possible to uphold a given status quo: the state interested in its alteration may fear the alliance rallied against it.

We need not proceed to an elaborate examination of the manifestation of such alliances in the political history of the world. We might only refer to a few such recent arrangements. Before the last war we had the Locarno Treaties, the Little Entente, the Balkan Pact, the Baltic Union, the Four-Power Pact of 1933, the London Convention of the same year and the like. Since the Second World War there have come into being the Rio Treaty, the Brussels Pact and the North Atlantic Treaty. This is indeed a very ancient tendency and it seems that even the post-war Organizations could not in the least abate this tendency. We are told that "it represents and translates into political terms, man's basic urge towards self-preservation." We are further told that "In states, as in human beings, this urge expresses itself in many forms. The most common form is the cultivation of good relations with one's neighbours, so as to be protected against harm from the nearest quarter whence attack may come." In the international world, however, even neighbours are not always considered to be safe friends and alliance with their neighbours is taken to be safer. This has been the ancient political wisdom also. "Be not your neighbour's friend, but your neighbour's neighbour's" is a maxim of Kautilya and it was a maxim of Venetian foreign policy "to be on good terms with your neighbour, but on better terms with your neighbour's neighbour."

This urge towards self-preservation in international life has taken on a variety of collective forms. As we have seen already, the League of Nations organized after the First World War was no better than a
particular variety of the same. Even the “United Nations” is an organization of the same category, though more comprehensive.

If will be beyond our purpose to analyse and discuss here these numerous forms. Suffice it to remember that these arrangements have been recognized to be the result of an elemental urge, the urge towards self-preservation in human society.

It must be remembered that in the state of international life as it was before the last war the right of self-defence and self-preservation was considered to be a fundamental right, all the duties of states being subordinate to this right. Hall * says:—

“Where law affords inadequate protection to the individual, he must be permitted, if his existence is in question, to protect himself by whatever means may be necessary, and it would be difficult to say that any act not inconsistent with the nature of a moral being is forbidden so soon as it can be proved that by it, and it only, self-preservation can be secured. But the right in this form is rather a governing condition, subject to which all rights and duties exist, than a source of specific rules, and properly perhaps it cannot operate in the latter capacity at all. It works by suspending the obligation to act in obedience to other principles . . . . . . . There are . . . . circumstances falling short of occasions upon which existence is immediately in question, in which, through a sort of extension of the idea of self-preservation to include self-protection against serious hurt, states are allowed to disregard certain of the ordinary rules of law in the same manner as if their existence were involved . . . . . . .

“The right of self-preservation in some cases justifies the commission of acts of violence against a friendly or neutral state, when from its position and resources it is capable of being made use of to dangerous effect by an enemy, when there is a known intention on his part so to make use of it, and when, if he is not forestalled, it is almost certain that he will succeed, either through the helplessness of the country or by means of intrigues with a party within if . . . . . .

“States possess a right of protecting their subjects abroad.” Rivier gives an account of this right of self-defence or self-preservation thus:

“These rights of self-preservation (conservation), respect, independence and mutual trade, which can all be carried back to a single right of self-preservation, are founded on the very notion of the state as a person of the law of nations. They form the general statute (loi) of the law (droit) of nations, and the common constitution of our political civilization. The recognition of a state in the quality of a subject of the law of nations implies ipso jure the recognition of its legitimate possession of those rights. They are called essential, or fundamental, primordial, absolute, permanent rights, in opposition to
those arising from express or tacit conventions, which are sometimes described as hypothetical or conditional, relative, accidental rights."

"When," Rivier says, "a conflict arises between the right of self-preservation of a state and the duty of that state to respect the right of another, the right of self-preservation overrides the duty. *Primum vivere.* A man may be free to sacrifice himself. *It is never permitted to a government to sacrifice the state of which the destinies are confided to it.* The government is then authorised, and even in certain circumstances bound, to violate the right of another country for the safety of its own. That is the excuse of necessity, an application of the reason of state. It is a legitimate excuse."

According to Kaufmann, the state is the instrument of an ideal which can justly claim the subjection of its members to an imposed command. *That ideal* is self-preservation and self-development in history in a world of competing physical forces represented by other states. This *ideal* can be ultimately fulfilled only by physical and moral force on the part of the state; it can be fulfilled only by enlisting all the physical and moral powers of its members. The essence of the state is power, as revealed in victorious war.

According to Hegel, the relation of states is one of independent entities which make promises, but at the same time stand above their promises. Nothing done *in the interest of the state* is illegal.

There are writers who support the view that there is nothing higher than the *interest of each of the parties as judged by each party himself.* If the other party is unwilling to give in, then only war can decide whose interest is legally stronger. This, according to them, is not the denial of law, but the only legal proof possible in international life.

Westlake," who takes a more restricted view of the right, says:—

"What we take to be pointed out by justice as the true international right of self-preservation is merely that of self-defence. A state may defend itself by preventive means if, in *its conscientious judgment* necessary, against attack by another state, threat of attack, or preparations or other conduct from which an intention to attack may reasonably be apprehended. In so doing, it will be acting in a manner *intrinsic defensive,* even though *externally aggressive.* In attack, we include all violation of the legal rights of itself or of its subjects, whether by the offending state or by its subjects without due repression by it or ample compensation, when the nature of the case admits compensation. And by due repression we intend such as will effectually prevent all but trifling injuries (*de minimis non curat lex*), even though the want of such repression may arise from the powerlessness of the government in question. *The conscientious judgment of the state acting on the right thus allowed must necessarily stand in the place of authoritative sanction, so long as the present imperfect organization of the world continues."
But the world was made to entertain high hopes about the post-
war international world. We expected a more rational and sincere
approach to a new wholeness whereby only such a new body would
be designed as would serve as an instrument for levelling national
antagonisms. But instead the powers are really preparing stages to
provide gathering places for the national factions. The principal
post-war activity of the ruling politicians has been specially channelled
in the interests of broad and conflicting patterns of powers. There
was really nothing in all this towards the building up of any genuine
world unity. It was leading instead to the openly acknowledged
splitting of the world into two hostile camps. They were manoeuvring
tactically in preparation for coming battles, engaging in the first
phases of vast logistical movements for collision. We were told that
the atom blast succeeded in blowing away all pre-war humbugs.
Indeed "when we consider the destructive possibilities now open to
us, a few miles of territory more or less, a few dotted islands more or
less in the vast ocean, seem to acquire an immense irrelevance." One
might reasonably expect that if we are really rational beings,
the prospect which the menace of the new weapons of atomic war
has introduced would transform the entire international attitude.
Indeed it is "a paradox of advancement that if Necessity be the
Mother of Invention, the other parent is Obstinacy, the determination
that you will go on living under adverse conditions rather than cut
your losses and go where life is easier."

It is not entirely simple cultural lack which keeps the new great
rival powers in the world arguing over Trieste, Manchuria or Iran.
Perhaps our rulers in their chronic uncertainty are still counting on
the possibility that no matter how swift the generalized development
of atomic weapons, the onset of the next conflict may be swifter and
they are preparing accordingly. Or it may also be that they are
preparing so that the onset of the next conflict may be swifter than
any further development of atomic weapons. This is really no
turning point, no radical ending, and no radical beginning. It is
simply the passage into the next descending curve of the historical
spiral.

It will be pertinent to recall to our memory the fact that the
existence of alliances like those that are now being formed had been
believed to be one of the main contributory causes of the terrible first
World War. It was really as an alternative to such alliances or
formations of power-blocs that an international organization of which
in principle all states were to be members was then suggested.
President Wilson declared that there could be no leagues or alliances
or special covenants and understandings within the general and com-
mon family of the League of Nations. We know however that this
was not heeded by the Powers and they had regional arrangements
in the name of keeping peace. The United Nations Charter approa-
ches the question, we are told, in a more realistic spirit than did the League Covenant. Yet it equally fails to abate this urge for alliances and counter-alliances.

As I have pointed out above, on principle the regional pacts like the North Atlantic Treaty cannot be differentiated from the pre-war Pacts like the Tri-partite Pact or the Anti-Commintern Pact both of which were regarded by the Allied Powers as aggressive preparations. Anticipating similar possible charges against the North Atlantic Pact Mr. Hector McNeil in the General Assembly of the United Nations said:

"The most absurd claim is that this is an aggressive alliance. For anyone to claim that a pact in which Great Britain and the democratic peoples are partners could be aggressive in design is to display not only a complete ignorance of modern history but a bewildering ignorance as to the structure and complexion of a representative democratic government. Let me, with great presumption, offer a touchstone upon this question. The closer a government is to its people, the more difficult does it become for such a government to declare war.

"Modern democratic peoples will not declare war except when their own territories are invaded, or when some democratic characteristic, such as liberty, justice or toleration, is violently or grossly abused.

"No one can stampede, persuade or impel a truly democratic people into aggressive war. And no one has attempted to show us how that can be done. I should add, however, that the history of this century displays that when the action of an aggressor compels a democratic people to make war, they display a fortitude, a courage and an ingenuity unmatched by any authoritarian people. Consequently, here is a test by which we shall note whether the Atlantic Pact is welcomed or repudiated.

"No one fears, or need fear, the Atlantic Pact if their intentions are pacific. No one can have any reason to fear the Atlantic Pact if aggressive intention is absent from their policy. The Atlantic Pact is so patently defensive in intention and in character, that only those who contemplate aggression have any reason to regret that pact."

But the question would be justiciable only if the parties to this pact come out defeated in a possible conflict and in the eyes of the then victors "Great Britain and the democratic peoples" may not appear to be incapable of having aggressive designs.

Indeed one of the delusions ruling the nations of the international world is that of being, itself, 'the Most Ardent Lover of Peace.' Every nation would say that it is more in love with peace than are other nations: these other nations rather are in love with violence. Every nation would say "our own armament is for defence only and will never be used for attack." Every nation's war is, in
its estimate, 'the Righteous War,' and every nation finds its own 'purpose' to be a noble one and itself of a pure heart. Every nation is indeed the Upright Nation Among Knaves.

The North Atlantic Treaty speaks of action being taken in the event of an armed attack. But what is an armed attack? President Roosevelt during the Second World War gave the world his view of what will constitute such an attack in order to bring into operation the right of self-defence. I have already given his views. I would once again repeat what the learned President said: "I have said on many occasions that the United States is mustering its men and its resources only for the purpose of defence only to repel attack. I repeat that statement now. But we must be realistic when we use the word 'attack'; we have to relate it to the lightning speed of modern warfare................. We shall actively resist wherever necessary, and with all our resources, every attempt by Hitler to extend his Nazi domination to the Western Hemisphere, or to threaten it. We shall actively resist his every attempt to gain control of the seas. We insist upon the vital importance of keeping Hitlerism away from any point in the world which could be used as a base of attack against the Americas............. We in the Americas will decide for ourselves whether and when and where our American interests are attacked or our security threatened. We are placing our armed forces in strategic military position. We shall not hesitate to use our armed forces to repel attack." According to him, "attack" "begins by the domination of any base which menaces our security—North or South" and "we have to relate it to the lightning speed of modern warfare." "The occupied base " may be thousands of miles away from our own shores." "The American Government must, of necessity, decide at which point any threat of attack against this hemisphere has begun, and to make their stand when that point has been reached." "Modern techniques of warfare" have thus extended the scope of self-defence. "It would be suicide to wait until the enemy is in our front yard." "It is stupid to wait until a probable enemy has gained a foothold from which to attack. Old-fashioned common sense calls for the use of a strategy which will prevent such an enemy from gaining a foothold in the first place."

Messrs. Heundel, Kalijarvi and Wilcox, staff members, Senate Foreign Relations Committee, are of opinion that "since the principal objective of the treaty is to safeguard the security of the North Atlantic area, only such armed attacks as threatened that security are contemplated. This rules out violence of irresponsible groups and refers to an armed attack of one state against another." According to them purely internal disturbances and revolution are not included in the expression "armed attack." But aid given to revolutions by outside powers can conceivably be considered an armed attack.
Senator Vandenberg, speaking of the commitments under Article 5, said:

(Article 5) commits us ... to take forthwith, individually and in concert with the other parties, "such action as we deem necessary, including the use of armed force, to restore and maintain the security of the North Atlantic Area." A commitment to take notice and to do something about it is automatic. A commitment to war is not. Indeed, the textual phrase "including the use of armed force" obviously indicates that there are many other alternatives.

Article 2 wherein the parties undertake to strengthen their free institutions, promote conditions of stability and well-being, and encourage economic collaboration was characterized by Secretary Acheson as the "ethical essence" of the treaty. According to him it "does not impose any obligations upon the contracting parties." The Committee viewed the article as "a re-affirmation of faith" which did not contemplate joint action of new machinery.

It may be noticed that the membership of the Pact is restricted. Admission of new members is possible but there are three restricted criteria for such admission. Article 10 makes the relevant provision. The three criteria for the admission of new members set out in that Article are:

1. A candidate must be a European State.
2. The candidate must be in a position to further the principles of this treaty and to contribute to the security of the North Atlantic Area.
3. It must be invited by unanimous agreement of the parties.

If these are the typical alliances on the one side there have been similar alliances on the Soviet side also. Dr. Kulski of the University of Alabama has very recently compared the Soviet system of collective security with the Western system and met the Soviet charge of aggressive character of that system. We are not concerned here with the merits and demerits of the two systems of alliances, or with the question whether a system based on multi-lateral agreement is preferable to another based on several bilateral agreements. It is not for us either to condemn or to commend such regional agreements or groupings for the so-called collective security. Dr. Kulski claims that "common sense indicates that members of the United Nations cannot be forbidden to take necessary precautions to safeguard, in case of necessity, their own security which the United Nations Organization is patently unable to protect." We need not quarrel with the prudence of such common-sense measures. In a society in which the interests of the members are primarily conflicting, the main concern of each entity must necessarily be directed towards self-preservation. The society of States which has developed is composed of nations too strong and too self-conscious to permit any of its members to attempt to solve its problem of self-preservation by means of impartial universality. So
long as the international social development remains on the plane of power politics, perhaps the only realistic alternative would be provided by the principle of the balance of power,—the only factor of relative stability in a world divided by alliances and counter-alliances. From the very nature of it, this policy involves continuous efforts at balancing in order to avert the ever-present danger of the preponderance of one group or the other.

If, however, the international society is prepared to regard war as radically wrong then any international agreement which would have the effect of extending hostilities from a limited area to the whole world can justly be condemned as based upon unsound principles. As we have observed already, in the actual circumstances of the present day, "Collective Security" means a system of military alliances opposed to another such system. Indeed the Atlantic Treaty group and other regional organizations like it recognize for their membership only societies organized for war and thus capable of contributing to the security of the group. Alliances like these are sure to be met by similar counter-alliances: "security zones" of such well-matched sorts of allied powers are sure to meet somewhere.

Modern war destroys with the maximum of efficiency and the maximum of indiscrimination, and therefore entails the commission of injustices far more numerous and far worse than any it is intended to redress.

Till recently war was looked upon as an extension of policy, though a most deplorable and regrettable one, to be avoided or at least to be postponed as long as at all possible. But when all prophylactics had failed and it could no longer be avoided it had to be faced like abnormalities of nature, earthquakes, epidemic diseases, famine or drought. It was justified only when it was waged in defence of the vital interests of the community. But the nature of the modern war is such that the vital interests of the community cannot be defended by it; on the contrary they must inevitably suffer more from war than from non-resistance to violence.

There is a tendency to place the responsibility for the present condition of the world on Nationalism. The spirit of Nationality, no doubt, has to a great extent an isolating effect in this respect. The interest of nationality no doubt contains elements which circumscribe its scope and obstruct united development. Yet there is nothing inherent in nationalism which is necessarily antagonistic to any development in the direction of world unity. As we have seen already, it may very well constitute a condition precedent to such organization by helping a thorough development of every inherent capability of a people as also by guiding healthy competition. However debased and distorted its present manifestations may be, nationalism is an organic and not necessarily evil development of the political life of man.
As has been pointed out by Dr. Schwarzenberger, "even if Europeans and Americans who have drunk too deeply from this dangerous cup might now be inclined to disagree with this opinion, those countries now just passing through those stages through which the western people have gone during past centuries will feel that they cannot overlap this essential and formative 'stage.'" In the words of Sun Yat-sen 'we, the wronged races, must first recover our position of national freedom and equality before we are fit to discuss cosmopolitanism. We must understand that cosmopolitanism grows out of nationalism; if we want to extend cosmopolitanism, we must, first, establish strongly our own nationalism.' It may be that 'if nationalism is to fulfill really positive functions from the standpoint of the international community as a whole, it would have to undergo a process of rather far-reaching self-limitations.' According to Dr. Schwarzenberger, for this purpose 'in the first place, nationalists would have to realize that the nation, though a reality and a high value, only represents a relative value. Secondly, it may be easy to perceive differences between nations but so far nobody has succeeded in establishing a just hierarchy between them.' "Judgments based, in a matter-of-course way, on our own civilization," says Dr. Schwarzenberger, "are only one of the many hypocrisies of which the West has become guilty, particularly regarding the Far East."

The epoch of the modern nation-state as an instrument of national economy came into being after a period of wars and dislocations that lasted for centuries. For nearly three hundred years it has served as a more or less reasonably sufficient instrument for fostering the growth of industrially productive forces.

We all know how during the war and under its pressure even these national states could offer a united front. There is nothing inherent in nationalism which necessarily prevents the nations from realizing correctly the deeper meaning of the 'emergency measures,' which can stand in the way of the nations taking full advantage of the war-time unanimity. It is indeed regrettable that the nations failed to see in these war-time measures a step towards the necessary co-ordination of the social techniques at their disposal, failed to see that they were simply an expression of the basic fact that the vital needs of the community should everywhere and always override the privileges of individual nations. There was certainly a chance of a new social order developing. But instead, at the end of the war, the decisive foreground is again allowed to be occupied by all the mutual fears and distrusts and the consequent preparations.

I do not know how much of this is a human challenge from the ruling groups which shall have to be overcome before the challenge from the physical environment can be taken up effectively.
LECTURE VI

INTERNATIONAL DELINQUENCIES

We have seen that even now the ultimate foundation of international law and of international society is the co-existence of independent sovereign states with their full sovereign right. Until the last two decades of the nineteenth century the membership of the family of nations was considered to bestow certain fundamental rights on states. Such rights were chiefly enumerated as the rights of existence, of self-preservation, of equality, of independence, of territorial supremacy, of holding and acquiring territory, of intercourse, and of good name and reputation. This existence of fundamental rights is disputed by many modern writers. Some would say that the membership, instead of bestowing fundamental rights, imposes certain fundamental duties. Indeed, the very notion of fundamental rights implies the corresponding duty to respect the fundamental rights of other members. In so far as it does that, the notion of fundamental rights or of fundamental duties would make no practical difference. Of course, the conception of right severed from that of duty has a separating tendency. Emphasis on rights involves an emphasis on the existence of its holder as distinct from and standing in opposition to others. In the conception of duty, on the other hand, emphasis is on the uniting factor. Whatever that may be, unless the notion of right is abused as a cover for purely political assertion, and so long as duty and right are looked upon as correlated notions, we need not, for our present purposes, join the controversy. Whatever name we give to them, there are rights and duties which do not arise from international treaties between states, but which the states enjoy and are subject to simply as international persons, and which they grant and receive reciprocally as members of the family of nations. They are rights and duties connected with the position of states within the Family of Nations.

We have seen above that a state as such is a member of the family of nations and becomes such a member retaining its full independence and sovereignty. This, however, does not exclude all possibility of legal responsibility of such a state in every respect. A sovereign state generally would not have any legal responsibility with reference to certain acts towards its subject. This proposition, however, is to be modified to a certain extent in view of some of the post-war developments. The post-war Declaration of Human Rights by the United Nations as also the Convention on the Prevention and Punishment of the Crime of Genocide would involve some legal
responsibility of a state with reference to certain acts even towards its subject. We shall see how in the name of offences against humanity the members of sovereign states were punished for peacetime acts of these states towards their subjects, by ex post facto law both at Nuremberg and at Tokyo.

The external responsibility of a state to fulfil its international legal duty stands on a different footing from its internal supremacy. Neglect of an international legal duty constitutes an international delinquency entitling the injured states through reprisals or even through war to compel the delinquent state to fulfil its international duty.

The state-responsibility arising out of various international duties may be placed under two heads,—original and vicarious. The responsibility for its own actions or actions performed at its government's command or with its authorization would be its original responsibility. Its vicarious responsibility will be for unauthorized injurious acts of its agents and subjects, and even of such aliens as are for the time being living within its territory.

International delinquencies must not be confused with international crimes,—crimes against or crimes under international law. We have already noticed what is international crime and what is the distinction between crimes against and crimes under international law. Crimes against international law are the real crimes in international relations. These are to be acts directed towards the deterioration, the hampering, the disruption, of the social order, if any, established by international law. These are to be infringements on the bases, if any, of international association. Crimes under international law on the other hand are in the nature of delicta juris gentium such as piracy, slave trade, genocide and the like. These may be defined by international law but in order to be a crime are to be enacted as law into the national systems by the respective states. According to Oppenheim,¹ "These, in the terminology of the criminal law of various States, are such acts of individuals against foreign States as are rendered criminal by these codes. They include, in particular, those for which the State on whose territory they are committed bears a vicarious responsibility according to the Law of Nations. They also include crimes like piracy on the high seas or slave trade, which either every State can punish on seizure of the criminals, of whatever nationality they may be, or which every State has by the Law of Nations a duty to prevent." This description given by Oppenheim would not however include all cases of genocide. But this shortcoming in this description would not affect the question before us.

The notion of an international delinquency ranges from ordinary breaches of treaty obligations, involving only pecuniary compensation, to violations of international law amounting to a criminal act in the generally accepted meaning of the term. An international delinquency may be committed by states, full sovereign, half sovereign or part
sovereign, provided only that they have a standing within the Family of Nations and thereby owe international duties of their own.

The responsibility of states in international law is essentially different from that of individuals in municipal law. Granted the supremacy of the state over individuals within it, it is obvious that no one person could maintain toward another the same relationship which the State alone is authorised to maintain toward individuals. The systems of law which govern the two relationships are different in theory and in practice; and it would be dangerous to draw analogies between responsibility as it has developed into a rule of law between states and the liability in municipal law of one citizen toward another.

It seems to be a well established principle of International Law that a State cannot invoke its own municipal legislation as a reason for avoiding its international obligations.

In case of any gap in the statutes of a civilized state regarding certain rules necessitated by the law of nations, such rules ought to be presumed to have been tacitly adopted by such municipal law. A State, it may be presumed, does not intentionally want its municipal law to be deficient in this respect. Thus a state when charged with an international delinquency cannot validly plead as a defence that its municipal law (1) is defective or (2) contains rules in conflict with International Law.

Whatever internal supremacy a state may enjoy by virtue of its sovereignty, its external responsibility to fulfil its international legal duties remains unaffected by such sovereignty. Responsibility for such duties is a quality of every state as an international person, without which the family of nations could not peaceably exist. The very basis of the law of nations is the common consent of the States that a body of legal rules shall regulate their intercourse with one another. A legally regulated intercourse between sovereign states is only possible under the condition that every state consents to certain restrictions of action in the interest of the liberty of action granted to every other state. Recognition of a state as a member of the family of nations involves recognition of such state's equality, dignity, independence and territorial and personal supremacy. The recognized state recognizes in turn the same qualities in other members of the family, and thereby undertakes responsibility for violation committed by it. State responsibility concerning international duties is therefore a legal responsibility. Every neglect of such an international legal duty constitutes an international delinquency.

International delinquencies may be committed in regard to so many different objects that it is impossible to enumerate them all. For our present purposes it would suffice to say that a state may be injured in regard to its right of protection over its citizens abroad through any act that violates the person, the honour, or the property of such a citizen.

A state, when charged with a breach of its international obligations
with regard to the treatment of aliens, cannot validly plead that according to its municipal law and practice the act complained of does not involve discrimination against aliens as compared with its own nationals.

The rule is clearly established that a State is bound to respect the property of aliens. This rule however is qualified to a certain extent by two factors:

1. The law of most states permits far-reaching interference with private property in connection with taxation, measures of police, public health and the administration of public utility;

2. In cases in which fundamental changes in the political system and economic structure of the State or far-reaching social reforms entail interference on a large scale with private property neither the principle of absolute respect for alien property nor rigid equality with the dispossessed nationals offers a satisfactory solution of the difficulty.

The State is responsible, in theory, for all internationally illegal injuries committed within its territories, since its exclusive jurisdiction permits no normal protection to be extended therein by other states.

Almost as a corollary to this responsibility is the right which a state enjoys to employ its own agencies for the repair of the damage done. The local remedies must be exhausted by the injured alien before his State may interpose in his behalf.

The rule that local remedial measures must be fully tested before diplomatic interposition is permissible is the most important rule in the application of the doctrine of state responsibility. For the alien, however, international law demands a certain standard of justice.

The rule of local redress does not however affect the responsibility itself. Responsibility arises from an internationally illegal act and is not necessarily contingent upon local redress. In the language of Mr. Hyde: "Whether the act of a State constitutes a denial of justice depends solely upon the quality of lawfulness or unlawfulness which international law attaches to the act, and not upon the means of redress afforded the individual against whom it was directed. While the adequacy of those means vitally affects the propriety of interposition, it is unrelated to the character of the conduct giving rise to the complaint. . . . . . . . . . The inquiry as to national responsibility is distinct from that respecting the propriety of interposition . . . . . . . Thus, in the examination of claims, it becomes important to distinguish events which tend to show internationally illegal conduct on the part of a territorial sovereign from those which tend to show a failure on its part to afford a means of redress in consequence of such conduct. The former serves to establish national responsibility; the latter to justify interposition."
The two situations must be carefully differentiated. They are to a certain extent confusing because local remedies serve both as a means of reparation, and, in case of failure, as a source of responsibility.

The rule of local redress is indeed of fundamental and essential value. It reconciles national autonomy and international co-operation into a system by which a happy compromise is effected between the two forces which have produced International Law.

The rule, however, cannot be availed of to screen a state from its international responsibility. It would not be available to enable a state to hide itself behind its municipal codes with the assertion that its own laws had been properly enforced and thus to refuse to allow any intervention on behalf of the alien by his state. A claimant in a foreign state is not required to exhaust justice in such a state when there is no justice to exhaust. Unilateral restriction by constitutional or legislative action, or the contractual renunciation by an alien of his nation's support, cannot serve to limit responsibility. The U.S., for example, has never receded from its position that a citizen's right to ask the protection of his government does not depend upon the local laws but upon the law of his own country, and that the limits of diplomatic protection are fixed by international law without possibility of restriction by municipal legislation. An alien's right to ask and to receive the protection of his government does not depend upon the local law, but upon the law of his own country. Such a local law cannot control the action or duty of his government, for governments are bound among themselves only by treaties or by the recognized law of nations. The U.S. and European states refuse to accept any such municipal limitation.

Oppenheim says:—

"In consequence of the right of protection over its subjects abroad which every State enjoys, and the corresponding duty of every State to treat aliens on its territory with a certain consideration, an alien, provided he possesses some nationality, cannot be outlawed in foreign countries, but must be afforded protection for his person and property. The home State of the alien has, by its right of protection, a claim upon such State as allows him to enter its territory that such protection shall be afforded, and it is no excuse that such State does not provide any protection whatever for its own subjects. In consequence thereof, every State is by the Law of Nations compelled to grant to aliens at least equality before the law with its citizens, as far as safety of person and property is concerned. An alien must in particular not be wronged in person or property by the officials and courts of a State. Thus, the police must not arrest him without just cause, custom-house officials must treat him civilly, courts of justice must treat him justly and in accordance with the law. Corrupt administration of the law against natives is no excuse for the same against aliens, and no Government can cloak itself with the judgment of corrupt judges."
Protection, however, is illicit and unjustified where it has the object of securing in favour of the citizens residing abroad a privileged position. Strong and powerful governments must not take advantage of their superiority and exaggerate the duty of protection by exercising pressure upon weak governments, in order to compel them to favour their citizens and exempt them from certain obligations or grant them privileges of any nature whatever.

A member of the Family of Nations is not bound by International Law to admit all aliens into its territory even if such entry is sought for lawful purpose. Indeed there is no fundamental right of intercourse between states. There does not exist an international legal duty for a state to admit all unobjectionable aliens to all parts of territories. Every state is, and must remain, master in its own house, and this is of special importance with regard to the admission of aliens.

It is obvious that if a state need not receive aliens at all it can receive them only under certain conditions.

A nation in exercise of its sovereignty may by general provisions exclude a certain class of persons individually entirely or place limitation upon their admission.

"A citizen or subject of one nation who in the pursuit of commercial enterprise carries on trade within the territory and under the protection of the sovereignty of a nation other than his own, is to be considered as having cast in his lot with the subjects or citizens of the state in which he resides and carries on business. Whilst on the one hand he enjoys the protection of that state, so far as the police regulations and other advantages are concerned, on the other hand he becomes liable to the political vicissitudes of the country in which he thus has a commercial domicile in the same manner as the subjects or citizens of that state are liable to the same. The state to which he owes national allegiance has no right to claim for him as against the nation in which he is resident any other or different treatment in case of loss by war—either foreign or civil—revolution, insurrection, or other internal disturbance caused by organised military force or by soldiers, than that which the latter country metes out to its own subjects or citizens."  

With his entrance into a State an alien, unless he belongs to the class of those who enjoy so-called ex-territoriality, falls at once under the territorial supremacy of that State, although he remains at the same time under the personal supremacy of his home State.

According to Oppenheim,  

"Apart from protection of person and property, every State can treat aliens according to discretion, except in so far as its discretion is restricted through international treaties. Thus, a State can exclude aliens from certain professions and trades; it can exclude them from holding real property; it can, as Great Britain did in former times and again during the First World War and since, compel them to register
their names for the purpose of keeping them under control, and the like. Before the First World War there was a tendency to treat admitted aliens more and more on the same footing as citizens, political rights and duties, of course, excepted. Thus, for instance, with the exception that an alien could not be sole or part owner of a British ship, aliens who had taken up their domicile in this country were for all practical purposes treated by the law of the land on the same footing as British subjects. But this is no longer the case. For example, the Aliens Restriction (Amendment) Act, 1919, provides, among other disabilities, that no alien is to hold a pilotage certificate for any pilotage district in the United Kingdom, or act as master, Chief Officer, or Chief Engineer of a British Merchant-ship registered in the United Kingdom, or as skipper or second hand of a British fishing-boat, or receive an appointment to the Civil Service. In practically all countries the restrictions are now, in a period of economic nationalism, much more severe."

Just as a State is competent to refuse admission to an alien, so, in conformity with its territorial supremacy, it is competent to expel at any moment an alien who has been admitted into its territory. And it matters not whether that individual is only on a temporary visit, or has settled down for professional or business purposes on its territory, having taken his domicile therein.

On the other hand, it cannot be denied that, especially in the case of expulsion of an alien who has been residing within the expelling State for some length of time, and has established a business there, the home State of the expelled individual is, by its right of protection over citizens abroad, justified in making diplomatic representations to the expelling State, and asking for the reasons for the expulsion. Although a State may exercise its right of expulsion according to discretion it must not abuse its right by proceeding in an arbitrary manner.

Since a State holds only territorial and not personal supremacy over an alien within its boundaries, it can never, under any circumstances, prevent him from leaving its territory, provided he has fulfilled his local obligations such as payment of rates and taxes, of fines, of private debts, and the like. An alien leaving a State can take all his property away with him, and a tax for leaving the country, or tax upon the property he takes away with him, cannot be levied.

At the third conference of the Inter-American Bar Association held in Mexico during July-August 1944 a sub-committee of the committee on post-war problems proposed a draft resolution relative to the diplomatic protection of citizens abroad. The resolution urged that diplomatic protection of citizens abroad be abolished in favour of an international protection of the rights of man.

This resolution has been variously commented on by international jurists. What on the surface seems to be a noble effort
to elevate the position of the individual in international law has been characterized in reality as marking the final and logical phase of a determined campaign against one of the most fundamental pillars of international law. Whatever that may be, the principle underlying the resolution has not yet been accepted by the Family of Nations.

The question of the subjects of international law has recently been agitating the minds of international jurists. It has been debated as part of the controversy whether or not, not only states but also individuals are subjects of the Law of Nations. In particular, much attention has been devoted to the problem of the direct access of individuals to International Tribunals and other international agencies.

Article 31 of the Statute of the International Court of Justice laid down that only states may be parties in cases before the court. Dr. Lauterpacht urges that the importance of this provision of the statute in relation to the question under discussion ought not be exaggerated. It is a provision defining the competence of the court. It is not intended to be declaratory of any general principle of International Law. No such principle prevents states from securing to individuals access to International Courts and Tribunals. Indeed there is nothing inherent in the structure of International Law which prevents individuals from being parties to due proceedings before International Tribunals. The matter is one of machinery and of determination by the Governments concerned in any given case.

So far as the question before us is concerned, there seems to have been no determination by the states concerned which would make the machinery of any international court or tribunal available to the individual concerned. We need not enter into the question whether the availability of such machinery would be appropriate at all.

The question of individuals' access to an International Court as a matter of right whenever they deem their rights under International Law to have been violated by a foreign state remains still to be solved.

Dr. Lauterpacht while editing Oppenheim’s International Law observed:

"156b. The responsibility of States is not limited to restitution and to damages of a penal character. The State, and those acting on its behalf, bear criminal responsibility for such violations of international law as by reason of their gravity, their ruthlessness, and their contempt of human life place them within the category of criminal acts as generally understood in the law of civilized countries. Thus if the Government of a State were to order a wholesale massacre of aliens resident within its territory the responsibility of the State and of the individuals responsible for the ordering and the execution of the outrage would be of a criminal character. The preparation and the launching of an aggressive war—now that resort to war as an instrument of national policy has been condemned and renounced in solemn international engagements—must be placed within the same category."
We shall take up this matter later on while examining the question of criminality of aggressive war. We may only notice here that this view seems to support at least partially the war crimes trials held at Nuremberg and at Tokyo and it found its place in that famous treatise in its 1947 edition.
LECTURE VII

ACTS CLAIMED TO HAVE BEEN CRIMINAL IN INTERNATIONAL RELATIONS

It will perhaps help a better appreciation of the position if at this stage we give concrete examples of acts that are being sought to be made criminal in international relations.

In Chapter IV of his book 1 Mr. Trainin purports to give a classification of international crimes. He begins by defining an international crime as a "punishable infringement on the bases of international association," and then classifies such crimes under two groups, the first group being "interference with peaceful relations between nations;" and the second, "offences connected with war." In the first group he places seven items, namely:—

1. Acts of aggression,
2. Propaganda of aggression,
3. Conclusion of agreements with aggressive aims,
4. Violation of treaties which serve the cause of peace,
5. Provocation designed to disrupt peaceful relations between countries,
6. Terrorism,
7. Support of armed bands (Fifth Column).

Perhaps the best way of giving examples of such acts will be to quote from the Charters of Nuremberg and Tokyo Tribunals for the trial of major war criminals of Germany and Japan respectively.

The Charter of the International Military Tribunal for the trials of war criminals of Germany provided in Article 6 in Part II under the head "Jurisdiction and General Principles" as follows:—

"Article 6. The Tribunal established by the agreement referred to in article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:—

(a) Crimes against peace: Namely, 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;
(b) War Crimes: Namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour 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:

(c) Crimes against humanity: Namely, 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.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

In the indictment the offending acts were placed under 4 counts, namely,

COUNT ONE—The Common Plan or Conspiracy.
COUNT TWO—Crimes against Peace.
COUNT THREE—War Crimes.
COUNT FOUR—Crimes against Humanity.

Under each Count a statement of the offence was given with particulars of the acts alleged to have been committed by the accused.

Under Count One the statement of the offence was in the following terms:

"All the defendants, with divers other persons, during a period of years preceding 8th May, 1945, participated as leaders, organizers, instigators or accomplices in the formulation or execution of a common plan or conspiracy to commit, or which involved the commission of, Crimes against Peace, War Crimes and Crimes against Humanity, as defined in the Charter of this Tribunal, and, in accordance with the provisions of the Charter, are individually responsible for their own acts and for all acts committed by any persons in the execution of such plan or conspiracy. The common plan or conspiracy embraced the commission of Crimes against Peace, in that the defendants planned, prepared, initiated and waged wars of aggression, which were also wars in violation of international treaties, agreements or assurances. In the development and course of the common plan or conspiracy it came to embrace the commission of War Crimes, in that it contemplated, and the defendants determined upon and carried out, ruthless wars against countries and populations, in violation of the rules and customs of war, including as typical and systematic means by which the wars were prosecuted, murder, ill-treatment, deportation for slave labor and for other purposes of civilian populations of occupied territories, murder and
ill-treatment of prisoners of war and of persons on the high seas, the taking and killing of hostages, the plunder of public and private property, the wanton destruction of cities, towns, and villages, and devastation not justified by military necessity. The common plan or conspiracy contemplated and came to embrace as typical and systematic means, and the defendants determined upon and committed, Crimes against Humanity, both within Germany and within occupied territories, including murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations before and during the war, and persecutions on political, racial or religious grounds, in execution of the plan for preparing and prosecuting aggressive or illegal wars, many of such acts and persecutions being violations of the domestic laws of the countries where perpetrated."

In giving particulars of the nature and development of the common plan or conspiracy as alleged under this Count the offending acts were detailed under the following heads:—

1. Nazi Party as the Central Core of the Common Plan or Conspiracy

Under this sub-head details were given as to how from 1921 onwards Adolf Hitler became the supreme leader of the National Socialist German Workers Party, how this Nazi Party together with certain of its subsidiary organizations, became the instrument of cohesion among the defendants and their co-conspirators and how the party became an instrument for the carrying out of the aims and purposes of the conspiracy.

2. Common Objectives and Methods of Conspiracy

Under this head the common objectives were given to be:—

(i) to abrogate and overthrow the Treaty of Versailles and its restrictions upon the military armament and activity of Germany;

(ii) to acquire the territories lost by Germany as the result of World War of 1914-18 and other territories in Europe asserted by the Nazi conspirators to be occupied principally by so-called "racial Germans";

(iii) to acquire still further territories in continental Europe and elsewhere claimed by the Nazi conspirators to be required by the "racial Germans" as "Lebensraum," or living space. The allegation was that the party resolved to accomplish these aims and purposes by any means deemed opportune, including ultimate resort to threat of force, force and aggressive war. It was further alleged that as a matter of fact these methods including the ultimate aggressive wars in violation
of international treaties, agreements and assurances were actually resorted to.

3. Doctrinal Techniques of the Common Plan or Conspiracy

The offending acts under this head were alleged to be that the defendants put forth, disseminated and exploited certain doctrines, such as:—

(i) racial superiority;
(ii) leadership principle of the governance of the German people;
(iii) holding out war as a noble and necessary activity of Germans;
(iv) claiming for the Nazi party the leadership in the matter of shaping the structure, policies and practices of the German State and all related institutions, and of directing and supervising the activities of all individuals within the State and of destroying all opponents.

4. The Acquiring of Totalitarian Control of Germany: Political

5. The Acquiring of Totalitarian Control in Germany: Economic; and the Economic Planning and Mobilization for Aggressive War

6. Utilization of Nazi Control for Foreign Aggression

Under this head the following amongst other details were given:—

(i) Their plan to rearm and to re-occupy and fortify the Rhineland, in violation of the Treaty of Versailles and other treaties;
(ii) The plans were put into operation by 7th March, 1936.
   (a) A course of secret re-armament from 1933 to March, 1935, including the training of military personnel and the production of munitions of war, and the building of an air force:
   (b) They led Germany to leave the International Disarmament Conference and the League of Nations;
   (c) Aggressive action against Austria and Czechoslovakia;
   (d) Formulation of the plan to attack Poland, etc.

7. War Crimes and Crimes Against Humanity Committed in the Course of Executing the Conspiracy for which the Conspirators are Responsible

Under Count Two the offence was stated in the following terms:—

"All the defendants, with divers other persons . . . participated in the planning, preparation, initiation, and waging of wars of aggres-
sion, which were also wars in violation of international treaties, agreements and assurances."

Under Count Three the statement of the offence stood thus:—

"All the defendants, acting in concert with others formulated and executed a common plan or conspiracy to commit War Crimes as defined in Article 6(b) of the Charter. This plan involved, among other things, the practice of "total war" including methods of combat and of military occupation in direct conflict with the laws and customs of war, and the commission of crimes perpetrated on the field of battle during encounters with enemy armies, and against prisoners of war, and in occupied territories against the civilian population of such territories.

The said War Crimes were committed by the defendants and by other persons for whose acts the defendants are responsible (under Article 6 of the Charter) as such other persons when committing the said War Crimes performed their acts in execution of a common plan and conspiracy to commit the said War Crimes, in the formulation and execution of which plan and conspiracy all the defendants participated as leaders, organizers, instigators and accomplices.

These methods and crimes constituted violations of international conventions, of internal penal laws and of the general principles of criminal law as derived from the criminal law of all civilized nations, and were involved in and part of a systematic course of conduct."

Further particulars of offending acts falling under this head were given in the following sub-head:—

(A) Murder and ill-treatment of civilian populations of or in occupied territory and on the High Seas.
(B) Deportation for slave labour and for other purposes of the civilian populations of and in occupied territories.
(C) Murder and ill-treatment of prisoners of war, and of other members of the armed forces of the countries with whom Germany was at war, and of persons on the High Seas.
(D) Killing of Hostages.
(E) Plunder of public and private property.
(F) The exaction of collective penalties.
(G) Wanton destruction of Cities, Towns and Villages and Devastation not justified by military necessity.
(H) Conscription of civilian labour throughout the occupied territories.
(I) Forcing civilians of occupied territories to swear allegiance to a hostile power.
(J) Germanization of occupied territories.

The allegation under this head was that "in certain occupied territories purportedly annexed to Germany the defendants methodically and pursuant to plan endeavored to assimilate those territories politically, culturally, socially and economically into the German
Reich. The defendants endeavored to obliterate the former national character of these territories. In pursuance of these plans and endeavors, the defendants forcibly deported inhabitants who were predominantly non-German and introduced thousands of German colonists.

This plan included economic domination, physical conquest, installation of puppet Governments, purported de jure annexation and enforced conscription into the German Armed Forces.

Under Count Four the statement of the offence was given thus:—

"All the defendants, acting in concert with others, formulated and executed a common plan or conspiracy to commit Crimes against Humanity as defined in Article 6(e) of the Charter. This plan involved, among other things, the murder and persecution of all who were or who were suspected of being hostile to the Nazi Party and all who were or who were suspected of being opposed to the common plan alleged in Count One.

The said Crimes against Humanity were committed by the defendants and by other persons for whose acts the defendants are responsible, (under Article 6 of the Charter) as such other persons, when committing the said War Crimes, performed their acts in execution of a common plan and conspiracy to commit the said war Crimes, in the formulation and execution of which plan and conspiracy all the defendants participated as leaders, organizers, instigators and accomplices.

These methods and crimes constituted violations of international conventions, of internal penal laws, of the general principles of criminal law as derived from the criminal law of all civilized nations and were involved in and part of a systematic course of conduct. The said acts were contrary to Article 6 of the Charter.

The prosecution will rely upon the facts pleaded under Count Three as also constituting Crimes against Humanity."

The offending acts under this Count were further detailed under two sub-heads:—

(a) Murder, extermination, enslavement, deportation and other inhumane acts committed against civilian populations before and during the war.

The allegation was that all these things were done against the civilians in Germany who were, or were believed to be, or were believed likely to be hostile to the Nazi Government.

The further allegation was that they imprisoned such persons without judicial process holding them in protective custody, etc., and that special courts were established to carry out the will of the conspirators.

(b) Persecution on political, racial and religious grounds in execution of and in connection with the common plan mentioned in Count One: By way of further details under this sub-head persecutions of the Jews since 1933 were given.
The Charter of the International Military Tribunal for the Far East was practically based on the Nuremberg Charter. Part II of the Tokyo Charter providing for jurisdiction and general provision in Article 5 enacted as follows:—

"Article 5, Jurisdiction Over Persons and Offenses. The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) Conventional War Crimes: Namely, violations of the laws or customs of war;

(c) Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial 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. Leaders, promoters, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan."

In the Indictment the offending acts were laid in 55 counts grouped in three categories:

1. Crimes against Peace: (Counts 1 to 36).
2. Murder: (Counts 37 to 52).
3. Conventional War Crimes and Crimes against Humanity: (Counts 53 to 55).

In Group One, the acts alleged were said to constitute crimes against Peace as defined in the Charter. The first five counts spoke of conspiracy to secure the military, naval, political and economic dominations of certain areas by the waging of declared or undeclared war or wars of aggression and of war or wars in violation of international law, treaties, agreements and assurances. The next twelve counts give the offending acts as the planning of and preparing for such illegal wars. In the next nine counts the offending acts are those of initiation of such illegal wars and in the next ten counts the acts alleged were those of waging such illegal wars.

In Group Two the acts alleged were said to amount to murder or conspiracy to murder. It was alleged that there was conspiracy
unlawfully to kill and murder people of the United States, the Philippines, the British Commonwealth, etc., by ordering, causing and permitting Japanese armed forces in time of peace to attack those people in violation of Hague Convention III, as also of other numerous treaties. Further offending acts alleged in the counts under this group were the unlawful killing and murdering the above people by ordering, causing and permitting, in time of peace, armed attacks by Japanese armed forces at Pearl Harbour and other places. Another act constituting crime under this head was conspiracy to procure and permit the murder of Prisoners of War, civilians and crews of torpedoed ships.

In Group Three, the acts alleged were as follows:

1. That the accused participated as leaders, organizers, instigators or accomplices in the formulation or execution of a common plan or conspiracy. The object of such plan or conspiracy was said to be to order, authorize and permit the Commanders-in-Chief of the several Japanese naval and military forces in each of the several theatres of war, the officials of the Japanese War Ministry, the persons in charge of each of the camps and labour units for prisoners of war and civilian internees, the military and civil police of Japan frequently and habitually to commit the breaches of the Laws and Customs of War, as contained in and proved by the Conventions, assurances and practices etc., against the armed forces of the United States, British Common-wealth etc.

2. The accused ordered, authorized and permitted the officers named above to commit the offences named above.

3. The accused being by virtue of their respective offices responsible for securing the observance of the said conventions and assurances and the laws and customs of war deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observances and prevent breaches thereof and thereby violated the laws of war.

Summarized particulars in support of these counts were presented in the Appendices of the Indictment. We shall deal with the particulars in their proper places.

Appendix A purported to give the "summarized particulars showing the principal matters and events upon which the prosecution will rely in support of the several counts of the indictment in Group One." These particulars were subdivided under 10 sections.

Section One gave particulars of what was called "military aggression in Manchuria." Section 2 related to "military aggression in the rest of China." Section 3 gave what was called "economic aggression in China and Greater East Asia." The particulars given under this section will indeed be illuminating. They were given in the following terms:

"During the period covered by this Indictment, Japan established a general superiority of rights in favour of her own
nationals, which effectively created monopolies in commercial, industrial and financial enterprises, first in Manchuria and later in other parts of China which came under her domination, and exploited those regions not only for the enrichment of Japan and those of her nationals participating in those enterprises, but as part of a scheme to weaken the resistance of China, to exclude other Nations and nationals, and to provide funds and munitions for further aggression.

This plan, as was the intention of some, at least, of its originators, both on its economic and military side, gradually came to embrace similar designs on the remainder of East Asia and Oceania.

Later it was officially expanded into the "Greater East Asia Co-Prosperity Scheme" (a title designed to cover up a scheme for complete Japanese domination of those areas) and Japan declared that this was the ultimate purpose of the military campaign.

"The same organizations as are mentioned in Section 4 hereof were used for the above purposes."

Section 4 purported to give "Methods of Corruption and Coercion in China and other Occupied Territories." Here the particulars are given thus:—

"During the whole period covered by this Indictment, successive Japanese Governments, through their military and naval commanders and civilian agents in China and other territories which they had occupied or designed to occupy, pursued a systematic policy of weakening the native inhabitants' will to resist, by atrocities and cruelties, by force and threats of force, by bribery and corruption, by intrigue amongst local politicians and generals, by directly and indirectly encouraging increased production and importation of opium and other narcotics and by promoting the sale and consumption of such drugs among such people. The Japanese Government secretly provided large sums of money, which, together with profits from the government-sponsored traffic in opium and other narcotics and other trading activities in such areas, were used by agents of the Japanese Government for all the above-mentioned purposes. At the same time, the Japanese Government was actively participating in the proceedings of the League of Nations Committee on Traffic in Opium and other Dangerous Drugs and, despite her secret activities above-mentioned, professed to the world to be co-operating fully with other member nations in the enforcement of treaties governing traffic in opium and other narcotics to which she was a party." It was alleged that this participation in and sponsorship of illicit traffic in narcotics was effected through a number of Japanese governmental organizations and numerous subsidiary organizations, trading companies in the various occupied and so-called independent (puppet) countries which were operated or supervised by senior officers or civilian appointees of the Army and Navy. It was further alleged that revenue from the above-mentioned Traffic in Opium and other narcotics was used to finance the preparation
for and waging of the wars of aggression and established and financed the puppet governments in the various occupied territories.

Section 5 gave particulars of "general preparation for war." The particulars related to the strengthening of naval, military, productive and financial preparations for war. Under the head "Productive" it was alleged that "Japan continually and progressively increased her capacity for the production of munitions of war both on her own territory and in territories occupied or controlled by her, to an extent greater than was required for her war of aggression against China, for the purpose of other wars of aggression.

Section 6 purported to give the particulars of "the organization of Japanese politics and public opinion for war." The details were given in the following terms:

"Two provisions incorporated by ordinance or custom in the Japanese constitution gave to the militarists the opportunity of gaining control over the Governments which they seized during the period covered by this Indictment.

"The first was that, not only had the Chiefs of Staff and other leaders of the Army and Navy direct access at all times to the Emperor, but they had the right to appoint and withdraw the War and Navy Ministers in any Government. Either of them could thus prevent a Government from being formed, or bring about its fall after it was formed. In May, 1936, this power was further increased by a regulation that the Army and Navy Ministers must be senior Officers on the active list. E.g., the fall of the Yonai Government on 21st July, 1940, and of the Third Konoye Government on the 16th October, 1941, were in fact brought about by the Army; in each case they were succeeded by Governments more subservient to the wishes of the Army.

"The second was that, although the Diet had the right to reject a Budget, this did not give them control, because in that case the Budget of the preceding year remained in force.

"During this period such free Parliamentary institutions as previously existed were gradually stamped out and a system similar to the Fascist or Nazi model introduced. This took definite shape with the formation on 18th October, 1940, of the Imperial Rule Assistance Association, and later of the Imperial Rule Assistance Political Society.

"During this period a vigorous campaign of incitement to expansion was carried on, in the earlier part of the period by individual writers and speakers, but gradually this came to be organized by Government agencies, which also stamped out free speech and writing by opponents of this policy. A large number of societies, some secret, was also formed both in the Army and Navy and among civilians, with similar objects. Opposition to this policy was also crushed by assassinations of leading politicians who were not considered sufficiently friendly to it, and by fear and threats of such assassinations. The civil
and especially the military police were also used to suppress opposition to the war policy.

"The educational systems, civil, military and naval, were used to inculcate a spirit of totalitarianism, aggression, desire for war, cruelty, and hatred of potential enemies."

The particulars under this section contain two distinct categories of matters, namely,

1. The organization of Japanese politics for war;
2. The organization of Japanese public opinion for war.

It was alleged that for these purposes the educational system of Japan, censorship, propaganda, police coercion, political organizations, assassinations and threats were utilized. Special emphasis was laid on the introduction of the feeling of a racial superiority in the Japanese educational policy.

Section 7 spoke of "Collaboration between Japan, Germany and Italy and Aggression against French Indo-China and Thailand."

Under the head 'collaboration' the allegations are the "successive Japanese Governments from early in 1936 onwards, cultivated close relations with the totalitarian powers in Europe . . ." Under this head came also the "Anti-Comintern Pact with a secret Protocol and a secret Military Treaty directed against the Union of Soviet Socialist Republics and Communism." The Tripartite Pact was also placed under this section.

Section 8 gave particulars of "Aggression against the Soviet Union." An important step in the preparation of a war of aggression against the Union of the Soviet Socialist Republics was alleged to be "the occupation of Manchuria in 1931" and it was alleged that Manchuria as well as Korea was transformed into a military base for attacking the Union of Soviet Socialist Republics in a number of years.

Section 9 gave particulars of "Aggression against United States, the Commonwealth of Philippines and the British Commonwealth of Nations."

Section 10 gave particulars of "Aggression against Kingdom of Netherlands and the Republic of Portugal."

Under these two sections the principal allegations were surprise attacks without delivering any declaration of war and violations of various treaty obligations.

Appendix B gave the list of Articles of treaties violated by Japan. The Appendix names the following treaties and agreements:

2. The Convention for the Pacific Settlement of International Disputes, signed at the Hague, 18 October, 1907.
3. The Hague Convention No. III relative to the opening of Hostilities, signed 16 October, 1907.
4. Agreement effected by exchange of notes between the United States and Japan, signed 30 November, 1908.


6. The Treaty of Peace between the Allied and Associated powers and Germany, signed at Versailles, 28 June, 1919, known as the Versailles Treaty.


8. Treaty between the British Commonwealth of Nations, France, Japan and the United States of America relating to their Insular possessions and Insular Dominions in the Pacific Ocean, 13 December, 1921.

9. Identical communication made to the Netherlands Government on 4 February, 1922 on behalf of the British Commonwealth of Nations and also "mutatis mutandis" on behalf of Japan and the other Powers signatory to the Quadruple Pacific Treaty of 13 December, 1921.

Identical Communication made to the Portuguese Government on 6 February, 1922 on behalf of the British Commonwealth of Nations and also "mutatis mutandis" on behalf of Japan and the other Powers signatory to the Quadruple Pacific Treaty of 13 December, 1921.


11. The Treaty between the United States and Japan signed at Washington, 11 February, 1922.


15. Treaty between Thailand and Japan concerning the continuance of friendly relations etc., signed at Tokyo, 12 June, 1940.

16. Conventions respecting the Rights and Duties of Neutral Powers etc., signed at the Hague, 18 October, 1907.

17. Treaty of Portsmouth between Russia and Japan, signed 5 September, 1905.


19. The Neutrality Pact between the Union of Soviet Socialist Republics and Japan, signed 13 April, 1941 in Moscow.

Of these items 4, 8, 9, 10, 11, 15, 17, 18 and 19 are all bilateral treaties giving rise to certain rights and duties between the parties thereto. They, by their terms, did not prohibit any war. We shall consider the bearing of the allegation made here on the question before us later on.
Appendix C gave the list of official assurances violated by Japan. Appendix D purported to give the particulars of war crimes *stricto sensu*.

Appendix E, the last appendix, will have a very important bearing on the question before us as it purported to give the basis of individual responsibility for crimes set out in the Indictment.

The basis was given in the following terms:—

"It is charged against each of the accused that he used the power and prestige of the position which he held and his personal influence in such a manner that he promoted and carried out the offences set out in each Count of this Indictment in which his name appears.

"It is charged against each of the accused that during the periods hereinafter set out against his name he was one of those responsible for all the acts and omissions of the various Governments of which he was a member, and of the various civil, military or naval organizations in which he held a position of authority.

"It is charged against each of the accused, as shown by the numbers given after his name, that he was present at and concurred in the decisions taken at some of the conferences and cabinet meetings held on or about the following dates in 1941, which decisions prepared for and led to unlawful war on 7th/8th December, 1941."

This was followed by the dates of 14 such conferences and cabinet meetings.

Even a cursory reading of the above allegations would indicate that practically the entire body of acts usually done in course of administration of a state is sought to be made justiciable by a tribunal set up by a section of the so-called international community and if such acts are found to have been tainted with the alleged vitiating object or motive they are to constitute crimes and the individuals responsible for doing them are to be made criminally liable.

We must not lose sight of the essential requirement of such acts being crimes in international life: They first of all must be made justiciable by some agency other than the State where such acts are done. This justiciability of acts of this category is the essential requirement and whether or not they can constitute crime in international relations will depend upon whether the international community has reached a stage of organization where such acts of each member state are accepted as having been so justiciable.

Further a victor-trial in this respect, to say the least, is most inappropriate. In deciding the character of most of such acts a court would have to investigate the allegations and elicit the facts from both sides. No just decision in this respect is possible only on the captured documents of the vanquished, even great documents of State, and even captured in the Army Head Quarters and Government buildings of the vanquished without obtaining the corresponding documents of the victors.
LECTURE VIII

POST-WAR PROGRESS OF CRIMES AGAINST HUMANITY

In order to appreciate the significance of the steps taken by the United Nations towards securing 'Human Rights' and preventing 'Genocide' it would be helpful to remember the several atrocious acts of 'Genocide' and acts in violation of fundamental human rights alleged against the German Major War Criminals. We may just notice here only those allegations that were considered established by the Tribunal concerned on the evidence adduced in the case.

The Nuremberg Tribunal records its findings in this respect under the heads "War Crimes and Crimes against Humanity," "Murder and Ill-treatment of Civilian Population," "Pillage of Public and Private Property," "Slave Labour Policy," and "Persecution of the Jews." Most of these are war-time acts and, if established, would constitute War Crimes Stricto Sensu. Acts found under the head "Persecution of the Jews" however also refer to peace-time doings. We should pay special attention to the findings under this head.

Under this head the Tribunal finds: "The Persecution of the Jews at the hands of the Nazi Government has been proved in the greatest detail before the Tribunal. It is a record of consistent and systematic inhumanity on the greatest scale."

"The anti-Jewish policy was formulated in Point 4 of the Party Programme which declared 'Only a member of the race can be a citizen. A member of the race can only be one who is of German blood, without consideration of creed. Consequently, no Jew can be a member of the race.'"

Other points of the programme declared that Jews should be treated as foreigners, that they should not be permitted to hold public office, that they should be expelled from the Reich if it were impossible to nourish the entire population of the State, that they should be denied any further immigration into Germany, and that they should be prohibited from publishing German newspapers. The Nazi Party preached these doctrines throughout its history. "Der Stuermer" and other publications were allowed to disseminate hatred of the Jews, and in the speeches and public declarations of the Nazi leaders, the Jews were held up to public ridicule and contempt.

"With the seizure of power, the persecution of the Jews was intensified. A series of discriminatory laws were passed, which limited the offices and professions permitted to Jews; and restrictions
were placed on their family life and their rights of citizenship. By
the autumn of 1938, the Nazi policy towards the Jews had reached the
stage where it was directed towards the complete exclusion of Jews
from German life. Pogroms were organised, which included the
burning and demolishing of synagogues, the looting of Jewish businesses
and the arrest of prominent Jewish business men. A collective fine
of one billion marks was imposed on the Jews, the seizure of Jewish
assets was authorised, and the movement of Jews was restricted by
regulations to certain specified districts and hours. The creation of
ghettos was carried out on an extensive scale, and by an order of the
Security Police Jews were compelled to wear a yellow star to be worn
on the breast and back.

"The Nazi persecution of Jews in Germany before the war,
severe and repressive as it was, cannot compare, however, with the
policy pursued during the war in the occupied territories. Originally
the policy was similar to that which had been in force inside Germany.
Jews were required to register, were forced to live in ghettos, to wear
the yellow star, and were used as slave labourers. In the summer of
1941, however, plans were made for the final solution " of the Jewish
question in all of Europe. This "final solution" meant the
extermination of the Jews, which early in 1939 Hitler had threatened
would be one of the consequences of an outbreak of war, and a special
section in the Gestapo under Adolf Eichmann, as head of Section B4
of the Gestapo, was formed to carry out the policy.

"The plan for exterminating the Jews was developed shortly
after the attack on the Soviet Union. Einsatzgruppen of the Security
Police and SD, formed for the purpose of breaking the resistance of
the population of the areas lying behind the German armies in the
East, were given the duty of exterminating the Jews in those areas.
The effectiveness of the work of the Einsatzgruppen is shown by the
fact that in February, 1942, Heydrich was able to report that Estonia
had already been cleared of Jews and that in Riga the number of
Jews had been reduced from 29,500 to 2,500. Altogether the
Einsatzgruppen operating in the occupied Baltic States killed over
1,350,000 Jews in three months.

"Units of the Security Police and SD in the occupied territories
of the East, which were under civil administration, were given a
similar task.

"These atrocities were all part and parcel of the policy
inaugurated in 1941, and it is not surprising that there should be
evidence that one or two German officials entered vain protests
against the brutal manner in which the killings were carried out.
But the methods employed never conformed to a single pattern.

"Beating, starvation, torture, and killing were general. The
inmates were subjected to cruel experiments at Dachau in August,
1942, victims were immersed in cold water until their body temperature was reduced to 28° Centigrade, when they died immediately. Other experiments included high altitude experiments in pressure chambers, experiments to determine how long human beings could survive in freezing water, experiments with poison bullets, experiments with contagious diseases, and experiments dealing with sterilisation of men and women by X-rays and other methods.

"Evidence was given of the treatment of the inmates before and after their extermination. There was testimony that the hair of women victims was cut off before they were killed, and shipped to Germany, there to be used in the manufacture of mattresses. The clothes, money and valuables of the inmates were also salvaged and sent to the appropriate agencies for disposition. After the extermination the gold teeth and fillings were taken from the heads of the corpses and sent to the Reichsbank.

"After cremation the ashes were used for fertilizer, and in some instances attempts were made to utilise the fat from the bodies of the victims in the commercial manufacture of soap. Special groups travelled through Europe to find Jews and subject them to the "final solution." German missions were sent to such satellite countries as Hungary and Bulgaria, to arrange for the shipment of Jews to extermination camps and it is known that by the end of 1944, 4,00,000 Jews from Hungary had been murdered at Auschwitz. Evidence has also been given of the evacuation of 1,10,000 Jews from part of Roumania for "liquidation." Adolf Eichmann, who had been put in charge of this programme by Hitler, has estimated that the policy pursued resulted in the Killing of 6,000,000 Jews, of which 1,000,000 were killed in the extermination institutions."

By the way this reminds me of the story given out during the First World War about the use of dead bodies by the Germans. The story will remain recorded in history as the classic lie of war propaganda. Mr. A. J. Cuming, the then political editor of the "News Chronicle," an influential and widely circulated daily newspaper of England, in his book entitled "The Press" published in 1936, exposed the lie of this piece of propaganda and narrated how it was utilized. He said: "In Parliament, on April 30th, the late Mr. Ronald McNeil asked whether the Prime Minister would take steps to make known 'as widely as possible in Egypt, India and the East generally the fact that Germans were boiling down their dead soldiers into food for swine.' When Mr. John Dillon intervened to ask whether the Government had any solid ground for believing it, Lord Robert Cecil, Minister of Blockade, replied that he had no information beyond the extracts that had appeared in the Press, but "In view of other actions taken by the German military authorities there is nothing incredible in the present charge against them."
He added: "His Majesty's Government has allowed the circulation of the facts as they appeared through the usual channels."

"The Incident has now nearly slipped out of the public memory. The British authorities tried to forget it as soon as it had done its dirty work. But it is still dimly believed in as a fact by many persons who read no denials in the British Press and, like Lord Robert Cecil, saw 'nothing incredible' in the charge made in responsible papers whose bona fides they still artlessly trusted."

Mr. John Bassett Moore, formerly a Judge of the Permanent Court of International Justice writing in 1933 says: "There are, I believe, a few persons who realize the extent to which propaganda has been used in connection with international relations, . . . . only this year a leading English periodical has said:

"During the war the astonishingly efficient British propaganda service convinced the Americans of some of the most bizarre fairy tales that have ever been devised. To this day most of the population has not recovered from the alleged information which it then swallowed whole."

We cannot ignore the fact that the nations of the present day civilised world do not always show much scruple in adopting a different standard of conduct in their behaviour in connection with what they consider to be their national cause, from what they follow in their private life. They feel no scruples in devising "bizarre fairy tales" and spare no pains in making people "swallow the same whole."

To add to this, since the First World War there has been such a demand for the trial and conviction of defeated warlords, that a sort of unconscious processes were going on in the mind of every one who devoted his interest and energies to get these persons punished. These processes in most cases remain unobserved by the conscious part of the personality and are influenced only indirectly and remotely by it. The result might be a partial distortion of reality. There would always be some eagerness to accept as real anything that lies in the direction of the unconscious wishes.

Let us hope that this past history of propaganda was kept in view while considering the evidence on these points. Let us hope that in arriving at these findings it was not lost sight of that in war time a sort of vile competition is carried on in exerting the imagination as a means of infuriating the enemy, heating the blood of the stay-at-homes on one's own side and filling the neutrals with loathing and horror. Let us hope that the witnesses to these facts did not come with conviction induced only by excitability serving to arouse credulity in them and acting as a persuasive interpreter of probabilities and possibilities.
After these findings the Tribunal observes:—

"With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organised and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt. 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. The Tribunal is of the opinion 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 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."

We refrain from attempting to give the Tokyo findings because there have been several dissections both on questions of fact and of law and further because the decision of the majority in this respect is somewhat confused. Chapters III to VII of the majority judgment purports to record its findings of fact. Of these chapters the Year Book of World Affairs, 1950, records the following comment:—

"Chapters III-VII set out to consider seriatim the military, naval, political and economic aspects and Chapter VIII the atrocities of Japanese action in each major arena, China, Mongolia and the Pacific, but in 1099 pages they tangle themselves in such a welter of repetitive telescoped unchronological confusion as only to illustrate painfully the folly of unskilled hands essaying to summarize recently current history. Perhaps partly because of the colossal prolixity, there are a few errors and inconsistencies, and portions betray their origin in the prosecution's briefs."

We may now proceed to examine the post-war progress of the international law towards "Crimes against Humanity."

Of the various preventive functions of the Organization of the United Nations envisaged in the Charter of the United Nations, promotion of international co-operation in the various fields occupies a very important place. Such co-operation covers even the political
field, both international and national. The various provisions of the Charter concerning Human Rights may be viewed as establishing a function of the organization for co-operation in the field of national politics: it is the national legislation by which these rights are to be guaranteed.

The preamble of the Charter asserts that the people of the United Nations are determined "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small," and for these ends "to practice tolerance and live together in peace with one another as good neighbours."

The Charter does not impose upon the Member States a strict obligation to grant their subjects the rights and freedom mentioned in the preamble or in the text of the Charter. Besides it does in no way specify the rights and freedom to which it refers. The Charter does not confer upon the individuals the legal possibility to appeal to an International Court in case such rights or freedom are violated. The human rights and freedom were not mentioned at all in the Dumbarton Oak's proposals.

The General Assembly adapted on December 10, 1948, a "Universal Declaration of Human Rights." The resolution runs as follows:—

PREAMBLE

"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

"Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

"Whereas it is essential, if man is not to be compelled to have recourse, as last resort, to rebellion against tyranny and oppression, that human rights should be protected by rule of law,

"Whereas it is essential to promote the development of friendly relations between nations,

"Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

"Whereas Member states have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,"
CRIMES IN INTERNATIONAL RELATIONS

"Whereas a common understanding of these rights and freedoms is of the greatest importance for full realization of this pledge, Now, Therefore,
The General Assembly

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member states themselves and among the peoples of territories under their jurisdiction.

ARTICLE 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

ARTICLE 2

Everyone is entitled to all the rights and freedoms set forth in this declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

ARTICLE 3

Everyone has the right to life, liberty and security of person.

ARTICLE 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

ARTICLE 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

ARTICLE 6

Everyone has the right to recognition everywhere as a person before the law.
ARTICLE 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this declaration and against any incitement to such discrimination.

ARTICLE 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

ARTICLE 9

No one shall be subjected to arbitrary arrest, detention or exile.

ARTICLE 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

ARTICLE 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in public trial at which he has had all guarantees necessary for his defence.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

ARTICLE 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

ARTICLE 13

1. Everyone has the right to freedom of movement and residence within the borders of each state.

2. Everyone has the right to leave any country, including his own, and to return to his country.
ARTICLE 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

ARTICLE 15

1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

ARTICLE 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

ARTICLE 17

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

ARTICLE 18

Everyone has the right to freedom of thought, conscience and religion; this right includes the freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

ARTICLE 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontier.
ARTICLE 20

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

ARTICLE 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of authority of government: this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

ARTICLE 22

Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

ARTICLE 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration, insuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

ARTICLE 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.
Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available, and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have the prior right to choose the kind of education that shall be given to their children.

Article 27

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this declaration can be fully realised.

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

**Article 30**

Nothing in this declaration may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”

The General Assembly, it may be noticed, only “proclaims” this declaration “as a common standard of achievement for all peoples and all nations.” This proclamation is made “to the end that every individual and every organ or society keeping this declaration constantly in mind shall strive ... to promote respect for these rights and freedom and ... to secure their universal and effective recognition and observance.”

It is significant that this proclamation is not addressed to the members or to states or to the governments. It seems to be a recommendation to every individual and every organ of society in the world. It will thus be of a high ethical value but it does not touch the legal position of any.

It will be pertinent to notice here that prior to this proclamation a more comprehensive draft covenant on Human Rights prepared by the Drafting Committee on an International Bill of Human Rights had been transmitted to the General Assembly by a resolution of the Economic and Social Council.

At the meeting of the Economic and Social Council the representative of the United Kingdom stated:

““The United Kingdom Government felt strongly that the Covenant should be the core of the Bill, and that it should be a precise legal document without escape clauses. Only such a document would provide an effective safeguard of human rights and freedoms. The Declaration was a statement of ideals, to which it was hoped all peoples would aspire, but not an instrument legally imposing obligations on any state. It fell far short of being an adequate Bill of Rights for the purposes of the United Nations.”

The General Assembly did not adopt this Draft Convention of Human Rights to be submitted to the Members for ratification. In its resolution on universal declaration of human rights the General Assembly did not as we have seen above, recommend legislative acts or
international agreement. Its recommendations are directed only to "every individual and every organ of society." It is not directed to states or to the governments. The formulas used in the recommendation are all vague. It seems that the Assembly intentionally avoided making recommendation of any definite legal measures to the Members of the United Nations. No international measures were either recommended.

The resolution of the General Assembly in human rights is wholly illusory and has no legal effect whatever.

The protection of a special human right, the right of the individual to live as member of a national, ethical, racial or religious group, has been attempted on several occasions. A resolution for this purpose was adopted by the General Assembly at its fifty-fifth meeting on December 11, 1946, which runs as follows:

"Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.

"Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.

"The punishment of the crime of genocide is a matter of international concern.

"The General Assembly, therefore,

"Affirms that genocide is a crime under international law which the civilised world condemns, and for the commission of which principals and accomplices—whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds—are punishable;

"Invites the Member states to enact the necessary legislation for the prevention and punishment of this crime:

"Recommends that international co-operation be organised between states with a view to facilitating the speedy prevention and punishment of the crime of genocide, and, to this end,

"Requests the Economic and Social Council to undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly."

At its 123rd meeting on November 21, 1947, the General Assembly adopted a resolution reaffirming the above resolution of December 11, 1946.

Finally on December 9, 1948, at its hundred seventy-ninth meeting the General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide, the text of which was prepared
by the Economic and Social Council under Article 62 para 2 of the
Charter. The full text of the convention stands thus:

"The Contracting parties, having considered the declaration made
by the General Assembly of the United Nations in its Resolution 96 (1)
dated December 11, 1946, that genocide is a crime under international
law, contrary to the spirit and aims of the United Nations and condemned
by the civilised world;

Recognising that at all periods of history genocide has inflicted
great losses on humanity; and

Being convinced that, in order to liberate mankind from such an
odious scourge, international co-operation is required;

Hereby agree as hereinafter provided:

ARTICLE 1

The Contracting parties confirm that genocide, whether committed
in time of peace or in time of war, is a crime under international law
which they undertake to prevent and to punish.

ARTICLE 2

In the present convention genocide means any of the following
acts committed with intent to destroy, in whole or in part, a national,
ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the
group;
(c) Deliberately inflicting on the group conditions of life
calculated to bring about its physical destruction in whole
or in part;
(d) Imposing measures intended to prevent births within the
group;
(e) Forcibly transferring children of the group to another group.

ARTICLE 3

The following acts shall be punishable:
(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

ARTICLE 4

Persons committing genocide or any of the other acts enumerated
in Article 3 shall be punished, whether they are constitutionally
responsible rulers, public officials or private individuals.
Article 5

The contracting parties undertake to enact, in accordance with their respective constitutions, the necessary legislation to give effect to the provisions of the present convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3.

Article 6

Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.

Article 7

Genocide and the other acts enumerated in Article 3 shall not be considered as political crimes for the purpose of extradition.

The contracting parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article 8

Any contracting party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article 3.

Article 9

Disputes between the contracting parties relating to the interpretation, application or fulfilment of the present convention, including those relating to the responsibility of a state for genocide or any of the other acts enumerated in Article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Article 10

The present convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of December 9, 1948.

Article 11

The present convention shall be open until December 31, 1949, for signature on behalf of any Member of the United Nations and of
any non-member state to which an invitation to sign has been addressed by the General Assembly.

The present convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After January 1, 1950, the present convention may be acceded to on behalf of any Member of the United Nations and of any non-member state which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

**ARTICLE 12**

Any contracting party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present convention to all or any of the territories for the conduct of whose foreign relations that contracting party is responsible.

**ARTICLE 13**

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a process-verbal and transmit a copy of it to each Member of the United Nations and to each of the non-member states contemplated in Article 11.

The present convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

**ARTICLE 14**

The present convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such contracting parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

**ARTICLE 15**

If, as a result of denunciations, the number of parties to the present convention should become less than sixteen the convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.
A request for the revision of the present convention may be made at any time by any contracting party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member states contemplated in Article 11 of the following:

(a) Signatures, ratifications and accessions received in accordance with Article 11;
(b) Notifications received in accordance with Article 12;
(c) The date upon which the present convention comes into force in accordance with Article 13;
(d) Denunciations received in accordance with Article 14;
(e) The abrogation of the convention in accordance with Article 15;
(f) Notifications received in accordance with Article 16.

The original of the present convention shall be deposited in the archives of the United Nations.

A certified copy of the convention shall be transmitted to all Members of the United Nations and to the non-member states contemplated in Article 11.

The present convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force."

