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THE NUREMBERG TRIAL: LANDMARK IN LAW

By Henry L. Stimson

IN THE confusion and disquiet of the war's first aftermath, there has been at least one great event from which we may properly take hope. The surviving leaders of the Nazi conspiracy against mankind have been indicted, tried, and judged in a proceeding whose magnitude and quality make it a landmark in the history of international law. The great undertaking at Nuremberg can live and grow in meaning, however, only if its principles are rightly understood and accepted. It is therefore disturbing to find that its work is criticized and even challenged as lawless by many who should know better. In the deep conviction that this trial deserves to be known and valued as a long step ahead on the only upward road, I venture to set down my general view of its nature and accomplishment.

The defendants at Nuremberg were leaders of the most highly organized and extensive wickedness in history. It was not a trick of the law which brought them to the bar; it was the "massed angered forces of common humanity." There were three different courses open to us when the Nazi leaders were captured: release, summary punishment, or trial. Release was unthinkable; it would have been taken as an admission that there was here no crime. Summary punishment was widely recommended. It would have satisfied the immediate requirement of the emotions, and in its own roughhewn way it would have been fair enough, for this was precisely the type of justice that the Nazis themselves had so often used. But this fact was in reality the best reason for rejecting such a solution. The whole moral position of the victorious Powers must collapse if their judgments could be enforced only by Nazi methods. Our anger, as righteous anger, must be subject to the law. We therefore took the third course and tried the

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captive criminals by a judicial proceeding. We gave to the Nazis what they had denied their own opponents — the protection of the Law. The Nuremberg Tribunal was thus in no sense an instrument of vengeance but the reverse. It was, as Mr. Justice Jackson said in opening the case for the prosecution, "one of the most significant tributes that Power has ever paid to Reason."

The function of the law here, as everywhere, has been to insure fair judgment. By preventing abuse and minimizing error, proceedings under law give dignity and method to the ordinary conscience of mankind. For this purpose the law demands three things: that the defendant be charged with a punishable crime; that he have full opportunity for defense; and that he be judged fairly on the evidence by a proper judicial authority. Should it fail to meet any one of these three requirements, a trial would not be justice. Against these standards, therefore, the judgment of Nuremberg must itself be judged.

I. PUNISHABLE CRIMES

In our modern domestic law, a man can be penalized only when he has done something which was authoritatively recognized as punishable when he did it. This is the well-known principle that forbids *ex post facto* law, and it accords entirely with our standards of fair play. A mistaken appeal to this principle has been the cause of much confusion about the Nuremberg trial. It is argued that parts of the Tribunal's Charter, written in 1945, make crimes out of what before were activities beyond the scope of national and international law. Were this an exact statement of the situation we might well be concerned, but it is not. It rests on a misconception of the whole nature of the law of nations. International law is not a body of authoritative codes or statutes; it is the gradual expression, case by case, of the moral judgments of the civilized world. As such, it corresponds precisely to the common law of Anglo-American tradition. We can understand the law of Nuremberg only if we see it for what it is — a great new case in the book of international law, and not a formal enforcement of codified statutes. A look at the charges will show what I mean.

The Charter of the Tribunal recognizes three kinds of crime, all of which were charged in the indictment: crimes against peace, war crimes, and crimes against humanity. There was a fourth charge, of conspiracy to commit one or all of these crimes. To

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me personally this fourth charge is the most realistic of them all, for the Nazi crime is in the end indivisible. Each of the myriad transgressions was an interlocking part of the whole gigantic barbarity. But basically it is the first three that we must consider. The fourth is built on them.

Of the three charges, only one has been seriously criticized. War crimes have not greatly concerned the Tribunal's critics; these are offenses well understood and long generally recognized in the law or rules of war. The charge of crimes against humanity has not aroused much comment in this country, perhaps because this part of the indictment was not of central concern to the American prosecutor. The Tribunal's findings on this charge are significant, but not such as to raise much question of their legal validity, so I defer my comment to a later section of this article.

