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Nürnberg in Retrospect*

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I gladly embraced the invitation to address this gathering of the Canadian legal profession about the Nürnberg Trial of the Major Nazi War Criminals, because that trial was an attempt to answer in terms of the law the most serious challenge that faces modern civilization — war and international lawlessness.

The legal profession, by most countries, has been conceded leadership in working out rules of law which will keep their peace, security and liberty. As the lawyer is the most frequently chosen legislator, diplomat, executive, and political leader, the intellectual discipline which we call "the law" saturates Western world statesmanship and diplomacy.

Judged by its fruits, there must have been serious shortcomings in our practice, and perhaps in our teachings, of international law. Our own times may easily rate as the most bloody and cruel in recorded history. Our record includes two World Wars, millions of human beings put to death for no cause other than their race, other millions seized and transported to forced labour, and a whole continent gripped by terror of the concentration camp. The worst perhaps is that these things still go on. Civilization seems to have lost control of itself. What a record for an age governed more than any other by men of our profession! Certainly here is lawlessness which challenges not only the lawyer but the law itself.

At the opening of this tortured and bloody century, law-

*An address by the Hon. Robert H. Jackson, Associate Justice, Supreme Court of the United States, to the Thirty-First Annual Meeting of the Canadian Bar Association on September 1st, 1949.

trained men dominated the councils of most Western nations. They were thinking about problems of state in relation to certain assumptions supplied by their legal discipline. Four of these, at risk of over-simplification, may be thus condensed:

First, each state is sovereign, its right absolute, its will unrestrained, and free to resort to war at any time, for any purpose. Second, courts, therefore, must everywhere regard any war as legal, and engagement in warfare must be accepted as a good defence to what otherwise would be crime. Third, measures by high officials such as planning, instigating and waging war constitute "acts of state", in performance of which they owe no legal duty to international society and for which there is no accountability to international law. Fourth, for obedience to superior orders an individual incurs no personal liability.

It would be hard to devise an intellectual discipline that would do more to encourage international lawlessness and aggression. German leaders who precipitated the Second World War were ardent disciples of these teachings. When they led to catastrophe, they all invoked the shelter of one or more of these four doctrines as a defence. They pleaded that their acts, however shocking, could not be criminal because these doctrines of the Nineteenth Century still stood as the law in the third and fourth decades of the Twentieth Century.

The Nürnberg prosecutions constitute this Century's most definite challenge to this anarchic concept of the law of nations. Save the Nürnberg proceeding, too little has come out of the war to challenge the catastrophic doctrines invoked to excuse starting it. If those guilty of inciting the Second World War had been held immune from prosecution, any who might tomorrow plot a third one would be equally immune. Furthermore, machinery to make new international law is so inadequate, inertia is so great, conflict and suspicion are today so paralyzing, that we can foresee no time when aggressive wars will be outlawed or their perpetrators legally punishable if the Nürnberg basis for doing so was not valid.

If mankind were still helpless and hopeless in the throes of antiquated teachings it would be disheartening, for those who insist that there was no such law as Nürnberg applied generally agree that there should be such law.

At the opening of the International Trial, Dr. Otto Stahmer, on behalf of all defendants, asserted to the court that "a real order among the states is impossible as long as every state has the sovereign right to wage war at any time and for any purpose".

He acknowledged that public opinion already distinguished between just and unjust wars and demanded that the men guilty of launching unjust war be punished. He said, "Humanity wishes that in the future this idea will be more than a postulate, that it will become valid international law. But today it is not yet existing international law." And later he declared, "In fact, this [indictment] is far ahead of its time, as is the whole way of argumentation by Justice Jackson". A German critic, Dr. Hans Ehard, Minister-President of Bavaria, recently argued strongly that Nürnberg did not apply existing law, but nevertheless said, "We must salute the Nürnberg trial as a guide-post for the further development of the law of nations".

It is illuminating that these interested and learned opponents of the Nürnberg proceedings find it impossible to condemn the trial by standards of the past without also commending it by standards of the future. Their contention is that the trial has fallen, in a legal sense, "between two worlds — one dead, the other powerless to be born".

Of course a first attempt to conduct an international criminal trial, against the highest surviving officials of a once powerful state, for crimes against the peace of the world and the dignity of mankind was bound to cause lasting controversy. As contemporaries we all lack the perspective to anticipate the verdict of history on this effort. Those whose energies were engaged in the struggle lack objectivity most of all. But I recognize that there is room for honest and intelligent difference of opinion as to many aspects of the enterprise. Whatever view one takes, Nürnberg witnessed a legal event of importance. So, with such detachment as I can summon, I will try to tell you something of the origins of the trial and some of its more interesting problems, and of the use we made of the lawyers' hearing procedures and trial technique in this novel situation.