By Article 1 of the Convention the contracting parties undertake to prevent and to punish Genocide. Genocide is made a crime under international law.

The Convention imposes upon the contracting parties the obligation to prevent and to punish the crime of Genocide as defined in Article 2, and, certain related acts as given in Article 3. Article 5 imposes on the contracting parties the obligation to give effect to the provisions of the Convention, in particular to provide effective penalties for persons guilty of Genocide or of any of the other acts specified in Article 3.
Article 4 of this Convention is of very grave significance. It really establishes individual criminal responsibility for acts of states constituting violations of an international agreement. Professor Kelsen observed: "The obligation of the governments to punish individuals for having committed the crime of genocide or the other crimes defined in the convention implies the obligation of the individuals to refrain from performing the acts constituting these crimes. These crimes may be committed by private individuals or by a state, that is to say, by individuals in their capacity as organs of a state, especially as members of the government. For, Article 4 provides that persons committing genocide or any other acts enumerated in Article 3 shall be punished 'whether they are constitutionally responsible rulers, public officials or private individuals'; and Article 9 refers to the 'responsibility of a state for genocide or any other acts enumerated in Article 3.' That means that the Convention imposes not only upon individuals as private persons but also upon states, that is to say, upon individuals in their capacity as organs of a state, the obligation to refrain from performing the acts punishable under the Convention. In providing for punishment of individuals for having committed the crimes, determined in the convention, in their capacity as organs of a state, the Convention establishes individual criminal responsibility for acts of state constituting violations of an international agreement.'"

It may be noticed in this connection that the crime of genocide can hardly be committed by an individual in his private capacity. At the 218th meeting of the Economic and Social Council, the representative of New Zealand stated: "Since large-scale acts of genocide could hardly take place under modern conditions without at least the complicity of the government of the territory concerned, it might not be sufficient to rely on the jurisdiction of national courts, and some form of international tribunal working in conjunction with the United Nations would appear to be necessary."

At the 219th meeting of the Economic and Social Council, the representative of France declared that: "his delegation regarded genocide as a crime committed, encouraged or tolerated by the Government of a State and, hence as an international crime which should be dealt with by an international court. Various objections had been raised to that idea but his delegation considered that it would be unwise to have recourse to national courts" and requested that "the latter be deprived of their place in the present draft. Only an international court could try a crime of genocide committed by a Government."

It has been rightly pointed out that the crimes determined by the convention, in so far as they actually could be committed by private individuals in a way not imputable to the state, already constitute crimes which under the criminal law of all the states of the world are severely punishable. To protect mankind against these crimes no international convention is needed.

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The essential feature of the convention on genocide is the imposition of obligation upon states and their governments to refrain from genocide and the establishment of the individual criminal responsibility for acts of state constituting the crime.

From the very nature of the crime therefore the important question is how to provide an effective measure for the punishment of genocide. Article 6 provides that:

"Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction."

This is hardly satisfactory. In almost every serious case of genocide the complicity of the government of the territory would be present and consequently it would be impossible to rely on the courts of the states to punish such genocide. As Professor Kelsen points out: "the only effective way to punish genocide committed as acts of state, and thus to prevent this crime, is the establishment of an international criminal court and execution of its judgments by an internationally organized power." The convention only refers to the possibility of establishment of a court like this. Some of the members however, were opposed to the establishment of such a court. The representative of Poland for example, declared: "The inclusion in the Convention of the principle of an international criminal tribunal constitutes an obligation of the parties to this Convention, the contents of which are wholly unknown to them. The creation of an international criminal court whose jurisdiction could only be compulsory and not optional, is contrary to the principles on which the International Court of Justice and its Statute are based." The representative of the Soviet Union declared: "The representative of the Union of Soviet Socialist Republics considers that the decision of a majority of the Committee to place cases of genocide under the jurisdiction of a competent international court is wrong, since the establishment of an international court would constitute intervention in the internal affairs of states and a violation of their sovereignty, an important element of which is the right to try all crimes without exception, committed in the territory of the state concerned."

It may be of some interest to notice here that the convention was the subject of thorough consideration by the American Bar Association at its annual meeting in St. Louis held from the 5th to 9th September, 1949. The matter came before the Association through two channels, the Association’s special "Committee on Peace and Law through United Nations" and the Association’s section of "International and Comparative Law." Both the special Committee and the Section urged that the convention should not be ratified by the United States as
submitted. The decision taken by the Bar Association will appear from the resolution adopted by the Association, which reads as follows:—

"Be it resolved, that it is the sense of the American Bar Association that the conscience of America like that of the civilized world revolts against Genocide (mass killing and destruction of peoples); that such acts are contrary to the moral law and are abhorrent to all who have a proper and decent regard for the dignity of human beings, regardless of the national, ethnical, racial, religious or political groups to which they belong; that Genocide as thus understood should have the constant opposition of the government of the United States and of all its people.

"Be it further resolved, that the suppression and punishment of Genocide under an international convention to which it is proposed the United States shall be a party involves important constitutional questions; that the proposed convention raises important fundamental questions but does not resolve them in a manner consistent with our form of government.

"Therefore, be it resolved, that the convention on Genocide now before the United States Senate be not approved as submitted.

"Be it resolved further, that copies of the report of the Special Committee on Peace and Law Through United Nations and the suggested resolutions from the Section of International and Comparative Law be transmitted, together with a copy of this resolution, to the appropriate committees of the United States Senate and House of Representatives."

The criticism of the convention touched both the basic principles upon which it was drafted and procedure for enforcing it.

Article 8 of the convention lays down:—

"Any contracting party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article 3."

The only organ of the United Nations competent under the Charter to take effective action is the Security Council. Articles 27 and 39 of the Charter would be relevant for the purpose of determining what effective action under what circumstances and to what extent can be taken by the council in this respect. As is pointed out by Professor Kelsen "an enforcement action taken by the Security Council in such a case is based on the principle of collective responsibility of the state guilty of the threat to, or breach of, the peace, and not on the principle of individual responsibility proclaimed by the Convention on Genocide."

Mr. Finch, the Editor-in-Chief of American Journal of International Law observes:—

"Although the Convention purports to deal with the repetition anywhere of the shockingly atrocious crimes against humanity
perpetrated by Nazi Germany, it fails essentially to do so. Its approach is that of individual crime and not of persecutions instigated by governments. It provides no international court before which governmental transgressions of the international law declared in the Convention may be challenged, but relies for the enforcement of that international law upon the punishment of individuals by national courts. It foresees the eventual establishment of an international court, but for the purpose of trying individuals."

The Genocide Convention should deal only with mass killings and destruction of people which can only happen with official approval or complicity. It can hardly be expected that a government engaged in such a policy will voluntarily turn over its officials or citizens to any other Government or International Court for trial for carrying out that policy. To take the accused by force would involve an act of war: Mr. Finch expressed his deep regret that the United States did not hold to the position with which it started to negotiate the Genocide Convention, namely, that the crime of genocide properly defined is inherently one committed at the instigation or with the complicity of the state. He also regrets the vain reliance placed upon the unrealistic and impracticable attempt to apply under the conditions existing in the world of today the concept that advance in the development of international law can be achieved only by making individuals the direct subjects of that law. As was pointed out in the debates at St. Louis, such a theory can be made effective only through the establishment of political institutions with power to take custody of offenders. Such institutions do not now exist, and the Genocide Convention makes no provision for them.

The world however would do well to pay proper heed to the warning words of Mr. Austin of the United States and "pause in contemplation of the risk of seeking to establish any world government now." Such an organization cannot be had "at this time or within the predictable future."

The Crime of Genocide comes within the category of offences described in Article 6(c) of the Charter of the International Military Tribunal as "Crimes against Humanity." As we have already noticed the General Assembly of the United Nations described genocide as a "crime under international law contrary to the spirit and aims of the United Nations and condemned by the civilized world."

Genocide will thus be an international crime in the sense in which piracy is such a crime. The convention would require national legislation to give it effect. Indeed there is nothing new in thus recognizing by multilateral treaty certain offences in the combat against which and in material policies for the organization of which combat a group of countries feel interested. Such offences may be brought under the international law by various political motive but they are to be made criminal by the several national states for their respective
national system. The crime of genocide may thus be characterized as an addition to the *delicta juris gentium*, such as piracy, slave trade, etc.

These are crimes under international law but not crimes against international law; and they become crimes in law only if and when the states enact the corresponding legislation. Notwithstanding therefore the reference of the General Assembly to genocide as an international crime, the nations of the world do not yet combine themselves into a society of individuals subject to the authority of a definite legal order.
LECTURE IX

NUREMBERG JUDGMENT

I have already given you an idea of the charges against the German leaders who were called German Major War Criminals and were tried as such by the Tribunal set up for the purpose at Nuremberg.

In order fully to appreciate the judgment of the Tribunal it will be necessary for you to have an idea of the contents of the Charter constituting this Tribunal. The Charter itself was the product of an agreement, dated 8th August, 1945 by the Government of the United States of America, The Provisional Government of French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the establishment of an International Military Tribunal for the prosecution and punishment of major war criminals of the European Axis.

The agreement was in the following terms:

"Whereas the United Nations have from time to time made declarations of their intention that war criminals shall be brought to justice;

And whereas the Moscow Declaration of the 30th October, 1943 on German atrocities in occupied Europe stated that those German Officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in atrocities and crimes will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments that will be created therein;

And whereas this declaration was stated to be without prejudice to the case of major criminals whose offenses have no particular geographical location and who will be punished by the joint decision of the Governments of the Allies;

Now therefore the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics (hereinafter called "the signatories") acting in the interests of all the United Nations and by their representatives duly authorized thereto have concluded this agreement.

Article 1. There shall be established after consultation with the Control Council for Germany an International Military Tribunal for
the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.

Article 2. The constitution, jurisdiction and functions of the International Military Tribunal shall be those set out in the charter annexed to this agreement, which Charter shall form an integral part of this agreement.

Article 3. Each of the signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The signatories shall also use their best endeavours to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the signatories.

Article 4. Nothing in this agreement shall prejudice the provisions established by the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes.

Article 5. Any Government of the United Nations may adhere to this agreement by notice given through the diplomatic channel to the Government of the United Kingdom, who shall inform the other signatory and adhering Governments of each such adherence.

Article 6. Nothing in this agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any Allied territory or in Germany for the trial of war criminals.

Article 7. This agreement shall come into force on the day of signature and shall remain in force for the period of one year and shall continue thereafter, subject to the right of any signatory to give, through the diplomatic channel, one month's notice of intention to terminate it. Such termination shall not prejudice any proceedings already taken or any findings already made in pursuance of this agreement."

In accordance with Article 5 the following Governments of the United Nations expressed their adherence to the Agreement:—

Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxemburg, Haiti, New Zealand, India, Venezuela, Uruguay and Paraguay.

The Charter annexed to this Agreement as required in Article 2 above comprised 30 Articles of which Articles 1 to 5 related to the Constitution of the Tribunal, Articles 6 to 13 related to Jurisdiction and General principles, Articles 14 and 15 provided for the Committee for the investigation and prosecution of these major war criminals, Article 16 gave the procedure to be followed in order to ensure fair trial for the defendants, Articles 17 to 22 related to powers of the Tribunal and Conduct of the Trial, Articles 26 to 29 related to Judgment and Sentences,
and Article 30 related to expenses of the Tribunal and the trials. We would do better to give Articles 6 to 13, 16, 17 to 25 and 26.

Article 6. The Tribunal established by the agreement referred to in article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes against peace: Namely, 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;

(b) War Crimes: Namely, violations of the laws or customs of war. Such violations shall include, but not be 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;

(c) Crimes against humanity; Namely, 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.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Article 7. The official position of defendants, whether as heads of state or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8. The fact that the defendant acted pursuant to order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Article 9. At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

After receipt of the indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make
such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

Article 10. In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

Article 11. Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.

Article 12. The Tribunal shall have the right to take proceedings against a person charged with crimes set out in article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interest of justice, to conduct the hearing in his absence.

Article 13. The Tribunal shall draw up rules for its procedure. These rules shall not be inconsistent with the provisions of this Charter.

Article 16. In order to ensure fair trial for the defendants, the following procedure shall be followed:—

(a) The indictment shall include full particulars specifying in detail the charges against the defendants. A copy of the indictment and of all the documents lodged with the indictment, translated into a language which he understands, shall be furnished to the defendant at a reasonable time before the trial.

(b) During any preliminary examination or trial of a defendant he shall have the right to give any explanation relevant to the charges made against him.

(c) A preliminary examination of a defendant and his trial shall be conducted in, or translated into, a language which the defendant understands.

(d) A defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of counsel.

(e) A defendant shall have the right through himself or through his counsel to present evidence at the trial in support of his defense, and to cross-examine any witness called by the prosecution.
of the Nazi Party since 5th January, 1919, and narrates how the party seized and consolidated its power, and how the Nazi Government set about re-organizing the economic life of Germany and in particular the Armament Industry. We shall have to look into the findings in these respects in detail later on. Turning to consideration of the "Crimes against Peace" charged in the Indictment, the Tribunal observes: "Count 1 of the Indictment charges the defendants with conspiring or having a common plan to commit crimes against peace. Count 2 of the Indictment charges the defendants with committing specific crimes against peace by planning, preparing, initiating and waging wars of aggression against a number of other States. It will be convenient to consider the question of the existence of a common plan and the question of aggressive war together, and to deal later in this Judgment with the question of the individual responsibility of the defendants.

"The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world.

"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.

"The first acts of aggression referred to in the Indictment are the seizure of Austria and Czechoslovakia and the first war of aggression charged in the Indictment is the war against Poland begun on the 1st September, 1939.

"Before examining that charge it is necessary to look more closely at some of the events which preceded these acts of aggression. The war against Poland did not come suddenly out of an otherwise clear sky; the evidence has made it plain that this war of aggression, as well as the seizure of Austria and Czechoslovakia, was pre-meditated and carefully prepared, and was not undertaken until the moment was thought opportune for it to be carried through as a definite part of the pre-ordained scheme and plan.

"For the aggressive designs of the Nazi Government were not accidents arising out of the immediate political situation in Europe and the world; they were a deliberate and essential part of Nazi foreign policy.

"From the beginning, the National Socialist movement claimed that its object was to unite the German people in the consciousness of their mission and destiny, based on inherent qualities of race, and under the guidance of the Fuhrer.

"For its achievement, two things were deemed to be essential: the disruption of the European order as it had existed since the Treaty of Versailles, and the creation of a Greater Germany beyond the
frontiers of 1914. This necessarily involved the seizure of foreign territories.

"War was seen to be inevitable, or at the very least, highly probable, if these purposes were to be accomplished. The German people, therefore, with all their resources, were to be organised as a great political-military army, schooled to obey without question any policy decreed by the State."


The Tribunal then takes up the question of violation of international treaties and says: "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.' These treaties are set out in Appendix C of the Indictment."

It then proceeds to name some of these treaties which are considered by the Tribunal to be of principal importance. These are: The Hague Convention of 1899; The Hague Convention for Pacific Settlement of International Disputes of 1907; The Hague Convention relating to Opening of Hostilities, The Versailles Treaty (specially Articles 42 to 44, Articles 80, 81, 89 and 100); Treaties of Mutual Guarantee, Arbitration and Non-Aggression and The Kellogg-Briand Pact. Then follows the most important part of the judgment for our present purposes. The Tribunal proceeds to consider the law of the Charter. I would do better to give the judgment on this point in its entirety. The judgment proceeds thus:

"The jurisdiction of the Tribunal is defined in the Agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal.

"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 undisputed right of these countries to legislate for the occupied territories has been recognized by the
civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, 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.

"The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law.

"The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime; and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement. But in view of the great importance of the questions of law involved, the Tribunal has heard full argument from the Prosecution and the Defence, and will express its view on the matter. It was urged on behalf of the defendants that a fundamental principle of all law—international and domestic—is that there can be no punishment of crime without a pre-existing law. "Nullum crimen sine lege, nulla poena sine lege." It was submitted that ex post facto punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

"In the first place, it is to be observed that the maxim nullum crimen sine lege is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring 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. 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 all international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts.

"This view is strongly reinforced by a consideration of the state of international law in 1939, so far as aggressive war is concerned. The General Treaty for the Renunciation of War of 27th August, 1928,
more generally known as the Pact of Paris or the Kellogg-Briand Pact, was binding on sixty-three nations, including Germany, Italy and Japan at the outbreak of war in 1939."

The Tribunal then quotes the Pact and says:

"The question is, what was the legal effect of this Pact? The nations who signed the Pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact. 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 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. As Mr. Henry L. Stimson, then Secretary of State of the United States, said in 1932:—

"War between nations was renounced by the signatories of the Kellogg-Briand Treaty. This means that it has become throughout practically the entire world . . . . an illegal thing. Hereafter, when nations engage in armed conflict, either one or both of them must be termed violators of this general treaty law . . . . . . We denounce them as law breakers."

"But it is argued that the Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offences against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, 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. In interpreting the words of the Pact, it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law, and not with administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices
of states which gradually obtained universal recognition, and from the
general principles of justice applied by jurists and practised by military
courts. This law is not static, but by continual adaptation follows the
needs of a changing world. Indeed, in many cases treaties do no more
than express and define for more accurate reference the principles of
law already existing.

"The view which the Tribunal takes of the true interpretation of
the Pact is supported by the international history which preceded it.
In the year 1923 the draft of a Treaty of Mutual Assistance was
sponsored by the League of Nations. In Article 1 the Treaty
declared "that aggressive war is an international crime," and that the
parties would "undertake that no one of them will be guilty of its
commission." The draft treaty was submitted to twenty-nine States,
about half of whom were in favour of accepting the text. The principal
objection appeared to be in the difficulty of defining the acts which
would constitute "aggression," rather than any doubt as to the
crinality of aggressive war. The preamble to the League of Nations
1924 Protocol for the Pacific Settlement of International Disputes
("Geneva Protocol"), after "recognising 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."
It went on to declare that the contracting parties were "desirous of
facilitating the complete application of the system provided in the
Covenant of the League of Nations for the pacific settlement of disputes
between the states and of ensuring the repression of international
crimes." The Protocol was recommended to the members of the
League of Nations by a unanimous resolution in the Assembly of the
forty-eight members of the League. These members included Italy
and Japan, but Germany was not then a member of the League.

"Although the Protocol was never ratified, it was signed by the
leading statesmen of the world, representing the vast majority of the
civilised states and peoples, and may be regarded as strong evidence of
the intention to brand aggressive war as an international crime.

"At the meeting of the Assembly of the League of Nations on
the 24th September, 1927, all the delegations then present (including
the German, the Italian and the Japanese), unanimously adopted a
declaration concerning wars of aggression. The preamble to the
declaration stated:

"The Assembly:

Recognising 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 . . . . . . . ."
"The unanimous resolution of the 18th February, 1928, of twenty-one American Republics of the Sixth (Havana) Pan-American Conference, declared that "war of aggression constitutes an international crime against the human species."

"All these expressions of opinion, and others that could be cited, so solemnly made, reinforce the construction which the Tribunal placed upon the Pact of Paris, that resort to a war of aggression is not merely illegal, but is criminal. The prohibition of aggressive war demanded by the conscience of the world, finds its expression in the series of pacts and treaties to which the Tribunal has just referred.

"It is also important to remember that Article 227 of the Treaty of Versailles provided for the constitution of a special Tribunal, composed of representatives of five of the Allied and Associated Powers which had been belligerents in the first World War opposed to Germany, to try the former German Emperor 'for a supreme offence against international morality and the sanctity of treaties.' The purpose of this trial was expressed to be 'to vindicate the solemn obligations of international undertakings, and the validity of international morality.' In Article 228 of the Treaty, the German Government expressly recognised the right of the Allied Powers 'to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war.'

"It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognised. In the recent case of Ex Parte Quirin (1942 317 US 1), before the Supreme Court of the United States, persons were charged during the war with landing in the United States for purposes of spying and sabotage. The late Chief Justice Stone, speaking for the Court, said:

'From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals'.

"He went on to give a list of cases tried by the Courts, where individual offenders were charged with offences against the laws of nations, and particularly the laws of war. Many other authorities could be cited, but enough has been said to show that individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.
The provisions of Article 228 of the Treaty of Versailles already referred to illustrate and enforce this view of individual responsibility.

The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares:

The official position of defendants, whether as Heads of State, or responsible officials in government departments, shall not be considered as freeing them from responsibility, or mitigating punishment.

On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorising action moves outside its competence under international law.

It was also submitted on behalf of most of these defendants that in doing what they did they were acting under the orders of Hitler, and therefore cannot be held responsible for the acts committed by them in carrying out these orders. The Charter specifically provides in Article 8:

The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment.

The provisions of this Article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognised as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.

Then follows the Tribunal's decision regarding "The Law As to The Common Plan of Conspiracy; War Crimes and Crimes against Humanity; Murder and Ill-treatment of prisoners of War; Murder and Ill-treatment of Civilian Population; Slave Labour Policy; Persecution of the Jews; and the Law Relating to War Crimes and Crimes against Humanity."

Under the head "The Law as to the Common Plan or Conspiracy" the judgment stands thus:

In the previous recital of the facts relating to aggressive war, it is clear that planning and preparation had been carried out in the most systematic way at every stage of the history.
Planning and preparation are essential to the making of war. In the opinion of the Tribunal aggressive war is a crime under international law. The Charter defines this offence as planning, preparation, initiation or waging of a war of aggression or participation in a common plan or conspiracy for the accomplishment . . . . of the foregoing.' The Indictment follows this distinction. Count One charges the common plan or conspiracy. Count Two charges the planning and waging of war. The same evidence has been introduced to support both counts. We shall therefore discuss both counts together, as they are in substance the same. The defendants have been charged under both counts, and their guilt under each count must be determined.

The ‘common plan or conspiracy’ charged in the Indictment covers twenty-five years, from the formation of the Nazi Party in 1919 to the end of the war in 1945. The party is spoken of as ‘the instrument of cohesion among the defendants’ for carrying out the purposes of the conspiracy—the overthrowing of the Treaty of Versailles, acquiring territory lost by Germany in the last war and ‘lebensraum’ in Europe, by the use, if necessary, of armed force, of aggressive war. The ‘Seizure of power’ by the Nazis, the use of terror, the destruction of trade unions, the attack on Christian teaching and on churches, the persecution of the Jews, the regimentation of youth—all these are said to be steps deliberately taken to carry out the common plan. It found expression, so it is alleged, in secret rearmament, the withdrawal by Germany from the Disarmament Conference and the League of Nations, universal military service, and seizure of the Rhineland. Finally, according to the Indictment, aggressive action was planned and carried out against Austria and Czechoslovakia in 1936-1938, followed by the planning and waging of war against Poland: and, successively, against ten other countries.

The Prosecution says, in effect, that any significant participation in the affairs of the Nazi Party or Government is evidence of a participation in a conspiracy that is in itself criminal. Conspiracy is not defined in the Charter. But in the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party programme, such as are found in the twenty-five points of the Nazi Party, announced in 1920, or the political affirmations expressed in ‘Mein Kampf’ in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan.

It is not necessary to decide whether a single master conspiracy between the defendants has been established by the evidence. The seizure of power by the Nazi Party, and the subsequent domination by the Nazi State of all spheres of economic and social life must of course be remembered when the later plans for waging war are
examined. That plans were made to wage wars, as early as 5th November, 1937, and probably before that, is apparent. And thereafter, such preparations continued in many directions, and against the peace of many countries. Indeed the threat of war—and war itself if necessary—was an integral part of the Nazi policy. But the evidence establishes with certainty the existence of many separate plans rather than a single conspiracy embracing them all. That Germany was rapidly moving to complete dictatorship from the moment that the Nazis seized power, and progressively in the direction of war, has been overwhelmingly shown in the ordered sequence of aggressive acts and wars already set out in this Judgment.

"In the opinion of the Tribunal, the evidence establishes the common planning to prepare and wage war by certain of the defendants. It is immaterial to consider whether a single conspiracy to the extent and over the time set out in the Indictment has been conclusively proved. Continued planning, with aggressive war as the objective, has been established beyond doubt. The truth of the situation was well stated by Paul Schmidt, official interpreter of the German Foreign Office, as follows:

'The general objectives of the Nazi leadership were apparent from the start, namely the domination of the European Continent, to be achieved first by the incorporation of all German speaking groups in the Reich, and secondly, by territorial expansion under the slogan 'Lebensraum.' The execution of these basic objectives, however, seemed to be characterised by improvisation. Each succeeding step was apparently carried out as each new situation arose, but all consistent with the ultimate objectives mentioned above.'

"The argument that such common planning cannot exist where there is complete dictatorship is unsound. A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it. Hitler could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organised domestic crime.

"Count One, however, charges not only the conspiracy to commit aggressive war, but also to commit war crimes and crimes against humanity. But the Charter does not define as a separate
crime any conspiracy except the one to commit acts of aggressive war. Article 6 of the Charter provides:

'Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.'

In the opinion of the Tribunal these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan. The Tribunal will therefore disregard the charges in Count One that the defendants conspired to commit war crimes and crimes against humanity, and will consider only the common plan to prepare, initiate and wage aggressive war.'

The judgment under the heads "War crimes and crimes against humanity" and "the law relating to war crimes and crimes against humanity" mostly deals with war crimes *stricto sensu*. We may omit this portion of the judgment for the present.

In short the Nuremberg Tribunal accepted the Charter constituting the Tribunal as also giving the law making certain acts criminal in international life applicable to the case. According to it, the Charter defined the crimes and its definition was decisive and binding on the Tribunal. Incidentally it also found that aggressive war was made a crime in international life by the Pact of Paris of 1928. As regards individual responsibility, the Tribunal again mainly based its decision on the provisions of the Charter. It however also opined that international law imposes duties and liabilities upon individuals as well.

In his report of October 15, 1946, to the President of the United States of America on the Nuremberg Trials the American Chief Prosecutor, Mr. Justice Jackson, claimed, as one of the advantages of these trials, that the rules of law applied by the Tribunal have been "incorporated" into a "judicial precedent." "A judgment," reports Justice Jackson, "such as has been rendered shifts the power of the precedent to the support of these rules of law. 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—law with a sanction."

It will be illuminating to have here the very pertinent and weighty observations of Professor Kelsen on this part of the report. We can however give only a few extracts from the observations of that eminent authority. The learned Professor says:

"The judgment rendered by the International Military Tribunal in the Nuremberg Trial cannot constitute a true precedent because it did not establish a new rule of law, but merely applied pre-existing rules of law laid down by the International Agreement concluded on August 8, 1945, in London, for the Prosecution of European Axis War Criminals, by the Governments of Great Britain, the United States of America, France, and the Soviet Union. The rules created by this
Treaty and applied by the Nuremberg Tribunal, but not created by it, represent certainly a new law, especially by establishing individual criminal responsibility for violations of rules of international law prohibiting resort to war. These violations are called in the Agreement 'crimes against peace' and defined 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.'

Professor Kelsen then points out that the treaties for whose violation the London Agreement establishes individual criminal responsibility are the Briand-Kellogg Pact of 1928, and certain nonaggression pacts concluded by Germany with the neighbouring States. These treaties however forbade only resort to war, and not planning, preparation, initiation of war or conspiracy for the accomplishment of such actions. None of these treaties stipulated individual criminal responsibility. The learned Professor says: "For their violation the sanctions provided by general international law applied, that is to say, the State whose right was violated was authorised to resort to reprisals or counter-war against the violator. The Briand-Kellogg pact, it is true, does provide in its preamble a special sanction for its violation; but this sanction constitutes no individual criminal responsibility. The Pact stipulates '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'. That means that all States parties to the Pact, and not only the immediate victim of an illegal war, are authorised to resort to war against a State which in violation of the Pact has resorted to war. Reprisals and war as sanctions are directed against a State as such, and not against the individuals, forming its government. These sanctions constitute collective responsibility, not criminal responsibility of definite individuals performing the acts by which international law is violated. A war waged in violation of treaties prohibiting resort to war, especially in violation of the Briand-Kellogg Pact, is certainly illegal. It is not necessarily a 'war of aggression', as the London Agreement assumes.'

An illegal war may be called an 'international crime.' This, however, will not carry us far and shall not mean that 'those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.' According to Professor Kelsen the Briand-Kellogg Pact did not establish individual criminal responsibility for its violation.

To deduce individual criminal responsibility for a certain act from the mere fact that this act constitutes a violation of international law, to identify the international illegality of an act by which vital human interests are violated with its criminality, meaning individual criminal
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responsibility for it, is in contradiction with positive law and generally accepted principles of international jurisprudence.

Prof. Kelsen then asserts that international law prior to the London Agreement did not provide punishment of those individuals who performed the acts of an illegal war. He equally asserts that neither do the national laws of the States which waged a war illegal under international law, but carried out in conformity with the law of the State concerned, provide punishment for those who performed the acts of such war. The jurisdiction conferred upon the international military tribunal by the London Agreement was thus unwarranted by the international law.

"It cannot be assumed that general international law obliges or authorizes the States, contracting parties to the Pact, to punish under their own law the individuals who, in their capacity as organs of a State, violated the Pact. In establishing such individual criminal responsibility the London Agreement created law not yet established by the Briand-Kellogg Pact, or valid as a rule of general international law."

Referring to that portion of the judgment where the Tribunal states that the law of war is not static, but by continual adaptation follows the needs of a changing world, the learned Professor says: "This is not an appeal to the law that has existed 'for many years past,' but to a new law adapted to a changing world. That the London Agreement is only the expression, not the creation, of this new law, is the typical fiction of the problematical doctrine whose purpose is to veil the arbitrary character of the acts of a sovereign law-maker."

"In creating the law to be applied by the tribunal, in providing for individual criminal responsibility not only for waging war in violation of existing treaties but also for planning, preparation or initiation of such war and participation in a conspiracy for accomplishment of these actions, the London Agreement has certainly created new law."

"One of the fundamental questions to be decided by the tribunal was the question, as to whether Germany, in resorting to war against Poland and the Soviet Union, violated international treaties concluded with the States whose representatives formed the court. Thus these States made themselves not only legislators but also judges in their own cause. Among the States whose representatives were the judges and prosecutors in the Nuremberg trial was one which had shared with Germany the booty of the war waged against Poland, a war declared by the tribunal, in conformity with the London Agreement, as a crime against peace because waged in violation of a non-aggression pact. It was the State which, in addition to this, committed exactly the same 'crime' in resorting to war against Japan in violation of a still existing non-aggression pact. If the principles applied in the Nuremberg trial were to become a precedent—a legislative rather than a judicial precedent—then, after the next war, the governments of the victorious States would try the mem-
bers of the Governments of the vanquished States for having committed crimes determined unilaterally and with retroactive force by the former. Let us hope that there is no such precedent."

Referring to the same report and in respect of the same claim of Mr. Justice Jackson, The Right Hon'ble Lord Hankey observes:

"If that means such precedents as trials of the Vanquished by the Victors, and the making—by the prosecutors designated for the trial—of new crimes ex post facto, and of rules to enable important evidence to be excluded, then a great many people will differ as to its being anything like a precedent of which we ought to be proud. If the 'precedent' is set with a view to a universal practice by the Victor in every future war of setting up his own Tribunal with his own list of crimes to try and punish the leading politicians and Generals and thousands of the citizens of the vanquished as war criminals, then the outlook is stupefying."

Mr. R. T. Paget, K. C., M. P., in his book entitled "Manstein, His Campaigns and His Trial" in chapter VIII at page 66 reveals the history of the Nuremberg charter. After pointing out how "the various war criminal trials that have taken place since the war have been an implementation of the policy declared at Yalta of punishing individuals amongst our enemies," the learned author divulges that "In June 1945 a conference was held in London to give effect to this policy. It was attended by the prosecutors designate of the United Kingdom and the U.S.A., and by General Nikitchenko, who was to be the Russian Judge at Nuremberg. At this conference prosecutors and judge consulted before the trial upon the method by which the accused should be brought to punishment. The minutes of the conference have been published by the Americans. No effort was made to provide a general statement of international law by which the actions of the accused should be judged. Instead these actions were considered and a law drafted expressly to exclude the defences that it was anticipated the accused might advance. Such was the statute of Nuremberg, the basis of the war criminal Trials." The same story of this conference for charter-making is given by Lord Hankey in his book entitled "Politics, Trials and Errors" at pages 16 and 17. The Tokyo charter is only a copy of this "Statute of Nuremberg." With the help of these charters the Allied powers "meted out stern justice" to their Vanquished enemies.

It will be interesting to notice in this connection the following report of a recent speech of Lord Oaksey, who as Lord Justice Lawrence presided with so much distinction over the Nuremberg Tribunal. Lord Oaksey is reported to have said:

"After the Nuremberg trial it seemed that the rules of law laid down there, would be recognised by all civilized nations. Now it was doubtful whether that acceptance could be relied on. The Soviet Union appears to have abandoned the principle activating it in 1945. It may
be there is some explanation of Russian diplomacy which we at present do not comprehend. It does not appear that there is any principle or practice that we can hope to rely on for the rule of law that must some day govern the world. It appears at present impossible to rely on the submission of all nations to a complete system of international law. The United Nations is trying to do something about it, but with so many checks and counter-checks and so many vetoes and counter-vetos it is not safe to rely on the United Nations alone."

According to Lord Maugham the charter never purported to lay down "principles" for all mankind. According to this eminent Lawlord these trials were not a trial under international law at all.
LECTURE X

*Tokyo Judgments*

Mr. Justice Francis Biddle, member for the United States of America of the International Military Tribunal at Nuremberg on his return to the U.S. on completion of his duty at Nuremberg submitted a report to the President of the U.S. wherein he referred to some executive instruction of the President at the inception of his appointment on the Tribunal and expressed his satisfaction at having been able to act according to that instruction. The instruction referred to in his report seems to be the desirability of acting in unison with and without dissent from the members representing the other three Great Powers.

Unfortunately the Tokyo Tribunal could not be unanimous. There were differences among the Judges throughout the trial over material questions of rules of evidence and procedure; there were dissensions among the Judges both as to law and fact in their final conclusions.

The majority judgment, which, of course, became the judgment of the Tribunal briefly meets the questions of law involved in the case in its Chapter II Part A. I quote below this portion of the judgment in its entirety. It runs thus:

"(a) Jurisdiction of the Tribunal"

"In our opinion the law of the Charter is decisive and binding on the Tribunal*. This is a special tribunal set up by the Supreme Commander under authority conferred on him by the Allied Powers. It derives its jurisdiction from the Charter. In this trial its members have no jurisdiction except such as is to be found in the Charter. The Order of the Supreme Commander, which appointed the members of the Tribunal, states: 'The responsibilities, powers, and duties of the members of the Tribunal are set forth in the Charter thereof . . . . .'

In the result, the members of the Tribunal, being otherwise wholly without power in respect to the trial of the accused, have been empowered by the documents, which constituted the Tribunal and appointed them as members, to try the accused but subject always to the duty and responsibility of applying to the trial the law set forth in the Charter.

*The foregoing expression of opinion is not to be taken as supporting the view, if such view be held, that the Allied Powers or
any victor nations have the right under international law in providing for the trial and punishment of war criminals to enact or promulgate laws or vest in their tribunals powers in conflict with recognised international law or rules or principles thereof. In the exercise of their right to create tribunals for such a purpose and in conferring powers upon such tribunals belligerent powers may act only within the limits of international law.

"The substantial grounds of the defence challenge to the jurisdiction of the Tribunal to hear and adjudicate upon the charges contained in the Indictment are the following:

"(1) The Allied Powers acting through the Supreme Commander have no authority to include in the Charter of the Tribunal and to designate as justiciable " Crimes against Peace " (Article 5 (a)));

"(2) Aggressive war is not per se illegal and the Pact of Paris of 1928 renouncing war as an instrument of national policy does not enlarge the meaning of war crimes nor constitute war a crime;

"(3) War is the act of a nation for which there is no individual responsibility under international law;

"(4) The provisions of the Charter are " ex post facto " legislation and therefore illegal;

"(5) The Instrument of Surrender which provides that the Declaration of Potsdam will be given effect imposes the condition that Conventional War Crimes as recognised by international law at the date of the Declaration (26th July, 1945) would be the only crimes prosecuted;

"(6) Killings in the course of belligerent operations except in so far as they constitute violations of the rules of warfare or the laws and customs of war are the normal incidents of war and are not murder;

"(7) Several of the accused being prisoners of war are triable by court martial as provided by the Geneva Convention 1929 and not by this Tribunal.

"Since the law of the Charter is decisive and binding upon it this Tribunal is formally bound to reject the first four of the above seven contentions advanced for the Defence but in view of the great importance of the questions of law involved the Tribunal will record its opinion on these questions.

"After this Tribunal had in May, 1946 dismissed the defence motions and upheld the validity of its Charter and its jurisdiction thereunder, stating that the reasons for this decision would be given later, the International Military Tribunal sitting at Nuremberg delivered its verdicts on the first of October, 1946. That Tribunal expressed inter alia the following opinions:

"'The Charter is not an arbitrary exercise of power on the part of the victorious nations but is the expression of international law existing at the time of its creation;'}
The question is what was the legal effect of this pact (Pact of Paris August 27, 1928)? The Nations who signed the pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy and expressly renounced it. After the signing of the pact any nation resorting to war as an instrument of national policy breaks the pact. 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 committing a crime in so doing.

The principle of international law which under certain circumstances protects the representative of a state cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.

The maxim 'nullum crimen sine lege' is not a limitation of sovereignty but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring 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.

The Charter specifically provides... 'the fact that a defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility but may be considered in mitigation of punishment.' This provision is in conformity with the laws of all nations... The true test which is found in varying degrees in the criminal law of most nations is not the existence of the order but whether moral choice was in fact possible.

With the foregoing opinions of the Nuremberg Tribunal and the reasoning by which they are reached this tribunal is in complete accord. They embody complete answers to the first four of the grounds urged by the defence as set forth above. In view of the fact that in all material respects the Charters of this Tribunal and the Nuremberg Tribunal are identical, this Tribunal prefers to express its unqualified adherence to the relevant opinions of the Nuremberg Tribunal rather than by reasoning the matters anew in somewhat different language to open the door to controversy by way of conflicting interpretations of the two statements of opinions.

The fifth ground of the Defence challenge to the Tribunal's jurisdiction is that under the Instrument of Surrender and the Declaration of Potsdam the only crimes for which it was contemplated that proceedings would be taken, being the only war crimes recognized by international law at the date of the Declaration of Potsdam, are Conventional War Crimes as mentioned in Article 5(b) of the Charter.
Aggressive war was a crime in international law long prior to the date of the Declaration of Potsdam, and there is no ground for the limited interpretation of the Charter which the defense seek to give it.

A special argument was advanced that in any event the Japanese Government, when they agreed to accept the terms of the Instrument of Surrender, did not in fact understand that those Japanese who were alleged to be responsible for the war would be prosecuted.

There is no basis in fact for this argument. It has been established to the satisfaction of the Tribunal that before the signature of the Instrument of Surrender the point in question had been considered by the Japanese Government and the then members of the Government, who advised the acceptance of the terms of the Instrument of Surrender, anticipated that those alleged to be responsible for the war would be put on trial. As early as the 10th of August, 1945, three weeks before the signing of the Instrument of Surrender, the Emperor said to the accused KIDO, "I could not bear the sight . . . of those responsible for the war being punished . . . but I think now is the time to bear the unbearable."

The sixth contention for the Defence: namely, that relating to the charges which allege the commission of murder will be discussed at a later point.

The seventh of these contentions is made on behalf of the four accused who surrendered as prisoners of war—ITAGAKI, KIMURA, MUTO and SATO. The submission made on their behalf is that they, being former members of the armed forces of Japan and prisoners of war, are triable as such by court martial under the articles of the Geneva Convention of 1929 relating to prisoners of war, particularly Articles 60 and 63, and not by a tribunal constituted otherwise than under that Convention. This very point was decided by the Supreme Court of the United States of America in the Yamashita case. The late Chief Justice Stone, delivering the judgment for the majority of the Court said: "We think it clear from the context of these recited provisions that Part 3 and Article 63, which it contains, apply only to judicial proceedings directed against a prisoner of war for offences committed while a prisoner of war. Section V gives no indication that this part was designated to deal with offences other than those referred to in Parts 1 and 2 of Chapter 3." With that conclusion and the reasoning by which it is reached the Tribunal respectfully agrees.

The challenge to the jurisdiction of the Tribunal wholly fails.

(b) Responsibility for War Crimes Against Prisoners

Prisoners taken in war and civilian internees are in the power of the Government which captures them. This was not always the case. For the last two centuries, however, this position has been recognised and the customary law to this effect was formally embodied in the
Hague Convention No. IV in 1907 and repeated in the Geneva Prisoner of War Convention of 1929. Responsibility for the care of prisoners of war and of civilian internees (all of whom we will refer to as "prisoners") rests therefore with the Government having them in possession. This responsibility is not limited to the duty of mere maintenance but extends to the prevention of mistreatment. In particular, acts of inhumanity to prisoners which are forbidden by the customary law of nations as well as by conventions are to be prevented by the Government having responsibility for the prisoners.

"In the discharge of these duties to prisoners Governments must have resort to persons. Indeed the Governments responsible, in this sense, are those persons who direct and control the functions of Government. In this case and in the above regard we are concerned with the members of the Japanese Cabinet. The duty to prisoners is not a meaningless obligation cast upon a political abstraction. It is a specific duty to be performed in the first case by those persons who constitute the Government. In the multitude of duties and tasks involved in modern government there is of necessity an elaborate system of subdivision and delegation of duties. In the case of the duty of Governments to prisoners held by them in time of war those persons who constitute the Government have the principal and continuing responsibility for their prisoners, even though they delegate the duties of maintenance and protection to others.

"In general the responsibility for prisoners held by Japan may be stated to have rested upon:

"(1) Members of the Government;

"(2) Military or Naval Officers in command of formations having prisoners in their possession;

"(3) Officials in those departments which were concerned with the well-being of prisoners;

"(4) Officials, whether civilian, military, or naval, having direct and immediate control of prisoners.

"It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill-treatment by establishing and securing the continuous and efficient working of a system appropriate for these purposes. Such persons fail in this duty and become responsible for ill-treatment of prisoners if:

"(1) They fail to establish such a system.

"(2) If having established such a system, they fail to secure its continued and efficient working.

"Each of such persons has a duty to ascertain that the system is working and if he neglects to do so he is responsible. He does not discharge his duty by merely instituting an appropriate system and thereafter neglecting to learn of its application. An Army Commander or a Minister of War, for example, must be at the same pains to ensure
obedience to his orders in this respect as he would in respect of other
orders he has issued on matters of the first importance.

"Nevertheless, such persons are not responsible if a proper system
and its continuous efficient functioning be provided for and conventional
war crimes be committed unless:

" (1) They had knowledge that such crimes were being committed,
and having such knowledge they failed to take such steps as were within
their power to prevent the commission of such crimes in the future, or

" (2) They are at fault in having failed to acquire such knowledge.

"If, such a person had, or should, but for negligence or supineness,
have had such knowledge he is not excused for inaction if his Office
required or permitted him to take any action to prevent such crimes.
On the other hand, it is not enough for the exculpation of a person,
otherwise responsible, for him to show that he accepted assurances
from others more directly associated with the control of the prisoners
if having regard to the position of those others, to the frequency of
reports of such crimes, or to any other circumstances he should have
been put upon further enquiry as to whether those assurances were
true or untrue. That crimes are notorious, numerous and widespread
as to time and place are matters to be considered in imputing knowledge.

" A member of a Cabinet which collectively, as one of the principal
organs of the Government, is responsible for the care of prisoners is
not absolved from responsibility if, having knowledge of the commission
of the crimes in the sense already discussed, and omitting or failing to
secure the taking of measures to prevent the commission of such crimes
in the future, he elects to continue as a member of the Cabinet. This is
the position even though the Department of which he has the charge
is not directly concerned with the care of prisoners. A Cabinet member
may resign. If he has knowledge of ill-treatment of prisoners, is
powerless to prevent future ill-treatment, but elects to remain in the
Cabinet thereby continuing to participate in its collective responsibility
for protection of prisoners he willingly assumes responsibility for any
ill-treatment in the future.

"Army or Navy Commanders can, by order, secure proper treatment
and prevent ill-treatment of prisoners. So can Ministers of War and
of the Navy. If crimes are committed against prisoners under their
control, of the likely occurrence of which they had, or should have had
knowledge in advance, they are responsible for those crimes. If, for
example, it be shown that within the units under his command
conventional war crimes have been committed of which he knew or
should have known, a commander who takes no adequate steps to
prevent the occurrence of such crimes in the future will be responsible
for such future crimes.

"Departmental Officials having knowledge of ill-treatment of
prisoners are not responsible by reason of their failure to resign; but
if their functions included the administration of the system of protection
of prisoners and if they had or should have had knowledge of crimes and did nothing effective, to the extent of their powers, to prevent their occurrence in the future then they are responsible for such future crimes.

" (c) The Indictment

" Under the heading of " Crimes Against Peace " the Charter names five separate crimes. These are planning, preparation, initiation and waging aggressive war or a war in violation of international law, treaties, agreements or assurances; to these four is added the further crime of participation in a common plan or conspiracy for the accomplishment of any of the foregoing. The Indictment was based upon the Charter and all the above crimes were charged in addition to further charges founded upon other provisions of the Charter.

" A conspiracy to wage aggressive or unlawful war arises when two or more persons enter into an agreement to commit that crime. Thereafter, in furtherance of the conspiracy, follows planning and preparing for such war. Those who participate at this stage may be either original conspirators or later adherents. If the latter adopt the purpose of the conspiracy and plan and prepare for its fulfilment they become conspirators. For this reason, as all the accused are charged with the conspiracies, we do not consider it necessary in respect of those we may find guilty of conspiracy to enter convictions also for planning and preparing. In other words, although we do not question the validity of the charges we do not think it necessary in respect of any defendants who may be found guilty of conspiracy to take into consideration nor to enter convictions upon counts 6 to 17 inclusive.

"A similar position arises in connection with the counts of initiating and waging aggressive war. Although initiating aggressive war in some circumstances may have another meaning, in the Indictment before us it is given the meaning of commencing the hostilities. In this sense it involves the actual waging of the aggressive war. After such a war has been initiated or has been commenced by some offenders others may participate in such circumstances as to become guilty of waging the war. This consideration, however, affords no reason for registering convictions on the counts of initiating as well as of waging aggressive war. We propose therefore to abstain from consideration of Counts 18 to 26 inclusive.

" Counts 37 and 38 charge conspiracy to murder. Article 5, sub-paragraphs (b) and (c) of the Charter, deal with Conventional war Crimes and Crimes against Humanity. In sub-paragraph (c) of Article 5 occurs this passage: " Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan." A similar provision
appeared in the Nuremberg Charter although there it was an independent paragraph and was not, as in our Charter incorporated in sub-paragraph (c). The context of this provision clearly relates it exclusively to sub-paragraph (a), Crimes against Peace, as that is the only category in which a "common plan or conspiracy" is stated to be a crime. It has no application to Conventional War Crimes and Crime against Humanity as conspiracies to commit such crimes are not made criminal by the Charter of the Tribunal. The Prosecution did not challenge this view but submitted that the counts were sustainable under Article 5(a) of the Charter. It was argued that the waging of aggressive war was unlawful and involved unlawful killing which is murder. From this it was submitted further that a conspiracy to wage war unlawfully was a conspiracy also to commit murder. The crimes triable by this Tribunal are those set out in the Charter. Article 5(a) states that a conspiracy to commit the crimes therein specified is itself a crime. The crimes, other than conspiracy, specified in Article 5(a) are "planning, preparation, initiating or waging" of a war of aggression. There is no specification of the crime of conspiracy to commit murder by the waging of aggressive war or otherwise. We hold therefore that we have no jurisdiction to deal with charges of conspiracy to commit murder as contained in Counts 37 and 38 and decline to entertain these charges.

"In all there are 55 counts in the Indictment charged against the 25 defendants. In many of the counts each of the accused is charged and in the remainder 10 or more are charged. In respect to Crimes against Peace alone there are for consideration no less than 756 separate charges.

"This situation springs from the adoption by the Prosecution of the common practice of charging all matters upon which guilt is indicated by the evidence it proposes to adduce even though some of the charges are cumulative or alternative.

"The foregoing consideration of the substance of the charges shows that this reduction of the counts for Crimes against Peace upon which a verdict need be given can be made without avoidance of the duty of the Tribunal and without injustice to defendants.

"Counts 44 and 53 charge conspiracies to commit crimes in breach of the laws of war. For reasons already discussed we hold that the Charter does not confer any jurisdiction in respect of a conspiracy to commit any crime other than a crime against peace. There is no specification of the crime of conspiracy to commit conventional war crimes. This position is accepted by the Prosecution and no conviction is sought under these counts. These counts, accordingly, will be disregarded.

"In so far as the opinion expressed above with regard to Counts 37, 38, 44, and 53 may appear to be in conflict with the judgment of the Tribunal of the 17th May, 1948, whereby the motions going to the Tribunal's jurisdiction were dismissed, it is sufficient to say that the
point was not raised at the hearing on the motions. At a much later date, after the Nuremberg judgment had been delivered, this matter was raised by counsel for one of the accused. On this topic the Tribunal concurs in the view of the Nuremberg Tribunal. Accordingly, upon those counts, it accepts the admission of the Prosecution which is favourable to the defendants.

"Counts 39 to 52 inclusive (omitting Count 44 already discussed) contain charges of murder. In all these counts the charge in effect is that killing resulted from the unlawful waging of war at the places and upon the dates set out. In some of the counts the date is that upon which hostilities commenced at the place named, in others the date is that upon which the place was attacked in the course of an alleged illegal war already proceeding. In all cases the killing is alleged as arising from the unlawful waging of war, unlawful in respect that there had been no declaration of war prior to the killings (Counts 39 to 43, 51 and 52) or unlawful because the wars in the course of which the killings occurred were commenced in violation of certain specified Treaty Articles (Counts 45 to 50). If, in any case, the finding be that the war was not unlawful then the charge of murder will fall with the charge of waging unlawful war. If, on the other hand, the war, in any particular case, is held to have been unlawful then this involves unlawful killings not only upon the dates and at the places stated in these counts but at all places in the theatre of war and at all times throughout the period of the war. No good purpose is to be served, in our view, in dealing with these parts of the offences by way of counts for murder when the whole offence of waging those wars unlawfully is put in issue upon the counts charging the waging of such wars.

The foregoing observations relate to all the counts enumerated; i.e., Counts 39 to 52 (omitting 44). Counts 45 to 50 are stated obscurely. They charge murder at different places upon the dates mentioned by unlawfully ordering, causing, and permitting Japanese armed forces to attack those places and to slaughter the inhabitants thereby unlawfully killing civilians and disarmed soldiers. From the language of these counts it is not quite clear whether it is intended to found the unlawful killings upon the unlawfulness of the attack or upon subsequent breaches of the laws of war or upon both. If the first is intended then the position is the same as in the earlier counts in this group. If breaches of the laws of war are founded upon them that is cumulative with the charges in Counts 54 and 55. For these reasons only and without finding it necessary to express any opinion upon the validity of the charges of murder in such circumstances we have decided that it is unnecessary to determine Counts 39 to 43 inclusive and Counts 45 to 52 inclusive."

To this judgment members from U.K., U.S., U.S.S.R., China, Canada and Newzealand were parties.
The President of the Tribunal, Mr. Justice Webb of Australia in a separate judgment gave his view of the law. I believe his views will admit of the following summary:

1. "The Charter is binding as it is International Law, the Potsdam Declaration and the Instrument of Surrender put into operation by the martial law of the Supreme Commander of the Allied Powers in occupation of Japan.

"The Supreme Commander stated in his proclamation of the Tribunal and Charter—the martial law referred to—that he acted in order to implement the term of surrender that stern justice should be meted out to war criminals.

"By the Instrument of Surrender the Japanese Emperor and Government undertook to carry out the provisions of the Potsdam Declaration in good faith and to issue whatever orders and take whatever action might be required by the Supreme Commander for giving effect to the declaration.

"This imposed on the Japanese Government the obligation, among others, of apprehending and surrendering persons named by the Supreme Commander as required for trial on charges of war crimes.

"The Emperor and Government of Japan understood the term "war criminals" to include those responsible for the war.

"The Instrument of Surrender also provided that the authority of the Emperor and the Japanese Government to rule the state should be subject to the Supreme Commander who would take such steps as he deemed proper to effectuate the terms of surrender.

"Under International Law belligerents have the right to punish during the war such war criminals as fall into their hands. The right accrues after occupation of the enemy territory. As a condition of the armistice a victorious belligerent may require the defeated state to hand over persons accused of war crimes. The Potsdam Declaration and the Instrument of Surrender contemplate the exercise of this right. But guilt must be ascertained before punishment is imposed; hence the provision for trials.

"The occupying belligerent may set up military courts to try persons accused of war crimes: and to assure a fair trial may provide among other things for civilian judges, the right of appeal, and publicity. (Oppenheim on International Law, 6th Edn. Vol. II, p. 456.)

"Under the Charter the Supreme Commander has made provision for these things. He may review a sentence and reduce a heavy sentence to a light one: a sentence of death to, say, one of imprisonment for a brief period.

2. "The Pact of Paris made the aggressive war a crime.

(a) "But there is the right of recourse to war in self defence, as appears from the negotiations that led to the Pact.

(b) "As to the right to judge of the necessity of self defence, "it is of the essence of the conception of self defence that recourse
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to it must in the first instance be left to the unfettered judgment of the party which deems itself to be in danger . . . .
But elementary principles of interpretation preclude a construction which gives to a state resorting to an alleged war in self-defence the right of ultimate determination, with a legally conclusive effect, of the legality of such action. No such right is conferred by any other international agreement. The legality of recourse to force in self-defence is in each particular case a proper subject for impartial determination by judicial or other bodies.” (Oppenheim on International Law, 6th Edn. Vol. II, pp. 154-5).

3. “The conduct perceived and acknowledged as illegal and criminal is recourse to war for the solution of international controversies as an instrument of national policy. Where the war takes place those responsible necessarily include those who decided on it and those who planned it and prepared for it. Preparation embraces crimes against humanity committed to facilitate war.

(a) “The Charter, in providing for the trial of persons accused of this crime and for their punishment if convicted, does not violate International Law or the Natural Law, but gives effect to it, as well as to the Potsdam Declaration and Instrument of Surrender. Such crimes are not distinguishable in this regard from conventional war crimes.

(b) “The view that aggressive war is illegal and criminal must be carried to its logical conclusion, e.g., a soldier or civilian who opposed war but after it began decided it should be carried on until a more favourable time for making peace was guilty of waging aggressive war.

(c) “There are no special rules that limit the responsibility for aggressive war, no matter how high or low the rank or status of the person promoting or taking part in it, provided he knows, or should know, it is aggressive.

4. “International law, unlike the national laws of many countries, does not expressly include a crime of naked conspiracy. The Pact of Paris recognizes as a crime recourse to aggressive war. This does not include conspiracy not followed by war. So too, the laws and customs of war do not make mere naked conspiracy a crime.

(a) “It may well be that naked conspiracy to have recourse to war or to commit a conventional war crime or crime against humanity should be a crime, but this Tribunal is not to determine what ought to be but what is the law.

(b) “Article V of the Charter declares participation in a common plan or conspiracy a means of committing a crime against peace, and states that leaders, organizers, instigators and accomplices, participating in the formulation or execution of such plan or conspiracy, are responsible for the acts performed.
by any person in execution of the plan. This is in accordance with a universal rule of criminal responsibility: when the substantive crime has been committed, leaders, organizers, instigators and accomplices are liable everywhere.

(c) "International Law may be supplemented by rules of justice and general principles of law: rigid positivism is no longer in accordance with International Law. The natural law of nations is equal in importance to the positive or voluntary." (Oppenheim on *International Law*, Vol. I, 6th Edn., pp. 98, 102, 103.)

Mr. Justice Jaranilla of the Philippines gave his view of the law in his separate judgment and substantially agreed with the majority view occasionally supplementing some of its reasons on the authority of Prof. Jorge Americano and Prof. Phillip C. Jessup.

Mr. Justice Bernard of France partly dissented from the majority view both on questions of facts and of law. I believe his view may be summarized thus:

1. "If the word 'jurisdiction' is accepted in the sense in which it is usually recognized, it means and signifies the limits within which a court has authority to hear and determine a cause or causes.

(a) "It may be noticed in passing that any assumption of criminal jurisdiction does not in itself imply criminality of the facts or the acts in relation to which such jurisdiction is assumed. This is particularly true when the authority which relays the facts to the judges is not the one qualified to legislate on their criminality. The reference to the judges only implies that in the estimation of this authority the facts or the acts in question are certainly or perhaps crimes.

(b) "The jurisdiction in rem of the International Military Tribunal for the Far East is determined by the Potsdam Declaration of 26 July, 1945, the act of surrender of 2 September, 1945, the Moscow Conference of 26 December, 1945, and by Article V of the Charter approved on 19 January, 1946 by the Supreme Commander for the Allied Powers, establishing the International Military Tribunal for the Far East. This jurisdiction is manifestly limited to the facts which could be deeds only of the people of the enemy nations or of renegades.

(c) "The Charter does not limit as to date the facts susceptible of being prosecuted and it can be assumed that only the normal rules of prescription, if any, as accepted by conscience and universal reason would limit the action of the Prosecution. However, it is to be noted that the Far East Commission in its session of 5 April 1946 in adopting the policy in regard to the apprehension, trial and punishment of war criminals in the Far East seems to have had in contemplation some limitation in this respect. By its committee number 5; "war criminals,"
it says: "the offense need not have been committed after a particular date . . . but in general, should have been committed since, or in the period immediately preceding the Mukden Incident of 18 September, 1931. The preponderance of cases may be expected to relate to the years since the Lukouchiao Incident of 7 July, 1937 ".

(d) "In the light of this text and of the report adopted on 24 February by the League of Nations Assembly according to which "while at the origin of the state of tension that existed before September 18, 1931, certain responsibilities would appear to be on one side and the other, no question of Chinese responsibility can arise for the development of events since September 18, 1931," it can be concluded that in the mind of the Far Eastern Commission, whose above-mentioned policy was transmitted to the Supreme Commander for the Allied Powers, the facts of the same category as those of Lake Khassan and Khalkhin Gol River did not figure with those contemplated for prosecution. Without doubt, however, if they can be established as having formed an integral part of the whole of the facts uncontestedly referred to the judgment of the Tribunal, they would validly come within cognizance of the Tribunal.

2. "What the authors of the Charter wished to submit to the Tribunal were not, as is ordinarily the case, eventual facts which would come within the scope of a penal definition previously established by a qualified legislator, but on the contrary, facts already committed and specified concerning which the Tribunal itself will have to decide whether they were in fact and validly subjected to penal sanctions by a competent authority and to investigate and decide whether the Accused were the authors of them. Under these conditions the Tribunal has the right to examine the facts submitted to it with due regard to all the qualifications recognized possible by the conscience and universal reason; it is its duty to examine those of them that would entail the most severe sanctions.

3. "According to the majority judgment, 'The law of the Charter is decisive and binding on the Tribunal . . . . In the trial its members have no jurisdiction except such as is to be found in the Charter . . . . In the result, the Members of the Tribunal being otherwise wholly without power in respect to the trial of the accused, have been empowered by the documents, which constituted the Tribunal and appointed them as members to try the accused but subject always to the duty and responsibility of applying to the trial the law set forth in the Charter.'

"The following expression of opinion is not to be taken as supporting the view, if such view be held, that the Allied Powers or any victor nations have the right under international law in providing for
the trial and punishment of war criminals to enact or promulgate laws or vest in their tribunals powers in conflict with recognized international law or rules or principles thereof. In the exercise of their right to create tribunals for such a purpose and in conferring powers upon such tribunals belligerent powers may act only within the limits of international law.'

"But other passages of the judgment, such as those in which the Tribunal declares not being able to see a crime in the conspiracy for a conventional war crime on a crime against humanity, show nevertheless that this interpretation reveals the real guiding view of the majority.

4. "Actually and contrary to the opinion shared by the majority in certain parts of its judgment, though rejected in others, nowhere do the authors of the Charter express their determination to make crimes of certain facts or to give definition of certain crimes. Article 5 of the Charter only furnishes an enumeration of acts which, listed under the three titles of Crimes against Peace, Conventional War Crimes, and Crimes against Humanity, are alleged crimes coming within the jurisdiction of the tribunal for which there shall be individual responsibility.

5. "It was stated by the majority that the signing of the Pact of Paris implied the same proposition as do the abovementioned acts. In my opinion this is not the case. The signatories of the Pact were able to outlaw the war as an instrument of national policy without troubling themselves to know to what extent society would be authorized to go towards repression of eventual violations of their agreement.

6. But "There is no doubt in my mind that such a war is and always has been a crime in the eyes of reason and universal conscience,—expressions of natural law upon which an international tribunal can and must base itself to judge the conduct of the accused tendered to it.

7. "There is no doubt either that the individual cannot shelter behind the responsibility of the community the responsibility which he incurred by his own acts. Assuming that there exists a collective responsibility, obviously the latter can only be added to the individual responsibility and cannot eliminate the same.

Mr. Justice Roling of Netherlands was another of the dissenting Judges. The relevant portions of his judgment may be summarized thus:

1. "Article 5 of the Charter, dealing with "jurisdiction over persons and offenses," limits the scope of the jurisdiction of the Tribunal as to persons and as to offenses.

(a) "In the Nuremberg judgment it is stated—and in our case the prosecution and the majority of the Tribunal have held the same view—that the Tribunal is bound by its Charter. This is true in the sense that never could the Tribunal have power "to try and punish" beyond the Charter. But it does not, and cannot, imply that the
Tribunal would be bound to follow the Charter in case it should contain provisions in violation of international law.

(b) "If the Nuremberg Judgment is correct in stating that "the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State," it would be surprising if the Charter, laid down on behalf of the Allied Nations, should be intended to be binding upon the Tribunal even if it disregarded existing international law. The authority of military tribunals, as the United States Supreme Court pointed out in "Ex Parte Quirin," derives from the national sovereignty, while their law in dealing with the enemy derives from international law.

(c) "The position taken in the majority judgment amounts this: that the victorious nations, in providing for the trial and punishment of war criminals, have the right to promulgate a Charter and to create a Tribunal. "In the exercise of their right to create tribunals for such a purpose and in conferring powers upon such tribunals, belligerent powers may act only within the limits of international law." However, "the law of the Charter is decisive and binding on the Tribunal." The Tribunal may try the accused 'but subject always to the duty and responsibility of applying to the trial the law set forth in the Charter.'

(d) "Consequently, according to the majority judgment, the Tribunal, though called upon to mete out justice, is not the authority called upon to judge whether the victorious powers have stayed within the limits of international law. Members of an International Tribunal, therefore, could only refuse office or resign in case they regard the Charter as trespassing those limits. and leave their places to judges prepared to share the views as set out in the Charter.

(e) "This standpoint seems to be not only dangerous for the future, but incorrect at this moment.

"It would be the worst possible service this Tribunal could render to the cause of international law if it should establish as a rule that an international tribunal, called upon to mete out justice, would have to apply the rules laid down by the Supreme Commander of the victorious nations, without having either the power or the duty to inquire whether it was applying rules of justice at all.

"The interpretation which considers the Charter as giving rules of jurisdiction and procedure only is indicated by the very constitution of the Tribunal. We observe that in the Tokyo Tribunal there were eleven judges, representing eleven nations.

2. "The Charter determines which facts may be subjected to a legal hearing. The Tribunal, having been invested by the Charter with "the power to 'try and punish'" (Article 5), will determine which of those facts are crimes according to international law. This follows from the principles of general international law.
3. "The Pact of Paris, signed on behalf of sixty-three nations, among those Japan, appears to be the only real basis for a different conception with regard to the *jus ad bellum*. It is questionable, however, whether it did in fact bring about such a change that aggressive war became a vile crime. The Pact itself provides only the one sanction that states waging war in violation of the Pact "Should be denied the benefits furnished by this Treaty." (Preamble). But hardly any mention was made (before the Second World War), by those who interpreted this Pact, of the consequence that aggressive war is criminal, and involves individual responsibility.

"It appears that this went further than the reservation of the right of every nation to defend its territory from attack or invasion. However, with the vagueness of the text as it stands, it is essential to know with what ideas in mind parliaments were prepared to ratify the pact, especially so in view of author Kellog's explanation of its implications.

(a) "The principal question in relation to the above is: Did the Pact of Paris make aggressive war an international crime for which individuals can be held responsible?

(b) "Neither the lofty phrases used in resolutions, nor the ambiguous Pact of Paris outlawed war in the sense that waging an illegal war did become criminal in the ordinary sense.

(c) "But, it has been asked, does not the criminality of aggression follow from the entity of resolutions and pact together? Glueck has based his changed opinion on this thesis, "that the Pact of Paris may, together with other treaties and resolutions, be regarded as evidence of a sufficiently developed *custom* to be acceptable as international law."

(d) "This, however, is a misunderstanding of the meaning of the source of international law as mentioned in Article 38 of the Statute of the International Court of Justice, according to which the Court shall apply "international custom, as evidence of a general practice accepted as law." Custom can indicate law if it shows behaviour thus accepted. The only custom referred to in Glueck's argument is the custom to use more or less empty phrases where real issues failed to materialize. Actual practice of states in their dealings with each other since 1928, the only practice which could indicate the alleged fundamental change, would not support the new conception at all.

(e) "In this connection, it is illuminating to note that criminal responsibility on the part of the authors of aggressive war came under serious discussion only towards the end of the war. In 1928 this particular consequence of the Pact of Paris was by no means recognized.

4. "The question has to be faced and answered whether the concept of these crimes was, and could be, created as such by the London Agreement of August 8, 1945, or by the Charter for the IMTFE.

(a) "Aggression was not considered a true crime before and in the beginning of this war, and could not be considered as such for lack of
those conditions in international relations on which such a view could be based.

5. "The dreadfulness of World War II may have made us realize the necessity of preventing wars in the future. But we need not discuss here whether the horror of the atomic bomb opened our eyes to the criminality of Japanese aggression.

"These horrors of World War II may compel the nations to take the legal steps to achieve the maintenance of peace. This has not been done to date. Consequently, apart from the question as to whether, according to international law, victorious powers, either in a mutual treaty or by order of their Supreme Commander, could bring about a change in the legal situation of aggressive war, the relations of the nations did not change in the sense that even at this moment every illegal war could be qualified as a vile crime.

"Positive international law, as existing at this moment, compels us to interpret the "crime against peace," as mentioned in the Charter, in a special way. It may be presupposed that the Allied Nations did not intend to create rules in violation of international law. This indicates that the Charter should be interpreted so that it is in accordance with International Law.

"There is no doubt that powers victorious in a "bellum justum," and as such responsible for peace and order thereafter, have, according to international law, the right to counteract elements constituting a threat to that newly established order, and are entitled, as a means of preventing the recurrence of gravely offensive conduct, to seek and retain the custody of the pertinent persons. Napoleon's elimination offers a precedent."

In my dissenting judgment I had to deal with each and every one of the points covered by these various views including the views of the Nuremberg Tribunal. My views, I believe, will admit of the following short summary:—

1. The Charter did not define the crime in question.
2. (a) It was not within the competence of its author to define any crime.
   (b) Even if any crime would have been defined by the Charter that definition would have been ultra vires and would not have been binding on us.
3. It was within our competence to question the authority of the Charter in this respect.
4. The law applicable to the case must be the international law as found by us.
5. The Pact of Paris did not affect the pre-existing legal position of war in international life. War in international life remains as before, outside the province of law, its conduct alone having been brought within the domain of law.
(a) The Pact of Paris did not come within the category of law at all and consequently failed to introduce any change in the legal position of a belligerent state or in the jural incidence of belligerency.

6. No category of war became criminal or illegal in international life either by the Pact of Paris or as a result of the same or in any other way.

7. The individuals comprising the Governments and functioning as agents of that Government incur no criminal responsibility in international law for the acts alleged.

8. The international community has not as yet reached a stage which would make it expedient to include judicial process for condemning and punishing either states or individuals.

As I have said above my dissent from the majority judgment as also from the Nuremberg view was complete. Mr. Ireland writing in the "Year Book of World Affairs, 1950," appended the following extracts from my judgment:

"The acts alleged are, in my opinion, all acts of state and whatever these accused are alleged to have done, they did that in working the machinery of the government, the duty and responsibility of working the same having fallen on them in due course of events (p. 9).

"The statement that if an act is forbidden by international law as a war crime, the perpetrator may be punished by the injured state if he falls in its hands is correct only with this limitation that the act in question is not an act of the enemy state (p. 18).

"The crimes triable by this Tribunal must be limited to those committed in or in connection with the war which ended in the surrender on September 2, 1945 . . . . It is preposterous to think that defeat in a war should subject the defeated nation and its nationals to trial for all the delinquencies of their entire existence (p. 18).

"If there is any international law which is to be respected by the nations, that law does not confer any right on the conqueror in a war to try and punish any crime committed by the vanquished not in connection with the war lost by him but in any other unconnected war or incident (p. 20).

"The so-called trial held according to the definition of crime now given by the victors obliterates the centuries of civilisation which stretch between us and the summary slaying of the defeated in a war. A trial with law thus prescribed will only be a sham employment of legal process for the satisfaction of a thirst for revenge. It does not correspond to any idea of justice. Such a trial may justly create the feeling that the setting up of a tribunal like the present is much more a political than a legal affair, an essentially political objective having thus been cloaked by a juridical appearance (p. 37).

"The author of the Charter in the case before us derived his authority at least in part from the United States of America, and, so
far as his power of legislation is concerned, it may be subject to (the limitation on sovereignty imposed by the United States Constitution, Article I, Sections 9 and 10) at least when this power is sought to be supported as delegated by that authority (p. 50).

"Under international law, as it now stands, a victor nation or a union of victor nations would have the authority to establish a tribunal for the trial of war criminals, but no authority to legislate and promulgate a new law of war crimes. When such a nation or group of nations proceeds to promulgate a Charter for the purpose of the trial of war criminals, it does so only under the authority of international law and not in exercise of any sovereign authority. I believe, even in relation to the defeated nationals or to the occupied territory, a victor nation is not a sovereign authority (p. 56).

"As soon as (victor states) set up an international tribunal, they cannot create any law defining the crime for such a tribunal (p. 62).

"It is beyond the competence of any victor nation to go beyond the rules of international law as they exist, give new definitions of crimes and then punish the prisoners for having committed offences according to this new definition (p. 64).

"The Pact (of Paris of August 27, 1928) did not in any way change the existing international law. It failed to introduce any new rule of law in this respect (p. 80).

"The parties thereto intended to create by this Pact only a contractual obligation. Its originators did not design it for the entire Community of Nations (p. 90).

"The single fact that war in self-defence in international life is not only not prohibited, but that it is declared that each state retains 'the prerogative of judging for itself what action the right of self-defence covered and when it came into play' is, in my opinion, sufficient to take the Pact out of the category of law. As declared by Mr. Kellogg, the right of self-defence was not limited to the defence of territory under the sovereignty of the state concerned (p. 91).

"The pre-existing legal position of war in international life remained unaffected (by the Pact of Paris) (p. 104).

"When the conduct of the nations is taken into account the law will perhaps be found to be that only a lost war is a crime (p. 128).

"No category of war became illegal or criminal either by the Pact of Paris or as a result of the same. Nor did any customary law develop making any war criminal (p. 129).

"Any new precedent made now will not be the law safeguarding the peace-loving, law-abiding members of the Family of Nations, but will only be a precedent for the future victor against the future vanquished. Any misapplication of a doubtful legal doctrine here will threaten the very formation of the much coveted Society of Nations, will shake the very foundation of any future international society (p. 141).
"A wealth of authority, both ancient and modern, is requisitioned to establish that public international law is derived from natural law (p. 147).

"This doctrine of natural law is only to introduce a fundamental principle of law and right. The fundamental principle can weigh the justice of the intrinsic content of juridical propositions, but cannot affect their formal quality of juridicity. Perhaps its claim that the realisation of its doctrine should constitute the aim of legislation is perfectly legitimate. But I doubt if its claim that its doctrines should be accepted as positive law is at all sustainable. At any rate in international law of the present time such an ideal would not carry us far (p. 149).

"No category of war became a crime in international law up to the date of commencement of the world war under our consideration. Any distinction between just and unjust war remained only in the theory of the international legal philosophers (p. 151).

"As the law now stands, it will be a 'war crime' stricto sensu on the part of the victor nations if they would 'execute' these prisoners otherwise than under a due process of international law, though, of course, there may not be any one to bring them to book for that crime at present (p. 178).

"So long as the international organization continues at the stage where the trial and punishment for any crime remains available only against the vanquished in a lost war, the introduction of criminal responsibility cannot produce the deterrent and the preventive effects. The risk of criminal responsibility in planning an aggressive war does not in the least become graver than that involved in the possible defeat in the war planned (p. 214).

"It is inappropriate to introduce criminal responsibility of the agents of a state in international life for the purpose of retribution . . . . The only justification that remains for the introduction of such a conception in international life is revenge, a justification which all those who are demanding this trial are disclaiming (p. 216).

"Part II—What is 'Aggressive War'? (pp. 227-279)

"In International life as at present organised is not possible 'by the simple aid of popular knowledge' to find out which category of war is to be condemned as aggressive (p. 233).

"To leave the aggressive character of war to be determined according to 'the popular sense' or 'the general moral sense' of humanity is to rob the law of its predictability (p. 234).

"Even in course of the negotiations between Japan and the United States of America just on the eve of the present Pacific War, an action of legitimate self-defence was understood by the United States of America to mean 'their own decision for themselves whether and when and where their interests were attacked or their security threatened.' This self-defence was understood to extend to the placing
of armed forces in any strategic military position keeping in view 'the lightning speed of modern warfare' (vide Exhibit 2876. Radio address by President F. D. Roosevelt, from Washington, May 27, 1941) (p. 250).

"A war, if not otherwise criminal, would not be so only because it involves any violation of the rights and duties arising out of legal relations constituted by bilateral treaties and agreements. Any breach of such treaties and agreements, though brought about by war, would only give the other party a right to protest, and resist and maintain its rights even by having recourse to war. In any case a war involving such a breach does not, in international law, bring in any individual responsibility or criminality (p. 271).

