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WAR CRIMES UNDER INTERNATIONAL LAW (1)

In April last I wrote an essay entitled “Natural Law and International Law”, for publication in a volume of legal essays, which has not yet, however, been published. In concluding the essay I observed that I had not been able then to examine “a larger question, that is the criminality of an unjust war purely aggressive and acquisitive, designed to be carried on and, in fact, carried on with all the atrocities advered to in this essay”.

My thesis here is that such a war is a crime under International Law and that those responsible for it are liable to be prosecuted and punished under that law. It is important for those who approach the consideration of this topic to consider what are the nature, the sources and the sanctions of International Law. They must not expect to find that they are the same as exist in the case of systems of Municipal Law, whether the particular law is of the Anglo-American or Common Law type, or is of the Civil Law or the codified class. Either type has the feature that it is law enacted by a central law-making authority such as a Legislature or a Court, and the further feature that there is a standing judicial authority to expound it and a standing executive to give effect to it.

International Law differs from these national systems because there is no central law-making authority. It may thus be described as the law of the international community. That community, however, consists of a number of independent sovereign nations, each with its own system of National or Municipal Law.

The sources of International Law must, therefore, be sought elsewhere than in the acts of a national law-making authority. In my earlier essay I pleaded to have it recognised that International Law was the product, however imperfect, of that sense of right and wrong, of the instincts of justice and humanity which are the common heritage of all civilised nations. This has been called for many ages “Natural Law”; perhaps in modern days it is simpler and truer merely to refer to it as flowing from the instinctive sense of right and wrong possessed by all decent men, or to describe it as derived from the principles common to all civilised nations. This is, or ought to be, the ultimate basis of all law.

Just as civilised men (or perhaps any men) living together in society under the most complete system of individual freedom must necessarily suffer the restrictions inevitably imposed on each by the similar freedom enjoyed by their neighbours, so, in the community of nations, the sovereignty (i.e., the freedom and independence of each nation) must be conditioned by regard for the like freedom and independence of the neighboring nations. Modern conditions have made increasingly apparent the mutual interdependence of nations and have led to the concept of the community of nations. Some day there may be a central law-making and law-enforcing body charged with settling the relations between the members of what would then become the community of nations in the full sense. But that time is not yet.

International Law represents the imperfect endeavour to develop a body of rules and principles which will go towards establishing a rule of law among the nations, not dissimilar in character from the rule of law which is established in greater or lesser degree inside each separate sovereign nation.

The lawyer familiar with a municipal system of law will question how this is possible. The idea of law for him will be something to be precisely ascertained from Codes or Acts of the Legislature or decisions of competent Courts, something fixed, precise, coercive, something which corresponds to the ideal of analytical

(1) This article by Lord Wright appeared in the LAW QUARTERLY REVIEW, Jan., 1946 (pp.40-52). It is reprinted here because it concisely explains the legal philosophy upon which is based the rapid development of war crimes concepts in international law since the beginning of World War II. It was considered by the prosecution and courts both at Nuremberg and Tokyo to be a significant pronouncement. The article naturally could not fully anticipate some of the exact developments which emerged in the judgment of the first Nuremberg Tribunal and the various military and other courts which have followed.

—Editor.
jurisprudence. But that concept does not exhaust the idea of what law is. Law consists of rules for determining conduct. There may be such rules without legislation, without Courts and without executives to give effect to them. There may be the customary or traditional rules which are so familiar that men obey them or act in accordance with them as a matter of ordinary course. The common lawyer is familiar with the idea of customs which develop into law and may eventually receive recognition from competent Courts and authorities. But the Court does not make the law, it merely declares it or decides that it exists. After hearing the rival contentions of those who assert and those who deny the law.

