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Crimes Against Peace in International Law: From Nürnberg to the Present

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Of the three charges contained in the Charter of the International Military Tribunal that sat at Nürnberg, the so-called crimes against peace have undoubtedly caused the greatest controversy. Technical questions concerning the retroactive character of the law applied by the Tribunal and the apparent disregard of the maxim *nulla poena sine lege* were vigorously contested by international jurists at the time. And today, almost two decades after the execution of the Nürnberg Judgment, difficulties still remain regarding the nature of crimes against peace and the application of the Nürnberg precedent in future international law. These problems are specially relevant in connection with contemporary schemes designed for the maintenance of peace. It is thus the purpose of this article to determine the precise nature of crimes against peace as construed by the Nürnberg and other military tribunals, and to discuss the development of this concept in subsequent international instruments. It is hoped that in so doing some useful light may be shed upon the meaning of these offenses.
I. THE NATURE OF CRIMES AGAINST PEACE

According to the Nürnberg Charter crimes against peace consist in the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of the foregoing." Essentially the same perspective may be seen to infuse the Charter of the International Military Tribunal for the Far East under which the Japanese leaders were tried and punished, and the Control Council Law No. 10, enacted on December 20, 1945, by the four Powers occupying Germany, for the trial of the so-called minor war criminals. The application of the Nürnberg provision was quickly revealed as inapt for the specific circumstances of the cases. The principles involved proved embarrassing to the presiding judges and led them to base their determination upon two assumptions, the validity of which has been seriously questioned. The first of such assumptions consists in the belief that a war of aggression was an international crime before the London Agreement of August 8, 1945, under which the International Military Tribunal at Nürnberg was established. The Tribunal succinctly said that in its opinion "aggressive war is a crime under international law." Unfortunately, however, the Nürnberg Judgment did not adequately deal with this assertion, thus leaving the mat-

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4 Charter of the International Military Tribunal at Nürnberg art. 6, para. (a). There is a slight modification in the wording of the provision, for the Tokyo Charter conferred jurisdiction on the Tribunal to try "Crimes Against Peace: namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of International Law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." For text of this Charter, see In re Hirota and Others, International Military Tribunal for the Far East, Tokyo, November 12, 1948, [1948] Ann. Dig. 356, 357-358 (No. 118) (1953).

5 Charter of the International Military Tribunal for the Far East art. 5, para. 6 For the text of this law, see Taylor, Final Report to the Secretary of the Army on the Nürnberg War Crimes Trials Under Control Council Law No. 10 at 250 (1949).

7 Control Council Law No. 10 art. II, sect. 1, para. (a).

8 Professor Percy E. Corbett says that those who wrote the decision "were catching at straws." See Corbett, Law and Society in the Relations of States 231 (1951).

9 For the text of this Agreement, see Sohn, Cases and Materials On United Nations Law 858-859 (1956).

10 1 Trial of the Major War Criminals Before the International Military Tribunal 224 (1947). See also 22 Id. at 467. Long before 1945 Professor H. Donnedieu De Vabres had maintained that "a War of aggression is a crime." See De Vabres, Les Principes Modernes du Droit Pénal International 426 (1928).
ter subject to much speculation and doubt. Instead the Tribunal contented itself with saying that "The law of the Charter is decisive, and binding upon the Tribunal," and that since the Charter made "the planning or waging of a war of aggression or a war in violation of international treaties a crime," it was not "strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement." It did say, however, that "to initiate a war of aggression . . . is not only an international crime; it is the supreme international crime. . . ." The Tribunal supported its position by citing such pre-war agreements as the Kellogg-Briand Pact of August 27, 1928, outlawing war as an instrument of national policy, the Draft Treaty of Mutual Assistance sponsored by the League of Nations in 1923 providing in Article 1 that "aggression is an international crime," the Preamble to the League of Nations Protocol for the Pacific Settlement of International Disputes of 1924 stating that a war of aggression constitutes a violation of the solidarity between nations and therefore is an international crime, the declaration adopted by the Assembly of the League of Nations on September 24, 1927, saying that war is an international crime, and the resolution unanimously adopted on February 18, 1928, by the twenty-one American Republics at Havana providing that a "war of aggression constitutes an international crime against the human species." This is an impressive list indeed, but it should immediately be added that aside from the Kellogg-Briand Pact, which at the outbreak of the war was in force between sixty-three States, the other instruments mentioned by the Tribunal either never came into force or else were mere resolutions without any building force. And even in respect to the Kellogg-Briand Pact, no specific condemnation of aggression is found within its terms, nor an individual criminal liability for this offense. The assumption, therefore, that a war

11 Trial of the Major War Criminals Before the International Military Tribunal 218 (1947).
12 Id. at 427.
13 Id. at 427.
14 Trial of the Major War Criminals Before the International Military Tribunal 219-222 (1947).
of aggression is an international crime remains, in the main, highly conjectural.¹⁶