As, one after another, a dozen unprepared countries, with each of which Germany had a treaty of friendship and non-aggression, were overrun by undeclared wars, the opinion was almost universal that the hostilities had no cause except Germany's ambition for conquest. As it went on, the world was also shocked and horrified by Germany's wantonly brutal and savage conduct. Appeals and protests alike were scorned. Then came a series of unequivocal warnings that the course of its leaders was regarded as outside the bounds of modern warfare and criminal. In 1942 representatives of nine occupied countries met in London and issued the "St. James Declaration", that the war criminals would

be "sought out, handed over to justice and judged". This brought replies from President Roosevelt that "they shall have to stand in courts of law . . . and answer for their acts", and from Mr. Churchill that they would "have to stand up before tribunals", and a Soviet declaration that they must be "arrested and tried under criminal law". As the terrorism grew, seventeen nations formed the "United Nations War Crimes Commission", headed first by Sir Cecil Hurst and later by Lord Wright. It did valiant service in gathering information as to war crimes and suspects. As the horrors did not abate, Churchill, Stalin and Roosevelt, by the Moscow Declaration of November 1943, pledged the Allies to return accused Germans for trial by the country in which atrocities were committed, but declared that those whose offences had no particular geographical location "will be punished by a joint decision of the Governments of the Allies".

Wartime accusations, of course, rested upon information that appeared credible, but in large part did not measure up to the standard of legal evidence, and could not then be verified. But the Allies were forced to decide whether to investigate these charges or to abandon them when they found the survivors of the accused among Allied prisoners. Shortly before the German surrender, I was appointed to represent the United States in negotiating the joint decision promised in the Moscow Declaration and, as Chief of Counsel, to conduct in its behalf such trial as might be decided upon.

Only three dispositions have ever been suggested as possible for these accused captives. One was to free them and abandon the accusations. That course, at that time, had almost no responsible advocates. The second possible method was a political decision to execute, exile or otherwise punish them. Some favoured doing this by simple fiat of the Allied powers, but others would have camouflaged it with some kind of farcical trial. For example, one periodical editorialized, "In our opinion the proper procedure for this body would have been to identify the prisoners, read off their crimes with as much supporting data as seemed useful, pass judgment upon them quickly, and carry out the judgment without any delay whatever". And a professor of political science was widely quoted in the press to this effect: "What, in my opinion, they should have done is to set up summary courts martial. Then they should have placed these criminals on trial before them within twenty-four hours after they were caught, sentenced them to death, and shot them in the morning." Such insistent and popular, but stultifying, counsel was rejected.

The only course remaining was to hold a good-faith trial for specific offences, to be proved by evidence, with full opportunity to the accused to offer evidence or argument in defence or mitigation. How else than by our traditional hearing process could it be determined who was and who was not really responsible for particular reprehensible acts? How else would we discriminate between those who should be executed, who imprisoned and who exculpated? And how could anything we did be justified before the future if we did not make and act upon a record? On June 7th, 1945, I reported to President Truman, recommending against "undiscriminating executions or punishments without definite findings of guilt, fairly arrived at" and in favour of trying the accused not only for the planned campaign of atrocities but for the instigation and waging of wars of aggression as well. This report, approved by the President, was published and became an integral part of the foreign policy and occupation programme of the United States.

However, the decision to hold a trial was made in the face of obstacles so formidable that many well-wishers thought it a quixotic undertaking beyond our power to accomplish. There was no beaten path to follow, no precedents to teach former successes or failures. No court was in existence to hear such a case. The prosecution must be conducted in four languages by lawyers trained in four different legal systems, two being of the common law tradition and two of the civil or Roman law school. The defence would be made by counsel whose practice, especially under the Nazis, was in many respects different from all the others. Many differences in their customs and practice in criminal cases must be reconciled in some yet undrafted code of procedure. While substantive law could be gleaned from scattered sources, there was no codification of applicable law. Moreover, very little real evidence was in our possession, the overwhelming mass of documents being still undiscovered and their existence largely unsuspected. We did not even know whether a courthouse that could house such a trial was still standing in Germany, or if so, where it was to be found. Most of our preparation and all of the trial must be carried on where we would be surrounded by enemies, and where transport and communication were at a standstill and the ordinary facilities for living, as well as for work, had been destroyed.

To try to bring some order out of this chaos, representatives of the four powers met in London in June of 1945. The published minutes of this conference record the discussions and conflicts,

concessions and compromises which produced the Charter of the Nürnberg International Military Tribunal. I doubt that a more novel or challenging task ever was set before members of the legal profession. All countries chose delegates who were pre-eminently lawyers rather than diplomats or politicians, although not strangers to these activities. All had long practical trial experience and approached the negotiations as a technical professional task, with the utmost good will toward each other and a determination to succeed. All agreed in principle that no country reasonably could insist that an international trial should be conducted under its own system and that we must borrow from all and devise an amalgamated procedure that would be workable, expeditious and fair. The conference resulted in an agreement, signed for the four powers by delegates high in their respective judicial systems, who had shared responsibility for negotiating it. These were Jowitt, Lord Chancellor, for the United Kingdom; Falco, Judge of the *Cour de Cassation*, for France; Nikitchenko, Vice-President of the Soviet Supreme Court, for the Soviet Union; and myself, for the United States.

Within the confines of this address, it is not easy to explain fairly and accurately all the ideological conflicts which perplexed the London Conference. The chief differences, however, had their roots in two conflicting fundamental concepts — one as to the relation between a court and the government which establishes it; the other as to the nature of the criminal process.