All I am here concerned with is a limited area of International Law, that relating to the trial and punishment of war criminals in the full sense of that term, as adopted in the Agreement of 8th August, 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, which established a Tribunal for the trial and punishment of the major war criminals of the European Axis countries. 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 in International Law. I understand the Agreement to import that the three classes of persons which it specifies are war criminals, that the acts mentioned in paras (a), (b) and (c) are crimes for which there is personal responsibility, that they are not crimes because of the agreement of the four Governments, 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 Court of power. The principles which are laid down in the Agreement are not laid down as an arbitrary direction to the Court but are intended to define and do, in my opinion, accurately define what is the existing International Law on these matters.

Let me first deal with class (b), namely, war crimes of the type named, war crimes, as it is sometimes said, "stricto sensu." That there is a system of laws of war will not, I think, be contested by any international lawyer and, ancillary to that system, is the recognised right of military commanders to create military Courts to enforce that branch of International Law.

A code of such laws is to be found in various International Conventions, in particular, the Hague Convention of 1907, of which No. IV deals with the usages of law on land, and there have been similar Conventions with regard to naval war and to air war, and with regard to the treatment of prisoners of war, to sick and wounded and other objects of humanity. These are instances of what I have already adverted to, namely, a law or laws, not enacted by any sovereign law-making body, but depending for its creation on the voluntary consent of the civilised nations of the world, and on the humane feelings of civilised mankind enforceable, if need arise, by military Courts. The animating motive of these Conventions is admirably expressed in a sentence from Article I of the Preamble to the Hague Convention, No. IV, which recognised that these rules must be subject to development and revision as new necessities are realised or operate, as well as stating the governing principle of the rules in the following words, "the inhabitants and the belligerents remain under the protection of the principles of the law of nations, derived from the usages established among civilised peoples, from the laws of humanity and from the dictates of the public conscience." In the annex to the Convention there are fifty-six articles which enumerate and define the specific laws, rights and duties of war. Various lists of such crimes have been drawn up. The main heads are enumerated by the Agreement of the four nations of 8th August, 1945.

Before the era of Conventions of this character, writers on International Law had attempted to regulate and mitigate to some extent the inevitable cruelties of war. Hall, a most accurate and precise writer, in Part III, Chapter II of his work
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gives a useful summary of what had been done when he wrote. I quote from the
fourth edition, 1885, the last edition which he revised. There had been the Geneva
Conventions in the sixties of the last century, but otherwise the matter was left to
the informal or implicit agreement of the nations. It had, however, been fully
established that a belligerent could punish those who had broken the laws of war.
Thus Hall, p. 135, writes: "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".
Hall thus makes the test of jurisdiction to punish for the violation of the law,
the fact that the offender has fallen into the belligerent's hands. The test is not
territorial or temporal. It is simply the test of custody. But the right only
continues while the war continues, and ceases with the conclusion of the peace
unless, by the peace treaty, the period is extended.

For the purpose of dealing judicially with most of such cases it has long been
established in International Law that the most generally used and most appropriate
Court is a military tribunal. This may be the Court of one belligerent alone or it
may be a mixed Tribunal constituted by Allied belligerents as in the Agreement
of 8th August, 1945, to which I have referred. There is thus under International
Law a complete system of law and an appropriate Tribunal. The whole position is
very fully explored by Chief Justice Stone in the judgment of the Supreme Court
of the United States which he delivered in the case of Sabeur, Ex p., Quirin
U.S. Rep. The prisoners there were charged with landing during the war in the
United States for the purpose of spying and sabotage. The President, in his
capacity as such and also as Commander-in-Chief of the armed forces of the nation,
appointed a Military Commission and directed it to try the accused men for offences
against the law of war. The Supreme Court upheld the validity of that appoint-
ment and directed the Court to proceed. The case raised some important
points under the Constitutional and Statutory Law of the United States which I need not here
discuss. What is relevant now is that the Supreme Court, while distinguishing
Military Courts from Courts Martial, affirms the jurisdiction of Military Courts
to try offences that by the law of war are triable by military tribunals. The Chief
Justice says: "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 refers to the jurisdiction of Military Commission to try persons
for offences which according to the rules and precepts of the law of nations, and
particularly the laws of war, are cognizable by such tribunals. The Chief Justice
gave a long list of cases in which such Courts had tried such offences; such as
spying and the like. He points out that International Law, as enforced by these
Courts, has established a defined penalty, death for heinous offences and for lesser
offences such more lenient penalty as the Court may deem just. He quoted with
approval as a statement of the law the passage from the Preamble to the Hague
Convention which I have already cited. These and other passages from the
Chief Justice will, I am confident, be regarded as classical and authoritative
statements that there is a law of nations which includes the laws of war and which
defines the functions of military tribunals, and also the punishments assigned by
that law and those Courts to violators of the law of war.