The second important assumption underlying the Nürnberg Judgment concerns the criterion of aggression adopted by the Tribunal. The Tribunal seemed to have assumed that aggression is a well-established and fairly precise concept in international criminal law. Yet, unlike domestic criminal legislation where crimes are precisely defined so that individuals may know exactly the limits of permissible behavior, the crime of aggression is a most vague and general concept not yet defined nor described by any international instrument.¹⁷ The Nürnberg Charter itself offered no criterion of aggression for the guidance of the Tribunal, nor did the latter ever formulate any criteria in the course of its decisions.¹⁸ As the United Nations International Law Commission subsequently observed, what the Tribunal did was to review "the historical events before and during the war" in an effort to determine whether aggression had been committed by the defendants.¹⁹ From such a broad and flexible orientation, the Tribunal found that certain of the defendants had committed acts of aggression in seizing Austria and Czechoslovakia,²⁰ and

¹⁶See 2 Guggenheim, Traité de Droit International Public 43 (1954); 2 Podest Costa, Derecho Internacional Público 322-323 (3d ed. 1955); Schwarzenberger, supra note 3, at 346. See also the dissenting opinion of Judge Roling in the Tokyo Judgment, where he maintains that aggressive war, although perhaps the subject of moral condemnation, was "not considered a true crime before and in the beginning of this war and could not be considered as such for lack of those conditions in international relations on which such a view could be based." In re Hirota, International Military Tribunal for the Far East, Tokyo, November 12, 1948, [1948] Ann. Dig. 356, 375 (No. 118) (1953). Cf. Wright, The Law of the Nuremberg Trial, 41 Am. J. Int'l L. 38, 72 (1947).


¹⁸Stone, Aggression and World Order: A Critique of United Nations Theories of Aggression 186 (1958). The Tokyo Charter did not offer a definition of aggression either. However, the Tribunal formulated some kind of a criterion. Thus, in describing the wars of aggression which Japan launched on December 7, 1941, against Great Britain, the United States and The Netherlands as "unprovoked attacks, prompted by the desire to seize the possessions of these nations," it went on to say that "Whatever may be the difficulty of stating a comprehensive definition of 'a war of aggression,' attacks made with the above motive cannot but be characterized as wars of aggression." For this portion of the Tokyo Judgment, see Sohn, op. cit. supra note 9, at 915.


²⁰These aggressive actions were regarded as steps in the plan to wage aggressive war. See 22 Trial of the Major War Criminals Before the International Military Tribunal 433-439 (1948). See, however, some decisions of the American (Continued on next page)
war of aggression against Poland, Belgium, Denmark, Norway, Holland, Luxembourg, Yugoslavia, Greece, the Soviet Union, and the United States. The Tribunal significantly added that these findings made it unnecessary to discuss in detail whether these aggressive wars were also "wars in violation of international treaties, agreements, or assurances" within the terms of the Charter. It is thus obvious that a war of aggression may technically exist quite independently of a war "in violation of international treaties, agreements, or assurances." It may also be noted that these two kinds of wars constitute two separate and independent categories of crimes against peace.

Despite the broad generalizations of the Nürnberg Judgment certain legal principles can be readily perceived which reveal more clearly the nature of crimes against peace as understood by the Tribunal. Turning again to the Nürnberg Charter, it will be recalled that crimes against peace embrace a series of offenses consisting in the planning, preparation, initiation, or waging of a war of aggression, or participation in a common plan or conspiracy for the accomplishment of the preceding acts. Although at first sight it may appear that each one of these acts constitutes a separate and distinct crime against peace, in practice, however, the guilt of the defendants was judged on the basis of two counts whose precise limits are difficult to mark in specific cases. Count one dealt with a common plan or conspiracy to plan, prepare, initiate and wage aggressive war, while count two was concerned with the planning, preparation, initiation and waging

(Footnote continued from preceding page)

military tribunals established at Nürnberg under Control Council Law No. 10, where the seizure of Austria and parts of Czechoslovakia was regarded as aggressive in the case of Austria, and aggressive invasion in the case of Czechoslovakia, and in both cases as crimes against peace. See United States v. Weizsaecker, 14 Trials of War Criminals Before the Nürnberg Military Tribunals under Control Council Law No. 10 at 331, 336-337 (1949). (Hereinafter cited as War Crimes Reports). For an excellent discussion of this distinction, see Woetzel, The Nuremberg Trials in International Law 223-224 (1960).

