

THE POSITION OF INDIVIDUALS IN INTERNATIONAL LAW

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In the PELEUS War Crimes Trial, the British judge advocate characterized "customary international law" as: "nothing but a body of rules and customs, expressing the common sense of civilized nations." I would like to make my first parenthetical remark at this point by saying that I have been tremendously impressed by the common sense approach of the draft Law Instructions for Naval Warfare.

The PELEUS, a Greek tramp freighter of some 8,800 tons, with a crew of thirty-five British, Greek, Egyptian, Chinese, Chilean, Russian and Polish, was under British charter. She was torpedoed in the South Atlantic at about 7:00 P.M. on the evening of March 13, 1944, on the way from Freetown to Argentina. She was torpedoed by a German submarine, the U-852, with Captain Heinz Eck as commander, and she went down immediately.

A few survivors managed to get on rafts or wreckage. The sub was surfaced at all times and, after picking up the ship's third officer and a rating for questioning, returned them to a raft, steamed away, about a thousand meters, and then returned and fired intermittently on the survivors with machine guns for a period of five hours, with some of the officers actually throwing hand grenades. Three men survived the attempt to exterminate them and were

picked up on April 20, five or six weeks later, by a Portuguese freighter.

The submarine was later captured—on May 2, 1945—after having been beached off Somaliland as a result of a British air attack. The U-boat's log, with German thoroughness, recorded the sinking of the PELEUS.

The captain, the first officer, the chief engineer, the ship's doctor (or the medical officer) and a rating were indicted before a British military tribunal sitting in Hamburg, Germany, in October, 1945. They were indicted on a charge not of unlawful sinking but of committing a war crime: namely, that in violation of the laws and usages of war they were concerned in the killing of members of the crew of the PELEUS, allied nationals, by firing and throwing grenades at them.

The captain did not plead the defense of "superior orders." Despite secret orders, which had been given to all U-boat commanders leaving Kiel after September, 1942 (and I quote a copy which was found): "rescue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews," it is ambiguous with reference to the treatment of surviving crewmen.

There was an attempt in the Dönitz trial, of the major Nuremberg criminals, to get the official text of this but the charge against Dönitz, based on this

order, was dropped. I will read it again. The words are ambiguous. The instructions were given orally to all submarine commanders. The commander—and possibly the first officer—knew the content of the secret instructions and others were aware (according to the evidence that came out in the trial) that there were secret instructions, but they did not know their content. "Rescue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews."

The captain's defense was "operational necessity," and a denial—in which all defendants joined—of trying to kill the survivors. It seemed that they were merely trying to destroy the wreckage because four of Germany's newest, shiniest submarines had gone down in that area in the preceding months.

In remaining at the place of sinking, the submarine lost over five (5) hours. The testimony showed that she could go eighteen (18) knots on the surface at night. The captain, after having the members of the crew and officers fire on the wreckage for about five hours, got underway and then went below to broadcast to, as he testified, "a somewhat restive crew." He reminded them that allied aviators were bombing innocent German women and children—perhaps their wives and children. At the trial, he was asked why it was necessary to make this broadcast if he had only been firing at bits of wreckage.

The first officer had protested to the captain against the shooting and pointed out that it was a violation of international law. He went below, made out a report of interrogatories which he had had with the third officer of the sunken ship, came back up and found a seaman using a machine gun and firing at bits of wreckage. He grabbed the machine gun from the sailor and he, himself, fired.

He was asked at the trial why he did this. He said: "Well, this man had an illegitimate child and I did not want to

see those people killed by a person of such a bad character."

So far as the doctor was concerned, he was asked if he did not know that this was contrary to the rules of naval warfare. He said: "Yes."

They then asked: "Why did you fire?"

The doctor replied: "Well, it was our first kill—and it was all very exciting."

For the benefit of a court, which included British and Greek naval officers, the British judge advocate summed up in part as follows:

You should be in no way embarrassed or put out by the alleged complications of international law, which it has been suggested surround such a case as this. International law is nothing but a body of rules which have been expressed in treaties, or of customs and usages which express the common sense of civilized nations. All of those rules and usages are based upon the dictates of ordinary humanity. It is a fundamental usage of war that the killing of unarmed enemies is forbidden. It is forbidden as a result of the experience of civilized nations throughout many centuries. To fire so as to kill helpless survivors of a torpedoed ship is a grave breach against the law of nations. The right to punish persons who break such rules of war has equally been recognized for many years.