The passages I have cited and the instances quoted by the Chief Justice show
conclusively that the offences covered by the laws of war involve the personal
responsibility of individuals. The fate of the unfortunate Major André in 1780
will occur to many persons' thoughts. To skip nearly a century, there is the case
of the Confederate Captain Wirz in 1865 who was sentenced to death for killing,
during the Civil War, Federal prisoners without justification by the laws of war.
The Conventions do not in general expressly impose responsibility on individuals,
whereas they do impose on the Government a liability to make compensation
for damage due to violations of the laws of war. But the Conventions must
be construed in the light of the long-established practice of imposing individual
punishment. Indeed, the efficacy of this part of the law of nations would be
hamstrung by any other construction. The liability of Governments is additional
to and consistent with the responsibility of individual criminals.

The Chief Justice accepts as established law that Military Courts have power to
inflict punishments on individuals, and that they have jurisdiction to give effect
to offences specified in the Hague Convention and similar offences so as to give full scope to the governing purposes.

I do not find anything contrary to natural justice in thus giving effect to what the Chief Justice calls the common law of war. The rules of war are law in the fullest sense. The crimes and the punishments are established. There must always be left to the Military Court, or to any National or International Court of a belligerent which may have jurisdiction to try such offences, the decision not only whether the offence is proved against the particular accused, but whether the facts bring it within the proper construction and operation of the law.

I have, I am afraid, at undue length developed what seem to me to be almost obvious plaitudes. But so many objections have been strenuously raised in various quarters that I must deal at least briefly with them.

Thus, it is said that the idea of punishing individual violators of the laws and customs of war is unjust because the law relied on is retrospective, or because it is uncertain or not sufficiently specified, so that the violators of it cannot be taken to have known that they were doing wrong. But all these objections fail if the "laws and customs of war are a standard certain to be found in books of authority and in the practice of nations". I quote this description, with which I fully agree, from the Minority Report by the American jurists, Scott and Lansing, which forms part of the Report of the Commission on Responsibilities (Conference of Paris, 1919), which I shall refer to as the 1919 Report. The opponents of this view can only support their thesis by denying that the laws and customs of war are law and, so far as I can see, they can only do so on the footing that there can be no law save the municipal law of a Sovereign State, which, as I have explained, not only denies the possibility of any International Law at all, but is contrary to modern conceptions of law. The actual law with its specified offences and penalties may not be familiar to a cheesemonger in the City of London, but must be taken to be known to all those who have to act in the matter to which it relates, for instance, to statesmen, to military, naval and air officers and even to soldiers of lower ranks.

A criminal cannot exculpate himself on the grounds that he was ignorant of the law which affects him. Nor is it an answer to the law that it is being enforced by the victorious belligerents against the vanquished. Someone must act as policeman if law is violated. The policeman must belong to the stronger side. So it is in ordinary national life. The policeman represents the force of law and order; his action involves an exercise of power; so does the action of the victorious belligerent which seeks to punish violators of the laws of war, but it also seeks to vindicate the law for the benefit of humanity. That the stronger may sometimes in fact be substituting power for justice is no doubt a calamity when it happens, but this possibility is not relevant to the argument when what is being sought is justice, not revenge.

Nor can a criminal complain that he is entitled to be tried by an impartial and neutral Court and not by a Court constituted by the enemy. All he is entitled to is a trial on fact and law conducted on the principles of elementary justice. A burglar cannot complain that he is being tried by a jury of honest citizens. Trials of international criminals are watched by the world and the Court knows that it is also itself on trial. Not only is the practice of trials of war offences by Military Courts of the other belligerents established by International Law, but it is obviously the only practicable course, certainly in such circumstances as those now existing.