21 22 Trial of the Major War Criminals Before the International Military Tribunal 439-458 (1948).
22 21 Trial of the Major War Criminals Before the International Military Tribunal 216 (1947).
23 Charter of the International Military Tribunal at Nürnberg art. 6, para. (a).
25 The Tribunal thus said: "We shall . . . discuss both Counts together, as they are in substance the same." See 1 Trial of the Major War Criminals Before the International Military Tribunal 224 (1947).
of specific wars of aggression. The vague and clumsy drafting of these two counts left the Nürnberg Charter open to a wide and flexible interpretation sometimes productive of highly undesirable results. The separate discussion of the two counts will adequately support this conclusion.

As to count one, wholly apart from the fact that the Charter did not define conspiracy, international jurists have agreed that there was no crime of conspiracy in international law in 1939, and that even in domestic legal systems other than those of the common law world, this crime is largely unknown. Yet it must not be assumed that the Tribunal regarded conspiracy within the meaning of Anglo-American criminal law. The Tribunal considered conspiracy as a number of closely related acts developed from 1919 to 1945 and including the formation of the Nazi Party in 1919 as "the instrument of cohesion among the defendants," the overthrow of the Treaty of Versailles, the secret rearmament by Germany, and the planning and waging of aggressive actions. What seems particularly significant is that these acts in themselves did not constitute a criminal conspiracy under the indictment unless they were a part of a plan to wage aggressive war. The Tribunal was most explicit in this connection when it said:

... the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and action. The planning, to be criminal, must not rest merely on the declarations of a party programme, such as are found in the twenty-five points of the Nazi Party, announced in 1920, or the political affirmations expressed in Mein Kampf in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan.

It can be readily seen, therefore, that the crime of conspiracy cannot be isolated from the crime of waging concrete wars of

26 Id. at 29, 42. Actually, these two counts overlap. See Leventhal, Harris, Woolsey, & Farr, The Nuremberg Verdict, 60 Harv. L. Rev. 857, 882 (1946-1947).
27 The Tokyo Judgment defined conspiracy as "an agreement" to wage aggressive war. See Sohn, op. cit. supra note 9, at 910.
28 See, for discussion, Stone, Legal Controls of International Conflict 361 (1954).
29 See, generally, Perkins, Criminal Law 527 (1957); Williams, Criminal Law 663-669 (2d ed. 1961).
30 1 Trial of the Major War Criminals Before the International Military Tribunal 224-225 (1947).
31 Id. at 225.
aggression under count two of the indictment. Yet it has already been seen that conspiracy to commit aggression and the waging of specific wars of aggression are in principle two separate and distinct crimes against peace.

The technical difficulty faced by the Tribunal in describing the crime of conspiracy can be clearly seen in another portion of the Judgment. While the notion of conspiracy in Anglo-American criminal law signifies a combination between two or more persons to commit an unlawful act or to do a lawful act by criminal or unlawful means, thus implying the existence of a "unity of design and purpose," the Nürnberg Judgment apparently could not point to one single combination embracing one single master plan to commit crimes against peace. What it did find were separate plans, which were nothing more than "a series of connected events," leading up to the commission of aggressive wars. The Tribunal sharply said:

It is not necessary to decide whether a single master conspiracy between the defendants has been established by the evidence . . . the evidence establishes with certainty the existence of many separate plans rather than a single conspiracy embracing them all. . . . It is immaterial to consider whether a single conspiracy to the extent and over the time set out in the Indictment has been conclusively proved. Continued planning, with aggressive war as the objective, has been established beyond doubt.

Conceivably, therefore, conspiracy could exist even though no specific combination for the accomplishment of the unlawful act was present. A distinguished jurist has suggested that this rather flexible interpretation may well have been adopted to allow more latitude in the proof of the other counts than would otherwise be permitted under the conspiracy concept in Anglo-American law. The force of this suggestion can be most clearly seen when remembering that not a single defendant was convicted on the conspiracy count alone, and that conviction on this count

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32 Perkins, op. cit. supra note 29, at 530.
33 Brownlie, International Law and The Use of Force by States 201 (1963).
34 Trial of the Major War Criminals Before the International Military Tribunal 225 (1947).
35 In United States v. Von Leeb, 11 War Crimes Reports 488-489 (1948), a United States military tribunal stressed the necessity of proving the existence of a concrete plan in order to constitute conspiracy to commit a crime against peace.
36 Stone, Legal Controls of International Conflict 361 (1954).
was only had when connected with the planning and preparation for specific wars of aggression under count two of the indictment.\(^\text{37}\) It thus becomes clear that the conspiracy count was unnecessary and superfluous, since the criminal liability of the defendants could have been adequately judged on the basis of planning and preparation for specific aggressive wars under count two.\(^\text{38}\) This observation is of critical importance, for any assessment of the future of the crime of conspiracy in international law must take account of the confusion and uncertainty underlying the Nürnberg Judgment. On such a basis, the assertion that there is a notion of conspiracy to commit a crime against peace can hardly be supported.\(^\text{39}\)

The second count of the Nürnberg indictment embraces in its widest sweep all the component steps leading up to the commission of a war of aggression. More specifically considered, these components include the “planning,” “preparation,” “initiation,” and “waging” of aggressive war. While these concepts might logically be expected to differ in their technical import, the Nürnberg Judgment, however, did not distinguish between “planning” and “preparation” and, further, failed to give a separate consideration to the concept of “initiation.” The operative reality of these four conceptions was substantially reduced by the Judgment to “preparation,” and “waging” of aggressive war.\(^\text{40}\) This certainly reflects the atmosphere of ambiguity and abstraction in which the Nürnberg Charter was framed.