"Part III—Rules of Evidence and Procedure (pp. 280-348).

"In prescribing the rules of evidence for this trial the Charter practically discarded all the procedural rules devised by the various national systems of law, based on litigious experience and tradition to guard a tribunal against erroneous persuasion (p. 280).

"The major part of the evidence given in this case consists of hearsay . . . . These are statements taken from persons not produced before us for cross-examination (p. 283).

"I for myself find great difficulty in accepting and acting upon an evidence of this character at a trial at which the life and liberty of individuals are concerned. Some of these statements are ascribed to persons who had already appeared before us as prosecution witnesses. The defence was not even told at that time that this record of their prior statement would be offered in evidence (p. 289).

"The rule against leading questions lost all its practical importance when we decided (on June 18, 1946) to allow the prosecution to adduce, in lieu of presenting the witness for direct examination in court, the affidavit of the witness or his statement taken out of court, offering the witness only for cross-examination (p. 299).

("The Tribunal ruled, on July 25, 1946, that) All cross-examination shall be limited to matters arising in the examination-in-chief (Record, p. 2515) (p. 304).

"It is one of the cardinal rules of examination of witnesses in many systems that the examination-in-chief and cross-examination must relate to relevant facts, but that the cross-examination need not be confined to the facts to which the witness testifies in his examination-in-chief (p. 305).

"The very essence of the prosecution case is the existence of a conspiracy, plan or design of the kind alleged in Count 1 of the indictment. In order to establish this conspiracy, the prosecution relied mainly on circumstantial evidence. As I read the prosecution evidence there is not a single item in it which goes directly to establish this conspiracy. Whatever that be, the prosecution, at least, relied strongly on the evidence of subsequent occurrences and invited us to draw an
inference therefrom that these were all the result of the alleged conspiracy and hence established that conspiracy by reference back (p. 921).

"Part IV—Over-All Conspiracy (pp. 349-1014)

"The statesmen, diplomats and politicians of Japan were perhaps wrong, and perhaps they misled themselves. But they were not conspirators. They did not conspire (p. 983).

"Public opinion in Japan during this period might have been influenced by propaganda but there was nothing illicit or criminal in the means adopted for this purpose . . . Not a single decision taken by the government could be said to be the decision of a dictator or of a dictatorial group. The evidence discloses how every measure suggested and every step taken was the result of careful and anxious deliberations of the persons responsible for the management of the affairs of the state and how, in arriving at these decisions, they were always alive to the public opinion and public interest as understood by them (p. 989).

"I have arrived at the conclusions (1) that no conspiracy either of a comprehensive character and of a continuing nature, or of any other character and nature was ever formed, existed or operated during the period from January 1, 1928, to September 2, 1945, or during any other period: (2) that neither the object and purpose of any such conspiracy or design for domination of the territories, as described in the indictment, nor any design to secure such domination by war has been established by evidence in this case; (3) that none of the defendants has been proved to have been members of any such conspiracy at any time (p. 990).

"Conspiracy by itself is not at all a crime in international life. In the indictment in this case, conspiracy has been allotted a very prominent place and has, by itself, been introduced as a crime . . . . . . The prosecution charges the Japanese leaders with the commission of a crime of conspiracy apart from the actual perpetration of the conspired act, asserting that the said crime was committed as soon as the conspiracy was completed. According to the prosecution, the Japanese war leaders became guilty of this crime even prior to the commission of the act itself, as soon as they entered into an understanding either among themselves, or with the leaders of Italy and Germany, to commit any of the acts alleged in the indictment (p. 991).

"The instances of criminal international law affecting individuals are all cases where the act in question is the act of the individual on his own behalf, committed on high seas or in connection with international property (p. 1002).

"The nations have not as yet considered the conditions of international life ripe enough for the transportation of principles of criminality into rules of law in international life (p. 1003).

"We, as a court of justice, cannot assume that the legal concepts of the authors of the Charter and of its adherents were correct. We
must also remember that it was not enacted even by the legislatures of these civilised nations. Men of very high positions, no doubt, represented these nations; but there is nothing before us to show their juristic competence (p. 1004).

"If we carefully examine the principles of the law of conspiracy as prevailing in the several civilised countries, we cannot fail to see that the essential principle underlying that law is the desirability and possibility of prevention. In my opinion this object cannot be achieved in international life as at present constituted (p. 1008).

"'Conspiracy' by itself is not yet a crime in international law (p. 1014.).

"Part V—Scope of Tribunal's Jurisdiction (pp. 1015-1026).

"The hostilities relating to these matters (involved in Counts 2, 18, 25, 26, 35, 36, 51 and 52) ceased long before the Potsdam Declaration of July 26, 1945, and the Japanese Surrender of September 2, 1945. The crimes triable by this Tribunal must be limited to those committed in or in connection with the hostility which ended in the Surrender of September 2, 1945. International law does not invest the victors with any right more extensive than this (p. 1015).

"Counts 25, 35 and 51 relate to the hostility between Japan and the Union of Soviet Socialist Republics in the area of Lake Khasan, during July and August, 1938. The evidence . . . conclusively shows that these hostilities long ceased before the Potsdam Declaration and the Surrender . . . . These long past hostilities were not, and could not have been, within the contemplation of the Potsdam Declaration, the deed of Surrender and the Charter constituting this Tribunal (p. 1018).

"Counts 26, 36 and 52 relate to a hostility between Japan and the Mongolian People's Republic in the area of the Khalkhin Gol River during the summer of 1939. This hostility also ceased long before the present Surrender . . . . The Mongolian People's Republic was not a party either to the Declaration or to the deed of Surrender . . . (It) is not a prosecuting nation . . . . The charges contained in Counts 2, 18, 25, 26, 35, 36, 51 and 52 therefore fail on this ground also and the accused must be acquitted of these charges (p. 1019).

"I am inclined to the view that the word 'war' as used in these declarations included the hostilities (between China and Japan) which commenced with the Marco Polo Bridge Incident of July 7, 1937 (p. 1026).

"Part VI—War Crimes Stricto Sensu; Charges of Murder and Conspiracy (pp. 1027-1226)

"In order to take any killing outside the definition of murder all that is necessary is to show that it was done in war, the war itself is not required to be justified at the same time. The killing in question
does not come within the definition of the national system because of the war-relation between the two states . . . The killing is done under the authority of the killer's state *animo belligerandi*, and this is sufficient to place it outside the definition of murder in any national system (p. 1032).

"There is absolutely no evidence of any order, authorisation or permission as alleged in Count 54 (p. 1090).

"On a review of the entire evidence from this point, I have come to the conclusion that the evidence would not entitle us to infer that the members of the government in any way ordered, authorised or permitted the commission of these offences. Nor can I accept the prosecution hypothesis that such offences were committed pursuant to any government policy. There is no evidence, testimonial or circumstantial, concomitant, prospectant, restrospectant, which would in any way lead to the inference that the government in any way permitted the commission of such offences . . . As members of the Government, it was not their duty to control the troops in the field, nor was it within their power so to control them. The commanding officer was a responsible personage of high rank. The members of the government were certainly entitled to rely on the competency of such high-ranking officers in this respect (p. 1108).

"No such inaction in this respect on the part of the accused has been established in this case as would entitle us to infer that these acts of inhuman treatment meted out to the prisoners of war were ordered, authorised or permitted by any of the accused. The war here might have been aggressive. There might have been many atrocities. Yet, it must be said in fairness to the accused that one thing that has not been established in this case is that the accused designed to conduct this war in any ruthless manner (p. 1165).

"Part VII—Recommendation (pp. 1226-1235)

"For the reasons given in the foregoing pages, I would hold that each and every one of the accused must be found not guilty of each and every one of the charges in the indictment and should be acquitted of all those charges . . . There is indeed one possible approach to the case, which I have, as yet, left unexplored. It is said that the victor nations, as military occupants of Japan, can take action under Article 43 of Hague Convention IV of 1907 in order to 'ensure public order and safety' and that this power entitles them to define the circumstances in which they would proceed to take such action and the action which they would consider requisite for the purpose . . . . I believe this is really an appeal to the political power of the victor nations with a pretence of legal justice. It only amounts to 'piecing up want of legality with matter of convenience' (p. 1226)."
"I am not prepared to strain and twist Article 43 of the Hague Convention to cull any such purpose and goal out of it . . . . . As a judicial tribunal, we cannot behave in any manner which may justify the feeling that the setting up of the tribunal was only for the attainment of an objective which was essentially political, though cloaked by a juridical appearance (p. 1231).

"The name of Justice should not be allowed to be invoked only for the prolongation of the pursuit of vindictive retaliation" (p. 1238).
LECTURE XI

VICTORS' CHARTER

It would appear that the decisions of the Tribunals were mainly based on the definitions of crimes given in the Charter. The Nuremberg judgment would perhaps admit of the following summarization:—

1. The Charter constituting the Tribunal also gave the law defining and declaring certain acts as constituting crimes:—

"By the Charter annexed to the Agreement, the constitution, jurisdiction and functions of the Tribunal were defined. The Tribunal was invested with power to try and punish persons who had committed crimes against peace, war crimes and crimes against humanity as defined in the Charter". . . . . . . "These provisions (Article 6 of the Charter) are binding upon the Tribunal as the law to be applied to the case". . . . . . . "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 law of the Charter is decisive, and binding upon the Tribunal". . . . . . . "The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime; and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement."

"The Tribunal is of course bound by the Charter, in the definition which it gives both of war crimes and crimes against humanity. With respect to war crimes, however, as has already been pointed out, the crimes defined by Article 6, section (b), of the Charter were already recognized as war crimes under international law. They were covered by Articles 46, 50, 52, and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46, and 51 of the Geneva Convention of 1929. That violations of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument. . . . . . . With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond
all doubt. 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. The Tribunal is of the opinion 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 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."

2. The provisions of the Charter including the definitions of crimes are binding on the Tribunal:

(a) Because the Tribunal was the creature of the Charter and therefore the entire Charter is binding on it: "The jurisdiction of the Tribunal is defined in the Agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal;"

(b) Because the Charter was given by the sovereign legislative power: "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 civilised world."

"The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law;"

(c) Because the Charter is not an arbitrary exercise of power on the part of the Victorious nations, but 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.

3. The maxim "nullum crimen sine lege, nulla poena sine lege" has no application to the present fact:

(a) Because the maxim is not a limitation of sovereignty, but is in general a principle of justice;
(b) Because "to assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring 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. 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 all international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts."

4. There is no question of ex post facto punishment in this case in view of the state of international law in 1939.

(a) "The General Treaty of the Renunciation of War of 27th August, 1928, more generally known as the Pact of Paris or the Kellogg-Briand Pact, was binding on sixty-three nations, including Germany, Italy and Japan at the outbreak of war in 1939."

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 committing a crime in so doing.

(b) The Tribunal thinks that the view which the Tribunal takes of the true interpretation of the Pact is supported by the International history which preceded it.

5. The submission that international law is concerned with the actions of sovereign States, and provides no punishment for individuals, and that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the state, must be rejected:

(a) Because it has been long recognized that international law imposes duties and liabilities upon individuals as well as upon States: Ex Parte Quirin;

(b) Because crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced;

(c) Because the provisions of Article 228 of the Treaty of Versailles illustrate and enforce this view of individual responsibility;
(d) Because the principle of international law, which, under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law;

(e) (i) Because the Charter in its Article 7 expressly declares individual responsibility;
(ii) Because the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law. . . . The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.

6. The argument that common planning cannot exist when there is complete dictatorship is unsound. A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it. Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and businessmen. When they, with the knowledge of his aims, gave him their co-operation, they made themselves parties to the plan he had initiated. They are, not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organized domestic crime.

7. Count One, however, charges not only the conspiracy to commit aggressive war, but also to commit war crimes and crimes against humanity. But the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war. Article 6 of the Charter provides:

"Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

In the opinion of the Tribunal these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan. The Tribunal will therefore disregard the charges in Count One that the defendants conspired to commit war crimes and crimes against
humanity, and will consider only the common plan to prepare, initiate and wage aggressive war.

The remaining portion of the judgment shall be dealt with in their proper places. For the present we shall proceed to consider the questions involved in the points above specified.

The Tokyo majority view is really an echo of the Nuremberg view. Indeed the Tokyo majority did not give any separate reason for its conclusion that the law of the Charter is decisive and binding on the Tribunal though the Prosecution there disclaimed any such authority of the Charter. The majority briefly summarized the Nuremberg opinions and said: "With the foregoing opinions of the Nuremberg Tribunal and the reasoning by which they are reached this Tribunal is in complete accord. They embody complete answers to the first four of the grounds urged by the defence as set forth above. In view of the fact that in all material respects the Charters of this Tribunal and the Nuremberg Tribunal are identical, this Tribunal prefers to express its unqualified adherence to the relevant opinions of the Nuremberg Tribunal rather than by reasoning the matters anew in somewhat different language to open the door to controversy by way of conflicting interpretations of the two statements of opinions."

I shall, first of all, take up the question whether the Charter establishing the Tribunal, in any way obliged it to apply any particular law other than what may be determined by the Tribunal itself to be the international law, and, if so, what that law is,—whether the Charter did define 'war crimes' and whether the Tribunal was bound by that definition, if any, in determining the guilt of the persons under trial either at Nuremberg or at Tokyo. The line of reasoning followed in answering these questions is the same that I followed in my dissenting Judgment.

The relevant provisions are Articles 1, 2, 6, 7 and 8 of the Nuremberg Charter and Article 1, 2, 5 and 6 of the Tokyo Charter. Article 6 of the Nuremberg Charter corresponds to Article 5 of the Tokyo Charter and Articles 7 and 8 of the former correspond to Article 6 of the latter. These are expressed almost in identical languages in the two Charters. The Nuremberg Charter is given by the Four Powers, parties to the London agreement of 8th August 1945 and the trial is declared to be pursuant to the Moscow declaration of October 1943 and other declarations made from time to time. The Tokyo Charter is given by the Supreme Commander who derived his authority from the occupying Allied Powers which included seven others besides those four. The Authority was conveyed in a Message transmitted on September 6 through the Joint Chief of staff to General MacArthur. It was prepared jointly by the Department of State, the War Department, and the Navy Department and approved by the President of the United States on September 6. The message
purports to be a statement clarifying the authority which General MacArthur is to exercise in his position as Supreme Commander for the Allied Powers. The full text of the message is as follows:

"1. The authority of the Emperor and the Japanese Government to rule the State is subordinate to you as Supreme Commander for the Allied powers. You will exercise your authority as you deem proper to carry out your mission. Our relations with Japan do not rest on a contractual basis, but on an unconditional surrender. Since your authority is supreme, you will not entertain any question on the part of the Japanese as to its scope.

"2. Control of Japan shall be exercised through the Japanese Government to the extent that such an arrangement produces satisfactory results. This does not prejudice your right to act directly if required. You may enforce the orders issued by you by the employment of such measures as you deem necessary, including the use of force.

"3. The statement of intentions contained in the Potsdam Declaration will be given full effect. It will not be given effect, however, because we consider ourselves bound in a contractual relationship with Japan as a result of that document. It will be respected and given effect because the Potsdam Declaration forms a part of our policy stated in good faith with relation to Japan and with relation to peace and security in the Far East."

For our present purpose paragraph 3 of the message alone is relevant.

The relevant provisions of the two Charters stand thus:

NUREMBERG CHARTER:

"1. CONSTITUTION OF THE INTERNATIONAL MILITARY TRIBUNAL

Article 1. In pursuance of the agreement signed on the eighth day of August 1945 by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal (hereinafter called "the Tribunal") for the just and prompt trial and punishment of the major war criminals of the European Axis.

Article 2. That Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the signatories. The alternates shall, so far as they are able, be present at all sessions of the Tribunal. In case of illness of any member of the Tribunal or his incapacity for some other reason to fulfill his functions, his alternate shall take his place.

Article 3. Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the defendant or their
counsel. Each signatory may replace its member of the Tribunal or his alternate for reasons of health or for other good reasons, except that no replacement may take place during a trial, other than by an alternate.

"II. Jurisdiction and General Principles"

_Article 6._ The Tribunal established by the agreement referred to in article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes against peace: Namely, 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;

(b) War Crimes: Namely, violations of the laws or customs of war. Such violations shall include, but not be 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;

(c) Crimes against humanity: Namely, 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.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

_Article 7._ The official position of defendants, whether as heads of state or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment.

_Article 8._ The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the tribunal determines that justice so requires.
CRIMES IN INTERNATIONAL RELATIONS

TOKYO CHARTER:

"Section I—Constitution of Tribunal

"Article 1. Tribunal Established. The International Military Tribunal for the Far East is hereby established for the just and prompt trial and punishment of the major war criminals in the Far East. The permanent seat of the Tribunal is in Tokyo.

"Article 2. Members. The Tribunal shall consist of not less than six members nor more than eleven members, appointed by the Supreme Commander for the Allied Powers from the names submitted by the Signatories to the Instrument of Surrender, India, and the Commonwealth of the Philippines.

"Section II—Jurisdiction and General Provisions

"Article 5. Jurisdiction over Persons and Offenses. The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

" (a) Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

" (b) Conventional War Crimes: Namely, violations of the laws or customs of war;

" (c) Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial 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. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

"Article 6. Responsibility of Accused. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his Government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires."
Excepting these the Charters contain no other provisions having any bearing on the question under consideration. There is no express provision in the Charters making it obligatory on the Tribunal either to apply or to exclude any particular law.

The real questions that arise for our consideration are:

1. Whether any of the Charters defined the crime in question; if so,
2. Whether it was within the competence of its author so to define the crime;
3. Whether it was within the competence of the Tribunal to question the authority of its author in this respect.

A revealing account of the promulgation of the Nuremberg charter has been given by the Rt. Hon’ble Lord Hankey in his "Politics, Trials and Errors," pp. 16-23 et seq. and p. 128 and by Mr. R. T. Paget, K.C., M.P., in his "Manstein, His Campaigns and His Trial," p. 66. The London Agreement for the establishment of the Tribunal and the promulgation of the charter was the result of the London conference of 1945. It was attended by the prosecutors designate of the United Kingdom and the U.S.A. and by General Nikitchenko who was to be the Russian Judge at Nuremberg. "At this conference prosecutors and Judge consulted before the trial upon the method by which the accused should be brought to punishment . . . No effort was made to provide a general statement of International law by which the actions of the accused should be judged. Instead these actions were considered and a law drafted expressly to exclude the defences that it was anticipated the accused might advance." The Judge and the prosecutors designate sat together to make new crimes ex post facto and to give "rules to enable important evidence to be excluded " in order to "bring all war criminals to just and swift punishment." The United States were anxious to demonstrate by these trials that the war had from the outset been one of almost uniquely flagrant aggression by Nazi Germany."

Such was the Nuremberg charter and The Tokyo charter was only a copy of the same.

In subsequent discussions we shall refer to the Articles of the Nuremberg Charter.

Article 6 of the Charter, it is said, defines the different categories of crimes. The article in its plain terms purports only to provide for "jurisdiction over persons and offenses." In so doing the Charter says: "the following acts . . . . . are crimes coming within the jurisdiction of the Tribunal . . . . . . ." The intention, in my opinion, is not to enact that these acts do constitute crimes but that the crimes, if any, in respect to these acts, would be triable by the Tribunal. Whether or not these acts constitute any crime is left open for determination by the Tribunal with reference to the appropriate law. In my opinion, this is the only possible view that we can take of
these provisions of the Charter. The Moscow declaration of 1945 or any other declaration or declarations referred to in the London Agreement, the Anglo-Soviet-American Conference at Berlin 1945, the Instruments of Surrender or the Potsdam Declaration did not contemplate that the Allied Powers would have authority to give, whatever character they might choose, to past acts and then meet such acts with such justice as they might, in the future, determine.

The relevant provisions in these several instruments stand thus:

Moscow Declaration of 1943:

"The United Kingdom, the United States and the Soviet Union have received from many quarters evidence of atrocities, massacres and cold-blooded mass executions which are being perpetrated by the Hitlerite forces in the many countries they have overrun and from which they are now being steadily expelled. The brutalities of Hitlerite domination are no new thing and all the peoples or territories in their grip have suffered from the worst form of government by terror. What is new is that many of these territories are now being redeemed by the advancing armies of the liberating Powers and that in their desperation, the recoiling Hitlerite Hunns are redoubling their ruthless cruelties. This is now evidenced with particular clearness by monstrous crimes of the Hitlerites on the territory of the Soviet Union which is being liberated from the Hitlerites, and on French and Italian Territory.

Accordingly, the aforesaid three allied Powers, speaking in the interests of the thirty-two (thirty-three) United Nations, hereby solemnly declare and give full warning of their declaration as follows:

At the time of the granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein. Lists will be compiled in all possible detail from all these countries having regard especially to the invaded parts of the Soviet Union, to Poland and Czechoslovakia, to Yugoslavia and Greece, including Crete and other islands, to Norway, Denmark, the Netherlands, Belgium, Luxemburg, France and Italy.

Thus, the Germans who take part in wholesale shootings of Italian officers or in the execution of French, Dutch, Belgian or Norwegian hostages or of Cretan peasants, or who have shared in the slaughters inflicted on the people of Poland or in territories of the Soviet Union which are now being swept clear of the enemy, will know that they will be brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged. Let those who
have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three allied Powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.

The above declaration is without prejudice to the case of the major criminals, whose offences have no particular geographical localisation and who will be punished by the joint decision of the Governments of the Allies.''

ANGLO-SOViet-AMERICAN CONFERENCE AT BERLIN 1945:

"5. War criminals and those who have participated in planning or carrying out Nazi enterprises involving or resulting in atrocities or war crimes shall be arrested and brought to judgment. Nazi leaders, influential Nazi supporters and high officials of Nazi organizations and institutions and any other persons dangerous to the occupation or its objectives shall be arrested and interned.

"6. All members of the Nazi party who have been more than nominal participants in its activities and all other persons hostile to allied purposes shall be removed from public and semi-public office, and from positions of responsibility in important private undertakings. Such persons shall be replaced by persons who, by their political and moral qualities, are deemed capable of assisting in developing genuine democratic institutions in Germany.''

WAR CRIMINALS

"The three governments have taken note of the discussions which have been proceeding in recent weeks in London between British, United States, Soviet and French representatives with a view to reaching agreement on the methods of trial of those major war criminals whose crimes under the Moscow Declaration of October 1943 have no particular geographical localization. The three governments reaffirm their intention to bring those criminals to swift and sure justice. They hope that the negotiations in London will result in speedy agreement being reached for this purpose, and they regard it as a matter of great importance that the trial of those major criminals should begin at the earliest possible date. The first list of defendants will be published before September first.''

POTSdam DECLARATION OF JULY 26, 1945:

"(5) Following are our terms. We will not deviate from them. There are no alternatives. We shall brook no delay.

(6) There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world.
(7) Until such a new order is established and until there is convincing proof that Japan's war-making power is destroyed, points in Japanese territory to be designated by the Allies shall be occupied to secure the achievement of the basic objectives we are here setting forth.

(8) The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine.

(9) The Japanese military forces, after being completely disarmed, shall be permitted to return to their homes with the opportunity to lead peaceful and productive lives.

(10) We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established.

(11) Japan shall be permitted to maintain such industries as will sustain her economy and permit the exaction of just reparations in kind, but not those which would enable her to re-arm for war. To this end, access to, as distinguished from control of, raw materials shall be permitted. Eventual Japanese participation in world trade relations shall be permitted.

(12) The occupying forces of the Allies shall be withdrawn from Japan as soon as these objectives have been accomplished and there has been established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government.

(13) We call upon the government of Japan to proclaim now the unconditional surrender of all Japanese armed forces, and to provide proper and adequate assurances of their good faith in such action. The alternative for Japan is prompt and utter destruction.'"
Referring to the Agreement of August 8, 1945, made in London between the Governments of the United Kingdom, of the United States, of the French Republic and of the Union of Soviet Socialist Republics, establishing the Tribunal for the trial and punishment of the major war criminals of the European Axis countries, Lord Wright says:

"The Agreement includes, as falling within the jurisdiction of the Tribunal, persons who committed the following crimes:

"(a) Crimes against Peace, which means in effect, planning, preparation, initiation or waging of a war of aggression;

"(b) War crimes, by which term is meant mainly violation of the laws and customs of war;

"(c) Crimes against Humanity, in particular, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population.

"The Tribunal so established is described in the Agreement as an International Military Tribunal. Such an International Tribunal is intended to act under International Law. It is clearly to be a judicial tribunal constituted to apply and enforce the appropriate rules of International Law.

"I understand the Agreement to import:

"(a) That the three classes of persons which it specifies are war criminals:

"(b) That the acts mentioned in classes (a), (b), and (c) are crimes for which there is properly individual responsibility;

"(c) (i) That they are not crimes because of the agreement of the four governments;

"(ii) But that the governments have scheduled them as coming under the jurisdiction of the Tribunal because they are already crimes by existing law.

"On any other assumption the Court would not be a Court of Law, but a manifestation of power."

The same principles apply with equal force in the case of Tokyo also. There also the Tribunal was set up as an International Military Tribunal. The clear intention was that the body was to be "a judicial tribunal" and not "a manifestation of power." The intention was that the Tribunal was to act as a court of law and act under international law. It was for the Tribunal to find out, by the application of the appropriate rules of international law, whether the acts constituted any crime under the already existing law, dehors the Declaration, the Agreement or, the Charter. Even if the Charter, the Agreement or the Declaration scheduled them as crimes, it would only be the decision of the relevant authorities that they were crimes under the already existing law. But the Tribunal must come to its own decision. It was never intended to bind the Tribunal by the decision of these bodies, for otherwise the Tribunal will not be a 'judicial tribunal' but a mere tool for the manifestation of power.
The so-called trial held according to the definition of crime now given by the victors obliterates the centuries of civilization which stretch between us and the summary slaying of the defeated in a war. A trial with law thus prescribed will only be a sham employment of legal process for the satisfaction of a thirst for revenge. It does not correspond to any idea of justice. Such a trial may justly create the feeling that the setting up of a tribunal like the present is much more a political than a legal affair, an essentially political objective having thus been cloaked by a juridical appearance. Formalized vengeance can bring only an ephemeral satisfaction, with every probability of ultimate regret; but vindication of law through genuine legal process alone may contribute substantially to the re-establishment of order and decency in international relations.

But that is not the only consideration which influences me to the view I am taking of the Charter in this respect. The contrary view would make at least the Tokyo Charter ultra vires.

The term of authority of the Supreme Commander have been quoted above. These are in the simplest possible form and nowhere expressly authorize the Supreme Commander to define the provisions of international law.

It was contended in this connection that the Moscow Declaration made the intention of the Allied Powers in this respect clear and that there the Allied Powers clearly proclaimed that "war criminals" would mean and include persons who are now classed as having committed offences against peace.

The Moscow Declaration was released on November 1, 1943 and I could not discover anything in this document which would support this view. The Declaration refers to war criminals stricto sensu. The only reference to others is in the last paragraph which stands thus:

"The above declaration is without prejudice to the case of the major criminals, whose offences have no particular geographical localisation and who will be punished by the joint decision of the Governments of the Allies."

The document nowhere says who are these "major criminals". In the earlier parts of the document actual perpetrators of the various cruelties in violation of jus in bello are specifically named; these major criminals may only be the persons responsible for issuing general orders, if any, relating to those cruel actions. But even assuming that the expression was intended to include persons responsible for the preparation of aggressive war, the Declaration does not say that the Allied Powers had scheduled them as war criminals irrespective of their legal position in this respect under international law. Even if the Allied Powers intended to do that, this, their Declaration, alone will not invest them with any such legal authority, if international law be otherwise. This might have been a declaration of threat on the strength of might; but if the Allied Powers, instead of executing the might,
choose to place the matter in the hands of judicial tribunal, by this very fact they express their intention clearly enough that they want to deal with such persons according to law.

It will be pertinent here to notice what Professor Hans Kelsen of the University of California has said regarding the position of the victors in this respect. I am referring to him in this connection as his is the view most favourable to the prosecution. The learned Professor says:

"If the individuals who are morally responsible for this war, those persons who have, as organs of their states, disregarded general or particular international law, and have resorted to or provoked this war, if these individuals as authors of the war shall be made legally responsible by the injured states, it is necessary to take into consideration:

1. That general international law does not establish individual, but collective responsibility for the acts concerned, and

2. That the acts for which the guilty persons shall be punished are acts of state—that is, according to general international law, acts of the government or performed at the government's command or with its authorization."

According to the learned Professor:

"If individuals shall be punished for acts which they have performed as acts of state, by a court of another state, or by an international court, the legal basis of the trial, as a rule, must be an international treaty concluded with the state whose acts shall be punished, by which treaty jurisdiction over these individuals is conferred upon the national or international court." The learned Professor then points out: "If it is a national court, then this court functions, at least indirectly, as an international court. It is national only with respect to its composition in so far as the judges are appointed by one government only: it is international with respect to the legal basis of its jurisdiction."

"The law of a state," says Professor Kelsen, "contains no norms that attach sanctions to acts of other states which violate international law. Resorting to war in disregard of a rule of general or particular international law is a violation of international law, which is not, at the same time, a violation of national criminal law, as are violations of the rules of international law which regulate the conduct of war. The substantive law applied by a national court competent to punish individuals for such acts can be international law only. Hence, the international treaty must not only determine the delict but also the punishment, or must authorize the international court to fix the punishment which it considers to be adequate."

According to Professor Kelsen: "An international treaty authorizing a court to punish individuals for acts they have performed as acts of state constitutes a norm of international criminal law with retrospective force, for the acts were at the moment when they were
committed not crimes for which the individual perpetrators were responsible."

With due respect I do not accept all the propositions propounded by the learned Professor in support of the legality of trial and punishment of such criminals. I cannot accept the view that by such a treaty ex post facto law can always be created and applied to the case of such persons. It is, however, not necessary for me to quarrel with this proposition in the present connection. Here there is no such treaty in either case; and so far as the Tokyo Charter is concerned the terms of authority of the Supreme Commander make it expressly clear that any power conferred on him is not in any way derived from the vanquished through any contractual relationship.

From what has been stated above it seems amply clear that if the Allied Powers as victors have not, under the international law, the legal right to treat such persons as war criminals, they have not derived any such right by a treaty or otherwise. The Allied Powers have nowhere given the slightest indication of their intention to assume any power which does not belong to them in law. It is therefore pertinent to inquire what is the extent of the lawful authority of a victor over the vanquished in international relations. I am sure no one in this Twentieth Century would contend that even now this power is unlimited in respect of the person and the property of the defeated. Apart from the right of reprisal, the victor would no doubt have the right of punishing persons who had violated the laws of war. But to say that the victor can define a crime at his will and then punish for that crime would be to revert back to those days when he was allowed to devastate the occupied country with fire and sword, appropriate all public and private property therein, and kill the inhabitants or take them away into captivity. When international law will have to allow a victor nation thus to define a crime at its will, it will, like David Low's "Peace", be surprised to find itself back on the same spot whence it started on its apparently onward journey several centuries ago. Perhaps humanity also will feel the same inward surprise though it may be civilized enough not to give any outward expression of the same.

When Lord Wright says that the victors have accurately defined the crime in accordance with the existing international law, he overlooks the fact that if it is not open to the Tribunal to examine this definition with reference to the existing law, if becomes a definition now given by the victor, though it may happen to be a correct definition. In my opinion, such a power is opposed to the principles of international law and it will be a dangerous usurpation of power by the victor, unwarranted by any principle of justice.

While considering the questions whether aggressive war can be denominated an international crime and whether individuals comprising the government or general staff of an aggressor state may be
prosecuted as liable for such crime, Dr. Glueck says 'that the Charter under which the International Military Tribunal at Nuremberg is supposed to operate gives dogmatically affirmative answers to both of the questions. In his view "there is no question but that, as an act of the will of the conqueror, the United Nations had the authority to frame and adopt such a Charter; and it may well be that the Tribunal at Nuremberg will deem itself completely bound by the restrictions above quoted" (i.e., Articles 6 and 7 of the Nuremberg Charter, corresponding to Articles 5 and 6 of the Tokyo Charter).

The Tribunal at Nuremberg seems to have deemed itself bound by the so-called definition of the law given in the relevant charter. But in fairness to the prosecution in the Tokyo case before us it must be pointed out that it did not claim any conclusive character for the Tokyo charter in this respect. According to the prosecution "The Charter is conclusive as to the composition and jurisdiction of the Tribunal and as to all matters of evidence and procedure." As to the crimes listed in Article 5, the prosecution submitted that "the Charter is and purports to be merely declaratory of international law as if existed from at least 1928 onwards...." The Tribunal was urged by the prosecution to examine this proposition and base its judgment upon it. The prosecution, of course, did not say what the Tribunal were to do in case it found the international law in this respect to be otherwise.

Assuming that the supposed definition given in the Charter does not represent the correct position under international law, I can understand Dr. Glueck if he means to say that the Charter is the act of the will of the conqueror and therefore must be obeyed by those who are bound to obey such will. But I fail to see how Dr. Glueck can speak of the conqueror having authority so to will. I believe the existing international law nowhere confers on the conqueror any such authority. Neither the belligerent's rights with respect to the person of any enemy nor the conqueror's rights with respect to such person would cover any such authority. Neither the rights following the military occupation of an enemy territory nor the rights following the conquest of such a territory would confer such an authority on the invader or the conqueror. Whether the accused be treated as prisoners of war or not, they are not legally at the mercy of the invader or the conqueror. Only military necessity seems to invest the invader or the conqueror with very wide power and perhaps if is impossible to set bounds to the demands of such military necessity. But even there it must be remembered that military necessity is not a mere phrase of convenience, but is to be an imperative reality.

A belligerent, besides having the rights over his enemy which flew directly from the right to attack, no doubt also possesses the right of punishing persons who have violated the laws of war, if they fall into his hands. Hall says: "To the exercise of the above-mentioned rights no objection can be felt so long as the belligerent confines
himself to punishing breaches of *universally acknowledged laws* . . . . . When, however, the act done is *not universally thought to be illegitimate* . . . . . it may be doubtful whether a belligerent is justified in enforcing *his own views* to any degree, and unquestionably he ought as much as possible to avoid inflicting the penalty of death, or any punishment of a disgraceful kind." Hall is here speaking of war crimes *stricto sensu* and even in such cases the belligerent’s own view of the law does not justify his action or will. In my opinion a conqueror does not enjoy any higher right in this respect in international law.

It is also my opinion that an International *Tribunal*, by whomsoever set up and manned, is not bound by any such expression of the *will* of the conqueror.

We have already seen the judgment of the Nuremberg Tribunal in this respect. In delivering the judgment of that Tribunal, Lord Justice Lawrence, referring to the provisions of the Charter establishing that Tribunal, observed as follows:

"These provisions are binding upon the Tribunal as *the law to be applied to the case*. The Tribunal will later discuss them in more detail; but, before doing so, it is necessary to review the facts."

Later, while considering ‘the Law of the Charter’ his Lordship said:

"The jurisdiction of the Tribunal is defined in the Agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal."

Coming later to the definition in the Charter, his Lordship said:

"It was urged on behalf of the defendants that a fundamental principle of all law—international and domestic—is that there can be no punishment of crime without a pre-existing law. *Nullum crimen sine lege, nulla poena sine lege*. It was submitted that *ex post facto* punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

His Lordship then said:

"In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring 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 . . . . ."
According to Lord Justice Lawrence:

"This view is strongly reinforced by a consideration of the state of international law in 1939, so far as aggressive war is concerned." He said "The General Treaty for the Renunciation of War of August 27, 1928, more generally known as the Pact of Paris or the Kellogg-Briand Pact, was binding on sixty-three nations, including Germany, Italy and Japan at the outbreak of war in 1939.

"The question is, what was the legal effect of this Pact? The nations who signed the Pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact any nation resorting to war as an instrument of national policy breaks the Pact. 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 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 question as to what is international law dehors the Charter and where the law stood after the Pact of Paris will be discussed later. Here we are concerned only with that part of the observations of Lord Justice Lawrence which deals with the obligatory character of the Charter.

I have already given my reading of the Charter in this respect. In my view the Charter did not define the crime, did not make any act criminal and punishable, but only specified the acts the authors whereof were placed under the jurisdiction of the Tribunal. The acts were only scheduled as triable ones.

But we would assume for the present that the Charters defined these crimes as was held by the Nuremberg Tribunal and the majority of the Tokyo Tribunal. The question then is whether this definition is intra vires.

Lord Justice Lawrence considers that the maxim nullum crimen sine lege has no application to the case as it is not a maxim in limitation of sovereignty but is only a principle of justice.

I am not quite sure if the Constitution of the U.S.A., in its Article 1 Sections 9 and 10 providing that "no ex post facto law shall be passed" by the Congress and "no state shall . . . pass any . . . ex post facto law", did not limit its sovereignty itself in this respect. The authorship of the Charters at least in part is ascribable to the U.S.A., and, so far as the power of legislation of the U.S.A. is concerned, it may be subject to this limitation.
Further we have now the United Nations' Declaration of Human Rights of which Article 11(2) declares:

"No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

This declaration then places the maxim *nullum crimen sine lege* in the category of fundamental rights. It must therefore be taken to provide a controlling principle perhaps based upon conditions essential to civilized social life. The very existence of state and its executive and legislative powers would be conditioned by such a right of its citizens. The very constitution of the state would be subject to this guarantee and even the organs of the state powers would be prevented thereby from being authorized to encroach upon the sphere of interest determined by such fundamental right. I am afraid after this solemn declaration of the United Nations it will be hard to contend that the maxim is not in limitation of sovereignty.

Further we do not know if the authority of the representatives of the several states in entering into the London Agreement really extended to the creation of any *ex post facto* law. We must avoid all confusions of sovereignty with the power of those human beings who from time to time function in different capacity in the matter of governance.

At any rate, as we have noticed above, at least in the case of one of the signatories the very constitution imposed such a limitation.

The Right Hon'ble Lord Hankey in his book entitled "Politics, Trials and Errors" and published in 1950 while commenting on the advantages claimed for the war crimes trials by their defenders observes that "the first and most important of these is the establishment of a Rule of Law to do for nations what national systems of law have done for individuals throughout the world by providing for the punishment and prevention of crime and the maintenance of order." This, he points out, is no doubt a very high ideal but "in practice if Victor States have committed the same crimes as those of which they accused the enemy, if they have so much to hide that by one expedient or another they have to keep their misdeeds out of the jurisdiction of the Court, if they wish to dictate the list of crimes beforehand and to create them *ex post facto*, then that system becomes unusable." I shall have occasion to come back to these observations of the Right Hon'ble Lord Hankey later on. For our present purposes we shall confine ourselves to the observation of His Lordship on the *ex post facto* creation of crimes. His Lordship referred to Article 10 and 11 of the Universal Declaration of Human Rights approved by the General Assembly of the United Nations on December 10, 1948 and observed:
"It is inconceivable that the United Nations would consider a Tribunal composed exclusively of Victor judges to be 'an independent and impartial tribunal' for the trial of the Vanquished as insisted upon by Article 10. Similarly, Article 1 of the Charter of the Nuremberg Tribunal establishing it 'for the just and prompt trial and punishment of the major war criminals of the European Axis' is hardly consistent with the principle enunciated in Article 11, 1. And the *ex post facto* creation of crimes for the Nuremberg and Tokyo Tribunals is utterly incompatible with Article 11, 2.

"In these circumstances the value of the Nuremberg and Tokyo trials for the establishment of a Rule of Law appears negligible. Rather have they given it a grave setback."

Lord Hankey then quoted a few brief extracts from the dissenting judgment of the Representative of India at the Tokyo Trials and observed:

"Again and again in the different sections of his dissenting Judgment Mr. Justice Pal insists that 'prisoners can be tried only for breaches of recognized laws of war' (p. 53), and that it is beyond the rules of international law as they stand, for Victors to establish new crimes or new definitions, or to punish prisoners for having committed offences according to the new definitions (pp. 64, 68). He is also a consistent critic of Victor trials.

"Mr. Justice Pal's contention has received powerful confirmation from the Universal Declaration of Human Rights approved by the General Assembly of the United Nations on December 10, 1948, Article 11, subsection 2, quoted above.

"That pregnant Article appears to demolish, morally at any rate, the validity of a great part of the Nuremberg and Tokyo sentences, to render reconsideration absolutely essential."

But let us proceed on the assumption that the characterization of the maxim by Lord Justice Lawrence is correct and let us see how the *question of sovereignty* comes in.

Lord Justice Lawrence says: "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. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, 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."

His Lordship continues: "The Signatory Powers created this Tribunal, *defined the law* it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly; for it is not to
Further we have now the United Nations' Declaration of Human Rights of which Article 11(2) declares:

"No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

This declaration then places the maxim *nullum crimen sine lege* in the category of fundamental rights. It must therefore be taken to provide a controlling principle perhaps based upon conditions essential to civilized social life. The very existence of state and its executive and legislative powers would be conditioned by such a right of its citizens. The very constitution of the state would be subject to this guarantee and even the organs of the state powers would be prevented thereby from being authorized to encroach upon the sphere of interest determined by such fundamental right. I am afraid after this solemn declaration of the United Nations it will be hard to contend that the maxim is not in limitation of sovereignty.

Further we do not know if the authority of the representatives of the several states in entering into the London Agreement really extended to the creation of any *ex post facto* law. We must avoid all confusions of sovereignty with the power of those human beings who from time to time function in different capacity in the matter of governance.

At any rate, as we have noticed above, at least in the case of one of the signatories the very constitution imposed such a limitation.

The Right Hon'ble Lord Hankey 5 in his book entitled "Politics, Trials and Errors" and published in 1950 while commenting on the advantages claimed for the war crimes trials by their defenders observes that "the first and most important of these is the establishment of a Rule of Law to do for nations what national systems of law have done for individuals throughout the world by providing for the punishment and prevention of crime and the maintenance of order." This, he points out, is no doubt a very high ideal but "in practice if Victor States have committed the same crimes as those of which they accused the enemy, if they have so much to hide that by one expedient or another they have to keep their misdeeds out of the jurisdiction of the Court, if they wish to dictate the list of crimes beforehand and to create them *ex post facto*, then that system becomes unusable." I shall have occasion to come back to these observations of the Right Hon'ble Lord Hankey later on. For our present purposes we shall confine ourselves to the observation of His Lordship on the *ex post facto* creation of crimes. His Lordship referred to Article 10 and 11 of the Universal Declaration of Human Rights approved by the General Assembly of the United Nations on December 10, 1948 and observed:
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His Lordship continues: "The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly; for it is not to
be doubted that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law."

According to his Lordship: "The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime, and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London agreement . . . . ."

Lord Justice Lawrence refers to "the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered." He again refers to "what any one of the Signatory Powers might have done singly." It is thus not very clear which sovereignty was in the mind of Lord Justice Lawrence when he made these observations. It may be that His Lordship had in his mind either one or both of the following two sovereignties:

1. The sovereignty of the defeated state,
2. The sovereignty of the victor state.

This portion of the judgment comes under the heading "The Law of the Charter", and it seems to deal with two distinct matters relating to the question of jurisdiction. The first is the question of creation of the Tribunal and the second is that of defining the law to be administered by the Tribunal thus created.

These observations of Lord Justice Lawrence, therefore, involve the following questions:

1. (a) Whether the victor states in the right of their own respective national sovereignties can try and punish prisoners of war falling within their custody for War Crimes;
   (b) Whether, for this purpose, they can in the right of their own sovereignty
       (i) set up a Tribunal for such a trial,
       (ii) legislate defining such war crimes.
2. Whether any state (victor or vanquished) in exercise of its right of sovereignty
   (a) can try and punish its own citizens for war crimes, and
   (b) for this purpose can,
       (i) set up a Tribunal for such a trial,
       (ii) legislate defining such war crimes.
3. (a) Whether a victor state derives the sovereignty of a defeated state
       (i) by reason of the unconditional surrender of the vanquished state,
       or, (ii) by the terms of the surrender,
       or, (iii) by anything else.
(b) If so, whether this acquired sovereignty includes all the
rights, ordinary and extraordinary, of the vanquished
sovereign.

The pronouncements are not very clear so far as these several
questions are concerned. It is not, for example, clear what is intended
to be pronounced as "not to be doubted" about any nation's right.
The judgment says, "it is not to be doubted that any nation has the
right thus to set up special courts to administer law." If this refers
to the question of setting up of special courts, we need not trouble
ourselves with it here. If, however, it refers to the right of "defining
the law" such "court is to administer," I respectfully beg to differ
from the view thus expressed. International law certainly does not
yet recognize any such right in any nation.

The observations of Lord Justice Lawrence seem to contain the
following pronouncements:

1. War criminals are within the jurisdiction of:
   (a) their own national state,
   (b) the belligerent state when they fall within its custody.

2. (a) Their national state had power to legislate defining war
crime;
   (b) By reason of surrender, this power now vests in the victor
state.

3. (a) Any belligerent state within whose custody such persons
might come had right to legislate defining their crime;
   (b) The combined victor states also consequently have that
right.

As I have already noticed there is no quarrel with the first of
the above three propositions. But the entire difficulty is with the
propositions 3(a) and 2(b) as set down above.

No one, I believe, will seriously support the proposition marked
3(a) above. As I have noticed already, prisoners can be tried and
punished only for breaches of recognized rules of law. Any power of
the nature contemplated in item 3(a) above will obliterate the centuries
of civilization which stretch between us and the days of summary
slaying of the vanquished.

The questions whether the Charter is or is not "an arbitrary
exercise of power on the part of the victor nations," and whether it is
or is not "the expression of international law existing at the time of
its creation" and to that extent is or is not "itself a contribution to
international law are not relevant for our present purpose. If the
authors of the charter had the right to legislate and give the law which
the Tribunal would be bound to administer, then while administering
that law, the Tribunal would have no business to raise such questions.
If such authors are ever called upon to justify their action, then only
such considerations would be relevant. The question now before us.
is whether the author or authors of the charter had right to legislate and give the law defining war crimes for the trial of the prisoners of war in their custody."

Professor Quincy Wright * of the Board of Editors of the American Journal of International Law, in an Article entitled "The Law of Nuremberg Trial" published in the Journal in January, 1947, referring to this part of the judgment says: "Every state does . . . have authority to set up special courts to try any person within its custody who commits war crimes, at least if such offences threaten its security. It is believed that this jurisdiction is broad enough to cover the jurisdiction given by the Charter." It is not clear if Professor Wright wants to support even the belligerent's right to legislate for the purpose of defining 'war crimes.' I hope he did not purport to do any such thing. As I read his view, it seems even to limit the belligerent's power of trial only to cases when the act, over and above being a criminal act under the recognized rule of law, also goes to threaten the security of the belligerent state.

Professor Wright's reference to the Lotus case and the conclusions drawn therefrom do not, in any way, advance the case of the alleged legislative power of the victor states. Extending criminal jurisdiction is one thing, and extending the criminal law itself by defining 'crime' is a different thing. In my opinion, the principle of international law forbids a state from doing this last thing in respect of Prisoners of War in its custody.

A victor state, as sovereign of its own state, may have the right to try prisoners of war within its custody for war crimes as defined and determined by the international law. But neither the international law nor the civilized world recognizes any right in it to legislate defining the law in this respect to be administered by any court set up by it for the purpose of such trial.

I am further inclined to the view that this right which such a state may have over its prisoners of war is not a right derivative of its sovereignty but is a right conferred on it as a member of the international society by the international law.

A victor nation promulgating such a Charter is only exercising an authority conferred on it by international law. Certainly such a nation is not yet a sovereign of the international community.

Professor Wright suggests a novel source for this legislative power. According to him "Art. 5 of the Moscow Declaration of November 1, 1943 and Art. 2(6) of the Charter of the United Nations support the idea that the four Powers acting in the interest of the United Nations had the right to legislate for the entire community of nations."

Indeed occasions may sometimes arise for such desperate efforts!

Article 5 of the Moscow Declaration runs thus: "That for the purpose of maintaining international peace and security pending the re-establishment of law and order and the inauguration of a system of
general security, they will consult with one another and as occasion requires with other members of the United Nations with a view to joint action on behalf of the community of nations.”

Article 2(6) of the United Nations Charter says that the organization shall ensure that non-members act in accordance with the principle of Article 2, so far as may be necessary for the maintenance of international peace and security.

I do not see what is there in these provisions which authorizes such a revolutionary creation of *ex post facto* international law.

Under international law, as it now stands, a victor nation or a union of victor nations would have the authority to establish a tribunal for the trial of war criminals, but no authority to legislate and promulgate a new law of war crimes. When such a nation or group of nations proceeds to promulgate a Charter for the purpose of the trial of war criminals, it does so only under the authority of international law and not in exercise of any sovereign authority. I believe, even in relation to the defeated nationals or to the occupied territory a victor nation is not a sovereign authority.

At any rate the sovereignty is recognized by the civilized world to have been limited in this respect by the international law at least in respect of its power over the Prisoners of War within its custody.

The next question is whether the victor nations derived the sovereignty of the defeated nations by reason of the latters’ defeat and unconditional surrender, and whether a sovereignty thus acquired or derived vested the victor nations with the legislative power in question.

The judgment mentions “the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered.” It is not very clear what is the view of Lord Justice Lawrence about the acquisition or the derivation of this “sovereign legislative power” by the victor countries. If his line of approach is dependent on any special factual features of the case before him, namely, that the character and terms of the surrender or of occupation in question vested the victors with the sovereignty of the vanquished state, then very little remains for me to say in this connection excepting that the terms of surrender here in the case before us and the character of occupation did not vest the sovereignty of Japan in the victor nations.

Professor Quincy Wright in supporting this part of the judgment seems to enunciate the following propositions:

1. The derivation of the Tribunal’s jurisdiction from the sovereignty of Germany is well-grounded:
   (a) such derivation is supportable on the special factual features of the case;
   or, (b) as a legal consequence of the surrender.

2. Under International law a state may acquire sovereignty of a territory by declaration of annexation after subjugation of the
territory if that declaration is generally recognized by the other states of the world;

(a) There is no doubt but that sovereignty may be held jointly by several states;

(b) (i) The Four Allied Powers assumed the Sovereignty of Germany in order, among other purposes, to administer the country until such time as they thought fit to recognize an independent German Government;

(ii) Their exercise of powers of legislation, adjudication, and administration in Germany during this period is permissible under international law, limited only by the rules of international law applicable to sovereign states in territory they have subjugated;

(iii) Their powers go beyond those of a military occupant.

It is not very clear whether he too considers this derivation of sovereignty as the result of the special factual features of the German case.

As a proposition of international law 'that the unconditional surrender transfers the sovereign legislative power of the vanquished state from it to the victor', it has no support in international law as it stood during the relevant war.

As has been warned by Oppenheim, "subjugation must not be confounded with conquest, although there can be no subjugation without conquest." "Conquest is taking possession of enemy territory by military force, and is completed as soon as the territory is effectively occupied." "A belligerent, although he has annihilated the forces and conquered the whole of the territory of his adversary, and thereby brought the armed contention to an end, may nevertheless not choose to exterminate the enemy state by annexing the conquered territory, but may conclude a treaty of peace with the...defeated state, re-establish its government and hand back to it the whole or a part of the conquered territory. Subjugation takes place only when a belligerent, after having annihilated the forces and conquered the territory of his adversary, destroys his existence by annexing the conquered territory. Subjugation may, therefore, be correctly defined as extermination in war of one belligerent by another through annexation of the former's territory after conquest, the enemy forces having been annihilated."

I need not pursue the question whether the legal effect of subjugation would be the derivation of the sovereignty of the defeated state by the victor state. In my opinion, even assuming that the victor state becomes the sovereign of the subjugated territory, it is wrong to say that such sovereignty is derived from the defeated state or the defeated people and hence is the continuation of the sovereignty of the defeated state. Even if it is a sovereignty, it is a sovereignty of the victor state now extended to the subjugated territory. If it is a
sovereignty at all it is not derived from the vanquished people or the vanquished state—but is acquired in spite of them.

I would not call it a sovereignty of the defeated state at all. That state is non-est, having been annihilated. A new state might have come into existence; but such a state is based entirely on the might of the conqueror. The sovereignty of the vanquished state, or, more correctly, the sovereignty of which the vanquished state was the depositary is annihilated with its depositary or only remains in abeyance. Indeed the sovereign power is not a mysterious subject which might be severed from the state itself; it is only a general personification of the sum total of the conception and activity of the state so far as it has become self-conscious and asserts its functions self-consciously.

Whatever that be, the case before us, is not one of subjugation, though it is a case of complete defeat and unconditional surrender.

It is obvious that mere conquest, defeat and surrender, conditional or unconditional, do not vest the conqueror with any sovereignty of the defeated state. The legal position of the victor prior to subjugation is the same as that of a military occupant. Whatever he does in respect of the vanquished state he does so in the capacity of a military occupant. A military occupant is not a sovereign of the occupied territory.

But even assuming that in International law, a victor state derives the sovereignty of the vanquished state, the former would not have the power claimed for it even in this capacity.

Prisoners of war, so long as they remain so, are under the protection of International law. No national state, neither the victor nor the vanquished, can make any ex post facto law affecting their liability for past acts, particularly when they are placed on trial before an International tribunal. Their own state might try and punish them in its own national court, either already existing or created specially for the purpose; and, even if we assume that for this purpose, it might create some ex post facto law binding on such national tribunal, it does not follow that it would have been competent to create law for the application by an international tribunal. So long as the prisoners are placed on trial before an International tribunal, it does not matter whether as prisoners of war, by the victor state, or, as its citizens, by the vanquished state, neither state can legislate so as to give any ex post facto law to be applied by that International tribunal in order to determine their crime. Such states might have an option in the matter of setting up the tribunal: they might create a national tribunal for the trial. We are not concerned with what they might or might not have done in defining the law in such a case. But as soon as they set up an International tribunal, they cannot create any law defining the crime for such a tribunal.
It may be observed in passing that the Charter of a German Sovereign giving some law for its national court would not, I am sure, be to any extent, a contribution to international law.

It seems some emphasis is to be found in the judgment of the Nuremberg Tribunal on the _factum_ of "unconditional surrender." We are not much concerned with the history and politics of such surrender. Those of you who feel interested in the subject may with profit consult Lord Hankey's "Politics, Trials and Errors", Chapter II. The idea of unconditional surrender in the cases before us was, we are told, President Roosevelt's. "Mr. Churchill thought, frowned, thought, finally grinned and at length announced 'Perfect'." We are not so much concerned with the authorship of the idea and the question who gained most by it. It may be necessary for us to remember that the idea was produced on Saturday, January 23, 1943 and that its demand caused the enemy to hold out with great tenacity. For our present purposes we are concerned with the meaning of the formula. We would do better to have a clear grasp of that meaning as expounded by Lord Hankey. His Lordship says:

"On February 11, 1943, in the course of his short mention in Parliament of Unconditional Surrender already quoted on page 30, Mr. Churchill added:

"'But our inflexible insistence upon unconditional surrender does not mean that we shall stain our victorious arms by any cruel treatment of whole populations. But justice must be done upon the wicked and the guilty, and, within her proper bounds, justice must be stern and implacable. No vestige of the Nazi or Fascist power, no vestige of the Japanese war plotting machine will be left to us when the work is done, and done it certainly will be.'"

"We see here the beginning of the policy of War Crimes Trials, the natural sequel to Unconditional Surrender, which was announced later in the year, but it is noteworthy that as yet _justice_ was to be kept 'within her proper bounds'—a prescient phrase!"

"Two days later (February 13) in a broadcast, President Roosevelt spoke as follows:

"'In an attempt to ward off inevitable disaster, the Axis propagandists are trying all of their old tricks in order to divide the United Nations. They seek to create the idea that if we win this war, Russia, England, China and the United States are going to get into a cat and dog fight.' (That was prophetic).

"'That is their final effort to turn one nation against another in the vain hope that they may settle with one or two at a time . . . .'

"'To these panicky attempts to escape the consequences of their crimes we say—all the United Nations say—that the only terms on which we shall deal with any Axis Government or any Axis factions are the terms proclaimed at Casablanca: ' _Unconditional Surrender_.'"
"In our uncompromising policy we mean no harm to common people of the Axis nations. But we do mean to impose punishment upon the guilty, barbaric leaders."

"In those last words the War Crimes policy was again fore-shadowed. But, so far, it was confined to the leaders.

"In time a good deal of doubt began to assert itself about the policy of 'unconditional surrender'. and on February 22, 1944, Mr. Churchill sought to clarify it further:

"'Here I may point out that the term "Unconditional Surrender" does not mean that the German people will be enslaved or destroyed. It means, however, that the Allies will not be bound to them at the moment of surrender by any pact or obligation. There will be, for instance, no question of the Atlantic Charter applying to Germany as a matter of right and banning territorial transfers or adjustments in any countries.'

"That statement seems to overlook the fact that the various clauses in the Atlantic Charter applied severally to 'all peoples', 'all States, great or small, victor or vanquished', (viz., 'access on equal terms to trade and raw materials'), 'all nations' and 'all men'. By this new statement the enemy States were deprived of any prospect of sharing automatically the benefits of the Atlantic Charter which became a distant guerdon on the far side of Unconditional Surrender. To continue Mr. Churchill's subsequent explanation:

"'No such arguments will be admitted by us as were used by Germany after the last war, saying that they surrendered in consequence of President Wilson's Fourteen Points. Unconditional Surrender means that the victors have a free hand. It does not mean that they are entitled to behave in a barbarous manner, nor that they wish to blot out Germany from among the nations of Europe. If we are bound, we are bound by our own consciences to civilization. We are not to be bound as the result of a bargain struck. That is the meaning of "Unconditional Surrender".'

"Thus more than a year after the declaration our Leaders were still trying to think out what it meant. But what would they have found if they had taken the trouble to look into the question before they took the plunge?"

Coming to the 'expected advantages' his Lordship said:

"We are now in a position to discuss in the light of the past and of the actual results, how far the announcement of Unconditional Surrender was justified. But first it will be convenient to sum up the advantages claimed for it by its authors; these were:

"1. A reasonable assurance of world peace through the destruction of German and Japanese war power:

"2. The destruction of the philosophies in those countries based on fear and hate;"
3. No vestige of the Nazi or Fascist Power, no vestige of the Japanese plotting machine will remain;

4. Punishment of the guilty and barbaric leaders;

5. The Allies will not be bound to the enemy at the moment of surrender by any pact or obligation. Unconditional surrender means that the victors will have a free hand;

6. No possibility of the Germans saying, as they did after the last war, that they did not surrender, but only accepted President Wilson’s Fourteen Points. (As a matter of fact they made many other excuses, e.g., that they were not beaten in battle, but starved by blockade, or that Hindenburg and Ludendorff lost their nerve).

None of these expected advantages materialized. The destruction of German and Japanese war power did not assure world peace, because immediately after the end of the war the Allies began to fall out, as so often happens, and the hopes of world peace soon vanished. Such co-operation as had been forced on us all by common adversity faded away when the risk was removed. The Western Powers had saved Poland and Roumania from the Nazis, as they had promised to do, but only to hand them over with all Eastern Europe to the Soviets whom these countries had always feared much more. And soon the West found itself faced with a ‘cold war’ waged by communism, which threatened to become a hot war. If the necessary destruction of Hitler had warded off a great danger, the West had, by destroying German and Japanese war power, and by alienating their populations, removed the barriers against communism in Europe and the Far East and greatly decreased the security of the whole world.

* * * * * *

Punishment of the guilty barbaric leaders (point 4) has been carried out. However, not only have all the political leaders but so many capable and experienced administrators and potential administrators been liquidated that the Governmental machines in ex-enemy countries are so weakened as to make their early economic recovery impossible. As Mr. Bevin put it in a statement quoted at the end of this Chapter, ‘it left us without a single person with whom we could deal’.

It is true, owing to the announcement of Unconditional Surrender at the end of the war, the Allies found themselves bound to the enemy by no pact or obligation (point 5). As victors they had a free hand. But, this has not proved an advantage. It has merely enabled them to impose victor trials and other unwise things upon the enemy and to bring unpopularity upon them, and especially on this country in Germany. Moreover, although the Allies were not bound to their former enemies, neither were they bound to one another! The result is that they have no common ties, can never agree among themselves, and have made the very name of United Nations a by-word for disunion.”
Unconditional surrender implies a complete defeat and an admission of such complete defeat. It imports complete surrender to the might and mercy of the victor. What the vanquished gets, he gets, not by a stipulation, but by the grace of the victor; it does not matter that some indication of the policy to be followed is graciously indicated by the victor even before the formal surrender. Of course, by saying this, I do not mean to say that the defeated party has no protection whatsoever from the whims of the victor's might. International law and usage purport to define the rights and duties of the victor in such a case. However impotent such law may be to afford any real protection, it at least does not legally place the vanquished at the absolute mercy of the victor.

We shall see later what is the position of the victor nations as such in international law in relation to a conquered nation. All that I need point out here is, that so far as the terms of the demand of surrender and of the ultimate surrender go, there is nothing in them to vest any absolute sovereignty in respect of Japan or of the Japanese people either in the victor nations or in the Supreme Commander. Further, there is nothing in them which either expressly or by necessary implication would authorise the victor nations or the Supreme Commander to legislate for Japan and for the Japanese or in respect of war crimes. It will be pertinent to notice here that in vesting authority on the Supreme Commander the victor nations did not claim any authority derived from the vanquished under any agreement.

Mr. Justice Jackson of the United States in his report as Chief of Counsel for the United States in prosecuting the principal war criminals of the European Axis observed:

"We could execute or otherwise punish them without a hearing. But undiscriminating executions or punishments without definite findings of guilt, fairly arrived at, would violate pledges repeatedly given, and would not set easily on the American conscience or be remembered by our children with pride."

It is, indeed, surprising that no less a person than Mr. Justice Jackson, in his considered report to no less an authority than the President of the United States, could insert these lines in the Twentieth Century. On what authority, one feels inclined to ask, could a victor execute enemy prisoners without a hearing? I need not stop here to consider what would be the legal position of a victor if we accept the view that by the Pact of Paris war has been renounced as an instrument of national policy rendering such a war a crime and that such a war only entitles the other party to a right of self-defense. Whether the weapon of defense can be of any avail to the victor for any acquisitive or aggressive purposes is a question which we need not consider here. Even apart from any limiting effect of the outlawry of war on the victor's rights, I do not think that during recent centuries any victor has enjoyed any such right as is declared by Mr. Justice Jackson in...
his report. If the victor really had such a right then perhaps it might have been possible for him to give a new definition of a crime in respect of past acts and punish the prisoners as criminals according to such new definition after hearing them if that would ease the conscience of any nation. In that case it would have been mere adaptation of a particular method to the enforcement of an existing right. But I do not see anything anywhere in the existing international law conferring any such power on the victors. Neither temporary military occupation of a territory nor final acquisition by conquest, if acquisition by war is even now possible, of a territory and subjugation would confer any such rights on the occupying belligerent or victor over the inhabitants or over the prisoners either taken during the war or after truce. Even under the martial law of the occupant the position of the prisoners and of the inhabitants of the occupied territory is not so helpless.

Whatever view of the legality or otherwise of a war may be taken, victory does not invest the victor with unlimited and undefined power now. International laws of war define and regulate the rights and duties of the victor over the individuals of the vanquished nationality. In my judgment, therefore, it is beyond the competence of any victor nation to go beyond the rules of international law as they exist, give new definitions of crimes and then punish the prisoners for having committed offence according to this new definition. This is really not a norm in abhorrence of the retroactivity of law: It is something more substantial. To allow any nation to do that will be to allow usurpation of power which international law denies that nation.

In fairness to the prosecution at Tokyo it must be said that there they took up the position that it is the already existing international law, existing at the date of commission of the acts alleged, on which the indictment was based, and that whether the charges would stand or fall would depend upon what view the Tribunal took of those rules of international law.

Mr. Comyns Carr for the prosecution made this position clear in his address of 14 May, 1946, at the hearing of the preliminary objection taken by the Defense Counsel as to the jurisdiction of this Tribunal. He said:

"We are not asking this Tribunal to make any new law, nor are we admitting that the Charter purports to create any new offence."

According to him, international law itself "being the gradual creation of custom and of the application by judicial minds of old established principles to new circumstances . . . . it is unquestionably within the power, and . . . . the duty of this Tribunal to apply well-established principles to new circumstances, if they are found to have arisen, without regard to the question whether precise precedent for such application already exists in every case."
The position was made clearer by the Prosecution in the final summation of the case. In its summation the prosecution submitted that 'the Charter is conclusive as to the composition and jurisdiction of the Tribunal and as to all matters of evidence and procedure.' "As to the crimes listed in Article 5," the prosecution submission was "that the charter is and purports to be merely declaratory of international law as it existed from at least 1928 onwards and indeed before." The prosecution urged the Tribunal to examine this proposition and to base its judgment upon it.

But whatever be the prosecution view, in my opinion, the criminality or otherwise of the acts alleged must be determined with reference to the rules of international law existing at the date of the commission of the alleged acts. In my opinion, the Charter cannot and has not defined any such crime and has not, in any way, limited our authority and jurisdiction to apply the rules of international law as may be found by us to the facts alleged in this case.

Keeping all this in view my reading of the Charter is that it does not purport to define war crimes: it simply enacts what matters will come up for trial before the Tribunal, leaving it to the Tribunal to decide, with reference to the international law, what offence, if any, has been committed by the persons placed on trial.

A view seems to have been entertained that as these Tribunals were set up by the victor nations, the Tribunals were not competent to question their authority in respect of any of the provisions of the Charter establishing the Tribunals. Even the view expressed by Lord Wright in his Article on "Nuremberg" may bear this construction. Lord Wright in this Article after having quoted the provisions contained in Article 6 of the Nuremberg Charter, observed: "these provisions defined the law to be applied by the Tribunal and were binding on it." Later on he said: "The judges could not, of course, question the competency of their appointment and refuse to apply the definitions of the law laid down in the London Agreement and the Charter . . ." I do not see why questioning any legislation purporting to give definitions of the law would necessarily involve questioning the competency of the judges' appointment. I must confess, I do not see any principle in support of this view.

Those who entertain this view, say:—

1. That "the sole sources of the powers of the judges of the Tribunal are the Charter and their appointments to act under the Charter";

2. That apart from the Charter they have no power at all; and

3. That each judge of this Tribunal accepted the appointment to sit under the Charter and that apart from the Charter he cannot sit at all nor pronounce any order at all.

From these they conclude that this Tribunal is not competent to try
the question whether the Supreme Commander has exceeded his mandate, "as the Charter has not remitted such a question to it."

I sincerely regret I cannot persuade myself to accept this view. I believe the Tribunal, established by the Charter, is not set up in a field unoccupied by any law. If there is such a thing as international law, the field where the Tribunal is being established is already occupied by that law, and that law will operate at least until its operation is validly ousted by any authority. Even the Charter itself derives its authority from this international law. In my opinion it cannot override the authority of this law and the Tribunal is quite competent, under the authority of this international law, to question the validity or otherwise of the provisions of the Charter. At any rate, unless and until the Charter expressly or by necessary implication overrides the application of international law, that law shall continue to apply, and, a Tribunal, validly established by a Charter under the authority of such international law, will be quite competent to investigate the question whether any provision of the Charter is or is not ultra vires. The trial itself will involve this question. Its specific remittance for investigation by the Charter will not be required.

In national systems it is not inconceivable that an authority competent to set up a Tribunal may not at the same time be competent to legislate. In such a case simply because such an authority sets up a Tribunal by a document wherein it also purports to legislate, the Tribunal would not be incompetent to declare that piece of legislation ultra vires.

As I have pointed out above, a victor nation is, under the international law, competent to set up a Tribunal for the trial of war criminals, but such a conqueror is not competent to legislate on international law. A tribunal set up by such a nation will certainly be a valid body. But if the nation in question purports also to legislate beyond its competency under the recognised rules of international system, that legislation shall be ultra vires and I do not see what can debar the Tribunal from examining this question if called upon to apply this legislated norm. It makes no difference in this respect that the same document which sets up the Tribunal also purports to legislate. This fact would not obligate the Tribunal:

1. To uphold the authority of its promulgator in every other respect.
2. To uphold every provision of the document promulgating the Tribunal.
3. To construe the Charter in any particular manner.

After a careful consideration of the question I come to the conclusion:

1. That the Charters did not define the crime in question;
2. (a) That it was not within the competence of their authors to define any crime;
(b) That even if any crime would have been defined by the Charters that definition would have been *ultra vires* and would not have been binding on the Tribunals.

3. That it was within the competence of the Tribunals to question their authority in this respect.

4. That the law applicable to such cases would be the international law to be found by the Tribunals.
LECTURE XII

PACT OF PARIS, IF MADE ANY WAR A CRIME IN INTERNATIONAL LAW

The Tribunals at Nuremberg as also at Tokyo proceeded on the footing that the provisions of the Charters were binding upon them as the law to be applied to the cases. They, however, also found that the acts alleged in the Indictment under the category of crimes against peace constituted a crime in the international law as it stood in 1939.

The acts alleged are "planning, preparation and initiation" of wars of certain specified character. It is not the case of the Victors that "irrespective of its character, a war became a crime in international law."

Their case is that a war possessing the alleged character was made illegal and criminal in international law and that consequently persons provoking such criminal war by such acts of planning, etc., committed a crime in international law.

Two principal questions therefore arise here for our consideration, namely:

1. Whether the wars of the alleged character became criminal in international law.
2. Assuming the wars of the alleged character to be criminal in international law, whether the individuals functioning as alleged by the Victors would incur any criminal responsibility in international law.

I would take up the first of these questions first.

For the sake of convenience the question may be considered with reference to four distinct periods, namely:

1. That up to the First World War of 1914;
2. That between the First World War and the date of the Pact of Paris (27th August, 1928);
3. That from the date of the Pact of Paris to the commencement of the World War under consideration;
4. That since the Second World War.

So far as the first of the above four periods is concerned it seems to be generally agreed that no war became crime in international life, though it is sometimes asserted that a distinction between "just" and "unjust" war had always been recognized. It may be that international jurists and philosophers sometimes used these distinctive expressions in their learned discourses. But international life itself never recognized this distinction and no such distinction was ever
allowed to produce any practical result. At any rate an "unjust" war was not made "crime" in international law. In fact any interest which the western powers may now have in the territories in the Eastern Hemisphere was acquired mostly through armed violence during this period and none of these wars perhaps would stand the test of being "just war".

During the second of the above periods, Mr. Quincy Wright \(^1\) writing in 1925 on "The Outlawry of War", said:—

"Under present international law 'acts of war' are illegal unless committed in time of war or other extraordinary necessity but the transition from a state of peace to a 'state of war' is neither legal nor illegal.

A state of war is regarded as an event, the origin of which is outside of international law although that law prescribes rules for its conduct differing from those which prevail in time of peace. The reason for this conception, different from that of antiquity and the Middle Ages, was found in the complexity of the causes of war in the present state of international relations, in the difficulty of locating responsibility in the present regime of constitutional governments and in the prevalence of the scientific habit of attributing occurrences to natural causes rather than to design.

"In so far as wars cannot be attributed to acts of responsible beings, it is nonsense to call them illegal. They are not crimes but evidences of disease. They indicate that nations need treatment which will modify current educational, social, religious, economic, and political standards and methods in so far as they affect international relations."

Indeed so many factors having roots in so many different soils at so many different times in so many different manners prepare the way for the advent of war that any but a pre-occupied mind would feel the greatest difficulty in fixing responsibility on any particular head appearing in the whirlpool of all the responsible events. Besides, when the decision will be in the hands of an opponent we shall also have to face convictions induced by factors serving to arouse credulity and acting as persuasive interpreters of probabilities and possibilities. All the irrelevancies of rumours and canny guesses would be likely to be completely lost under a predisposition to believe the worst, created perhaps by the emotions normal to those who feel themselves to have been victims of injury. This is why every right thinking statesman considers, like the Rt. Hon'ble Lord Hankey,\(^2\) that "war is an extension of policy, though a most deplorable and regrettable one, to be avoided or at least to be postponed as long as at all possible. But when all prophylactics have failed and it can no longer be avoided it must be faced like abnormalities of nature, earthquakes, epidemic diseases, famine or drought. The first aim in war is to win, the second to avoid defeat, the third to shorten it, and the fourth and the most important,
which must never be lost to sight, is to make a just and durable peace. Emotionalism of all kinds, hate, revenge, punishment and anything that handicaps the nation in achieving these four aims are out of place. It must always be kept in mind that after a war we have sooner or later to live with our enemies in amity."

Senator Borah, on December 12, 1927, in his Resolution before the United States Senate, stated thus:—

"Whereas, war is the greatest existing menace to society, . . . .

and

"Whereas, civilization has been marked in its upward trend out of barbarism into its present condition by the development of law and courts to supplant methods of violence and force; and . . . .

"Whereas, war between nations has always been and still is a lawful institution, so that any nation may, with or without cause, declare war against any other nation and is strictly within its legal rights, and . . . .

"Whereas, the overwhelming moral sentiment of civilized people everywhere is against the cruel and destructive institution of war: . . . .

"Resolved, that it is the view of the Senate of the United States that war between nations should be outlawed as an institution or means for the settlement of international controversies by making it a public crime under the law of nations, and that every nation should be encouraged by solemn agreement or treaty to bind itself to indict and punish its own international war-breeder or instigators and war profiteers under powers similar to those conferred upon our Congress under Article 1, Section 8, of our Federal Constitution, which clothes the Congress with the power to define and punish offences against the law of nations . . . ."

So, even on the 12th day of December, 1927, Senator Borah could say that "War between nations has always been and still is a lawful institution and that "any nation may, with or without cause, declare war against any other nation and is strictly within its legal rights. . . ." I fully agree with this view. As the preamble itself shows, Senator Borah, in making this statement, was fully alive to the evils of war.

In the 8th edition of Hall's International Law (1924), we find the following passages:

"As international law is destitute of any judicial or administrative machinery, it leaves states, which think themselves aggrieved, and which have exhausted all peaceable methods of obtaining satisfaction, to exact redress for themselves by force. It thus recognizes war as a permitted mode of giving effect to its decisions. Theoretically, . . . . as it (international law) professes to cover the whole field of the relations of states which can be brought within the scope of law, it ought to determine the causes for which war can be justly undertaken; . . . . it might also not
unreasonably go on to discourage the commission of wrongs by subjecting a wrongdoer to special disabilities.