There are two other more limited arguments which are often advanced by those (by no means negligible in number) who oppose the punishment of war criminals. They are closely inter-connected and if logically applied would defeat, for all practical purposes, any attempt to punish war criminals. One is called the defence of superior orders, the other the defence of the immunity of heads of State.

Under the former, any man, except a mere wanton evildoer, accused of a war crime, would plead that what he did was done in obedience to orders of superiors. One might start with the common soldier and proceed upwards through one grade after another until one reaches the head of the State; then the accused would claim to be immune from any superior control except that of his own nation, which would, generally, not condemn his acts. The futility of the trial of war criminals by their own Courts was shown by the Leipzig trials at the end of the last war. This mounting scale of responsibility would be the normal case, though
there might be cases in which the sequence of responsibility would stop at some intermediate authority, such as a general or a gaukler.

Both these pleas are in my opinion ill-founded. As to superior orders as a defence, the true view is, in my opinion, that if what is ordered is a crime, which is or ought to be a crime manifest to the subordinate soldier or Government agent, he cannot justify his obedience. It might be different if the criminality of the order is not reasonably obvious to the man; the order, for instance, might appear to him justifiable on the grounds of reprisals, or the nature and effects of the order might not be apparent. But even then, the plea would not be a defence though it might go to extenuation. But, an order, such as an order to burn the women and children of a village in the village church, or to machine-gun a crowd of innocent hostages, or to murder a number of airmen who had attempted to escape and been recaptured, or to inflict hideous tortures to extract information, are all instances of manifest criminality.

As for the defence of the immunity of heads of States, that is, in my opinion, based on one or both of two obsolete and exploded fallacies. One of these is the idea that heads of States are entitled to claim immunity from the processes of law not only of their own nation but of all other nations, and not only in peace but also in war and in regard to war. They are, it is said, above every law. It is true that, by the courtesy of nations, immunity is granted to the Sovereign, as also to Ambassadors and the like, in the Courts of the other States, but that immunity only exists by a reciprocal courtesy on the footing of peaceful relations existing between the States. That, however, no longer continues in war conditions. Both the sovereign State and its head or Sovereign are then responsible and are subject to penal measures at the hands of the victorious State for war crimes. Even extreme supporters of the doctrine of sovereign immunity admit that it does not apply to heads of State who are captured, or who surrender, or who have abdicated. These extreme supporters of the doctrine of sovereign immunity admit that the imaginary rule of immunity is illogical. Indeed, in the last resort it can only be supported on the lines of a personal immunity, like the divine right of kings eloquently claimed by certain royal personages in Shakespeare. The Agreement of the four Governments of 8th August, 1945, explicitly rejects this defence of personal immunity and explicitly limits the defence of superior orders to a mitigation of punishment by the Court if it decides that justice so requires.

I have discussed at some length the question of responsibility for violations of the law of war, because it is of great importance that particular violators of the law, that is the actual perpetrators, should be made to realize that they also are personally responsible. I should be sorry to think that the fiendish torturers, the guards, and administrators of concentration camps with all their horrors, the men who carried out forced deportations and all the atrocities committed in the occupied countries, should not realise that they are responsible and liable to personal punishment as well as their superiors.

War crimes are generally of a mass or multiple character. At one end are the devisers, organisers, 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.