A hasty general glance at the Soviet legal tradition will make the Soviet doctrine easier to understand, but not more easy to accept. As you know, the Russian people received their philosophy of law and government from the ancient Mediterranean world through the same geographical route by which they received their religion — Byzantium and the East. Also, modern Russia remained largely insulated from the intellectual forces which liberalized Western Europe and shaped the institutions of both Canada and the United States. The English conception, expressed by Coke, that “the King is under God and the law”, would have been regarded by Russian jurists as treason, and French liberalism, expressed by such writers as Montesquieu, never effectively persuaded them. The authoritarianism of Russia’s venerable institutions has had no amelioration over the centuries. The Bolshevik Revolution appropriated, rather than reformed, the instruments of despotic power. Premier Atlee recently described the Soviet Union as merely an “inverted czarism”. Soviet jurists teach that this union of Marxism with czarism, through a dicta-

torship of the proletariat, is enough to make the Soviet Union "democratic". Hence, the Soviet revolution has done very little to bring Russian legal thinking any closer to our Western tradition.

The able Soviet representative brought to London from this background his conception of a court and of the law. An earlier revolutionary writer expressed it in these terms: "The court has always been and still remains, as it ought to be according to its nature — namely, one of the organs of governmental power, a weapon in the hands of the ruling class for the purpose of safeguarding its interests". Vyshinsky's more recent book, *The Law of the Soviet State*, reiterates that a court is merely another implement of a dominant class in advancing its interests. He pronounces the idea of "bourgeois theorists" that courts are organs "above classes and apart from politics" to be radically false.

In accord with this philosophy, the Soviet representative took the position that any tribunal we set up must be bound by the Moscow Declaration of Roosevelt, Churchill and Stalin that our Nazi captives were criminals and hence would consider the personal guilt of each only as a basis for sentencing him. All other delegations, of course, rejected this idea and insisted that the Tribunal independently determine the whole question of each defendant's guilt or innocence upon the evidence and the law. The Soviet yielded and this Western concept of the court was finally adopted and governed the trial.

The other fundamental difference concerned the nature of a criminal proceeding and consequently the manner in which it should be conducted. Our common-law criminal trial is an adversary proceeding before a jury, in which the judge is a moderator or arbitrator between combatant counsel. The Continental countries generally, including the Soviet Union, regard the criminal trial as an inquest to solve a crime, conducted on behalf of society by the court, not as a moderator, but as an active inquisitor. The Soviet delegates, with particular reference to the United States, expressed dislike for the extremes to which we carry the adversary theory, and suggested that some of our methods are unfair to defendants, tend to promote contests, and permit trials to drag out into endurance tests, like sporting events. I could not deny that these criticisms have some truth as to criminal trials in the United States, some of which have degenerated close to the limits of toleration.

These differences of fundamental theory manifested themselves in several procedural disagreements. One concerned the contents

of an indictment. Soviet and also Continental jurists consider that our method of providing the accused with only a skeleton statement of charges, withholding the evidence until he is in court, does not give an innocent man fair opportunity to prepare for trial, and leads a guilty one to contest charges to which he might plead guilty if he knew the government's evidence. There is much to be said in support of these criticisms. The Russians proposed that this indictment should furnish to the court and to defendants a dossier of the evidence, including statements of all witnesses, and all documents relied upon. Our compromise was that the indictment should contain much more than would be customary in the United States, while giving the defendant much less information than would be given in France, Germany or Russia.

Another manifestation of the difference in systems concerned the relative functions of the court vis-à-vis the prosecution. We believed that the Tribunal should have no responsibility for preparation or conduct of the prosecution, but should receive the indictment, hear the evidence offered by the parties, and render judgment. The Soviet idea was that the case would actively be conducted by the Tribunal, with the prosecutors as subordinates. The Tribunal, they thought, should decide what witnesses to call, what documents to put in evidence, and should examine the witnesses and interrogate the accused.

The Soviet finally acceded, in general, to common-law methods of trial, saying that it was contrary to their procedural legislation, but was more widely known because it was used in the English-speaking countries.

Another conflict between Continental and common-law practice arose over allowing a defendant to testify under oath in his own behalf. Soviet like Continental law generally does not permit him to do so. At one time this was the rule at common law also and it still prevails in at least one of our States. Continental and Soviet practice, however, gives the accused what is regarded as an equivalent. At the end of all proceedings except judgment, he is entitled to make an unsworn statement in which he may deny guilt, plead for mercy, attack the prosecution, or advance any arguments he chooses, and it does not subject him to cross-examination. We felt that English-speaking countries would not regard a procedure as fair which refused defendants the right to testify. Our Continental associates felt that no process which denied the defendant his traditional final statement would be regarded as fair in France, Germany or the Soviet

Union. Our solution was to allow the Germans both privileges, and nearly all the defendants testified for themselves under oath, subject to cross-examination, and also made final statements.

The rules of evidence which should govern the Tribunal might have caused serious disagreement if we had insisted on our own. Continental lawyers regard our common-law rules of evidence with abhorrence. Since they were evolved in response to the peculiarities of trial by jury, we saw no reason to urge their use in an international trial before professional judges. They have not generally been followed by international tribunals. We settled, therefore, upon one simple rule: that the Tribunal "shall admit any evidence which it deems to have probative value". While this vested considerable discretion in the Tribunal, it had the merit of making admission of evidence turn on the value of what was proffered rather than upon compliance with some formal rule of evidence.