Defendants other than the captain pleaded the defense of "superior orders." On this point, the judge advocate said this:

It is quite obvious that no sailor nor no soldier can carry with him a library of international law, or have immediate access to a professor in that subject who can tell him whether or not a particular command is a lawful one. But members of the Armed Forces are

bound to obey lawful orders only, and it must have been obvious to the most rudimentary intelligence that the carrying out of Captain Heinz Eck's commands involved the killing of helpless survivors and was, therefore, not a lawful command.

The court, basing its opinion somewhat upon the *Llandovery Castle* case—in which, during the First World War, a German Crimes Court, sitting in Leipzig after the war, had convicted an officer and a sailor of a German submarine for torpedoing a hospital ship and then firing upon survivors in lifeboats (some of them did get away)—found all five (5) defendants guilty. The captain, the first officer and the medical officer were sentenced to death by shooting, which was carried out within three weeks. The chief engineer and the rating were sentenced to life imprisonment and to fifteen (15) years, respectively, the plea of “superior order” having been allowed in mitigation of sentence although not as a complete defense against responsibility for the crime.

I might point out that the fifteen (15) volumes of reported War Crimes Trials, which were published by the United Nations War Crimes Tribunal, stress this point in the concluding volume: that “superior orders” is not a defense, but may be considered in mitigation of sentence (the same as stated in your draft of Naval Instructions).

These applications of the law of nations, that is of the common sense of civilized nations, have sometimes appeared easier to perform in practice than the theory of the position of the individual in international law might suggest. Doctrinal disputes of almost bitter intensity have raged over the question of legal theory as to whether or not the individual human being is a subject of international law.

On the one hand it has been argued (and this is the orthodox view) that only collective entities, such as States or

organizations of States (like the United Nations), can be subject to the rights and duties of international law. That is what we mean by “subject of international law”—one is subject to the rights and the obligations of international law.

On the other hand it has been asserted that *all* law exists to regulate human conduct; that States and organizations of States can act only through individuals; and that, therefore, many of the rules of international law are designed to regulate the conduct of individuals—whether they are acting as individuals or as agents and officers of the States.

I am not too concerned about the doctrinal disputes. We all agree that much of international law is designed to require or prohibit certain behavior, or to further certain processes and procedures. Whether the principles and rules of international law bear directly on individuals or only indirectly—through the incorporation of these rules of international law into national naval or army regulations, for example—may appear important in legal theory. However, these considerations may be immaterial in a practical sense if the purposes of the law are fulfilled.

For example: in the absence of treaties, international law establishes no right for the individual to leave his country of origin, to enter a foreign country, and to become naturalized there or to divest himself of his original nationality. This is only another way of saying that the individual has under international law, in the absence of treaties, no right of emigration, immigration, naturalization or expatriation. Nor would the individual necessarily have any one of these rights even if we labeled him a “subject of international law.” Why? If he acquires any of these rights to change his nationality, to leave his country to enter another country, the rights come to him either from the law of his domicile or from the law of his nationality; that is, he derives

them directly from the place of residence or from the law of the nationality which he possesses.

It may be that the State of his domicile, as an alien, and the State of his nationality have concluded a treaty, stipulating benefits on his behalf as a citizen of one State and a resident of another. In such a case it makes little practical difference whether the treaty stipulations are referred to as the "treaty rights of aliens under international law," or as the "obligations of the State under international law to grant certain rights to aliens under national law." In civilized countries, the alien will have the procedural capacity to seek in the local courts the benefits which are stipulated in his behalf by the treaty.

The common sense of civilized nations finds comparable expression with reference to what is called the "delictual capacity of individuals under international law." For example, there is the liability of the individual for the commission of war crimes. You may agree with the dictum of the Nuremberg War Crimes Tribunal that crimes against international law are committed by men—not by abstract entities; or, you may plausibly argue that war crimes, and so-called "offenses against the law of nations," are in legal theory violations of national regulations which incorporate by reference the requirements of international law.

Support for this interpretation can be found in Hague Convention IV of 1907. By Article 2 of that treaty, the annexed Hague Regulations Respecting the Laws and Customs of War on Land apply "between Contracting Powers"; that is, they are legally binding on States. Article 1 requires that: "The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations. . . ."; that is, the States which are bound by the Hague Regulations as international law shall transform the

provisions of those regulations into national regulations, binding upon individual members of the armed forces. Thus, whichever legal theory is adopted, international law and national laws and regulations are in agreement in stipulating that war crimes—that is, violations of the laws and customs of war—are acts entailing individual criminal liability. From the point of view of the individual member of the armed forces the practical position is that certain conduct is forbidden by the rules of warfare. He knows that the courts will have jurisdiction to try him—and even to impose the death penalty—for conviction of violating the laws and customs of war.