Professor Trainin, in his work on *Hilterite Responsibility under the Criminal Law* (at p. 82 of the English translation) observes that all members of the Hilterite clique were not only participants in an international band of criminals, but also organisers of a countless number of criminal acts (murders, robberies, destructions, etc.) performed by the Hilterite invaders. He also says that full responsibility must also be borne by those guilty of individual crimes—the actual murderers, incendiaries, violators, exploiters of slave labour and purchasers of goods known to be stolen. He concludes that all the Hilterite criminals are liable, without exception, “from the lance-corporal in the army to the lance-corporal on the throne”. Thus it is seen that the more highly placed the Nazi criminal the greater his responsibility. However high his rank in the hierarchy, he is still only a murderer, robber, torturer, debaucher of women, liar and so on. He is still only a common criminal though his murders and the like crimes are multiplied by the million. They do not cease to be crimes because planned and organised on an unparalleled magnitude, nor because they are done in pursuance of a criminal conspiracy by those whom the professor calls the “band” or clique. Nor do they
cease to be crimes because they were aimed at world domination which some would call a political purpose, as I suppose some would call the organised scheme for the extermination of races like the Jews. A "political" purpose does not change murder into something which is not murder. Nor do the 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.

It is well to start, in my mind, 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. The question may be approached in two ways. One which I shall call the concrete method is to start from the actual violations of the laws of war and trace the responsibility on the lines which I have explained, up to the originators of the whole scheme, so that thus the responsibility of Hitler and his Government as conspirators for all the "terrorism" and atrocities of war can be established.

The war just ended is what has been called totalitarian war and has the peculiar feature that it was ushered in by the most brutal and blatant announcements, not only that it aimed at aggression and world domination but would be conducted with every possible atrocity in order to strike terror, and would include both national degradation of the vanquished and racial extermination of the Jews and others. The war was to be not only aggressive and unjust, but was to be merciless. Such were the preliminary announcements. What was actually done by the Nazi Government and forces carried out the policy. It early became apparent to those who had to study the tale of Nazi atrocities that they were not the casual crimes of separate evildoers, but were committed according to a set plan or scheme. This was clear from the uniform pattern of what was done at different places and times. It is not possible to have occurred except under the direction of the higher governmental powers, the band or clique. Besides these general grounds of inference, it has also been possible, by captured orders and other evidence, to trace the responsibility for the whole complex tissue of infamy to its authors and originators, that is to Hitler and his Government. They are thus seen, in accordance with elementary principles of criminal law, to be the principals guilty of the crimes against peace, in that they initiated this particular war in the form in which it was in fact carried out, that is, as a vast series of separate crimes, all traceable back to Hitler and his gang.

Thus the totalitarian crime against peace is established.

But that these men were guilty of the crimes against peace can be shown on another line of argument, which would not depend, as does the argument which I have explained, on the war being not only unjust but so planned and organised that it was to be conducted on the particular lines of terrorism to which it actually conformed. The more abstract argument would rest upon the very nature of war as a thing evil in itself, though in special cases it might be justified, for instance, on the ground that the war was forced on the Power which declared it because it was necessary for the defence or liberation of that Power. Every nation has the inalienable right to self defence. But a war of aggression falls outside that justification. *War is an evil thing.* It is no hyperbole to describe the war of 1939 to be one of the greatest calamities that ever befell the human race. To initiate a war of aggression is thus not only a crime, but the chief of war crimes. It differs in its universal scope from the specific offences which are included in the breaches of the particular laws of war. It is the accumulated evil of the whole. If it were possible to conceive of a war conducted on the most chivalrous and humane methods possible, the initiation of the war, if it were an unjust war, would still be a crime. It would be a crime against peace.

I have already referred to the concept of the community of nations. That is, it is true, an ideal, but, though it may seem to have merely an inchoate and imperfect realisation, the concept itself is vital and has a definite reality. Hence I adopt Professor Train's definition (loc. cit., p. 37), "International crime", he says, "is the punishable infringement of the foundations of international communion. . . . The basic prescriptions of any international communion is the existence of peaceful relations between States. . . . Peace may be directly broken by various forms of criminal activity. . . . The direct and most dangerous form of
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offence against peace is the attack of one State on another—aggression—which directly breaks the peace and forces war on the peoples. Aggression is the most dangerous international crime.” Professor Trainin is, of course, referring to unjust aggression. He proceeds also to detail what may be described as preparatory or ancillary aggression, such as treacherous underground assaults on the intended victim.