This compromise criminal procedure which we adopted was put to a hard test by experience. The trial extended through more than 400 sessions of court, covering 10 months. Prosecutors for the four nations called 33 witnesses and put in evidence over 4,000 documents. In addition to the defendants themselves, 61 witnesses testified in their behalf, 143 more gave evidence for them by written answers to interrogatories, and they offered a large number of defence documents. Yet less time was devoted to disputes over procedure and admissibility of evidence than would be so consumed in a criminal trial of any comparable magnitude in the United States. It was the demonstrated success of our procedure which led Dr. Ehard, while voicing German criticism of the legal basis of the trial, to declare that, "From a technical point of view, the trial was an important accomplishment".

Counsel representing all the governments associated in the prosecution, as well as the judges, spared no effort to assure the fundamental integrity of the process. The charter allowed each defendant counsel of his choice, and if he had none, a German advocate was appointed for him by the Tribunal. Defence counsel included leaders of the practising and academic profession in Germany. Many were Nazis, but defendants were permitted to have their cases presented by sympathetic advocates. All such counsel were paid, fed and housed by Military Government. They were furnished office space, stenographers and supplies. Copies of documents presented as a part of the prosecution's case were given to them at least twenty-four hours in advance of presentation in court. They were given access to captured documents that were

not used by the prosecution. They were allowed, so far as physical conditions permitted, to have the deposition or presence at the trial of any witness they could convince the Tribunal had information relevant to their defence. How far they were allowed to go will appear from the record showing depositions from Nimitz, Admiral of the United States Navy, and Halifax, former Foreign Secretary of Great Britain. We sent airplanes to Sweden and to Switzerland to bring defence witnesses from neutral territory to testify. A transcript of proceedings, in his own language, was furnished daily to each counsel. The prosecution made its case in three months, while the defendants offered evidence for nearly five months. Our closing speeches occupied three days, while defendants used twenty days to complete their argument. The trial record will stand the most severe scrutiny of history, for we knew that as we judged, so would the future judge us.

In prescribing the structure of the Tribunal we had to consider whether to draw the judges from the prosecuting countries or to attempt to enlist some or all of them from neutral nations. The scope of the war, however, left few neutrals, and formal neutrality of a government did not mean disinterestedness on the part of all of its citizens. There was no escape from selection of the judges by the victorious powers and it seems naive to believe that they would have chosen more dispassionate or just jurists from other lands than from England, France and the United States. Those countries which enjoy the blessing of an independent judicial tradition rely upon the individual integrity, detachment and learning of the judge to shape his decisions rather than upon the source of his commission, his nationality or his class. In making these defendants stand trial before a court of the aggrieved countries we followed an almost universal criminal law. If an offender escapes into jurisdiction of an indifferent society, he is extradited and the fugitive brought back to trial in the territory interested in his prosecution. In your courts and mine the Government constantly litigates before the judges it appoints and maintains, and it frequently meets with defeat. That indeed happened at Nürnberg. No men did we plead more earnestly to convict than Schacht and Von Papen, both of whom the Tribunal acquitted. Indeed, all but six of the defendants were acquitted on one or more of the counts. These defendants were before judges who, with their alternates, attended every session of the trial, except one alternate who suffered an illness of two or three days. Their undivided attention to the evidence, their impartial rulings and judicial bearing and their dispassionate and discriminating

written judgment won for the Tribunal the commendation of all disinterested observers. It set a high standard of judicial conduct for all future international tribunals.

However, participation of a Soviet judge is a grievance much exploited by Germans. It is urged that since the Soviet Union joined with Hitler in the aggression against Poland, it was an accomplice and should not have had a seat in judgment. Regardless of the merits I do not doubt that German pride and nationalism found judgment by Russians especially objectionable and that it will always injure the repute of the trial with the German people. But I think the grievance is more symbolic than substantial.

The charter provided that convictions and sentences should require affirmative votes of at least three members of the Tribunal. Hence a Soviet vote to convict or sentence could be effective only if two, constituting a majority of the remaining three judges, concurred, so the same result would be reached as if the Soviet seat had been left vacant. No defendant, therefore, was found guilty or punished because of Soviet participation. At all events, it was hardly to be expected that, within two months of the German surrender, we would refuse the Soviet a seat on the bench and thus initiate a break in an alliance that had just won the war. Perhaps it would have been better for Germany and the rest of the world if other efforts to retain Soviet cooperation had been as successful as ours.

But however one looks at the propriety of Soviet participation, a righteous judgment is not impeached by the unworthiness of a judge, just as our clerical brethren hold that the effectiveness of the Sacraments is not diminished even when they be "ministered by evil men". The ultimate question with which history will be concerned is whether the end of this process was a right judgment.

No one can intelligently decide whether the legal foundation for this judgment is valid, so that it amounts to a judicial conviction and not a mere political condemnation, without consideration of the record on which it is based. The judgment, unlike the wartime accusations, rests on proven facts. Of course I can not adequately review these, but neither can I adequately discuss the law until we know just what kind of acts our opponents say are beyond the law and which we say the law may punish.