The fifteen (15) volumes of the United Nations War Crimes Trials, based upon decisions of the last war, indicate that the death penalty was given only in cases of murder and rape. There may have been one or two exceptions but in most cases, although it is possible to give the death penalty for any war crime upon conviction, the practice was to limit it to serious offenses. I have noticed that the draft regulations of both the Army and the Navy talk about "grave offenses" rather than any violation of the laws of war. Any violation of the laws of war might be considered an illegal act, but not all of them are considered of such a heinous character as to warrant the death penalty.

The courts before which the individual member of the armed forces can be tried may be national military courts or international military tribunals, set up as such through international agreement between States. Although procedural law will vary in different courts between different national courts, and as between international courts and national courts, the substantive content of the law which all of these courts (national and international) will apply will be quite the same: the traditionally accepted laws and customs of war.

The jurisdiction which international

law permits States to exercise over persons charged with war crimes is broad and comprehensive. It has sometimes been stated as follows: "International law obligates States to exercise jurisdiction over their own nationals for war crimes and authorizes them to try and punish certain enemy nations for violations of the laws of war." However, such jurisdiction is not limited to nationals and enemy nationals.

Following the Second World War, the United States military courts tried and convicted Spanish, Dutch and Yugoslav citizens (the Spanish, at least, were neutrals) for violations of the laws of war. British military courts similarly convicted Swiss and Danish citizens. French military courts convicted Poles, Belgians, Italians, Luxembourgers, Frenchmen, and, of course, Germans.

An interesting situation arose in the Pacific. The transcript of the trial is not reported in these volumes but there is a summary, which I will quote:

In the trial of one Shimio, of the Japanese Army, before a British military court sitting at Singapore, the accused was charged, found guilty, and sentenced to death by hanging by a court consisting of British officers only, for having unlawfully killed American prisoners of war in French Indo-China.

In other words, the place where the crime was committed was French territory; the nationals injured were Americans; and the court was made up exclusively of British officers.

Mr. Willard B. Cowles, who is now the Assistant Legal Adviser of the Department of State, has concluded, after a study of jurisdiction over war crimes, that every independent State has jurisdiction to punish war criminals in its custody—regardless of the nationality of the victim, the nationality of the perpetrator, or the place where the offense was committed. Physical custody of the accused, rather than any principle of the

territoriality of criminal law, seems to be the jurisdictional criterion. Of course some States have limited the jurisdiction of their own national courts so as not to take full benefit of this principle of universality.

There was a case of one Wagner, who was tried and acquitted before a French military court, where evidence showed that he had committed a war crime. But that war crime had not been one listed in the French Penal Code and the particular tribunal had been authorized to try persons only where there was a concordance between international law and French national law. So in this case he escaped on a technicality.

I have no reliable statistics, and I have not been able to get any, on the number of persons tried and convicted on charges of war crimes. However, of the fifteen (15) volumes published by the United Nations War Crimes Commission, the last volume (published in 1949) states that the Commission had received the transcripts of 1,911 trial records—an admittedly incomplete list, since some States had not complied with the request for sending in transcripts. I understand that this figure may even be off by as much as 1,000. In other words, we know that there were 1,911 trials, but there may have been one thousand other war crimes trials following the Second World War in which transcripts were not sent to the Commission. It is important to note that these 1,911 trials dealt with war crimes in the traditional sense of the term: namely, violations of the laws and customs of war. The fifteen (15) volumes of Law Reports present a selected number of 89 trials and there are penetrating legal analyses of the cases which have been appended by Mr. George Brand, a British lawyer. If there is little novelty in the findings of these courts, it may be because, as one writer has said, "all the offenses of any importance which the term "war crime" properly denotes are old and well

known in the law of war." The facts may differ, but the offenses are not new. In any case, this collection provides a substantial body of new case law on traditional war crimes.

The novelty of the Nuremberg Trial of the major war criminals lay not in its proceedings and findings with reference to traditional war crimes, but in certain other features. Of the major war criminals convicted at Nuremberg, all except three were found guilty of traditional war crimes. Why, then, did it appear necessary or desirable to indict the major war criminals at Nuremberg and at Tokyo for crimes against peace and crimes against humanity? Most of the latter were subsumed under war crimes, anyway, and they were more often than not identical. The answer appears to lie in political rather than legal considerations.