Looking comprehensively at the Judgment, some light may be shed upon the meaning of the above conceptions. Thus, “planning,” and “preparation” were broadly considered by the Tribunal as embracing all the stages necessary for the initiation of a war of aggression. The Tribunal clearly said that “‘planning’ and ‘preparation’ are essential to the making of war.”\(^\text{41}\)

\(^{37}\) It is also interesting to note that although count one charged, in addition, conspiracy to commit war crimes and crimes against humanity, the latter conspiracy variant was disregarded by the Tribunal. See 1 Trial of the Major War Criminals Before the International Military Tribunal 226 (1947).

\(^{38}\) Brownlie, op. cit. supra note 33, at 201.


\(^{40}\) See, however, Kelsen, Principles of International Law 185 (1952) who believes that “planning,” “preparation,” and “initiation” of aggressive war are new international crimes.

\(^{41}\) 1. Trial of the Major War Criminals Before the International Military Tribunal 224 (1947).
naturally follow that "planning" and "preparation" cannot be regarded as elements of guilt under the counts of the indictment unless they are a part of a specific plan for the making of aggressive war. A direct connection between "planning" and "preparation" on the one hand, and the "waging" of aggressive war, on the other, was essential for conviction on the charge of "planning" and "preparation" for aggressive war. When this requisite connection was found, "planning" and "preparation" became crimes against peace. Clearly, then, the "planning" and "preparation" for a nebulous and future plan of aggression unconsummated by a concrete aggressive war is not sufficient to engage the criminal responsibility of the individuals concerned.42

The trial of Schacht is particularly instructive in this connection, for while the Tribunal recognized that he was largely responsible for the rapid rearmament of Germany after 1933, he was nevertheless acquitted on both counts. This portion of the Judgment is specially significant, for the Tribunal unmistakably made the crime of "planning" and "preparation" for aggressive war entirely dependent upon the waging of such a war. The Tribunal thus said:

But rearmament of itself is not criminal under the Charter. To be a Crime against Peace under Article 6 it must be shown that Schacht carried out this rearmament as part of the Nazi plans to wage aggressive war.43

From this passage, it should be evident that if "planning" and "preparation" are found to exist in a specific case, criminal responsibility is still no necessary result. In these terms, "planning" and "preparation" really represent the beginning of a particular pattern of behavior which can be characterized as criminal if functionally related to aggressive war. It may additionally be noted that implicit in the Schacht decision is the distinction between actions and policies in support of the war effort which are criminal, and those which are not.44 The decisive test in this con-

42 Brownlie, op. cit. supra note 33, at 196.
43 1 Trial of the Major War Criminals Before the International Military Tribunal 309 (1947).
44 Thus, the Tribunal acquitted Speer who became head of the armament industry. The Tribunal said: "His activities in charge of German armament production were in aid of the war effort in the same way that other productive enterprises aid in the waging of war; but the Tribunal is not prepared to find that such activities involved engaging in the common plan to wage aggressive war as

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nection is whether such actions and policies are directly connected with plans of aggression.

In contrast with "planning" and "preparation," the "waging" of aggressive war is by itself a crime against peace, even if not directly connected with the former. Thus conceived, the "waging" of aggressive war is totally independent of the "planning" and "preparation" for such a war. The opinion of the Tribunal in respect to Admiral Dönitz illustrates this point well, for he was convicted under count two alone for waging aggressive submarine warfare, even though no connection with the "planning" and "preparation" of such a war could be found. Moreover, the conviction on this charge of civilians such as industrialists and financiers as well as military men strikingly indicates that the crime of waging unlawful war is not limited to the exclusive military facets of a war.

