THE WAR TRIALS AND INTERNATIONAL LAW.

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(A) *Nuremberg.*

The question of the punishment of war criminals has called forth a voluminous literature, some of which is cited below.[1] There are few who doubt that, morally at least, those executed deserved their fate; but much of the discussion of the legal points involved in the trial is obscured by what may be politely called special pleading.

The International Military Tribunal was set up by agreement between the U.K., U.S., France and U.S.S.R. on August 8th, 1945, and nineteen countries later adhered. To this Agreement was annexed a Charter which determined the constitution, jurisdiction and functions of the Tribunal: broadly the Tribunal was given power to try and punish persons who had committed crimes against peace, war crimes and crimes against humanity as defined in the Charter. The making of the Charter was regarded by the Tribunal as " 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 recognised by the civilised world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but, in the view of the Tribunal . . . it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law. 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."[2]

There are, therefore, two aspects of the trial. From one angle, it is a sovereign exercise of power by the victors over those in occupied territory: from another, it is an attempt to administer international law by a tribunal set up by agreement between certain nations.

From the first point of view, the Tribunal was bound by the Charter " as a valid exercise of sovereign legislative authority by the only sovereign authority for Germany and the occupied territories which had power *de facto* by virtue of occupation and *de jure* by virtue of the surrender of Germany's constitutional sovereign and the recognition of the civilised

1. Sheldon Glueck, The Nürnberg Trial and Aggressive War, 59 Harv. L.R. (1946) 396.
A. N. Sack, Punishment of War Criminals and Defence of Superior Orders, 60 L.Q.R. (1944) 63: Lord Wright, War Crimes under International Law, 62 L.Q.R. (1946) 40: Lauterpacht, The Law of Nations and the Punishment of War Crimes, 21 Brit.Y.B. of Int. Law (1944) 58: G. A. Finch, The Nuremberg Trial and International Law, 41 Amer. Jo. of Int. Law (1947) 20: Quincy Wright, The Law of the Nuremberg Trial, op. cit. 38: The Judgment of the Court is published, op. cit. 172.
The issue of the Temple Law Quarterly for 1946, Vol. 19, contains the following articles: The Legal Basis for Trial of War Criminals (133), R. H. Jackson, The Rule of Law among Nations (135), Justice Jackson's Report to President Truman (144), The Indictment against Major Nazi War Criminals (172): in Vol. 20, R. H. Jackson, The Nürnberg Trial becomes an Historic Precedent (167), Judgment of the Court (168), Dissenting Opinion of the Soviet Member of the Tribunal (318), Justice Jackson's Final Report to the President (338).
Max Radin, International Crimes, 32 Iowa Law Rev. (1946) 33: Karl Jaspers, The Significance of the Nürnberg Trials for Germany and the World, 22 Notre Dame Lawyer (1947) 150: Lawrence L.J., 23 International Affairs (1947) 151: J. B. Schick, War Criminals and the Law of the United Nations, 7 Univ. of Toronto Law Jo. (1947) 27: Kuhn, 41 Amer. Jo. of Int. Law (1947) 430: Emilio von Hofmannsthal, 22 N.Y. Univ. L.Q.R. (1947) 93.
2. Judgment as reported in 20 Temple L.Q. (1946), at 210-1

states of the world."[3] The second point raises more difficulty and is discussed below.

The Tribunal did its work well. A copy of the indictment was served on the prisoners thirty days before the trial began. 403 open sessions of the tribunal were held.[4] The English transcript covers over 17,000 pages and all proceedings were recorded mechanically. By almost simultaneous translation, the proceedings could be heard in any one of four languages. In preparation for the trial, over 100,000 German captured documents were examined and over 10,000 selected as having evidentiary value. Millions of feet of Nazi film were examined and 100,000 feet were brought to Nuremberg. Over 25,000 Nazi photographs were used. The staff of the court produced 30,000 photostats, fifty million pages of typed matter and 4,000 record discs.[5] Much of the evidence thus consisted of official documents seized from German custody. The Judgment consists of 169 pages. Most of the decisions were unanimous, but the Soviet member dissented from the acquittal of Schacht, von Papen and Fritzsche: objected to the leniency of a sentence of life imprisonment for Hess and to the failure to declare as criminal organisations the German Cabinet, the General Staff and the OKW.