At about the time that Mr. Roosevelt was elected President of the United States, Adolf Hitler engineered what his partisans aptly called "the seizure of power". The Nazi party overthrew the parliamentary institutions of the Weimar Republic and set

up a strong dictatorship admittedly as a step towards re-establishing Germany's predominance in Central Europe — by war if need be. To this end, two great policies were embarked upon: one was to prepare for war; the other was to crush all internal opposition to the regime.

All constitutional liberties were suspended, courts were purged of independent judges, special "people's courts" of partisans were set up, and concentration camps were established for dissenters. Trade unions were seized and brought under the regime and Jew were excluded from all civil rights. Goering testified that "If for any cause someone was taken into custody for political reasons, this could not be reviewed in any court". He gave this summation of the ultimate achievement: "So far as opposition is concerned in any form, the opposition of each individual person was not tolerated unless it is a matter of no importance."

Meanwhile, as early as 1935, Schacht was secretly appointed to prepare the economy for war, and within a year Goering, Coordinator of the Economy, brought the departments of government together and informed them that "all measures are to be considered from the standpoint of an assured waging of war". A gigantic armament programme was commenced, compulsory military service was re-established, and a military air force and a submarine navy were planned superior to any in the world. Remilitarized Germany tested its strength in several instances without encountering opposition enough to cause a war. The German Army re-entered the Rhineland, an *anschluss* was forced upon Austria and Czechoslovakia was taken over. Not satisfied with this, Hitler then threw his armed forces against Poland, which constituted the aggression which plunged the world into war. It is fortunate that the first occasion on which military aggression was sought to be punished as a crime was also an occasion on which the aggression was so clear and its proof so indisputable that there was no choice except to convict or to abandon the principle that military aggression is a crime.

In November 1937, nearly two years before the war, Hitler called a meeting of his High Command at the Reichschancellery in Berlin. The captured minutes, kept by Colonel Hoszbach, were admitted to be authentic by defendants who attended the conference. Hitler said, "It is not a case of conquering people, but of conquering agriculturally useful space". And after reviewing Germany's needs, he concluded with this observation: "The question for Germany is where the greatest possible conquest could be made at the lowest cost". At this time he only disclosed

an aim to conquer Czechoslovakia and Austria. He had them both in his possession within about a year, and without a war.

These acquisitions did not satisfy his ambitions and on May 23rd, 1939, he held another meeting at which he announced his intention to attack Poland — which attack was carried out four months later. Captured minutes, kept by Lt. Col. Schmundt, record Hitler as saying, "There is no question of sparing Poland and we are left with the decision to attack Poland at the first suitable opportunity. We cannot expect a repetition of the Czech affair. There will be war." He anticipated that England and France would enter a life-and-death struggle which might last a long time, and ordered preparations made accordingly. He shortly dispatched Ribbentrop to Moscow to negotiate a non-aggression pact with the Soviet Union to protect his Eastern front.

A final meeting was held at Obersalzberg on August 22nd, 1939, and again we captured minutes of Hitler's speech. He announced the decision to invade at once, and said: "I shall give a propagandist cause for starting the war, never mind whether it be plausible or not. The victor shall not be asked later on whether we told the truth or not. In starting and making a war, not the truth is what matters, but victory." His attitude is shown by his further statement: "I am only afraid that at the last moment some *schweinehund* will make a proposal for mediation". Appeals from President Roosevelt, from His Holiness the Pope, and from Daladier, Prime Minister of France, to refrain from war were scorned. On the 1st of September, the German forces invaded Poland, and for the second time in a generation a world war was begun.

The Tribunal found that Hitler, aided and abetted by certain of the defendants on trial, planned and waged aggressive wars against twelve nations. Invasion of similarly aggressive character of Denmark and Norway, Belgium, Netherlands and Luxembourg, Yugoslavia and Greece, in rapid succession, followed that of Poland, and *every one was in violation of repeated assurances and non-aggression treaties*. I shall not detail the story of the secret and undeclared attack in June of 1941 on the Soviet Union, to whom she was then bound by treaties of friendship and non-aggression — an attack which was pursuant to a plan issued by Hitler and initialled by his High Command more than six months before. Nor shall I recite the somewhat tentative plans which were considered for the prosecution of a war against the United States at a later date, or the plotting which ultimately induced Japan to attack us.

As the *Wehrmacht* expanded the area of Nazi conquest, the terrors of the Nazi regime were spread over Europe with increasing efficiency and ferocity. We paid no attention at Nürnberg to such atrocities as were spontaneous outbursts of passion. We charged systematic and planned organization to subdue populations by terror and to get rid of races the Nazis disliked and of peoples who lived on lands they wanted for themselves.