There remains the charge of crimes against peace, which has been the chief target of most of the honest critics of Nuremberg. It is under this charge that a penalty has been asked, for the first time, against the individual leaders in a war of aggression. It is this that well-intentioned critics have called "*ex post facto* law."

It is clear that until quite recently any legal judgment against a war-maker would have been absurd. Throughout the centuries, until after World War I, the choice between war and peace remained entirely in the hands of each sovereign state, and neither the law nor the ordinary conscience of humanity ventured to deny that right. The concept of just and unjust wars is of course as old at least as Plato. But in the anarchy of individual sovereignties, the right to fight was denied to no people and the right to start a fight was denied to no ruler. For the loser in a war, punishment was certain. But this was not a matter of law; it was simply a matter of course. At the best it was like the early law of the blood feud, in which the punishment of a murderer was the responsibility of the victim's family alone and not of the whole community. Even in 1914 the German violation of Belgian neutrality was regarded as a matter for action only by those nations directly concerned in the Treaties of 1839. So far indeed was this sovereign right of war-making accepted that it was frequently extended to include the barbarous notion that a sovereign ruler is not subject to the law.

In the face of this acceptance of war as a proper instrument of sovereign national policy, the only field for the early development of international law lay in restricting so far as possible the bru-

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talities of warfare. In obedience to age-long instincts of chivalry and magnanimity, there were gradually developed international standards for the conduct of war. Civilians and neutrals were given protecting rights and privileges, the treatment of prisoners was prescribed, and certain weapons were outlawed. It is these long established and universally accepted standards, most of them formally included in the internal law of Germany, that are covered by the charge of war crimes in the Nuremberg indictment.

The attempt to moderate the excesses of war without controlling war itself was doomed to failure by the extraordinary scientific and industrial developments of the nineteenth and twentieth centuries. By 1914 the world had been intertwined into a single unit and weapons had been so far developed that a major war could shake the whole structure of civilization. No rules of warfare were sufficient to limit the vast new destructive powers of belligerents, and the First World War made it clear that old notions must be abandoned; the world must attack the problem at its root. Thus after 1918 repeated efforts were made to eliminate aggressive war as a legal national undertaking. These efforts reached their climax in the Kellogg-Briand Pact of 1928, in which 63 nations, including Germany, Japan and Italy, renounced aggressive warfare. This pact was not an isolated incident of the postwar era. During that period the whole world was at one in its opinion of aggressive war. In repeated resolutions in the League of Nations and elsewhere, aggression was roundly denounced as criminal. In the judgment of the peoples of the world the once proud title of "conqueror" was replaced by the criminal epithet "aggressor."

The progress made from 1918 to 1931 was halting and incomplete, but its direction was clear; the mandate for peace was overwhelming. Most tragically, the peoples who had renounced war were not sufficiently alert to their danger when in the following years the ruling groups of three great nations, in wanton denial of every principle of peace and civilization, launched a conspiracy against the rest of the world. Thus it happened that in the ten years which began with the invasion of Manchuria the principles of the Kellogg Pact were steadily under attack, and only as the danger came slowly home to each one of them individually did the peace-loving nations take action against aggression. In early 1945, as it became apparent that the long delayed

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victory was at hand, the question posed itself directly: Has there been a war of aggression and are its leaders punishable? There were many then, as there are some now, who argued that there was no law for this offense, and they found their justification in the feebleness and acquiescence of other nations in the early aggression of the Axis. Other counsels prevailed, however, and by the Charter of the Nuremberg Tribunal the responsible leaders of aggressive war were subjected to trial and conviction on the charge of crimes against peace.

Here we come to the heart of the matter. Able lawyers and honest men have cried out that this aggressive war was not a crime. They have argued that the Nuremberg defendants were not properly forewarned when they made war that what they did was criminal.