The Counts against the individuals indicted were as follows:

1. Conspiracy to commit crimes against peace, war crimes and crimes against humanity.
2. Crimes against peace. This was defined under Article 6 of the Charter as meaning planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances.
3. War crimes, namely violations of the laws and customs of war.
4. Crimes against humanity.[6]

CONSPIRACY.

From the angle of international law, this was an innovation. Conspiracy is a crime recognised by the municipal laws of many states, but it had not been regarded before as an "international crime." It is to be deprecated that this count was ever introduced. The defect of conspiracy in municipal law is that it enables a mass of evidence to be introduced which would not be available if the conspirators were tried separately. Once the conspiracy is proved, evidence against one conspirator is evidence against all—theoretically the conspiracy should be proved before such evidence is regarded as admissible against each individual, but in spite of clear direction from the Judge, it is not always possible for the jury to keep the two issues distinct.

Incidentally the very existence of the crime of conspiracy is unknown to the laws of Germany and France, and it is the more surprising, therefore, that this count was used. The object was clear—to enable the net to be flung so as to include the civilian who planned as well as the soldier who executed.

3. Lawrence L.J., 23 International Affairs (1947), at 155.
4. For the number of witnesses and affidavits, see 41 Amer. Jo. of Int. Law (1947), 173.
5. Justice Jackson, 20 Temple L.Q. (1946) 338-9.
6. The official publication of the Judgment is in Cmd. 6964: the proceedings and speeches are published by H.M.S.O. separately.

CRIMES AGAINST PEACE.

The Tribunal was, of course, bound by the Charter which defined as a crime the planning or waging of war that is a war of aggression or a violation of international treaties. This particular count was undoubtedly a breach of the maxim *nulla poena sine lege.*

The violation of various treaties, to which Germany was a party, was charged: e.g. declaring war without a declaration, and breaches of the Versailles Treaty and the Kellogg Pact. There was undoubtedly breach of treaty but the real point was how far the individuals responsible were *criminally* responsible and could be made to answer before an international court.

Strenuous efforts were made to prove that the waging of an aggressive war was an international crime in 1939. It was pointed out by the Tribunal that the preamble to the Geneva Protocol of 1924 used the words *international crime* in referring to the institution of aggressive war. This document was recommended to the members of the League of Nations by a unanimous vote but it was never ratified. In 1927 the League also declared a war of aggression to be an international crime. The Kellogg Pact inevitably was used as an argument—here war was expressly condemned as an instrument of policy. The Tribunal, however, accepted the view 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 used the analogy that those guilty of a breach of the Hague Conventions relating to war had frequently been punished for war crimes, in spite of the fact that the Conventions did not in express terms declare these acts criminal. With respect, this is a false analogy. Historically, the prisoner of war had no rights—it was no breach of the rules to submit him to the sword. As the rules were ameliorated, the prisoner was first by custom and then by Hague Convention, protected by rules—but these applied only to one who had not been guilty of a breach of the laws of war. Those who had been so guilty could claim no protection. There was no need for the Hague rules to create a specific crime, for it was established by the custom of centuries.

If the waging of aggressive war was a crime before 1939, it is curious that no attempt was made between the two world wars to set up a court. Judge Caloyanni pleaded in 1931 for the establishment of a permanent penal jurisdiction for international crimes, but no success greeted his efforts.[7]

Another crime charged under this Count was the planning or preparation of an illegal war. This is extraordinarily wide and would raise interesting discussions concerning *mens rea* if it were seriously pursued. Presumably planning for a war cannot be an international crime. That is the professional duty of the heads of the services and the patriotic duty of many scientists and industrialists. If the sting of the charge is the preparation for an *illegal* war, what degree of knowledge or complicity is required in the individual perpetrator? Clearly the soldier and the

7. Kuhn, 41 Amer. Jo. of Int. Law (1947) 432.

industrialist prepares for war: what kind of a war it will be depends on the politician.

BREACHES OF THE LAWS OF WAR.

It has already been emphasised that a war prisoner can demand the treatment accorded to him by the Geneva Convention only if he has observed the laws of war. Hence an offender who has committed a war crime in the narrow sense may be executed. *War crime* is defined in the British Manual of Military Law as[8] "the technical expression for such an act of enemy soldiers and enemy civilians as may be visited by punishment or capture (*sic*) of the offenders . . . War crimes may be divided into four different classes:

(i) Violations of the recognised rules of warfare by members of armed forces:
(ii) Illegitimate hostilities in arms committed by individuals who are not members of the armed forces:
(iii) Espionage and war treason:
(iv) Marauding.