In announcing to his high Command at Obersalzberg the purpose to invade Poland, Hitler twice commanded a war of cruelty. He told his generals, "Our strength is in our quickness and brutality. Ghengis Khan had millions of women and children killed with a gay heart. History sees in him only a great state builder. . . . Thus, for the time being, I have sent to the East only my 'Death's Head Units' with the order to kill without pity or mercy all men, women and children of Polish race or language. Only in such a way will we win the vital space that we need." Again, the notes show him commanding, "Have no pity. Brutal attitude." And, "The aim is the elimination of living forces". Of course, such high and emphatic commands of brutality fanned out in lower echelons into systematic murder of prisoners and of civilian populations.

The two outstanding applications of this Hitler policy were the slave labour programme and persecution of the Jews. In all occupied territories, compulsory labour service was instituted. A vast labour supply was recruited for shipment to labour in Germany. Defendant Sauckel, who had charge of the programme, was shown by captured documents to have reported, "Out of the five million workers who arrived in Germany, not even two hundred thousand came voluntarily". The largest slaving operation in history, this was also one of the most cruel. The Tribunal summarizes the recruitment in occupied countries: "Manhunts took place in the streets, at motion picture houses, even at churches, and at night in private houses. Houses were sometimes burnt down and the families taken as hostages." These persons were transported under the most inhuman conditions and turned over to employers for use in agriculture and industry. Sauckel's instructions of April 20th, 1942, read: "All the men must be fed, sheltered and treated in such a way as to exploit them to the highest possible extent, at the lowest conceivable degree of expenditure". It takes little imagination to picture how German employers would behave when self-interest was added to such official commands. The slaves were treated with great cruelty and died in vast numbers. The remnants of this labour horde constitute "displaced persons" in Germany today.

The persecution of the Jews began in Germany with discriminatory laws and soon descended to pogroms organized with police approval, burning and demolishing of synagogues, looting of Jewish businesses, violence to Jewish people, and their confinement in ghettos. But anti-Semitism was a foreign as well as a domestic policy. Hitler declared that his war would bring about extermination of the Jews of Europe. As fast as his power spread, Jews were compelled to register and wear the yellow star, and were forced into ghettos where they were required to work on war material. It was in the summer of 1941 that plans were made for what was called "the final solution of the Jewish problem" — extermination. A special section of the Gestapo was set up under Eichmann to carry out this programme of extinction. Our evidence was gruesome, ghoulish, and indisputable, that it was carried out with relentless efficiency. I can only indicate its character. We captured General Stroop's report of the burning of the Warsaw ghetto, in which he reported to Berlin that he had cleaned out the ghetto "with utter ruthlessness and merciless tenacity" and caused the death of a proved total of 56,005 Jews. He said: "Jews usually left their hideouts but frequently remained in the burning buildings and jumped out of the windows only when the heat became unbearable. Then they tried to crawl with broken bones across the street into buildings which were not afire. . . . Countless numbers of Jews were liquidated in sewers and bunkers with blasting."

We also had captured reports of the operators of the gas wagons, detailing how they herded the people into closed trucks and suffocated them with the motor exhaust. Extermination squads even prepared a map, which fell into our hands, of the eastern territories with the symbol of a coffin in each province on which a figure represented the Jews exterminated and outside of the coffin another figure representing the Jews yet to be killed.

Another phase of the programme was to gather Jews from all occupied Europe in concentration camps, where those fit to work were used as slaves and those not fit to work were destroyed in gas chambers and their bodies burned. Hoess, commandant of the Auschwitz extermination camp, called as a defence witness, testified that in his administration alone two and a half million persons were thus done away with, and he gave lurid and technical details of the process. One extermination institution kept a death register which showed that all inmates died of "heart failure", and that each day they invariably died in alphabetical order.

These were not merely sadistic deeds of unimportant people. In the vaults of the great Reichsbank, the central financial institution of Germany, we found stored great quantities of gold fillings taken from the teeth and rings taken from the fingers of concentration camp victims, which were turned over to the financiers who supplied credit to help carry on the programme.

The evidence showed that at least six million Jews were killed, of which four million were killed in the extermination institutions. These are the things which caused Hans Frank, Nazi Governor-General of Poland, to cry out from the witness stand: "We have fought against Jewry. We have fought against it for years. And we have allowed ourselves to make utterances and my own diary has become a witness against me in this connection. Utterances which are terrible. . . . A thousand years will pass and this guilt of Germany will still not be erased."

Such were the courses of conduct which the German documents revealed and which all defendants admitted had occurred. The only issue of fact left was the degree of personal responsibility of those indicted for having so written German history in blood. The last stand of those implicated was not that the evidence failed to convict of the acts, but that the law had failed to make the acts crimes. Admitting that they were moral wrongs of the first magnitude, it was contended that they fell within that realm which the law leaves to the free choice of the individual and for which he must answer to no forum except his own conscience. In short, their position was that there are no binding standards of conduct for states or statesmen which they disregard at risk of answering to international law. If that is so, it is a sad conclusion for the world, for it reduces the whole body of what we have called international law to "such stuff as dreams are made of". If courses of conduct that rise so far beyond injury to mere individuals, and destroy the peace of the world and subvert civilization itself are not international crimes, then law has terrors only for little men and takes note only of little wrongs.