A group of crusaders (this is a value-judgment and there are some people who feel strongly that that is not the term which should be used to describe them, but I am giving my own opinion on it) set out to establish "aggressive war" as a crime under international law and to establish individual criminal liability therefore *ex post facto*, which is also a conclusion that I am drawing. It was easy enough to secure agreement to the phrases in the Charter of the International Military Tribunal, which is annexed to the London Agreement of August 8, 1945. In Article 6, for example (you are familiar with this, but I will read it anyway): "The following acts, or any one of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual criminal responsibility." Then, they list the categories: "crimes against peace, war crimes, crimes against humanity, the common plan or conspiracy."

I would like to quote the first one—Crimes Against Peace—from paragraph (a) of Article VI of the London Charter:

Crimes Against Peace; namely, 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 any of the foregoing.

I think that the evidence shows these provisions were rather hastily drafted. I think they may have been drafted with dangerous haste. Let me examine for a moment some of the words (I will leave out some of the words, but I will read only words which are incorporated in the provisions in order to give you an example).

You are engaged here in the planning and the preparation, not of a war of aggression, but of possible tactics and strategy in a situation against Country "X" or Country "Y." You are not planning a war of aggression; you are not planning a war in violation of a treaty. But suppose that we should get involved with Communist China in hostilities (we don't have to lose the war). One of you might be picked up and charged with the following, based on Paragraph (a) (Crimes Against Peace): namely, that at the Naval War College, Newport, Rhode Island, you planned or prepared a war in violation of international assurances. The assurances might be one by Mr. Dulles saying that we are not going to attack them or it might be one by Mr. Walter Robertson. Of course, I am giving you a hypothetical case. I should add that the Nuremberg Tribunal did not apply these provisions in this way—they did not try to convict people merely on the "planning" and "preparation." They went on to the "initiation" of the war, which was one of the main points they tried to prove, and also the "waging of a war of aggression." What I am suggesting is that leaving on the books vague terms like the planning or preparation of a war in which you might happen to be a prisoner may lead your captors to say: "At the Naval War College did you not plan

and did you not go to war in violation of assurances?" The words are twisted by your captors, but that is not the point.

Agreement to these terms was secured from twenty-three (23) States (the original drafters and nineteen (19) other States agreed to them) at London prior to the Nuremberg Trial. After the trial, Justice Robert H. Jackson, who had been the Chief Counsel for the United States in the prosecution of the major German war criminals, observed: "The Nuremberg Trial avoided wrangles over definitions and deals with the clean-cut challenge: Is it a crime to make a war of aggression?"

It was somewhat disconcerting to find Justice Jackson writing two pages later: "This question—whether it is a crime to conduct a war of aggression—is not technically an issue in the trial itself, having been foreclosed by the specific terms of the London Agreement."

Two questions of at least possible interest to international lawyers were apparently not decided by the Court, namely: (1) whether aggressive war was an international crime prior to the London Agreement of 1945; and, (2), whether, if it was a crime before 1945, there existed in law at the time the acts charged were committed individual criminal liability therefor on the part of agents of the aggressive State.

What do I mean by saying "whether there existed in law?" It is obvious that there did not exist in German law any provisions making illegal the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances. . . ." The question was: Was there any other system of law which applied? That threw the Court back to international law in an attempt to discover whether international law had made aggressive war a crime *at the time the acts were committed*—not later, but at the time the acts were committed.

However, the Tribunal consistently held, in its judgment of October 1, 1946, that it was bound by the London Charter, which "is decisive and binding upon the Tribunal" and "the law to be applied in the case." Although the court stated that it was not strictly necessary to consider whether, or to what extent, aggressive war was a crime before the London Agreement of 1945, the court sought *obiter dictum*—that is, it was unnecessary intellectual exercise; they sought to establish that aggressive war was not only illegal but criminal prior to the London Charter. The evidence was weak—a series of unratified draft treaties and declaratory or declamatory resolutions, some of which had been passed by the League of Nations, none of which laid down the law, none of which ever came into force, and none of which ever acquired any legal significance of a binding nature upon the behavior of States or of individuals.

There was left the Kellogg Pact, which, even if it made certain wars illegal—and people have asserted that it did make some wars illegal, but that, in my judgment, is doubtful because of the extensive right of self-defense as determined by the State employing it and the so-called "reservations" which preceded its enactment—certainly contained no provisions establishing the criminality of aggressive war or the individual liability of those who initiate or wage it.