. . . Charges of war crimes may be dealt with by military courts or by such courts as the belligerent concerned may determine. In every case however there must be a trial before punishment. . . All war crimes are liable to be punished by death, but a more lenient penalty may be pronounced . . . ."

Article 6 (*b*) of the Charter defined war crimes as follows: "War Crimes: namely violation of the laws or customs of war. Such a violation 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 prisoners 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."

Under this head the evidence related to acts that have been clearly regarded as war crimes for a considerable time. Conviction on this count introduced no new legal elements at all,[9] e.g. murder of prisoners of war is an obvious war crime, as are also such acts as cruel medical experiments on prisoners, or the attempted extermination of the population of Russian villages. It is true that the defendants were not all prisoners of war, but jurisdiction over war crimes covers a larger field.

There always have been, however, certain difficulties arising in the application of these rules.

(A) THE DEFENCE OF SUPERIOR ORDERS.

The British Manual of Military Law states that members of the armed forces who commit violations of the recognised rules of warfare as are ordered by their government, or by their commanders, are not war criminals and cannot, therefore, be punished.[10] Oppenheim was

8. 287-9, Sections 441 et seq.
9. As the Tribunal points out, these crimes 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: see Judgment, 20 Temple L.Q. (1946), at 241.
10. 288.

responsible for this doctrine and it remained in the first five editions of his work on international law. Professor Lauterpacht left this rule unchanged in the fifth edition but in the sixth the text was altered. British Army Orders revised the Manual in April 1944 so that superior orders ceased to be a defence.[11]

Curiously enough, in municipal English law the defence of superior orders has not been allowed either in civil or criminal cases. In the latter instance, the soldier is protected if the order is not manifestly unlawful on its face[12]—if he obeys an order that is clearly unlawful and causes death, he may be convicted of murder. France recognises the plea of the validity of superior orders in a suit depending on municipal law, but rejects it when put forward by enemy officers and soldiers accused of war crimes.[13]

The *reductio ad absurdum* of the plea of superior orders is seen in the acquittal of Grand Admiral Tirpitz for having ordered unrestricted submarine warfare. The *Reichsgericht* held that he did not give the order, and also that none of the other persons who, during the war, occupied the position of Secretary of State for the Navy, had given the order. The judgments did not elucidate who was the person who gave the order, but one hints that it was given by the Emperor himself. If we couple with the doctrine of the validity of the defence of superior orders that of the international irresponsibility of the Head of a State, then no one would be liable.[14]

The Charter, therefore, rejected the plea of superior orders: "The fact that the defendant acted pursuant to the order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment." The hardship of this rule in particular cases is discussed below in connection with other war trials.

(B) Uncertainty of the Law of War.

The sober truth is that every major war begins under a set of rules which have not even been properly adapted to the conditions of the previous war. The advent of the submarine made it difficult to apply the orthodox rules relating to search and capture: the aeroplane cannot easily conform to the ancient rules concerning bombardment. Moreover, the introduction of "total war" has extended the category of military objectives.

This uncertainty is made worse by the prevailing habit of indulging in reprisals. Reprisals are recognised as legitimate in some cases by international law, but the scope given to the operation of this doctrine has been amazing in both world wars. This is especially true of the doctrines of maritime war, and even as a matter of history it is difficult to decide the legality of certain acts. At any rate, no soldier or officer faced with an order stated to be based on a theory of reprisals could be expected to determine its legality.

11. See the discussion by G. Schwarzenberger, 60 Harv. L.R. (1947), 545-7.
12. *Keighley v. Bell*, (1866) 4 F. & F. 763, at 790.
13. Lauterpacht, 21 B.Y.I.L. (1944) 72.
14. See Lauterpacht, 21 B.Y.I.L. (1944) 70.

These factors must certainly be considered in any individual case where a prosecution is brought. Clearly prosecution should, at the present stage, be confined to breaches of laws universally recognised.[15]

CRIMES AGAINST HUMANITY.

Crimes against humanity were defined in the Charter as " murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, *before or during the war*, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, *whether or not in violation of the domestic law of the country where perpetrated.*" This definition overlaps that of war crimes in many respects but the italics (which have been added) show that it is wider in two significant ways :

(*a*) war crimes in the traditional sense cannot be committed in a time of peace ;

(*b*) war crimes would not include savage acts by a German administrator against portion of the German population.