It finally remains to observe that although the crime of waging aggressive war would seem to be fairly broad since its existence is not necessarily dependent upon any other factor, the Tribunal significantly convicted on this charge only those defendants who were so close to Hitler as to possess concrete knowledge of his aggressive plans and to collaborate intimately with him. It would seem inexorably to follow, therefore, that the aggressive war charge applies only to high-ranking military personnel and high State officials and, consequently, not everyone in uniform who fights in a war of aggression can be charged with the crime. This is certainly a most reasonable construction, for the conception of "waging" would seem to imply the ability to influence policy decisions—a power which personnel below the top echelon of the State does not possess. It may thus be submitted that in

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charged under Count One or waging aggressive war as charged under Count Two." 1 Trial of the Major War Criminals Before the International Military Tribunal 330-331 (1947).
45 Id. at 310-311. See also 22 Trial of the Major War Criminals Before the International Military Tribunal at 556-557 (1948).
46 Besides military men, such civilians as Frick, Von Neurath and Rosenberg were convicted under count two.
47 See 22 Trial of the Major War Criminals Before the International Military Tribunal 468-469 (1948).
48 This was the assumption of the International Law Commission in formulating the Principles of Nürnberg. See note 19 supra.
49 This point was repeatedly stressed in the trial of the so-called minor war criminals by American military tribunals. See, specifically, United States v. Von Leeb, 11 War Crimes Reports 483-489 (1949). In United States v. Krupp, 9 (Continued on next page)
assessing the guilt of the defendants under the count of waging aggressive war the Nürnberg Tribunal adopted a narrow test of responsibility, thereby substantially limiting the scope of the crime.\textsuperscript{50}

From the foregoing exposition, the most conspicuous facts about crimes against peace are both their vague and general description, and the utter lack of agreement regarding their criminality under international law.\textsuperscript{51} For an accurate consideration of this point, it is highly relevant to contrast briefly crimes against peace with war crimes and crimes against humanity, both of which were also punishable under the Nürnberg Charter.\textsuperscript{52} The conception of war crimes was not new in 1945, but has reference to specific violations of the laws and customs of war made punishable by domestic legislation and international conventions.\textsuperscript{53} Similarly, crimes against humanity consist of acts generally recognized as criminal by the penal law of all civilized States.\textsuperscript{54} Therefore, war crimes and crimes against humanity refer to clearly defined offenses, whose criminality was recognized long before 1945, so that the charge of ex post facto legislation could not possibly be applied to these offenses.\textsuperscript{55} Crimes against peace, on the other hand, were rather novel in 1945,\textsuperscript{56} thus giving rise to the charge of ex post facto legislation, and even after the Nürnberg and the other war crimes trials, they have remained largely undefined. Considerable controversy and doubt still attend their determination. Subject to this qualification, therefore, the general effect of the charge of crimes against peace is somewhat weakened by the uncertainty underlying its application and, thus,
can scarcely be a promising subject for an international agreement in the near future.

II. Crimes Against Peace in the Draft Code of Offenses Against the Peace and Security of Mankind.

Partially in recognition of the above considerations, and in an attempt at clarification, the United Nations General Assembly requested the International Law Commission in 1947 (a) to formulate the principles of international law recognized in the Charter and in the Judgment of the Nürnberg Tribunal, and (b) to prepare a Draft Code of Offenses against the Peace and Security of Mankind, indicating clearly the place to be accorded to the above principles.57 While the formulation of the International Law Commission regarding the Judgment of the Nürnberg Tribunal reproduced in almost identical terms the provision of the Nürnberg Charter concerning crimes against peace so that no progress was made in this regard,58 the real innovation of the Commission consisted in the adoption of a Draft Code of Offenses against the Peace and Security of Mankind in its third session in 1951.59 The most important aspect of this Code is its attempt to impute criminal responsibility to individuals for acts which previously only engaged the responsibility of the State.60 After providing that "Offenses against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished,"61 the Draft Code proceeds to enumerate the acts which fall into this forbidden category. A careful reading of these acts at once reveals three fundamental departures from the Nürnberg Charter and Judgment. First, while the Draft Code evidently seeks to project much the same policy that the Nürnberg Charter sought to apply in respect to crimes against peace, it has, however, enlarged the scope of such crimes by linking them

57 Resolution 177 (II), November 21, 1947.
58 See Principle VI, which incorporates the Nürnberg provision. For text, see note 19 supra.
61 Draft Code art. 1.
with other offenses which affect the security of mankind. It is for this reason that war crimes and crimes against humanity, which under the Nürnberg Charter were separate crimes, are now included within the general category of offenses described in the Code. The offenses against the peace and security of mankind, therefore, go far beyond the acts giving rise to responsibility for crimes against peace under the Nürnberg Charter.

Second, while both the Nürnberg Charter and Tribunal failed to give a definition of a war of aggression, the Draft Code, on the other hand, has attempted a general and inexhaustive description of aggressive acts. It says in this connection that an act of aggression includes "the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defense or in pursuance of a decision or recommendation by a competent organ of the United Nations." It may significantly be added that such other acts as any threat to resort to an act of aggression, preparation for the employment of armed force against another State, incursion of armed bands into foreign territory, fomenting civil strife and encouragement of terrorist activities against another State are also regarded as offenses against the peace and security of mankind and presumably as acts of aggression. The comments on every one of these offenses specifically say that the offenses thus defined can only be committed by the authorities of the State, though the criminal responsibility of private persons is similarly envisaged.