Now in one sense the concept of *ex post facto* law is a strange one to apply here, because this concept relates to a state of mind on the part of the defendants that in this case was wholly absent. That concept is based on the assumption that if the defendant had known that the proposed act was criminal he would have refrained from committing it. Nothing in the attitude of the Nazi leaders corresponds to this assumption; their minds were wholly untroubled by the question of their guilt or innocence. Not in their aggression only but in their whole philosophy, they excluded the very concept of law. They deliberately put themselves below such a concept. To international law — as to the law of Germany — they paid only such respect as they found politic, and in the end they had smashed its every rule. Their attitude toward aggressive war was exactly like their attitude toward murder — both were useful instruments in a great design. It is therefore impossible to get any light on the validity of this charge of aggressive war by inspecting the Nazi mind. We must study rather the minds of the rest of the world, which is at once a less revolting and a more fruitful labor.

What did the rest of us think about aggressive war at the time of the Nazi attacks? This question is complex, but to that part of it which affects the legality of the Nuremberg trial we can give a simple answer. That we considered aggressive war wicked is clear; that we considered the leaders of an aggressive war wicked is equally clear. These opinions, in large part formally embodied in the Kellogg Pact, are the basis for the law of Nuremberg. With the detailed reasoning by which the prosecution has sup-

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ported the law set forth in the Charter of the International Military Tribunal, we cannot here concern ourselves. The proposition sustained by the Tribunal is simple: if a man plans aggression when aggression has been formally renounced by his nation, he is a criminal. Those who are concerned with the law of this proposition cannot do better than to read the pertinent passages in the opening address of Mr. Justice Jackson, the closing address of Sir Hartley Shawcross, and the opinion of the Tribunal itself.

What really troubles the critics of Nuremberg is that they see no evidence that before 1945 we considered the capture and conviction of such aggressors to be our legal duty. In this view they are in the main correct, but it is vitally important to remember that a legal right is not lost merely because temporarily it is not used. What happened before World War II was that we lacked the courage to enforce the authoritative decision of the international world. We agreed with the Kellogg Pact that aggressive war must end. We renounced it, and we condemned those who might use it. But it was a moral condemnation only. We thus did not reach the second half of the question: What will you do to an aggressor when you catch him? If we *had* reached it, we should easily have found the right answer. But that answer escaped us, for it implied a duty to catch the criminal, and such a chase meant war. It was the Nazi confidence that we would never chase and catch them, and not a misunderstanding of our opinion of them, that led them to commit their crimes. Our offense was thus that of the man who passed by on the other side. That we have finally recognized our negligence and named the criminals for what they are is a piece of righteousness too long delayed by fear.

We did not ask ourselves, in 1939 or 1940, or even in 1941, what punishment, if any, Hitler and his chief assistants deserved. We asked simply two questions: How do we avoid war, and how do we keep this wickedness from overwhelming us? These seemed larger questions to us than the guilt or innocence of individuals. In the end we found an answer to the second question, but none to the first. The crime of the Nazis, against *us*, lay in this very fact: that their making of aggressive war made peace here impossible. We have now seen again, in hard and deadly terms, what had been proved in 1917 — that "peace is indivisible." The man who makes aggressive war at all makes war against mankind. That is an exact, not a rhetorical, description of the crime of aggressive war.

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Thus the Second World War brought it home to us that our repugnance to aggressive war was incomplete without a judgment of its leaders. What we had called a crime demanded punishment; we must bring our law in balance with the universal moral judgment of mankind. The wickedness of aggression must be punished by a trial and judgment. This is what has been done at Nuremberg.

Now this is a new judicial process, but it is not *ex post facto* law. It is the enforcement of a moral judgment which dates back a generation. It is a growth in the application of law that any student of our common law should recognize as natural and proper, for it is in just this manner that the common law grew up. There was, somewhere in our distant past, a first case of murder, a first case where the tribe replaced the victim's family as judge of the offender. The tribe had learned that the deliberate and malicious killing of any human being was, and must be treated as, an offense against the whole community. The analogy is exact. All case law grows by new decisions, and where those new decisions match the conscience of the community, they are law as truly as the law of murder. They do not become *ex post facto* law merely because until the first decision and punishment comes, a man's only warning that he offends is in the general sense and feeling of his fellow men.