Traditionally such matters would be the concern of the domestic law. The definition of crimes against humanity was made wide enough to cover German persecution of Jews who were German citizens. Laudable as the motive may have been, this opens up an alarming vista of retrospective interference in the internal affairs of another state.

The Tribunal refused to consider crimes before 1939 unless they were in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. This at least reduced to some extent the scope of the wide rule laid down in the Charter.

INDICTMENT OF GROUPS.

Article 9 of the Charter provided that at the trial of any individual member of a group or organisation, the Tribunal may declare that the group or organisation of which the individual was a member was a criminal organisation. If the Prosecution asked for a declaration against any group, then notice was to be given and any member of the group might apply for leave to be heard on the question of the criminal nature of the organisation. If an organisation was declared criminal, then the competent national authority of any Signatory should 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 was not to be questioned. Membership alone is a crime which may be punished by death, imprisonment or fine.

The Prosecution asked for a declaration concerning the following organisations : (1) The Leadership Corps of the Nazi Party : (2) The Gestapo : (3) The S.A. : (4) The S.S. : (5) The Reich Cabinet, and (6) The General Staff and High Command of the German Armed Forces. The judgment declared criminal the first, second, third, and fourth groups, but did not include within this declaration the minor officials or members. The S.A. was acquitted. The Reich Cabinet was held on the facts not to

15. Hall, International Law, (3rd ed.), S. 135 ; Lauterpacht, 21 B.Y.I.L. (1944) 79.

be an organisation as in the relevant periods it did not operate as such. The General Staff and the High Command were also held not to be organisations within the meaning of Article 9. The view of the Tribunal was that members who had no knowledge of the criminal purposes or acts of the organisation, and those who had been compulsorily drafted, should not be included in the declaration of criminality, unless they were personally implicated in the commission of acts declared criminal by the Charter. This is a just limitation. Even so, the use of this declaration of criminality is to be deprecated—it savours too much of injustice to the individual, in that it reduces the quantum of proof necessary in presentation of a suspected offender. To make mere membership punishable with death is too severe.

FINDINGS AND SENTENCES.

Of those who were convicted, all were found guilty of war crimes except Hess, Streicher and Schirach.[16] The complaint with regard to the others can only be that after being convicted for a war crime the punishment for which is death according to the generally understood rules of international law, they were also convicted of other crimes which were not generally recognised, i.e. that in additon to being hanged for a good reason, they were also hanged for two or three bad ones. But if this is the sole explanation of the trial, then of course it is not of great historical significance. It is the establishment of liability for conspiracy and crimes against the peace that make the judgment important as a precedent.

The general consensus of opinion of Allied writers has been enthusiastically in favour of the law as laid down by the Tribunal, but Finch writes : " The invocation of principles of doubtful legality in the punishment of the Nazi defendants may lay the entire proceedings open to challenge by future generations of Germans. Hitler's amazing rise to political power received its initial impetus and was successful primarily because of its attack on the ' war guilt clause ' improvidently inserted for political reasons in what he called the *Versailles Diktat*."[17]

(B) *Other War Trials.*

An interesting volume has now appeared—the first number of the Law Reports of Trials of War Criminals.[18] For the humbler criminals, British Military Courts were set up under the authority of a Royal Warrant dated 14th June, 1945. This is based on the Royal Prerogative. In Australia a special Act has been passed[19] and in Canada Regulations have been made under the authority of a *War Measures Act*. On the United States side, Military Commissions and Military Government Courts were used. The former are really based on " American common law," though they have been recognised by statute. The source and nature of the authority to establish such Commissions were considered

16. Hess was convicted of conspiracy and crimes against peace : Streicher and Schirach of crimes against humanity.
17. 41 Amer. Jo. of Int. Law (1947) 24-5.
18. Selected and Prepared by the United Nations War Crimes Commission, English Edition, Vol. I., H.M.S.O. 1947.
19. *War Crimes Act* 1945 No. 48.

at length in the *Saboteur Case*[20] and in *Re Homma*[21] and *Re Yamashita*,[22] but the Supreme Court upheld the power of the President as Commander in Chief to appoint Military Commissions and to prescribe rules for their operation. The source of authority of the British Military Courts has not been raised in the courts in England, or it seems within the Empire.

One broad difference between British and U.S. practice concerning these courts is the position of the Judge Advocate. The British theory is that the Judge Advocate is the impartial adviser of the Tribunal, whereas his U.S. counterpart prosecutes in the name of the U.S. and prepares the record of the trial.