Third, included in the Draft Code are notions of conspiracy, incitement, attempt and complicity to commit the offenses, which are difficult to grasp unless related to the actual determinations of the Nürnberg Tribunal. The Draft Code thus says that the following shall constitute punishable offenses:

(i) Conspiracy to commit any of the offences defined in the preceding paragraphs of this article; or

(ii) Direct indictment to commit any of the offences defined in the preceding paragraphs of this article; or

\[\text{Draft Code art. 2, paragraphs 10 & 11. In paragraph 9 genocide is also included as an offense.}\]

\[\text{Draft Code art. 2, para. (1).}\]

\[\text{"Preparation" was used here in the same sense described by the Nürnberg Tribunal. Thus, in this offense "preparation" includes "planning" as well.}\]

\[\text{Draft Code art. 2, paras. (2), (3), (4), (5) & (6).}\]

\[\text{Brownlie, op. cit. supra note 33, at 207.}\]
(iii) Attempts to commit any of the offences defined in the preceding paragraphs of this article; or

(iv) Complicity in the commission of any of the offences defined in the preceding paragraphs of this article.67

The comment on this provision clearly indicates that the notion of “conspiracy” was taken from the Nürnberg Charter and, therefore, carries with it the uncertainties of the Nürnberg Judgment. On the other hand, the notions of “incitement,” “attempt,” and “complicity” are not found in the Nürnberg Charter, but were subsequently incorporated into the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the United Nations General Assembly on December 9, 1948,68 and ratified by a substantial number of States. It is thus obvious that as regards these offenses the Draft Code goes beyond the Nürnberg precedent. But this provision of the Code is of considerable scope and importance for another reason, namely, that although the Nürnberg Judgment seemed to have linked the criminal responsibility of individuals with the delinquent character of the activity engaged in by the State,69 the Draft Code, on the other hand, apparently proceeds on a differentiation between State and individual responsibility. This observation may be supported on two grounds. First, though perhaps difficult to mark in practice, the Draft Code foresees the possibility that the authorities of the State may become criminally liable at a different stage at which the responsibility of the State arises.70 In fact, there is scarcely any doubt that in respect to certain individuals criminal liability may be entirely absent. These assertions are instructively illustrated by the comment on Article 2, paragraph (12) of the Code, which says:

In including ‘complicity’ in the commission of any of the offences defined in the preceding paragraphs among the acts which are offences against the peace and security of mankind, it is not intended to stipulate that all those contributing, in the normal exercise of their duties, to the perpetration of

69 For discussion, see Bowett, Self-Defense in International Law 266, 267 (1958).
offences against the peace and security of mankind could, on that ground alone, be considered as accomplices in such crimes. There can be no question of punishing as accomplices in such an offence all the members of the armed forces of a State or the workers in war industries.\textsuperscript{71}

It is to be further noted that the criminal responsibility of the authorities of the State will not arise at all if it can be shown that the individual charged with State functions did not have a moral choice in fact open to him.\textsuperscript{72} It is therefore clear that a member of the government committing any of the crimes enumerated in the Code will be criminally liable only if in the prevailing circumstances it was quite possible for him to act contrary to superior orders.\textsuperscript{73}

And, secondly, while the criminal responsibility of the State is enforced by sanctions provided for by the Charter of the United Nations,\textsuperscript{74} in respect to the individual the penalty for any of the offenses defined in the Code is to be determined by the tribunal exercising jurisdiction over the accused.\textsuperscript{75} In this connection, the Code envisages international criminal jurisdiction over individuals, but pending its establishment, measures may be adopted for the application of the Code by national courts.\textsuperscript{76} It is highly relevant to note that according to the Draft Statute for an International Criminal Court, drafted by the United Nations Committee on International Criminal Jurisdiction in 1951 and revised in 1953, in the trial of persons accused of crimes against international law, in which crimes against peace are clearly included, the Court is to apply international criminal law and, when appropriate, national law.\textsuperscript{77} This would seem to suggest that the trial of persons is to take effect without any reference to principles of State re-


\textsuperscript{72} See Article 4 of the Draft Code, which is identical to Article 8 of the Nürnberg Charter. See Report of the International Law Commission, \textit{op. cit. supra} note 59, at 13.

\textsuperscript{73} This is brought out by the Commission in its Comment on Article 4. See Report of the International Law Commission, \textit{op. cit. supra} note 59, at 13-14.

\textsuperscript{74} U.N. Charter ch. VII.

\textsuperscript{75} Draft Code art. 5.

\textsuperscript{76} Report of the International Law Commission, \textit{op. cit. supra} note 59, at 11.