To laymen it is incomprehensible that lawyers should be in doubt as to what law is and how it gets to be law. But that fundamental enigma is the root of the controversy as to the legal validity of the Nürnberg trial. That controversy, I think, is more interesting than important, for no matter what conclusion it reaches the result of the Nürnberg process, the execution and imprisonment of the Nazis, is valid and legitimate by the very tenets which its opponents invoke. Even by conventional international law it cannot be denied that the victors could properly

impose punishments on the vanquished by political decision. Certainly what they legally could do summarily would not be less valid because they paused to hear the explanations of the accused and to make certain that they punished only the right men and for right reasons. And, of course, if the opponents of the trial could establish that there was no law which required German statesmen to respect the lives and liberties of other peoples, it follows that no law compelled the Allies to respect the lives or liberties of Germans. In this connection, it must not be forgotten that the Allies had succeeded to the German state's own sovereignty over these defendants by the unconditional surrender. The argument of the defendants does not affect the legitimacy of the punishment; it only goes to the question whether the trial must be looked upon as a political and military measure incident to victory, or as an exercise of judicial power in applying a law binding upon victor and vanquished alike.

If no moral principle is entitled to application as law until it is first embodied in a text and promulgated as a command by some superior effective authority, then it must be admitted the world was without such a text at the time the acts I have recited took place. No sovereign legislative act to which the Germans must bow had defined international crimes, fixed penalties and set up courts to adjudge them. From the premise that nothing is law if not embraced in a sovereign command, it is easy to argue that the Nürnberg trial applied retroactive, or *ex post facto*, law. European lawyers generally, and particularly those of the German school, think of the command as making the law, and of the law as only the command. And with the increasing reliance of all society upon the legislative process there is a growing tendency of common-law peoples to think of law in terms of a specific sovereign enactment.

The fallacy of the idea that law is found only in such a source appears from the fact that crimes were punished by courts under our common-law philosophy long before there were legislatures. The modern law of crimes may largely be traced to judicial decision of particular cases earlier than it appeared in statute. While of late years legislation is more frequent; in England today no statute defines murder or fixes its penalty, and the same is true of many crimes. Some states of our Union still recognize common-law crimes, and those which do not have codes which, in the main, only declare what before was common law. The early English judge was confronted with an evil act. He dealt with it, unaided by statute, as reasonably and justly as he could; what

he did made a precedent. A series of leading cases, each adding something in response to its particular facts, made a body of law. This slow and inductive process of developing general rules from particular decisions is quite opposite to that of the Continental jurist, who starts with the general command and reasons somewhat deductively to the specific case. The common-law judge is less text-bound. Common law depends less on what is commanded by authority and more on what is indicated by reason. The judge reaches a decision more largely upon consideration of the inherent quality and natural effect of the act in question. He applies what has sometimes been called a natural law which binds each man to refrain from acts so inherently wrong and injurious to others that he must know they will be treated as criminal.

Unless international law is to be deprived of this common-law method of birth and growth, and confined wholly to progression by authoritarian command, — then the judges at Nürnberg were fully warranted in reaching a judicial judgment of criminal guilt. The common-law authorship of the tribunal's judgment was betrayed by the fact that while it does not deny the authority of the London charter, it did not rest upon it, but explored its antecedents after the common-law method and rested, in part at least, upon common-law justifications as well as upon the charter.

Under this philosophy of law, it is clear that by 1939 the world had come to regard aggressive war as so morally wrong and illegal that it should be treated as criminal if occasion arose. The change in world opinion probably dates from Germany's launching of the First World War, at which moment Chancellor von Bethmann-Hollweg was cynically telling the Reichstag, "this violates the rules of International Law", and added, "The wrong — I speak openly — the wrong that we now do we will try to make good again, as soon as our military ends have been reached". Men everywhere saw that civilization could not abide such irresponsible nationalism. When that war ended, the Treaty of Versailles provided for a special tribunal to try the former Kaiser for offences not vitally different from certain of the crimes defined by the London Agreement, a fate from which he was saved by sanctuary in a country neutral in that war. Moreover, that treaty recognized the right of the allied powers to try persons accused of violating the laws and customs of war, although the Hague Conventions, which forbid such conduct, do not expressly name such conduct criminal, nor set up courts to try such offences nor fix any penalties.

In 1923 a draft treaty sponsored by the League of Nations flatly declared that "aggressive war is an international crime" and that the parties "undertake that no one of them will be guilty of its commission". That treaty was not consummated because of disagreement over what would constitute aggression rather than because of doubt as to the criminality of aggressive war. The next year, the so-called Geneva Protocol, by unanimous resolution of the forty-eight members of the League of Nations Assembly, which at that time included Italy and Japan but not Germany, declared that a war of aggression "is an international crime". In 1927 all the delegations, which then included the German, Italian and Japanese, unanimously adopted a declaration that "a war of aggression can never serve as a means of settling international disputes and is in consequence an international crime". In 1928 twenty-one American Republics, at the Sixth Pan-American Conference, united in a declaration that "war of aggression constitutes an international crime against the human species".

Most important of all, of course, was the General Treaty for the Renunciation of War of August 28th, 1928, known as the Pact of Paris or the Kellogg-Briand Pact, which became binding on sixty-three nations including Germany, Italy and Japan, "uniting civilized nations of the world in a common renunciation of war as an instrument of their national policy" and agreeing that all disputes or conflicts, of whatever nature or origin, shall be solved only by pacific means.