These Military Courts and Commissions were set up to try war crimes in the narrow sense—they were not concerned with conspiracy to wage war, the waging of aggressive war or crimes against humanity. The general principles of the rules of evidence in English criminal courts are applied by section 128 of the *Army Act*—thus the accused has the benefit of the maxim that he is innocent till he is proved guilty and of the doctrine of reasonable doubt. The accused is allowed to give evidence on oath if he so desires. But there is relaxation in other respects. Thus the Court may admit any oral statement or any document appearing on the face of it to be authentic.[23] This allows evidence on affidavit to be introduced where the witness is not available and in some cases hearsay has been admitted. The effect of these rules may be seen in the *Dreierwalde Case*,[24] where the accused was in charge of five allied prisoners of war, and killed four by firing on them. The defence was that the accused thought that the prisoners were about to escape. The fifth prisoner, who escaped though wounded, was an Australian officer. His evidence was by affidavit, as he could not attend the court. He was naturally the chief witness for the prosecution. The other witness was one Erdmann, a German subject who had made an affidavit but could not be found. The defence, therefore, did not have the opportunity of cross-examining these witnesses whose stories differed in material ways from that of the accused. Circumstantial evidence was therefore important e.g. the angle at which the bullets entered the skull—the pathologist swore in an affidavit that in some cases the bullets could not have entered the head while the deceased were standing. But this witness again was not available for cross-examination. This trial shows the alarming results of such relaxation of the laws of evidence and runs counter to accepted English principles of the necessity for clear proof.

The Military Courts give no reasoned judgment. The reporter is, therefore, faced with the difficulty of creating a report without what in civil cases is the essential part. The technique used is to give the case and evidence for the prosecution, the case for the defence, the summing up by the Judge Advocate, the decision and sentence of the court and then to attach notes discussing the points at issue which are considered to be implicit in the decision of the Court.

20. *Ex parte Richard Quirin*, (1942) 317 U.S. 1.
21. (1946) 66 Sup. Ct. 515.
22. (1946) 66 Sup. Ct. 340.
23. Reg. 8 (1) of the Royal Warrant. By 8 (ii) where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence relating to crime against any member of the unit may be received as prima facie evidence of the responsibility of each member of the group.
24. Law Reports of Trials, I., 81.

The theory of the universality of jurisdiction over war crimes has been adopted. Thus in the *Zyklon B Case* the charge was complicity in the murder of interned civilians by means of poison gas. The accused were Germans who were members of a firm that supplied the chemical to the camps : the victims were from many allied nations, but it was not alleged that there were any British sufferers. Yet the case was tried by a British military court. This can be justified either on the ground that, like pirates, those who commit war crimes are *hostes humani generis* and may be dealt with by any State into the hands of which they fall. Another justification was that British courts were interested in providing sanctions for wrongs committed against allies and a third that the occupation of Germany gave jurisdiction over all war criminals found in the territory over which the particular court had jurisdiction. This case also illustrates that war crimes may be committed by civilians.

In the nine war trials reported in Volume 1, the defence of superior orders was raised in six. This shows the practical importance of the view taken as to the validity of this defence. In the *Peleus Trial* the charge was killing the survivors of a vessel which had been torpedoed. The prisoners consisted of the commander of the submarine and four of his crew. The defence was that it was an operational necessity to destroy rafts and wreckage, as otherwise air reconnaissance would have revealed the presence of a submarine in the neighbourhood. Whether the commander had rightly interpreted the orders of his superiors or not, the three members of the crew were under an obligation to obey orders and they had to choose between the threat of instant imprisonment and the prospect of a trial for a war crime thereafter. It is difficult not to feel that the crew of a submarine would normally take the course that is easiest at the moment. The paragraph in the British Manual of Military Law and that of the U.S. Basic Field Manual (which recognised the validity of the plea of superior orders) were rather an embarrassment to the Courts as they were inevitably cited by the defence. It is true that both had been amended ; but it was 1944 before the amendment was made.

In addition to the cases specifically referred to, the trials dealt with the following points : giving an order to shoot a captured demolition party operating behind the front line : killing a prisoner of war and a civilian without trial : killing civilians by means of injecting poisonous drugs : scuttling U-boats after the armistice : lynching allied prisoners : failure of a German officer to prevent a lynching by a crowd.