The combined operation of these principles would seem to establish beyond any vestige of doubt that a criminal individual liability may exist without any degree of connection with State responsibility. It will be recalled that under the Nürnberg Judgment the responsibility of the State and of the individual were indissolubly linked.

In summing up the discussion of the Draft Code it may be stressed that the type of criminal responsibility found therein in respect to crimes against peace is decidedly more far-reaching than that seen in the Nürnberg Charter and Judgment. It is in this sense that the provisions of the Draft Code are innovatory rather than declaratory of existing law. It may well be that the Draft Code represents an attempt to overcome the difficulties raised with respect to the retroactivity charge of the Nürnberg Charter. However, the broader basis upon which the criminal responsibility of individuals is predicated may be open to the objection that it is vague and general in the extreme, and that in the area of international crimes more definite conceptions are required precisely to avoid both the charge of retroactivity and of violation of the maxim *nulla poena sine lege* repeatedly levelled against the Nürnberg Judgment. These criticisms are likely to arise as long as there is no international legislature to enact the law and an international criminal court to achieve uniformity of decision. But even conceding such obligations, it should be quite evident that underlying the Draft Code is the attempt to tighten up the obligations of individuals in respect to acts which vitally engage the peace and security of mankind.

### III. Crimes Against Peace in Treaties and Constitutional Enactments

It should be clear from the preceding observations that the International Law Commission presented its proposal *de lege*
ferenda and, hence, the provisions of the Code are far from being binding upon the States. It is, however, in the Peace Treaties ending World War II with certain States that crimes against peace appear in an entirely different light. The pertinent provisions of these treaties impose upon the defeated nations the obligation to surrender persons accused of crimes against peace found within their jurisdiction. Thus, according to the Peace Treaty with Italy, it Italy agreed to “take all the necessary steps to ensure the apprehension and surrender for trial of: (a) Persons accused of having committed, ordered, or abetted war crimes and crimes against peace or humanity.” Identical provisions are found in the Peace Treaties with Rumania, Bulgaria, Finland, and Hungary. Although the conception of crimes against peace in the sense of Nürnberg has clearly been incorporated into these treaties in a more enduring form, the fact should not be overlooked that the obligation undertaken by the signatory States is of a rather limited character since it has reference to the surrender of fugitives and not to the definition or punishment of the crimes. But even in respect to the extradition of offenders the Peace Treaties give rise to further doubts, for not only can an asylum State invoke traditional extradition doctrines to block the surrender of individuals, but, perhaps vastly more important, crimes against peace are likely to be regarded as political offenses for which extradition is not generally granted. Indeed, this is

83 Id. art. 45, para. (a).
88 Thus, in 1949 Italy refused to extradite to Yugoslavia a person accused, inter alia, of having committed war crimes and crimes against peace and humanity. This result was achieved despite the provision of the Peace Treaty with Italy. See In re Bukavina, Italy, Court of Appeal of Rome (Chamber of Accusations), July 28, 1949, [1949] Ann. Dig. 273, (No. 88) (1955).
89 In his dissenting opinion in the Tokyo Judgment, Judge Roling regarded the crime of waging aggressive war as a political offense. For this opinion, see Sohn, op. cit. supra note 9, at 938. See also Woetzel, op. cit. supra note 20, at 168-169 and authorities therein cited.
another persistent legal problem,\textsuperscript{90} and although admittedly the exclusion of crimes against peace from the scope of political offenses may be a useful development as a means of deterring the commission of aggression, it is quite possible to argue that a person accused of crimes against peace, just like any other political offender, may well have waged a war of aggression for the sake of his political convictions and as long as he remained within the provisions of the laws and customs of war in the conduct of hostilities, his acts clearly fall within the meaning of a purely political offense.\textsuperscript{91} Under these conditions, there seems to be no compelling reason why his extradition should be granted. From a broader perspective, in so far as the issues of trial and punishment of aggressor individuals are concerned, this question of the political character of crimes against peace may become deeply involved with peace enforcement measures, thereby depriving the latter of much of their effectiveness and force. The difficulties that may arise in this connection have largely been ignored.

If the foregoing observations be correct, it will at once be seen that substantial doubts attend the definiteness of the Peace Treaties in respect to the surrender of persons accused of crimes against peace. Of perhaps more contemporary importance is the Convention Relating to the Status of Refugees adopted in Geneva on July 28, 1951,\textsuperscript{92} by a United Nations Conference of Plenipotentiaries. In excluding from its benefits persons guilty of crimes against peace, the Convention explicitly says:

\begin{quote}
The provisions of this Convention shall not apply to any persons with respect to whom there are serious reasons for considering that:

\begin{itemize}
  \item[(a)] he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; \ldots \textsuperscript{93}
\end{itemize}
\end{quote}

This provision is certainly related to the categories of crimes against peace as found in the Nürnberg Charter, and undoubtedly


\textsuperscript{93}Convention Relating to the Status of Refugees art. 1, para. F.
assumes that the existence of these crimes is clear and unmistakable. The Convention should be limited, however, to recognizing the criminality of aggressive war, for it neither punishes this crime nor determines its make-up, thus removing much of the apparent definiteness of the provision in question. For the meaning of crimes against peace, the Nürnberg Judgment and the determinations of the other war crimes trials are still the only available authorities.