"The first of these ends it attains to a certain degree, though very imperfectly. . . . In most of the disputes which arise between states, the grounds of quarrel, though they might probably be always brought into connection with the wide fundamental principles of law, are too complex to be judged with any certainty by reference to them: sometimes again they have their origin in divergent notions, honestly entertained, as to what those principles consist in, and consequently as to the injunctions of secondary principles by which action is immediately governed; and sometimes they are caused by collisions of naked interest or sentiment, in which there is no question of right, but which are so violent as to render settlement impossible until a struggle has taken place. It is not, therefore, possible to frame general rules which will be of any practical value.

"The second end international law does not even endeavour to attain. However able law might be to declare one of two combatants to have committed a wrong, it would be idle for it to affect to impart the character of a penalty to war when it is powerless to enforce its decisions. . . . International law has consequently no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation. Hence both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal rights."

I need not stop here to express my view of the character of an international community or of international law. Both the expressions are used in specific senses in relation to international life as I have endeavoured to show elsewhere. But even taking them in unqualified sense, no distinction was made between just and unjust war or between non-aggressive and aggressive war, and no difference in the legal character of a war was based on any such distinction.

In the 6th edition (1944) of Oppenheim's "International Law", revised by Dr. Lauterpacht of the University of Cambridge, we find the following statement:

". . . . So long as war was a recognized instrument of national policy both for giving effect to existing rights and for changing the law, the justice or otherwise of the cause of war was not of legal relevance. The right of war, for whatever purposes, was a prerogative of national sovereignty. Thus conceived every war was just."

Whether the legal position has now changed after the covenants and the Pact of Paris will be examined later. So far as the position unaffected by such covenants and pacts is concerned, it seems amply
clear that no war became crime during the first two of the above four periods. War might have been an evil in international life; it might have become even its disease as Mr. Quincy Wright says; but certainly was not a crime.

Before leaving these two periods it would be fair to point out that at least two distinguished international jurists of the present age seem to think that aggressive war became crime in international life during perhaps the second of these periods. I mean Dr. Glueck of the United States of America and Mr. Trainin of the U.S.S.R. Dr. Glueck seems to think that a customary international law developed making aggressive war a crime in international life. According to Mr. Trainin even before the Second World War there were "two tendencies of the historical process"—one being the collision of imperialistic interests, the daily struggle in the field of international relations and the futility of international law—the tendency reflecting the policy of the aggressive nations in the imperialistic era—and the other, just a parallel and opposite to the former, being the struggle for peace and liberty and independence of nations, tendency in which is reflected the policy of a new and powerful international factor—the socialist state of the toilers, the U.S.S.R.

According to him there was some scope for the introduction of the conception of criminal responsibility in international life in respect of the first named tendency in view of the rise of the second tendency named above.

In my opinion neither view is sustainable. I would examine them in detail while considering the position during the next period. It may only be noticed here that even the Nuremberg Tribunal did not trace criminality of any war beyond the Pact of Paris of 1928.

Coming now to the third of the periods specified above, namely, the period beginning with the Pact of Paris, I must say there has already come into existence a formidable array of literature relating to the question. A careful examination of these various authorities would, I believe, yield the following conflicting results:

1. The Kellogg-Briand Pact made resorting to a war of aggression a delict: (Prof. Hans Kelsen of the University of California)

2. The Pact of Paris failed to make violations of its terms an international crime punishable either by national courts or some international tribunal: (Mr. George A. Finch and Dr. Glueck of the U.S.)

3. (a) The time has arrived in the life of civilized nations when an international custom should be taken to have developed to hold aggressive war to be an international crime: (Dr. Glueck)

(b) Considering international law as a progressive system, the rules and principles of which are to be determined at any moment by examining all its sources, "general principles of
law”, “international custom” and teachings of the most highly qualified publicists, no less than “international conventions” and “judicial decisions”, there can be little doubt that international law had designated as crimes the acts...specified in the Charter long before the acts charged against the defendants were committed: (Prof. Wright)

4. (a) The Pact of Paris is the evidence of the acceptance by the civilized nations of the principle that war is an illegal thing: (Lord Wright)

(b) This principle so accepted and evidenced is entitled to rank as a rule of international law: (Lord Wright)

(c) The Pact of Paris converted the principle that “aggressive war is illegal” from a rule of “natural law” to a rule of “positive law”: (Lord Wright and Prof. Wright)

(d) International law, being a living and operative force in these days of widening sense of humanity, has progressed, and an international court, faced with the duty of deciding if the bringing of aggressive war is an international crime, is entitled and bound to hold that it is: (Lord Wright)

5. (a) (i) In order that there may be international crime, there must be international community: (Mr. Trainin and Lord Wright)

(ii) There is a community of nations, though imperfect and inchoate: (Mr. Trainin and Lord Wright)

(iii) The basic prescription of this community is the existence of peaceful relations between States: (Mr. Trainin and Lord Wright)

(b) (i) War is a thing evil in itself: It breaks international peace: (Mr. Trainin and Lord Wright)

(ii) It may be justified on some specified grounds: (Lord Wright)

(iii) A war of aggression falls outside that justification, and is, therefore, a crime: (Lord Wright)

(c) Whatever might have been the legal position of war in an international community prior to the Pact of Paris, the Pact clearly declared it to be an illegal thing: (Lord Wright)

6. Since the Moscow Declaration of 1913 and as a result of the same, a new international society has developed. To facilitate this process of development and to strengthen these new ideas, juridical thought is obliged to forge the right form of these new relations, to work out a system of international law and, as an indissoluble part of this system, to dictate to the conscience of nations the problem of criminal responsibility for attempts on the foundations of international relations: (Mr. Trainin)
This last proposition of Mr. Trainin really falls to be considered in relation to the fourth period specified above. But I would examine it along with the other propositions formulated by the learned author.

I would first of all proceed to examine the effect of the Pact of Paris.

In my opinion the Pact did not in any way change the existing international law. It failed to introduce any new rule of law in this respect.

The question falls to be considered from two distinct viewpoints namely:

1. Whether the Pact made any war a crime in international life?
2. Whether the Pact introduced the question of justification of war in international life and thus, making aggressive war unjustifiable, made such a war a crime or an illegal thing by reason of its own harmful character?

The Pact commonly known as the Kellogg-Briand Pact or the Pact of Paris was signed on the 27th August, 1928.

In the preamble, after acknowledging a deep sensibility of their solemn duty to promote the welfare of mankind, the parties announce that:

"Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated;

"Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory power which shall hereafter seek to promote its national interest by resort to war, should be denied the benefits furnished by this treaty;

"Hopeful that, encouraged by their example, all other nations of the world will join in this humane endeavor, and by adhering to the present treaty as soon as it comes into force, bring their peoples within the scope of its beneficent provisions, thus uniting the civilized nations of the world in a common renunciation of war as an instrument of their national policy; they have agreed to the following articles:

"Article 1. The High Contracting Parties solemnly declare, in the names of their respective peoples, that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

"Article 2. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."
"Article 3. The present treaty shall be ratified by the High Contracting Parties, in accordance with their respective constitutional requirements, and shall take effect as between them as soon as all their several instruments of ratification shall have been deposited at Washington.

"This Treaty shall, when it has come into effect as prescribed in the preceding paragraph, remain open as long as may be necessary for adherence by all the other powers of the world...."

It will be profitable to have a brief sketch of the history of the Pact.

I would start from the abortive Geneva Protocol of 1924. In the preamble of this Protocol, the parties declared themselves to be animate by the firm desire to ensure the maintenance of general peace and the security of nations, whose existence, independence or territories may be threatened, purported to recognize the solidarity of the members of the international community, and asserted "that a war of aggression constituted a violation of this solidarity and was an international crime." The purpose of the Protocol was declared to be the realization of the reduction of the national armaments to the lowest point consistent with national safety, and the enforcement by common action of international obligations. The Protocol was never ratified by the several states, and consequently, never came to have any legal effect. In these circumstances, the assertion in this document that aggressive war is international crime, produced no legal consequences. But it might have given birth to the idea of condemning aggressive war in international life.

On the 6th September, 1927, the representative of the Netherlands, in the 8th Assembly of the League of Nations, put forth a draft resolution in favour of taking up the study of the fundamental principles of the Geneva Protocol again. The leading opponents of the Geneva Protocol had been Great Britain and the self-governing Dominions of the British Crown. This opposition continued, and this attempt at revival failed.

During this Eighth Session of the League Assembly, however, on the 24th September, 1927, the following Polish Resolution was adopted:

"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;"
"Considering that a solemn renunciation of all wars of aggression would tend to create an atmosphere of general confidence calculated to facilitate the progress of the work undertaken with a view to disarmament:

"Declares:

"1. That all wars of aggression are, and shall always be, prohibited.

"2. That every pacific means must be employed to settle disputes of every description which may arise between states."

It may be noted that this Resolution already contained the two features of the Pact of Paris, namely:

1. A renunciation of a certain kind of war;
2. An undertaking not to seek the settlement of international disputes by other than pacific means.

At the last plenary session of the Sixth International Conference of American States, which sat at Havana from the 16th January to the 20th February, 1928, the Mexican Delegate introduced a resolution to the effect that:

1. All aggression is considered illicit and as such is declared prohibited.
2. The American States will employ all pacific means to settle conflicts which may arise between them.

This resolution was accepted at the conference.

In the meantime, France was thinking of celebrating the tenth anniversary of the entry of the United States into the General War. The date fell on the 6th April, 1927. Monsieur Briand met Professor James T. Shotwell on the 22nd March, who formulated to him the idea of renunciation of war as an instrument of national policy. Following his suggestion, Monsieur Briand sent a personal message to the American people, suggesting that France and the United States might celebrate the occasion by subscribing publicly to some mutual engagement tending to outlaw war as between these two countries. He interpreted the American slogan "to outlaw war" as meaning "the renunciation of war as an instrument of national policy."

This gave rise to a correspondence between Monsieur Briand and Mr. Kellogg. On the 1st June, 1927, Briand transmitted to Kellogg a draft treaty of his own, consisting of a preamble and three articles. This was intended only to be a bilateral instrument. These three articles eventually re-appeared as the three articles of the Pact signed on the 27th August, 1928, with little change of the text, apart from what was required to alter the same into a multilateral one.

In the meantime, the then existing Franco-American Arbitration Treaty of 1908, which was due to expire on the 27th February,
1928, was replaced by a new treaty, duly signed on the 6th February, 1928, containing a new preamble, with a declaration to the effect that the two parties were:

"Eager by their example not only to demonstrate their condemnation of war as an instrument of national policy in their mutual relations, but also to hasten the time when the perfection of international arrangements for the pacific settlement of international disputes shall have eliminated forever the possibility of war among any of the powers of the world."

As regards the other treaty, Mr. Kellogg, in his note of the 28th December, 1927, suggested that the treaty for the renunciation of war, proposed by Monsieur Briand, should not be merely bilateral, but multilateral.

There followed a conflict. The French Government insisted that, if the treaty was to be multilateral, the terms proposed by Monsieur Briand should be qualified; the American Government insisted that the text of the Pact, even in case of its being made multilateral, should be as in the proposed draft. Eventually the French Government accepted a suggestion from the American Government that the two governments should jointly submit to the Governments of Germany, Great Britain, Italy and Japan, the correspondence exchanged between them since June. The U.S.S.R. was excluded up to this stage.

In the third phase, Mr. Kellogg, on the 13th April, 1928, issued a circular letter to the German, British, Italian, and Japanese Governments, submitting to these governments the draft of a multilateral treaty to be signed by all the surviving great powers except the U.S.S.R. The two substantive articles of this draft were identical with those of Briand's draft of the preceding June, except some verbal change making it multilateral.

On the 20th April, the French Government circulated to the same powers an alternative draft in which the two substantive articles were expanded to five, and a number of qualifications and provisos were introduced in precise terms. This French draft sought to bring to a point the various provisos, interpretations, and understandings that had been put forward on the French side in the course of the Franco-American correspondence.

On the 29th April Mr. Kellogg dealt with these French considerations in a speech delivered before the American International Law Association, to demonstrate that the French desiderata could be satisfied within the framework of the draft circulated by him. This he did, not only to his immediate audience, but to the governments and to the world at large. These interpretations were the turning point of the whole transaction. The British, the Italian, and the Japanese Governments had before them Kellogg's interpretative exposition of the 29th April, 1928, before they had dispatched their replies to Kellogg's note of the 13th April.
I need not stop here to examine the long series of correspondence that followed after this. Eventually, the British Government accepted Kellogg’s proposal of the 13th April, as read together with his speech of the 29th, in a long and reasoned note, dated the 19th May, 1928. Further, the British Government suggested that Mr. Kellogg’s invitation should be extended to the British self-governing Dominions and to India, and postulated an understanding which came to be nicknamed as the “British Monroe Doctrine.” Mr. Kellogg promptly acted upon the suggestion of extending an invitation to the Governments of the Dominions and India, and received favourable replies from them all by the middle of June. As regards the postulate, the British Government did not either demand that it should be incorporated in the text of the treaty or formulate it in so many words as a British reservation. They did, however, reassert this postulate in a note of the 18th July, 1928, in the act of accepting the treaty re-submitted by Mr. Kellogg in its definitive form; and on the 6th August they forwarded copies of the two notes of the 19th May and the 18th July to the Secretary General of the League of Nations at Geneva, with a request that they should be circulated to the governments of other states members.

The postulate in question stood thus:

"The language of Article I, as to the renunciation of war as an instrument of national policy, renders it desirable that I should remind Your Excellency that there are certain regions of the world, the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty’s Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the British Empire a measure of self-defense. It must be clearly understood that His Majesty’s Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect. The Government of the United States have comparable interests, any disregard of which by a foreign power they have declared that they would regard as an unfriendly act. His Majesty’s Government believe, therefore, that in defining their position they are expressing the intention and meaning of the United States Government."

On the 23rd June, 1928, Mr. Kellogg dispatched another circular note to the several governments, quoting therein the interpretative paragraphs from his speech of the 29th April. With this note the draft treaty was re-submitted with no change in the text of the articles, but with a modification in the preamble postulating "that any signatory power which" should thereafter "seek to promote its national interests by resort to war should be denied the benefits furnished by this treaty."

The treaty was accepted by the various governments in this form.
Before the Senate of the United States ratified the Pact, Mr. Kellogg often appeared before the Senate Committee on Foreign Relations, and in the colloquies between the Secretary of State and individual members of the committee, most of the controversial points were brought out. On the question whether the terms of the treaty were affected by the previous correspondence between the signatory powers, Mr. Kellogg stuck to the opinion that there was nothing in any of those notes that was not contained, explicitly or implicitly, in the treaty itself. On the question of self-defense, Mr. Kellogg declared that the right of self-defense was not limited to the defense of territory under the sovereignty of the state concerned, and that under the treaty, each state would have the prerogative of judging for itself, what action the right of self-defense covered and when it came into play, subject to the risk that this judgment might not be endorsed by the rest of the world. "The United States must judge. . . . . and it is answerable to the public opinion of the world if it is not an honest defense: that is all." This is Mr. Kellogg's own statement.

This is how the Pact of Paris came into being and what it was intended to convey by its authors.

The account given above is substantially taken from that given by Professor Toynbee. It indicates that the parties thereto intended to create by this Pact only a Contractual obligation. Its originators did not design it for the entire Community of nations. There were several reservations introduced by the several parties for their respective interests. This is compatible with contractual obligations, but not with law. No doubt it was a multilateral treaty or pact. But though a law can be created only by a multilateral treaty, every multilateral treaty does not create law. A rule of law, once created, must be binding on the states independently of their will, though the creation of the rule was dependent on its voluntary acceptance by them. The obligation of this Pact, however, always remains dependent on the will of the states, inasmuch as it is left to these states themselves to determine whether their action was or was not in violation of the obligation undertaken by the Pact.

Apart from any other consideration, the single fact that war in self-defense in international life is not only not prohibited, but that it is declared that each state retains "the prerogative of judging for itself what action the right of self-defense covered and when it came into play" is, in my opinion, sufficient to take the Pact out of the category of law. As declared by Mr. Kellogg, the right of self-defense was not limited to the defense of territory under the sovereignty of the state concerned.

Considerations relevant for the determination of the legal character of rules of conduct obtaining in society are":

31—1909 B.
1. That only through final ascertainment by agencies other than the parties to the dispute can the law be rendered certain; it is not rendered so by the ipse dixit of an interested party. Such certainty is of the essence of law.

2. That it is essential for the rule of law that there should exist agencies bearing evidence of or giving effect to the imperative nature of law.

The law's external nature may express itself either in the fact that it is a precept created independently of the will of the subject of the law, or that no matter how created, it continues to exist in respect of the subjects of the law independently of their will.

The Pact of Paris as explained by Mr. Kellogg and as understood and accepted by the parties thereto would not stand these tests. The reservation of the right of self-defense and self-preservation in the form and to the extent explained by Mr. Kellogg would take the Pact out of the category of a rule of law.

It must also be remembered that in the present state of the international life this reservation cannot be lightly dealt with. At the present stage of international community, if it can be called a community at all, this right of self-defense or self-preservation is even now a fundamental right and follows from the very nature of international relations. The whole of the duties of states are normally subordinate to this right. Hall* says:

"Where law affords inadequate protection to the individual, he must be permitted, if his existence is in question, to protect himself by whatever means may be necessary, and it would be difficult to say that any act not inconsistent with the nature of a moral being is forbidden, so soon as it can be proved that by it, and it only, self-preservation can be secured. But the right in this form is rather a governing condition, subject to which all rights and duties exist, than a source of specific rules, and properly perhaps it cannot operate in the latter capacity at all. It works by suspending the obligation to act in obedience to other principles . . . . There are circumstances falling short of occasions upon which existence is immediately in question, in which, through a sort of extension of the idea of self-preservation to include self-protection against serious hurt, states are allowed to disregard certain of the ordinary rules of law in the same manner as if their existence were involved. . . ."

"The right of self-preservation in some cases justifies the commission of acts of violence against a friendly or neutral state, when from its position and resources it is capable of being made use of to dangerous effect by an enemy, when there is a known intention on his part so to make use of it, and when, if he is not forestalled, it is almost certain that he will succeed, either through the helplessness of the country or by means of intrigues with a party within it. . . ."
"States possess a right of protecting their subjects abroad."

Rivier gives an account of this right of self-defense or self-preservation thus:

"These rights of self-preservation, (conservation, respect, independence and mutual trade), which can all be carried back to a single right of self-preservation, are founded on the very notion of the state as a person of the law of nations. They form the general statute (loi) of the law (droit) of nations, and the common constitution of our political civilization. The recognition of a state in the quality of a subject of the law of nations implies ipso jure the recognition of its legitimate possession of those rights. They are called essential, or fundamental, primordial, absolute, permanent rights, in opposition to those arising from express or tacit conventions, which are sometimes described as hypothetical or conditional, relative, accidental rights."

"When", Rivier says, "a conflict arises between the right of self-preservation of a state and the duty of that state to respect the right of another, the right of self-preservation overrides the duty. Primum vivere. A man may be free to sacrifice himself. It is never permitted to a government to sacrifice the state of which the destinies are confided to it. The government is then authorized, and even in certain circumstances bound, to violate the right of another country for the safety of its own. That is the excuse of necessity, an application of the reason of state. It is a legitimate excuse."

According to Kaufmann, the state is the instrument of an ideal which can justly claim the subjection of its members to an imposed command. That ideal is self-preservation and self-development in history in a world of competing physical forces represented by other states. This ideal can be ultimately fulfilled only by physical and moral force on the part of the state; it can be fulfilled only by enlisting all the physical and moral powers of its members. The essence of the state is power, as revealed in victorious war.

According to Hegel, the relation of states is one of independent entities which make promises, but at the same time stand above their promises. Nothing done in the interest of the preservation of the state is illegal.

There are writers who support the view that there is nothing higher than the interest of each of the parties as judged by each party himself. If the other party is unwilling to give in, then only war can decide whose interest is legally stronger. This, according to them, is not the denial of law, but the only legal proof possible in international life.

Westlake, who takes a more restricted view of the right says:

"What we take to be pointed out by justice as the true international right of self-preservation is merely that of self-defense. A state may defend itself by preventive means, if in its conscientious judgment necessary, against attack by another state, threat of attack,
or preparations or other conduct from which an intention to attack may reasonably be apprehended. In so doing, it will be acting in a manner *intrinsically defensive*, even though *externally aggressive*. In attack, we include all violation of the legal rights of itself or of its subjects, whether by the offending state or by its subjects without due repression by it or ample compensation, when the nature of the case admits compensation. And by due repression we intend such as will effectually prevent all but trifling injuries (*de minimis non curat lex*), even though the want of such repression may arise from the powerlessness of the government in question. The *conscientious judgment of the state acting on the right thus allowed must necessarily stand in the place of authoritative sanction, so long as the present imperfect organization of the world continues.*

These different views of the right of self-defense are not of much consequence to us for our present purposes. What is necessary for us to notice is that the conception of aggression being only the complement of that of self-defense, so long as the question whether a particular war is or is not in self-defense remains unjustifiable, and is made to depend only upon the "conscientious judgment" of the party itself, the Pact fails to add anything to the existing law. It only serves to agitate the opinion of the world, and the risk involved in its violation lies only in rousing an unfavourable world opinion against the offending party. Nothing can be said to be "law" when its obligation is still for all practical purposes dependent on the mere will of the party.

Regarding the Pact of Paris of 1928 Mr. Cheney Hyde states: "Honeycombed as it is with reservations, and purporting, according to its distinguished authors, not to have reference to wars waged on grounds of defense, a breach of the Pact is not easy to establish. To conclude, for example, the embarking on war is a breach, calls for a decision based upon a complicated appraisal of facts and law, which in a particular case it may be highly difficult to reach correctly."

The Rt. Hon'ble Lord Hankey after quoting from the dissenting judgment of the Tokyo Tribunal that "no category of war became a crime in international life up to the date of commencement of the second World War; any distinction between just and unjust war remains only in the theory of the international legal philosophers; the Pact of Paris did not affect the character of war and failed to introduce any criminal responsibility in respect of any category of war in international life", observed: "I have no doubt at all that Mr. Justice Pal is absolutely right. As one who was cognisant of all that went in in connection with the making of the Kellogg-Briand Pact, of which I was an enthusiastic supporter, and as one with special responsibility at all stages in the co-ordination of planning and all that affected it between the wars, I assert that from the signature of the Pact until I read the Nuremberg Judgment and sentences, I never
heard a hint that it could be used as the basis of a war crimes charge of planning, preparing or waging war."

Professor Lauterpacht 14 points out that "the question of the fulfilment of the Pact of Paris has been treated as non-justiciable matter as the result of the determination of its principal signatories to remain the sole judges whether a case for self-defense (that is for disregarding the object of the treaty) has arisen." The question is undoubtedly of the highest importance for the state concerned, but, as Professor Lauterpacht very rightly points out, it is at the same time par excellence a question capable of judicial cognizance. The claim that it should be removed from the purview of judicial determination is not an illustration of non-justiciability of important matters, but of a controversial interpretation calculated to reduce the value of the Pact of Paris as a legal instrument.

The question before us, however, is not whether the fulfilment or nonfulfilment of the Pact was capable of judicial cognizance, but whether it was so made by the Parties. Remembering that the question is entirely dependent upon the Covenant of the Parties, upon the meaning of the Parties to the covenant, if the Parties themselves intended to give it a particular meaning or have understood and acted upon it in a particular way, it is not open to us now to ascribe any other meaning to it.

The learned Professor suggests that probably the view as to the impossibility of judicial determination of the recourse to force in self-defense is due to the confusion of two different aspects of this question. There is, first, the actual use of force when a state believes its life and vital interests to be endangered beyond possibility of redress if immediate action is not taken, when, in the words of the classical definition, a state believes that there is a necessity for action which is instant, overwhelming, and leaving no choice of means and no moment for deliberation. It is of the essence of the legal conception of self-defense that recourse to it must, in the first instance, be a matter for the judgment of the state concerned. But this is no reason why it should not remain justiciable to see if the state really had any occasion so to believe—why the legitimacy of the action taken should not be justiciable.

It is rightly pointed out that:

"It is not the right of self-defense which threatens to introduce the principal element of disintegration into the General Treaty for the Renunciation of War. The possible element of disintegration lies in the assertion that recourse to self-defense is not amenable to judicial determination."

If this were the correct interpretation of the Treaty, then, it is admitted that the result would be to deprive it of its legal value as a means of preventing war. The Treaty would stamp as unlawful such wars only as the belligerents might openly declare to be undertaken
with the intention of aggression. It could not be described as rendering unlawful wars which States, fully conscious of the moral and political implications and risks of their action, honestly declared to be undertaken in repelling a danger, actual or threatened, to their vital interests. It would be immaterial that, under this interpretation, discretion in the exercise of the right of self-defense would be subject to the general legal requirement of good faith in the performance of treaty obligations. Various systems of law contain provisions which expressly refer to the requirement of good faith. It is the elimination of any objective legal authority endowed with the competence to ascertain whether the duty of good faith has been complied with, which would largely be destructive of the legal object of the Treaty so interpreted.

Professor Lauterpacht himself, however, is of the opinion that there is nothing in the declaration or reservations referring to the Pact for Renunciation of War and concerning the right of self-defense, which necessitates the assumption that the signatories of the Treaty intended to adopt this interpretation which would deprive the Treaty of most of its legal value. He says:

"It is possible, perhaps probable, that the intention was merely to reaffirm a principle necessarily valid without any express declaration, namely, that implied in the first-mentioned interpretation of the non-justiciability of the right of self-defense."

This may be so; or from what has been said of the nature of this right the States might have thought otherwise. We are not much concerned with the question what should or could have been done. If, as a matter of fact, the question was kept to be determined by the State concerned, the value of the Pact must be appraised with reference to this fact, and not with reference to what the fact might have been. Even if the Parties did so under a misapprehension or misconception of the scope of self-defense, it is not open to us to go behind it so far as the effect of the Pact is concerned. The prosecution in the Tokyo case very fairly admitted in its summation that "when the Kellogg-Briand Pact was signed, it was stipulated that it did not interfere with the right of self-defense, and that each nation was to be the judge of that question."

In my opinion, it would not be correct to say that the parties to the Pact intended to reserve for their own judgment only the question of immediate action. The parties themselves never understood the Pact in that way, and, I believe, Mr. Kellogg himself made it amply clear what the Pact was intended by the parties to mean in this respect.

Professor Lauterpacht points out the principal difficulty to be that there is no machinery provided in the Pact for a legal regulation of the recourse to self-defence. Such machinery exists in the Covenant of the League of Nations. According to him, the Council and the
Assembly of the League provide a possibility for evolving not only a moral, but also a legal judgment on the observance of the provisions of the Covenant as to recourse to war. It should, however, be remembered that the League of Nations was not an organization for all nations, and the organization itself provided for withdrawal of nations from it. The United States was no party, and Japan withdrew and the U.S.S.R. became a member after her withdrawal. Further, covenants prior to the Pact of Paris had reference only to a procedure to be followed in coming to war; these did not affect the legality or otherwise of the war itself.

In interpreting the Pact, we must not in any way be influenced by the fact that we are called upon to interpret it in a case against a vanquished people. Our interpretation must be the same as it would have been had the question come before us prior to any decisive war. With international law still in its formative state, great care must be taken that the laws and doctrines intended to regulate conduct between state and state do not violate any principles of decency and justice. History shows that this is a field where man pays dearly for mistakes. Those who felt interested in the two War-crimes trials, not for retaliation, but for the future of world peace, certainly expected that nothing was done there which might have the effect of keeping the hatefire burning.

The function of law is to regulate the conduct of parties by reference to rules whose formal source of validity lies, in the last resort, in a precept imposed from outside.

Within the community of nations, this essential feature of the rule of law is constantly put in jeopardy by the conception of the Sovereignty of States which deduces the binding force of international law from the will of each individual member of the international community.

The inquiry involved in the consideration of the question raised in the case before us is at the very start confronted with the doctrine of sovereignty. The same doctrine confronts us in our inquiry as to the question of limitation of the function of law in the settlement of international disputes.

The theory of the sovereignty of states may reveal itself in international law mainly in two ways:

First, as the right of the state to determine what shall be for the future the content of international law by which it will be bound;

Second, as the right to determine what is the content of existing international law in a given case.

As a result of the first:

1. A state is not bound by any rule unless it has accepted it expressly or tacitly.

2. In the field of international legislation, unanimity and not mere majority is essential.
The second aspect connotes that the state is to be the sole judge of the applicability of any individual rule to its case.

So long as the states retain this right in respect of any rule, that rule, in my opinion, does not become law in the ordinary sense of the term. Even if we choose to give it the name "law", it will only be so in a specific sense, and its violation leads us nowhere. Its violation does not become a crime for the simple reason that none but the alleged defaulter can say whether it has been violated.

The view I take of the legal effect of the Pact makes it unnecessary for me to consider the various adverse comments made on it. It is sometimes said that the Pact was designed to be a perpetual guarantor of the status quo and thus, by it, an unstable and unjustifiable status quo was sought to be erected in 1928.

We need not proceed to examine these criticisms; perhaps they are correct. At least Mr. Justice Jackson of the U.S.A. in his summing up of the case against the German War Criminals at the Nuremberg Trial lent much support to this view by refusing to go behind the state of affairs in Europe existing in a certain specified year. He would not allow any justification to come in from any prior period. Perhaps he could not have done otherwise in view of what was agreed upon at the London Conference of June, 1945. "Punish" was the operative word of policy guiding the Conference where the "prosecutors and judge consulted before the trial upon the method by which the accused should be brought to punishment" and where "a law was drafted expressly to exclude the defences that it was anticipated the accused might advance."

But these criticisms have no bearing on the question before us. If otherwise law, such shortcomings as are propounded through these comments would not have changed the character of the Pact as law.

In order to introduce the conception of crime in international life, it is essential that there would be an international community brought under the reign of law. But, as yet, there is no such community.

The expressions "International Law" and "International Community" are both used in relation to the existing international life only in some specific sense.

I have elsewhere discussed the character of international community. No doubt there is such a community in a sense; but to say that it is a community under the reign of law is only to extend the meaning of both law and community so as to enable them to cover some strange fields.

Apart from the domain regulated by expressly accepted international obligations, there is no international community. As these obligations exist only in the limited sphere of the expressly recognized partial community of interests, the individual interests of each state must always remain the guiding consideration.
Modern international law was developed as a means for regulating external contacts rather than as an expression of the life of a true society.

Maine, writing even before the necessity for an international constitutional system became evident, characterized international law as an Eighteenth Century superstition, "a superstition of the lawyers' seized upon and promulgated by philosophers, in their eagerness to escape from what they deemed a superstition of the priests."

It is the misfortune of the international lawyers, not their fault, that the confusions and perplexities of our time should have excited false hopes and led to a revival of the superstition and even to the promulgation of what may not unfairly be described as substitute religions in legal wrappings.

On a careful consideration of the nature and the scope of the obligations assumed by the states under the Pact of Paris, I have arrived at the conclusion that the pre-existing legal position of war in international life remained unaffected. The only effect produced by the Pact is the possible influencing of the world opinion against the offending belligerent and thereby developing the law-abiding sentiment as between states.

However insignificant this effect may appear to some writers, men of very high position and authority attached much importance to it. Lord Parker of Waddington, one of the Lords of Appeal, in the debate of March 19, 1918, in the House of Lords, on the League of Nations, remarked:

"One thing only I fear, and that is that the movement in favour of the League of Nations runs some risk by reason of the fact that its advocates are in somewhat too great a hurry. They are devoting their attention to the details of the superstructure rather than to the stability of the foundation."

He was speaking on the schemes for an international tribunal and an international police force. After pointing out that the schemes were based upon a false analogy between municipal and international law, Lord Parker said:

"Every sound system of municipal law, with its tribunal and organized police, is a creation of historical growth, having its roots far in the past . . . . . . if we attack that part of the problem at first, I have very serious fears that the whole structure that we are trying to build may fall about our ears. It is a very serious matter to ask great nations in the present day to agree beforehand to the arbitrament of a tribunal consisting of representatives of some two dozen or three dozen states, many of whom may be indirectly interested in casting their votes on this side or on that . . . . ."

He pointed out that the only sound course was to recognize that the law-abiding sentiment as between states was still only in the embryonic stage. The right method of approach was to concentrate on mobilizing
sentiment and opinion against war itself, as anti-social conduct, a crime in violence against the community. Professor Zimmern \textsuperscript{21} sums up the speech saying that on the basis of embryonic world citizenship, Lord Parker builds a structure more firmly grounded, if less imposing, than that of the legalists. It is the organization of the hue and cry and nothing more. This is a stage preceding the stage of reign of law and is one without which no reign of law is possible.

Some such consideration might have prevailed with the parties to the \textit{Pact of Paris} which induced them to leave the Pact where it now stands. Perhaps this is all that was thought possible and advisable in the present rudimentary stage of the world community. Perhaps much expectation was based on the assumption that a country does not lightly throw away its fair fame—that national reputation is an asset that is generally highly prized by modern states.

The possibility of influencing the world opinion one way or the other does not seem to be looked upon as a negligible factor in the present day international life. At least the nations seem to attach much value to this opinion and propaganda for this purpose is daily gaining in importance in that life.

It will be of some interest to notice in this connection what M. Briand himself said about this matter while welcoming the first signatories of the Pact.

"It may be objected," Briand said, "that this pact is not practicable; that it lacks sanctions. But does true practicability consist in excluding from the realm of facts the moral forces, amongst which is that of public opinion? In fact, the state which would risk incurring the reprobation of all its associates in the pact would run the positive risk of seeing a kind of general solidarity, gradually and spontaneously directed against it, with the redoubtable consequence which it would soon feel. And where is the country, signatory to the pact, which its leaders would assume the responsibility of exposing to such a danger?"

The same view of its sanction was taken in 1929, by Mr. Stimson, the then Secretary of State of the United States of America, in a statement made public in which he denied the British argument that as between the Signatory States 'there has been in consequence a fundamental change in the whole question of belligerent and neutral rights', and declared that "its efficacy depends solely upon the public opinion of the world and upon the conscience of those nations who sign it."

I would now take up the remaining question in relation to the Pact, namely, whether, \textit{though the Pact of Paris did not declare any war to be a crime}, \textit{its effect was to demand justification for a war in international life and thus to render any war that would not be justifiable a crime or an illegal thing by its very nature.}

This is Lord Wright's view and it requires a serious consideration,
As I understand him, Lord Wright wants to say that as soon as by the Pact of Paris the signatory nations renounced war as an instrument of national policy, it no longer remained within the right of any nation to wage any war; war as a right was thus banished from international life.

If after this any nation should think of war, it must justify its action. Otherwise the nation commits a crime, a war by its very nature involving criminal acts. A war can be justified only if it is necessitated by self-defense. Hence an aggressive war being a war which is not in self-defense, is unjustifiable and consequently a crime.

Perhaps this would have been so had the Pact been unqualified by any reservation. The whole difficulty is that the Pact of Paris by leaving the question what is war in self-defense to be determined by a Party itself, subject only to the risk of an adverse world opinion, rendered its effect absolutely nugatory in this respect. In my opinion, when by any rule the Party itself is allowed to remain the sole judge of the justifiability of any action taken by it, the action still remains outside the province of any law requiring justification and its legal character remains unaffected by the so-called rule.

As I have already noticed, Dr. Lauterpacht inclines to the view that the Pact should be taken to mean that war as an instrument of national policy is given up, subject only to the right of self-defense. The Party claiming this right may take action on the strength of his own judgment, but the existence or otherwise of this right is justiciable by others.

Similar seems to be the opinion of Mr. Quincy Wright. After pointing out how in the earlier ages the concept that war is a suitable instrument of justice prevailed subject only to certain limitations upon the application of this concept, Mr. Wright says:

"The covenant with hesitation, and the Pact of Paris with more firmness, proceed upon a different hypothesis—that war is not a suitable instrument for anything except defense against war itself, actual or immediately threatened. Thus, under these instruments, the tests of 'just war' have changed from a consideration of the subjective ends at which it is aimed, to a consideration of the objective conditions under which it is begun and is continued."

He points out how with the post-war efforts at world organization, the jus ad bellum becomes the predominating feature of international law, with a concept which no longer attempts to distinguish between the justice or the injustice of the belligerent's cause, but instead, attempts to distinguish between the fact of aggression and the fact of defense.

I have already given my reason why I could not accept the view of Dr. Lauterpacht in this respect. Mr. Quincy Wright only says that the test provided is a consideration of the objective conditions instead of the subjective ends. But to whom is this consideration left?
Wright does not give any decisive answer to this question. I have already given my view of this question and in my opinion this is the crucial question so far as the present matter is concerned.

The right of self-defense referred to by the various states in relation to the Pact of Paris is certainly not the same thing as the right of private defense given by a national system against criminal acts. It is a right inherent in every sovereign state and implied by the sovereignty of the state. It is not the right which comes into existence by some act of violence of an opponent. I have already quoted from authorities to show the scope of this right and its fundamental character. It is the very essence of sovereignty and so long as sovereignty remains the fundamental basis of international life, it cannot be affected by mere implication.

The proposition that the question of interpretation of a treaty is a matter justiciable in international law need not be denied. At the same time the right of self-defense or self-preservation is equally a fundamental matter in international life. Such a right cannot be said to have been limited in any way by implication. If the right was non-justiciable for the purposes of international law at the date of the Pact, it must be left still a non-justiciable matter. The Pact of Paris did not change the legal position in this respect.

There is certainly a great deal of difficulty in reconciling the uncompromising claims of national sovereignty in international relations with the growing necessities dictated by political developments in international relations and by demands of the growing public consciousness and opinion of the world. But the solution of this difficulty does not lie in staging trials of the vanquished only.

In international law, unlike municipal law, the general justiciable of disputes is no part of the existing law; it is in the nature of a specifically undertaken and restrictively interpreted obligation. Accordingly in international law, when the question arises whether any actual dispute is justiciable or not, the proper procedure is necessarily to inquire whether contesting states have in regard to that particular dispute undertaken to accept the jurisdiction of an international tribunal.

As far back as 1934 at a conference of the International Law Association held in Budapest views were expressed that the Pact of Paris had brought in a revolution in international law—not a revolution in the sense that war had ceased,—but that, while war waged as an instrument of national policy prior to 1928 was lawful, and gave rise to belligerent rights and neutral duties, such a war waged after 1928 had become unlawful and, consequently, could not give rise to rights and duties: ex injuria non oritur jus. Similar views were reiterated at the Fortieth Conference of the Association held at Amsterdam in 1938. Some of the international lawyers asserted that no party to the Pact of Paris, which would violate the Pact, would
have any rights whatever as a belligerent, as regards either the state
attacked or neutrals, and that it would render itself in law liable for
every injury done, whether to the state attacked and its members or
to a neutral state and its members.

This view as to the effect of the Pact on the legal character of
war was not shared by all and certainly did not in any way reflect
the changes that might take place amongst nations in their practical
regard for the Pact. If the effect of the Pact were to render war
illegal depriving its author of belligerent rights there would be no duty
of neutrality in any nation on the occasion of any such war.

Dr. Scheuener of Vienna examined the practice of nations with
regard to neutrality since 1928, and the result of his examination was
presented before the Conference at Amsterdam referred to above.
The learned Professor traced the development of neutrality first since
the foundation of the League of Nations up to 1928 and then since the
Kellogg-Briand Pact. For the first period he considered how much
regard the several nations paid to the Articles of the League
Convention and summed up the result thus:

"In practice . . . all the states have acted during this period
as though the law of the neutrality had continued to exist."

He then cited instances in support of this view.

Coming to the second period Dr. Scheuener found "that the
governments since 1928 have in their treaties as well as in their
political declarations and actions accepted the point of view that
neutrality in its traditional sense is not incompatible with the obliga-
tions of the members of the League and of the signatories of the
Briand-Kellogg Pact of Paris. A number of governments have not
hesitated to declare themselves neutral, to undertake obligations to
remain neutral in the event of a war, or to declare that in the event
of war they wish to remain neutral. . . ."

Though not decisive, this throws some light on the question as
to what changes took place amongst nations in their practical regard
for the Pact. Nations do not seem to have behaved as if war after
1928 became an illegal thing. At least they preferred to recognize
belligerent rights even in the case of a war in violation of the Pact.
As I shall show later, both the U.S.A. and the U.K. entertained this
view of the incidents of belligerency attaching to such a war. On
February 27, 1933, Sir John Simon, discussing in the House of
Commons the embargo on the shipments to China and Japan, spoke
of Great Britain as a "neutral government", and of the consequent
necessity of applying the embargo to China and Japan alike. So, at
that time Japan's war in China was not considered to be an illegal thing.

Professor Max Radin of the University of California in an
article published in April, 1946, on "Justice of Nuremberg" speaks
of the effect of the Kellogg-Briand Pact of 1928 and of the Geneva Protocol of 1924 in the following terms:

"By that Pact, Germany among many other nations formally renounced war as a means of international policy and vigorously denounced all wars of aggression. But whatever may have been the statements of individual statesmen and publicists, those who recall the circumstances in which the Pact was made will only with difficulty be persuaded that at the time any sanction was contemplated in public opinion, other than at the most, an economic boycott, and, at the least, the moral disapproval of the world."

The learned Professor then points out that "the words 'international crime' used about an aggressive war in the Geneva Protocol of 1924 cannot be rated higher than it was rated then, as a rhetorical term—a noble rhetoric, to be sure, but not a term with definite legal content."

Professor Radin* then makes certain observations which would have a pertinent bearing on the question before us. The learned Professor says:

"If the violation of the Kellogg-Briand Pact or of the Geneva Protocol constitutes a crime, either for the nation or for the persons instigating it, then the conduct at the time of all the Powers that joined in creating the Tribunal at Nuremberg puts them in the unfortunate light of having acquiesced in what they now denounce as criminal. No official protest was made by these Powers when acts violating the Pact were committed. The personal indignation of such high-minded men as Mr. Stimson, Secretary of State when Japan invaded Manchuria, was shared, so far as our records go, neither by the President nor the Congress. And if it was shared by the majority of the people, there is abundant reason to hold that at that time no substantial number of Americans would have approved of war on Japan because of it."

The learned Professor asks,

"Did the United States, did Great Britain, France and Russia become accessories after the fact in these crimes when they declined to treat them as crimes and continued close relations both with the nations that had committed them and the persons, who had instigated them? It is hard to understand why that conclusion does not follow."

That conclusion certainly follows if we accept the view that Japan and the present accused persons committed the crime now alleged in relation to the Manchurian Incident.

As has been pointed out by Mr. Finch **

1. In January, 1938, during the alleged aggression of Japan upon China in violation of the Nine Power Treaty, the Covenant of the League of Nations and the Pact of Paris, Secretary of State Mr. Stimson, recommended that Congress "confer upon the President authority in his discretion to
limit or forbid, in co-operation 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." 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.

2. This law was put into effect by President Roosevelt in the War of Italy upon Ethiopia.

3. The Neutrality Act 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, etc. to all belligerents. . . .

4. 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 U.S. 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."

Mr. Finch points out that in the light of this legislative history of the official attitude of the government of the U.S toward the interpretations of the pact, it is impossible to accept the thesis that a war in violation of the Pact was illegal in international law on September 1, 1939.

My own view is that war in international life remained, as before, outside the province of law, its conduct alone having been brought within the domain of law. The Pact of Paris did not come within the category of law at all and consequently failed to introduce any change in the legal position of a belligerent state or in the jural incidents of belligerency.

The Pact of Paris thus failed to affect the legal character of war, either directly or indirectly.

We have already seen that this view is characterised by the Rt. Hon'ble Lord Hankey as "absolutely right". He was cognisant of all that went on in connection with the making of Kellogg Pact and shouldered special responsibilities at all stages in the coordination of planning and all that affected the Pact. He could assert that he never heard a hint that it could be used as the basis of a war crimes charge.
At the London Conference of June, 1945, Prof. Gros for France repeatedly rebutted the claims that aggression could be made a criminal charge against individuals.

Judge Roling, a member of the Tokyo Tribunal for Netherlands, after a careful examination of all the materials referred to in the Nuremberg judgment and many others, came to the conclusion that "no international events prior to the Pact can be adduced which would permit one to conclude any change in international relations in the sense of out-lawrie of war. Neither abortive treaties, nor misleading resolutions could effect this change... It is illuminating to note that criminal responsibility on the part of the authors of aggressive war came under serious discussion only towards the end of the war. In 1928 this particular consequence of the Pact of Paris was by no means recognized... 'crimes against peace' were not regarded true crime before the London Agreement, and were not considered as such before the end of 1943.'"

According to him "the question has to be faced and answered whether the concept of these crimes was, and could be, created as such by the London Agreement of August 8, 1945 or by the Charter for the IMTJE."

The learned Judge then succeeded in answering this last question in the affirmative. I have already given my view. According to this learned Judge "There is no doubt that powers victorious in a 'bellum justum' and as such responsible for peace and order thereafter, have, according to international law, the right to counteract elements constituting a threat to that newly established order, and are entitled, as a means of preventing the recurrence of gravely offensive conduct, to seek and retain the custody of the pertinent persons. Napoleon's elimination offers a precedent."

The learned Judge admits that "mere political action, based on the responsibility of power, could have achieved this aim." But "That the judicial way chosen to select those who were in fact the planners, instigators and wagers of Japanese aggression is a novelty which cannot be regarded as a violation of international law in that it affords the vanquished more guarantees than mere political action could do." This is indeed one possible approach to the case and I tried to explore this in the concluding chapter of my dissenting judgment. There I said:

"It is said that the victor nations, as military occupants of Japan, can take action under Article 43 of the Hague Convention IV of 1907 in order to 'ensure public order and safety' and that this power entitles them to define the circumstances in which they would proceed to take such action and the action which they would consider requisite for the purpose."

"Reference is made to the case of Napoleon Bonaparte and thence to Article 48 of the Hague Convention of 1907, and it is contended
that the victor powers would have every right, for the sake of ensuring public order and safety of the world, to remove any of the accused from any sphere of life where there would be any possibility of his doing any future mischief.

"I believe this is really an appeal to the political power of the victor nations with a pretense of legal justice. It only amounts to "piecing up want of legality with matter of convenience."

"I have already noticed the case of Napoleon Bonaparte and have pointed out how, even in those days, a good deal of difficulty was felt and doubts entertained as to the exact legal position arising in his case. Those who took the final step of detention of Napoleon realized that it was necessary for them to equip themselves with some authority for this purpose from their national legislature. 56 George III chapters 22 and 23 were enacted to furnish this authority.

"At the Congress of Aix-la-Chapelle, 1818, the Allied Powers, in their measures against Napoleon, proceeded on the assumption that the case was not covered by international law, and they gave their reasons for saying so. I do not see what productive principle we can derive from his case for the purpose of international law. The case only yields a particular rule having a very narrow sphere of attraction and, in my opinion, a strictly limited field of projection. We may no doubt sometimes apply even such a rule beyond the field covered by its original logical content. But such a projection must not be allowed to take it to a field essentially and fundamentally different from its field of origin.

"The Allied Powers thought that they were justified by the law of nations in using force to prevent Bonaparte from usurping the governorship of France, and that with this justification they made war upon him and his adherents as enemies to the Allies when France was no enemy to them. Bonaparte was designated as merely "the chief of a shapeless force without recognized political character," and consequently, without any right to claim the advantages and the courtesies due to public power by civilized nations. That might have been the position of the Hitler group also, if that group stifled altogether the German constitutional life, and usurped power in the manner in which, and, to the extent to which, it is brought out in evidence in that case. In either case perhaps, the so-called state, if it could be called a state at all, succeeded in withdrawing from the influence of the social tendency and placing itself consciously into opposition to the society concerned.

"The case of the accused before the Tokyo Tribunal, however, cannot in any way be likened to the case either of Napoleon or of Hitler. The constitution of Japan was fully working. The Sovereign, the Army and the civil officials, all remained connected as usual and in normal ways with the society. The constitution of the State remained fashioned as before in relation to the will of the
society. The public opinion was in full vigor. The society was not in the least deprived of any of its means to make its will effective. These accused came into power constitutionally and only to work the machinery provided by the constitution. They remained all along amenable to public opinion, and even during war the public opinion truly and vigorously functioned. The war that took place in the Pacific was certainly war with Japan. These persons did not usurp any power, and certainly they were only working the machinery of the internationally recognized state of Japan as parts of the Japanese force which was at war with the Allied Powers.

"An appeal to Article 43 of the Hague Convention IV of 1907 may indeed look like seeking a pretext for the trial of these persons. We are told that the starting point for a discussion of the punishment of war criminals must be the Hague Convention IV of 18 October, 1907. This convention, it is said, is essentially the handbook of modern European scholarship and as such essentially reflects the tradition of modern Roman law and of modern Romanist codification. We are then told that it will be distorted or misunderstood, if it is conceived of exclusively in accordance with Anglo-American conceptions of legal or juridical method, and if it is conceived of without recognizing modern juristic theories concerning the role of purpose in law. It will be ineffectual and distorted if it is not interpreted and administered in accordance with Romanist conceptions relating to juridical method, as well as in accordance with the purposes or goals stated in the very text of the convention itself.

"The purposes or goals said to be "stated in the very text of the Convention itself" are referred to in order to bring within Article 43 the right and power of the victors to make law declaring aggressive war a crime and a crime for individuals. I believe "the purposes and goals" of the convention would not take us to the determination of the character of the war itself. The whole purpose was to give the laws and customs of war, assuming the pre-existence of the war condition.

"The Covenanting Powers, 'Seeing that, while seeking means to preserve peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case where the appeal to arms has been brought about by events which their care was unable to avert;

'Animated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization;

'Thinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as would mitigate their severity as far as possible;

'Have deemed it necessary to complete and explain in certain particulars the work of the First Peace Conference, which, following on the Brussels Conference of 1874, and inspired by the ideas dictated
by a wise and generous forethought, adopted provisions intended to define and govern the usages of war on land."

"While so doing, they gave certain rules relating to 'Military authority over the territory of the hostile state' in Section III of the Annex to the Covenant, and Article 43 found a place in that section. The Article stands thus: 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.' Its provisions would apply when a territory is occupied during belligerency by a hostile army. If the construction sought to be put on Article 43 be correct, then an army, in such occupation of a territory during war, would be entitled to declare the war conducted by the government of that territory as aggressive and criminal, and, if it succeeds in getting hold of any personnel of that government, would be competent to create a charter defining law for the trial of such personnel and get them tried and convicted. I shall not, for a moment, think that that was 'the purpose and goal' of the Powers who covenanted themselves into the Hague Convention of 1907.

"I am not prepared to strain and twist Article 43 of the Hague Convention to cull any such purpose and goal out of it. I am not also prepared to project the Napoleon case to the present. I have already pointed out, how even after this war, the charter of the United Nations, which was promulgated by the peoples of the United Nations avowedly 'to save succeeding generations from the scourge of war' and expressly announced 'the purposes of the United Nations' to be 'to maintain international peace and security and to that end; to take corrective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace . . . . . . .', did not introduce any such measure against the individual members of any offending state.

"Chapter VII of that Charter provides for 'action with respect to threats to the peace, breaches of the peace, and acts of aggression.' The provisions of this chapter do not contemplate any steps against individuals. It may safely be asserted that the coercive actions envisaged by chapter VII would not be invoked individually against those who might be responsible for the functioning of the offending collective entity.

"As a judicial tribunal, we cannot behave in any manner which may justify the feeling that the setting up of the tribunal was only for the attainment of an objective which was essentially political though cloaked by a juridical appearance.

"It has been said that a victor can dispense to the vanquished everything from mercy to vindictiveness: but the one thing the victor cannot give to the vanquished is justice. At least, if a tribunal be
rooted in politics as opposed to law, no matter what its form and pretences, the apprehension thus expressed would be real, unless 'justice is really nothing else than the interest of the stronger.'

"Had we been openly called upon to decide such political issues, the entire proceedings would have assumed a different appearance altogether and the scope of our enquiry would have been much wider than what we allowed it to assume. The past conduct of the persons under trial in such a case would have simply furnished some evidentiary facts; the real ultimate probandum would have been the future threat to the 'public order and safety' of the world. There was absolutely no material before us to judge of any such future menace. The parties were never called upon to adduce any evidence in this respect. The matter would certainly involve extensive investigation of facts perhaps hitherto undisclosed to the world. When the Nazi aggressors are all eliminated and the Japanese conspirators are well secure in prison, we are still authoritatively told that 'never before in history has the world situation been more threatening to our ideals and interests.' So, it may be that the world's attention has not yet been directed in the right direction. 'The depressing aspect of the situation,' the world is told, 'is the duplication of the high handed, calculated procedure of the Nazi regime.' This may be so; or it may also be that we are only being betrayed by what is false within,—the incipient failure of will and wisdom.

"It is indeed a common experience that, in times of trial and stress like those the international world is now passing through it is easy enough to mislead the people's mind by pointing to false causes as the fountains of all ills and thus persuading it to attribute all the ills to such causes. For those who want thus to control the popular mind, these are the opportune times; no other moment is more propitious for whispering into the popular ear the means of revenge while giving it the outward shape of the only solution demanded by the nature of the evils. A judicial tribunal, at any rate, should not contribute to such a delusion.'"

The name of Justice should not be allowed to be invoked only for the prolongation of the pursuit of vindictive retaliation. The world is really in need of generous magnanimity and understanding charity. The real question arising in a genuinely anxious mind is, "can mankind grow up quickly enough to win the race between civilization and disaster?"

Judge Bernard of the Tokyo Tribunal representing France also opined that the Pact of Paris did not make any war a crime in international life, but that an aggressive war "is and always has been a crime in the eyes of reason and universal conscience—expression of natural law upon which an international tribunal can and must base itself to judge the conduct of the accused tendered to it." We have
already seen 'the eyes of reason and universal conscience' as also 'expression of natural law.'

We may once again quote the views of Mr. Gordon Ireland recorded in the Year Book of World Affairs 1950. Referring to the majority judgment of the Tokyo Tribunal Mr. Ireland says:

'‘That aggressive war is per se illegal this Tribunal does not reason afresh for itself, but quotes and adopts the statement of the Nuremberg Tribunal that the Pact of Paris of August 27, 1928, unconditionally condemned recourse to war for the future as an instrument of policy and expressly renounced it. After the signing of the pact any nation resorting to war as an instrument of national policy breaks the pact. 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 committing a crime in so doing.'

'The fallacy in this reasoning is that there is no way of determining what is or may be a crime in international law, if it has not been recognized as such for any substantial length of time, as of course aggressive war has not, the doctrine being at most twenty years old, according to its supporters, except by application of the tests which would determine a crime in legal systems of the nations concerned. Obviously, not all war has been or can here be condemned, for even the prosecuting nations are not universal pacifists, and before one form of war can be singled out for punishment, it ought to be made clear what kinds are included. Aggressive war has never been acceptably defined internationally, and it is to be seriously doubted if it even can be, further than as the kind of war one's own country never wages. It will be remembered, of course, that the Japanese claimed their nation's safety and very existence were threatened, so all their later actions were in fact done in self-defence. The Juridical Consultant of the prosecution recognises this definitional difficulty and, taking refuge in Thomistic philosophy, declares:—

'‘The fathers of the science of international law arrived at the conclusion that common juridical moral values, as made effective by the specific legal doctrines and techniques of a large number of nations, were part of a pattern of an objective natural law, and hence, justly binding on all nations, under international law.'

'The common law prevails in a majority of the nations whose judges sat on the Tokyo Tribunal, and in that system the penal law rule is well settled that a statute may prohibit an act and prescribe a penalty for doing it, but still the act will remain a statutory wrong only and, unless the statute expressly declares it so, will not be a crime nor capable of being the subject of indictment or punishment, beyond the penalty specified. The piously hopeful Kellogg-Briand Treaty of 1928 nowhere uses the words 'crime', 'criminal', 'penal'
or 'penalty' and no sanction of any kind or consequence of a breach is defined, suggested or hinted at. By all ordinary principles of international law as universally known and accepted before 1945, the consequences of breaking this like any other treaty are to be settled by protests, claims, reciprocal treatment in some way, negotiated indemnity or, in the last resort, war, between the nations party to the treaty (and in this case the Philippines were not), and such breaches cannot in any way constitute a matter to be laid at the door of any individuals whatsoever."

Mr. Ireland concludes by saying that the products of the two trials, the Nuremberg Judgment as also the Tokyo Judgment, would be for ever challenged "as being not an example of international law at all but no more than a round about subterfuge by which victorious nations through legal forms avenged themselves on enemy leaders who committed the real crime of being beaten."
LECTURE XIII

WHAT IS AGGRESSIVE WAR

It must have been noticed that neither the charters nor the judgments of the Tribunals at Nuremberg and at Tokyo offer any definition of ‘aggressive war.’

The reason is that the London Conference of 1945 of the four nations at which the agreement covering the Charter of the Nuremberg trials was arrived at, although succeeded in patching up many of the differences in many other respects, notably failed in the question of a definition of aggression for which the Americans were pressing.

It will be interesting to examine the discussions on aggression of the said London Conference of June-July, 1945. This conference was appointed by the Allied Governments for preparing and prosecuting the charges on the subject of aggression. Lord Hankey gives a revealing account of this conference in his ‘Politics, Trials and Errors’ at pages 16 to 27. After naming the leading figures at the conference and pointing out that “the American and British Representatives were both already designated as prosecutors and the Russian delegate was destined to become one of the Judges at Nuremberg.” Lord Hankey observes that “the task of the Conference was to bring all war criminals to just and swift punishment as decided by the Crimea (Yalta) Conference.” Lord Hankey then says: “It appears from the record that the United States were anxious to demonstrate by these trials that the war had from the outset been one of almost uniquely flagrant aggression by Nazi Germany which had been the justification of President Roosevelt’s Lease-Lend scheme and of his whole policy towards the war. But, as we have seen, the Paris Peace Conference had been very hesitant about declaring aggression to be a criminal act in law and similar doubts had been expressed in the Cadogan aide-mémoire of April 23, 1945. However, none of the Delegates boggled much about declaring if to be, in the legal sense, a crime—which astonishes the lay mind. Very soon it was realized that the defendants would be likely to raise the question of what constituted an aggression. Unless the Charter contained something to prevent it, the defence would raise all the great international issues that had so gravely beset the inter-war period to explain their actions. That was the main reason for the American desire for a definition of aggression.”

Various definitions of aggression were attempted by the delegates but it was found difficult to accept any that would leave Allied Powers out of it. At last attempt at condemning aggression in general was
given up and it was proposed to accept a definition to condemn specifically aggressions started by the Nazis in this war. A French draft, dated July 19, for example, included the following in a list of war crimes:

"The policy of aggression against, and of domination over, other nations, carried out by the European Axis Powers in breach of treaties and in violation of international laws."

The Russian delegate made the following laconic statement:

"Is it proposed then to condemn aggression or initiation of war in general or to condemn specifically aggressions started by the Nazis in this war? If the attempt is to have a general definition, that would not be agreeable."

Ultimately, however, no acceptable definition could be found. When some one tried to raise it again later on, General Nikitchenko observed dryly: "If we start on that again, I am afraid, the war criminals would all die of old age." Lord Hankey gave an interesting sketch to show that "for centuries past and in recent times, certainly during the war, technical aggressions have been committed by most of the principal Allied European Powers." He gave the Soviet record, the Polish record, the French record, and the British record in this respect.

The Conference ultimately gave up the attempt and the Charter had to leave aggression undefined.

The indictments use the expression but nowhere specify its meaning. The Charters speak of "a war of aggression or war in violation of international law, treaties, agreements or assurances." In the Nuremberg indictment we have "wars of aggression which were also wars in violation of international treaties, agreements, or assurances," and "aggressive or illegal wars." In the Tokyo indictment we have "war or wars of aggression, and war or wars in violation of international law, treaties, agreements and assurances."

Dr. Schwarzenberger in his 'Power Politics' says that while in a system of Power Politics the distinction between aggressive and defensive wars is only of propagandist relevance, and the naturalistic distinction between just and unjust wars was bound to degenerate into a meaningless ideology, the difference is essential in an international community which seriously attempts to limit resort to war to exceptional cases, or to abolish it completely.

At the Paris Conference of 1936 of the International Law Association the question of the right of self-defence came up for discussion. It was, however, resolved to adjourn the question for the further consideration of the Committee on "Conciliation between nations." At the time of this adjournment, however, the examination of the question of aggression was added to it as it was considered that the two could not be separated from each other.
The Committee at the next conference of the Association held in 1938 at Amsterdam reported that the Association was not likely "to arrive at a general agreement with regard to the definition and the incidents of the right of self-defense." The Committee accordingly suggested that the further consideration of the subject as also of the question of aggression be adjourned.


The report came before the Conference presided over by Lord MacMillan.

Mr. Bewes in presenting this report observed that the Committee without division approved "that they should wait until, among other things, large diversities of opinion between the different states had quieted down in some way or other, when they should have a chance of doing some useful work."

Mr. Temple Grey characterized the question of aggression as having become a hardy annual and wanted to have an exchange of views on what he called "a difficult part of a difficult subject." He referred to some prior attempts at a definition of aggression in certain conventions, notably between the Soviet Russia and the neighbouring powers. One such definition was: "He is an aggressor, who is found on enemy territory." Mr. Grey observed that this definition had the demerit of appearing to make the matter much more simple than it is. He then referred to an undertaking in Article 5 of the Pact of Non-Aggression between France and Russia and observed that this was an interesting step towards taking into consideration other than mere mechanical methods of defense. Mr. Grey then said:

"It does not, however, deal with certain things which are hostile acts, that is to say, he may be an aggressor who indulges in unfriendly acts which are not physical and who takes part in international mischief-making."

He referred to adverse propaganda as one such act.

Mr. Whitman suggested that, "Whenever trouble brews, or starts, the nation which declines to submit the question involved to some peaceful determination, either by arbitration or by some tribunal to be determined, is the aggressor. If neither party is so willing, nothing can be done but to let them fight it out."

Mr. Rabagliati observed that: "If it is impossible to define 'aggression' at a time when the world is reverberating with aggressions and the threats of aggressions, it will probably never be possible to define it at all." He further observed that: "As between self-defence and aggression there is sometimes such a balance as makes it almost impossible to say which is which."
Lord MacMillan said that he personally had always taken the view that nothing was more dangerous than definition—that in definition *latet periculum*. He was for postponing the consideration of the question. Ultimately the question was postponed.

The views quoted above, of course, have no official authority, the Institute being a wholly unofficial body of international jurists. Yet, from the eminence of its members, its pronouncements are always entitled to respect.

At the Paris Conference a definition of the right of self-defence was proposed which defined purely from what might be said to be a pre-war view of self-defence.

Mr. Quincy Wright ² in 1935 dealt with the concept of aggression in international law; but in proposing a definition he expressly stated that the definition proposed did not demand that the consequence of aggression be of the nature of criminal liability. According to him: "An aggressor is a state which may be subjected to preventive, deterrent, or remedial measures by other states because of its violation of an obligation not to resort to force." He emphasized that aggression is not the equivalent of the violation of an international obligation. Even if a state violates an obligation not to resort to force, it would still not be an aggressor under the definition proposed unless the law draws some practical consequence therefrom. The measures consequent upon aggression may be preventive, deterrent or remedial rather than punitive, and their application may be discretionary rather than obligatory with other states; but unless there is some sanction, some legal consequences of the breach, the breaker is not, under this definition, an aggressor.

Mr. Wright ³ distinguishes three classes of tests of aggression, each again being divided into four sub-classes according as attention is directed primarily to legal, military, psychological or procedural events. His three principal classes are:

1. The tests giving weight to events which occurred before fighting began.
2. The tests confining attention to events which occurred at the time fighting began.
3. The tests based upon events after fighting is in progress.

The first class conforms best to the usual conception of justice, though it is incapable of rapid application. Hundreds of thousands of events may have to be examined before the just evaluation of a controversy may be possible and this is bound to be a matter of long and laborious analysis.

The second class, according to Mr. Wright, conforms less to the usual conception of justice but perhaps more to the usual conception of aggression. Even here there is the difficulty that the events occurring where and when hostilities began are likely to be witnessed only by excited or prejudiced observers. Tests of this class, being
dependent upon an appreciation of unexpected circumstances at a time of unusual tension, are seldom capable of precise conclusions which a war-prevention procedure demands.

The third class contemplates the following definition of an aggressor: "An aggressor is a state which is under an obligation not to resort to force, which is employing force against another state, and which refuses to accept an armistice proposed in accordance with a procedure which it has accepted to implement its no-force obligation."

Mr. Quincy Wright elsewhere \(^4\) points out that the League of Nations has moved toward the following different tests each adopted for a distinctive use:

1. The state responsible for the first act of war, especially by invasion of foreign territory, is the aggressor: This test was proposed in connection with disarmament discussions.

2. The state under the least defensive necessity at the time hostilities began is the aggressor: This was proposed in connection with claims for reparation after hostilities had ceased.

3. A state is an aggressor if it refuses to accept an armistice proposed in accordance with a procedure which it has accepted to implement its no-force obligation: "This test has been suggested in most of the disputes involving hostilities before the League. Instead of examining the temporal priority of the belligerents in committing acts of war, or the moral necessities of the belligerents at the time fighting began, the League has examined the willingness of the belligerents to stop fighting when invited to do so."

Mr. Quincy Wright's own view seems to be to accept the first of the above three tests. According to him, a state of war can never exist among parties to the Pact of Paris without violation of the Pact. The initiation of a state of war, Mr. Wright says, can hardly be a proper defensive measure. The term defence has, however, tended to be used to cover all the unnamed circumstances which should extenuate the strict application of the rule against force.

The definition proposed by Mr. Wright, however, would not help us very much as will be seen later. He himself limited his definition to purposes other than determination of criminal liability.

Some suggest that a definition of the term is neither expedient nor necessary. A Court would experience no difficulty, it is said, on the facts in each particular case, in determining whether there has been an aggression or not. Certainly in definition there is danger. But I do not agree that all danger is eliminated simply by leaving the term undefined and thus allowing it to remain chameleonic. It may be easy for every nation to determine for others what is aggression. Perhaps every nation will say that war against what it considers to be its interest is aggressive. No term is more elastic or more susceptible of interested interpretation, whether by individuals, or by groups,
than aggression. But when a court is called upon to determine the question it may not always be so easy for it to come to a decision.

In my opinion in international life as at present organized it is not possible "by the simple aid of popular knowledge" to find out which category of war is to be condemned as aggressive. The duty of definition in such a case is obvious; it would not only make the matter clear but would also give it its true place in the scheme of knowledge showing its origin and connection with other cognate facts and determining its essentials. The so-called "simple popular" idea in a case like this would not be sufficient and we must not make a confusion between the idea entertained by a particular group and the real popular idea of the entire international community. It is a question of a clear agreement of the different nations as to the measures which they would deem to be aggressive.

The question involves further difficulty in view of the fact that the fundamental basis of these trials has been declared to be the organization of international life on the footing of humanity, but as a matter of fact there are still nations under the domination of another nation. The question would naturally arise whether the term aggressive would have reference to the interest of the dominated nation as distinct from that of the dominating power, or whether it would only have reference to the status quo. It is obvious that there is thus the possibility of want of agreement in popular ideas if the word 'popular' is to be taken in a sense comprehensive enough to embrace the dominated population as well. I do not see any reason why in a community organized on the basis of humanity, the interest of the dominated people should not be adverted to in such a case, if the word humanity again is not being used in any specific sense so as to exclude reference to the unlucky dominated nations of the world.

One of the most essential attributes of law is its predicability. It is perhaps this predicability which makes justice according to law preferable to justice without law,—legislative or executive justice. The excellence of justice according to law rests upon the fact that judges are not free to render decision based purely upon their personal predilections and peculiar dispositions, no matter how good or how wise they may be. To leave the aggressive character of war to be determined according to "the popular sense" or "the general moral sense" of the humanity is to rob the law of its predicability. In those fields of international controversy where passion runs high and where even now nations are only beginning to be induced to substitute for war, settlement by peaceful action, the law has a very difficult and delicate function to fulfil. Here, at any rate, no rule of law should be made to stand on a veritable quicksand of shifting opinion and ill-considered thought. Let not its very vagueness be accepted as the magic jingle through whose potency bewitched adventurers would be delivered from all their troubles.
I have already considered the views of Dr. Lauterpacht as to the legal position of the Pact of Paris and as to reservation of the right of self-defense having reference only to the faculty of determining what action should be taken when there is periculum in mora. According to him the legality of recourse to force in self-defense is in each particular case a proper subject for impartial determination by judicial or other bodies. I have already given my reason why I could not accept this view. Dr. Lauterpacht, however, in this connection says something about the definition of aggression which may be of some use for our present purpose.

The learned Professor proposes to lay down in advance in what circumstances recourse to force, including war, must be regarded prima facie as a measure of self-defense, and says: "Such circumstances constitute aggression on the part of the State against which the measures of self-defense are directed." He then refers to a number of treaties in which different states have adopted a definition of aggression and concludes by recommending further attempts in that direction. According to him such attempts cannot be regarded either as legally unsound or as inimical to justice.

The treaties referred to by Dr. Lauterpacht are the conventions between Russia and the several other states for the definition of aggression.

According to Article II of the convention for the definition of aggression of July 3, 1933, between Russia and Afghanistan, Estonia, Latvia, Persia, Poland, Roumania and Turkey, the aggressor in an international conflict will be considered the state which will be the first to commit any of the following acts:

1. Declaration of war against another State;
2. Invasion by armed forces, even without a declaration of war, of the territory of another State;
3. An attack by armed land, naval, or air forces, even without a declaration of war, upon the territory, naval vessels, or aircraft of another state;
4. Naval blockade of the coasts or ports of another State;
5. Aid to armed bands formed on the territory of a State and invading the territory of another State, or refusal, despite demands on the part of the State subjected to attack, to take all possible measures on its own territory to deprive the said bands of any aid and protection.

The learned professor then points out that this definition followed closely the definition of aggression proposed in May, 1933, by the Committee on Security Questions of the Disarmament Conference. The Draft Convention submitted by Great Britain to the Disarmament Conference in 1933 contained a definition of 'resort to war' within the meaning of Article 16 of the covenant which followed closely the definition quoted above except as to part 4.
Closely following this, Mr. Justice Jackson, at the Nuremberg Trial, proposed a definition of 'aggressor' for the purpose of determining the criminality of the act of aggression. Mr. Jackson said:

"An aggressor is generally held to be that state which is the first to commit any of the following acts:

1. Declaration of war upon another state.
2. Invasion by its armed forces with or without declaration of war, of the territory of another state.
3. Attack by its land, naval or airforces, with or without a declaration of war, on the territory, vessels or aircraft of another state.
4. Provisions of support to armed bands formed in the territory of another state, or refusal notwithstanding the request of the invaded state, to take in its own territory, all the measures in its power to deprive those bands of all assistance or protection."

According to Mr. Jackson:

"It is the general view that no political, military, economic or other considerations shall serve as an excuse or justification for such actions; but exercise of the right of legitimate self-defense, that is to say, resistance to an act of aggression, or action to assist a state which has been subjected to aggression, shall not constitute a war of aggression."

He emphasized that by these trials we are not inquiring into the conditions which contributed to causing this war. He pointed out the difference between the charge that this war was one of aggression and a position that Germany had no grievances and said:

"It is no part of our task to vindicate the European status quo as of 1935, or as of any other date. The United States does not desire to enter into discussion of the complicated pre-war currents of European Politics....

"Our position is that whatever grievances a nation may have, however objectionable it finds the status quo, aggressive warfare is an illegal means for settling those grievances or for altering those conditions."

We need not stop here to consider whether a static conception of peace is at all justifiable in international relations. I am not sure if it is possible to create 'peace' once for all, and if there can be status quo which is to be eternal. At any rate in the present state of international relations such a static idea of peace is absolutely untenable. Certainly, dominated nations of the present day status quo cannot be made to submit to eternal domination only in the name of peace. International law must be prepared to face the problem of bringing within juridical limits the politico-historical evolution of mankind which up to now has been accomplished chiefly through war. War and other methods of self-help by force can be effectively excluded only when this problem is solved, and it is only then that we can think of introducing
criminal responsibility for efforts at adjustment by means other than peaceful. Before the introduction of criminal responsibility for such efforts the international law must succeed in establishing rules for effecting peaceful changes. Till then there can hardly be any justification for any direct and indirect attempt at maintaining, in the name of humanify and justice, the very status quo which might have been organized and hitherto maintained only by force by pure opportunist "Have and Holders", and, which, we know, we cannot undertake to vindicate. That part of the humanity which has been lucky enough to enjoy political freedom can now well afford to have the deterministic ascetic outlook of life, and may think of peace in terms of political status quo. But every part of the humanity has not been equally lucky and a considerable part is still haunted by the wishful thinking about escape from political dominations. To them the present age is faced with not only the menace of totalitarianism but also the actual plague of imperialism. They have not as yet been in a position to entertain a simple belief in a valiant god struggling to establish a real democratic order in the Universe. They know how the present state of things came into being. A swordsman may genuinely be eager to return the weapon to its scabbard at the earliest possible moment after using it successfully for his gain, if he can keep his spoil without having to use it anymore. But perhaps one thing which you cannot do with weapons like bayonets and swords is that you cannot sit on them.

The approach suggested by Mr. Justice Jackson might have appealed to us had we been dealing with a recognized rule of law already settled with that limitation. But in a field where we are called upon to exercise our creative function, where we are called upon to have recourse to the progressive character of international law, and to declare and apply, in the name of justice and humanity, a newly found norm in order to fix criminal liability on a group of persons who acted in a particular manner while working the constitution of their country, I do not see how we can shut our eyes to the period beyond an arbitrarily fixed limit. The approach suggested would certainly deliver us from all our troubles and would afford an easy solution of all our bewilderment. But I am not sure if it would lead us to anything which in the name of humanity we can call wholesome and salutary.

When international law will be made to yield the definition suggested by Mr. Justice Jackson, it would be nothing but "an ideological cloak, intended to disguise the vested interests of the interstate sphere and to serve as a first line for their defense." A device to perpetuate a casual status quo without providing any machinery for peaceful change may not command much respect in international life.