The net result has been that the justifiable findings of the Nuremberg Tribunal on traditional crimes have been overshadowed by a polemical controversy as to what the Nuremberg Trial really established and as to its value as a precedent. Justice Jackson thought that certainly no future lawyer or nation, undertaking to prosecute crimes against the peace of the world, would have to face the argument that the effort was unprecedented. But Professor Hans Kelsen, one of the world's great jurists, has elaborately questioned whether in a legal sense the trial constitutes any

precedent at all, since, as he says, it was a case in which a specially-created court applied specially-created law to a designated group of people, most of whom (happily for us) have now expired. The precedential value—that is, the value of Nuremberg as a precedent—can be left in abeyance and if States wish to establish the Nuremberg principles as the international law for future application they are entitled to do so, without proving that this was decided at Nuremberg.

Attempts to do this have been zealously pursued by representatives of certain States in the United Nations. The project has taken two forms: (1) the attempt to establish a permanent international criminal court; and, (2) the attempt to establish a body of international criminal law for that court to apply. Understandably, the attempts to create the law have preceded the attempts to set up a court to apply the law.

In a broad sense, the formulation of a body of international criminal law has been pursued along three related lines: (1) a code, formulating the principles of international law recognized in the Charter and judgment of the Nuremberg Tribunal of the major war criminals (that is printed in one of the notes to your draft instructions); (2) a code of offenses against the peace and security of mankind; and (3) the genocide convention, which entered into force (it is already in force) in 1951—although not for the United States. The genocide convention is not ordinarily included in this category, but what I am dealing with here is: (1) you are trying to set up a court; (2) you are trying to find a body of law for that court to apply—the body of law will include the formulation of the Nuremberg principles for the future and it will also include the draft code of offenses, if it ever goes into effect; (3) the genocide convention in effect dealt not with war crimes but with what was subsumed under the

rubric of crimes against humanity, and is comparable to that. By the genocide convention the High Contracting Parties confirm that genocide is a crime under international law, which they undertake to prevent and punish. Whether persons committing it are constitutionally responsible rulers, public officials, or private individuals, they shall be tried by a competent tribunal of the State in the territory of which the act was committed; that is to say, if this had been in force twelve years ago the Germans would have tried Hitler for genocide. Or, if the Communists do not want to try Malenkov (maybe I had better leave him out and say Khrushchev and some of the others), there is another obligation: if you do not try your own Heads of States and rulers for this crime of genocide, then you are legally obligated to submit this man to an international court *if* there is such a court and *if* you have accepted the jurisdiction of that court. I am not distressed because the United States has not ratified the genocide convention because it seems to me, although it does establish a principle in Article 1 that genocide is an evil thing, that the other terms appear to be almost fraudulent. I shall say nothing more about this third category because it is established, a great many States have ratified this convention.

Still dealing with the establishment of a body of international criminal law, the formulation of the Nuremberg Principles was intended to establish principles of international criminal law for future application so as to avoid the charge made at Nuremberg that the application of these provisions was *ex post facto*, or, that it was not law and the people were not individually responsible under that non-existent law at the time of the Trial. The formulation was entrusted to the United Nations International Law Commission, which, after some debate, declined to express any opinion as to the legal character of the

Nuremberg judgment and principles; that is to say, they deliberately refused to decide or to express an opinion as to whether or not the Nuremberg Charter and judgment expressed preexisting law before 1945, whether it created new law as of 1945, or whether they had established a law for the future.

The Nuremberg Principles, formulated by the United Nations International Law Commission, consisted largely of a mere restatement of principles found in the London Charter and the Nuremberg judgment. When the Second Report of the International Law Commission containing this formulation went to the General Assembly of the United Nations in 1950, doctrinal battles were reopened in the Legal Committee of the Assembly over the question as to whether the Nuremberg Principles accurately expressed existing international law. The General Assembly, without expressing any opinion on this question, invited the governments of Members of the United Nations to make observation on the International Law Commission's draft. They requested the Commission to take into account the governments' observations when it prepared its second code—the Draft Code of Offenses Against the Peace and Security of Mankind. Of sixty (60) governments requested to make observations on the International Law Commission's draft, only seven (7) had sufficient interest to reply. Of these seven, only the French and Lebanese replies contained detailed observations of any value. That is to say, fifty-three (53) States did not even reply and fifty-eight (58) did not send in any comments of value.