These solemn acts in which statesmen held out their promises, and in which peoples put their hopes, can not be brushed aside as mere extravagant expressions of disapproval of war and pious avowals of a will to peace. And unless these repeated declarations are regarded as legally meaningless and the statesmen of the world have been lulling people into complacency with a gigantic hoax, the charter and judgment of Nürnberg apply law which responsible representatives of all nations had proclaimed as such before the acts prosecuted took place.

We must not forget that we did not invoke the outlawry of war as a sword to punish acts that were otherwise innocent and harmless. On the contrary, it was the accused who had to establish the lawfulness of their belligerency to excuse a course of murders, enslavements, arsons and violence which, except in war, is criminal by every civilized concept. They were like pirates or buccaneers who are punishable wherever, whenever and by whomever caught unless they can show that their acts fall within

the protection the law always has afforded those who commit acts of violence in prosecuting war. The very least legal consequences that follow outlawing wars of aggression is to withdraw from one knowingly and voluntarily causing or promoting such aggression the defence of lawful warfare. Thus if the treaties outlawing this war did not expressly create a new crime, they took away the immunity of war makers from prosecution for old crimes.

It is much too early to appraise the influence of Nürnberg. But I would disclaim any expectation that it alone is enough to prevent future wars. When stakes are high enough and chances of success look good enough, I suppose reckless leaders may again plunge their people into war, just as men still resort to murder, notwithstanding the law's penalty. But I do think that we have forever laid to rest in the minds of statesmen the vicious assumptions that all war must be regarded as legal and just, and that while the law imposes personal responsibility for starting a street riot, it imposes none for inciting and launching a world war.

Dr. Philip Jessup, writing of a *Modern Law of Nations*, has set out the two "keystones of a revised international legal order". He describes the old idea of absolute sovereignty as "the quicksand upon which the foundations of traditional international law are built", and he says that "international law, like national law, must be directly applicable to the individual".

It may, too, be significant of a more promising intellectual attitude that the new organic law adopted by the Germans provides that the general rules of international law shall take precedence over German federal law and shall create rights and duties directly for the inhabitants of German territory. It also provides, "activities tending to disturb, or undertaken with the intention of disturbing, peaceful relations between nations, and especially preparing for aggressive war shall be unconstitutional. They shall be made subject to punishment."

Thus "the old order changeth yielding place to new". Like much legal work ours at Nürnberg has far-reaching implications rarely apparent to laymen and often missed by lawyers. Its value to the world will depend less on how faithfully it interpreted the past than on how accurately it forecasts the future. It is possible that strife and suspicion will lead to new aggressions and that the nations are not yet ready to receive and abide by the Nürnberg law. But those who gave some of the best effort of their lives to this trial are sustained by a confidence that in place of

what might have been mere acts of vengeance we wrote a civilized legal precedent and one that will lie close to the foundations of that body of international law which will prevail when the world becomes sufficiently civilized.

Recent Judicial Appointments

His Honour Ian MacRae, Junior Judge of the County Court for the County of Middlesex, in the Province of Ontario, to be Judge of the County Court for the County of Middlesex and also a Local Judge of the High Court of Justice for Ontario.

J. W. Thompson, Esquire, K.C., of the Town of Maple Creek, in the Province of Saskatchewan, to be Judge of the District Court of the Judicial District of Weyburn, effective on the first day of September, 1949.

The Honourable Donald Alexander McNiven, a Judge of His Majesty's Court of King's Bench for Saskatchewan, to be a Judge of the Court of Appeal for Saskatchewan, and *ex officio* a Judge of His Majesty's Court of King's Bench for Saskatchewan.

Clifford S. Davis, Esquire, K.C., of the City of Prince Albert, in the Province of Saskatchewan, to be a Judge of His Majesty's Court of King's Bench for Saskatchewan, effective on the first day of September, 1949.

John J. Kelly, Esquire, K.C., of the City of Winnipeg, in the Province of Manitoba, to be a Judge of the Court of King's Bench for Manitoba.

The Honourable Sir Albert Joseph Walsh, Knight Bachelor, K.C., of St. John's, in the Province of Newfoundland, to be Chief Justice of the Supreme Court of Newfoundland, *vice* the Honourable Sir Edward Emerson, deceased, effective September 5th, 1949.

George Swan Challies, Esquire, K.C., of the City of Montreal, in the Province of Quebec, to be a Puisne Judge of the Superior Court for the District of Montreal.

Elphege Marier, Esquire, K.C., of the City of Montreal, in the Province of Quebec, to be a Puisne Judge of the Superior Court for the District of Montreal.

Honourable Joseph Jean, K.C., of the City of Montreal, in the Province of Quebec, to be a Puisne Judge of the Superior Court for the District of Montreal.

Eugene Marquis, Esquire, K.C., of the City of Quebec, in the Province of Quebec, to be a Puisne Judge of the Superior Court for the District of Quebec.

Honourable Ernest Bertrand, K.C., of the City of Outremont, in the Province of Quebec, to be a Puisne Judge of the Court of King's Bench in and for the Province of Quebec.