This emphasis on an arbitrarily fixed status quo would certainly not lead us to any understanding of the real conditions of peace and
would fail to build any respect for justice. A trial conducted on this basis may be sufficiently unrevealing so as to shut out the essential facts responsible for the world trouble and may at the same time, afford ample opportunity for a collective expression of retributive and aggressive sentiment. Guilt is usually an elusive idea, especially when it is to be assigned under the pressure of strong emotions stimulated and snarled by wartime propaganda. When to this we add the proposed arbitrary and artificial limit to our enquiry, the resulting situation may eminently suit the occasion for any vindictive and oratorical plea in the language of emotional generalities. But such an enquiry may only entertain: it would hardly educate. It would contribute little to a comprehension of the causes of war or the conditions of peace.

Some of the tests suggested above would land us on some difficulties. We must remember that the U.S.S.R. and the Netherlands are some of the prosecuting nations in the Tokyo case and both declared war against Japan first. So far as the U.S.S.R. is concerned, even if self-defence be taken as admitting of initiation of war under certain conditions, the circumstances in which that state declared war against Japan would hardly justify it as war necessitated by any consideration of defence. It would perhaps be difficult to read "an instant and overwhelming necessity for self-defense, leaving no choice of means, and no moment of deliberation" in a war against already defeated Japan.

The Prosecution in its summation said: "We do not deny that in the Spring of 1944 the Japanese General Staff for the first time had to begin drafting defensive plans contemplating war with the U.S.S.R. But that took place when the Soviet Army had already broken the spine of the German Fascist army and the Japanese Army was suffering defeat from the Allies." It may be difficult to guess any necessity, instant or otherwise, overwhelming or otherwise, for defence where there is no danger of attack. Japan had already been fatally weakened and the U.S.S.R. knew it. Japan was given the first atom blast on the 6th August, 1945.

The U.S.S.R. declared war against Japan on 8th August, 1945. The Potsdam Declaration demanding unconditional surrender of Japan was issued on July 26, 1945. Japan had requested the Soviet Union to mediate in the early part of June, 1945, and ultimately offered to surrender on August 10, 1945. In the meantime, on 8th August, the U.S.S.R. declared war stating the following in justification of the action thus taken by it:

"After the rout and capitulation of the Hitlerite Germany, Japan is the only great power which is still for the continuation of the war.

"The demand of the unconditional surrender of the Japanese armed Forces made by the Three Powers—the United States of America, Great Britain and China—on July 26, this year, was declined by Japan.
Thus the proposal made by the Japanese Government to the Soviet Union containing the request of mediation in the war in the Far East loses all ground.

"Taking into consideration the fact that Japan refused to surrender, the Allied Powers made a proposal to the Soviet Government to join the war against the Japanese aggression and thus to shorten the period of time necessary to end the war, to reduce the number of victims, and to contribute to the speedy restoration of peace in the world. True to the allied cause, the Soviet Government accepted the proposal made by the Allied Powers and joined the declaration of the Allied Powers made on July 26, this year.

"The Soviet Government believes that such a policy of its is the only way to bring nearer the advent of peace, to free the nations from further sacrifices and sufferings, and to give a chance to the Japanese people to avoid those dangers and damages, which were suffered by Germany, after she had declined the unconditional capitulation. On the basis of the above said, the Soviet Government declares, that from tomorrow, i.e., August 9, the Soviet Union will consider herself to be in a state of war against Japan."

The declaration does not refer to any periculum in mora and, as a matter of fact, there was none. The U. S. S. R. did not say and, in the circumstances disclosed by the evidence in Tokyo case, could not have said that it believed its very life and vital interests to have been endangered beyond possibility of redress if immediate action was not taken. In its summation the prosecution said that "true to her commitment to the Allies, the U. S. S. R. at the request of the U. S. A. and Great Britain, declared war on the Japanese aggressor on August 9, 1945, thereby contributing to the speedier termination of World War II............." The evidence discloses that this action on the part of the U. S. S. R. had been arranged beforehand with the other Allied Powers who were all parties to the Pact of Paris. In my opinion we should not put such a construction on the Pact which would lead us to hold that all these big powers participated in a criminal act.

The justification offered by the U. S. S. R. in this document is certainly not one of self-defense; and, though at the hearing of the case, evidence has been introduced to show Japan's alleged aggressive design against the U. S. S. R. no such consideration seems to have weighed with that State in its decision in this respect. In my opinion in view of the law on the assumption of which we are now proceeding we must either accept the justification sought to be given in this document as a valid excuse for war in international law or declare the action taken to be unjustifiable and consequently aggressive and criminal. Of course, it might be contended that so far as the Pact of Paris is concerned, the war declared by the U. S. S. R. would not offend against its provisions. The U. S. S. R. might contend that it

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resorted to war as an instrument of international policy. Further, Japan having already violated this Pact, forfeited its benefit and consequently this war by the U. S. S. R. did not violate the Pact being against a signatory who had been waging war in violation of the same. This plea would be available only if we say that the test whether or not a particular war is criminal is whether it is or is not in violation of the Pact.

We do not know what justification the U. S. S. R. would offer of its action against Poland. Professor Kelsen says that "One of the fundamental questions to be decided by the Nuremberg Tribunal was the question as to whether Germany, in resorting to war against Poland and the Soviet Union, violated international treaties concluded with the States whose representatives formed the court. Thus these States made themselves not only legislators but also judges in their own cause. Among the States whose representatives were the judges and prosecutors in the Nuremberg trial was one which had shared with Germany the booty of the war waged against Poland, a war declared by the Tribunal, in conformity with the London Agreement, as a crime against peace because waged in violation of a non-aggression pact. It was the State which, in addition to this, committed exactly the same 'crime' in resorting to war against Japan in violation of a still existing non-aggression pact. If the principles applied in the Nuremberg trial were to become a precedent—a legislative rather than a juridical precedent—then, after the next war, the governments of the victorious states would try the members of the Governments of the vanquished States for having committed crimes determined unilaterally and with retroactive force by the former. Let us hope that there is no such precedent."

So far as the act of the Netherlands is concerned it may be supportable as a measure of self-defense only if we do not accept the test of aggression suggested by Mr. Jackson. At the time when the Japanese Imperial Rescript declaring war on the United States and Great Britain was issued, no declaration of war was made against the Netherlands. The Prosecution contends that this was so only "in view of future strategic convenience." According to the Prosecution "there was no doubt that on December 8, 1941, Japan entered into a war with the Netherlands. Recognizing this situation, the Netherlands declared that a state of war existed between the Netherlands and Japan."

I need not proceed to examine this question further at this place. All that I need point out is that from the very fact that the prosecuting nations including these two nations made a common case, the test of aggression must be sought somewhere else. Otherwise the test suggested by the various authorities would lead to the result that the U.S.S.R. committed the crime of starting aggressive war against Japan: That it also committed the same crime by its war against
Finland and Poland and consequently committed crime against humanity as well, may be left out of consideration in the present case. I am pointing this out here only to show where the suggested tests would lead us. As I cannot believe for a moment that the nations themselves having thus committed crimes would combine to prosecute the defeated nationals for the same crime, ignoring altogether similar criminals of their own nationalities, my conclusion is that the nations have not accepted any one of those tests of aggression that would produce this result.

It may be suggested, as was very often done in course of the Tokyo trial, that simply because there might be robbers untried and unpunished it would not follow that robbing is no crime and a robber placed under trial for robbery would gain nothing by showing that there are other robbers in the world who are going unpunished. This is certainly sound logic when we know for certain that robbery is a crime. When, however, we are still to determine whether or not a particular act in a particular community is or is not criminal, I believe it is a pertinent enquiry how the act in question stands in relation to the other members of the community and how the community looks upon the act when done by such other members.

Before we can decide which meaning should be attached to the words 'aggressor', 'aggression' and 'aggressive', we must decide which of the views as to a certain category of war having become criminal is being accepted by us. It is needless to say that we are now proceeding on the assumption that a certain category of war is a crime under the international law.

We have already noticed that there are at least four different views as to how war becomes a crime in international life.

According to Lord Wright, war is a crime in so far as it cannot be justified: The only justification of war being that it is necessitated by self-defense or self-protection, it would follow that the term 'aggressive' in this view should mean what is not justifiable on this ground. The Nuremberg Tribunal seems to have taken this view. In this connection it will be necessary for us to decide whether there need be any objective condition as the basis of self-defense or whether mere subjective end would suffice. Even if we accept the position that an objective condition is essential for self-defense, the question would still remain who, under the international law, is to judge the existence or otherwise of such objective condition?

According to Dr. Glueck, neither the Pact of Paris nor any of the Covenants made any war a crime. But repeated pronouncements of popular conviction that aggressive war is a crime gave rise to a customary international law making war a crime in international life. In this view we must look to these pronouncements to find out the meaning of aggression.
Professor Kelsen's view seems to be that the distinction between just and unjust war has always been recognized. The Pact of Paris now definitely defines what is unjust war: the war thus declared unjust will be a crime. This view is substantially the same as that of Lord Wright for our present purposes and will lead to the same meaning of the terms aggressor, aggressive, or aggression.

Mr. A. N. Trainin's views are somewhat difficult of application in this respect. He defines international crimes as infringements on the basis of international association, and consequently the conception of crime in international life can come into existence only when peace is established as the basis of such association.

I have already shown that in the ultimate analysis, Mr. Trainin's view comes to this that any infringement or attempted infringement of the status quo is crime. This seems to correspond to the view asserted by Mr. Jackson at the Nuremberg Trial.

There is yet a fifth view presented in the cases at Nuremberg and Tokyo, namely, that a war started with a certain procedural defect is a crime and consequently this procedural defect will amount to aggression.

I have already expressed my view that no war was made a crime in international life. Assuming, however, that a certain category of war has been made a crime in international life, the only view that might be accepted is that of Lord Wright where the learned author says that a war which cannot be justified has become a crime as the consequence of the Pact of Paris. The position in international law in this respect, prior to the Pact of Paris, was lucidly given by Senator Borah in December, 1927, and our consideration need not be pushed behind that declaration of the then state of law.

If we accept the above view of Lord Wright as to what category of war is now a crime, the test of aggression will be want of justification. Of course in order to be an aggressor, the state must be the first to commit the act of war. The temporal priority in my opinion is essential though not enough.

If we proceed on the assumption that there exists an international community organized on the basis of humanity, then, domination of one nation by another against the will of that nation will be the worst type of aggression, and, an action to assist such a dominated nation, which has thus been subjected to aggression, to free itself from such aggression, must also be accepted as justifiable. Mr. Jackson supports, as justifiable, an action to assist a state which has been subjected to aggression. I do not see why in an international community organized on the footing of humanity, similar action to assist a nation subjected to aggressive act of domination should not be equally justifiable.

Self-defense is certainly such a justification. It seems to be agreed on all hand that the Kellogg-Briand Pact 'did not interfere
with the right of self-defense" and that under the Pact "each nation was to be the judge of that question." The contention, however, is that even with such wide scope left for self-defense it cannot be "raised as a defense at the will of the aggressor without regard to the fact." "Whether action under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced." It may be contended that "self-defense can only apply in the case of a reasonably anticipated armed attack."

I have already discussed the nature and scope of self-defense of States in international life, and have pointed out wherein it differs from individual right of private defense in a national system. I have also pointed out how the Kellogg-Briand Pact left this right altogether unaffected.

You will remember that even in course of the negotiations between Japan and the United States of America just on the eve of the last Pacific War, an action of legitimate self-defense was understood by the United States of America to mean "their own decision for themselves whether and when and where their interests were attacked or their security, threatened." This self-defense was understood to extend to the placing of armed forces in any strategic military position keeping in view "the lightning speed of modern warfare."

I have already noticed how, before the ratification of the Pact of Paris by the United States, Mr. Kellogg, on the question of self-defense, declared that the right of self-defense was not limited to the defense of territory under the Sovereignty of the State concerned, and that under the treaty, each State would have the prerogative of judging for itself what action the right of self-defense covered and when it came into play, subject only to the risk that this judgment might not be endorsed by the rest of the world.

This right of self-defense seems to extend to what may be characterized as economic blockade by other powers. "The evolution of man, with his advancement in science, with the ever-increasing interdependence of nations upon each other for their sustenance introduces into the realm of warfare more than the explosion of gun-powder and the resultant killing of the enemy, but other, and, equally formidable, methods of reducing the resistance of an opposing nation and curbing it to the will of another.... To deprive a nation of those necessary commodities which enable its citizens and subjects to exist is surely a method of warfare not dissimilar to the violent taking of lives through explosives and force because it reduces opposition by delayed action resulting in defeat just as surely as through other means of conventional hostilities. It can even be said to be of a more drastic nature than the blasting of life by physical force, for it aims at the slow depletion of the morale and well-being of the entire civilian
population through the medium of slow starvation." It cannot be denied that this would require a serious consideration.

In the colloquies between him and individual members of the Senate Committee on Foreign Relations, Mr. Kellogg explained that the right of self-defense extended even to economic blockade. The treaty, it was understood, did not impair or abridge the right of the United States to defend its territory, possessions, trade or interests. In its report, the Committee made inter alia the following pertinent statement: "The Committee reports the above treaty with the understanding that the right of self-defense is in no way curtailed or impaired by the terms or conditions of the treaty. Each nation is free at all times and regardless of the treaty provisions to defend itself, and is the sole judge of what constitutes the right of self-defense and the necessity and extent of the same." This is what the Committee understood to be "the true interpretation of the treaty."

In my opinion the nature and scope of self-defense and the occasion for its application should all be determined with reference to the law as it stood before the Pact. Of course it is also my view that the question remained unjusticiable even after the Pact. I have already given my reasons for saying so. But here I am proceeding on the assumption that it was made justiciable to a certain degree by the Pact.

The Prosecution at Tokyo submitted that "it must be for the Tribunal to determine

(a) whether the facts alleged raise a case of self-defense within the proper meaning of that term;
(b) whether the accused honestly believed in the existence of that state of affairs, or whether it was . . . . a mere pretext; and
(c) whether there were any reasonable ground for such a belief."

According to this view "it is only if all three of these conditions are satisfied, that the right of each nation to judge for itself can operate." But none of these conditions would be satisfied in the case of the war by the U.S.S.R. against Japan.

Perhaps at the present stage of the International Society the word "aggressors" is essentially 'chameleonic' and may only mean "the leaders of the losing party."

If may only be suggested that for the purpose of determining this question of justifiability or otherwise of the war we should see:

1. Whether according to the information and bona fide belief of the invading state there existed any objective condition as the basis of the justification pleaded.

2. Whether the alleged objective condition as believed by the invading state was such as would justify a reasonable statesman in acting on it in the manner it was acted upon by the accused.
In determining the questions of "bona fides" or otherwise or of
"reasonableness", the contemporaneous behaviour and opinion of
similar statesmen of other countries including the victors would certainly
be pertinent consideration. Such questions can hardly be decided in
an intellectual quarantine area. When any determination of these
questions is destined to determine the question of life or liberty of the
accused, it is only fair that his conduct should be measured by a
standard having universal application. In so doing we may not ignore
any possible elusive connection between non-verbal behaviour and the
words employed to describe or disguise it.

I would take the law relating to self-defense or self-protection to
be substantially what it was, prior to the Pact of Paris, subject only to
such modifications as might have been warranted by any changed
circumstances of international life.

The International world seems to consider it legitimate for one
state to pursue the policy of "supporting free peoples of other states
who are resisting attempted subjugation by armed minorities of those
states or by outside pressure." This may lead us to the consideration
of the real character of the world's "terror of Communism" and its
bearing on the extent of legitimate interference with other state's
affairs. It is a notorious fact that the world's nightmare was
Communism since the Bolsheviks had made themselves masters of
Russia in 1917. The "catastrophe" which the existing states were
contemplating in their "terror of communism" was perhaps not so
much the obstructive impact of an external force but a spontaneous
disintegration of society from within. But in their expression of this
terror they always preferred to minimize or altogether ignore this
internal disintegrating infirmity and emphasize the delusion of impact
coming from without.

Ordinarily a state can have no right to interfere with the affairs
of another state simply on the ground of any ideological development
in that state. But Communism everywhere may not mean only a
political doctrine held by certain members of existing parties, or an
organization of a special party to compete for power with other political
parties. It sometimes becomes an actual rival of the national govern-
ment. It possesses its own law, army and government, and its own
territorial sphere of action. Consequently, its development itself may,
for all practical purposes, be on a par with a foreign intrusion, and, it
is certainly a pertinent question whether other states having interest
in such a country would be entitled to come in and fight this develop-
ment in order to protect their interest.

It may also be pertinent to notice here that Communism itself is
not looked upon as a mere development of a different ideology. There
is a grave fundamental difference between the Communistic theory of
the state and property and the existing democratic theory. In short,
Communism means and attempts at "withering away of the state."
The traditional French and Anglo-American democracies may roughly be said to be based on Lockean, Humean, and Jevonian philosophy interspersed with Church of England or Roman Catholic, Aristotelian philosophical assumptions. The Russian Communism has for its basis the Marxian philosophy.

No doubt the words "democracy" and "freedom" are used also in connection with communistic ideal. But there, they are made to bear a fundamentally different import. The "democracy" of the communistic ideal means and implies the withering away of the present day "democracy". The possibility of Communistic 'freedom' is seen only in the disappearance of the present day democratic state organizations.

Lenin says:10 "Only in Communistic Society, when the resistance of the capitalists has been completely broken, when the capitalists have disappeared, when there are no classes...(i.e. when every member of society spontaneously accepts the Marxian philosophy), only then does 'the state...cease to exist', and it 'becomes possible to speak of freedom.' Only then will really complete democracy, democracy without any exceptions, be possible and be realized. And only then will democracy itself begin to wither away...Communism alone is capable of giving really complete democracy, and the more complete it is, the more quickly will it become unnecessary and wither away of itself."

Thus the attitude of the Communist with respect to a democracy grounded on the Lockean or Humean philosophy is definite.

In these circumstances it is generally felt that the Communistic development is not directed by a correct ideology and that therefore the Communists are not thoroughly safe neighbours for the rest of the world.

It is not for me to comment on the justification or otherwise of these feelings. Such feelings have not always been shared by the world's wisest minds. While frankly condemning "the ruthless suppression of all contrary opinion, the wholesale regimentation, and the unnecessary violence in carrying out various policies" in Soviet Russia, some with equal frankness point out that "there was no lack of violence and suppression in the capitalist world." "I realized more and more", says Pandit Jawaharlal Nehru of India, "how the very basis and foundation of our acquisitive society and property was violence... A measure of political liberty meant little indeed when the fear of starvation was always compelling the vast majority of people everywhere to submit to the will of the few... Violence was common in both places, but the violence of the capitalist order seemed inherent in it; while the violence of Russia, bad though it was, aimed at a new order based on peace and co-operation and real freedom for the masses." Pandit Nehru then points out how, with all her blunders, Soviet Russia had triumphed over enormous difficulties and taken great strides toward this new order, and concludes by saying that
the presence and example of the Soviets "was a bright and heartening phenomenon in the dark and dismal world."

Such appraisals, however, do not help any solution of the difficulties which the present International Society, composed as it is of Capitalist democratic states as also of Communist states, feels in adjusting and stabilizing the relations between the two groups. Real or fancied, such difficulties were, and, still are, being felt almost universally.

Solution of such difficulties, however, is not what concerns me now. All that I need point out is that as the Communist development thus goes to the very foundation of the existing state and property organizations, the following questions would naturally arise for our determination:

1. Whether a sister state of the existing international society would have right to help the distressed state when its existence is thus threatened by internal communistic development; if so, what is the extent of this right?

2. Whether a sister state having interests within the distressed state would have right to protect that interest from the dangers of communistic revolution. If so, what is the extent of this right?

3. Remembering the ideology of Communism and keeping in view the fact that some of the states of international society have already assumed communistic organizations, what, if any, is the extent of the rights of interference of other existing sister states if and when they bona fide apprehend the spread of this communistic development in other states.

The present-day world behaviour in the matter of helping the group of peoples of a particular nation in fighting another group of the same on the plea that that other group are communists would throw much light on the solution of these questions.

Some of the Big Powers, we are told, "have always felt... that they cannot prosper and live securely in contact with states where governments work on principles radically different from their own." It is to be seen whether the defeated nations also are entitled to share such feelings and shape their policy and behaviour accordingly. We are told that "no nation can endure in a politically alien and morally hostile environment", and are given "the profound and abiding truth" that "a people which does not advance its faith has already begun to abandon it." It may only be noticed here that even the width of the Pacific or of the Atlantic may not be considered sufficient to prevent 'contact' in this respect.

These behaviours will indeed be very material for our present purpose. If an individual life or liberty is to be taken, it would certainly be proper that his conduct should be measured by a standard having universal application.

36–1809 B.
There is yet another difficult matter that must enter into our consideration in this connection. We must not overlook the system of Power Politics prevailing in international life. If will be a pertinent question whether or not self-defense or self-protection would include maintenance of a nation's position in the system.

As, in my opinion, the Pact of Paris left the parties themselves to be the judge of the condition of self-defense, I would only insist upon there having been bona fide belief in the existence of some sufficient objective condition.

In order to appreciate what may be such a sufficient objective condition we must look to the behaviour of the international community itself. As we shall see later, powerful nations seem to have shaped their behaviour on the footing "that protracted impotence of a state to maintain within its domain stable conditions in relation to alien life and property both inspires and justifies the endeavour of an aggrieved neighbour to enter the land and possess itself thereof." The Lytton Report seems to justify such actions even on the part of non-neighbours. The international society is supposed to look upon its individual members as fatally delinquent if it be persistently negligent of certain standards of conduct believed to be established by international law in relation to occurrences within the territory which it regards as its own. In the event of such delinquency, it is said, "the delinquent member must be regarded as inviting conquest or an external attempt to subject it to wardship." "Such grim alternatives do not necessarily point to lawlessness on the part of countries which avail themselves, possibly for selfish reasons, of the failures of the palsied state. They merely accentuate the fact that respect for the territorial integrity of a state invariably demands of the sovereign an assertion of supremacy within its domain which is responsive to all that international law demands." I am not supporting this justification of conquest. I am simply pointing out that this has not been a mere theory but has been a principle of action at least in respect of areas outside the western hemisphere.

There is yet another matter which would require our consideration in this connection—I mean the question of neutrality and of the extent of neutral's rights and duties. After, for example, Japan's war in violation of the Pact of Paris was initiated against China, the behaviour of other nations towards her would be a pertinent consideration in order to determine the character of any subsequent action of Japan against those nations. It would, therefore, be essential to enquire

1. Whether, even after the China Incident, those other nations owed any duty to remain neutral;

2. Whether their behaviour including their hostile comments, if any, upon the action of belligerent Japan was within the right and consistent with the duty of a neutral;
3. If not, whether Japan's action against such nation was justifiable in view of such behaviour.

Apart from any other matter, the question how far a neutral has the right to make hostile comment upon the actions of a belligerent is decidedly a grave one, remembering that today, besides the power of the press, the radio carries the spoken word to all corners of the earth in a moment. The effect of a nation's broadcasting may alone do more harm to a combatant than the destruction of any army corps; so that if a combatant feels that the broadcasting and the press utterances of a nation which owed the duty of remaining neutral are sufficiently damaging to him, he may be within his right to demand discontinuance of such utterances or fight.

In the explanatory note which Kellogg dispatched to the Powers on June 23, 1928, he declared that he did not share the scruples of France that adhesion of France to the Pact could prevent her from fulfilling her obligations towards the states whose neutrality she had guaranteed. According to this note a supersession of neutrality was not regarded as the consequence of the Pact.

"Neutrality legislation which has been enacted in the U.S.A. from time to time since the Pact of Paris, seems to indicate that both Congress and the President believe that the U.S.A., though a signatory of the Briand Kellogg Pact, can also remain neutral. American neutrality legislation is the result of a lively difference of opinion. On the one hand, it was claimed that the United States ought to draw, from the notion that neutrality is no longer compatible with the new international law, the logical conclusion that the exportation of arms, munitions and war materials to the aggressor should be forbidden. In February, 1929, Senator Capper brought in a resolution to forbid the exportation of arms and munitions to any country which the President declared had violated the Kellogg Pact. The resolution was rejected." This is taken from Dr. Scheuner's report placed before the Amsterdam Conference of 1938 already referred to. It throws a good deal of light on the question now raised. Incidentally this seems also to indicate that at least this powerful state did not consider war in violation of the Pact an illegal thing. In any other view such a strong power would have to be taken to be so unscrupulous in its international behaviour as to openly help the doing of an illegal thing. The prospect of profits from the sale of arms alone could not have been responsible for such a behaviour in such a big power.

Many well-known authors are also of opinion that the traditional law of neutrality has lost none of its validity as a result of the Pact.

Judge J. B. Moore" writing in 1933 says: "As a lifelong student and administrator of international law, I do not hesitate to declare the supposition that neutrality is a thing of the past is unsound in theory and false in fact. There is not in the world today a single govern-
ment that is acting upon such supposition. Governments are acting upon the contrary supposition, and in so doing are merely recognizing the actual fact."

On February 27, 1933, Sir John Simon, discussing in the House of Commons the embargo on the shipment of arms to China and Japan, spoke of Great Britain as a "neutral government" and of the consequent necessity of applying the embargo to China and Japan alike.

Of course the law of neutrality does not preclude any government from taking part in a war if it sees fit to do so. "It merely requires the observance of candor and decency in international dealings, by inhibiting acts of war under the guise of neutrality." From the elementary principles of international law it necessarily follows that if a government bans the shipment of arms and munitions of war to one of the parties to an armed conflict and permits it to the other, it intervenes in a conflict in a military sense and makes itself a party to a war, whether declared or undeclared.

The fact that America was helping China in all possible ways during Sino-Japanese hostilities would thus be a pertinent consideration in determining the character of Japan's subsequent action against the U.S.A. Admittedly the United States "rendered aid economically and in the form of war materials to China to a degree unprecedented between non-belligerent powers and that some of her nationals fought with the Chinese against the aggression of Japan."

In this connection we may have to consider the bearing of boycott of a belligerent state by the so-called neutral states or of economic sanction against such a state.

The really parallel situation in international life arises when two or more countries combine to cut off all commercial intercourse with another that may be singled out for penalization. It may be that this uniting or combining of two or more states transforms conduct to which a single country might legitimately have recourse, into conduct which at once attains a sinister aspect, and of which the proscribed country may justly complain.

As has been observed by Charles Cheney Hyde and Luis B. Wehle:---

"It is greatly to be doubted whether a group of countries enjoys a broader right to restrict or penalise a particular state (except, of course, in consequence of some general arrangement to which it is a party) than does the individual member of the group. The sheer power of the matter to achieve its end is not indicative of a special legal right to do so. Yet the very success of some instances of joint intervention may tend to encourage the notion that the pressure brought to bear upon a country whose conduct is offensive to a group gains sanctity from the united power that is welded together against it. If a weapon such as the international boycott be applied to check
the conduct of a member of the family of nations, the reasonableness or fairness of the measure depends not upon the power behind it or upon its success, but upon quite a different consideration, the nature of the conduct of the state that is interfered with.

"States may be expected to intervene, and to assert the right to do so, even collectively, to thwart the conduct of a particular country that is internationally illegal, when they smart enough from the consequences of it. What justifies their action is the essential wrongfulness of the conduct that is repressed. This principle is obviously applicable when the boycott, rather than any other, happens to be the instrument of interference. Yet the very potency of that instrument accentuates the care to be taken lest it minister to caprice or revenge, rather than to the demands of justice."

Certain safeguards are suggested in this respect:

1. The scheme of organized intervention exemplified by the international boycott ought not to be put into force save as a deterrent of, or as a penalty for, the commission of a well-defined act, the existence of which is ascertainable as a fact;

2. It should not be applied without giving the state charged with the commission of the act an opportunity for a hearing before an impartial body;

3. It should be directed solely against a state which has previously agreed, as a member of a group participating in a multipartite arrangement to the use of the weapon under specified contingencies for the common weal.

I would briefly notice the explanations offered on these suggested safeguards by Messrs. Charles Cheney Hyde and Luis B. Wehle:

1. It is of utmost importance that the proscribed conduct be of unequivocal character: it must not be a complicated superstructure calling for a conclusion on a question of law as a means of determining its existence: it must be a simple factual situation easily recognizable as such and not likely to be misapprehended. The distinction between these tests of requisite improper conduct is seen in the difference between a so-called war of aggression and a mere act of hostility. To apply a penalty for the former necessitates an enquiry into a complex situation not unmixed with law, and a conclusion which in numerous cases may well be open to doubt.

2. The opportunity for a hearing before an impartial body is essential because the strength and virility of the international society is proportioned to its respect for law: The foundation of international justice is likely to be lost sight of and even held in contempt when the sheer power of a group of countries is launched against a single state by a summary process that gives if no opportunity for defense.
3. The reason for the limitation that boycott be confined for use against a state that has previously agreed to that use under specified circumstances, ought to be obvious. The boycotters need assurance that they may stay at peace and penalize the covenant-breaking belligerent, and at the same time be not charged with violating a legal duty towards it because of their taking sides and abandoning every pretence of neutrality. When war breaks out in any quarter, the law of nations imposes heavy burdens upon the country that professes to stay with peace with the fighting powers. It forbids its government to help either belligerent at the expense of the other. That law takes no cognizance of the efforts or desires of the country that seeks to participate in the contest and yet remain at peace: If it will participate as supporter of a favoured belligerent, international law decrees that it does so squarely as a belligerent, and not as a neutral. In a word, governmental participation by a state supposedly at peace is not only not contemplated, but is also sharply proscribed. Upon the outbreak of war these requirements immediately become operative. The point to be emphasized is that they are not modified or lessened by a general arrangement designed to minimize occasions for a just and excusable war, and which do not in terms purport to alter them.

The mere embarking upon war in violation of the terms of a multipartite treaty hardly suffices in itself to deprive the treaty-breaking belligerent of the right to demand that the other parties to the arrangement which elect to remain at peace, respect their normal obligations as neutrals. Thus, if two or three of them unite to apply the boycott against the offender, and even succeed in checking its further belligerent activities, they still subject themselves to the charge of unneutral conduct.

The employment of a boycott against a country engaged in war amounts to a direct participation in the conflict, which may, in fact, prove to be as decisive of the result as if the boycotters were themselves belligerents. It is defiant of the theory of neutrality and of the fundamental obligations that the law of nations still imposes upon non-belligerent Powers.

The economic measures taken by America against Japan as also the factum of A B C D encirclement scheme will thus have important bearings on the question of determining the character of any subsequent action by Japan against any of these countries. —

The prosecution at Tokyo characterized the economic blockade against Japan as aiming only at the diminution of military supplies. According to the defense “the blockade affected all types of civilian goods and trade, even food.” The defense contended: “This was
more than the old fashioned encirclement of a nation by ships of overwhelming superiority and refusing to allow commerce to enter or leave. It was the act of all powerful and greatly superior economic states against a confessedly dependent island nation whose existence and economics were predicated upon world commercial relations."

I believe I have said enough to indicate that in deciding whether or not any particular action was aggressive we shall have to take into account the antecedent behaviour of the other nation concerned including its activity in adverse propaganda and the so-called economic sanction and the like.

We are also told that the following are illegal wars:

1. A war to secure the military, naval, political and economic domination of certain countries and of the Pacific and Indian Oceans.

2. A war in violation of:
   (a) Treaties,
   (b) Agreements,
   (c) Assurances,
   (d) International law.

The contention is that a war in violation of treaties, agreements, assurances or international law is illegal and hence those who planned or waged such a war committed a crime thereby.

A war in violation of treaties, agreements or assurances without anything more may only mean a breach of contract. In my opinion such a breach would not amount to any crime. The treaties, agreements or assurances do not change the legal character of the war itself.

The treaties and the agreements in question are detailed in Appendix C of the Nuremberg Indictment and in Appendix B of the Tokyo Indictment and the Assurances are given in Appendix C.

The following Treaties and Agreements are named:


2. The Convention for the Pacific Settlement of International Disputes, signed at the Hague, 18th October, 1907.

3. The Hague Convention No. III relative to the Opening of Hostilities, signed 18 October, 1907.

4. Agreement effected by exchange of notes between the United States and Japan, signed 30 November, 1908.


6. The Treaty of Peace between the Allied and Associated Powers and Germany, signed at Versailles, 28 June, 1919, known as the Versailles Treaty.

8. Treaty between the British Commonwealth of Nations, France, Japan and the United States of America relating to their Insular possessions and Insular Dominions in the Pacific Ocean, 13 December, 1921.

9. Identical communication made to the Netherlands Government on 4 February, 1922 on behalf of the British Commonwealth of Nations and also 'mutatis mutandis' on behalf of Japan and the other Powers signatory to the Quadruple Pacific Treaty of 13 December, 1921.

Identical Communication made to the Portuguese Government on 6 February, 1922, on behalf of the British Commonwealth of Nations and also 'mutatis mutandis' on behalf of Japan and the other Powers signatory to the Quadruple Pacific Treaty of 13 December, 1921.

11. The Treaty between the United States and Japan signed at Washington, 11 February, 1922.
15. The Treaty between Thailand and Japan concerning the continuance of friendly relations, etc., signed at Tokyo, 12 June, 1940.
16. The Convention respecting the Rights and Duties of Neutral Powers, etc., signed at the Hague, 18 October, 1907.
17. The Treaty of Portsmouth between Russia and Japan, signed 5 September, 1905.
19. The Neutrality Pact between the Union of Soviet Socialist Republics and Japan, signed 13 April, 1941 in Moscow.

Of these treaties and agreements, items 1 and 2, The Hague Convention of 1899 and 1907 for the Pacific Settlement of International Disputes, item 3 (The Hague Convention No. III relative to the opening of hostilities) and item 13 (The Kellogg-Briand Pact of 1928) alone seem to have any direct bearing on the question of the legal or illegal character of the war. The effect of items 1, 2 and 13 has already been considered in detail. I shall presently take up the examination of the Hague Convention No. III.

Of the rest of these treaties and agreements, items 4, 8, 9, 10, 11, 15, 17, 18 and 19 are bilateral treaties giving rise to certain rights and duties as between the parties thereto. They, by their terms, did not prohibit any war. When the indictment speaks of 'a war in violation
WHAT IS AGGRESSIVE WAR

of such treaties and agreements, it seems to have either of the two following things in view:

1. War having the effect of injuriously affecting the legal relations constituted by these treaties and agreements;

2. War designed as a means for the procuration of the cessation of the legal relations constituted as above.

In my opinion, a war, if not otherwise criminal, would not be so, only because it involves any violation of the rights and duties arising out of legal relations constituted by such bilateral treaties and agreements. Any breach of such treaties and agreements, though brought about by war, would only give the other party a right to protest, to resist and to maintain its rights even by having recourse to war. In any case a war involving such a breach does not, in international law, bring in any individual responsibility or criminality.

The second item specified above, however, will have an important bearing on the cases of conspiracies. I would take it up while considering the law relating to such conspiracies.

Item 6 is the treaty of Versailles and item 7 relates to that treaty. The relevant provisions of this treaty have already been considered at some length. Item 16 relates to the question of neutrality. I have already considered the bearing of the rights and duties of neutrality on the question before us.

Items 5, 12 and 14 refer to treaties and agreements relating to the use of opium and other drugs. I do not see any bearing of these treaties on the question before us now. If these were violated during war in occupied territories, such violations might amount to war crimes stricto sensu. But I do not see how such facts would go to affect the character of the war itself.

It will be interesting in this connection to recall to our memory the part played by opium in Sino-British relations. The career of the narcotic in China in the most noxious form of smoking commenced very early. It was first introduced there by the Dutch. Soon, addiction to the opium-smoking came to be far more wide spread there than elsewhere in spite of the efforts of the Chinese Government to eradicate the evil by making opium-smoking a penal offence in China. This failure of the Chinese Government is largely ascribable to the British design. British-India soon came to be the chief source of opium production in the world and of opium importation into China. The British Government in India assumed a monopoly of the sale of opium in their dominions in A.D. 1773, and of the manufacture of it in A.D. 1797. In A.D. 1800 the Chinese Government forbade both the cultivation of the opium poppy in China and its importation from abroad. This clashed with the British policy of winning the maximum revenue from opium. The policy was to stimulate its consumption both in India and in China. From A.D. 1830 onwards the British followed
this policy by lowering the price which had the double effect of greatly increasing the smuggling of opium into China and the amount of revenue accruing to the British Government in India. The British-Indian Government's opium revenue rose from about £1,000,000 per annum in the years 1820-13 to over £7,000,000 in 1910-11. In the period A.D. 1800-1858, during which the importation of opium into China was made illegal by the Chinese Government, the British Government encouraged the smuggling trade, and the lion's share of the smuggling trade was done by British ships.

The British Government in the United Kingdom never made this smuggling trade illegal for British subjects, and they discountenanced compliance with the Chinese Government's demand that foreign merchants should sign bonds undertaking not to smuggle opium into China and accepting a liability to suffer capital punishment for this offence at the hands of the Chinese authorities if the offenders were caught and convicted.

The Chinese justly complained that the advent of Western traders had brought on China the curse of opium-smuggling on a large scale. In A.D. 1836 the value of the opium smuggled into China was greater than the combined value of the tea and silk legitimately exported.

"In 1839, a Chinese Imperial Commissioner, Lin Tse-sū, succeeded, by a bloodless boycott and blockade of the Western merchants at Canton, in compelling the British Chief Superintendent of the trade of British subjects in China, Captain Charles Elliot, to co-operate with him in enforcing the surrender, by Western merchants, of 20,283 chests of opium, valued at over £11,000,000, at that time held by them on Chinese soil or in Chinese territorial waters. Commissioner Lin duly destroyed the confiscated opium, though he failed to put an end to opium-smuggling."

"Thereafter, hostilities were started by the British, first on 4 September 1839, at Kowloon in retaliation for a refusal of permission to purchase food supplies, and then on 3 November 1839, at Chuen-pi, in retort to a Chinese demand for the surrender of the murderer of a Chinese subject Lin Wei-hi, who had been fatally injured on 7 July, at Kowloon, in an indiscriminate assault on the Chinese civilian population by British (and perhaps also American) sailors who were trying to lay hands on intoxicating liquor."

"The British Government in the United Kingdom had already taken steps to despatch a naval and military expeditionary force to China after being informed of the action taken by Commissioner Lin, but before receiving the news of the outbreak of hostilities."

The British Government met with some opposition and censure, from a minority in Parliament and among the public, for making war on China in A.D. 1839-42. The influence of China Trade in Parliament, however, was still considerable. In the peace treaty at Nanking
on 29 August 1842 the British compelled the Chinese to open treaty ports and to cede territory and at last on 13 October, 1858, the Chinese Government had to agree to legalize the importation of opium into China after defeat in a Second Sino-British War and 58 years experience of failure to prevent the smuggling traffic.

This is the opium war and this is how the issue over opium was eventually closed between the Chinese and the British by the latter having secured the right of importation of opium into China from India.

This account, you will find collected in Toynbee's "Civilization on Trial" pp. 94-96. The authorities relied on for giving this account are all non-Chinese, are all westerners.

Prof. Toynbee remarks that "the best that can be said for the perpetrators of this international crime is that they have, ever after, been ashamed of it." Let us hope that some such feeling was responsible for the Hague Conventions of 1912 and 1913. But all this is beside the point. There was total prohibition of exports of opium from British India only in A.D. 1926.

As regards war in violation of international law, the question falls to be considered in relation to:

1. Law renouncing war;
2. Law making aggressive war criminal;
3. Law regarding the opening of hostilities.

Cases 1 and 2 have already been considered while disposing of the material questions of law arising for our consideration.

The third case falls to be considered under two different heads, namely, (1) In relation to law, if any, dehors the Third Hague Convention of 1907 regarding the opening of hostilities and (2) In relation to the Third Hague Convention of 1907.

In the Seventh Edition of Wheaton's International Law, Dr. B. Keith\textsuperscript{13} discusses the history and the principle of declaration of war and concludes that non-declaration does not make the war illegal. Dr. Keith points out that a formal declaration of war to the enemy was once considered necessary to legalize hostilities between nations. It was uniformly practised by the ancient Romans, and by the states of modern Europe until about the middle of the Seventeenth Century. In the Seventeenth Century formal declarations were not regarded essential. From the Eighteenth Century previous notifications became exceptional. Out of some one hundred twenty wars that took place between 1700 and 1872 there were barely ten cases in which a formal declaration preceded hostilities. In the latter part of the Nineteenth Century, however, it became customary to publish a manifesto, within the territory of the state declaring war, announcing the existence of hostilities and the motives for commencing them. This publication perhaps was considered necessary for the instruction and direction of the subjects of the belligerent state in respect to their
intercourse with the enemy, and regarding certain effects which the law of nations attributes to war in form. Dr. Keith also points out that apart from the conclusions to be drawn from actual practice, there was by no means unanimity of opinion among jurists and publicists. On the whole, continental writers urged the necessity of a previous declaration. The British view was contrary to this. According to Lord Stowell a war might properly exist without a prior notification—the notification only constituted the formal evidence of a fact.

Dr. Keith then cites examples from the period between 1870 and 1904 to show that in some cases there were formal declarations while in others there were none. Among the latter group were the hostilities of 1884-1885 between France and China, the Serbian invasion of Bulgaria of 1885, the Sino-Japanese War of 1894, the Greek invasion of Turkey of 1897, and the allied action against China on June 17, 1900. In the Russo-Japanese War, 1904, Japan attacked the Russian Fleets two days before she formally proclaimed war. Russia thereupon accused the Japanese of treacherous conduct. Dr. Keith says that as there had been no surprise attack, the charge was hardly maintainable. Diplomatic relations between the two powers had been going on fruitlessly since the preceding July, and were severed on February 6, by the Japanese note declaring that "The Imperial Government of Japan reserve to themselves the right to take such independent action as they may deem best to consolidate and defend their menaced position, as well as to protect their established rights and legitimate interests." A few hours before the delivery of this note, however, the Japanese captured a Russian cruiser, as the Russian Fleet appeared on February 4 between Port Arthur and the Japanese Coast.

As has been pointed out above, though a practice developed to issue a general manifesto, this practice was uncertain and was only a matter of courtesy rather than of legal obligation. Dr. Keith says that because of this unsatisfactory state of the matter, the Hague Conference of 1907 took up the question, and laid down definite rules in its third convention, which is now binding on the belligerents.

The Convention in question is entitled "Convention Relative to the Opening of Hostilities" and comprises eight articles, of which Articles 1, 2, 3 and 7 are relevant for our present purpose.

Article 1 stands thus: "The contracting powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war."

Article 2 requires that the existence of a state of war must be notified to the neutral powers without delay....

Article 3 says that Article 1 shall take effect in case of war between two or more of the contracting powers.
Article 7 enables any of the contracting parties to denounce the present convention and lays down how such denunciation is to be made.

A careful reading of the articles will show that the Convention only created contractual obligation and did not introduce any new rule of law in the international system. Westlake thinks that this Convention did not seriously affect the previous law on the subject. According to Pitt-Cobbett "The signatories do not pledge themselves absolutely to refrain from hostilities without a prior declaration, but merely recognize that as between the belligerents hostilities ought not to commence without previous unequivocal warning." Bellot considers that despite the limits imposed by custom and convention the opening of hostilities appears to be mainly a question of strategy.

Dr. Keith also concludes that the rule introduced by the Convention in no degree stigmatizes a war without declaration as illegal. It would appear from the rules that it is not necessary to allow any definite interval to elapse between the declaration and the actual opening of hostile operation. A delay of twenty-four hours was suggested at the Conference, but it was not approved and no period was mentioned as requisite interval. For the Second World War an ultimatum was presented by Britain to Germany on September 2 at 9 A.M. to expire at 11 A.M. France delivered a similar ultimatum which expired at 5 P.M. on the same date. Russia attacked Finland in 1939 without formal notice. Dehors this convention there was no law rendering war without declaration illegal.

A war to secure domination of territories as alleged would perhaps constitute a breach of the Pact of Paris if such a measure cannot be justified by the party adopting it. But I have already given my view of the Pact. So far as the question of criminal liability, either of the state or of the state agents, is concerned, I have already given my conclusion in the negative.

I would only like to observe once again that the so-called Western interests in the Eastern Hemisphere were mostly founded on the past success of these western people in "transmuting military violence into commercial profit." The inequity, of course, was of their fathers who had had recourse to the sword for this purpose. But perhaps it is right to say that "the man of violence cannot both genuinely repent of his violence and permanently profit by it."
LECTURE XIV

IF ANY CATEGORY OF WAR BECAME CRIME IN ANY OTHER WAY

If the Pact of Paris thus failed to affect the legal character of war, either directly or indirectly, the next question is whether any category of war became crime or illegal thing in international life in any other way.

I would answer this question again by giving you the relevant portion of my judgment at the Tokyo Trial.

Dr. Glueck answers this question in the affirmative and says that a customary international law developed making an aggressive war a crime in international life.

For this purpose Dr. Glueck relies on the following data:

1. The time has arrived in the life of civilized nations when an international custom should be taken to have developed to hold aggressive war to be an international crime.

2. It is familiar law in the international field that custom may, in the words of Article 38 of the statute of the Permanent Court of International Justice, be considered "as evidence of a general practice accepted as law."

(a) All that is necessary to show is that during the present century a widespread custom has developed among the civilized states to enter into agreements expressive of their solemn conviction that unjustified war is so dangerous a threat to the survival of mankind and mankind's law that it must be branded and treated as criminal.

3. In addition to the Pact of Paris, the following solemn international pronouncements may be mentioned as the evidence of this custom and of this conviction:

(a) The agreements limiting the nature of the deeds permissible in the extreme event of war: The Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1929 regulating the treatment of prisoners of war.

(b) The draft of a treaty of mutual assistance sponsored by the League of Nations in 1923, solemnly declaring (Article 1) that aggressive war is an international crime, and that the parties would undertake that no one of them will be guilty of its commission.
(c) The preamble to the League of Nations 1924 Protocol for the Pacific Settlement of International Disputes (Geneva Protocol) referring to aggressive war as crime.

(d) The declarations made at the Eighteenth Plenary meeting of the Assembly of the League of Nations, held on September 24, 1927.

(c) The unanimous resolution of February 18, 1928, of the twenty-one American Republics at the Sixth (Havana), Pan American Conference declaring that "War of aggression constitutes an international crime against the human species."

(f) The preamble of the general convention signed by the representatives of all the republics at the international conference of American states on conciliation and arbitration held at Washington in December, 1928, containing the statement that the signatories desired "to demonstrate that the condemnation of war as an instrument of national policy in their mutual relations set forth in the Havana Resolution constitutes one of the fundamental bases of inter-American relations . . . ." 

(g) The preamble of the Anti-war Treaty of Non-Aggression and conciliation signed at Rio de Janeiro, October 10, 1933, stating that the parties were entering into the agreement "to the end of condemning wars of aggression and territorial acquisitions . . . ."

(h) Article 1 of the notable Draft Treaty of Disarmament and Security prepared by an American group and carefully considered by the Third Committee on Disarmament of the Assembly of the League of Nations 1924, providing that "The High Contracting Parties solemnly declare that aggressive war is an international crime . . . ."

(i) Senator Borah's Resolution introduced on December 12, 1927.

As evidence of the suggested custom Dr. Glueck refers to a few solemn international pronouncements noticed above. These pronouncements, it may be observed, are mostly in agreements between states.

Agreements between states no doubt may have the significance attached to them by Dr. Glueck. Besides creating rights and duties inter-partes, they may have the significance of being the pronouncement of some growing popular conviction and may thus ultimately contribute to the growth of a rule as an international customary law.

There is, however, some difficulty in determining the value of usages professing to be the groundwork of rules derogating from accepted principles. As has been pointed out by Hall, in some cases their universality may establish their authority; but in others, there may be a question whether the practice which is said to uphold them,
though unanimous as far as it goes, is of value enough to be conclusive; and in others again it has to be decided which of two competing practices, or whether a practice claiming to support an exception, is strong enough to set up a new, or destroy an old authority.

In the present case the alleged customary law, if established, would destroy a well-established fundamental law, namely, the sovereign right of each national state. Before the alleged custom was established this right was recognized as a fundamental one in the international system and the reason why this had to be recognized as an essential one still exists.

"The interests protected by international law are not those which are of major weight in the life of states. It is sufficient to think of the great political and economic rivalries to which no juridical formula applies, in order to realize the truth of this statement. International law develops its true function in a sphere considerably circumscribed and modest, not in that in which there move the great conflicts of interests which induce states to stake their very existence in order to make them prevail."

This is what Anzilotti says about the sphere of international law as it now stands. It may not be an accurate statement from the point of view of the actual content and scope of international law insofar as it wants to say that international law is concerned only with minor issues between states. The major questions of the existence of states and their rights as members of the international community certainly form the subject-matter of that law. But even now questions of very great weight in the life of states are left outside the system and no state would agree to make them justiciable. It is an undeniable fact that such major questions of international relations have been regarded as pertaining to the domain of politics and not of law. No customary law can develop in respect of them until they are brought within the domain of law. So long as states persist in retaining their own right of judgment as to whether or not a certain requirement is necessitated by their self-defense, the matter remains outside the domain of law.

I have already quoted from the views expressed by Professor Quincy Wright in 1925 to show that in his view no war was crime up to that time.

In December 1927, Senator Borah in his Resolution before the United States Senate stated that until then "War between nations has always been and still is lawful institution, so that any nation may, with or without cause, declare war against any other nations and be strictly within its legal rights." Dr. Glueck refers to this resolution but omits to notice this statement of the then existing law.

These statements, in my opinion, correctly give the law then existing. The question, therefore, is when did the alleged customary
law develop? It did not certainly develop during the few months preceding the date of the Pact of Paris. In my opinion it never developed even after that date. Customary law does not develop only by pronouncements. Repeated pronouncements at best developed the custom or usage of making such pronouncements.

Before we can accept pronouncements referred to by Dr. Glueck as evidence of proposed customary rule we must remember that these pronouncements relate to the very foundation of the present international system which keeps such issues outside the domain of law.

National sovereignty is, even now, the very basis of the so-called international community. States are not only parties but also judges and executors in their own cases in relation to certain matters. The dangers of a too rigid application of the doctrine of national sovereignty and of the principles of "self-determination" are not even now fully appraised. It is still considered better to run the risk of sacrificing the directing influence of any central authority, than to allow its operations to be extended into the sphere of the internal activity of states.

The division of mankind into national states dates from the time when the idea of the World Empire had disappeared, and all the states confronted one another independently, and without any supreme authority.

The division was indispensable: Its justification had been that the members of the different states could develop their qualities and talents without being hindered by the contradictory views and endeavours of others who might be dominated by an entirely different view of life. Such a national formation is of special value, because it is the only way in which a uniformly gifted national group can develop its own life, its own talents and abilities to the utmost. It is the vocation of a national society to thoroughly develop every capability inherent in any people and its justification is its affording an opportunity for the profitable employment of everyone's activity everywhere.

A national society, however, from the very circumstances of its origin and development, is aware of the bearing of the interests of its own members upon the universal objects of general humanity and consequently is bound to regard other national societies not only as entitled to rights equal with its own, but as supplementing itself. National states thus cannot seek any absolute seclusion, nor strive after any absolute self-sufficiency: and in this sense the period of national states is also marked by the period of international society. But this international society is anything but a society under the reign of law.

No doubt the national state cannot be considered so definite and perfect a polity amongst the societies as to form the utmost boundary of their development. Every class of the population has its own one-sidedness; it will remain stationary on a certain plane of education and
knowledge unless it receives impulses from without and feels the influence of foreign images and ideas; so that a constant exchange between its own development and between the assimilation of, and adaptation to, external ideas takes place. In this way nations have developed and are developing in state communities.

The federation of mankind, based upon the external balance of national states, may be the ideal of the future and perhaps is already pictured in the minds of our generation. But until that ideal is realized, the fundamental basis of international community, if it can be called a community at all, is and will continue to be the national sovereignty.

*International organization* has not, as yet, made any provision for full realization of this very essence of national sovereignty. Its realization is left to the power of the national state. There has not, as yet, been any organization for real international peace. Peace, hitherto, has been conceived of only as negation of war and nothing more. In such circumstances, so long as the application of "power" remains the fundamental principle, pronouncements, like those referred to by Dr. Glueck would, in my opinion, fail to create any customary law.

But what are really these pronouncements? And before we attach any value to them we must not ignore the fact that whenever called upon to declare a war to be a crime states did not adequately respond.

The states have always been careful in retaining their right to decide what they would consider to be war in defense. None as yet is prepared to make the question whether a particular war is or is not "in defense" justiciable. So long as a state retains its own decision as final in this respect, no war is made criminal.

After a careful consideration of all these facts and circumstances I am of the opinion that *no international customary law could develop* through the pronouncements referred to by Dr. Glueck.

The pronouncements at most only amounted to expressions of the conviction of persons making them. But these are not yet attended by any act on the part of any of the states.

Custom as a source of law presupposes two essential elements:

1. The juristic sentiments of a people.
2. Certain external, constant and general acts by which it is shown.

It is indicated by identical conduct under similar external circumstances. *The conduct of national states* during the period in question rather goes the other way.

It may be that Dr. Glueck is thinking of "customary law" in a specific sense. It cannot be denied that in one sense customary law, statute and juristic law are all shoots from the same slip, namely, popular consciousness. In this sense the center of gravity of the development of all law—not only of customary law—can be placed
into the legal consciousness, "the natural harmony of the conviction of a people, which is a popular universal conviction". For this purpose its emergence in usage is not essential to the origin of law. In this sense there need be no other prerequisites to the origination of customary law than a common popular conviction.

We are, however, not much concerned with customary law in this specific sense. No doubt it has its own scientific value. But we are concerned with customary law in a sense in which it becomes applicable by a judge. There are prerequisites to its applicability by the judge. Puchta was not concerned with such prerequisites in his scientific evaluation of customary law, but he recognized them: "But if we take prerequisites to mean something else, e.g., if we take it in the sense of a prerequisite to the application by the judge, to his acceptance of customary law, then that whereof we are speaking no longer is a prerequisite to customary law itself. In this case the question to be answered is: What must the judge take into account when a party litigant appeals to customary law or when for any other reason he is called upon to consult this source of law? What are the presuppositions under which customary law can actually be assumed to exist?"

There is thus a sharp distinction between the question as to the origin of customary law in the mere popular conviction and as to its applicability by a court. There may be customary law in the sense that it exists in the conviction of the people; yet it may not be law applicable by a court because the prerequisites to its applicability by the court are lacking. Herein comes the usage which is wanting in the present case. The people should not merely be conscious of their law but they must live their law,—they must act and conduct themselves according to it.

This living according to law is required not as a mere form of manifestation but also as a means of cognition of customary law. When the conduct of the nations is taken into account the law will perhaps be found to be that only a lost war is a crime.

I may mention here in passing that within four years of the conclusion of the Pact there occurred three instances of recourse to force on a large scale on the part of the signatories of the Pact. In 1929 Soviet Russia conducted hostilities against China in connection with the dispute concerning the Chinese Eastern Railway. The occupation of Manchuria by Japan in 1931 and 1932 followed. Then there was the invasion of the Colombian Province of Leticia by Peru in 1932. Thereafter, we had the invasion of Abyssinia by Italy in 1935 and of Finland by Russia in 1939. Of course there was also the invasion of China by Japan in 1937. Dr. Lauterbach points out that it is arguable that a war or a succession of wars between a considerable number of important signatories would remove altogether (i.e. also for other signatories) the basis of a Pact in which a substantial degree
of universality may appropriately be regarded as being of the essence. But we may leave this question alone for the present.

In my opinion, no category of war became illegal or criminal either by the Pact of Paris or as a result of the same. Nor did any customary law develop making any war criminal.

Mr. Conyngham Carr for the prosecution at Tokyo appealed to what he characterized as the very foundation of international law and invited us to apply what he called well-established principles to new circumstances. He said:

"International law like the legal system of........all of the English speaking countries ... consists of a common law and a more specific law, which in the case of individual countries is created by statute, and in the case of international law is created by Treaties. But the foundation of international law, just like the foundation of legal system.........of English speaking countries is, common law. That is to say, it is the gradual creation of custom and of the application by judicial minds of old established principles to new circumstances. It is unquestionably within the power, and, ........the duty of this Tribunal to apply well-established principles to new circumstances, if they are found to have arisen, without regard to the question whether precise precedents for such application already exist in every case."

I would presently consider how far this so-called foundation of international law will carry us towards declaring any category of war as having been a crime in international life. The context in which Mr. Carr made this appeal only goes to indicate that the well-established principle referred to by him relates to a "nomenclature."

Mr. Carr was there dealing with the defense contention as to the import of the expression "war criminal" as used in the Potsdam Declaration. He referred to Article 227 of the Treaty of Versailles as "laying down the principle and applying what was already a well-established principle to new circumstances."

The Article in question of the Treaty of Versailles is the one wherein "the Allied and Associated Powers" proposed "publicly to arraign" the German emperor "for a supreme offence against international morality and the sanctity of treaties." The only principle or principles that can possibly be gathered from this Article seem to be:

1. That the Allied and Associated Powers may place on trial the head or heads of the defeated state.
2. That such powers may constitute a Tribunal for such trial.
3. That such a Tribunal is to be guided by the highest motives of international policy, with a view to vindicating the solemn obligation of international undertakings and the validity of international morality.
As I read the Article it contains no principle making the war a crime or obliging the tribunal set up by the victors to declare such a war illegal or criminal.

Analogous to Mr. Carr's appeal seems to be the appeal of Lord Wright to the progressive character of international law and to the creative power of an international tribunal. Similarly there have been appeals to the developed character of international community, to the laws of nature as also to a widening sense of humanity.

Lord Wright says:

"It may be said that for ages it has been assumed, or at least taken for granted in practice, among the nations that any state has the right to bring aggressive war as much to wage war in self-defense and that the thesis here maintained is revolutionary. In fact, the evil or crime of war has been a topic of moralists for centuries. It has been said that 'one murder makes a felon, millions a hero.' The worship of the great men, or perhaps the idea of sovereignty, paralyses the moral sense of humanity. But international law is progressive. The period of growth generally coincides with the period of world upheavals. The pressure of necessity stimulates the impact of natural law and of moral ideas and converts them into rules of law deliberately and overtly recognized by the consensus of civilized mankind. The experience of two great world wars within a quarter of a century cannot fail to have deep repercussions on the senses of the peoples and their demand for an International Law which reflects international justice. I am convinced that International Law has progressed, as it is bound to progress if it is to be a living and operative force in these days of widening sense of humanity. An International Court, faced with the duty of deciding if the bringing of aggressive war is an international crime, is, I think, entitled and bound to hold that it is, for the reasons which I have briefly and imperfectly here sought to advance. I may add to what I have said, that the comparatively minor but still serious outrages against the Pact, such as the rape of Manchuria in 1931 and the conquest of Abyssinia in 1935 were strongly reprobed as violations of the Pact of Paris: indeed though the Pact did not provide for sanctions, the latter outrage provoked certain sanctions on the part of some nations. In addition there is a strong weight of legal opinion in favour of the view here suggested."

He then proceeds: "An International Court, faced with the duty of deciding the question, would do so somewhat on the same principles as a municipal Court would decide the question whether a disputed custom has been proved to exist. It would do so on the materials before it. These materials are of course different in character where the dispute is whether the existence of a rule of International Law has been established as part of the customary law between the nations. I have indicated my view as to what such materials are.
A Court would also seek to harmonize the customary rule with the principles of logic, of morality and of the conscience of civilized mankind. The Law merchant (to compare small things with great) existed as Law enforceable by its proper courts before it was accepted as part of the national legal system. The Court would bear in mind that time and experience bring enlightenment and that obsolete ideas and prejudices become outworn."

The reference to the progressive character of international law is really an appeal to the ultimate vital forces that bring about the development of legal institutions.

The observations made in this connection are very valuable contributions to a theory of the sources of law and certainly are of permanent value as such. They expose the real workshop of the law.

No doubt it is the function of a theory of the sources of law to discover the vital forces that bring about the development of legal institutions. But these are yet to pass through some adequate social process in order to develop into law. I do not consider trials of the defeated nationals to be the just and adequate social process for this purpose. At least in international life, in developing legal relations, the feeling of helplessness should not be allowed to serve as the basis. A mere Might's grip cannot long elude recognition as such and pass for Law's reach.

Like Lord Wright, Prof. Wright, Mr. Trainin and Dr. Glueck also, appeal to this progressive character of the law and to a widening sense of humanity.

According to Dr. Glueck the time has arrived in the life of civilized nations when an international custom should be taken to have developed to hold aggressive war to be an international crime. He insists that an issue of this kind ought not to be disposed of on the basis of blind legalistic conceptualism; it should be dealt with realistically in the light of the practical as well as logical result to which one or the other solution will lead.

Mr. Trainin relies principally on the Moscow Proclamation of October 30, 1943 and emphasizes that this marks a new era of development of social life in international community. According to him to facilitate this process of development and to strengthen these new ideas, juridical thought is obliged to forge the right form for these new relations, to work out a new system of international law, and, as an indissoluble part of this system, to direct the conscience of nations to the problem of criminal responsibility for attempts on the foundations of international relations.

In my view, international society has not yet reached the stage where the consequences contemplated by these learned authors would follow.

Even after the formation of the League of Nations we had only a group of coordinated states with their sovereignty intact. The best
account of the developments of international society is given by Professor Zimmern in his book entitled "The League of Nations and the Rule of Law." Dr. Schwarzenberger also takes the same view. "People learned from the war only to substitute the notion of organic association between independent, self-governing and co-operatively minded peoples." Democracy and centralization do not, it is said, belong to the same order of ideas. They are, in essence, as incompatible as freedom and slavery. The League of Nations thus "while morally a great effort of faith was administratively a great effort of decentralization." It was simply a system of international co-operation.

"The high contracting parties in order to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war, by the prescription of open, just and honourable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another, agreed to this covenant of the League of Nations."

No international community of any higher order came into being. The League showed particularly scrupulous regard for national sovereignty and laid special emphasis on such sovereignty by adopting the principle of unanimous vote. National sovereignty and national interest continued to play the fundamental part in this organization.

There has no doubt been, since the outbreak of the World War, a feeling on the part of many writers that there should be some restatement of the fundamental principles of international law in terms of international life.

At the same time it must be said that this is yet to happen. The international organization as it now stands still does not indicate any sign of abrogation of the doctrine of national sovereignty in the near future.

As to the "widening sense of humanity" prevailing in international life, all that I can say is that at least before the Second World War the powerful nations did not show any such sign. I would only refer to what happened at the meeting of the Committee drafting resolutions for the establishment of the League of Nations when Baron Makino of Japan moved a resolution for the declaration of the equality of nations as a basic principle of the League. Lord Robert Cecil of Great Britain declared this to be a matter of highly controversial character and opposed the resolution on the ground that it "raised extremely serious problems within the British Empire." The resolution was declared lost: President Wilson ruled that in view of the serious objections on the part of some it was not carried.
Coupled with this, if we take the fact that there still continued domination of one nation by another, that servitude of nations still prevailed unreveiled and that domination of one nation by another continued to be regarded by the so-called international community only as a domestic question for the master nation, I cannot see how such a community can even pretend that its basis is humanity. In this connection I cannot refrain from referring to what Mr. Justice Jackson asserted in his summing up of the case at Nuremberg. According to him, a preparation by a nation to dominate another nation is the worst of crimes. This may be so now. But I do not see how it could be said that such an attempt or preparation was a crime before the Second World War, when there was hardly a big power which was free from that taint. Instead of saying that all the powerful nations were living a criminal life, I would prefer to hold that international society did not develop before the Second World War so as to make this taint a crime.

The atom bomb during the Second World War, it is said, has destroyed selfish nationalism and the last defense of isolationism more completely than it razed an enemy city. It is believed that it has ended one age and begun another—the new and unpredictable age of soul.

"Such blasts as levelled Hiroshima and Nagasaki on August 6 and 9, 1945, never occurred on earth before—nor in the sun or stars, which burn from sources that release their energy much more slowly than does Uranium." So said John J. O'Neill, the Science Editor, New York Herald Tribune. "In a fraction of a second the atomic bomb that dropped on Hiroshima altered our traditional economic, political and military values. It caused a revolution in the technique of war that forces immediate reconsideration of our entire national defense problem."

Perhaps these blasts have brought home to mankind "that every human being has a stake in the conduct not only of national affairs but also of world affairs." Perhaps these explosives have awakened within us the sense of unity of mankind,—the feeling that:

"We are a unity of humanity, linked to all our fellow human beings, irrespective of race, creed or color, by bonds which have been fused unbreakably in the diabolical heat of those explosions."

All this might have been the result of these blasts. But certainly these feelings were non-existent at the time when the bombs were dropped. I, for myself, do not perceive any such feeling of broad humanity in the justifying words of those who were responsible for their use. As a matter of fact, I do not perceive much difference between what the German Emperor is alleged to have announced during the First World War in justification of the atrocious methods directed by him in the conduct of that war and what is being pro-
claimed after the Second World War in justification of these inhuman blasts.

I am not sure if the atom bombs have really succeeded in blowing away all the pre-war humbugs; we may be just dreaming. It is yet to be seen how far we have been alive, to the fact that the world’s present problems are not merely the more complex reproductions of those which have plagued us since 1914; that the new problems are not merely old national problems with world implications, but are real world problems and problems of humanity.

There is no doubt that the international society, if any, has been taken ill. Perhaps the situation is that the nations of the international group are living in an age of transition to a planned society.

But that is a matter for the future and perhaps is only a dream. The dream of all students of world politics is to reduce the complex interplay of forces to a few elementary constants and variables by the use of which all the past is made plain and even the future stands revealed in lucid simplicity. Let us hope it is capable of realization in actual life. I must, however, leave this future to itself with the remark that this future prospect will not in the least be affected even if the existing law be not strained so as to fix any criminal responsibility for state acts on the individual authors thereof in order to make the criminality of states more effective. The future may certainly rely on adequate future provisions in this respect made by the organizers of such future.

During and after the present war, many eminent authors have come forward with contributions containing illuminating views on the subject of “War Criminals—their Prosecution and Punishment”. None of these books and none of the prosecutions professed to be prompted by any desire for retaliation. Most of these contributors claim to have undertaken the task because “miscarriage of justice” after World War I shocked them very much, particularly because such failure was ascribable to the instrumentality of jurists who deserved the epithets of being “stiff-nacked conceptualists,” “strict constructionists,” and men “afflicted with an ideological rigor mortis”. These Jurists, it is said, by giving the appearance of legality and logic to arguments based on some unrealistic, outworn and basically irrelevant technicality caused the greatest confusion in the minds of ordinary laymen with regard to the problems of war criminals. These, it is claimed, were the chief present-day obstacles to the just solution of the problem and these authors have done their best to remove such obstacles and to supply “not a mere text book on some remote technically intricate phrase of a branch of law”, but “a weapon with which to enforce respect for the tenets of international law with its underlying principles of international justice”.

Some of these authors have correctly said that law is not merely a conglomeration of human wisdom in the form of rules to be applied
wherever and whenever such rules, like pieces in a jigsaw puzzle, may fit in. "Law is instead a dynamic human force regulating behaviour between man and man and making the existence and continuity of human society possible." Its chief characteristic is that it stems from man's reasonableness and from his innate sense of justice.

"Stability and consistency are essential attributes of rules of law, no doubt," says such an author: "Precedent is the *sine qua non* of an orderly legal system. But one must be certain that the precedent has undoubted relevancy and complete applicability to the new situation or to the given set of facts. And if applicable precedent is not available, a new precedent must be formed, for at all times law must seek to found itself on common sense and must strive for human justice."

With all respect to these learned authors, there is a very big assumption in all these observations when made in connection with international law. In our quest for international law are we dealing with an entity like national societies completely brought under the rule of law? Or, are we dealing with an inchoate society in a stage of its formation? It is a society where only that rule has come to occupy the position of law which has been unanimously agreed upon by the parties concerned. Any new precedent made will not be the law safeguarding the peace-loving law-abiding members of the Family of Nations, but will only be a precedent for the future victor against the future vanquished. Any misapplication of a doubtful legal doctrine here will threaten the very formation of the much coveted Society of Nations, will shake the very foundation of any future international society.

Law is a dynamic human force only when it is the law of an organized society; when it is to be the sum of the conditions of social co-existence with regard to the activity of the community and of the individual. Law stems from a man's reasonableness and from his innate sense of justice. But what is that law? And is international law of that character?

A national society, as I have pointed out above, from the very circumstances of its origin and development, is aware of the bearing of the interests of its own members upon the universal objects of general humanity, and is thus bound to regard other national societies not only as entitled to rights equal with its own, but as supplementing itself. A national state cannot therefore seek any absolute seclusion, or strive after an absolute self-sufficiency. *In this sense*, from the very moment of the origin of national states, international society also came into existence. This also accounts for the circumstance that the period of national states is also marked by the development of the system of international law.

Yet it is difficult to say that this international society is a society *under the reign of law*. I shall quote extensively from Professor
Zimmern, where he very ably and truly characterizes international society.

"For anyone", says Professor Zimmern, "trained in the British tradition, the term International Law embodies a conception which is, at its best, confusing and at its worst exasperating. It is never law as we understand it, and it often, as it seems to us, comes dangerously near to being an imposter, a simulacrum of law, an attorney's mantle artfully displayed on the shoulders of arbitrary power."

"A satisfactory political system, in British eyes, is the offspring of a harmonious marriage between law and force. . . . It is the essence of what we call British Constitutionalism. By it is ensured the working of two processes, separable in theory for the analysis of the political scientists, but inextricably blended in practice, the observance of the law, or, to use the language of post-war controversy, 'sanctions' and 'peaceful change'. Thus the judge, the legislator and the executive throughout its range, from the Prime Minister to the policeman, form interdependent parts of a single system."

"This constitutional system does not function because it is wound up from outside or impelled from above. Its driving force is supplied from within. It derives its validity from consent; and its energy is constantly renewed and refreshed by contact with public opinion. It is the popular will which the legislature is seeking to embody in appropriate statutes. It is the popular will which the judge is engaged in interpreting and the policeman in enforcing. All three are performing what is felt to be a social function. They are adapting the organization of the State, which is the most continuous and potent agency of social service in the community to the permanent and changing needs of society."

"Seen as a part of this larger whole, law may be defined as social habit formulated into regulations. When these regulations, if any part of them are felt to be anti-social, no longer in accordance with the general sentiment of the day, or even repugnant to it, they are changed. Thus the notion of law and the notion of change, so far from being incompatible, are, in fact, complementary. The law is not a solid construction of dead material, a fixed and permanent monument: it is an integral part of a living and developing society created and transmitted by men. . . ."

"Turn now to international law, what do we find? A situation almost exactly the opposite of what has just been described."

"To begin with, where are we to look for the rules and obligations of international law? We shall not find them embodied in the habits or the will, still less in the affections of a society."

"International law, in fact, is a law without a constitution. And since it is not grounded in a constitution, it lacks the possibility of natural growth. Unconnected with a society, it cannot adjust
itself to its needs. It cannot gather itself together by imperceptible stages into a system. . . .

"The reason for this is very simple. The rules of international law, as they existed previous to 1914, were, with a few exceptions, not the outcome of the experience of the working of a world society. They were simply the result of the contacts between a number of self-regarding political units—stars whose courses, as they moved majestically through a neutral firmament, crossed one another from time to time. The multiplication of these external impacts or collisions rendered it mutually convenient to bring their occasions under review and to frame rules for dealing with them."

In my view this is where the international law stands even now and will stand unless and until the political units agree to yield their sovereignty and form themselves into a society. As I have shown elsewhere, the post-war United Nations Organization is certainly a material step towards the formation of such a society. It is not for me to preach the need for a wider social consciousness or to propound practical solutions for the problems involved in the material interdependence of the modern world. Yet the international relation has reached a stage where even an insignificant individual can not remain silent.

I believe with Professor Lauterpacht that it is high time that international law should recognize the individual as its ultimate subject and maintenance of his rights as its ultimate end. "The individual human being—his welfare and the freedom of his personality in its manifold manifestations—is the ultimate subject of all law. A law of nations effectively realizing that purpose would acquire a substance and a dignity which would go far toward assuring its ascendency as an instrument of peace and progress." This certainly is to be done by a method very different from that of trial of war criminals from amongst the vanquished nations. An international organization of the kind recommended by Dr. Lauterpacht would not permit a dominating foreign power to claim its dealings with the dominated nation as its "domestic affairs" outside the jurisdiction of the organization.

Inducements to the exercise of creative judicial discretion in the field before us do not inspire much enthusiasm in me. The decision would not create anything new: It would only create precedent for a victor in war to bring the vanquished before a tribunal. It can never create precedent for the sovereign states in general unless such states voluntarily accept such limitations. Certainly this is open to them to do by treaties or conventions.

We are told that if the persons in the position of the accused before the Nuremberg and Tokyo tribunals are not made responsible for acts such as were alleged against them, then the Pact of Paris brings in nothing useful. I am not sure whether that is the position.
Law, no doubt, ends by being what it is made to be by the body which applies it to concrete situations: Yet the body called upon to apply it should not force it to be what it is not, even at the risk of missing the most attractive opportunity for contributing towards the development of a temptingly significant concept of international law,—I mean "the legal concept of the crime against peace".

I doubt not that the need of the world is the formation of an international community under the reign of law, or correctly, the formation of a world community under the reign of law, in which nationality or race should find no place. In an organization like that it would certainly be most conducive to the benefit of the community as a whole and to the necessity of stable and effective legal relations between its members to chastize activities like those alleged in the present case. *But, until then it serves no useful purpose. When the fear of punishment attendant upon a particular conduct does not depend upon law but only upon the fact of defeat in war, I do not think that law adds anything to the risk of defeat already there in any preparation for war.* There is already a greater fear—namely, the power, the might of the victor. If law is not to function unless the violating party succeeds in violating the law effectively and then is overwhelmed by power or might, I do not find any necessity for its existence. If it is really law which is being applied I would like to see even the members of the victor nations being brought before such tribunals. I refuse to believe that had that been the law, none of the victors in any way violated the same and that the world is so depraved that no one even thinks of bringing such persons to book for their acts.