Wholly apart from the above treaties, the national constitutions of a number of States explicitly recognize the criminality of aggressive war. As a vivid illustration of a typical constitutional provision, the Constitution of Italy may particularly be noted, for it says

Italy renounces war as an instrument of offense to the liberty of other peoples or as a means of settlement of international disputes, and, on conditions of equality with other States, agrees to the limitations of her sovereignty necessary to an organization which will assure peace and justice among nations, and promotes and encourages international organizations constituted for this purpose.\(^{94}\)

In varying formulations, the same principle has been incorporated in the constitutions of many other States.\(^{95}\) It follows from this exposition that even if no universally binding convention imposes upon the States the obligation to punish the preparation and waging of wars of aggression, the domestic legislation of the States may explicitly prohibit it.\(^{96}\) The provisions of the constitutions here cited, concurrent with the conventions previously mentioned, show that there is a firm conviction among governments that aggressive war should be made an international de-

\(^{94}\) Constitution of the Italian Republic, 1947, art. 11. For text, see 2 Peaslee, Constitutions of Nations 279 (1950).

\(^{95}\) See the following constitutional provisions: Basic Law of the Federal Republic of Germany, 1949, art. 26; Constitution of the German Democratic Republic, 1949, art. 5; Constitution of Japan, 1946, art. 9; Constitution of the Republic of Korea, 1948, art. 6; Constitution of the Union of Burma, 1947, § 211; Constitution of the Philippines, 1947, § 3; Constitution of Venezuela, preamble.

\(^{96}\) In addition, some laws punishing offenses against the peace and security of mankind were enacted by the Soviet Union, East Germany, Czechoslovakia, Albania, Bulgaria, Hungary, Poland, Rumania and the Outer Mongolian Republic. These laws, however, deal with war propaganda, which is punishable as a criminal offense. For the text of these laws, see 46 Am. J. Int'l L. Supp. 35 et seq. (1952). For discussion, see Grzybowski & Pundeff, Soviet Bloc Peace Defense Laws, 46 Am. J. Int'l L. 537 (1952), and Garcia-Mora, International Responsibility for Subversive Activities and Hostile Propaganda by Private Persons Against Foreign States, 35 Ind. L.J. 306, 322-324 (1960).
linquency. Although some may argue that the matter was definitely settled at Nürnberg, it may nevertheless be observed that the Nürnberg Judgment stands as a living reminder that the future possibility of legally imputing criminal responsibility to individuals for planning and waging aggressive war still needs to be determined by a more explicit principle of existing international law.\textsuperscript{97} This conclusion is not only inescapable, but the world community cannot safely afford to ignore it.\textsuperscript{98}

IV. Conclusion

The preceding pages have unfolded the development of crimes against peace as originally postulated in the Nürnberg Charter right down to the present time. It is believed that enough evidence has been adduced to support the proposition that, although the notion of crimes against peace is most vital in future punishment of aggression, unfortunately, however, the tribunals that have dealt with these crimes have left them rather vague and uncertain, thus casting serious doubts upon the question of whether there are such crimes in international law.\textsuperscript{99} International legislation on the same subject has similarly met insuperable difficulties, largely because the generalities of the Nürnberg Charter and Judgment have permeated its prescriptions. But if this be the situation for international law, the internal legislation of the States is more successful in this regard, for it has clearly made aggression a prohibited activity of the government. It would seem, therefore, that the domestic legislation of some States is far ahead of the requirements of general international law. It may be that crimes against peace should be punished by the domestic criminal law of the State, since presently there is no international criminal court to assume jurisdiction over offenders. This, however, does not detract from the desirability of clearly recognizing the criminality of aggressive war on the international plane. It is thus hoped that future international legislation in

\textsuperscript{97} The reference to acts of aggression in Article 1, para. 1 and the limitation upon the use of force in Article 2, para. 4 of the United Nations Charter would seem to be of little help here. For discussion of these provisions, see Goodrich & Hambro, Charter of the United Nations: Commentary and Documents 59, 67 (1946).


\textsuperscript{99} See Woetzel, op. cit. supra note 20, at 170.
this area will firmly implant the conception of crimes against peace with as much clarity and precision as it can reasonably muster. Under such a development, the charges levelled against the prosecution and punishment of aggressors after the termination of a war will accordingly be eliminated.