The International Law Commission, at the request of the General Assembly, has also formulated and reformulated a Draft Code of Offenses Against the Peace and Security of Mankind. The contents of this draft code are in part an elaboration of some of the Nuremberg Principles, but they go beyond the

Nuremberg Principles in treating genocide, certain forms of intervention by one State in the affairs of another State, certain terrorist activities fostered by one State against another, and illegal annexation of another State's territory, as crimes under international law for which the responsible individuals shall be punished.

Although delegates of some of the countries argue that this is already international law, there is an overwhelming expression of opinion in the United Nations' organs that these are not international law—that they could become such if enacted in a treaty and if the treaty were ratified. Some of them have argued that it is highly desirable that this should be done. But I would like to point out that some of these principles are not an expression of existing international law any more than the Nuremberg principles were.

At its Ninth Session, in 1954, the General Assembly decided to postpone further discussion of the draft code until after a special committee had reported on a more basic question, namely: How is aggression defined? There have been three (3) committees on this subject and there is a history that goes back to the days of the League of Nations. The best definition that I have ever seen of "aggression" was one which Maxim Litvinoff, the Soviet Commissar for Foreign Affairs, introduced into the League of Nations before the Soviets invaded the Baltic States. It was about as good a definition as I think you can get.

Again, there has been quite a doctrinal debate as to how to go about the definition. Should one enumerate that the following things are aggression and list them: A, B, C, D, E, et cetera? Or, if that is done, will some new techniques of the "cold war" be forgotten? Therefore, some people argue to set up a general formula which will say that acts of a certain kind in certain relationships are aggression, while others say that one

cannot in advance formulate a hard-and-fast definition. But, pending another try by another committee (I believe it is the third) of the United Nations to formulate a definition of "aggression," they have laid on the shelf the reformulation of Offenses Against the Peace and Security of Mankind.

Discussion of the establishment of a proposed International Criminal Court has likewise been postponed. There have been two Commissions of the United Nations dealing with this and they have come up with somewhat differing texts (some of you have read them). They are very elaborate, and, again, they are not an expression of existing law. They are an attempt to devise a court and deal with its jurisdiction. But that question has been postponed; the question of the Code on Offenses Against the Peace and Security of Mankind has been postponed; and the Nuremberg Principles are dormant, as far as immediate action is concerned, because States have not shown sufficient interest in their formulation.

Professor Jean Spiropoulos, the Greek member of the Sixth Committee, and a member also of the International Law Commission, may not have been far wrong when he observed that it will be "a long time" before the General Assembly takes up again the question of establishing an International Criminal Court.

Mr. G.G. Fitzmaurice, the Legal Adviser of the British Foreign Office and the British representative in the Sixth Committee, observed in the Committee that such a court (the proposed International Criminal Court) could consider only two types of crimes: (1) traditional war crimes; and, (2), the non-traditional Nuremberg offenses, or the Offenses Against Peace and Security. The former, traditional war crimes, will probably be dealt with in future wars by national or international military tribunals, just as we have done in the past. Possibly we might add

neutral judges, but it seems unlikely that persons charged with traditional war crimes would be sent to this new court for it would be inconvenient—you would have to have a location somewhere and they would be tried all over the world, just as they have been. It was unfortunate, but the General Assembly should face realistically the fact that it would be possible to bring to justice after a war only war criminals of defeated countries. Therefore, the proposed permanent International Criminal Court, in the British view, would be dealing only with the second category—Offenses Against the Peace of Mankind—which have not been clearly formulated and for which, moreover, governments would be unlikely to surrender persons to be tried unless the countries were defeated. The British view was, therefore, that it is all right to talk about the court—but they took a rather dim view of it.

Where, then, do we stand with regard to the position of the individual in international law? The prospects of establishing a permanent International Criminal Court, with adequate jurisdiction to try individuals for violations of international law, are remote; nor are the prospects for agreement upon a Code of International Criminal Law much healthier. Some of the provisions of the draft Code of Offenses Against the Peace of Mankind are so far-fetched that they have not even been able to command the support of international lawyers, let alone governments. The formulation of the Nuremberg Principles is far from general acceptance as a statement of existing international law. In civilized countries, the individual will continue to benefit from the standards established by international law for his protection, and he will continue to be individually liable for traditional war crimes whether or not we confer upon him the label "subject of international law." In time, the common sense of civilized nations may come to establish

more adequate covenants for the protection of human rights and it may come to establish individual responsibility for aggressive war.

The late Justice Oliver Wendell Holmes once transfixed a colleague of

mine, Professor Carl Becker, and suddenly demanded: "What do you think of the prospects of the human race?"

Professor Becker, a gentle scholar, replied: "I wish them well, but I am not overly sanguine."