I cannot leave the subject without referring to another line of reasoning in which reference is made to the various doctrines of natural law and a conclusion is drawn therefrom that "the dictates of the public, common, or universal conscience profess the natural law which is promulgated by man's conscience and thus universally binds all civilized nations even in the absence of the statutory enactment."
A wealth of authority, both ancient and modern, is requisitioned to establish that public international law is derived from natural law. The authorities cited for this purpose range from Aristotle to Lord Wright. That this natural law is not a mere matter of history but is an essential part of the living international law is sought to be established by reference to the preamble of the Hague Convention of 1907 (Convention No. 4) as also to the text of the American Declaration of Independence.

The Hague Convention in its preamble, it is pointed out, refers to the laws of humanity and the dictates of the public conscience. The American Declaration of Independence refers to "the laws of nature and nature's God". From these and various other authorities it is concluded "that public international law" is based on natural law: It is said "the principles of international
law are based on the very nature of man and are made known to man by his reason, hence we call them the dictates of right reason. They are, therefore, not subject to the arbitrary will of any man or nation. Consequently, the world commonwealth of nations forms one natural organic, moral, juridical and political unity." It is further said, "From what has been said so far it follows that the world commonwealth must needs enjoy an inherent authority to enact positive law for the promotion of the common good. For, on the one hand, the dictates of right reason are only general provisions that must be applied and determined according to the particular circumstances of any given case. Thus, the positive legal enactments or agreements which govern international relations represent the political interpretations and applications of the general principles of the natural and moral law. . . . . . On the other hand, unified cooperation of all can only be obtained by issuing binding rules."

It is not for me to question the relevancy of this appeal to natural law. There may be deep-seated reason that in all ages and countries the idea of natural law, that is one founded on the very reality of things and not on the simple "placet" of the legislature has been cultivated. There have no doubt been fundamental divergencies in the doctrine of natural law. The relations between the dictates of natural justice and juridical norms have also been variously conceived, depending upon diverse speculative tendencies and historical phases. Often a wide and impassable separation arose between the two systems of determination, while at other times the difference seemed one of genus and species, or two views of the same object. These divergencies however should not prevent the recognition of the deep-seated unity of the conception containing all the characteristics of a psychological necessity. What is a source of difficulty for science does not cease to exist in reality; and it would be a vain illusion to ignore a need because we cannot satisfy it.

The war against natural law, which many have declared in our day, is a reaction against the errors and omissions of the philosophical systems of the past. Indeed "for many the term 'natural law' still has about it a rich, deep odor of the witches' caldron, and the mere mention of it suffices to unloose a torrent of emotions and fears." It would certainly be unjust and irrational, if, under the pretext of correcting errors and omissions, this hostility is carried to the destruction of the very object of these systems.

We must not, however, forget that this doctrine of natural law is only to introduce a fundamental principle of law and right. The fundamental principle can weigh the justice of the intrinsic content of juridical propositions; but cannot affect their formal quality of juridicity. Perhaps its claim that the realization of its doctrines should constitute the aim of legislation is perfectly legitimate. But I doubt if its claim that its doctrines should be accepted as positive law is at all
sustainable. At any rate in international law of the present time such ideal would not carry us far. I would only like to refer to Hall’s International Law, Eighth Edition, Introductory Chapter where the learned author discusses what international law consists in and gives his views as to its nature and origin. The learned author gives in the footnote the fundamental ideas of the writers who have exercised most influence upon other writers or upon general opinion and assigns two weighty reasons for discarding this theory of natural law as a guide in determining what the law is at present. His conclusion is given in the following terms:

"States are independent beings subject to no control, and owning no superior; no person or body of persons exists to whom authority has been delegated to declare law for the common good; a state is only bound by rules to which it feels itself obliged in conscience after reasonable examination to submit; if therefore states are to be subject to anything which can either strictly or analogically be called law, they must accept a body of rules by general consent as an arbitrary code irrespective of its origin or else they must be agreed as to the general principles by which they are to be governed . . . Even if a theory of absolute right were universally accepted, the measure of the obligations of a state would not be found in its dictates but in the rules which are received as positive law by the body of states . . . However useful . . . an absolute standard of right might be as presenting an ideal towards which law might be made to approach continuously nearer . . . it can only be source of confusion and mischief when it is regarded as a test of the legal value of existing practices."

I respectfully agree with this view and therefore do not consider that the various theories of natural law should detain me any longer. I should only add that the international community has not yet developed into "the world commonwealth" and perhaps as yet no particular group of nations can claim to be the custodian of "the common good."

International life is not yet organized into a community under a rule of law. A community life has not even been agreed upon as yet. Such an agreement is essential before the so-called natural law may be allowed to function in the manner suggested. It is only when such group living is agreed upon, the conditions required for successful group life may supply some external criteria that would furnish some standard against which the rightness or otherwise of any particular decision can be measured.

In my view no category of war became a crime in international life up to the date of commencement of the world war under our consideration. Any distinction between just and unjust war remained only in the theory of the international legal philosophers. The Pact of Paris did not affect the character of war and failed to introduce any criminal responsibility in respect of any category of war.
in international life. No war became an illegal thing in the eye of international law as a result of this pact. War itself, as before remained outside the province of law, its conduct only having been brought under legal regulations. No customary law developed so as to make any war a crime. International community itself was not based on a footing which would justify the introduction of the conception of criminality in international life.

I have not said anything about the alleged object of the Japanese plan or conspiracy. I believe no one will seriously contend that domination of one nation by another became a crime in international life. Apart from the question of legality or otherwise of the means designed to achieve this object it must be held that the object itself was not yet illegal or criminal in international life. In any other view, the entire international community would be a community of criminal races. At least many of the powerful nations are living this sort of life and if these acts are criminal then the entire international community is living that criminal life, some actually committing the crime and others becoming accessories after the fact in these crimes. No nation has as yet treated such acts as crimes and all the powerful nations continue close relations with the nations that had committed such acts.

Questions of law are not decided in an intellectual quarantine area in which legal doctrine and the local history of the dispute alone are retained and all else is forcibly excluded. We cannot afford to be ignorant of the world in which disputes arise.

We may next examine whether there has been any development of international law in this respect since the Second World War.

Apart from the suggested progress of international law by its own inherent nature Two possible sources of development of the law during this period seem to have been suggested: Mr. Trainin suggested the Moscow Declaration of 1943 and Dr. Glueck suggested the will of the victor and its product, the Charter. I have already expressed my views why I consider that if there was any such attempt on the part of the victor nations it would fail to produce the desired effect. The same principle would apply to the suggested consequences of the Moscow Declaration. But has this declaration really started any new era in international life and has, as a result, any new rule of law come into being?

Mr. Trainin's hopes are based on the Moscow Declaration of 1943 whereby, according to him, the nations have now agreed that they "respect the right of all nations to choose their own form of government." His hopes, however, are not yet realized in actual life and certainly till now the tendency reflecting the policy of the powerful nations does not even offer any scope for such a hope.

The world is still engaged in the fateful game of power politics with all the ruinous addictions of a gambler.
LECTURE XV

CONSPIRACY, IF CRIME IN INTERNATIONAL LAW

In the Nuremberg and Tokyo Charters conspiracy was allotted a very prominent place and was by itself introduced as a crime.

Lord Wright¹ in his article on "War Crimes under International Law" seems to have hinted at conspiracy as constituting a crime in international life. He said:

"War crimes are generally of a mass or multiple character. At one end are the devisers, or organizers, or originators who would, in many cases constitute a criminal conspiracy; at the bottom end are the actual perpetrators . . . . . ."

What Lord Wright says here does not necessarily support the view that conspiracy by itself, apart from the actual perpetration of the act, constitutes a crime in international system. All that he says is that when there has been a war there may be these two categories of criminals in relation to it.

The prosecution at Tokyo, however, in its indictment, charged the Japanese leaders with the commission of a crime of conspiracy apart from the actual perpetration of the conspired act, asserting that the said crime was committed as soon as the conspiracy was completed.

According to the prosecution, the Japanese war leaders became guilty of this crime even prior to the commission of the act itself, as soon as they entered into an understanding either among themselves, or with the leaders of Italy and Germany, to commit any of the acts alleged in the indictment.

In the facts placed before the tribunal, however, excepting in the case of Soviet Russia, there was no other instance where the planned war was not actually waged.

In the case of the Soviet Russia, though the indictment brought in the two border incidents as instances of actual waging of war, the case substantially lay only in bare conspiracy.

In conferring jurisdiction on the Tribunal, the Charter in Article 5 says:

"5. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

"(a) Crimes against peace: namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or
participation in a common plan or conspiracy for the accomplishment of any of the foregoing . . . . .

* * * * *

"(c) Crimes against humanity; . . . . . Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan."

Count 1 of the indictment stands thus:

All the accused, together with other persons, . . . . participated as leaders, organizers, instigators or accomplices in the formulation or execution of a common plan or conspiracy, and are responsible for all acts performed by any person in execution of such plan.

The object of such plan or conspiracy was that Japan should secure . . . domination of East Asia . . . and for that purpose they conspired that Japan should alone or in combination with other countries . . . wage declared or undeclared war or wars of aggression, and war or wars in violation of international law . . . against any country or countries which might oppose their purpose.

Count 1 contains the charge of over-all conspiracy. It is apparent that it is framed in the very language of Article 5(c) of the Charter.

Count 2 charges similar planning against Manchuria; Count 3, against rest of China; Count 4, against the United States, the British Commonwealth of Nations, etc., including the U. S. S. R. and Count 5, against the whole world. Counts 6 to 17 speak of planning and preparing wars of aggression against different countries.

A careful analysis of the charge would show that the requirements of the offence contemplated therein are the following:

1. The persons charged must be leaders, organizers, instigators or accomplices in the formulation or execution of the plan;
2. The object of the plan was that Japan should secure the military, naval, political and economic domination of the countries named;
3. The persons who participated as leaders, etc., in the formulation or execution of the plan must also be shown to have conspired that, for the purpose of the above domination, Japan should wage declared or undeclared war;
4. That such war need not be against the country sought to be dominated but against any country which might oppose their purpose.

The fourth item in the requirements seems to be a little too widely expressed in the count. As the war to be waged must be war or wars of aggression and war or wars in violation of international law,
treaties, agreements and assurances, it may be that the idea was that "any country" was intended to mean any country standing in such a relation to the question of particular domination that war against it would be a war of the kind named above. Thus, for example, by reason of the Treaty of Washington, the Signatory Powers were to maintain the integrity of China and respect her sovereignty. If Japan wanted any domination of China which would violate her treaty obligation, any of the Signatory Powers, might come and oppose such domination, though China herself might not oppose. If Japan planned to wage war against such opposing power, the action would come under Count 1 though China might not have opposed it or might even have supported it.

The Count simply speaks of the leaders conspiring for the purpose of domination that Japan should wage war against any country. It is comprehensive enough to cover a case where no war, as a matter of fact, is waged. The substantive portion of the charge seeks to make the persons charged responsible for all acts performed by any person in execution of such plan. Acts performed in execution would not necessarily imply that the war is to be actually waged. The execution of the plan may take place in part even before the actual waging of the war.

In the Nuremberg Charter Article 6 contained the corresponding provisions.

Count one of the Nuremberg indictment related to "the common plan or conspiracy" and charged that "all the defendants . . . . participated as leaders . . . . in the formulation or execution of a common plan or conspiracy to commit . . . . crimes against peace, war crimes, and crimes against humanity, as defined in the Charter . . . ."

The Nuremberg Tribunal held that the Charter did "not define as a separate crime any conspiracy except the one to commit acts of aggressive war." Referring to the clause "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan," that Tribunal opined that "these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in the common plan." The Tribunal, therefore, disregarded "the charges in Count one that the defendants conspired to commit war crimes and crimes against humanity" and confined its consideration only to "the common plan to prepare, initiate and wage aggressive war."

The prosecution in the case before the Tokyo Tribunal accepted this construction of the Nuremberg Tribunal as applicable to Article 5 of the Tokyo Charter. Consequently the charge of conspiracy there became limited to "the common plan to prepare, initiate and wage aggressive war."
In view of the charges relating to the U.S.S.R., the question whether conspiracy by itself is a crime in international law was not a mere academic one.

The prosecution at Tokyo contended:

1. That bare conspiracy was listed as a crime in the Charter;
2. That the Charter in this respect was, and purported to be, merely declaratory of international law as it existed from at least 1928 onwards;
3. That the Tribunal was to examine this proposition and to base its judgment on its own decision in this respect;
4. That the provisions of the Charter, with regard to conspiracy, planning, preparation, accessories and the common responsibility of those engaged in a common plan, represented the general principles of law recognized by all civilized nations:
   (a) The general principles of law recognized by civilized nations being one of the sources of international law, these provisions are themselves part of international law.

In the alternative, the Prosecution urged that:

1. The provisions in the Charter were merely forms of charge and of proof of responsibility:
   (a) As such, these were within the power of the Supreme Commander to lay down.
2. There was important distinction between conspiracy as a separate crime, and conspiracy as the method of proof of a crime alleged to have been committed by several persons jointly:
   (a) The principles are similar, but the application of them is different;
   (b) These principles are applied to a joint crime, even if it is not one, the conspiracy to commit which, is a separate crime.

As I have pointed out already, here are grave questions for our consideration. Keeping in view the character of the present-day international life, the propositions must be very carefully examined.

I would, first of all, take up the question whether it is correct to say that conspiracy has been a crime in international law as it existed from at least 1928 onwards.

One approach to the question may be put thus:

1. One of the sources of international law is "the general principles of law recognized by civilized nations";
2. Conspiracy is recognised by civilized nations as crime in their national systems;
3. Therefore, it must be taken that conspiracy has been a crime in international law.
It is difficult to accept this as the correct approach. Indeed this was the approach of the Prosecution at Tokyo.4

The prosecution named "the general principles of law recognized by civilized nations" as one of the sources of international law, and based its whole argument on this statement. It relied on "the Statute of the Permanent Court of International Justice, 1936", for this purpose and referred to Article 38, paragraph 3, of the Statute in support of the proposition.

Article 38 of that Statute is as follows:

"The Court shall apply—

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

2. International custom, as evidence of a general practice accepted as law;

3. The general principles of law recognized by civilized nations;

4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

"This provision shall not prejudice the power of the Court to decide a case ex acquo et bono, if the parties agree thereto."

The Permanent Court of International Justice was established pursuant to Article 14 of the Covenant of the League of Nations.

Article 14 of the Covenant stood thus:

"The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a permanent court of international justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

It was pointed out by the United States when the Covenant was presented for ratification, that there was in it no provision for a judicial settlement of differences through which a nation might assert its legal rights in lieu of war, and that there was in the Covenant no declaration of the existence of any right which could be successfully vindicated against an aggressor by any other means than war.

The proposal embodied in Article 14 of the Covenant is clearly less committed to the conception of imperative justice than the Hague Conference of 1907. In that conference it was in effect conceded that an international court should have jurisdiction over all justiciable cases, a previous agreement being made as to what disputes should be recognized as having this character. Article 14 on the contrary attempts no discrimination between justiciable and non-justiciable
differences, limiting the jurisdiction of the court to any dispute of an international character which the parties thereto may submit to it.

Leaving aside this Permanent Court of International Justice for a moment, we should remember that international judicial proceedings are always unique in that the parties themselves create the tribunal before which their case is to be tried and select its judges. The nature of the authority of the tribunal and the extent of its jurisdiction are defined and fixed by the parties. It is the consent of the parties that gives life to the tribunal. In the arbitral agreement creating the tribunal, the question to be decided is stated, the jurisdiction of the tribunal is defined, and the extent of its power in matters of procedure is delimited.

The Statute of Permanent Court of International Justice is really in the nature of such arbitral agreement.

Article 38 of the Statute says that the court shall apply "the general principles of law recognized by civilized nations". In my opinion it simply amounts to a common consent that such general principles shall be applicable for the purposes for which the court is being established. From this common consent we cannot arrive at the conclusion that "the general principles of law recognized by civilized nations" in every sphere of law are adopted by the consenting nations for all the purposes of international life.

As I have already pointed out, the basis of the international law is the common consent of the member states of the family of nations. The common consent is the essential source of such law and it is essential in order to vest any rule with the character of law. The question, therefore, resolves itself into this: what is the extent to which the implication of the consent of nations conveyed through this clause in the Statute would carry us?

On the face of it, such consent cannot be implied beyond the purposes of the Statute.

It may be remembered that the advisory committee of the jurists which met at the Hague to prepare this Statute expressed a "voeu" for the establishment of international court of criminal justice. But this was not then adopted by the nations and has not yet been adopted.

We have seen how in the present state of international life introduction of criminal law in it has been considered at least inexpedient.

It may be pertinent to notice in this connection that even in the Charter of the United Nations, though one of the purposes of the United Nations is expressed to be "to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace", there is no provision even implying any individual criminal responsibility. Neither this Charter nor the Statute of the Permanent
Court of International Justice did conceive of any measure to govern the conduct of individuals.

Remembering that international law is applied primarily to states in their relations inter se, and that it creates rights of states and imposes duties upon them vis-a-vis the states, its content must be determined accordingly. If and when international law would be conceived to govern the conduct of individuals, it may become less difficult to project an international penal law.

I have already pointed out where the conception of piracy and the like stands in the international legal system. Despite the employment of such analogies, no authoritative attempt has been made to extend international law to cover the condemned and forbidden conduct of individuals. As I have already quoted from Judge Manley O. Hudson: "Whatever course of development may be imminent with reference to political organization, the time is hardly ripe for the extension of international law to include judicial process for condemning and punishing acts either of states or of individuals."

The instances of criminal international law affecting individuals are all cases where the act in question is the act of the individual on his own behalf, committed on high seas or in connection with international property. Most of these cases are expressly provided for. The selection of these crimes as the object of the provisions of international convention was necessitated, not by theoretical considerations concerning the nature of international crime, but by various political motives such as the interest of one country or a group of countries in the combat against a given crime, material facilities for the organization of such combat, and other reasons of that nature.

The concept of an international offence as a particular kind of infringement upon the sphere of international relations has hitherto been absent from the international system. Those that have hitherto been taken cognizance of as crime in the international system are really individual crimes. "Because of their juridic nature and because of their factual significance, conventions for certain common criminal offenses appear to be one of the various forms of reciprocal support for criminal law by governments having in view a realistic combat against crime. This reciprocal act of governments is not connected directly with the problem of international crimes."

As I have already pointed out, the conception of international criminal responsibility in international life can arise only when that life itself reaches a certain stage in its development. Before we can introduce this conception there, we must be in a position to say that that life itself is established on some peaceful basis. International crime will be an infringement of that base—a breach or violation of the peace or pax of the international community.

I have already given my view of the character of the so-called international community at least as it stood on the eve of the second
World War. It was simply a co-ordinated body of several independent
unites and certainly was not a body of which the order or security could
be said to have been provided by law.

Keeping all this in view it may safely be asserted that the
nations have not as yet considered the conditions of international life
ripe enough for the transposition of principles of criminality into rules
of law in international life.

I cannot, therefore, read into the consent conveyed through
adopting the general principles for their application by the Permanent
Court of International Justice, a consent to effectuate any transposition
of the principles of criminal responsibility into rules of law in
international life. I do not consider this as sufficiently indicative of
the requisite consent for our present purpose.

The prosecution at Tokyo laid emphasis on the fact that the
Charter, which declared conspiracy to be a crime, was created by
several civilized nations and was adhered to by others.

The prosecution urged that it would be strange that the twenty-
three nations involved, eighteen of which were not followers of the
Anglo-American system, should sign a document defining conspiracy
as a crime if that doctrine was foreign to their own legal concepts.
I do not see why it should be so strange, remembering that they were
laying down law not for themselves, but for the trial of the vanquished
leaders. The Charter provided law, if it did so at all, only for the
"major war criminals of the European Axis". We cannot assume
that the legal concepts of the authors of the Charter and of its
adherents were correct. We must also remember that it was not
enacted even by the legislatures of these civilized nations. Men of
very high positions, no doubt, represented these nations; but their
high position alone would not assure their juristic competence.

Coming to show that conspiracy is a concept common to most
legal systems, the prosecution at Tokyo proceeded to analyse the Anglo-
American doctrine, and culled out the following rules as a result
of that analysis:—

1. That the crime of conspiracy is complete with the agreement
by two or more to commit a crime against the security of the state, whether in fact it is committed or any active
steps are taken for the purpose or not;
2. That the offence extends subject to the same conditions to
an agreement to commit any felony;
3. Also to any misdemeanour;
4. Also to any unlawful act or any lawful end agreed to be
attained by unlawful means, although not a crime if actually
committed by one person alone;
5. That planning and preparation by one person to commit a
crime is not by itself a crime unless it amounts to at least
an attempt;
6. That a joint offender, a principal in the second degree or an accessory before the fact, i.e., "a leader, organizer, instigator or accomplice," may be tried and convicted as a principal, and in the absence of the person or other persons who actually committed the offence;

7. That in all cases where there is in fact a common plan or conspiracy whether that is the crime actually charged, or one or more of the parties are charged with the substantive offence, any person who joins in it at any time is from that moment until the moment, if any, when it comes to an end or he definitely dissociates himself from it, responsible for all acts and words of his fellow conspirators, whether known to him or not, provided that they are within the scope of the plan or conspiracy to which he has become a party, either originally or by subsequent extension with his consent.

The Prosecution then proceeded to point out which of these rules represent the general principles of law as recognized by civilized nations. It said:

1. Rules 1 and 7 are part of the law of every country concerned, including Japan.

(a) That a conspiracy to disturb the peace of the world or of a number of countries by waging wars of aggression and in breach of treaties is closely analogous in the international sphere to the conspiracy against the security of the state in the municipal sphere.

2. As regards Rule 2, the practice of the countries varies.

3. Rules 3 and 4 are unknown to other countries, but this is academic because the Prosecution was not making any such charges.

4. Many countries do include planning or preparation as crimes apart from conspiracy, contrary to Rule 5.

5. Rule 6 relates to a matter of procedure only. All countries recognize the persons there mentioned as criminals. But practice varies as to whether they can be charged as principals or must be separately charged.

The prosecution contended that the offences which are here sought to be punished under the international doctrine of conspiracy, are also punishable, besides the Anglo-American systems, in the French, German, Dutch, Spanish, Chinese, Japanese and Russian legal orders. Consequently, the prosecution urged, the doctrine of conspiracy became a rule of international law being grounded on juridical notions existing in the French, German, Japanese, Chinese and Anglo-American legal orders and on a Russian juridic philosophy.

41—1899 B.
This however would be of no avail to make conspiracy a crime in international law unless we accept the proposition that "the general principles of law recognized by civilized nations" became a source of international law even for the purposes of introducing individual criminal responsibility in international life. I have already given my reason why I cannot accept this proposition.

The basic principle of this crime as recognized by the various national systems is that every state has a right to evolve legal institutions to suppress by force, as criminal, certain agreements for the ultimate commission of acts which are at least mala in se and irrevocably involve grave social evils. Every state has a right to anticipate the ultimate commission of the act and suppress the combination by force.

The only general principle which these various systems will yield is that it is legitimate and expedient to evolve legal institutions for the prevention and suppression of potential crimes of certain categories. Such crimes are generally those endangering the very existence of the state.

Strictly speaking, in the present stage of the international society, there is no such organization at all whose security would attract the operation of this principle. There is no international superstate as yet. The national states are only individual members of that society occupying the position of individuals in a national state.

Mr. Ireland commenting on the majority judgment of the Tokyo Tribunal observes:

"At common law, the misdemeanor of conspiracy was defined as an unlawful confederation or combination of two or more persons to do an unlawful act or accomplish an unlawful purpose, and although the offence is said to be complete as soon as the confederacy or combination is formed, it is commonly held that it cannot be prosecuted or punished until there is some overt act toward the purpose or object to be effected. Statutes in many common law jurisdictions have changed these requirements in various respects, but obviously no statute is applicable to the present instance, and if the requirement of an unlawful object persists, the conspiracy charge can have no value unless, again, it is found that aggressive war was unlawful. In the United States the several States recognise common law crimes, but there is no federal criminal law except as provided by an act of Congress, and conspiracy was first made a federal crime in 1867. Since then by statutory amendment and judicial decision the scope of this charge has greatly expanded and broadened, especially within the last forty years, until now the purpose of the conspiracy need not be unlawful, the overt act does not need to be material to the end, to be proved as charged or even charged at all in the indictment and the conspiracy is held to continue down to the last act proved. The prosecution here may well have been influenced by this novel and
peculiar United States federal view and practice in its development of the conspiracy charge under this Indictment, and it may be noted that its Judicial Consultant in support of the charge said:—

""'The efficacy of the Anglo-American doctrine of conspiracy as a technical device for the prevention and suppression of potential crime stems largely from its elasticity. It is a phase of the administration of justice without positive law but with objective natural law. . . . . The elasticity of the doctrine of conspiracy is the consequence of the authority of the State to administer criminal equity.'

"'At common law a participant may repent and withdraw from a conspiracy and on adequate proof and notice he will not be responsible for overt acts subsequently undertaken, but the contrary rule is categorically stated without reasons given by the Tribunal.'"

Even apart from these considerations, if we carefully examine the principles of the law of conspiracy as prevailing in the several civilized countries, we cannot fail to see that the essential principle underlying that law is the desirability and possibility of prevention. In my opinion, this object cannot be achieved in international life as at present constituted.

Conspiracy is fundamentally a mental offense. But in order to constitute conspiracy there must be crossing of the line of mere meditation. The essence of the offense is the joint agreement, the joint undertaking. The crossing of the line of meditation would require some overt act. But "'the act required does not amount to the dignity of the act required to sustain a conviction for an attempt to commit a crime. It is any act which is in furtherance of the conspiracy. It need not be a criminal act; it need not be an illegal act; it need not be an act of any importance; it need not be performed by more than one of the conspirators; . . . the sole purpose of requiring the overt act is to ensure that there is sufficient evidence that a conspiracy has actually been entered into. Any single one of the thousands of acts by any one of these defendants or by any one of their co-conspirators would meet the requirements of an overt act necessary to establish a conspiracy in those jurisdictions where it is required.'"

Activity in the external forum is relevant for determining whether there has been a conspiracy only in so far as it establishes the existence of the internal elements sufficient to constitute the crime. The two factors of will and reason, which enter into the making of any agreement, are the starting points in any analysis of the nature of the conspiratorial agreement.

Basically "'conspiracy is an inchoate act for which the essential act is slight. It involves an intent to commit a further act. It is the commission of that act which the state desires to prevent.'"
The essential element in the principle of the law of conspiracy is thus the desirability as also the possibility of prevention of the design contemplated by the conspirators.

Manifestly, there is grave danger where conviction and punishment can be based purely on intent. This has been recognized. The commissioners, on behalf of the Legislature of New York, in revising the conspiracy statutes of New York, in the introduction to the section which required an overt act before one could be convicted of conspiracy observed as follows:

"By a metaphysical train of reasoning, which has never been adopted in any other case in the whole criminal law, the offense of conspiracy is made to consist in the intent, in an act of the mind; and to prevent the shock to common sense, which such a proposition would be sure to produce, the formation of this intent by the interchange of thoughts, is made itself an overt act, done in pursuance of the interchange of agreement. Surely an opportunity for repentance should be allowed to all human beings; and he who has conspired to do a criminal act, should be encouraged to repent and abandon it. Acts and deeds are subjects of human laws; not thoughts and intents, unless accompanied by acts."

Professor Sayre of the Harvard Law School is more outspoken in his denunciation of the doctrine of criminal conspiracy in the Anglo-American system. He says:

"Under such a principle every one who acts in co-operation with another may some day find his liberty dependent upon the innate prejudices or social bias of an unknown judge. It is the very antithesis of justice according to law.

"A doctrine so vague in its outlines and uncertain in its fundamental nature as criminal conspiracy lends no strength or glory to the law; it is veritable quicksand of shifting opinion and ill considered thought.

"It is a doctrine which has proved itself the evil genius of our law wherever it has touched it. May the time not be long delayed in coming when it will be nothing more than a shadow stalking through past cases."

Thus even in national systems conspiracy as constituting a crime has not gone unchallenged. Its only justification is the prevention and suppression of potential danger. It can have no place in a community which has not as yet organized any preventive means. Even if fully discovered at the conspiracy stage, the international community, as it now stands, has no means of punishing the offence and consequently the punishment provided in view of its potentiality is brutum fulmen. The law must wait till the potentiality becomes an actuality and then again till the favourable contingency happens, that is, till the conspirators lose the war.
CONSPIRACY, IF CRIME IN INTERNATIONAL LAW

On the other hand, if completed conspiracy by itself is a crime in international law, once certain parties enter into this conspiracy, there remains no scope for _locus penetentiae_ for them. They gain nothing by desisting from further act so far as a conspiracy for aggressive war is concerned. They have already completed their offence. I do not think there is any justification for introducing such a crime in international life at the stage where it now stands.

We must also remember that in transposing the law of conspiracy in international system we are really not seeking to prevent any dangerous combination, because, as I have shown above, such prevention is impossible at this stage of international life. The proposed extension may only give a dangerous weapon in the hands of an unscrupulous victor. Nations while making preparations for war would never think or admit that they are making such preparation for aggressive purposes. I should not repeat it here, but we have seen how statesmen in very high positions were claiming openly very wide and extensive right of self-defence. Every nation for itself and for the nation which it likes, would take self-defence in such extensive sense, while at the same time, it would never appreciate its opponent's similarly wide definition. In order to make aggressive war a crime in international life, it would be necessary for us to hold that whether or not a measure taken by a state was in self-defence, the decision of the state concerned would not be final. The ultimate decision as to the lawfulness of the action claimed as taken in self-defence may not lie with the state concerned. But, in the absence of any international agency or court with compulsory jurisdiction competent to decide whether or not any right of self-defence was involved, it becomes the right of the victor to decide whether or not any right of self-defence was involved, it becomes the right of the victor to decide whether or not the vanquished resorted to war in self-defence. The application of the rule which we are now seeking to introduce will thus necessarily be in the hands of the opponent who would happen to be the victor, and who could never appreciate its defensive character. We can well imagine what may be the consequence. In my opinion, while serving no useful purpose, it would be introducing a dangerous principle in the international system, further retarding the peaceful relations in that life.

There is yet another consideration against the introduction of conspiracy as a crime in international life. The international society even now recognizes the compulsive means of settlement of differences between states. Even now it is permissible to a state to take to measures containing a certain amount of compulsion for the purpose of making another state consent to such settlement of a difference as is required by the former. These compulsive means remain legitimate even after the Pact of Paris. "The question ", says Dr. Laufepacht, "whether the Paris Pact by forbidding resort to war has also prohibited
resort to force short of war is a controversial one. Article 2 of the Pact refers to the obligation of the contracting parties not to solve disputes by any other except pacific means; and in the Preamble the contracting parties express their conviction that 'all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process.' In the view of some writers these provisions must be interpreted as meaning that the Pact prohibits recourse to force short of war. But the last-quoted passage refers only to changes in relations, not to the enforcement of existing legal relations; as to Article 2, it must be borne in mind that although measures of force short of war are compulsive means, they are still pacific means.' Compulsive means are in theory and practice considered peaceable, although not amicable, means of settling international differences. I need not stop here to examine in detail the various compulsive means in contradistinction to war. All that I want to point out in this connection is that in the preparatory stages the line between the two may be very thin and a preparation ultimately to serve only the purposes of a legitimate compulsive measure may be mistaken for a preparation for war. The same outward manifestation of mind may thus be indicative of two different mental states—one of them being legitimate in international life and the other criminal, if conspiracy be introduced as a crime. While serving no practical useful purpose, the introduction of this mental crime in international life would bring with it this difficulty of ascertaining the particular criminal state of the mind.

After giving my anxious thought to the question I have come to the conclusion that "conspiracy" by itself is not yet a crime in international law.

In my view of the authority of the Charter, conspiracy will not be a crime although listed as such by the Charter, if it is not a crime in international law, and in my opinion it is not a crime in international law.

Dr. Hans Ehard, Minister-President of Bavaria, addressing a meeting of lawyers at Munich on June 2, 1948, on the Nuremberg Trial and International Law made some pertinent observations on the Charter in general and on the concept of conspiracy in particular. His observations are indeed so well reasoned that I cannot resist the temptation of placing a few of them before you. Referring to the concept of conspiracy as given in count one of the Nuremberg indictment Dr. Ehard says:

"The concept is not one familiar to continental law. It has developed in Anglo-Saxon customary law. With the aid of this concept members and leaders of bands of criminals may be made responsible for all crimes of the band, even if they cannot be shown to have participated actively in each individual crime. By means of the introduction of the Anglo-Saxon concept into the Charter the legal
tool was provided to make every leading National Socialist responsible for all crimes of the regime.

"The Charter went even further still by introducing a concept of the common plan which hitherto was unknown either in the Anglo-Saxon or in any other law, a 'common plan' for the commission of crimes because the existing legal concepts obviously did not appear adequate to its authors for the punishment of the group of persons accused of such horrible crimes. This procedure is, as I want to note briefly, not unobjectionable, particularly since it does not provide any clear limit and is too little adapted to political reality.

"Does the provision of the Charter, which designates the planning or waging of a war of aggression as a punishable crime, correspond to a legal norm laid down by international law or to general legal principles already in existence in 1939?

"First, it must be stated that the concept of war of aggression is not defined in the Charter and that no generally binding agreement has been reached in regard to this term in international law. This fact is not unimportant. Whoever starts a war will always be prepared with a more or less credible justification.

"It is true that endeavours were made to clarify the concept. Jackson quotes as an example the 'Agreement concerning the Definition of the Concept Aggression' which was signed in London in 1933 by the Soviet Union, the Baltic States, Poland, Rumania, Turkey, Persia and Afghanistan, and he designates it as 'one of the most decisive sources of the Law of nations'. What now is termed a decisive source of international law at that time was considered merely a diplomatic manoeuvre on the part of the Soviet Union. Among the states represented in the court neither the United States nor England nor France has joined this or any agreement of similar contents, namely, for the reason that they did not want to have the definition applied to themselves. Incidentally, the agreement did not prevent the Soviet Union from moving into the territory of the contracting parties, of the Baltic States and of Poland, and from occupying Rumanian Bessarabia without worrying about its own definition of aggression and without regard to diplomatic protests.' Referring to the Pact of Paris Dr. Ehard\textsuperscript{11} says:

"This contractual renunciation of war as a tool of national politics implies, of course, that such a war is contrary to international law and that any nation which in spite thereof wages such a war commits a breach of contract. To this extent one must agree with the judgment. On the other hand, I do not find in the statements of the indictment and of the judgment any convincing proof for the further conclusion that after the treaty such a war was not only unlawful, but that those who plan such a war and wage it thereby commit a crime.
In the treaty itself war is not designated as a crime and the renunciation is not reinforced by a sanction. It must be regretted that the treaty is a lex imperfecta to this extent, but in my opinion this cannot be disputed. It certainly is not satisfactory from a moral point of view if, subsequent to the treaty, monstrous deeds such as the waging of a war of aggression may be considered unlawful but not as a punishable offense. But such imperfections are not infrequent in the development of law and they are not always avoidable.

"It is stated in detail in the trial and in the judgment that international law not only consists of treaties but also develops from usages and customs which gradually have found general recognition, and from legal principles which were worked out by jurists and which then slowly became general legal conviction. Furthermore, legal norms which originally were only contractual law may gradually become universal international law which applies to all nations. We fully agree with this view, which is also represented in German science of international law. Therefore, it remains to be examined in the present case whether war of aggression, even though no contractual norm has declared it punishable, perhaps was a punishable crime according to general legal conviction.

"In this connection the judgment refers to resolutions which term war of aggression an international crime, namely, to a Resolution of the League of Nations dated September 24, 1927, and to a Resolution of the Sixth Pan American Conference in Havana dated February 18, 1928, as well as to the so-called Geneva Protocol of 1924. These demonstrations without a doubt show that in the community of nations the desire increased to see wars of aggression declared an international crime. But they in no way prove that this wish has already been realized in international law. On the contrary, it must be stated that none of the participating governments has gone beyond a declaratory or declamatory demonstration and that no government has committed itself to the international law viewpoint that war of aggression is punishable. The Geneva Protocol at that time was recommended for adoption by unanimous resolution of the Members of the League of Nations. But nevertheless it was never ratified and has never achieved validity as international law. This circumstance, in my opinion, speaks not for, but against, the existence of a general legal conviction.

"Finally, let us consider the practice of nations, which is also an important source of international law.

"If, since 1928, a general legal conviction had existed which regarded war of aggression as a punishable act under international law, it would in all probability have expressed itself in practical politics. There was no lack of suitable or even compelling occasions therefor. Japan started war against China and occupied Manchuria by armed force. Italy engulfed Abyssinia in a war, the Soviet Union conducted
war against Finland. However, no official statement has become known in which the United States or the English, French or Soviet government would have designated these wars of aggression as international crimes under reference to the international law in effect, threatened with an international punishment and made the statesmen responsible for it personally liable. It is true that at the end of 1939 the Soviet Union was expelled from the League of Nations because of the war with Finland, but the prosecution and the judgment have not made reference to this resolution, nor to the 'sanctions' decided upon in individual cases, as proof of the punishable character of a war of aggression under international law.

"Furthermore, the urgent warnings which the various statesmen directed to Hitler upon the eve of the war and which speak a very earnest language, contain no reference to a general legal conviction of this type and no warning with regard to crimes and no threat of punishment. According to my knowledge, the Soviet Union in no way condemned the impending war of aggression against Poland, concerning which it was precisely informed, as a 'crime' under international law.

"I believe that these facts and considerations must lead to the conclusion that the punishable character of the war of aggression stipulated in the Charter does not correspond to a general legal conviction in force in 1939, but that it is new law and that to this extent the principle of nullum crimen sine lege has been violated."

Coming to the question of individual responsibility Dr. Ehard\textsuperscript{11} says:

"The court rejected the view that persons who perform an official act assume no responsibility of their own under international law but are protected by the doctrine of the sovereignty of the state. In this connection it may be stated that the view at one time generally in vogue, that international law is only the law between nations that does not concern the individual, has not at all been generally relinquished. The allegation advanced several times, that crimes are always committed by individuals, is undoubtedly correct, but it is a truism. It applies to every human act and of itself proves nothing with regard to criminal responsibility in the individual case. I recall the English maxim: 'The King can do no wrong.' International military tribunals also are made up of human beings, conventions also are entered into by human beings, a charter also is created by human beings, the indictment is brought by individual human beings—and nevertheless the indictment in the trial begins with the words: "The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Socialist Soviet Republics hereby indict. . . ."

"Finally, the apodictic statement of the judgment that the principle of international law which, under certain circumstances,
grants the representatives of the state protection, may not apply to acts which were branded as criminal by the law of nations, would require a more profound justification. In any event, no single case is known in which a statesman would have been subjected to criminal responsibility for any act committed in the name of the state. All representatives of the prosecution emphasize with fervor that the trial of those responsible for official acts is something completely new. Thus we come to the conclusion that, with regard to this question also, new law was applied with retroactive force."

Dr. Ehard concludes by saying that "the Charter and the trial have proceeded beyond international law as in force and have applied a new law retroactively."

But for this new law humanity, we are told, would have been deprived of the privilege of exacting expiation from the guilty ones. The voice we hear in these lines may be the voice of humanity only if it be correct that "in so far as the Charter of this Tribunal introduces new law, its authors have established a precedent for the future, a precedent operating against all, including themselves." But if it is only a subterfuge, if it is only an expedient devised to hide their own misdeeds, "if one of the reasons, why this was a military tribunal instead of an ordinary court of law, was in order to avoid precedent-creating effect of what is done here on our own law and the precedent-control which would exist if this were an ordinary judicial body", no one, I believe, will mistake this as the utterances of humanity.
Lecture XVI

Individual Criminal Responsibility

The question of individual responsibility in respect of acts of state is indeed the crucial one in cases like this. We have already noticed how the Nuremberg Tribunal deduced individual criminal responsibility from the Pact of Paris itself. Of course the main reliance of the Tribunal was on the provisions of the Charter. But apart from Charter the Tribunal opined that "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 committing a crime in so doing." The Tribunal then cites as authority in support of this proposition certain statement made in 1932 by Mr. Stimson, the then Secretary of States of the United States, and the Hague Convention. The Tribunal says: "But it is argued that the Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offences against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, 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."

The Nuremberg Tribunal characterizes the war in violation of the Pact of Paris as 'illega'. This implies that the Pact of Paris became 'law' in international life. I have already given my view of the Pact in this respect and have given my reason why I could not accept this Pact as adding to the international law at all. But even assuming that the Pact gave law and a war in violation of it became illegal individual criminal responsibility for planning, preparing and
waging such a war would not follow. We shall presently proceed to examine in detail this view of the Tribunal.

The Tribunal also refers to the fact that the law of war is not static, but by continual adaptation follows the needs of a changing world. We shall presently see how far these reasons are really sustainable in order to establish individual criminal responsibility in international life.

The question whether the individuals under trial at Nuremberg or at Tokyo committed any international crime by working the constitution of the government of their nations is really of grave moment in international life. The answer to the question would largely depend upon what answer we can give to the other question, namely, whether in their international relations the covenantiug nations agreed to limit their sovereign right of non-intervention from outside in the matter of working their own constitution and whether in any event they can be found as having yielded to the common will of all so as to hand over to an international tribunal the persons entrusted with the working of their own machinery of government for having worked the same badly. The question is, not how badly they behaved and thus brought their own nation to grief, but whether thereby they made themselves answerable to the international society.

The question of the responsibility of the authors of the First Great War was made the subject of an elaborate report by a commission of the Peace Conference. This report is printed in English by the Carnegie Endowment for International Peace. The Commission reported that:

1. The war was premeditated by the Central Powers together with their Allies, Turkey and Bulgaria;
2. It was the result of acts deliberately concocted in order to make it unavoidable.
3. That the war was carried on by these powers by barbarous methods in violation of:
   (a) The established laws and customs of war;
   (b) The elementary laws of humanity.

Yet, while dealing with the question of personal responsibility of individual offenders against the laws of nations, the Commission could not recommend their trial.

As to the acts which provoked the war, although in the opinion of the Commission the responsibility could be definitely placed, it advised that the authors thereof should not be made the object of criminal proceedings. The same conclusion was arrived at in respect of the violation of the neutrality of Belgium and Luxembourg. Nevertheless, in view of the gravity of the outrages upon the principles of the law of nations and upon international good faith, it was recommended that they should be made the subject of a formal condemnation by the Peace Conference.
It was recommended that as to the acts by which the war was provoked it would be right for the Peace Conference in a matter so unprecedented to adopt special measures and even to create a special organ in order to deal as they deserve with the authors of such acts. Finally, it was suggested that for the future it was desirable that penal sanctions should be provided for such grave outrages against the elementary principles of international law.

The two American members of the Commission, Messrs. Lansing and Scott, who dissented from certain conclusions and recommendations of the Commission, declared that they were as earnestly desirous as the other members that those persons responsible for causing the war and those responsible for violations of the laws and customs of war should be punished for their crimes, moral and legal, and that the perpetrators should be held up to the execration of mankind, but that they did not consider that a judicial tribunal was a proper forum for the trial of offenses of a moral nature. They objected to the proposal of the majority to place on trial before a court of justice persons charged with having violated the principles of humanity or the "laws of humanity". They also objected to the "unprecedented proposal to put on trial before an international criminal court the heads of states not only for having directly ordered illegal acts of war but for having abstained from preventing such acts".

Mr. Quincy Wright,¹ writing in 1925 on the "Outlawry of War" pointed out:

"The main difficulty found by the Commission was that international law did not recognize war-making as positively illegal; but even if it had, there would be doubt whether any particular individual, even a sovereign, could be held liable for the act of the state."

According to the learned author:

"With the complexity of modern state organization, it would be difficult to attribute responsibility for declaring war to any individual or group of individuals. There are few absolute monarchs. Ministers act under responsibility to legislatures which are in turn responsible to electorate. In an age of democracies an effort to hold individuals responsible for a national declaration of war would frequently involve an indictment of the whole people. This practical difficulty coupled with the theory of state independence has brought about recognition of the principle of state responsibility in international law, with a consequent immunity from international jurisdiction of individuals acting under state authority."

Judge Manley O. Hudson,² in his treatise entitled "International Tribunals, Past and Future" published in 1944, while dealing with the question of "The Proposed International Criminal Court" in Chapter 15, says:
"International law applies primarily to states in their relations _inter se_. It creates rights for states and imposes duties upon them, _vis-a-vis_ other states. Its content depends very largely upon the dispositions of interstate agreements, and upon deductions from the practice of states."

According to the learned Judge this is why it reflects but feebly a community point of view and why the halting progress made in international organization has not facilitated its protection of community interests as such. "Historically", says the learned Judge, "international law has not developed any _conception of crimes_ which may be committed by States. From time to time certain States have undertaken to set themselves up as guardians of community interest and have assumed competence to pronounce upon the propriety of the conduct of other states. Yet at no time in history have condemnations of States' conduct, whether before or after the event, been generally _formulated_ by legislation for _international crimes_. Only in quite recent times have official attempts been made to borrow the concept of criminality from municipal law for international law purposes. In the abortive Geneva Protocol of 1921, a "war of aggression" was declared to be an "international crime" and this declaration was repeated by the assembly of the League of Nations in 1927, and by the Sixth International Conference of American states in 1928; no definition was given to the terms, however, though the 1924 Protocol was designed to ensure "the repression of international crimes." At no time has any authoritative formulation of international law been adopted which would brand specific State conduct as criminal, and no international tribunal has ever been given jurisdiction to find a State guilty of a crime."

Coming to the question of individual responsibility, Judge Hudson⁴ says:

"If international law be conceived to govern the conduct of individuals, it becomes less difficult to project an international penal law. It was at one time fashionable to refer to pirates as 'enemies of all mankind' and to piracy as 'an offense against the law of nations'. The United States Constitution of 1789 empowered Congress to define and punish 'piracies and felonies committed on the high seas, and offenses against the law of nations.' Unanimity does not obtain upon the meaning to be given to these terms, but modern opinion seems to be inclined to the view that a broad category of armed violence at sea is condemned by international law as piratical conduct, with the consequence that any State may punish for such conduct and that other States are precluded from raising the objections which might ordinarily be advanced against the assumption of jurisdiction."

He then points out that:

"It is in this sense that the conception of piracy as an offense against the law of nations has been seized upon, by _way of analogy_,
for the service of other ends. Various treaties of the nineteenth century provided for the possibility of states punishing persons engaged in the slave trade as pirates..."

The learned Judge then points out:
"Despite the employment of such analogies no authoritative attempt has been made to extend international law to cover the condemned and forbidden conduct of individuals. States have jealously guarded their own functions in the repression of crime, and differences in national and local outlooks and procedures have precluded the development of an international or a supranational criminal law..."

He concludes the topic by saying:
"Whatever course of development may be imminent with reference to political organization, the time is hardly ripe for the extension of international law to include judicial process for condemning and punishing acts either of States or of individuals."

It may be noticed in this connection that whenever in international relations it has been considered desirable to control the conduct of individuals, care has been taken to make adequate provision for the same in the treaty itself.

Numerous treaties of recent date contain condemnations of the anti-social conduct of individuals and the states parties agree to adopt their national penal laws to serve common ends.

The treaties do not directly apply to individuals, and their impact on individual conduct will depend upon each State's performance of its treaty obligations by the incorporation of the provisions into national law or otherwise.

This view was clearly expressed in the 1899 and 1907 Hague Convention on the laws and customs of war on land, by which the States parties undertook to give their armed forces instructions conforming to regulations annexed to the Convention. Neither of the Conventions operated directly on individuals; but the 1907 Convention provided that a state would be responsible for acts committed by persons belonging to its armed forces in violation of the provisions of the regulations and would be liable for indemnities. The same view was taken in the numerous suggestions which were made for dealing with violations of the 1929 Geneva Convention on the treatment of sick and wounded soldiers, but Articles 29 and 30 of the Convention are not clear on the point.

This is how infringement on national prerogatives in this field has always been avoided.

An apparently contrary view is expressed by Professor Hans Kelsen of the University of California who says:
"When the Second World War broke out, the legal situation was different from that at the outbreak of the First World War. The Axis Powers were contracting parties to the Kellogg-Briand Pact by which resorting to a war of aggression is made a delict; and Germany
has, by attacking Poland and Russia, violated, in addition to the Kellogg-Briand Pact, non-aggression pacts with the attacked states. Any inquiry into the authorship of the Second World War does not raise problems of extraordinary complexity. Neither the questio juris nor the questio facti offers any serious difficulty to a tribunal. Hence, there is no reason to renounce a criminal charge made against the persons morally responsible for the outbreak of World War II. In so far as this is also a question of the constitutional law of the Axis Powers, the answer is simplified by the fact that these states were under more or less dictatorial regimes, so that the number of persons who had the legal power of leading their country into war is in each case of the Axis States very small. In Germany it is probably the Fuehrer alone; in Italy, the Duce and the King; and in Japan, the Prime Minister and the Emperor. If the assertion attributed to Louis XIV "'Etat c'est moi' is applicable to any dictatorship, the punishment of the dictator amounts almost to a punishment of the state."

This is however, only apparently contrary, as will appear from what I have already quoted from Professor Kelsen elsewhere. The learned Professor prefaced the above statement thus:

"If the individuals who are morally responsible for this war, the persons who have, as organs of their states, disregarded general or particular international law, and have resorted to or provoked this war, if these individuals as the authors of the war shall be made legally responsible for the injured states, it is necessary to take into consideration that general international law does not establish individual, but collective responsibility for the acts concerned, and that the acts for which the guilty persons shall be punished are acts of state—that is, according to general international law, acts of the government or performed at the government's command or with its authorization." Professor Kelsen then proceeds to examine the meaning of the expression "'act of state" and says:

"The legal meaning of the statement that an act is an act of state is that this act is to be imputed to the state, not to the individual who has performed the act. If an act performed by an individual—and all acts of state are performed by individuals—must be imputed to the state, the latter is responsible for this act... If an act is to be imputed to the state and not to be imputed to the individual who has performed it, the individual, according to general international law, is not to be made responsible for this act by another state without the consent of the state whose act is concerned. As far as the relationship of the state to its own agents or subjects is concerned, national law comes into consideration. And in national law the same principle prevails: an individual is not responsible for this act if it is an act of state, i.e. if the act is not imputable to the individual but only to the state... The collective responsibility of a state for its own
acts excludes, according to general international law, the individual responsibility of the person who, as a member of the government... has performed the act. This is a consequence of the immunity of one state from the jurisdiction of another state." According to the learned Professor, "this rule is not without exceptions but any exception must be based on a special rule of customary or conventional international law restricting the former."

He then points out:

"In this respect there exists no difference between the head of state and other state officials... There is no sufficient reason to assume that the rule of general customary law under which no state can claim jurisdiction over the acts of another state is suspended by the outbreak of war, and consequently that it is not applicable to the relationship between belligerents..."

According to the learned Professor:

"If individuals shall be punished for acts which they have performed as acts of state, by a court of another state, or by an international court, the legal basis of the trial, as a rule, must be an international treaty concluded with the state whose acts shall be punished, by which treaty jurisdiction over individuals is conferred upon the national or international court. If it is a national court, then this court functions, at least indirectly as an international court."

He is positive that:

"The law of a state contains no norms that attach sanctions to acts of other states which violate international law. Resorting to war in disregard of a rule of general or particular international law is a violation of international law, which is not, at the same time, a violation of national criminal law, as are violations of the rules of international law which regulate the conduct of war. The substantive law applied by a national court competent to punish individuals for such acts can be international law only. Hence the international treaty must determine not only the delict but also the punishment, or must authorize the international court to fix the punishment which it considers to be adequate. . . . ."

All that I need add to these observations of the learned author is that in the Tokyo case there was no treaty of the kind contemplated by him as I have noticed already.

The learned author is clear in his view:

1. That for such acts as are alleged in this case, international law, by itself, does not make their individual authors criminally responsible.

2. That such acts do not constitute crime in any individual in international law as it now stands.

3. That a victor nation cannot, on the mere strength of conquest:
(a) Make such acts criminal with retrospective effect;
(b) Punish in law the individual authors of such acts.

4. That a victor nation may derive such authority by appropriate treaty from the state for which the individuals in question acted.

His summarization of the position after the Second World War does not thus differ from the view expressed by Judge Manley O. Hudson. Only Professor Kelsen thinks that with the help of an appropriate treaty such a trial and punishment would have been made legitimate. As I have already indicated above, this view of his may or may not be supportable on principle, and in my opinion, it is not. But so far as the cases at Tokyo and at Nuremberg are concerned it would suffice to say that there was no such treaty in either case.

In this connection we cannot omit what Professor Kelsen observes while answering the question if the judgment in the Nuremberg Trial will constitute a precedent in international law. The learned Professor observes that individual criminal responsibility for violation of rules of international law prohibiting resort to war was not recognized by international law but was the product of the London Agreement of August 8, 1945, creating the Nuremberg Charter. "The treaties", says Professor Kelsen, "for whose violation the London Agreement establishes individual criminal responsibility are in the first place the Briand-Kellogg Pact of 1928, and certain non-aggression pacts concluded by Germany with States against which Germany, in spite of these treaties, resorted to war. All these treaties forbade only resort to war, and not planning, preparation, initiation of war or conspiracy for the accomplishment of such actions. None of these treaties stipulated individual criminal responsibility. For their violation the sanctions provided by general international law applied, that is to say, the State whose right was violated was authorized to resort to reprisals or counter-war against the violator. The Briand-Kellogg Pact, it is true, does provide in its preamble a special sanction for its violation; but this sanction constitutes no individual criminal responsibility. The Pact stipulates '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.' That means that all states parties to the Pact, and not only the immediate victim of an illegal war, are authorised to resort to war against a State which in violation of the Pact has resorted to war. Reprisals and war as sanctions are directed against a State as such, and not against the individuals, forming its government. These sanctions constitute collective responsibility, not criminal responsibility of definite individuals performing the acts by which international law is violated.'"

According to the learned Professor "An illegal war may be called an 'international crime', and has been so called in the Geneva Protocol of 1924 for the Pacific Settlement of International Disputes,
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and in a Resolution of the Eighth Assembly of the League of Nations
(but not in the Briand-Kellogg Pact). This term, however, does not
mean—as the International Military Tribunal erroneously declares in
its judgment—that those who plan and wage such a war, with its
inevitable and terrible consequences, are committing a crime in so
doing. This statement implies that the Briand-Kellogg Pact, accord-
ing to the interpretation of the tribunal, established individual criminal
responsibility for its violation. But such responsibility can be estab-
lished only by a rule of international or national law providing
punishments to be inflicted upon definite individuals. To deduce
individual criminal responsibility for a certain act from the mere fact
that this act constitutes a violation of international law, to identify
the international illegality of an act by which vital human interests
are violated with its criminality, meaning individual criminal respon-
sibility for it, is in contradiction with positive law and generally
accepted principles of international jurisprudence.

He points out that it can hardly be denied that international law
prior to the London Agreement did not provide punishment of those
individuals who performed the acts of an illegal war.

We have already noticed that the Nuremberg Tribunal somehow
read out of the Briand-Kellogg Pact individual criminal responsibility
for resorting to war in violation of the Pact. The Tribunal says:
"It is argued that the Pact does not expressly enact that such wars
are crimes, or set up courts to try those who make such wars. To
that extent the same is true with regard to the laws of war contained
in the Hague Convention. The Hague Convention of 1907 prohibited
resort to certain methods of waging war. These included the inhumane
treatment of prisoners, the employment of poisoned weapons, the
improper use of flags of truce, and similar matters. Many of these
prohibitions had been enforced long before the date of the Convention;
but since 1907 they have certainly been crimes, punishable as offences
against the laws of war; yet the Hague Convention nowhere design-
nates such practices as criminal, nor is any sentence prescribed, nor
any mention made of a court to try and punish offenders. For many
years past, however, military tribunals have tried and punished individ-
uals guilty of violating the rules of land warfare laid down by this
Convention. In the opinion of the tribunal, 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."

Referring to this portion of the judgment the learned Professor
points out the differences between the Hague Convention on the rules
of warfare and the Briand-Kellogg Pact. The difference is that the
Hague Convention can be violated by acts of State as well as by acts
of private persons; but the Briand-Kellogg Pact can be violated only
by acts of state. Further the Rules of the Hague Convention are
Rules regulating the conduct of war that have been transferred into the
law of the Member States of the Family of Nations and therefore the precedents of trial and punishment of individuals found guilty of violating the rules of land warfare laid down by the Hague Convention of 1907 would be of no avail in cases of violation of the Briand-Kellogg Pact.

This view finds support in what Professor Glueck says in his treatise on "War Criminals, their Prosecution and Punishment" published in September, 1944, after the Moscow Declaration of 1943 and after the learned Professor had served on the Commission on the trial and punishment of War Criminals of the London International Assembly. In Chapter III of his book, the learned Professor defines "war criminals" as "persons—regardless of military or political rank—who, in connection with the military, political, economic or industrial preparation for or waging war, have, in their official capacity, committed acts contrary to (a) the laws and customs of legitimate warfare or (b) the principles of criminal law generally observed in civilized states; or who have incited, ordered, procured, counselled, or conspired in the commission of such acts; or, having knowledge that such acts were about to be committed, and possessing the duty and power to prevent them, have failed to do so."

We need not stop here to examine the correctness or otherwise of this definition with reference to the norms of international law. The learned author, after giving his definition, makes certain observations which will be pertinent for our present purpose. He says:

"Observe certain features of this definition. First, it is not intended to include the 'crime' of flagrantly violating solemn treaty obligations or conducting a war of aggression. The Commission of Fifteen appointed by the Preliminary Peace Conference at the close of the World War I to examine the responsibility for starting that war and for atrocities committed during its conduct, found former Kaiser Wilhelm II and other high placed personages 'guilty' of 'gross outrages upon the law of nations and international good faith', but concluded that 'no criminal charge' could be brought; although the outrages should be the subject of a formal condemnation by the Conference."

They emphasized it to be "desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law." But throughout the quarter century between the two World Wars nothing has been done by the nations of the world to implement this recommendation. The Kellogg-Briand Pact, signed in Paris in 1928, condemned recourse to war for the solution of international controversies, renounced it as an instrument of national policy, and bound the signatories to seek the settlement of all disputes by pacific means only. But that Pact too failed to make violations of its terms an international crime punishable either by national courts or some international tribunal. Therefore,
the legal basis for prosecutions for violations of the Pact of Paris may be open to question, "though the moral grounds are crystal clear."

"Besides, to prosecute Axis leaders for the crime of having initiated an unjust war, or having violated the "sanctity of treaties", would only drag a red herring across the trial and confuse the much clearer principle of liability for atrocities committed during the conduct of a war, be it a just or an unjust one. The Germans would surely argue that the Allies had first violated the Treaty of Versailles in not disarming; and learned historians would insist, as they did at the close of World War I, that only lengthy historical and economic investigations could really fix responsibility for "causing" the war.

"For these reasons, the origination of an unjust war ought, for the present, not to be included among the acts triable as "war crimes", however desirable it would be to establish judicially the principles involved. . . . ."

Dr. Glueck, however, in a recent book published in 1946 and entitled "The Nuremberg Trial and Aggressive War" has expressed the opposite opinion. The learned Professor in this new book says:

"During the preparation of my previous book on the subject of war crimes, I was not at all certain that the act of launching and conducting an aggressive war could be regarded as "international crime". I finally decided against such a view, largely on the basis of a strict interpretation of the Treaty for the Renunciation of War (Kellogg-Briand Pact) signed in Paris in 1928. I was influenced also by the question of policy. . . However, further reflection upon the problem has led me to the conclusion that for the purpose of conceiving aggressive war to be an international crime, the Pact of Paris may, together with other treaties and resolutions, be regarded as evidence of a sufficiently developed custom to be acceptable as international law."

The learned Professor still says that "The case for prosecuting individuals and states for the "crime" of launching an aggressive war is not as strong as the case for holding them responsible for violations of the recognized laws and customs of legitimate warfare." He, however, considers it "strong enough to support the relevant count in the Nuremberg Indictment."

The count in question stands thus:

"All the defendants, with diverse other persons, during a period of years preceding 8th May, 1945, participated in the planning, preparation, initiation and waging of wars of aggression, which were also wars in violation of international treaties, agreements and assurance."

The revised opinion of the learned Professor is based on the following data in addition to those already given by me while considering his view that war became crime by an international customary law:

1. The United Nations could have executed the Nuremberg defendants without any judicial procedure whatsoever;
"summarily by executive or political action . . . . without any consideration whatsoever of whether the acts with which the accused were charged had or had not previously been prohibited by some specific provisions of international penal law";

(a) The law of an armistice or a treaty is, in the final analysis, the will of the victor;

(b) Although duress may be a good ground for repudiation of an international contract entered into during a period of peaceful relationships between law-observing states, compulsion is to be expected and is an historic fact in the case of international agreements imposed by a victorious belligerent state upon the vanquished;

2. The Fact that the contracting parties to a treaty have agreed to render aggressive war illegal does not necessarily mean that they have decided to make its violation an international crime. Even a multinational contract and one dealing with a subject so vital to the survival of nations as the Kellogg-Briand Pact is not a penal statute; and the remedy for breach of contract does not consist of prosecution and punishment of the guilty party, but rather of obtaining compensation for its breach.

3. (a) The Charter constituting the Tribunal gives dogmatically affirmative answers to the two following questions:—

(i) Whether aggressive war can be denominated an international crime.

(ii) Whether individuals comprising the government or general staff of an aggressor state may be prosecuted as liable for such crime.

(b) There is no question but that, as an act of the will of the conqueror, the United Nations had the authority to frame and adopt such a Charter.

4. Assuming modern aggressive war to be a crime, i.e., an offense against the Family of Nations and its international law, then the defendant must normally be the implicated state.

(a) But, action against a state must necessarily be ineffective in reducing international criminalism, compared to the imposition of penal sanctions upon members of a cabinet, heads of a general staff, etc., who have led a state into aggressive war.

(i) There are sound reasons for the familiar application of the act-of-state doctrine to the normal, peaceful intercourse of nations, without it necessarily following that it is also to be applied to the situation presented by the acts of Nazi ringleaders . . . .
(ii) An issue of this kind ought not to be disposed of on the basis of blind legalistic conceptualism; it should be dealt with realistically in the light of the practical as well as logical result to which one or the other solution will lead.

(iii) As Blackstone pointed out, a sovereign would not willingly ally himself with the criminal acts of his agents.

(iv) It is perfectly obvious that the application of a universal principle of non-responsibility of a state's agents could easily render the entire body of international law a dead letter.

(v) This is a doctrine contrary to reason and justice and it is high time the error were remedied... Since law is supposed to embody the rule of reason in the interests of justice, and the unqualified act-of-state doctrine emasculates both reason and justice, it cannot be regarded as sound law.

5. Individuals are liable under international law in many instances; the relevant principles of the law of nations may and do oblige individuals.

(a) The traditional view, that "individuals are not subjects of the law of nations", is open to question historically and in a practical sense: (The learned author cites the instances of piracy and the like.)

The two fundamental elements in Dr. Glueck's approach here are:

1. The unlimited power of the victor under international law;
2. The growth of the customary law in the international system.

If the learned Professor is correct in his first proposition, then there is no doubt that the United Nations can adopt any procedure for the exercise of this power, and, though quite unnecessary, may introduce a sort of definition of a crime covering the acts alleged to have been committed by the accused and on a finding of the constituent facts, thus specified, execute them. Dr. Glueck's authority for this proposition, as far as I could see, is the statement of Mr. Justice Jackson in his report to the President of the United States. I cannot accept this proposition either *raison d'état* or *imperio rationis*. I have already expressed my own view of the question. In my opinion, the view taken by the learned author, as also by Mr. Justice Jackson, has no support in the modern system of International Law.

It may be that Dr. Glueck and Mr. Justice Jackson are thinking of the right of the belligerent to kill such persons during belligerency. But the right of killing ceases as soon as they are taken prisoners.
From the date of their seizure they become entitled to the protection of the rule that more than necessary violence must not be used.

The learned author cites the case of Napoleon and points out how the powers there declared that Napoleon had put himself outside "civil and social relations and that, as enemy and perpetrator of the world, he has incurred liability to public vengeance." Had the Allies followed the recommendation of the Prussian Field Marshal Blucher, Napoleon would then have been short on sight as one who, under the above declaration, was an "outlaw".

I need not stop here to examine this view with reference to the provisions of International Law. It would be sufficient to say that International Law in this respect does not still stand where it might have been in those days and that the proclivities of the victors, unhindered as they may be by the weaknesses of their adversary, may reveal determinations that are uninfluenced by a sense of legal obligation; such determinations, however, should never be confused with law.

I believe Dr. Glueck did not ignore the fact that even in those days considerable doubts were entertained and difficulties, felt about the legality of the steps taken in respect of Napoleon. We may refer to Dr. Hale Bellot's article on "The Detention of Napoleon Buonaparte" published in the Law Quarterly Review, Vol. XXXIX pp. 170-192.

The Prussian Project referred to by Dr. Glueck did not find favour with the Duke of Wellington. The Duke disputed the correctness of the Prussian interpretation of the Viennese declaration of outlawry and asserted that it was never meant to incite the assassination of Napoleon. According to the Duke the victors did not acquire, from this act of outlawry, any right to order Napoleon to be shot.

Then, again, a considerable difficulty was felt about Napoleon's status. Napoleon himself never assented to the proposition that he was a Prisoner of War, and never claimed any rights as such. Before surrender, when arrangement for his escape on board a Danish vessel was completed, he refused to go and made up his mind to surrender to the British, saying, "There is always danger in confiding oneself to enemies, but it is better to take the risk of confiding in their honour than to fall into their hands as a prisoner according to law." After his surrender he repeatedly denied that he was a prisoner of war although he was aware of the rights of such a prisoner in international law. He professed to consider himself as a simple individual seeking asylum in Great Britain.

Apart from Napoleon's own view of his status, grave difficulties in this respect were felt by the then British authorities also. Legal opinion was sharply divided on the question. The first legal advice was that Buonaparte should be regarded as a rebel and surrendered to his
Sovereign. This view was taken by the Master of the Rolls and was adopted by Lord Liverpool. Lord Ellenborough and Sir W. Scott saw the following alternative possibilities.

Either 1. He was a subject of France and Britain was at war with France.

Or 2. He was a French rebel and Britain was assisting the Sovereign of France as an ally.

The war had not yet been put to an end by any treaty.

Lord Ellenborough suggested that he should be regarded as an individual of the French nation, at war with Great Britain, and consequently in common with the French nation an enemy to Great Britain. He thought that it would be possible to exclude him from the benefit of a treaty of peace that might be made subsequently with the French nation. Sir William Scott could not agree with this view. According to him, Great Britain could surrender him to France as a rebel subject; but to Great Britain he was a Prisoner of War and there was a clear general rule of the law of nations, that peace with the Sovereign of a State was peace with all its subjects. Lord Eldon raised the question whether Buonaparte could in fact be considered as a French subject: Great Britain had not been at war with France as France. He said: "We have acted upon the notion that... we are justified by the law of nations in using force to prevent Buonaparte’s being Governor of France—that we have made war upon him and his adherents—not as French enemies—not as French rebels—but as enemies to us and the allies when France was no enemy to us—that in this war with him, he has become a prisoner of war, with whom we can make no peace, because we can have no safety but in his imprisonment—no peace with him, or which includes him."

In the House of Lords, Lord Holland considered that the case involved inter alia the following questions:

1. Could any person be held as a prisoner of war who was not the subject of any known state?
2. Could any man be detained who was the subject of a state with whom we were not at war?
3. Whether any person could be considered as an alien enemy who was not the subject of any state with which we were at war?

At the congress of Aix-la-Chapelle, 1818, the Protocol by which Napoleon’s matter was brought before the congress described Buonaparte in 1815 as merely "the chief of a shapeless force, without recognized political character, and consequently, without any right to claim the advantages and the courtesies due Public Power by civilized nations. . . . Buonaparte, before the battle of Waterloo, was a dangerous rebel; after the defeat, an adventurer whose projects were betrayed by fate. . . . In this situation, his fate was submitted to the discretion of the governments which he had offended; and there
existed then in his favour (with the exception of the rights inseparable from humanity) no positive law, no salutary maxim applicable to him."

Certainly what happened to Napoleon cannot be cited as adding to or detracting from international law in any respect.

The regulations annexed to The Hague Convention No. 4 of 1907 respecting The Laws and Customs of War on Land, the Geneva (Prisoners of War) Convention of 1929, the War Rules of the several national states, especially the U. S. War Department Rules of Land Warfare of 1940, all point to a direction contrary to what Mr. Justice Jackson, and following him, Dr. Glueck, assert to be the legal position of a conqueror. Charles Cheney Hyde in his treatise on "International Law Chiefly as Interpreted and Applied by the United States" states: "According to the Instructions for the Government of the Armies of the United States in the Field", of 1863, and the Rules of Land Warfare of 1917, the Law of War disclaims all cruelty, as well as all acts of private revenge, or connivance at such acts, and all extortions. Nor does it allow proclaiming either an individual belonging to the hostile army or a citizen or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, "any more than the modern law of peace allows such intentional outlawry; on the contrary it abhors such outrage".

The Hague Regulations expressly forbid a belligerent to kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion, or to declare that no quarter will be given.

The Hague Convention No. 4 of 1907 no doubt does not apply except between the Contracting Powers and then only if all the belligerents are parties to this convention. But the regulations annexed to this convention purport to incorporate only the existing principles of the law of nations resulting from the usages established among civilized peoples.

As the law now stands, it will be a "war crime" stricto sensu on the part of the victor nations if they would "execute" the prisoners otherwise than under a due process of international law, though, of course, there may not be anyone to bring them to book for that crime at present.

Dr. Glueck takes the view that the Pact of Paris, itself, does not make its violation an international crime. His third proposition as given above, therefore, is only a corollary to his first proposition. The "dogmatically given affirmative answer" referred to in his third proposition would not stand if his first proposition fails. In my view if the alleged acts do not constitute any crime under the existing international law, the trial and punishment of the authors thereof with a new definition of crime given by the victor would make it a "war crime" on his part. The prisoners are to be dealt with
according to the rules and regulations of international law and not according to what the victor chooses to name as international law.

I need not stop here to examine the proposition regarding the law of armistice and treaty propounded by Dr. Glueck. For my present purposes it would be sufficient to notice, as I have noticed already, that there is nothing in the terms of the armistice or surrender here which would confer on the victor nations any such unfounded authority as is enunciated by Dr. Glueck. The International law, itself, does not vest in the victor any boundless authority.

Dr. Glueck in his fourth, fifth and sixth propositions, as analysed above, seeks to establish that "aggressive war" is an international crime not because it is made so by any pact, convention or treaty, but by what he calls the customary international law. In his seventh and eighth propositions he develops individual responsibility.

I have already examined this part of Dr. Glueck's reasoning and given my view that no such customary international law developed during the relevant period.

At any rate the alleged "custom" or "customary law" does not touch the individuals. The body of growing custom to which reference is made is, at most, custom directed to sovereign states, not to individuals.

I believe, what Mr. Finch has said very recently about the individual criminal responsibility in international law while commenting on the Nuremberg judgment will supply an answer to Dr. Glueck's thesis. I would summarize what Mr. Finch says on the point. Mr. Finch says:

1. The charge of crimes against peace is a new international criminal concept.

(a) (i) It was not envisaged in the warnings issued by the Allies before hostilities ended;

(ii) nor made part of the original terms of reference to the United Nations War Crimes Commission established in London during the war;

(iii) In Dr. Lachs' collection of texts there is an aide memoire of the British Government issued August 8, 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.

(b) It may be traced to the influence of Professor A. N. Trainin of the Institute of Law of the Moscow Academy of Science, who, in 1944, published a book entitled "Ugolovnaya Otvetstvennost Gitlerovtsov".
2. The crux of the argument by which it is sought to establish personal responsibility for crimes against peace centre around the Pact of Paris for the Renunciation of War.

(a) (i) The Pact itself makes no distinction between aggressive, defensive, or other kinds of war but renounces all wars.
(ii) Kellogg in the negotiations with France preceding the signature of the Pact definitely declined to accede to the French proposal that the Pact be limited to the renunciation of 'wars of aggression'.
(iii) According to him "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."

(b) The Pact does not mention sanctions for its enforcement other than 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."
(i) This provision is not imperative but conditional in the discretion of each signatory;
(ii) In identical notes submitting the draft treaty to the other signatories, 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."
(iii) Both by the preamble and Secretary of State's (Kellogg's) interpretation, any action which might result from a violation of the Pact was to be directed against the violating government.
(iv) Personal criminal responsibility was not stipulated nor even implicitly suggested.

(c) In the years immediately following its conclusion, the meaning of the Pact became the subject of discussion in other countries.

(i) 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. According to this British Memorandum: "The effect of those instruments, taken together 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 states there has been in consequence a fundamental change in the whole question of belligerent and neutral rights."

(ii) Upon receipt of the British Memorandum, Mr. Stimson, the then 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 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."

(d) In September, 1934, the International Law Association in its meeting at Budapest, adopted articles of interpretation of the Pact. This interpretation of these distinguished international law experts does not contain the remotest suggestion of criminal action against individuals for the violation of the Pact.

(i) 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 favour the victim of the aggression against the state making war in violation of the Pact.

(ii) This interpretation was relied upon in part in support of the modification of the attitude of the U.S. early in 1941 (Lend Lease Act, March 11, 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 U.S.

(iii) Earlier attempts made in the U.S. to implement the Pact of Paris by legislation which would have authorized the Government to discriminate between the belligerents in future war, all failed and resulted in the passage of more rigid laws to preserve the neutrality and peace of the United States.

(e) (i) In the light of the legislative history of the official attitude of the Government of the United States toward the interpretations of the Pact, from January, 1933 to the passing of the Neutrality Pact of November 4, 1939, 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, etc.

(ii) The Budapest articles of interpretation were cited in support of the Lend Lease legislation.

3. It requires an attenuated legal conceptualism to go further 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 violation of treaties regulating state conduct.

4. (a) It cannot be denied that beginning with the establishment of the League of Nations the concept of preventing aggressive war has been growing.

(b) All such efforts deserve the utmost praise, sympathy and support.