The charge of aggressive war is unsound, therefore, only if the community of nations did not believe in 1939 that aggressive war was an offense. Merely to make such a suggestion, however, is to discard it. Aggression is an offense, and we all know it; we have known it for a generation. It is an offense so deep and heinous that we cannot endure its repetition.

The law made effective by the trial at Nuremberg is righteous law long overdue. It is in just such cases as this one that the law becomes more nearly what Mr. Justice Holmes called it: "the witness and external deposit of our moral life."

With the Judgment of Nuremberg we at last reach to the very core of international strife, and we set a penalty not merely for war crimes, but for the very act of war itself, except in self-defense. If a man will argue that this is bad law, untrue to our ideals, I will listen. But I feel only pity for the casuist who would dismiss the Nazi leaders because "they were not warned it was a crime." They were warned, and they sneered contempt. Our shame is that their contempt was so nearly justified, not that we have in the end made good our warning.

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II. FAIR TRIAL

Next after its assertion of the criminality of aggressive war, the triumph of Nuremberg rests in the manner and degree to which it has discharged with honor the true functions of a legal instrument. The crimes charged were punishable as we have seen — so clearly punishable that the only important suggested alternative to a trial was summary execution of the accused. It is in its pursuit of a different course that the Nuremberg Tribunal has demonstrated at once the dignity and the value of the law, and students of law everywhere will find inspiration and enlightenment in close study of its work. In its skilful development of a procedure satisfying every traditional and material safeguard of the varying legal forms of the prosecuting nations, it represents a signal success in the field of international negotiation, and in its rigid fidelity to the fundamental principles of fair play it has insured the lasting value of its work.

In their insistence on fairness to the defendants, the Charter and the Tribunal leaned over backwards. Each defendant was allowed to testify for himself, a right denied by Continental law. At the conclusion of the trial, each defendant was allowed to address the Tribunal, at great length, a right denied by Anglo-American law. The difference between Continental and Anglo-American law was thus adjusted by allowing to the defendant his rights under both. Counsel for the defendants were leading German lawyers and professors from the German universities, some of them ardent and unrepentant Nazis. Counsel were paid, fed, sheltered and transported at the expense of the Allies, and were furnished offices and secretarial help. The defense had full access to all documents. Every attempt was made to produce desired witnesses when the Tribunal believed that they had any relevant evidence to offer. In the summation of the trial the defense had 20 days and the prosecution three, and the defense case as a whole occupied considerably more time than the prosecution.

The record of the Nuremberg trial thus becomes one of the foundation stones of the peace. Under the most rigid safeguards of jurisprudence, subject to challenge, denial and disproof by men on trial for their lives and assisted by counsel of their own choosing, the great conspiracy has been unmasked. In documents unchallenged by the defense and often in the words of the defendants themselves, there is recorded the whole black history

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of murder, enslavement and aggression. This record, so established, will stand as a demonstration, on a wholly new level of validity and strength, of the true character of the Nazi régime. And this is so not in spite of our insistence upon law, but because of it.

In this connection it is worth noting that the trial has totally exploded many of the strange notions that seem to lurk in the minds of some who have expressed their doubts about Nuremberg. Some of the doubters are not basically concerned with "*ex post facto* law" or with "vengeance." Their real trouble is that they did not think the Nazis could be proved guilty. To these gentlemen I earnestly commend a reading of the record. If after reading it they do not think there was in fact aggressive war, in its most naked form, then I shall be constrained to believe that they do not think any such thing exists or can exist.

III. FAIR JUDGMENT

Not having made a study of the evidence presented in the case with special reference to each defendant, I am not qualified to pass judgment on the verdicts and sentences of the Tribunal against individuals and criminal groups. I have, however, heard no claim that these sentences were too severe. The Tribunal's findings as to the law are on the whole encouraging. The charge of aggressive war was accepted and ably explained. The charge of war crimes was sustained almost without comment. The charge of crimes against humanity was limited by the Tribunal to include only activities pursued in connection with the crime of war. The Tribunal eliminated from its jurisdiction the question of the criminal accountability of those responsible for wholesale persecution before the outbreak of the war in 1939. With this decision I do not here venture to quarrel, but its effect appears to me to involve a reduction of the meaning of crimes against humanity to a point where they become practically synonymous with war crimes.