(C) *Conclusion.*

What is the significance of these war trials for the future of international law ? It is submitted that the importance of the trials may easily be exaggerated from a long range point of view. Realistically, it cannot be expected that the execution of a limited number of war criminals will have any effect whatever in deterring the launching of an aggressive war. The lesson of history has always been *vae victis* and fear of death has never yet prevented aggression—only those who are certain of victory plunge wilfully into war.

With regard to war crimes in the narrow sense, the trials will introduce a healthier respect for the laws of war, but the subordinate will often

face the dilemma of instant punishment for disobedience or the risk of prosecution by the other side.

The real defect arises, of course, from the nature of international law itself. Law begins when there is a regulation of self-help, and for long in international law, a nation had no alternative but to take the law into its own hands. The ultimate arbitrament of war being regarded as legal, there was no distinction between a just and an unjust war. From 1919 to 1939, there were fumbling attempts to deal with this problem. Violence can be successfully outlawed only if there is provided an alternative method of protecting rights. This requires a definite set of legal rules and an efficient system of administration—such truths were very clear to the Tudors in English history. Where criminal law is concerned, it satisfies a deep-seated instinct in man that the law should be laid down in advance rather than declared retrospectively. But if there is no legislature, there is no alternative to custom and treaty as the bases of law. Moreover we should remember that the maxim *nulla poena* is not a binding rule even in English domestic law—crimes can be created by statute retrospectively and the common law was developed only by the extension of rules to conduct that had already occurred. Any system of case law inevitably contains the defect of retrospective application of what are, realistically, new doctrines.

Sociologically the institution of the criminal sanction frequently appears before there is a fully developed legal order, but until this condition is satisfied the imposition of the penalty is somewhat arbitrary in its incidence.

If the trial of war criminals (in the broad sense) is to become established practice, the following points are important so that the procedure can satisfy the demands of justice: (1) A reasonable alternative to war, as a solution of international problems, must be found. The United Nations history for the first few years is far more discouraging than was the early history of the League of Nations. It is impossible accurately to define what types of war are illegal in the present state of international law: moreover, the international legal order, in default of universal agreement, sometimes provides no remedy for an impossible situation but war. Within the state there are constitutional means of removing injustice without resorting to self-help.

(2) The rules of war should be more definitely laid down. A study of any accepted Manual reveals the pitiful inadequacy of the generalisations, when we come to apply them to definite cases. Moreover, the rules are more easily applicable to the Boer war than to a modern conflict. Air bombardment, total war and the atomic bomb make the orthodox rules fantastically unrealistic. Is it permissible to blot out a city by the atom bomb and not to destroy the rafts of survivors after a torpedo attack? It is impossible to civilise war—for the concepts of war and civilisation (in the true sense) are incompatible. The most that the rules can attempt to do is to forbid the unnecessary infliction of death, suffering and interference with property. But when we try to analyse the concept of what is *unnecessary*, it is hard to avoid being driven to the theory of operational exigencies—and that plea, if allowed, gives wide latitude. No nation will refrain from conduct likely to have an important effect on the outcome

of war—even if there is hesitation at first (e.g. about the use of the atom bomb), the theory of reprisals, joined with the desire to save life by hastening the end of the war, drives the belligerent on to a course of conduct which at other times would not be tolerated by the public conscience. The so-called rules of law (whatever the threatened sanction) cannot entirely deter a nation fighting for self-preservation. (3) The Constitution of the Court should be seriously debated. Suggestions have been made since 1919 for the institution of an international criminal court, but clearly it was not possible to set up such a court within a reasonable time at the conclusion of this war. It was impracticable to secure a neutral court, for there were few neutrals left of any standing and some of these were definitely of Fascist bias. But, having admitted that the allied nations did the best that was possible in 1945, it is still necessary to evolve a better plan for the future.

The question of mutuality also arises. It cannot be assumed that in any future war, only the defeated will have been guilty of war crimes. Without in any way taking issue on the question of the legal and ethical justification for the use of the atom bomb, is it not clear that according to Japanese thought those who planned, and those who dropped, the bomb were guilty of a war crime ? It all depends on the point of view and it is precisely this factor which a developed legal order attempts, and international law has done so little, to eradicate.

The United Nations Charter does not deal with the problem of the criminal responsibility of the individual for a violation of international law.[25] It is hoped that the war trials will at least direct the minds of the nations to the unsatisfactory features of the present rules of international law.

25. Shick, 7 Univ. of Toronto Law Jo. (1947) 66.