(c) But unratified protocols cannot 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 cannot be relied upon as evidence to prove the evolution of an international custom outlawing aggression.

Dr. Glueck, however, does not rely on any customary law in fixing the criminal responsibility on the individuals. He admits that the alleged customary law will only take us to the state concerned. He correctly says that if war is crime the criminal responsibility attaches to the state concerned. He however reaches the individuals by a process of reasoning which seems to indicate as if we must get hold of them anyhow. Individuals must be got hold of in order to make the responsibility effective. This he considers to be the realistic view in the light of the practical as well as logical result to which one or the other solution will lead.

Even keeping in view the very harsh reproaches to which one must subject himself if he is not prepared to share this view of Dr. Glueck, I am afraid, I cannot induce myself to this view of the law.

I cannot forget that so long as national sovereignty remains the fundamental basis of international relations, acts done while working a national constitution will remain unjustifiable in international system and individuals functioning in such capacities will remain outside the sphere of international law. I, myself, am not in love with this national sovereignty and I know a strong voice has already been raised
against it. But even in the postwar organizations after this Second World War national sovereignty still figures very largely.

One great authority relied on by Dr. Glueck is the Right Honourable Lord Wright. His views are expressed in an article on "War Crimes Under International Law", published in the Law Quarterly Review in January, 1946. After all, as daily experience shows, the success of a thought in every field of human activity including the legal field does not always depend exclusively upon its inner value but also upon certain outward circumstances, particularly upon the weight generally attached to the words of the person who has given utterance to the thought. I must say with due respect that Lord Wright's utterances deserve special weight on both these grounds and these must be examined very carefully before we can decide one way or the other. I would quote from Lord Wright's article at some length.

Lord Wright does not base his conclusion on any unlimited power of the victor. He is rather against the view that any judiciary should be instrumental to the mere manifestation of the victor's power, if the trial is to be such a manifestation only. His thesis is that such acts constitute crime in the individuals concerned under the international law.

Lord Wright says:
"War crimes are generally of a mass or multiple character. At one end are the devisers, organizers, originators, who would in many cases constitute a criminal conspiracy; at the bottom end are the actual perpetrators; in between these extremes are the intermediate links in the chain of crime."

He then quotes from Professor Trainin's work on "Hitlerite Responsibility under the Criminal Law", where the learned Professor observes that all members of the Hitlerite clique were not only participants in an international band of criminals but also organizers of a countless number of criminal acts and concludes that "all the Hitlerite criminals are liable without exception from the lance-corporal in the Army to the lance-corporal on the throne." Accepting this view of Professor Trainin and referring to the several acts ascribed to the Hitlerite group, Lord Wright proceeds to observe: "A 'political' purpose does not change murder into something which is not murder. Nor do they cease to be crimes against the law of war because they are also crimes against the moral law or the elementary principles of right and wrong. Law and morality do not necessarily coincide, though in an ideal world they ought to. But a crime does not cease to be a crime because it is also an offence against the moral code."

With "the above thought in mind" Lord Wright approaches the question "whether the initiation of war, the crime against peace, which the Agreement of the four Governments pillories, is a Crime
calling for the punishment of individual criminals." He then proceeds to consider the question from two different view-points, namely:

1. That "the war was ushered in by the most brutal and blatant announcements that it would be conducted with every possible atrocity in order to strike terror"; and thus it became criminal;

2. That "even without the calculated system of terrorism" the war was criminal as it aimed at aggression and world domination.

Coming to the second aspect of his approach, Lord Wright says:

"But the category of crimes against peace which is one of the counts in the Indictment of 1945 and includes the planning, preparation and initiation of aggressive or unjust war, requires a short further discussion. It does raise one of the most debated questions of international law. I have stated why I think it is an international crime and indeed the master crime. It is the source and origin of all the evils of war—modern war, even without the calculated system of terrorism exhibited by the Germans and their Allies in the war just ended, is about the greatest calamity which can be inflicted upon mankind. No one can doubt that to bring this about with cold, calculated villainy, for the purpose of spoliation and aggrandisement, is a moral crime of the foulest character."

Lord Wright then points out how legal writers are fond of distinguishing moral from legal crime, and says:

"There is, however, no logical distinction in the character of the act or its criminality; the only question is whether the crime can be punished on legal grounds, that is whether the offence has achieved the status of being forbidden by law."

He then proceeds:

"To punish without law is to exercise an act of power divorced from law. Every act of punishment involves an exercise of power, but if it is not based on law it may be morally just, but it is not a manifestation of justice according to law, though some seem to think that if the justice and morality of the decision are incontrovertible, it may serve as a precedent for similar acts in the future and thus establish a rule of International Law. Thus the banishment of Napoleon I to St. Helena by the executive action of the Allies may, according to that way of thinking, be taken in some sort to create a precedent for the similar executive action for the punishment of deposed or of abdicated sovereigns. But the idea of an International Law between different members of the community of nations would not be thus developed."

Lord Wright then points out:

"The punishment of heads or other members of Governments or national leaders for complicity in the planning and initiating of aggre-
sive or unjust war has not yet been enforced by a Court as a matter of International Law."

In this connection he also refers to the fact that:
"The 1919 Commission did not recommend that the act which brought about the war should be charged against their authors."

According to Lord Wright, however:
"between then and the commencement of the war just ended, civilized nations, appalled by reviewing the destruction and suffering caused by the First Great War and appalled by the thought of the immeasurable calamities which would flow from a Second World War, gave much thought to the possibility of preventing the second war. The Covenant of the League of Nations did contain certain machinery for that end. Certain conventions were summoned to declare that unjust or aggressive war was to be prohibited: one of these actually declared that it was a crime."

Lord Wright then considers the effect of the Pact of Paris in this respect and says:
"In 1928 the Pact of Paris or the Kellogg-Briand Pact was signed or adhered to by over sixty nations. It was a solemn treaty. Its central operative clause was brief, unusually brief for an international document, but its terms were plain, clear and categorical. The nations who signed or adhered to it unconditionally renounced war for the future as an instrument of policy. There would seem to be no doubt or obscurity about the meaning of this...there seems to be no room for doubt that the Pact was, as is clear by its very terms, intended to declare war to be an illegal thing. This which is plain enough on its face has been declared to be the fact by the most eminent statesmen of the world."

Lord Wright then seeks to explain away the want of any provision in the Pact with regard to sanctions and machinery for the settlement of differences between nations. He says:
"The concert of the nations evidenced by the Pact had the sanction of being embodied in a Treaty, the most formal testimony to its binding force. As a treaty or agreement it only bound the nations which were parties to it. But it may be regarded from a different aspect. It is evidence of the acceptance by the civilized nations of the principle that war is an illegal thing. This principle so accepted and evidenced, is entitled to rank as a rule of International Law."

So far the criminal responsibility is traced to the aggressive nation. The reasoning with which Lord Wright justifies fixation of responsibility on the individuals finds expression thus:
"It may be that before the Pact the principle was simply a rule of morality, a rule of natural law as contrasted with positive law. The Pact, which is clear and specific, converts the moral rule into a positive rule comparable to the laws and customs of war, and like these laws and customs binding on individuals.
since the principle that individuals may be penally liable for particular breaches of International Law is now generally accepted. Thus violation of the principle that war, if unjust, is illegal and is not only a breach of treaty on the part of the nation which violates it, carrying with it all the consequences which attend a treaty-breaking, but is also a crime on the part of the individuals who are guilty as conspirators, principals or accessories of actively bringing it about, as much as a violation of the customary laws of war. Nations can only act by responsible instruments, that is by persons. If a nation, in breach of a treaty, initiates aggressive war the guilt of the responsible agents of the nation who bring this about, being able to do so by reason of their high position in the State, is a separate, independent and different liability, both in its nature and penal consequences. This is merely an illustration of the thesis that international crimes are of a multiple character: even violations of the laws of war will, unless the case is one of purely individual wrong-doing, generally involve multiple penal liability. Here the nation breaks the treaty, but the heads of the State who bring about the war are by their acts personally guilty of doing what the Pact declares to be illegal. That is a crime on their part like the crime of violating the laws of war. The nation is liable as a treaty-breaker, the statesmen are liable as violating a rule of International Law, namely, the rule that unjust or aggressive war is an international crime. The Pact of Paris is not a scrap of paper. This, in my opinion, is the position when the Pact of Paris is violated. It is on this principle, as I apprehend, that crimes against peace may be charged personally against the leading members of the Nazi Government."

Lord Wright's last appeal is to the progressive character of international law, already noticed by me.

The authorities such as I have referred to above or may hereafter have occasion to refer to are only of persuasive value to us and in spite of what I have said as to why a special weight is due to his view, I should at once say with due deference that for the reasons given below I do not feel inclined to the view supported by the Right Honourable Lord Wright.

The passages wherein Lord Wright quotes from Professor Trainin and concludes that however "high his rank in the hierarchy", a member of the Hitlerite clique "is still only a murderer, robber, torturer, debaucher of women, liar and so on", need not detain us long. These are mere expressions of indignation roused by the remembrance of recent abominable acts during war. It may not be possible for one to avoid such feeling who had to study the tale of Nazi atrocities. But such a feeling must be avoided by a Tribunal sitting on trial for such alleged acts.

Lord Wright approaches the question in two different ways. His first line of approach is dependent on a special factual feature of the
case before him, namely, that the war in question was not only an aggressive war but that it was expressly designed to be conducted in a criminal manner—it was ushered in by the most brutal and blatant announcements that it would be conducted with every possible atrocity in order to strike terror. In my opinion, this fact, if established, would make these persons responsible for war crimes stricto sensu. Legal or illegal, war is to be regulated in accordance with the regulating norms of international law. Those who actually violate such regulations and those who direct their violations are equally war criminals stricto sensu. This line of approach, therefore, does not help us in answering the question raised before us.

In his second line of approach, Lord Wright takes up the case of war without the calculated system of terrorism and this is what we are concerned with for our present purpose.

So far as the question before us is concerned, Lord Wright’s real reasons for declaring individual responsibility will be found to be the following:—

1. In order that there may be international crime, there must be an international community.
   (a) There is a community of nations, though imperfect and inchoate;
   (b) The basic prescription of this community is the existence of peaceful relations between states.

2. War is a thing evil in itself: It breaks international peace.
   (a) It may be justified on some specified grounds;
   (b) A war of aggression falls outside that justification;
   (c) To initiate a war of aggression is therefore a crime.

3. Granted the premises:
   (a) That peace among nations is a desirable thing;
   (b) That war is an evil in itself as it violates that peace;
   (c) That there is a criminal international law affecting individuals;

It follows that individuals responsible for planning, preparing, starting and waging war are criminally liable under the international law.

4. Whatever might have been the legal position of war in an international community, the Pact of Paris or the Kellogg-Briand Pact of 1928 clearly declared it to be an illegal thing.

Reasons 1, 2, and 4, specified above, relate to the question whether aggressive war is at all a crime in international law. I have already considered that question and have answered it in the negative. The question now under our consideration is, assuming such a war to be a crime, what is the position of the individual state agents responsible for bringing about this war condition? Lord Wright touches this question only in his reason 3(c) as specified by me.
He, himself, points out that the punishment of heads or other members of governments or national leaders for complicity in the planning and initiating of aggressive or unjust war has not yet been enforced by a court as a matter of international law.

The cases of criminal international law affecting individuals referred to by Lord Wright are also referred to and discussed by Judge Manley O. Hudson, Professor Glueck and Professor Hans Kelsen. Those are all cases where the act in question is the act of the individual on his own behalf committed on high seas or in connection with international property. Most of these cases are expressly provided for. I do not see how the existence of such international law helps the solution of the present question. It may be that even the present case could have been provided for, either in the several national systems or in international law. In fact, Senator Borah in 1927 placed a Resolution before the Senate to that effect. As has been pointed out by Professor Glueck, that has not been done by any of the nations for reasons best known to them. It may only be added here that during the period intervening between the two World Wars recommendations in this respect came from various unofficial bodies but all these seem to have gone unheeded by the several states.

Considering (1) that sovereignty of states has been the fundamental basis of hitherto existing international law; (2) that even in the post-war organizations this sovereignty is being taken as the fundamental basis; and (3) that so long as sovereignty of the states continues to play this important role, no state is likely to allow the working of its constitution to be made justiciable by any agency, I cannot hold that this omission on the part of the states in respect of the present question was not deliberate. I doubt if the states would even now agree to make such acts of their agents justiciable by others.

I have already given the view expressed by Prof. Quincy Wright in 1925. This is the place where I should notice what he now says while endeavouring to support the Nuremberg judgment.

Prof. Wright says:

"1. The Tribunal reached the conclusion that the Charter declared pre-existing international law when it provided that individuals were liable for crimes against peace.

"2. In coming to this conclusion the Tribunal emphasized the development of an international custom which regarded the initiation of aggressive war as illegal and which had been given formal sanction by substantially all the states in the Pact of Paris of 1928.

"3. (a) The nexus between the obligation of states not to resort to aggressive war and the criminal liability of individuals who contribute to the violation of this
obligation was illustrated by analogy to the generally recognized individual liability for War Crimes Stricto Sensu.

"(b) If an individual act is of a criminal character, that is, mala in se, and is in violation of the states' international obligation, it is crime against the law of nations."

Professor Wright supports this view and for this purpose relies on the authority of Lord Wright, who, according to Prof. Wright, pointed out that the Pact of Paris converted the principle that "aggressive war is illegal" from a rule of "natural law" to a rule of "positive law", which like the rules of war is binding on individuals as well as states. I have already given my reasons why I could not accept this view of the effect of the Pact of Paris.

Lord Wright in arriving at his conclusion placed great reliance on the views of Mr. Trainin of the U. S. S. R. who with Mr. I. T. Nikitchenko signed the London agreement for the Government of the U. S. S. R. for the establishment of the International Tribunal for the trial of the major war criminals of the European Axis.

Mr. Trainin, it must be said, frankly points out the real urge for these trials. He says:

"The question of the criminal responsibility of the Hitlerites for the crimes that they have committed is therefore of the greatest importance; it has become a very pressing problem, as the monstrous crimes of the Hitlerite butchers have aroused the most burning and unquenchable hatred, thirst for severe retribution in the hearts of all the honest people of the world, the masses of all liberty-loving people."

Mr. Trainin's article is entitled "The Criminal Responsibility of the Hitlerites." The learned author starts with the following propositions:

1. The problems of international criminal law have not hitherto been dealt with clearly.
   (a) There is no clear definition of the fundamental meaning of international criminal law or international crime.
   (b) No orderly system of institutes of international criminal law is recognized.

2. In the existing literature all problems of international criminal law usually boil down to one question—that of jurisdiction.
   (a) The policy of aggressive imperialistic supremacy, a constant threat to peace, a policy systematically giving ample scope for the use of force in the sphere of international relations, naturally could not contribute to the development and strengthening of international law as a system of rules protecting the liberty, independence and sovereignty of nations.
CRIMES IN INTERNATIONAL RELATIONS

(1) But it would be a serious mistake to draw the general conclusion from this fact—that the introduction of the problem of international criminal law was inopportune or fruitless.

(2) Two conflicting tendencies of the historical process had been visible even before the Second World War; namely:
   (a) the collision of imperialistic interests, the daily struggle in the field of international relations and the futility of international law—the tendency reflecting the policy of the aggressive nations in the imperialistic era;
   (b) the struggle for peace and liberty and independence of nations—a tendency in which was reflected the policy of a new and powerful international factor.

3. The present great war has given the latter tendency extraordinary scope and enormous power.
   (a) Liberty-loving nations have agreed that they respect the right of all nations to choose their own form of government and will strive to attain complete cooperation among all nations in the economic field in order to guarantee a higher standard of living, economic development and social security.
   (b) The Declaration of the Four Nations on general security proclaimed in Moscow on October 30, 1943, replaced "the period of full play of imperialistic plundering, and the weakness of international legal principles" by a period which strengthens the laws which are the basis of international relations and which consequently leads to the strengthening of the battle against all the evil elements.
   (c) That is why there is an indissoluble organic tie between the beginning of the creation of a new system of international legal relations and the fight against the Hitlerite crimes and against the international misdeeds of the aggressors.

4. To facilitate this process of development and to strengthen these new ideas, juridical thought is obliged:
   (a) to forge the right form for these new relations;
   (b) to work out a system of international law, and
   (c) as an indissoluble part of this system to dictate to the conscience of nations the problem of criminal responsibility for attempts on the foundation of international relations.

Towards the end of the first chapter Mr. Trainin considers it to be "the most serious problem and the honourable obligation of the Soviet jurists to give legal expression to the demand for retribution for the crimes committed by the Hitlerites." He then proceeds in
his second chapter to enumerate "German crimes in the First World War and the Treaty of Versailles".

In chapter three he takes up the discussion of "The Concept of International Crime". The learned author points out that though the War of 1914-1918 showed the great importance of the problem of the responsibility of the aggressor, juridical thought still continued to wander in formal, unrealistic abstractions.

He points out that the problem in this respect is quite different in the field of international law from that in any national system. Here in the international field "there is no experience, no tradition, no prepared formulae of crime or punishment. This is a field in which criminal law is only beginning to penetrate, where the understanding of crime is only beginning to take form."

He then examines certain existing definitions and international conventions relating to certain crimes and rejects the definitions, observing that in them "the concept of an international offence as a particular kind of infringement upon sphere of international relations disappears completely, being dissolved in the mass of crimes provided against in national laws and committed on the territory of different states."

As regards the international conventions the learned Professor points out that "the selection of this or some other crimes as the object of the provisions of international conventions is necessitated, not by theoretical considerations concerning the nature of international crime, but by various political motives; the interests of one country or a group of countries in the combat against a given crime, material facilities for organization of such combat, and other reasons of that nature". These do not help the solution of the problem now raised. "Because of their juristic nature and because of their factual significance, conventions for certain common criminal offenses appear to be one of the various forms of reciprocal support for criminal law by governments having in view a realistic combat against crime. This reciprocal action of governments is not connected directly with the problem of international crimes."

Mr. Trainin points out that such international conventions do not make these crimes international crime. Again, simply because there is no international convention relating to something that does not mean that this might not constitute international crime.

The learned author then takes up the League Conventions, and finds in them mere attempts at "classifying certain acts as criminal" and concludes that these also failed to "establish a concept of international crime".

He then proceeds to give his own views thus:

1. The conception of international crime and the combating of international crimes should be henceforth constructed on the
(a) Of experience of the "Fatherland Defence War".
(b) On principles imbued with a real solicitude for the strengthening of the peaceful co-operation of the nations.

2. An international crime is an original and complex phenomenon. It differs in quality from the numerous crimes provided for by the national criminal legislations. Crimes in national systems are connected by one common basic characteristic—they are infringements upon social relations existing within a given country.

3. The epoch when governments and peoples lived isolated or practically isolated from each other is long past.
   (a) The capitalistic system specially developed complicated relations between nations.
      (1) A steady international association has developed.
      (2) Despite the conflicting interests of various nations, despite the differences in patterns of the political systems of countries, this international association forms innumerable threads connecting peoples and countries and represents, in fact, a great economic, political and cultural value.

4. An international crime is an attempt against the abovementioned achievement of human society—an international crime is directed toward the deterioration, the hampering and the disruption of these connections.
   (a) An international crime should be defined as infringements on the bases of international association.

5. The legal regime of international relations rests on its own peculiar basic source of law, namely a treaty which is the only law-creating act.
   (a) It is wrong to say "that because the states accepted for themselves, by voluntary agreements, the rules of their conduct, they themselves are also the final judges to decide if they can recognize these rules for a long time, or due to changed conditions, they will regulate in a new way the vital rights of the nation".

The rule that criminal law has no retroactive force can be provided against by the terms of a treaty. The treaty itself may supply the basis for the acknowledgment of the retroactive effect of such a rule of law.

In Chapter four, the learned author gives a classification of international crimes. He begins by defining an international crime to be "a punishable infringement on the bases of international associations", classifies such crimes into two groups, the first group being "Interference with Peaceful Relations between Nations"; and the second, "Offences connected with War". In the first group he places seven items, namely:
1. Acts of aggression;
2. Propaganda of aggression;
3. Conclusion of agreements with aggressive aims;
4. Violation of treaties which serve the cause of peace;
5. Provocation designed to disrupt peaceful relations between countries;
6. Terrorism;
7. Support of armed bands (Fifth Column).

According to him, with the exception of terrorism, none of the others are covered by international conventions.

Chapter five is devoted to "Crimes of the Hitlerites against Peace" and the learned author concludes his enumeration by saying that "the Hitlerites, having criminally exploded the world, transformed war into an elaborately thought out system executed according to plan, a system of militarized banditry".

In the next chapter he again enumerates "War Crimes of the Hitlerites" giving war crimes stricto sensu committed during the last war.

In Chapter seven, Mr. Trainin proceeds to find out "the perpetrator of an international crime". His propositions here seem to be the following:

1. The central problem in the sphere of criminal justice is the problem of guilt; there is no criminal responsibility without guilt. Guilt is expressed in two forms: In the form of intention and in the form of negligence.
2. A state as such cannot act with intention or negligence: This brings in the criminal exemption of a state.
3. For criminal acts committed in the name of the state or under its authority, the physical persons who represent the government and act in its name must bear the responsibility.
   (a) The criminal responsibility of persons acting in the name of the state is natural under any form of government, but it is specially appropriate in Germany, ruled by tyranny.
   (b) The criminal responsibility of physical persons acting on behalf of juridical persons is recognized in criminal legislations in force now (e.g., Art. 172 of the Swiss Criminal Code of 1937 making directors of a company criminally liable for some act of the company).
   (c) The physical persons are criminally responsible because it is they, who infringe the relations based on international law—it does not matter that such individuals are no party in such international relations.

This is the whole thesis of Mr. Trainin. The remaining four chapters are not relevant for our present purpose.
Unlike the other authors named above, Mr. Trainin does not base his conclusion either on any pact or convention or on any customary law. He does not say that international law, as it stood before World War I, did contemplate such acts as criminal. It is not his case that any particular pact, including the Pact of Paris, made such acts criminal. He does not even claim that the criminality developed as a customary law. On the other hand, he seems to point out that it will be a false analogy to rely on the cases of crimes hitherto recognized in international relations and, from such recognition, to attempt the introduction of the present crime.

It may sometimes be legitimate to apply the juristic concept of a legal proposition to phenomena which were not within the original contemplation of the proposition. But I doubt if it is legitimate to pour an altogether new content into such a proposition, a content which is not even approximately similar to its original content.

Mr. Trainin's thesis seems to be that since the Moscow Declaration of 1943 and as a result of the same, a new International Society has developed. To facilitate this process of development and to strengthen these new ideas, juridical thought is obliged to forge the right form for these new relations, to work out a system of international law and, as an indissoluble part of this system, to dictate to the conscience of nations the problem of criminal responsibility for attempt on the foundations of international relations.

Mr. Trainin speaks of some "honourable obligation" of the Soviet jurists to give legal expression to the demand of retribution for the crimes committed by the Hitlerites. I hope this sense of obligation to satisfy any demand of retribution did not weigh too much with him. A judge and a juridical thinker cannot function properly under the weight of such a feeling. Yet, it cannot be denied that Mr. Trainin's is a very valuable contribution to deep juridical thinking.

The rules of law, no doubt, to a great extent, flow from the facts to which they apply. Yet an attempt to find such rules directly by such a consideration alone is likely to lead one to lose his way in a sort of labyrinth. The theoretical legal principles involved in this manner are not likely to stand the test of real life.

The Moscow Declaration is only a Declaration that a new epoch of international life is going to begin.

Even assuming that this new epoch has commenced, that will only mean that the "reason" for the suggested law has come into existence. But the reason for the law is not, itself, the law.

The legal rule in question here is not such as would necessarily be implied in the state of facts related by Mr. Trainin and would thus originate simultaneously with those facts. International relations, even as promissed by the Moscow Declaration, will still constitute a society in a very specific sense. It would be under the reign of law.
also in a specific sense, and, however much it may be desirable to
have criminal law in such a life, such a law would not be its necessary
implication.

At most, Mr. Trainin has only established a demand of the
changing international life. But, I doubt whether this can be a
genuine demand of that life and whether it can be effectively met
by the introduction of such a criminal responsibility which would
under the present organization only succeed in fixing such responsi-
bility upon the *parties to a lost War*.

The learned author ignores the fact that even now national
sovereignty continues to be the basic factor of international life and
that the acts in question affect the very essence of this sovereignty.
So long as submission to any form of international life remains
dependent on the volition of states, it is difficult to accept any mere
implication of a pact or agreement which would so basically affect the
very foundation of such sovereignty.

In any case, even assuming that such a criminal law flows
naturally from mere reason, it is difficult to see how it is carried back
to the past.

If Mr. Trainin is thinking of any treaty eliminating this diffi-
culty as to retroactivity, it would suffice to say, as I have said already,
that in the case before us there is no such treaty.

The *most valuable contribution of Mr. Trainin* in this respect
is his view of the place of criminal responsibility in international life.
He rightly points out that piracy, slavery and the like that have
hitherto been included in international system as crimes cognizable
by international law are really not international crimes in the correct
sense of the term. He points out that "In reality, the selection of
this or some other crimes as the object of the provisions of inter-
national conventions is necessitated, not by theoretical considerations
concerning the nature of international crimes, but by various political
motives: the interests of one country or a group of countries in the
combat against a given crime, material facilities for organization of
such combat and other reasons of that nature. . . . . . . . Because of their
juristic nature and because of their factual significance, conventions for
certain common criminal offenses appear to be one of the various *forms
of reciprocal support* for criminal law by governments having in view
a realistic combat against crime. This reciprocal action of govern-
ments is not a loss of practical attributes, but it is not connected
directly with the problem of international crimes."

Mr. Trainin points out that the conception of criminal respon-
sibility in international life can arise only when that life itself reaches
a certain stage in its development. Before we can introduce this con-
ception there, we must be in a position to say that that life itself is esta-
blished on some peaceful basis: international crime will be an infringe-
ment of that base—a breach or violation of the peace or pax of the international community.

I fully agree with Mr. Trainin in this view. What I find difficult to accept is his meaning of the term "peace" in this context; as also his view of the nature of the international community as it stood before the Second World War. Further, I doubt if it would at all be expedient to introduce such criminal responsibility in international life.

The question of introduction of the conception of crime in international life requires to be examined from the viewpoint of the social utility of punishment. At one time and another different theories justifying punishment have been accepted for the purpose of national systems. These theories may be described as (1) Reformatory, (2) Deterrent, (3) Retributive and (4) Preventive. "Punishment has been credited with reforming the criminal into a law-abiding person, deterring others from committing the crime for which previous individuals were punished, making certain that retribution would be fair and just, rather than in the nature of private revenge, and enhancing the solidarity of the group by the collective expression of its disapproval of the law-breaker." Contemporary criminologists give short shrift to these arguments. I would however proceed on the footing that punishment can produce one or the other of the desired results.

So long as the international organization continues at the stage where the trial and punishment for any crime remains available only against the vanquished in a lost war, the introduction of criminal responsibility cannot produce the deterrent and the preventive effects.

The risk of criminal responsibility incurred in planning an aggressive war does not in the least become graver than that involved in the possible defeat in the war planned.

I do not think anyone would seriously think of reformation in this respect through the introduction of such a conception of criminal responsibility in international life. Moral attitudes and norms of conduct are acquired in too subtle a manner for punishment to be a reliable incentive even where such conduct relates to one's own individual interest. Even a slight knowledge of the processes of personality-development should warn us against the old doctrine of original sin in a new guise. If this is so, even when a person acts for his own individual purposes, it is needless to say that when the conduct in question relates, at least in the opinion of the individual concerned, to his national cause, the punishment meted out, or, criminal responsibility imposed by the victor nation, can produce very little effect. Fear of being punished by the future possible victor for violating a rule which that victor may be pleased then to formulate would hardly elicit any appreciation of the values behind that norm.

In any event, this theory of reformation, in international life, need not take the criminal responsibility beyond the State concerned. The theory proceeds on this footing. If a person does a wrong to
another, he does it from an exaggeration of his own personality, and this aggressiveness must be restrained and the person made to realize that his desires do not rule the world, but that the interests of the community are determinative. Hence, punishment is designed to be the influence brought to bear on the person in order to bring to his consciousness the conditionality of his existence, and to keep it within its limits. This is done by the infliction of such suffering as would cure the delinquent of his individualistic excess. For this purpose, an offending State itself can be effectively punished. Indeed the punishment can be effective only if the delinquent State as such is punished.

In my opinion it is inappropriate to introduce criminal responsibility of the agents of a state in international life for the purpose of retribution. Retribution, in the proper sense of the term, means the bringing home to the criminal the legitimate consequences of his conduct—legitimate from the ethical standpoint. This would involve the determination of the degree of his moral responsibility, a task that is an impossibility for any legal Tribunal even in national life. Conditions of knowledge, of training, of opportunities for moral development, of social environment generally and of motive fall to be searched out even in justifying criminal responsibility on this ground in national life. In international life many other factors would fall to be considered before one can justify criminal responsibility on this retributive theory.

The only justification that remains for the introduction of such a conception in international life is revenge, a justification which all those who are demanding this trial are disclaiming.

It may be contended that indignation at a wrong done is a righteous feeling and that that feeling itself justifies the criminal law.

It is perhaps right that we should feel a certain satisfaction and recognize a certain fitness in the suffering of one who has done an international wrong. It may even be morally obligatory upon us to feel indignant at a wrong done.

But it would be going too far to say that a demand for the gratification of this feeling of revenge alone would justify a criminal law. In national systems a criminal law, while satisfying this feeling of revenge, is calculated to do something more of real ethical value and that is the real justification of the law. Though vengeance might be the seed out of which criminal justice has grown, the paramount object of such is the prevention of offences by the menace of law.

The mere feeling of vengeance is not of any ethical value. It is not right that we should wish evil to the offender unless it has the possibility of yielding any good. Two wholly distinct feelings require consideration in this connection. The one is a feeling of moral revulsion and is directed against the crime. The other is a desire for vengeance and is directed against the criminal. To revenge oneself is, in truth, but to add another evil to that which has already been
done, and the admission of it as a right is, in effect, a negation of all civil and social order, for thereby are justified acts of violence not regulated by, nor exercised with reference to, the social good. There are few who in modern times assert the abstract righteousness of a desire for vengeance.

I am not unmindful of the view expressed by Fitzjames Stephen wherein he asserts the righteousness of vengeance. "The infliction of punishment by law," says Stephen, "gives definite expression and a solemn ratification to the hatred which is excited by the commission of the offence, and which constitutes the moral or popular, as distinguished from the conscientious sanction of that part of morality which is also sanctioned by the criminal law. The criminal law thus proceeds upon the principle that it is morally right to hate criminals and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it." "I think it is highly desirable," he continues, "that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it."

Though apparently this seems to indicate as if Stephen defends the desire for vengeance as ethically proper, on a careful examination of the thought thus expressed by him it would be found that what he really has in mind is that feeling of indignation which we justly feel at the commission of a wrong rather than the feeling of revenge pure and simple. If from his thought the belief in the possible educative or preventive value of the punishment is eliminated then the sentiment hardly justifies the law. Indignation arises on the commission of the wrong act. The justification of the law is its preventive capacity. If in an organization this prevention is not at all possible, the justification for its introduction there is absent: the organization is inapt for the introduction of criminal punishment.

In the feeling of indignation, the element that really matters much for the community is the expression of disapprobation. This disapproving feeling prevails primarily against the act; but of necessity it extends also to its author. The question is what is the possible and proper method of expressing this disapprobation! In my opinion at the present stage of the international society, the method that would necessarily depend on the contingency of a war being lost, and that would be available only against the vanquished, is not what can be justified on any ethical ground. There are other available methods of giving expression to this disapprobation and in the present stage those other methods of expressing world opinion should satisfy the international community.

According to Mr. Trainin, before the present World War, "The policy of aggressive imperialistic supremacy, a constant threat to
peace, a policy systematically giving ample scope for the use of force in the sphere of international relations, naturally could not contribute to the development and strengthening of international law as a system of rules protecting the liberty, independence and sovereignty of nations.”

“But”, Mr. Trainin says, “it would be a serious mistake to draw the general conclusion from this fact that the introduction of the problem of international criminal law was inopportune or fruitless: this would be to disregard the difficulty and complexity of international relations.”

According to him even before the Second World War there were two “tendencies of the historical process”:,—one being the collision of imperialistic interests, the daily struggle in the field of international relations and the futility of international law—the tendency reflecting the policy of the aggressive nations in the imperialistic era—and the other, just a parallel and opposite to the former, being the struggle for peace and liberty and independence of nations, a tendency in which is reflected the policy of a new and powerful international factor—the Socialist State of the toilers, the U.S.S.R.

Thus there was some scope for the introduction of the conception of criminal law in international life in view of the second tendency named above.

This tendency, says Mr. Trainin, has been given extraordinary scope and enormous power by the Second War. The nations have now agreed that they “respect the right of all nations to choose their own form of government and will strive to attain complete co-operation among all nations in the economic field in order to guarantee a higher standard of living, economic development and social security “. He refers to the Moscow Declaration of October 30, 1943 as having confirmed this solemnly. It is not very clear, but it seems that Mr. Trainin takes this solemn resolve on the part of the great powers as establishing the base of the international life and consequently as supplying the basis of criminality in the international system. He says: “Just as earlier, in the period of full play of imperialistic plundering, the weakness of international legal principles hindered the development of a system of measures to prevent the violation of international law, now, on the contrary, the strengthening of the laws which are the basis of international relations must consequently lead to the strengthening of the battle against all the elements which dare, through fraud, terror or insane ideas upset international legal order.”

It seems Mr. Trainin here takes the Moscow Declaration as establishing an international association completely under the reign of law and consequently making any breach of its peace criminal. In this view all wars will be crime unless they can be justified on the strength of the right of private defence as in the national systems.
In another place Mr. Trainin gives credit to the capitalistic system as developing complicated relations between individual nations. From this, according to him, a steady international association has developed. "Despite the conflicting interests of various nations, despite the difference in patterns of the political systems of countries, this international association forms innumerable threads connecting peoples and countries and represents, in fact, a great economic political and cultural value." An international crime, according to Mr. Trainin, is an attempt against the association between countries, between peoples, against the connections which constitute the basis of relations between nations and countries. An international crime is said to be one which is directed toward the deterioration, the hampering and the disruption of these connections.

I have elsewhere given my view of the character of the so-called international community as it stood on the eve of the Second World War. It was simply a co-ordinated body of several independent sovereign units and certainly was not a body of which the order or security could be said to have been provided by law.

By saying this, I do not mean to suggest any absolute negation of international law. It is not my suggestion that the observance of the rules of international law, so far as these go, is not a matter of obligation. These rules might have resulted from the calculation that their observance was not incompatible with the interest of the state. Yet, their observance need not be characterized as the result of such calculation. A state before being a willing party to a rule, might have willed thus on the basis of some such calculation, but after contribution of its "will", which is essential for the creation of the rule, it may not retain any right to withdraw from the obligation of the rule thus created: the rule thus exists independently of the will of the parties: it is of no consequence that in coming into existence it had to depend on such will. Yet, simply because the several states are thus subjected to certain obligatory rules, it does not follow that the states have formed a community under a reign of law. Its order or security is not yet provided by law. Peace in such a community is only a negative concept—it is simply a negation of war, or an assurance of the status quo. Even now each state is left to perform for itself the distributive function. The basis of international relations is still the competitive struggle of states, a struggle for the solution of which there is still no judge, no executor, no standard of decision. There are still dominated and enslaved nations, and there is no provision anywhere in the system for any peaceful re-adjustment without struggle. It is left to the nations themselves to see to the re-adjustment.

Even a pact or a covenant which purports to bind the parties not to seek a solution of their disputes by other than pacific means, contains no specific obligation to submit controversies to any binding settlement, judicial or otherwise. It is a recognized rule of
international life that in the absence of an agreement to the contrary, no state is bound to submit its disputes with another state to a binding judicial decision or to a method of settlement resulting in a solution binding upon both parties. This is a fundamental gap in the international system. War alone was designed to fill this gap—war as a legitimate instrument of self-help against an international wrong, as also as an act of national sovereignty for the purpose of changing existing rights independently of the objective merits of the attempted change. Even when a pact is made to renounce war the gap is left almost unobserved and certainly unprovided for. The basis of a society so designed is not that peace which means public order or security as provided by law and of which an infringement becomes a crime. For a community thus designed, the conception of crime is still premature.

If the moral conscience of the world really wants to reassert the moral dignity of the human race, the world would do better to listen to the Pagan Pronouncement which says: "for the purpose with which good men wage wars is not the destruction and annihilation of the wrongdoers, but the reformation and alteration of the wrongful acts. Nor is it their object to involve the innocent in the destruction of the guilty, but rather to see that those who are held to be guilty should share in the preservation and elevation of the guiltless."

One way in which the moral conscience of the big powers of the world could think of re-asserting the moral dignity of the human race was, as we have seen, by organizing the trials at Nuremberg and Tokyo. We have seen how in this respect the conscience could act promptly.

Another effort in this respect is to be found in Article 13 of the Charter of the United Nations, the relevant provision of which stands thus: "General Assembly shall initiate studies and make recommendations for the purpose of: (a) promoting international cooperation in the political field and encouraging the progressive development of international law and its codification." This is Article 13(1) (a) of the Charter.

In order to initiate such studies a commission has been established which is known as the International Law Commission. This Commission was brought into being in 1948. It was directed inter alia:

(a) to formulate the principles of international law recognized by the Charter of the Nuremberg Tribunal and by the judgment of that Tribunal,

(b) prepare a draft code of offences against the peace and security of mankind.

The Commission took up this study, completed it in course of its second Session held at Geneva from 5th June to 29th July, 1950, and submitted its report which will be found in Vol. 44 of the American Journal of International Law, Supplement of Documents, pp. 105 to 47–1809 B.
148. Further details of this report are given in the appendices. It would suffice to say here for our present purpose that though the Allied Powers felt no hesitation in accepting and applying to the cases of the accused of German and Japanese nationalities the so-called principles of international law recognized in the Charter of Nuremberg Tribunal and in the judgment of the Tribunal, these principles, though so definitely formulated by the International Law Commission, have not even now been given any general acceptance by the United Nations in any binding form of a code.
LECTURE XVII

WAR CRIMES STRICTO SENSU

At least up to the Organization of the League of Nations War, entered upon at the decision of a state and waged by its own armed force, was the supreme sanction of international law, the ultima ratio, the last argument in the controversy. So clearly was the right to make a war recognized that the possession of that right was made one of the principal tests whether or not a particular state could be said to be sovereign state.

It is beyond our purpose here to proceed to examine how far this legal position of war in international life has been modified since the date of the League of Nations. We have already said enough to determine the present place of war in international law and how far international law recognizes, with some legal consequences, the distinction between just war and unjust war or war of aggression and illegal war. Here we are concerned with an altogether different matter. We are concerned with the laws, if any, of conducting such wars, we are concerned with jus in bello as distinct from jus ad bellum. One relates to the question of the proper conduct of belligerents during the war, whereas the other refers to the question of the right to make war itself. A war, whether legal or illegal, whether aggressive or defensive, is still a war to be regulated by the accepted rules of warfare.

So long as States, or any substantial number of them, still contemplate recourse to war, the principles which are deemed to regulate their conduct as belligerents must still be regarded as constituting a vital part of international law. There is a persistent tendency on the part of the belligerents to shape their conduct according to what they consider to be their own needs rather than the requirements of international justice. Strong measures are required to curb this tendency in the belligerent conduct.

War Crimes stricto sensu refer to acts ascribable to individuals concerned in their individual capacity. These are not acts of State and consequently the principle that no State has jurisdiction over the acts of another State does not apply to this case.

We must notice carefully the difference between jus ad bellum, and jus in bello in the matter of their violation. The rules of warfare can be violated by acts of state as well as by acts of private persons. But a jus ad bellum like, for example, the Briand-Kellogg Pact can be violated only by acts of state.
The question that will arise for our consideration here may be placed under the following heads:

1. Whether there are laws of war regulating the conduct of belligerents during the war;
2. The legal consequences of the violations of such rules, if any;
3. The trial and punishment of the violators of such rules.

There is no doubt that international law provides laws of war in order to regulate the conduct of belligerents. The attention of statesmen was early directed to the laws of warfare. Conferences took place at the Hague from time to time and in the formulation of the laws of war the Hague Conferences had an already existing body of customary laws in this respect to build upon. These customary laws were binding without the need of any international convention. As however there was from the very nature of such laws certain amount of uncertainty, these conferences and conventions were felt to be necessary to remove such uncertainties. Besides the rapidly changing techniques of warfare also necessitated such conferences and conventions in order to effectuate necessary changes in the laws of war.

I shall not proceed to give you these rules of warfare in detail. I would only name some of the conventions in order just to give you an idea of these rules. I have already given you the contents of the two indictments at Nuremberg and Tokyo in full details. Therein you will have an idea of the acts that would constitute War Crimes Stricto Sensu being acts in violation of the rules of warfare. You have also an idea of the conventions regulating the conduct of the belligerents in respect of such acts from the contents of those indictments. In short, I may tell you that practically all possible war crimes were detailed in the two indictments, all possible violations of the laws of war were alleged therein and all possible laws of war, customary or created by conventions were alleged to have been violated. You will therefore do better to look into those indictments for detailed information about War Crimes Stricto Sensu.

The acts in breach of the laws and customs of war may be well illustrated by the following:

1. Inhumane treatment, contrary to Article 4 of the Annex to the Hague Convention IV of 1907 and the whole of the Geneva Convention of 1929 and the said assurances. Prisoners of war and civilian internees were murdered, beaten, tortured and otherwise ill-treated, and female prisoners were raped.

2. Illegal employment of prisoner of war labour:
   (a) prisoners of war were employed on work having connection with the operations of war;
   (b) prisoners of war were employed on work for which they were physically unsuited, and on work which was unhealthy and dangerous;
(c) the duration of daily work was excessive, and prisoners were not allowed rests of twenty-four consecutive hours in each week;
(d) conditions of work were rendered more arduous by disciplinary measures;
(e) prisoners were kept and compelled to work in unhealthy climates and dangerous zones, and without sufficient food, clothing and boots.

3. Refusal and failure to maintain prisoners of war:
(a) In supplying food and clothing differences in national and racial customs were not adverted to. Adequate food and clothing were not supplied.
(b) The structural and sanitary condition of the camps and labour detachments failed entirely to comply with the Regulation and was extremely bad, unhealthy and inadequate.
(c) Washing and drinking facilities were inadequate and bad.

4. Excessive and illegal punishment of prisoners of war:
(a) Prisoners of war were killed, beaten and tortured without trial or investigation of any kind, for alleged offences;
(b) Such unauthorized punishments were inflicted for alleged offences which, even if proved, were not under the said Conventions' offences at all;
(c) Collective punishments were imposed for individual alleged offences;
(d) Prisoners were sentenced to punishment more severe than imprisonment for thirty days for attempting to escape;
(e) Conditions of the trial of prisoners did not conform to those laid down in the said Chapter;
(f) Conditions of imprisonment of prisoners sentenced did not conform to those laid down in the Geneva convention.

5. Mistreatment of the sick and wounded, medical personnel and female nurses:
(a) Officers and soldiers who were wounded or sick, medical personnel, chaplains, and personnel of voluntary aid societies were not respected or protected, but were murdered, ill-treated and neglected;
(b) Medical personnel, chaplains and personnel of voluntary aid Societies were wrongfully retained;
(c) Female nurses were raped, murdered and ill-treated;
(d) Camps did not possess infirmaries, and seriously sick prisoners and those requiring important surgical treatment were not admitted to military or civil institutions qualified to treat them;
(c) Monthly medical inspections were not arranged;
(f) Sick and wounded prisoners were transferred although
their recovery was prejudiced by their journeys.

6. Humiliation of prisoners of war, and especially officers:
(a) Prisoners were deliberately kept and made to work in
territories occupied by Japan, for the purpose of expos-
ing them to the insults and curiosity of the inhabitants;
(b) Prisoners in Japan and in occupied territories, including
officers, were compelled to work on menial tasks and
exposed to public view;
(c) Officer prisoners were placed under the control of non-
commissioned officers and private soldiers and compelled
to salute them, and to work.

7. Refusal or failure to collect and transmit information regard-
ing prisoners of war, and replies to enquiries on the subject.
Proper records were not kept, nor information supplied as
required by the said Articles, and the most important of such
records as were kept were deliberately destroyed.

8. Obstructions of the rights of the Protecting Powers, of Red
Cross Societies, of prisoners of war and of their representa-
tives:
(a) The representatives of the Protecting Power (Switzer-
land) were refused or not granted permission to visit
camps and access to premises occupied by prisoners;
(b) When such permission was granted they were not
allowed to hold conversation with prisoners without
witness or at all;
(c) On such occasions conditions in camps were deceptively
prepared to appear better than normal, and prisoners
were threatened with punishment if they complained;
(d) Prisoners and their representatives were not allowed to
make complaints as to the nature of their work or other-
wise, or to correspond freely with the military author-
ities or the Protecting Power;
(c) Red Cross parcels and mail were withheld.

This allegation is confined to the Republic of China.

10. Killing enemies who, having laid down their arms or no
longer having means of defense, had surrendered.

11. Destruction of Enemy Property, without military justifica-
tion or necessity, and pillage.

12. Failure to respect family honour and rights, individual life,
private property and religious convictions and worship in
occupied territories, and deportation and enslavement of
the inhabitants thereof.
Large numbers of the inhabitants of such territories were murdered, tortured, raped and otherwise ill-treated, arrested and interned without justification, sent to forced labour, and their property destroyed or confiscated.


14. Failure to respect military hospital ships and unlawful use of Japanese hospital ships.

15. Attacks, and especially attacks without due warning, upon neutral ships.

It is beyond our purpose to proceed to see how many of these allegations were established by the evidence in the case. Established or not, for the purpose of illustrating war crimes stricto sensu the allegation itself would suffice. You should only remember that the world is not quite unaware of baseless atrocity—stories during wars perhaps designed to arouse animosities.

Professor Arnold Anderson* of the Iowa State College in his recent Article on "The Utility of the Proposed Trial and Punishment of Enemy Leaders" points out how in connection with the American Civil War 'Prison atrocity stories', later disproved almost totally, were the major elements in a propaganda designed to arouse the animosities. He refers to W. B. Hesselten's "Civil War Prisons";—A Study in War Psychology", where these stories are dealt with in considerable detail. It will be interesting to notice here that the prison atrocity stories there given bear a striking similarity to the stories of atrocities alleged to have been perpetrated during the Second World War. There, the world was told of the southerners 'flashing the throats of some prisoners of war from ear to ear, cutting off the heads of others and kicking them about as footballs; setting up the wounded against trees and firing at them as targets or torturing them with plunges of bayonets into their bodies.' An Illustrated Weekly carried a full page picture of rebels plunging their bayonets into the bodies of the wounded soldiers. It was also told how prisoners were confined in closed rooms 'whose poisoned atmosphere was slowly sapping their strength hour by hour'. There were stories of bad food, cruel treatment and utter destitution. An escaped quarter master of an Iowa regiment reported to the Governor of his state an account of his experiences: he said that the two hundred and fifty officers who shared his confinement received less than one fourth the rations of a private in the United States Army and were "subjected to all the hardships and indignities which venemous traitors could heap upon them". The prisoners were confined in a foul and vermin-abounding cotton shed. "They were forbidden to leave the crowded room to go to the sinks at a time when diarrhoea was prevalent"; "the prisoners were destitute of clothing"; "the hospitals were denied medicines". "Cornbread issued
to prisoners was made of unsalted meal and the meat was spoiled. 
Men were killed for looking out the window—prohibiting them the 
poor privilege of looking at their mother earth." A surgeon told 
that "in the wounds of many of the men there were enough maggots 
to fill a wine glass."

There were official reports also prepared on an examination of 
the condition of the returned men. Pictures of these returned prison-
ers also were taken to accompany the report and the report contained 
all of the stories of atrocities told of the treatment of prisoners up to 
that time. One report recounted "the absence of shelter, the huddled 
men who were fed like swine on cornbread made from unbolted 
meal, soup with worms and bugs and mule meat." "Rats were 
eaten by the starving men—once a dog was eaten and men were 
grateful for the scraps thrown to them from the surplus supplies of 
their guards. The sick were not sent to the hospitals until past 
recovery, were mistreated by Surgeons, and died." The bleak tobacco 
warehouses of Richmond were described in lurid detail, the lack of 
furniture, the unheated rooms with broken windows, and the crowds 
confined within each room were dwelt upon. "Prisoners were shot 
at windows, the men were without food, and many become insane. . . . 
Men were brutally punished for trivial offenses; the naked bodies of 
the dead were placed in heaps awaiting burial and were eaten by 
hogs, dogs and rats. . . . ."

In short, the entire programme of mistreatment was such as to 
be charged to 'a predetermined plan, originating somewhere in a 
rebel counsel, for destroying and disabling the soldiers of their enemy, 
who had honourably surrendered in the field'.

Before the end of that war, however, the confederacy took an 
opportunity to strike a blow for its own defence in the field of propa-
ganda. A senate resolution in the Confederate congress appointed a 
joint committee to investigate the treatment of prisoners by the two 
sides. Early in March this committee presented a preliminary report 
which began with an examination of the charges made in the earlier 
reports and publications. The spirit and intent of these publications, 
it was asserted, was to inflame the evil passions of the North. The 
photographs were cited as evidence of this spirit; such cases, the com-
mittee believed, could have been found in every Northern hospital and 
even in homes.

Stories of war crimes generate passion and desire for vengeance. 
A Tribunal must avoid all influence of resentment. The Judges must 
avoid all possible interference of emotional factors and remember that 
they are concerned with events which occurred at the time when fight-
ing was going on. There is the special difficulty that the events 
occurring then are likely to be witnessed only by excited or prejudiced 
observers.
Further, belligerents, who during war succeed in winning victories and getting prisoners of war, are liable to be credited with various cruelties and, if ultimately defeated, their very defeat as it were establishes their most devilish and fiendish character.

In appraising the value of any contemporary press report or the like we must not forget the part propaganda is designed to play in war time. A sort of vile competition is carried on in exerting the imagination as a means of infuriating the enemy, heating the blood of the stay-at-homes on one's own side and filling the neutrals with loathing and horror. I have given above some war atrocity stories. I might also mention the story given out during the First World War about the use of dead bodies by the Germans. The story will remain recorded in history as the classic lie of war propaganda. Mr. A. J. Cuming, the then political editor of the "News Chronicle", an influential and widely circulated daily newspaper of England, in his book entitled "The Press" published in 1936, exposed the lie of this piece of propaganda and narrated how it was utilized. He said: "In Parliament, on April 30th, the late Mr. Ronald McNeil asked whether the Prime Minister would take steps to make known 'as widely as possible in Egypt, India and the East generally the fact that Germans were boiling down their dead soldiers into food for swine'". When Mr. John Dillon intervened to ask whether the Government had any solid ground for believing it, Lord Robert Cecil, Minister of Blockade, replied that he had no information beyond the extracts that had appeared in the Press, but "in view of other actions taken by the German military authorities there is nothing incredible in the present charge against them".

He added: "His Majesty's Government has allowed the circulation of the facts as they appeared through the usual channels."

"The incident has now nearly slipped out of the public memory. The British authorities tried to forget it as soon as it had done its dirty work. But it is still dimly believed in as a fact by many persons who read no denials in the British Press and, like Lord Robert Cecil, saw 'nothing incredible' in the charge made in responsible papers whose bona fides they still artlessly trusted."

Mr. John Basset Moore, formerly a Judge of the Permanent Court of International Justice writing in 1933 says: "There are, I believe, a few persons who realize the extent to which propaganda has been used in connection with international relations, ... only this year a leading English periodical has said: During the war the astonishingly efficient British propaganda service convinced the Americans of some of the most bizarre fairy tales that have ever been devised. To this day most of the population has not recovered from the alleged information which it then swallowed whole."

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We cannot ignore the fact that the nations of the present-day civilized world do not always show much scruple in adopting a different standard of conduct in their behaviour in connection with what they consider to be their national cause, from what they follow in their private life. They feel no scruples in devising "bizarre fairy tales" and spare no pains in making people "swallow the same whole".

I might mention in this connection that even the published accounts of Nanking "rape" could not be accepted by the world without some suspicion of exaggeration. Referring to the same incident, even as far back as November 10, 1938, Colonel Steward (in the chair) at Chatham House considered that such things as happened at Nanking were regrettable, but that he "could cast his mind back to 1900, and see that whatever was happening now, it was probable that the Japanese had learned it from other nations".

Referring to the same incident, Sir Charles Addis on that occasion could say:

"Between two countries at war there was always a danger that one or other of the combatants would seek to turn public opinion in his favour by resort to a propaganda in which incidents, inseparable alas (1) from all hostilities, were magnified and distorted for the express purpose of inflaming prejudice and passion and obscuring the real issues of the conflict."

To add to this, since the First World War there has been such a demand for the trial and conviction of defeated warlords, that a sort of unconscious processes were going on in the mind of everyone who devoted his interest and energies to get these persons punished. These processes in most cases remain unobserved by the conscious part of the personality and are influenced only indirectly and remotely by it. The result might be a partial distortion of reality. There would always be some eagerness to accept as real anything that lies in the direction of the unconscious wishes.

I need not multiply examples. All that I want to emphasize is that a certain extra amount of caution will always be needed in the sifting of evidence in a case of accusations of war crimes. Even narratives of personal experiences revealing a uniformity of testimony do not, by the very mass of such testimony, necessarily guarantee the truthfulness of the charges. Intriguing psychological problems may be involved in this. We know, we cannot always believe men who saw "something happen" even when they say they saw with their own two eyes. Suggest something to them, set their thought processes working on clearly defined lines, alarm them just a little, intrigue them somewhat, and anything may happen.

As is pointed out by Dr. Hesseltine, "an inevitable concomitant of armed warfare is the hatred engendered in the minds of the contestants by the conflict. The spirit of patriotism which inspires men
to answer the call of their country in its hour of need breeds within those men the fiercest antagonism toward that country’s enemies. Such enmity finds its natural expression not only on the battlefield in the heat of conflict but also in the lives of the soldiers and the sentiment of the community from which they come, both of which have been thrown out of their accustomed peacetime routine by the outbreak of the war. The attachment to an ideal, a cause, or a country, when such attachment calls for the sacrifice of security and life, blinds the person feeling that attachment to whatever of virtue there may be in the opposing ideal, cause, or country. Seemingly, it becomes necessary for the supporters of one cause to identify their entire personality with that cause, to identify their opponents with the opposing cause, and to hate the supporters of the enemy cause with a venom which counterbalances their devotion to their own.

"To a people actuated by such a devotion to a cause, it is inevitable that their opponents appear to be defective in all principles which are held dear by that people. The enemy becomes a thing to be hated; he does not share the common virtues, and his peculiarities of speech, race, or culture become significant as points of difference or, better, sins of the greater magnitude. The critical faculties, present to some degree in times of peace, atrophy on the approach of national catastrophe.

"With such a state of mind coming as the natural result of the upheaval of the social order which the war produced, it was not difficult for credence to be gained for stories of atrocities committed by one or the other side in the War."

Sometimes the defeat of the army produces a depression which is to be fed by the stories of barbarities of the enemy.

All the factors that can provoke a propaganda of this character were present in the cases from which we have taken the above illustrations. Besides these, there was an additional unfortunate factor in the Tokyo case which also cannot be neglected. The prisoners of war in the hands of the Japanese were extraordinarily overwhelming in number and indicated a result of the fight which, as every white nation felt, completely undermined the myth of white supremacy. A certain amount of propaganda against the non-white enemy might have been thought of to repair the loss.

These are, however, questions for the courts and Tribunals whose responsibility it will be to weigh evidence in cases that may come before them.

Oppenheim defines war crimes to be "such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders."

"They include acts contrary to International Law perpetrated in violation of the law of the criminal’s own State, such as killing or plunder for satisfying private lust and gain, as well as criminal acts
contrary to the laws of war committed by order and on behalf of the enemy State. To that extent the notion of war crimes is based on the view that States and their organs are subject to criminal responsibility under International Law."

Oppenheimer classifies war crimes under four different classes, namely:

1. Violations of recognized rules regarding warfare committed by members of the armed forces,
2. All hostilities in arms committed by individuals who are not members of the enemy armed forces,
3. Espionage and war treason,
4. All marauding acts.

The following are given as examples of the more important violations of rules of warfare:

"(1) Making use of poisoned, or otherwise forbidden, arms and ammunition, including asphyxiating, poisonous, and similar gases; (2) Killing or wounding soldiers disabled by sickness or wounds, or who have laid down arms and surrendered; (3) Assassination, and hiring of assassins; (4) Treacherous request for quarter, or treacherous feigning of sickness and wounds; (5) Ill-treatment of prisoners of war, or of the wounded and sick. Appropriation of such of their money and valuables as are not public property; (6) Killing or attacking harmless private enemy individuals. Unjustified appropriation and destruction of their private property, and especially pillaging. Compelling the population of occupied territory to furnish information about the army of the other belligerent, or about his means of defence; (7) Disgraceful treatment of dead bodies on battlefields. Appropriation of such money and other valuables found upon dead bodies as are not public property or arms, ammunition, and the like; (8) Appropriation and destruction of property belonging to museums, hospitals, churches, schools, and the like; (9) Assault, siege, and bombardment of undefended open towns and other habitations. Unjustified bombardment of undefended places by naval forces. Aerial bombardment for the sole purpose of terrorising or attacking the civilian population; (10) Unnecessary bombardment of historical monuments, and of such hospitals and buildings devoted to religion, art, science, and charity as are indicated by particular signs notified to the besiegers bombarding a defended town; (11) Violations of Geneva Conventions; (12) Attack on, or sinking of, enemy vessels which have hauled down their flags as a sign of surrender. Attack on enemy merchantmen without previous request to submit to visit; (13) Attack or seizure of hospital ships, and all other violations of the Hague Convention for the adaptation to Maritime Warfare of the Principles of the Geneva Convention; (14) Unjustified destruction of enemy prizes; (15) Use of enemy uniforms and the like during battle and use of the enemy flag during
attack by a belligerent vessel; (16) Attack on enemy individuals furnished with passports or safe conducts and violation of safeguards; (17) Attack on bearers of flags of truce; (18) Abuse of the protection granted to flags of truce; (19) Violation of cartels, capitulations, and armistices; (20) Breach of parole."

As regards the sources of the laws of war we may refer to the following conventions, practices and assurances by way of illustration:

1. The practice of civilized nations.

2. (a) The convention No. IV done at the Hague on the 18th October, 1907, concerning the laws and customs of war on land;
   (b) The regulations set out in the Annex to the said convention;
   (c) The convention No. X done at the same time and place concerning Maritime War;
   (d) The Geneva Red Cross Convention of 1929, being the International Convention for the Amelioration of the Condition of The Wounded and Sick in Armies in the Field, done at Geneva on the 27th July, 1929,
   (e) The Geneva Convention of 1929 being the International Convention relative to the Treatment of Prisoners of War, done at Geneva on the 27th July, 1929, though not ratified, yet acceded to by Japan within the meaning of its Article 95, as a result of the assurances given as per communications referred to below.

3. (a) The assurances given by Japan to the effect that "Although not bound by the Convention relative to the treatment of prisoners of war, Japan will apply mutatis mutandis."
   (i) The provisions of that Convention to American prisoners of war. (Communication, dated the 29th January, 1942: Exh. 1490.)
   (ii) The conditions of that Convention to English, Canadian, Australian and New Zealand Prisoners of War in their power. (Communication, dated the 30th January, 1942: Exh. 1496.)

Japan, by this communication, further assured that 'with regard to supply of food and clothing to prisoners of war, they will consider on condition of reciprocity national and racial customs of the prisoners'.

(b) The assurance given by Japan in a communication, dated the 13th February, 1942, in the following terms:

"The Imperial Government will apply during the present war, on condition of reciprocity, the provisions relative to the treatment of prisoners of war of the 29th July, 1929, to
enemy civilian internees, as far as applicable to them, and provided that labour will not be imposed upon them contrary to their free choice." (Exh. 1491.)

(c) The said communications constituted an assurance to all the nations at war with Japan other than the Republic of China.

I do not propose to examine in detail these conventions, practices and assurances. Suffice it would to say that these give the rules of warfare and their violations mostly constitute crime. These rules are really maintained by the sanction of common interest. Experience, however, shows that whenever any of these laws of war have been found to be a definite and permanent obstacle to the achievement of the objectives of war, the sanction has disappeared and the rule has not been observed. Unless the party violating gets worsted in the war such violations would go unheeded. I might mention here, by way of example, the case of the use of atom bomb during the last war. If any indiscriminate destruction of civilian life and property is at all illegitimate in warfare, if the principle underlying the prohibition of Dum Dum bullet still holds good, I cannot think of anything more atrocious and criminal than this use of atom bomb. But those who were perpetrators of this atrocity still go unpunished and untried simply because they belong to victor nations. This is how law, even when recognized as such, operates in international life!

I must, however, point out again that acts in violation of these rules constitute a crime because these are made criminal by domestic legislation of each State. They are really crimes under international law and not against that law.

For a more detailed consideration I shall keep myself confined to some of those cases that were indeed exceptional and were based on some exceptional grounds. These would indeed require some special considerations.

There is another matter to which I would draw your special attention in this connection. There is no difficulty about the responsibility of persons who of their own initiative committed these crimes and actually did the acts constituting such crimes. The special question that would arise for consideration is how far it would constitute a crime if such act is done under superior order.

Another question of importance is just the converse of the above and is what we may characterize as the vicarious liability of the heads of a government for the doings of its subordinates.

The other question of importance will be who is to try these alleged criminals.

We have already seen how the Nuremberg and Tokyo Charters excluded the defence of superior order, respondeat superior. The maxim "respondeat superior",—let the principal answer,—is usually applied to actions ex delicto. In municipal law no doubt where an
agent commits a tortuous act under the direction or with the assent of
his principal, each is liable at the suit of the party injured; the agent
is liable because the authority of the principal cannot justify his wrong-
ful act, and the person who directs the act to be done is likewise liable
under this rule of "respondeat superior"; qui facit per alium facit per
se. he who does anything by another does it by himself.

This may be a good principle in municipal law. In matters
military, however, this principle is hardly applicable. There very
different considerations involving the question of security of the State
itself will come in. Every State is exactingly strict in the maintenance
of discipline in matters military and it can hardly be denied that there
is weighty reason for such strictness. Keeping in view these rules of
strict discipline in military matters, and the reason for these rules and
remembering the consequences that may legitimately be apprehended
by a State in case of disobedience of an order of the superior and the
legitimate fate of the subordinate thus disobeying the superior order,
the act done under superior order here may very well be taken to be the
act of the superior only.

It was, however, provided in these Charters that the fact that the
defendant acted pursuant to an order of his government or of his superior
shall not free him from responsibility.

This is indeed a sweeping departure from the existing rules of
law in this respect and is a departure extremely unlikely to be adhered
to by the member states of the international world so long as armed
forces continue to be looked upon as the essential organ for state-
security.

British Manual of Military Law, Article 443 (Land Warfare)
lays down "It is important, however, to note that the members of
the armed forces who commit such violations of the recognized rules
of warfare as are ordered by their government or by their commanders
are not war criminals and cannot therefore be punished by the enemy."

The American Rule was also the same up to 1944. Its rules of
Land Warfare, Article 366, stood thus:

"Individuals of the armed forces will not be punished for these
offenses in case they are committed under orders or sanction of their
government or commanders. The commanders ordering the com-
mision of such acts, or under whose authority they are committed by
their troops may be punished by the belligerent into whose hands they
may fall."

This seems to have been the law on the point on the eve of the
Second World War. The Charters created ex post facto law in this
respect also.

It will be pertinent to notice also that the law applicable in this
respect is to be the law of the criminals’ own State. It must have
been observed that the British Manual purports to give law for this
purpose to be applied by the enemy into whose hands Britain’s soldiers
may fall during war. The United States of America also purports to do the same thing.

Oppenheim's editors say 10:

"The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. A different view has occasionally been adopted in military manuals and by writers, but it is difficult to regard it as expressing a sound legal principle. Undoubtedly, a Court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received; that rules of warfare are often controversial; and that an act otherwise amounting to a war crime may have been executed in obedience to orders conceived as a measure of reprisals. Such circumstances are probably in themselves sufficient to divest the act of the stigma of a war crime. Also, the political authorities of the belligerent will frequently incline to take into consideration the danger of reprisals against their own nationals which are likely to follow as a measure of retaliation for punishing a war crime *durante bello*. However, subject to these qualifications, the question is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity. To limit liability to the person responsible for the order may frequently amount, in practice, to concentrating responsibility on the head of the State whose accountability, from the point of view of both international and constitutional law, is controversial."

This was not Oppenheim's own view. Indeed it is difficult to accept this view without qualification. There may not be much difficulty in applying this principle to cases where the superior order is palpably illegal. But I do not know if it is always so easy to determine whether the act ordered is in violation of the laws of war. Indiscriminate slaughter and destruction of civilian population and property is a violation of the laws of war. I do not know if those airmen who, for example, were ordered to atom-bomb the enemy country had any choice in the matter, knowing that such bombing meant such indiscriminate devastation.

One of the special cases referred to above is the case of killing etc. in course of what is characterized as 'illegal war'. Would such killing amount to 'murder'? There was such a case in the Tokyo
indictment and the majority judgment of the Tribunal seems to have
taken the view that such killings would constitute murder. The judg-
ment stands thus: "In all cases the killing is alleged as arising from the
unlawful waging of war, unlawful in respect that there had been no de-
claration of war prior to the killings. . . . or unlawful because the wars in
the course of which the killings occurred were commenced in violation
of certain specified Treaty Articles (Counts 45 to 50). If, in any case,
the finding be that the war was not unlawful then the charge of
murder will fall with the charge of waging unlawful war. If, on the
other hand, the war, in any particular case, is held to have been un-
lawful then this involves unlawful killings not only upon the dates
and at the places stated in these counts but at all places in the theater
of war and at all times throughout the period of the war."

You would have my view in the following lines of my dissenting
judgment 11:

"The prosecution case in counts thirty-nine to forty-three, and
forty-five to fifty-two, is:

"1. That the hostilities referred to therein were illegal, being
in breach of treaties or having been initiated in violation
of the regulations;

"2. That consequently the jural incidents of belligerency did
not attach to them and the invading party had not any
belligerent right;

"3. That as a result, all the acts of killing etc. done in course
of such hostilities were without the protection of any
belligerent right and were ordinary murder etc.

"I have already given my view of the questions involved in the
propositions 1 and 2 as above stated while examining the definition
of aggressive war. In my opinion, the hostilities referred to in these
counts constituted 'war' within the meaning of the international
law in spite of the infirmities attendant upon their initiation and in
spite of their being in violation of treaties etc. In spite of the alleged
facts, deficiencies or violations, these hostilities attracted to themselves
the normal jural incidents of belligerency.

"As I have noticed in an earlier part of this judgment, the Charter
establishing this Tribunal in its Article 5(c) speaks of 'crimes against
humanity' and names them as 'murder, extermination, enslave-
ment, deportation and other inhumane acts committed before or
during the war . . . .' Originally this provision in the Charter was
confined to acts 'committed against any civilian population, before
or during war . . . .' A few days before the indictment in the present
case was presented, the Charter was amended dropping these limiting
words 'against any civilian population'.

"I have already given my reason why I could not construe the
Charter as defining any crime and why, even if the Charter purported
so to define, the definition would not have been binding on us. In
this view of the provisions of the Charter, I need not proceed to examine whether the acts alleged in these counts would be covered by this alleged definition of 'crimes against humanity', and, how the amendment of the Charter would affect the position.

"Mr. Comyns Carr of U.K. coming to these counts contended that 'murder' would be the inevitable consequence of aggressive warfare. According to him these counts reduce the matter to its simplest and most conclusive form. Mr. Carr says:

'Every statesman or commander who is a party to ordering his army to attack and kill an enemy, even in legitimate warfare, fulfills all the conditions of murder if it was done without lawful justification. However, if it appears that this was done in lawful belligerency he is not guilty. . . . The accused who necessarily fulfills all the other elements of murder, in that he has purposely ordered the killing of human beings, has to rely upon a lawful justification.' He says, 'War is such a justification, but if the war is unlawful his justification fails. Now even if it were not established . . . that aggressive war . . . is itself a punishable crime, it is certainly not lawful, and therefore cannot afford a justification for what is otherwise plain murder . . . . It has always been implicit in the definition of murder in every civilized country.'

"I am afraid I cannot accept this contention of Mr. Carr. In order to take any killing outside the definition of murder all that is necessary is to show that it was done in war, the war itself is not required to be justified at the same time. The killing in question does not come within the definition of the national system because of the war-relation between the two States. In so far as the definition extends to acts done by the subjects of other Sovereign States, it contemplates peaceful relation between the States and not war relation. If the relation has been the result of any unjust or unjustifiable act of a state that state may be answerable in various other ways; but that fact would not change the character of the relation. The killing is done under the authority of the killer's State animo belligerendi and this is sufficient to place it outside the definition of murder in any national system.

"As is pointed out by Oppenheim, armed forces are organs of the state which maintains them. They are organs of their home state, even when on foreign territory, provided only that they are there in the service of their state, and not for their own purposes. Whenever armed forces are on foreign territory in the service of their home state, they are considered extra-territorial and remain under its jurisdiction.

"I have already given my reason for saying that the wars of the categories referred to in these counts do not constitute any crime and are not illegal in international law. In this view, acts alleged in counts thirty-seven to forty-three, fifty-one and fifty-two would be only acts of war and would not be murder, etc. as alleged in these counts.
"The prosecution laid these charges on the assumption that such wars were illegal. In my opinion, even this assumption would not render these acts murder, pillage, etc. as asserted in these counts. An act of force committed under the authority of a state \textit{animo belligerendi} will bring in the state of war and will have all the jural incidents of belligerency.

Hall\textsuperscript{15} says: 'On the threshold of the special laws of war lies the question whether, when a cause of war has arisen, and when the duty of endeavouring to preserve peace by all reasonable means has been satisfied, the right to commence hostilities immediately accrues, or whether it is necessary to give some preliminary notice of intention. \textit{A priori} it might hardly be expected that any doubt could be felt in the matter. \textit{An act of hostility}, unless it be done in the urgency of self-preservation or by way of reprisal, \textit{is in itself a full declaration of intention}; any sort of previous declaration therefore is an empty formality unless an enemy must be given time and opportunity to put himself in a state of defence, and it is needless to say that no one asserts such quixotism to be obligatory.' According to him 'the date of the commencement of a war can be perfectly defined by the first act of hostility.' After reviewing the opinions of various jurists in the present century and recent practice, Hall concludes thus: 'Looking at the foregoing facts as a whole it is evident that it is not necessary to adopt the artificial doctrine that notice must be given to an enemy before entering upon war. The doctrine was never so consistently acted upon as to render obedience to it at any time obligatory... The moment at which war begins is fixed, as between belligerents, by direct notice given by one to the other, when such notice is given \textit{before} any acts of hostility are done, and when \textit{notice is not given}, by the commission of the first act of hostility on the part of the belligerent who takes the initiative.'

"In the Sixth Edition (1944) of Oppenheim's \textit{International Law} edited by Dr. Lauterpacht the law on the subject is stated thus\textsuperscript{14}: '\textit{Whatever may be the cause of a war} that has broken out, and \textit{whether or not the cause be a so-called just cause}, the same rules of International Law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other, and as between the belligerents and neutral States. This is so, even if the declaration of war is \textit{ipso facto} a violation of International Law, as when a belligerent declares war upon a neutral State for refusing passage to its troops, or when a State goes to war in patent violation of its obligations under the Covenant of the League or of the General Treaty for the Renunciation of War. To say that, because such a declaration of war is \textit{ipso facto} a violation of International Law, it is 'inoperative in law and without any judicial significance,' is erroneous. The rules of International Law apply to war from whatever cause it originates.'
"It may be noticed here that this is the view of the learned author as to belligerency and its jural incidents, though, according to him, the justice or otherwise of the causes of war has been of much legal relevance after the Pact of Paris. The learned author says: 'So long as war was a recognized instrument of national policy both for giving effect to existing rights and for changing the law, the justice or otherwise of the causes of war was not a legal relevance. The right of war, for whatever purposes, was a prerogative of national sovereignty. Thus conceived, every war was just. The legal position has now changed with the limitation of the right of war in the Covenant of the League and with its abolition as an instrument of national policy in the General Treaty for the Renunciation of War.' According to the learned author, 'War cannot now legally, as it could be prior to the conclusion of the Pact, be resorted to either as a legal remedy or as an instrument for changing the law. Resort to war is no longer a discretionary prerogative right of States Signatories of the Pact; it is a matter of legitimate concern for other signatories whose legal rights are violated by recourse to war in breach of the Pact; it is an act for which a justification must be sought in one of the exceptions permitted by the Pact of Paris.' I have already considered this aspect of the case and have given my reason why I cannot accept this view. What is pertinent for my present purpose is to point out that in spite of this view of the Pact, the learned author does not deny jural incidents of belligerency even to an unjust and unjustifiable war. Indeed, war is a condition producing certain effects as between the contending states and the condition is there, no matter whether it is brought about justly or unjustly. In the language of Oppenheim himself war is a fact recognized by International Law. It is a particular relation between States. It comes into being as a fact irrespective of its legitimacy or otherwise, and the very fact of its existence takes all killing in due course of its conduct out of the category of murder of the peacetime legal system. If any illegality is attached to the origination of the fact, that is to be dealt with otherwise. That does not change the character of the fact or relation itself or its jural incidents."

"Hall says: 'When differences between States reach a point at which both parties resort to force, or one of them does an act of violence which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which the combatants may use regulated violence against each other until one of the two has been brought to accept such terms as his enemy is willing to grant.'"

"In conferring the status of belligerents the Hague Regulations contemplate no distinction between the just and the unjust cause of war."

"The position is neither affected by the Hague Convention relative to the opening of hostilities. The crucial point, the period of time which must elapse between the presentation of the declaration
of the ultimatum and the beginning of hostilities, is left undetermined by that Convention.