If there is a weakness in the Tribunal's findings, I believe it lies in its very limited construction of the legal concept of conspiracy. That only eight of the 22 defendants should have been found guilty on the count of conspiracy to commit the various crimes involved in the indictment seems to me surprising. I believe that the Tribunal would have been justified in a broader construction of the law of conspiracy, and under such a construction it might

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well have found a different verdict in a case like that of Schacht.

In this first great international trial, however, it is perhaps as well that the Tribunal has very rigidly interpreted both the law and the evidence. In this connection we may observe that only in the case of Rudolf Hess, sentenced to life imprisonment, does the punishment of any of the defendants depend solely on the count of aggressive war. All of those who have been hanged were convicted of war crimes or crimes against humanity, and all but one were convicted of both. Certainly, then, the charge of aggressive war has not been established in international law at the expense of any innocent lives.

The judgment of the Tribunal is thus, in its findings of guilt, beyond challenge. We may regret that some of the charges were not regarded as proven and some of the defendants not found clearly guilty. But we may take pride in the restraint of a tribunal which has so clearly insisted upon certain proof of guilt. It is far better that a Schacht should go free than that a judge should compromise his conscience.

IV. THE MEANING OF NUREMBERG

A single landmark of justice and honor does not make a world of peace. The Nazi leaders are not the only ones who have renounced and denied the principles of western civilization. They are unique only in the degree and violence of their offenses. In every nation which acquiesced even for a time in their offense, there were offenders. There have been still more culpable offenders in nations which joined before or after in the brutal business of aggression. If we claimed for Nuremberg that it was final justice, or that only these criminals were guilty, we might well be criticized as being swayed by vengeance and not justice. But this is not the claim. The American prosecutor has explicitly stated that he looks uneasily and with great regret upon certain brutalities that have occurred since the ending of the war. He speaks for us all when he says that there has been enough bloodletting in Europe. But the sins of others do not make the Nazi leaders less guilty, and the importance of Nuremberg lies not in any claim that by itself it clears the board, but rather in the pattern it has set. The four nations prosecuting, and the 19 others subscribing to the Charter of the International Military Tribunal, have firmly bound themselves to the principle that aggressive war is a personal and punishable crime.

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It is this principle upon which we must henceforth rely for our legal protection against the horrors of war. We must never forget that under modern conditions of life, science and technology, all war has become greatly brutalized, and that no one who joins in it, even in self-defense, can escape becoming also in a measure brutalized. Modern war cannot be limited in its destructive methods and in the inevitable debasement of all participants. A fair scrutiny of the last two World Wars makes clear the steady intensification in the inhumanity of the weapons and methods employed by both the aggressors and the victors. In order to defeat Japanese aggression, we were forced, as Admiral Nimitz has stated, to employ a technique of unrestricted submarine warfare not unlike that which 25 years ago was the proximate cause of our entry into World War I. In the use of strategic air power, the Allies took the lives of hundreds of thousands of civilians in Germany, and in Japan the destruction of civilian life wreaked by our B-29s, even before the final blow of the atomic bombs, was at least proportionately great. It is true that our use of this destructive power, particularly of the atomic bomb, was for the purpose of winning a quick victory over aggressors, so as to minimize the loss of life, not only of our troops but of the civilian populations of our enemies as well, and that this purpose in the case of Japan was clearly effected. But even so, we as well as our enemies have contributed to the proof that the central moral problem is war and not its methods, and that a continuance of war will in all probability end with the destruction of our civilization.

International law is still limited by international politics, and we must not pretend that either can live and grow without the other. But in the judgment of Nuremberg there is affirmed the central principle of peace — that the man who makes or plans to make aggressive war is a criminal. A standard has been raised to which Americans, at least, must repair; for it is only as this standard is accepted, supported and enforced that we can move onward to a world of law and peace.

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