In the premises that peace among nations is a desirable thing, that war is an evil of unique enormity and that there is a criminal International Law affecting individuals, it is not easy at first sight to understand why an unjust war is not a crime under International Law and, as such, involving criminal responsibility on the part of the men who planned, prepared, started and waged it. In the Münchener Zeitung of the 15th of October, 1938, Dr. Goering said that the conduct of German forces was the result of a policy of aggression, and that it was committed in order to achieve the aims of the Hitler regime. He pointed out that the conduct of the German forces was in accordance with the principles laid down in the Treaty of Versailles.

The two United States delegates who signed the Minority Report were willing to concede that mixed Military Courts drawn from the different Allies would be competent to try charges against persons belonging to enemy countries who committed outrages against a number of civilians and soldiers of several allied nations, such as outrages in concentration camps or forced labour in mines or charges against persons in authority belonging to enemy countries whose orders were carried out by their officers, but whose orders reflected the conduct of the country.

The Majority Report, however, held that the conduct of the German forces was in accordance with the principles laid down in the Treaty of Versailles. They argued that the conduct of the German forces was in accordance with the principles laid down in the Treaty of Versailles.

If these elastic standards are of as wide utility as they have proved to be there is no reason why the doctrine of crimes against humanity should not be equally valid and valuable in International Law. The law deals with large concepts and not with the meticulous distinctions of Municipal Law.

In one sense, whenever an innocent French woman was tortured by the Gestapo, there was a crime against humanity. But what is meant by the term as used in the indictment against the major war criminals is conduct directed against a large section of humanity, such as the crime of racial or religious extermination, as that for instance directed against the Polish nation or the Jewish people in the course of which millions of mankind were deliberately destroyed.

There is a close parallel between such crimes and crimes against peace. But the plan of exterminating the Jews, though in one sense a war crime, was rather secondary and ancillary to the actual war. I cannot agree that crimes against humanity are too vague to be the subject of penal action. International Law does not deal with border-line cases or with subtle distinctions. What is meant in this context by crime against humanity is sufficiently clear. An International Court would have no difficulty in deciding whether or not such a crime is made out.

The Majority Report of 1919 included both offences against the laws and customs of war and the laws of humanity as falling within the category of offences rendering those guilty of them responsible to criminal prosecution. I cannot find that this conclusion is refuted by the objections set out in the Minority Report in 1919 either of the American or Japanese delegates. I have already stated why I dissent from the view that heads of States are immune from legal liability except at the hands of their own people, which was one of the objections taken.
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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 and subversion the 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 agrandisement, is a moral crime of the foulest character. But legal writers are fond of distinguishing moral from legal crime. 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. 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.

However, the punishment of heads or other members of Governments or national leaders for complicity in the planning, preparation and initiation of unjust war has not yet been enforced by a Court as a matter of International Law. The 1919 Commission did not recommend that the act which brought about the war should be charged against their authors, though the charge was not the same as that now brought against the members of the Nazi Government. But, between then and now, 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 a war of aggression or unjust war was to be prohibited; one of these actually declared that it was a crime.

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. In English law it is often said that the doubtful interpretation of an Act of Parliament may be elucidated by considering what was the mischief which the Act was intended to cure; this might be shown by considering the previous law and its deficiencies. In the same way, if there were any ambiguity about the effect of the Pact, it might be solved by considering the eager desire of the nations to avert any danger of war in the future by a clear declaration of International Law. But 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. It is true that no sanctions are provided by the Pact and no specific machinery is set up for the settlement of differences between nations, nor does the treaty provide for what would seem to be the natural corollary for disarmament. But efforts to secure that end soon followed.

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 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. It may be that before
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the Pact the principle was simply a rule of morality, a rule of natural 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. How far it is established in fact against each of the accused will depend on what is proved at the trial.

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 as to wage war in self defence 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 man, 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 recognised by the consensus of civilised 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 ideas in 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 reprobated 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.

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 harmonise the customary rule with the principles of logic of morality and of the conscience of civilised 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.

In less than a month from the day when I write these words the International Tribunal will begin the trial in which it will be decided what is the International Law which is material to the grave issues raised.

Wright.