"It will be pertinent to notice here the views of Oppenheim on this point. Though such initiation of hostility is looked upon by the author as a delinquency, he still holds that it will all the same be 'war' with all the incidents of belligerency."

"Oppenheim says: 'There is no doubt that, in consequence of Convention III, recourse to hostilities without a previous declaration of war, or a qualified ultimatum, is forbidden. But the war can nevertheless break out without these preliminaries. A State might deliberately order hostilities to be commenced without a previous declaration of war, or a qualified ultimatum. . . . .

"'It is certain that States which deliberately order the commencement of hostilities without a previous declaration of war or a qualified ultimatum commit an international delinquency: but they are nevertheless engaged in war. . . . . In all the similar cases, all the laws of warfare must find application, for a war is still a war in the eyes of international law, even though it has been illegally commenced.'

"It should be noticed here that though the learned author observed that the commencement of hostilities without a previous declaration of war is a delinquency, the war itself is not illegal. In an earlier passage he says: 'The failure to observe it (The Hague Convention III of 1907) does not render the war illegal; neither does it take away from the hostilities thus commenced the character of war.' In my opinion this correctly states the position of International Law. Otherwise the entire invading army would be guilty of murder and the victors in such a war will return to their primitive rights of total destruction of the vanquished, though now, in the name of justice and of a developed sense of humanity.'

The last war has brought to the surface a very important question, namely, how far the belligerents are entitled to make any ex post facto law of war in order to try and punish prisoners of war and whether or not such steps taken by a belligerent power would constitute war crimes stricto sensu on the part of the persons participating in this act. The question arose during the last war, specially in connection with the air warfare. The rules of law, I have noticed above, really relate to land and maritime warfare. The aerial warfare is still unprovided with any rules of conduct.

I have already considered the question of the scope of legislative power of a belligerent in respect of the trial and punishment of prisoners of war for war crimes, and have denied this right to any belligerent power, including the victors.

There I have pointed out how the Tribunal at Nuremberg accepted the Charter creating that Tribunal as defining war crimes and thereby giving it a binding law in that respect. It seems that the victor powers think that international law authorizes them to make
law in this respect. Whatever be my views, if the victor nations, and, for the matter of that, so many judges of the tribunals set up for the purpose of trying the war criminals could hold that it was open to the victor nations to create ex post facto law for the trial of prisoners of war, I would be reluctant to fix any criminal responsibility on the authors of any ex post facto law for the trial of captured airmen. I should not ascribe any mala fides to this action of theirs.

The Charter, we should remember, not only gave ex post facto law, but gave it not even for general purposes but for the purposes of trial of the particular prisoners. It was ex post facto law meant not for all people but for a special person or a special group of persons.

In judging the bona fides of the authors of such regulations we must remember that as yet air warfare is not provided with any rules of conduct. The States represented at the Washington Conference of 1922 on the limitation of armaments decided on the appointment of a commission of jurists charged with the task of proposing a code of air warfare rules. The British Empire, the United States of America, France, Italy and Japan were represented at that Conference. Holland was subsequently invited to participate in the work of the Commission.

In 1923 the Commission produced the proposed code of rules. This, however, was not ratified by any of the Powers. The code is of importance only as an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war; it will doubtless prove a convenient starting point for any future steps in this direction. But, in any case, this has not as yet been done, and it seems none of the belligerents including the allied powers paid any heed to these rules.

The Commission made certain rules regarding bombardment. They stated: "The subject of bombardment by aircraft is one of the most difficult to deal with in framing any code or rules for aerial warfare. The experiences of the recent war have left in the minds of the world at large a lively horror of the havoc which can be wrought by the indiscriminate launching of bombs and projectiles on the non-combatant populations of towns and cities. The conscience of mankind revolts against this form of making war in places outside the actual theater of military operations, and the feeling is universal that limitations must be imposed."

In its proposed Article 22, the Commission suggested: "aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants is prohibited."

In Article 24 it suggested:

1. Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military objective to the belligerent.
WAR CRIMES STRICTO SENSU

2. Such bombardment is legitimate only when directed exclusively at the following objectives: Military forces; military works; military establishments or depots; factories constituting important and well-known centers engaged in the manufacture of arms, ammunition or distinctly military supplies; lines of communication or transportation used for military purposes.

3. The bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighbourhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph 2 are so situated that they cannot be bombed without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.

4. In the immediate neighbourhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate, provided there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population. . . .

We are told that there were four main viewpoints which the Commission took of the work before it:

1. Humanitarian;
2. National point of view of the respective delegations;
3. The juridic point of view with regard to the laws of war;
4. The combatant point of view with regard to the conduct of war in which the combatant services considered their respective nations both as neutrals and as belligerents.

We are further told that "with regard to the revision of the laws of war from the humanitarian point of view, all nations and all members of each delegation were agreed that it was desirable that the laws of war should be such as to prevent suffering of persons or destruction of private property, except such as was inevitable for the accomplishment of the war objective. Every now and then in the course of the discussion, someone would raise anew the humanitarian point and immediately there would be an echo from the representatives of every other national delegation that his country was behind no other in its desire to limit the horrors of war. But although the public at large in time of peace and in a state of emotional rest sees only the disturbances of war, governments, more foreseeing, know that wars must occur. Subsequently they are unwilling to permit public opinion of their respective nations in time of peace to drive them to agree to arrangements by international conventions which the same public under the influence of war emotions would be the first to urge their governments to break. Thus, the codes as agreed upon will scarcely satisfy the most radical pacifists and humanitarians."

"... From the other three points of view there was cleavage of opinion in the Commission. In the formulation of the rules of war
for these new agencies, each nation seemed chiefly guided by the principle of promoting its own national policies and its position in the world, neglecting neither the point of neutral nor of belligerent. Each national delegation was a unit in standing for a code which should favour its national situation. . . . . But there was another line of cleavage more or less visible, running between the jurists forming the Commission as a whole and the technical advisors as a whole. The majority of the commissioners had little or no technical acquaintance with the art and practice of war. Some seemed inclined to believe that the course of war, even when great national emotions were aroused, might be guided by the phrases of a code of rules previously agreed upon. They did not appear always to realize that at any time the code of accepted rules of warfare is based almost entirely on past experience and that when a new war arises, new social, economic and belligerent conditions will make the existing code more or less unsuitable to meet the exigencies of the situation as developed in the course of the current war . . . ."

The Commission, in suggesting the rules of bombardment, took this into account. It said, "On the other hand, it is equally clear that the aircraft is a potent engine of war and no state which realizes the possibility that it may itself be attacked, and the use to which its adversary may put his air forces can take the risk of fettering its own liberty of action to an extent which would restrict it from attacking its enemy where that adversary may legitimately be attacked with effect."

The Commission therefore considered it useless to enact prohibitions unless there was an equally clear understanding of what constituted legitimate objects of attack. It is precisely in this respect that agreement was difficult to reach.

It is needless to say that during the last war even the victor allied powers did not follow these rules of bombardment. Leaving aside the case of bombardment by atom bomb, even in using the ordinary bombs, the suggested rules of bombardment were not at all heeded to. I shall not repeat here what is said in justification of the use of the atom bomb.

It has been rightly pointed out by Mr. Ellery C. Stowell of the Editorial Board of the American Journal of International Law,¹⁶ that the atom bomb has come "to force a more fundamental searching of the nature of warfare and the legitimate means for the pursuit of military objectives." He then says, "In view of the frightful efficiency of the bomb and the consequent indiscriminate destruction of civilian life and property, it has aroused a considerable popular opposition. At the same time our military and governmental authorities have given it their support on the ground that it hastens the defeat of the enemy with a consequent saving of lives of allied soldiers. . . . When the pros and cons are summed up and all the arguments are
heard, it will be found that, pending a more perfect world organization and union shown to be capable of preventing wars, the laws of war cannot rule out any means effective to secure the ends of war... If Great Britain, Canada and the United States can expect to keep the technique of the atom bomb secret, it would hardly be reasonable to expect them to forego this advantage any more than it would be to expect them to make public any other plan of military defense and the military advantage derived from superior research or administrative organization."

In this state of the aerial warfare, it was difficult for me to consider the conduct of the Japanese authorities in making the regulation for the purpose of trial of the air pilots criminal on the ground that the regulation gave ex post facto law. In my opinion, they did not commit any crime in making these regulations.

We should not fail to remember that the real horror of the air warfare is not the possibility of a few airmen being captured and ruthlessly killed, but the havoc which can be wrought by the indiscriminate launching of bombs and projectiles. The conscience of mankind revolts not so much against the punishment meted out to the ruthless bomber as against his ruthless form of bombing. Even if we judge by the standard given by the rules suggested by the Commission, there were bombardments in complete disregard of them. At any rate, if the court martial found that to be the fact and accordingly convicted the airmen of war crimes, I would not say that either the Commander-in-Chief or the members of the Cabinet or of the General Staff committed any crime in not opposing that conviction.

During the last war two new instruments of warfare were used, both giving rise to controversy as to their legality. Germany used rocket bombs and the United States used the atom bomb. The doubtful legality of the V-bomb lay in the fact that of its very nature it could not be aimed with accuracy against its proper target, and that the speed with which it came made it impossible to give warning to the inhabitants to take to shelter. The doubtful legality of the atom bomb consisted in the fact that the range of its action and its destructiveness were so great as to make it impossible to observe the restriction upon the bombardment of undefended cities.

During the last war the European-Axis-Major-War-Criminals were found to have been the authors of many orders, circulars and directives indicating that it was their policy to conduct the war in a ruthless way. We know also that during the First World War the German Emperor was charged with issuing similar directives.

The Kaiser Wilhelm II was credited with a letter to the Austrian Kaiser, Franz Joseph, in the early days of that war, wherein he stated as follows:

"My soul is torn, but everything must be put to fire and sword; men, women and children and old men must be slaughtered and not
a tree or a house be left standing. With these methods of terrorism, which are alone capable of affecting a people as degenerate as the French, the war will be over in two months, whereas if I admit considerations of humanity it will be prolonged for years. In spite of my repugnance I have therefore been obliged to choose the former system."

This showed his ruthless policy, and this policy of indiscriminate murder to shorten the war was considered to be a crime.

In the Pacific war under our consideration, if there was anything approaching what is indicated in the above letter of the German Emperor, it is the decision coming from the allied powers to use the atom bomb. Future generations will judge this dire decision. History will say whether any outburst of popular sentiment against usage of such a new weapon is irrational and only sentimental and whether it has become legitimate by such indiscriminate slaughter to win the victory by breaking the will of the whole nation to continue to fight. We need not stop here to consider whether or not "the atom bomb comes to force a more fundamental searching of the nature of warfare and of the legitimate means for the pursuit of military objectives". It would be sufficient for my present purpose to say that if any indiscriminate destruction of civilian life and property is still illegitimate in warfare, then, in the Pacific war, this decision to use the atom bomb is the only near approach to the directives of the German Emperor during the First World War and of the Nazi leaders during the Second World War.

But leave aside the atom bomb. What are we told the Americans are doing in Korea in the name of her liberation? Is it indeed possible to ignore all the accounts of American atrocities in Korea and of the germ warfare conducted by the Americans engaged in war there in the name of the United Nations? I would only give you a few of the allegations against the Americans contained in books written and published by non-Korean and non-Chinese authors, or, more correctly, written and published by American and British authors claiming to have first-hand knowledge.

'Koje Unscreened' is written by Wilfred Burchett and Alan Winnington. Wilfred Burchett is an Australian. Throughout the Second World War he served as a war correspondent in the Far East and Pacific areas for the London Daily Express, and, after the war, continued as its foreign correspondent in Berlin. In 1951 he went to Korea as correspondent for the French evening paper "Ce Soir" and was there during the truce talks.

Alan Winnington is an Englishman. He was the first journalist to enter Korea from the north after the war began and to travel south with the Korean People's Army.

These authors have given horrible accounts of ruthless and devilish violence against the Korean and the Chinese prisoners of war.
on Koje Island by American troops. They give accounts of the American policy of the wholesale wiping out of Korean civilians on mere suspicion of harbouring dangerous thoughts. They give horrible accounts of the operation of American racial contempt for those whom the Americans term "Gooks" and "Chinks". They give an account of the ignominious activities of the U.S. Army's Psychological Warfare Branch,—how the Branch devised the magic formula of "voluntary repatriation" as a "psychological" pill to dope the public. They give an account of the notorious "Counter-Intelligence Corps (CIC)" of America and their nefarious job in Korea. They disclose how the horrible atrocities were the direct actions of Generals Ridgway, Mark Clark, and "Bull" Boatner who sent tanks and flamethrowers, machine guns, and bayonets against unarmed prisoners. I need not give you all the nauseating details of the various atrocities alleged to have been perpetrated by the Americans in Korea. In short, these are thousand times more horrible, barbarous, brutal and inhuman than those that could be named in the indictments against the axis powers after their defeat in the Second World War. These authors give an account of how "Bull" Boatner enjoyed his Koje performance: They say: "As 'Bull' Boatner saw the pitiful procession of gasping, bleeding prisoners staggering out between withering clumps of wounded and dying, he slapped his thighs and roared 'Hot dog! Hot dog! Look at them coming out!' This degenerate had scored the first military victory of a miserable career, against unarmed and imprisoned men. AP's correspondent glories in the fact that the prisoners were killed and wounded by bayonets and grenades and not by bullets."

". . . . . The paratroopers had bullets in their rifle magazines but not in the chambers," AP reported and continued with sickening zest, "Not a shot was fired. They charged with their bayonets and ripped the Reds to pieces as the Communists hid in trenches surrounding their wooden buildings. The prisoners locked themselves in wooden buildings. The paratroopers cut holes in the buildings with axes and tossed in tear-gas and concussion grenades. . . ."

More horrible accounts of these alleged American atrocities in Korea will be found in "Cry Korea", a book written by Reginald Thompson, who served in the Intelligence Corps from 1940 to 1944 before becoming the War-correspondent of the Sunday Times from Normandy campaign to the end.

Add to this the most loathsome allegations of germ warfare conducted by the Army which is there in the name of the United Nations. Is it possible indeed to brush aside all these charges coming as they are from so many different sources?

Somewhat intriguing and sinister perspective for these alleged happenings in Korea will be found in "The Hidden History of the Korean War" by I.F. Stone of America.
All these are happening in Korea in the name of her liberation when this war of liberation is being waged in the name of the United Nations. The tide of war, augmented by Napalm bombs, phosphorus and rocket, and the tremendous weight of artillery, ebbed and flowed over the whole heart of Korea, both north and south, and with it the civilian tragedy grew to staggering proportions. Tens of thousands, even hundreds of thousands, were rendered homeless. Millions died. Practically the whole of Korea became a refuse heap of humanity, of towns and villages reduced to rubble and ashes, of harvest and homes burned, burned and burned again.

Experience shows that whenever any of the laws of war have been found to be a definite and permanent obstacle to the achievement of the objectives of war, the sanction of common interest and the reason for the continuance of the rule has disappeared and the rule has not been observed. We are told that if the countries having the atom bomb can expect to keep the technique of the atom bomb secret, it would hardly be reasonable to expect them to forego this advantage any more than it would be to expect them to make public any other plan of military defence and the military advantage derived from superior research or administrative organization. The frightful efficiency of the bomb, in spite of the consequent indiscriminate destruction of civilian life and property, offers an advantage which, we are told, would not be foregone simply on the sentimental humanitarian objections. The civilized powers would not, it seems, allow any scruples to stand in the way of efficacious utilization even of bacteriological weapons. Even the atrocities, it seems, are almost becoming efficient weapons of civilized war. The incidental civilian loss and suffering, we are told, are also of military advantage in that it weakens the enemy’s morale.

After the war the General Assembly of the United Nations made some attempts to control the use of the atomic energy. It adopted on January 24, 1946, a resolution creating a commission on atomic energy, the object of which was to make specific proposals for extending between all nations the exchange of basic scientific information for peaceful aims, for the control of atomic energy to the extent necessary to ensure its use only for peaceful purposes, for the elimination from national armament of atomic and other weapons adoptable to mass destruction, and for effective safeguard by way of inspection and other means to protect complying States against the hazard of violations and evasions.

Professor Fenwick in this connection observes:

"The chief obstacle in reaching an agreement lay in the unwillingness of the United States to give up the possession of bombs already made and the continued production of bombs without being given adequate assurances, in the form of international inspection, that the obligations undertaken would be mutually observed; and in the
unwillingness of the representative of the Soviet Union to accept the plan of inspection, which, it was alleged, conflicted with the principle of sovereignty. In consequence, the Soviet Union refused to enter into any agreement which would not leave the final decision with the Security Council, so that the veto power could be used to check measures that might be taken by the International Atomic Development Authority proposed by the United States."

However undesirable it may seem, the right of the belligerent to punish *durante bello* war criminals *stricto sensu* is now well recognized in international law.

Oppenheim *"* says: "The right of the belligerent to punish, during the war, such war criminals as fall into his hands is a well-recognized principle of international law. It is a right of which he may effectively avail himself after he has occupied all or part of enemy territory, and is thus in the position to seize war criminals who happen to be there. He may, as a condition of the armistice, impose upon the authorities of the defeated State the duty to hand over persons charged with having committed war crimes, regardless of whether such persons are present in the territory actually occupied by him or in the territory which, at the successful end of hostilities, he is in the position to occupy. For, in both cases the accused are, in effect, in his power. And although normally the Treaty of Peace brings to an end the right to prosecute war criminals, no rule of International Law prevents the victorious belligerent from imposing upon the defeated State the duty, as one of the provisions of the armistice or of the Peace Treaty, to surrender for trial persons accused of war crimes."

Similar views are expressed by Hall and Garner.

"The principle"," says Garner." that the individual soldier who commits acts in violation of the laws of war, when these acts are at the same time offences against the general criminal law, should be liable to trial and punishment. . . . . by the courts of the injured adversary in case he falls into the hands of the authorities thereof, has long been maintained. . . . ."

Hall *"* says: "A belligerent, besides having the rights over his enemy which flow directly from the right to attack, possesses also the right of punishing persons who have violated the laws of war, if they afterwards fall into his hands. . . . . To the exercise of the first of the above-mentioned rights no objection can be felt so long as the belligerent confines himself to punishing breaches of universally acknowledged laws."

It should only be remembered that this rule applies only where the crime in question is not an *act of State*. The statement that if an act is forbidden by international law as a war crime, the perpetrator may be punished by the injured State if he falls in its hands is correct.
only with this limitation that the act in question is not act of the enemy state.

It is now well settled that mere high position of the party in their respective States would not exonerate them from criminal responsibility in this respect, if, of course, the guilt can otherwise be brought home to them. Their position in the State does not make every act of theirs an act of State within the meaning of international law.

Yet, "As to breaches of the laws of war, international authorities have always been in such serious doubt as to whether heads of States or governments could be held responsible for them, and whether the order of superiors was not a complete defence, that no categorical declaration on the subject has ever been able to be written into a general multilateral treaty among the principal nations, and there was notoriously no accepted rule of international law on the questions. Both of these issues, like the criminality of aggressive war, are attempted to be removed altogether above the reach of contention in the present instance by the command of General MacArthur in his Charter, Articles 5 and 6; but it should be remembered that it is many hundred years since the fiat of a Caesar alone was taken to be sufficient to establish international law." 19
LECTURE XVIII

TRIAL

I would once again quote what Lord Hankey says is a Pagan Pronouncement, but sets a standard that the Allies never even approached in the Second World War. The Pronouncement is: "For the purpose with which good men wage wars is not the destruction and annihilation of the wrongdoers, but the reformation and alteration of the wrongful acts. Nor is it their object to involve the innocent in the destruction of the guilty, but rather to see that those who are held to be guilty should share in the preservation and elevation of the guiltless."

The standard set in this pronouncement has perhaps been too high for the modern nations since the First World War.

Prior to the First World War it was the custom for belligerents to insert in their treaties of peace an amnesty clause creating an immunity in relation to each belligerent for all persons who had committed wrongful acts on behalf of or in the service of the other belligerent during the course of the war. Even in the absence of treaty stipulation, an amnesty was one of the legal effects of the termination of war.

By the treaty of Versailles a striking exception to the customary law was made in the clauses providing for the trial and punishment of the German Kaiser and of individual members of the German armed forces. In the case of the Kaiser, the treaty provided that he should be tried "for a supreme offense against international morality and the sanctity of treaties". The offence was thus not one cognizable in accordance with the existing law. A special tribunal, appointed by the five leading powers, was to be constituted to try the accused and was to be guided in its decision "by the highest motives of international policy".

In the case of other offenders, the measures provided for were legal rather than political. The German Government recognized the right of the Allied and Associated Powers "to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war". Such persons were, if found guilty, to be sentenced to punishments laid down by law. In order to make possible these trials, the German Government on its part agreed to hand over to the Allied and Associated Powers all persons accused of the acts in question. In addition the German Government agreed to furnish the documents and information "necessary to insure the full
knowledge of the incriminating acts, the discovery of the offenders and the just appreciation of responsibility”.

In both cases, however, the proposed trials had to be abandoned. On the one hand, the Dutch Government refused to accede to the request for the surrender of the ex-Kaiser, who had already been granted asylum in that country. On the other hand, the practical difficulties involved in the demand for the surrender of designated members of the German armed forces, together with the obvious legal difficulty that many of the accused persons had acted in obedience to higher authority, and the general ex post facto character of the provisions of the treaty, led the Allied and Associated Powers to yield subsequently to the German request that the accused persons be tried by German judicial tribunals.

While the actual results of the trial of military offenders were negligible, the principle was established that persons guilty of offences against the laws of war might be brought to trial at the close of the war. The termination of war therefore did not automatically result in a general amnesty. On the other hand, in view of the fact that the delegates of two of the five leading powers refused to admit the criminal character of the act of the head of the defeated State in bringing on the war itself, it cannot be said that the attempt to try the Kaiser constituted a new principle of responsibility in that respect. At the Washington Conference on the Limitation of Armaments provision was made in the Treaty relating to the Use of Submarines and Noxious Gases in Warfare that any person who in the service of any State should violate any of the rules laid down, “whether or not such person is under orders of a governmental superior”, should be deemed to have violated the laws of war and be liable to trial “as if for an act of piracy” and might be brought to trial before the civil or military authorities of any power within the jurisdiction of which he might be found. While the new rule was limited to the special offences set forth in the treaty, it contained the important principle that a person who violated its provisions would not be able to excuse himself on ground of respondent superior.

At the Tripartite Conference at Moscow in 1943, the three powers, proclaiming that they were speaking in the name of the then thirty-two United Nations, declared their intention to demand that those German officers and men and members of the Nazi party guilty of atrocities should be sent back to the countries in which their crimes were committed in order that they might be judged and punished according to the laws of those countries. The declaration further announced that in the case of those “major criminals” whose offences had no particular geographical location, punishment would be inflicted by the joint decision of the governments of the Allies.

As we have already seen, on August 8, 1945, an agreement was reached in London between the United States, France, Great Britain,
and the Soviet Union making definite provision for the establishment of an International Military Tribunal for the trial of war criminals whose offences had no particular geographical location. Annexed to the agreement was a "Charter", defining the constitution, jurisdiction and functions of the tribunal and the crimes for which the defendants might be held individually responsible.

The crimes for which the defendants were indicted were listed in the Charter as (a) crimes against peace; (b) war crimes; and (c) crimes against humanity. The indictment for "crimes against peace" was an innovation in international law; and it included the "planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." The term "war crimes" included violations of the traditional laws or customs of war, a number of which were specifically mentioned. The term "crimes against humanity" included inhumane acts which were "committed in execution of, or in connection with the aggressive war", although they might not be war crimes in the strict sense. Participation in the common plan or conspiracy to commit any of the foregoing crimes formed a separate count in the indictment.

The Tribunal justified the indictment of the defendants for crimes against peace, the planning and waging of a war of aggression. Chief reliance was placed upon the Kellogg-Briand Pact by which the contracting parties condemned recourse to war and renounced it as an instrument of national policy. The argument that there could be no punishment of crime without a pre-existing law, *nulla poena sine lege*, was dismissed as inapplicable to the existing facts, since there could be no doubt that the defendants knew they were acting in defiance of international law. The argument that international law deals only with the acts of sovereign states and not with acts of individuals was rejected as contrary to established practice in the case of criminal acts. The argument that the defendants were acting in pursuance of higher orders and that they might plead *respondeat superior* was held inapplicable in the case of acts condemned as criminal by international law, although that fact might be taken into account in mitigation of the punishment. In respect of the common plan or conspiracy to bring about a war of aggression, the first count in the indictment, the Tribunal applied the principles of municipal criminal law.

The trial of Japanese major war criminals was carried out upon the same general principles applied in the case of the German war criminals. The Charter of the International Military Tribunal for the Far East classified the crimes as crimes against peace, conventional war crimes, and crimes against humanity, together with the separate crime of conspiracy to commit those crimes. The Tribunal consisted of eleven judges representing the states at war with Japan.
including members of the British Commonwealth of Nations, India, and the Philippine Islands. The indictment was drawn up in the form of fifty-five counts, reciting the various crimes charged against the defendants and the particular countries against which they had been committed.

It was to be expected that jurists would be divided in their views upon the extension of international law by the two Tribunals into the field of "crimes against peace". There was little difficulty in accepting the judgment of the Tribunal in respect to "war crimes" and "crimes against humanity", since international custom had long recognized the right of a victorious army to bring to trial individual members of the enemy armies alleged to be guilty of violations of the laws of war. Whether members of the higher command might be held responsible for the acts of subordinates was chiefly a question of proof that they knew of and either ordered or acquiesced in the acts committed.

With respect to "crimes against peace", the criticism of a number of jurists was directed partly against the attempt to consider aggressive war as in itself a crime apart from illegal acts committed during the course of the hostilities, and partly against the character of the tribunal which gave judgment in the case. The line between aggressive and defensive war was, critics observed, not so clear that aggressive war could be regarded as possessing the specific character required for a criminal offence. There was no general understanding at the time of the adoption of the Pact of Paris that a violation of the obligation of the Pact would carry with it a right on the part of other states to treat the leaders of the offending state as personally guilty of a criminal act.

The above account is taken from Prof. Fenwick and it lucidly gives the history of the practice developing in this respect.

Dr. Lauterpacht while editing the famous treatise of Oppenheim on International Law says:

"The right of the belligerent to punish, during the war, such war criminals as fall into his hands is a well recognised principle of International Law. It is a right of which he may effectively avail himself after he has occupied all or part of enemy territory, and is thus in the position to seize war criminals who happen to be there. He may, as a condition of the armistice, impose upon the authorities of the defeated State the duty to hand over persons charged with having committed war crimes, regardless of whether such persons are present in the territory actually occupied by him or in the territory which, at the successful end of hostilities, he is in the position to occupy. For in both cases the accused are, in effect, in his power. And although normally the Treaty of Peace brings to an end the right to prosecute war criminals; no rule of International Law prevents the victorious belligerent from imposing upon the defeated State..."
the duty, as one of the provisions of the armistice or of the Peace Treaty, to surrender for trial persons accused of war crimes. In this, as in other matters, the will of the victor is the law of the Treaty. It is not to be expected that he will concede to the defeated State the corresponding right to punish any war criminals of the victorious belligerent. The resulting inequality is the unavoidable concomitant of the existing imperfections of international organization and of the institution of war itself. But the victorious belligerent may achieve a substantial approximation to justice by making full provision for a fair trial of the surrendered enemy nationals, and by offering to try before his tribunals such members of his own armed forces as are accused of war crimes. Such conduct may go a long way towards reducing substantially the inequality of treatment as between the victor and the vanquished."

The first substantial question in such a trial would be the one relating to jurisdiction of the Tribunal. It goes without saying that the crimes triable by such a tribunal must be limited to those committed in or in connection with the war which has just ended. Indeed it is preposterous to think that defeat in war should subject the defeated nation and its nationals to trial for all the delinquencies of their entire existence. In my opinion, if there is any international law which is to be respected by the nations, that law does not confer any right on the victor in a war to try and punish any crime committed by the vanquished not in connection with the war lost by him but also in other unconnected wars or incidents.

You have seen above how matters were arranged from before at the London Conference and how law itself was made to take suitable shape.

But apart from that there are several other difficulties in this respect.

The very first difficulty in a victor-trial is about the constitution of the court for the trial,—about the judges with requisite moral integrity.

Regarding the Constitution of the Court for the trial of persons accused of war crimes, the Advisory Committee of Jurists which met at the Hague in 1920 to prepare the statute for the Permanent Court of International Justice expressed a "voeu" for the establishment of an International Court of Criminal Justice. This, in principle, appears to be a wise solution of the problem, but the plan has not yet been adopted by the states.

Hall suggests that "it should be possible for both the victor and the vanquished in war to be able to bring to trial before an impartial court persons who are accused of violating the laws and usages of war."

I feel tempted in this connection to quote the views of Professor Hans Kelsen of the University of California which may have the effect
of turning our eyes to one particular side of the picture likely to be lost sight of in a "floodlit court house where only one thing is made to stand out clear for all men to see, namely that the moral conscience of the world is there reasserting the moral dignity of the human race."

The learned Professor says:—"It is the jurisdiction of the victorious states over the war criminals of the enemy which the Three Power Declaration signed in Moscow demand . . . . It is quite understandable that during the war the peoples who are the victims of the abominable crimes of the Axis Powers wish to take the law in their own hands in order to punish the criminals. But after the war will be over our minds will be open again to the consideration that criminal jurisdiction exercised by the injured states over enemy subjects is considered by the peoples of the delinquents as vengeance rather than justice, and is consequently not the best means to guarantee the future peace. The punishments of war criminals should be an act of international justice, not the satisfaction of a thirst for revenge. It does not quite comply with the idea of international justice that only the vanquished states are obliged to surrender their own subjects to the jurisdiction of an international tribunal for the punishment of war crimes. The victorious states too should be willing to transfer their jurisdiction over their own subjects who have offended the laws of warfare to the same independent and impartial international tribunal."

The learned Professor further says: "As to the question what kind of tribunal shall be authorized to try war criminals, national or international, there can be little doubt that an international court is much more fitted for this task than a national, civil, or military court. Only a court established by an international treaty, to which not only the victorious but also the vanquished states are contracting parties, will not meet with certain difficulties which a national court is confronted with . . . ."

It might, indeed, he said that when the Victor Powers will set up an international tribunal for this purpose the judges though taken from the different victor nations, would be there in their personal capacities and there should not be much difficulty in having the right men there.

One of the essential factors usually considered in the selection of members of such tribunals is moral integrity. This of course embraces more than ordinary fidelity and honesty. It includes "a measure of freedom from prepossessions, a readiness to face the consequences of views which may not be shared, a devotion to judicial process, and a willingness to make the sacrifices which the performance of judicial duties may involve." Simply because a judge would come from a Victor nation would not necessarily mean that he cannot possess this requisite integrity.

Administration of justice, however, demands that it should be conducted in such a way as not only to assure that justice is done but
also to create the impression that it is being done. In the classic language of Lord Hewart, Lord Chief Justice of England, "It is not merely of some importance, but it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done . . . . Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice." The fear of miscarriage of justice is constantly in the mind of all who are practically or theoretically concerned with the law and especially with the dispensation of criminal law. The special difficulty as to the rule of law governing war crimes trials, taken with the ordinary uncertainty as to how far our means are sufficient to detect a crime and coupled further with the awkward possibilities of bias created by racial or political factors, makes the position of a judge of such a Tribunal one of very grave responsibility.

We cannot overlook or underestimate the effect of the influence stated above. They may indeed operate even unconsciously. The possibility of such influences remaining unobserved by the conscious part of the personality, and operating only indirectly and remotely rather presents a permanent pitfall to objective and sound judgment —always discrediting the integrity of human justice.

Whatever chances there might have been in developing the international law in this direction, the two victor trials at Nuremberg and Tokyo have completely destroyed such chances. I need mention in this connection only "the misgivings that are raised by the proceedings of the London Conference of June, 1945, where persons deligated as prosecutor or judge drafted the Charter for the Nuremberg Trial and discussed inter alia the desirability of excluding the raising at the trials of large issues of fact and policy, which captured documents had shown to be necessary to the defence." "The actual exclusion of many such questions as irrelevant increases these misgivings." This Charter was held to be decisive and binding on the Tribunal, of course, with this assurance that those who gave the Charter must have correctly appreciated international law and have incorporated only that international law in it.

It is very rightly pointed out by Mr. Ireland that "equality and universality are as much fundamental characteristics of true international law as they are of domestic justice in every legal system worthy of the name; the rules should apply equally to the large and the small, the powerful and the weak, the victors and the vanquished: but it must be noted that in the preparatory enactments for neither the Nuremberg nor the Tokyo trials have the prevailing nations embraced their opportunity to do a lasting service to international law by declaring roundly that the rules the defendants were accused of violating are accepted by the prosecutors and must be taken to govern with equal force all acts of the winning statesmen, leaders and armies."
"Much has been written on both sides of the Atlantic in support of one or another view on the major issues, and the arguments as to aggressive war being a crime, ex post facto laws, defence of superior orders and others have been thoroughly discussed. If the disputed principles had not been universally or even generally accepted among civilised nations, there was no such international law, and this Tribunal could not apply it, but, like the Nuremberg Tribunal, created so-called international law for itself."

Let us see whether defeated countries felt that justice was done. Dr. Ehard of Bavaria 8 says:—

"The defenders of the Charter apparently have also felt that one cannot subsume satisfactorily the tremendous complex of political, military, and legal problems which faced the court under existing international law by means of legal constructions which depend entirely upon the substantive law in force. After exhausting all legal arguments they finally have made a subsidiary appeal against the restrictive substantive law to higher justice, to which all substantive law is to be subordinated. That is understandable. A number of horrible deeds have been committed. Was humanity to be deprived of the privilege of punishing these deeds and of exacting expiation from the guilty ones? Every feeling of law and order revolts against it. This desire for higher justice must be fulfilled even if one should have to proceed beyond the law as in force at the time of the commission of the deeds.

"It probably is no coincidence that the prosecutors developed the noblest eloquence particularly on this point where substantive law no longer offers any conclusive arguments. Indeed, the ultimate and deepest justification of the Charter and the trial would be and would have to be the fulfilment of this ethical requirement. Whoever wishes to free the way to this higher justice would like to exclaim in the words of the British Chief prosecutor:

'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.'

"These are memorable words. If we follow them they will lead very far. Justice, sound human reasoning and the eternal aims of the law of nations demand that these norms, old or new, must apply to the strong as well as to the weak if they are to be felt to be law. For all nations are equal before the law of nations. It is contrary to law if one nation invokes legal norms against another nation which it does not consider binding also for itself. It is regrettable that this general recognition (of the binding force) by the nations sitting in judgment has not been made expressly. The Powers could have solemnly declared in the London Agreement that they consider the norms established in the Charter as generally binding for the
community of nations. They have not done so. The United Nations in whose interest the four Powers acted, as is stated in the preface to the London Agreement, have stated their "conviction" in a resolution of the General Assembly of December, 1946, with reference to the Nuremberg judgment, that the principles applicable to the criminals of a war of aggression are to be generally valid. However, this resolution, just as the resolutions already mentioned, did not of itself create international law, but it is only a recommendation de lege ferenda. A competent court was not constituted.

"It is true that the representatives of the prosecution have stated repeatedly that the signatory Powers have subjected themselves to this international law by virtue of the Charter. Thus the American representative states:

'Ve must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.'

And in another place:

'And let me make clear 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.'

"I am afraid that the light which this brilliant rhetoric sheds on sober reality is too rosy. At any rate the signatory Powers have not bound themselves in any way by contract to have the law of the Charter apply against themselves also.

"Now we may perhaps be inclined to assume that the judgment must have binding force as precedent particularly for the Anglo-Saxon legal mind. However, this hope might also be deceptive. The British chief prosecutor, it is true, stated once:

'In so far as the Charter of this Tribunal introduces new law, its authors have established a precedent for the future—a precedent operative against all, including themselves . . . .'

"However, the American chief prosecutor expressly stated during the oral argument:

'One of the reasons this was a military tribunal, instead of an ordinary court of law, was in order to avoid precedent-creating effect of what is done here on our own law and the precedent control which would exist if this were an ordinary judicial body.'

"Since Jackson probably is the chief author of the Charter, his words have particular weight. It must be regretted that a judgment whose fundamental importance has been stressed on all sides so loudly was restricted so considerably in its legal effect.

"Justice, sound human reasoning and the eternal aims of the law of nations also demand, finally, that the international jurisdiction, to which the lofty norms, may they be old or new, are entrusted for
interpretation and application, offer in its constitution and in its composition every attainable guarantee of impartiality. The principles of modern criminal procedure are hardly disputed in this respect. It is the undisputed general sense of justice that the legislator should not also be prosecutor and judge. It is the general sense of justice that the accessory to the crime should not be legislator and judge over the perpetrator. Whoever himself enters into pacts with the aggressor, encourages him in his aggression and has shared the spoils with him, is not justified in sitting in judgment upon him. It is the general sense of justice, and it is a practice of hitherto existing international jurisprudence, that the judicial decision should be made by neutrals and that the opposing parties should be represented.

"It is regrettable that in Nuremberg the law was applied only by the victors. The assurance that, inspite thereof, not the law of the victors but only the law of nations was to be applied, would have been more convincing if the sword of law had been put into the hands of neutral Powers. It is true that there were few neutrals in this World War, but nevertheless there were Switzerland, Sweden, Portugal, countries in which persons conversant with international law and wise judges are not scarce.

"Finally, the confidence in the jurisprudence of this court and the moral effect of the judgment would undoubtedly have been greater among the German people if German judges also would have been seated and had a voice in this court sitting over Germans."

Prof. Fenwick asks:

"Could the Nuremberg Tribunal of four members properly be regarded as an international tribunal'? Should it not at least have included representatives of other states in passing upon the question of the crimes against peace?" More pointed, however, was the question whether two of the members of the Tribunal were competent to try the defendants. In the case of the United States member there was the fact that the United States had not only adopted neutrality legislation during the years preceding the war, but in the opening days of the war had issued a proclamation of neutrality in which the United States was said to be "on terms of friendship and amity" with the state of which the indicted officials were leaders. In respect to the qualifications of the member of the Tribunal representing the Soviet Union, it was said that the Non-Aggression Pact signed with Germany on August 23, 1939, was clearly made in anticipation of the act of aggression Germany was about to commit, and that the Soviet Union became thereby an accessory before the fact; while the subsequent partitioning of Poland by the two countries made the Soviet Union accessory after the fact.

Questions of law are not decided in an intellectual quarantine area, in which legal doctrine and the local history of the dispute alone are retained and all else forcibly excluded. We cannot afford to be
ignorant of the world in which such disputes arise. Yet, says Lord Hankey, "that is just what the Nuremberg and Tokyo Tribunals were forced to do owing to the presence on the Bench of a Russian Judge."

The next difficulty in such a trial is about the evidence and this is equally baffling.

Apart from the question whether any accessory, either before or after the fact, should have been allowed to participate in the prosecution of the defeated nations, the participation by such accessories created difficulties about the evidence also, and thereby caused failure of justice. The defence was not allowed to adduce evidence of any act of aggression of any of the nations sitting in judgment. These matters were excluded from evidence as irrelevant saying that "the fact that similar crimes might have been committed by others as well and might go unpunished can never be any defense for the accused: It is no defense for the accused to show that other persons guilty of the same crime have not been prosecuted."

This may be a good rule of justice elsewhere. But when applied to a trial where the law-giver, the prosecutor and the judge happen to be that fortunate guilty person, the rule becomes at least of dubious propriety.

Further, the evidence of such acts of aggression, however obnoxious to the judge and the prosecutor might be, may be of immense value to the defence. Many of these would explain and sometimes would even justify many of the acts alleged in the indictment. In deciding on aggressions a court cannot refuse to investigate the allegations and elicit the facts from both sides. A court cannot, for example, characterize increase in Japanese army as evidence of aggressive preparation without knowing how the U. S. S. R. was going on increasing its army at that time. A court cannot characterize Japanese hesitation to enter into a Pact of Non-Aggression with the U. S. S. R. as indicative of evil design without, at the same time, knowing what respect U. S. S. R. showed to similar prior pacts with other nations. A court should not use, say, captured documents of the vanquished, even great documents of State, without obtaining the corresponding documents of the victors. A fair trial would mean giving the defence all possible facilities in these respects and not merely in giving them a large quantity of paper, ink, and the like and a large number of counsel to defend.

It will be illuminating to have here a few instances of disallowance of evidence at the Tokyo Trial. The Tribunal disallowed the following categories of evidence sought to be introduced by the defence:

1. Evidence relating to the state of affairs in China prior to the time when the Japanese armed forces began to operate:
   (Proc. p. 2505, July 25, 1946)
2. The evidence showing that the Japanese forces in China restored peace and tranquility there: (Proc. page 2154, July 9, 1946)

It was observed in this connection that "none of the accused will be exculpated merely because it is shown, if it is shown, that the Japanese forces in China restored peace and tranquility there. What you must establish ... is that the Japanese armed forces ... had authority or justification or excuse for what they did."

3. Evidence relating to the Chinese trouble with Great Britain in 1927: (Proc. page 21,106)

4. Evidence showing the public opinion of the Japanese people that Manchuria was the life-line of Japan: (Proc. page 3134, August 2, 1946)

It was observed in this connection that "that type of reasoning is useless. What does it matter ... if the Japanese people did think they needed a part of China? Their honest belief, if it be an honest belief, as to their needs for part of China, is not justification for an aggressive war."

5. (a) Evidence as to the relations between the U. S. S. R. and Finland, Latvia, Estonia, Poland and Roumania.
   (b) Evidence as to the relations between the U. S. and Denmark vis-a-vis Greenland and Iceland: (Proc. page 17,635—March 3, 1947)
   (c) Evidence as to the relations between Russia and Great Britain and Iran.

6. Evidence relating to A-Bomb decision (Proc. page 17,662)

7. Evidence regarding the Reservation by the Several States while signing the Pact of Paris: (Proc. page 17,665)

8. (a) The United Nations Charter: (Proc. page 17,682)
   (b) The Lansing-Scott Report.


These were discarded on the ground that they were prepared for the Propaganda purposes and consequently have no probative value.

(b) Statements made by the then Japanese Foreign Office. (Proc. pages 21,134—21,139)—These were discarded as being self-serving statements.

10. Evidence relating to Communism in China: The Tribunal was of opinion that no evidence of the existence or spread of Communism or of any other ideology in China or elsewhere is relevant in the general phase. Evidence of an actual
attack on Japanese nationals or property by Chinese Communists or any other Chinese may be given in justification of Japan's act.

When the accused come to give evidence, they may tender their fear of Communism in explanation of their acts. This was decided on 29 April, 1947 by a majority of the Tribunal (Proc. page 21081). Later on it was ruled that 'assault' includes a threat of assault (Proc. page 21113), where the threat is of a serious nature, where it is imminent, and where the persons making it have present ability to give effect to it. (Proc. page 21115)

11. Evidence otherwise considered to have no probative value:
(Proc. pages 18805, 18809, 18826, 19178, 19476, 19614, 19715, 20930, 20960).

As regards the Press Releases of the then Japanese Government, the grounds on which the tribunal rejected them were in substance the following:—

1. "These documents emanate either from the Board of Information or from what are called Foreign Office Spokesmen. They paint with a Japanese brush a picture of events for consumption at home and abroad. Any statement by the Board of Information or by a Foreign Office spokesman as to what took place in China does not prove the fact of what took place in China one way or another. They may have no probative value." (Proc. page 20508).11

2. "It is pure propaganda and nothing else. It seems to be nothing but argument from the Japanese viewpoint; propaganda, in short." (Proc. pages 20806, 20801).12

3. "It is a document painting the picture from the Japanese point of view on matters which are in dispute before this Tribunal and which cannot be decided by a statement in English found in the Japanese Foreign Office." 13

4. "Evidence relating to the activities of the belligerent armies would stand 'on the order of probative value' thus:
(i) A person present who gives a credible account.
(ii) Dispatches of Commanders in the field.
 Versions of (i) and (ii) for public or enemy consumption are not of probative value." (Proc. page 20809).14

5. "These are self-serving statements and hence are not admissible." (Proc. pages 20810-15).15

6. "Public declarations of alleged facts by the Japanese Government which are to be circulated through the press for other and even enemy countries cannot be accepted as candid or complete so as to possess probative value." (Proc. pages 20810-15).16

The tribunal had, however, admitted in evidence press release of the prosecuting nations when offered in evidence by the prosecution:
Vide Exhibits 952, 959, 960, 963, 982, 1013, 1102, 1287, etc. (Proc. pages 9438, 9463, 9464, 9476, 9556, 9667, 10047, 11679, etc.).

I have already given you an idea of the present place of propaganda in International life. No doubt efficient propaganda sometimes aims at convincing the world public of "the most bizarre fairy tales that have ever been devised."

"Between two countries at war there was always a danger that one or other of the combatants would seek to turn public opinion in his favour by resort to a propaganda in which incidents were magnified and distorted for the express purpose of inflaming prejudice and passion and obscuring the real issue of the conflict." Even the story of Nanking rape was looked upon in the above light at an address at Chatham House held on 10th November, 1938, with Colonel G. R. V. Steward C.B., C.B.E., D.S.O. in the Chair.

Yet keeping in view the place assigned to this propaganda by the Great Powers in their respective government organizations, it would be unjustifiable to stigmatize it as synonymous with falsehood, or even as raising a presumption that it is a lie. I believe that when we make it a rule of evidence that this statement was prepared for propaganda and therefore has no probative value, we assume that a propaganda is prima facie a lie. In my opinion, the tribunal had no materials before it to justify such sweeping assumption and I believe no power in the world would appreciate this implied characterization of propaganda. I may mention also in this connection that the tribunal had no evidence before it which might entitle it to ascribe any special character to Japanese propaganda.

Propaganda is often abused. But its primary function is to inform, influence and win mass opinion of the world, not necessarily by misinforming.

Even if these press releases be taken as "painting with a Japanese brush a picture of events for consumption at home and abroad" they would have presented the tribunal with one version of the event, the prosecution having given it another version. It would have been for the tribunal to decide which version it should accept. The prosecution version was also a version of a party. Some infirmity was likely to be present in both.

A rule rejecting "versions of a person present or of commanders in the field given for public or enemy consumption" is perhaps an extreme rule of caution. Such a rule perhaps will help the elimination of everything tainted with any doubt or suspicion. But when the record of the tribunal had already been allowed to be filled up with dubious materials introduced by one party under relaxed rules, I doubt very much if it was not too late for the tribunal to introduce these healthy exclusionary rules only to eliminate equally dubious materials coming from the defence to compete with the prosecution materials of similar character.
I also have my doubts if the tribunal were correct in characterizing these statements as 'self-serving'. None of these press releases could be ascribed to the authorship of any of the accused before us.

It might be noticed here in passing that those who held that the Charter defined the crime for which this trial was being held and that that definition was binding on the Tribunal, offered, as one of their grounds for so holding, that the sovereignty of the vanquished state devolved on the victors by right of conquest and that the present prosecution was in exercise of that sovereign right. If this is so, it may be that the prosecution would be bound by these statements of its predecessor state.

If the evidence offered relates to a relevant fact in issue, then its rejection on the ground that it has no probative value really means appreciation of its weight in fragment. In my opinion, it is risky thus to treat each piece of evidence singly and reject the same on the ground that it has no weight. I believe the view which the tribunal took on the 22nd July, 1946 on the defence objection to prosecution evidence was preferable to that it subsequently took on the prosecution objection to the defence evidence.

For weighing evidence and drawing inferences from it there can hardly be any canon. Each case presents its own peculiarities and common sense and shrewdness must be brought to bear on the facts elicited in every case. The effect of evidence must necessarily be left to the discretion of each judge.

As regards item 4, I doubt if the tribunal were right in saying that the views of the Japanese people had no bearing at all on the question before it. It cannot be denied that in the realm of foreign policy, the preservation of interest of the nation has always been taken to be the main consideration. In the words of Lord Palmerston, the principle on which the foreign affairs of a country ought to be conducted is the principle of maintaining peace and friendly understanding with all nations, so long as it was possible to do so consistently with due regard to the interests, the honour and the dignity of the country. "If I might be allowed," says Lord Palmerston, "to express in one sentence the principle which I think ought to guide an English Minister, I would adopt the expression of Canning, and say that with every British Minister the interests of England ought to be the Shibboleth of his policy." It has been looked upon as a duty of statesmen to abide by this principle and it has been justified by the idea of the political trust which governments execute on behalf of their people.

Of course the mere voice of the people would not establish their interest. Existence of such interests must be established by other evidence, and it was sought to be so established. If the tribunal accepted that as established, then, the people's voice might go to show their aliveness to this interest and though not justifying, might at least,
explain the adoption of this foreign policy without having recourse to a theory of conspiracy.

I am not sure that the tribunal was right in rejecting the evidence referred to in item 5 above.

Remembering the nature of the so-called family of Nations, the meaning which the parties to the Pact gave to it is much more important than anything else in its interpretation. This meaning becomes a stronger guide when it is attended with a conduct consistent only with such meaning.

I equally felt difficulties in agreeing with the decision regarding items 1 to 3 of the rejected evidence.

The Defence proposed to establish that the state of affairs in China which since 1922 was put forward by the several Signatory Powers of the Treaty of Washington as grounds for not giving effect to that treaty, and which provoked some pungent condemnation by America in 1925 and some hostile action by Great Britain in 1927 became even worse when the TANAKA Cabinet assumed the alleged policy towards China or when Japan took action against China. Their offer was thus to establish the existence of a state of affairs which always, by all the Powers has been considered as presenting occasions for similar statement of policy or similar action. They further offered to establish the result of Japan’s action which, according to them, would retrospectantly indicate both necessity and justification for Japan’s original action.

It would certainly be wrong to justify Japan’s policy in China at the present moment by reference to the policy of other Powers in the long past. If the conduct of powers today were to be based upon the conduct of powers in the past, the outlook for the world in the future was very gloomy indeed. Ordinarily it is of little use to try to elucidate the present by a comparison with the past. It is to be hoped that during the course of years, the standard of international morality had not remained stationary, but had been advanced so that acts which had been justified by international practice in the past were no longer justifiable today.

But the past in question here had a very relevant connection with the present. The prosecution case laid much emphasis on the Nine Power Treaty of Washington: the incidents in question related to a period after that treaty and the Powers were all its Signatory Powers. I still feel difficulty in disregarding the defence reason for this offer. I would only add that even if such matters would fail to justify the action taken by Japan, they might at least offer an explanation of the happening and to this extent might weaken the prosecution case of conspiracy.

The very essence of the prosecution case before the tribunal was the existence of a conspiracy, plan or design of the kind alleged in Count 1 of the indictment.

In order to establish this conspiracy the prosecution relied mainly on circumstantial evidence. As I read the prosecution evidence there
was not a single item in it which went directly to establish this conspiracy. Whatever that be, the prosecution, at least, relied strongly on the evidence of subsequent occurrences and invited the tribunal to draw an inference therefrom that these were all the result of the alleged conspiracy and hence established that conspiracy by reference back.

After the close of the prosecution case the defence moved the Tribunal for dismissal of the case asserting that the evidence adduced did not disclose any *prima facie* case against any of the accused.

In reply to this motion the prosecution laid stress on what it characterized as the *conspiracy method of proof* and emphasized that the occurrences from the Mukden incident of 18th September, 1931 to the invasion of Pearl Harbour all led to the inference of the overall conspiracy as asserted in count 1.

The defence motion was ultimately rejected by the Tribunal.

In the result the defence must be taken to have been called upon to adduce evidence:

1. To disprove the occurrences.
2. To explain them.
3. To justify them.

The importance of item 2 as specified above cannot be minimised by the defence in view of the charge contained in count 1. To the extent to which the defence succeeds in explaining any occurrence, the prosecution case of overall conspiracy is explained away. Apart, therefore, from the consideration whether the incident offered by way of explanation of the occurrence would or would not *justify* the action taken by Japan, it is relevant as an *explanation* and consequently the defence was entitled to bring it in evidence. Unfortunately the Tribunal in laying emphasis on justification ignored this bearing of mere explanation.

The tribunal rejected the evidence relating to the development of *Communism in China*.

A part of the bearing of this Communism on the case before the tribunal would appear from the following passages in the summation of the prosecution. The prosecution says: "She (Japan) accused China of menacing Japan's national defense by supporting communism and failing to keep law and order. With respect to Communism, it is true that for a short period prior to 1927 the Communists were permitted to participate in the government, but in 1927 the national leaders decided that Communism was a menace and began to fight against it, with the result that by July, 1931, the Communist strongholds had been taken and the Communists were in retreat, having been driven by Generalissimo Chiang Kai Shek into the mountains. However, with the outbreak of September 18, China was compelled to suspend the offensive against the Communists and withdraw a large part of her troops and the Communists thereupon resumed the offensive. Thus, at the time Japan was complaining of the Communist menace in China, China had the
Communists well in hand, only to lose her dominance over them because of Japanese action." In view of its rejection of the defence evidence the tribunal should not have accepted this summation of the Prosecution. In this summation the Prosecution invited the tribunal to accept all the findings of the Lytton Commission in this respect. In my opinion, the defence was entitled to adduce evidence and to ask this Tribunal to come to its own findings as to the questions of fact involved.

The Lytton Commission Report in pages 20 to 23 gives some account of this Communism in China and characterizes it as a menace to the authority of the Chinese Central Government as such.

The Report says:—

1. There is a menace to the authority of the Central Government of China from Communism;

2. The 'Chinese Communist Party' was formally constituted in May, 1921;

3. In the autumn of 1922, the Soviet Government sent a Mission to China. Important interviews resulted in the joint declaration of January 26, 1923, by which assurance was given of Soviet sympathy and support to the cause of national unification and independence of China. It was explicitly stated, on the other hand, that the Communist organization and the Soviet system of government could not be introduced at that time under the conditions prevailing in China.

(a) Following this agreement a number of military and civil advisers were sent from Moscow by the end of 1923 and undertook ... the modification of the internal organization of the Kuomintang and of the Cantonese army.

(b) At the first National Congress of the Kuomintang, convened in March, 1924, the admission of Chinese Communists into the party was formally agreed to.

4. (a) There was a period of tolerance with regard to Communism which covered 1924-1927. In 1927 the Nationalist Revolution was almost on the point of being transformed into a Communist Revolution.

(b) A national government was constituted at Nanking on 10th April, 1927; a proclamation was issued by the government ordering the immediate purification of the Army and the Civil Service from Communism.

(c) (i) On July 30, 1927 the garrison at Nanchang, capital of Kiangsi Province, together with some other military units, revolted and subjected the population to numerous excesses;

(ii) On December 11, a Communist rising at Canton delivered control of the city for two days into their hands;
(iii) The Nanking Government considered that official Soviet agents had actively participated in these uprisings;
(iv) An order of December 14, 1927, withdrew the exequatur of all the consuls of the U.S.S.R. residing in China.

5. (a) The recrudescence of civil war favoured the growth of Communist influence in the period between 1928 and 1931. A Red Army was organised and extensive areas in Kiangsi and Fukien were Sovietized.
(b) Large part of the Provinces of Fukien and Kiangsi and parts of Kwangtung, are reliably reported to be completely Sovietized.
(c) Communist zones of influence are far more extensive. They cover a large part of China south of the Yangtze, and parts of the provinces of Hupeh, Anhwei, and Kiangsu north of that river. Shanghai has been the centre of Communist propaganda.
(d) When a district has been occupied by a Red Army, efforts are made to Sovietize it. Any opposition from the population is suppressed by terrorism.

6. Communism in China does not mean only a political doctrine held by certain members of existing parties or the organization of a special party to compete for power with other political parties. *It has become an actual rival of the National Government. It possesses its own law, army and government and its own territorial sphere of action.*

7. (a) So far as Japan is China’s nearest neighbour and largest customer, she has suffered more than any other power from the lawless conditions in China.
(b) Over two-thirds of the foreign residents in China are Japanese.

In rejecting the evidence offered by the defence to show the character and development of the Communist movement in China it was ruled that the only relevant evidence in this respect would be that which would show that Japanese interest was actually assailed, or was in imminent danger of being assailed.

The *international world seems to consider it legitimate for one state to have the policy ‘‘ to support free peoples of other states who are resisting attempted subjugation by armed minorities or by outside pressure.’’*

In view of the very nature of the Communist movement in China as indicated in the Report of the Lytton Commission, the evidence offered by the defence might not have been beside the point. In any case, after excluding the evidence offered by the defence the tribunal should not have accepted what the Prosecution offered in its summation.
as stated above. If the matter at all entered into tribunal’s consideration, it was, I believe, bound to take it as the defence contended it to be.

But apart from the question of its being a justification, the defence contended that the evidence was relevant in view of the charge of an overall conspiracy. Mr. Logan for the defence contended: “Not only do these Communistic activities in China exist—did they exist before the beginning of the incident, but they also occurred during the entire period of time. And, since these incidents occurred during the entire period of time, they are material to the charge in the indictment as to whether or not these accused conspired to and did, wage aggressive war. If this evidence proves as we believe it does that incidents were created and stirred up by Communistic activities, the activities of the Communist would be evidence material to meet that charge in the indictment. I might also point out, it was Japan’s policy to try and settle and localize these incidents, and the activities of the Communists, it will be shown, prevented the settlement of the incidents and stirred up new ones.”

It might certainly be pertinent evidence to explain the occurrence. Whether or not the development sought to be established would have justified the action taken by Japan, it might certainly offer a good explanation of why these occurrences took place and thus might shut out or weaken the inference of overall conspiracy from such occurrences.

Further, in my opinion, in order to comply with the conditions of the above ruling it might not have been required of the defence to bring in only that item of evidence which would at once satisfy all the conditions. In my opinion, under the ruling, the defence might bring in evidence to establish the threat and then by some other evidence might establish that the threat was of the specified character and by persons of the required capacity. Each and every piece of evidence offered by them need not by itself have shown all these factors. In the application of the rule, however, the tribunal insisted that the item offered by itself must satisfy all these requirements.

In this connection we must not lose sight of the following pertinent considerations:

1. Japan had interest in China itself and consequently might not have been disinterested even if Communism in China were a mere ideology;
2. Communism in China might not have been a mere ideology as was noticed by the Lytton Commission;
3. The very history of the development of the Communist movement might justly lead Japan to see the hand of the U.S.S.R. in it;
4. The defence sought to connect the Communist movement with the anti-Japanese movement during the relevant period.

Unfortunately in rejecting the evidence of this category the tribunal regarded the situation involved in the case as a simple factual
one easily recognizable as such and not likely to be mis-apprehended. As a matter of fact there is involved in this situation a complicated superstructure calling for a conclusion on a difficult question of law as a means of determining its existence.

In determining the extent of the right of self-protection in this respect it may again be necessary for us to examine the character of the so-called international society. Professor Schwarzenberger ably analyses the development of modern international law and shows that "its original standards of value were completely eliminated during the gradual process which, starting from the Christian law of nations, led via the law of civilized nations to the victory of positivism and voluntarism. It is apparent from the correlation between community and society and their respective systems of law that whatever community may have existed during the initial stages of the law of nations, it has gradually been transformed into a society."

"In pre-war Europe, the political system of alliances and counter-alliances, which brought in its train the balance of power as a means of preserving peace, was the overriding force. Within its limits, international law could fulfil the functions of society law which is ' founded on mutuality and reciprocity ' only in subordination to the requirements of this system. The law of nations either directly served the objects of the balance system or pursued aims not incompatible with it. Even before the World War the forces of nationalism and imperialism threatened to reduce to unlimited anarchy the balance system on which the working of international law depended. In the post-war period additional disintegrating forces were brought into play by the incompatibility between the two main objects of the Peace Treaties—h egemony over the former Central Powers on the one hand, and on the other an organized community of the 'fully self-governing' nations of the world based on the comprehensive rule of law."

As I have already pointed out, it requires a serious consideration how far growth of Communism extends the right of intervention of a state, remembering on the one hand the character of change involved in Communism in relation to the very fundamentals of the existing state organization and property rights, and on the other the fact that a state organization based on Communism is a recognized member of the family of Nations.

The tribunal rejected some evidence relating to the Chinese boycott movement offered by the defence, but that is because the existence of the boycott and its aims and effects were not seriously questioned by the prosecution.

As to the existence of this movement in China the Lytton Commission Report itself is sufficient evidence.

The Report says:

"For centuries the Chinese have been familiar with boycott methods in the organization of their merchants, bankers and craft guilds.
These guilds, although they are being modified to meet modern conditions, still exist in large numbers and exercise great power over their members in the defence of their common professional interests. The training and attitude acquired in the course of this century-old guild life has been combined, in the present-day boycott movement, with the recent fervent nationalism of which the Kuomintang is the organised expression.

"The era of modern anti-foreign boycotts employed on a national basis as a political weapon against a foreign Power (as distinct from a professional instrument used by Chinese traders against each other) can be said to have started in 1905, with a boycott directed against the United States of America because of a stipulation in the Sino-American Commercial Treaty, as renewed and revised in that year, restricting more severely than before the entry of Chinese into America. From that moment onward until today there have been ten distinct boycotts which can be considered as national in scope (besides anti-foreign movements of a local character), nine of which were directed against Japan and one against the United Kingdom."

The Report then after giving the causes and nature of these movements before 1925 proceeds to examine the character of the boycott organization since that year and points out that "the Kuomintang, having from its creation supported the movement, increased its control with each successive boycott until today it is the real organising, driving, co-ordinating and supervising factor in these demonstrations."

The Commission noticed three controversial issues involved in the policy and methods of the boycott:

1. Whether the movement was purely spontaneous or was an organised movement imposed upon the people by the Kuomintang by methods which at times amounted to terrorism.
2. Whether or not, in the conduct of the boycott movement, the methods employed have always been legal.
3. What was the extent of the responsibility of the Chinese Government.

The Commission concluded:

1. That the Chinese boycotts were both popular and organised, the main controlling authority being the Kuomintang;
2. that it is difficult to draw any other conclusion than that illegal acts have been constantly committed, and that they have not been sufficiently suppressed by the authorities and the courts;
3. that the evidence indicates that the part taken by the Chinese Government in the present boycott has been somewhat more direct.

In connection with the second of the above conclusions the Commission observed:

"In this connection, a distinction should be made between the illegal acts committed directly against foreign residents in
casu Japanese, and those committed against Chinese with the avowed intention, however, of causing damage to Japanese interests. As far as the former are concerned, they are clearly not only illegal under the laws of China but also incompatible with treaty obligations to protect life and property and to maintain liberty of trade, residence, movement and action."

With regard to illegal acts committed against the Chinese, the Chinese Assessor observed at page 17 of his Memorandum on the Boycott:

"We would like to observe, in the first place, that a foreign nation is not authorised to raise a question of internal law. In fact, we find ourselves confronted with acts denounced as unlawful but committed by Chinese nationals in prejudice to other Chinese nationals. Their suppression is a matter for the Chinese authorities, and it seems to us that no one has the right of calling into account the manner in which the Chinese penal law is applied in matters where both offenders and sufferers belong to our own nationality. No State has the right of intervention in the administration of exclusively domestic affairs of another State. This is what the principle of mutual respect for each other's sovereignty and independence means."

So stated, the argument is incontestable, but it overlooks the fact that the ground of the Japanese complaint is not that one Chinese national has been illegally injured by another but that the injury has been done to Japanese interests by the employment of methods which are illegal under Chinese law, and that failure to enforce the law in such circumstances implies the responsibility of the Chinese Government for the injury done to Japan.

Coming to the question of legal position created by these boycott movements, the Commission observed:

"The claim of the government that the boycott is a legitimate weapon of defense against military aggression by a stronger country, especially in cases where methods of arbitration have not previously been utilized, raises a question of much wider character. No one can deny the right of the individual Chinese to refuse to buy Japanese goods, use Japanese banks or ships, or to work for Japanese employers, to sell commodities to Japanese, or to maintain social relations with Japanese. Nor is it possible to deny that the Chinese, acting individually or even in organised bodies, are entitled to make propaganda on behalf of these ideas, always subject to the condition, of course, that the methods do not infringe the laws of the land. Whether, however, the organized application of the boycott to the trade of one particular country is consistent with friendly relations or in conformity with treaty obligations is rather a problem of international law than a subject for our enquiry. We would express
the hope, however, that in the interest of all states, this problem should be considered at an early date and regulated by international agreement."

The Chinese Assessor in his Memoranda, presented to the Lytton Commission, referred to the 1905 boycott against American goods and quoted the communication of the American Minister of August 7 of that year to Prince Ching, informing him that the United States Government would hold the Chinese Government directly responsible for the loss to American interests sustained through the failure on the part of the Imperial Government to put a stop to the movement. "The Chinese Government", says the author of the Memoranda, "opposed the claim of the American Minister and refused to admit it." An extract from Ching’s reply to the American Minister is quoted, wherein it is stated that "this idea of a boycott of American goods came directly from the trades people. It did not come from the Chinese Government which certainly therefore cannot assume the responsibility." It is alleged in the Memoranda that "the responsibility of the state supposed to be involved in a boycott has never been seriously raised"; that "in no case has it resulted in the payment of indemnities"; that none were demanded by the United States in the present instance, or by the British on the occasion of the 1925 boycott, although here, too, it is stated that a representative of the aggrieved government alleged the existence of the national responsibility; and that "one can therefore say that international practice does not condemn the boycott as an illegitimate method of bringing pressure."

While the fact that two of the members of the family of nations officially announce that a course of action followed by a third is an international delinquency which gives occasion for pecuniary redress, cannot per se create a delinquency, it by no means follows that a failure to demand an indemnity is evidence that a delinquency has not been committed. Nor would such restraint constitute evidence that the course of action complained of is not condemned as illegitimate either in international law or practice. On the other hand, it may be assumed that responsible states are not apt to declare the existence of national responsibility on the part of a sister state in the absence of any legal ground on which to support their contention. The statement in the Memoranda that the question of national responsibility for a national boycott "has never been seriously raised" would seem to be controverted by the tenor of the diplomatic exchanges between the United States and China during the boycott controversy of 1905.

In considering the subject of the national responsibility in its relation to boycott, it would be necessary to examine carefully into its origin, methods and effect.

International law does not call upon the government of a country to thwart the establishments thereof when they decide, in the course of
availing themselves of it, to stop trading with the people of any
other. No duty is imposed on a country to prevent the exercise of a
normal right that is inherent in an independent country. The
withholding of trade is ordinarily regarded as such a right. Perhaps
it is correct to say that international law standing by itself does not
interfere with the freedom of the people of any single country to agree
to withhold their trade from a particular foreign state.

But the question may not always remain so simple as that.
The following matters may fall to be considered in this connection:

1. Whether the concerted action productive of non-intercourse
   (a) is attended with any acts of violence directed against
      (i) the interest of the proscribed country;
      (ii) the people of that country;
   or, (iii) the country itself;
   (b) is, in fact, the precursor of such acts of violence.

2. Whether the action in question is really inspired by the
government, making the boycott an instrument of govern-
mental conduct.

3. Whether the movement in question was the action of the
government itself being its officially undertaken policy.
   If so, how far this action can be said to amount to a breach
   of the recognized norm of international law that a civilized
   state must give protection to the life, liberty and property
   of foreigners more or less in accordance with the liberal
   traditions of the "Burger-liche Rechtsstaat". (See, in this
   connection, the American Journal of International Law,
   Vol. 24, p. 517—The article on "Responsibility of States"
   by M. Borchard.)

4. Whether the two countries stand in any special relation as
   a result of any treaty.

5. Under what circumstances and to what extent the proscribed
   country can have recourse to self-help to remedy the injury
   caused to it or to prevent any apprehended injury.

It has been noticed above that the first act of Chinese boycott
took place in 1905 and was directed against the United States of
America. On that occasion the United States notified the Chinese
Government that, under the provisions of Article 15 of the Treaty of
1858, it would be held responsible for any loss sustained by American
trade on account of any failure on the part of China to stop "the
present organized movement against the United States." That
movement, embracing the so-called boycott of American goods, and the
printing by the native press of inflammatory articles against the United
States, was described by the American Minister as "a conspiracy in
restraint of our trade carried on under official guidance and with the
sympathy of the Central Government."
Japan too had acquired special treaty rights in China and a large number of her citizens had been in China under those treaty rights.

In these circumstances, the question certainly arose for the consideration of the tribunal what was the extent of Japan's right to protect these interests and whether the boycott in question created any situation which would entitle Japan to exercise that right.

Hall says: "If the safety of a state is gravely and immediately threatened either by occurrences in another state, or aggression prepared there, which the government of the latter is unable, or professes itself to be unable to prevent, or when there is an imminent certainty that such occurrences or aggression will take place if measures are not taken to forestall them, the circumstances may fairly be considered to be such as to place the right of self-preservation above the duty of respecting a freedom of action which must have become nominal, on the supposition that the state from which the danger comes is willing, if it can, to perform its international duties . . . . When a state grossly and patently violates international law in a matter of serious importance, it is competent to any state, or to the body of states, to hinder the wrong-doing from being accomplished, or to punish the wrong-doer . . . . Whatever may be the action appropriate to the case, it is open to every state to take it. International law being unprovided with the support of an organized authority, the work of police must be done by such members of the community of nations as are able to perform it. It is however for them to choose whether they will perform it or not."

It is now well-settled that states possess a right of protecting their subjects abroad. I need not stop here to examine the extent of this right. It is evident that the legitimacy of action in any given case and the limits of right of action are essentially dependent on the particular facts of the case.

But apart from this question of justification, the evidence might establish a convincing explanation of the occurrence otherwise than as a product of the alleged conspiracy.

The defence often charged the tribunal with inconsistency in its rulings on the questions of admissibility of evidence in this case. At least some of the rulings referred to above would appear to justify such a charge. There were a few more instances also like the following:

On June 26, 1946 in cross-examining a prosecution witness, the defence asked him a question from a prosecution document which had not yet been introduced into evidence. The document was not a statement of the witness. Objection was made by the prosecution to the use of the document without it being introduced into evidence. This objection was upheld and the defence was not allowed to use the document for the purpose. (Proc. page 1429.)

On June 29, 1946 the defence in cross-examining a prosecution witness asked him a question with respect to a certain document.
Objection was taken by the prosecution that the document could not be used unless served on the prosecution twenty-four hours in advance and processed. This objection was also upheld and the defence was not allowed to use it. (Proc. pp. 1368-1371; June 29, 1948.)

Subsequently, however, on March 5, 1947 when prosecution offered to do the same thing in course of cross-examining the defense witnesses, the tribunal departed from this rule and announced that the rule as to processing and serving a copy of the document in advance did not apply in such cases, the very essence of cross-examination being the element of surprise. (Proc. pp. 17,608-12). The tribunal could not therefore disown its inconsistency in this respect; but it had a very good explanation as was pointed out by the President.

The President said: "... I am not here to offer any apology on behalf of the Tribunal, but as you know the Charter says we are not bound by any technical rules of evidence. That not merely prevents us from following our own technical rules—we could hardly do that because there are eleven nations represented and in some particulars they all differ in these technical rules—but it has the effect of preventing us from substituting any other body of technical rules of our own. All we can do on each piece of evidence as it is presented is to say whether or not it has probative value, and the decision on that question may depend on the constitution of the court. Sometimes we have eleven members; sometimes we have had as low as seven. And you cannot say, I cannot say, that on the question of whether any particular piece of evidence has probative value you always get the same decision from seven judges as you would get from eleven. I know that you would not... You cannot be sure what decision the court is going to come to on any particular piece of evidence—not absolutely sure—because the constitution of the court would vary from day to day and I would be deceiving you if I said decisions did not turn on how the court was constituted from time to time. They do. On the other day in court on an important point I know the decision would have been different if a Judge who was not here was present. How are we to overcome that. We cannot lay down technical rules. We might spend months in trying to agree upon them and then fail to reach an agreement. The Charter does not allow us to adopt them in any event. It is contrary to the spirit of the Charter. The decision of the Court will vary with its constitution from day to day. There is no way of overcoming it."

Lord Eldon once said: "This inconvenience belongs to the administration of justice, that the minds of different men will differ upon the result of the evidence, which may lead to different decisions on the same cause."

It seems this inconvenience also belongs to the administration of justice, that "it is impossible to reduce men's minds to the same standard, as it is to bring their bodies to the same dimensions."
The report of the United States Member of the Nuremberg Tribunal pointed out that the significance of the trial would depend upon taking the "next step" of a general codification by the United Nations of offences against the peace and security of mankind. But this is only a vocifer expressed by the prosecutor.

Even such a codification would not mean much. Punishment of the violation of the contemplated code would be contingent upon the defeat of the state guilty of the violation. If the event proved otherwise the aggressor might proceed to try the leading members of the community for aggression on their part.

The Challenge is overwhelming and is sure to baffle all the responses hitherto devised. All talk of peace, security, stability, human freedom is ephemeral nonsense so long as world politics remains mere power politics, so long as the activities of ruling politicians remain directed to the carving out of spheres of influence and 'security zones', so long as the principles and policies of the powers continue to be mere matters of changing convenience in their pursuit of power.

Yet the issue is man's future. The shape of that future depends on whether we can still organize the world more rationally by levelling all national antagonisms and federate its races, nations and cultures on the sincere basis of equality of the East and the West, so that the values of each civilization complement and reinforce rather than combat and destroy those of the other.

We are told that "Quest for Unity" is fundamental in human nature. "It is a tendency", we are told, "traceable and profoundly influential through all Man's thinking and practical life as soon as, and wherever, he is recognizably human." We are told that "man's progress towards and in civilization proceeds by a series of integrations, by the formation of more and more comprehensive and yet more definite wholes, which are linked together by successive differentiations."

"What happens is that Man with his unifying tendency forms a primitive integration, whether in his mental or practical life. This integration, on the emergence of some new power or idea in Man, is found inadequate, and is broken through by a differentiation which applies the new power or idea to wider areas of experience. Out of the more differentiated phenomena and relations that arrived at, the mind with its determined search for unity creates a new integration, larger, richer and more organised than the former one. This again is followed by a differentiation; and so the process goes on, Man ever becoming more capable of more comprehensive, higher, and finer integrations both of his own inner life and of his outward social relations."

Indeed Man has wandered about long in the wide new field, trying many wrong paths and culs-de-sac, making many false integration. Let us hope that his unifying power is sufficiently developed to form the right integration.
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