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## AN INQUIRY INTO THE JURIDICAL BASIS FOR THE NUERNBERG WAR CRIMES TRIAL.

*By Nathan April\**

SITTING IN Nuernberg is a court known to the world as "The International Military Tribunal" (hereinafter referred to as the IMT) composed of four members and their alternates, each of whom has been appointed thereto by the executive authority of one of the following nations, viz. United States, Russia, France and Great Britain. At the bar of this court are some 22 individual defendants and some government controlled organizations. They are being tried under an indictment charging them with the commission of "Crimes against Peace, War Crimes and Crimes against Humanity." The specifications of these charges are elaborated in the body of the indictment; these specifications, from a purely factual standpoint, amply vindicate the general allegations.

We propose here to examine into :

- I. The juridical basis for the existence of the tribunal;
- II. The validity of the commission held by the members of the IMT :
- III. The sufficiency of the indictment to charge a juridically cognizable offense.

### I

#### BY WHAT WARRANT DOES THE IMT SIT?

The instrumentality with which we are dealing is called a "Tribunal." In the context of the present world scene etymological discussions would be mere pedantry. There can be no reasonable doubt

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that in the eyes of those who fashioned it, the term "Tribunal" held and holds the meaning of the word "Court" and that the proceedings before this Court are conceived of as a "trial."

Now a "Court," be it a court of civil or criminal jurisdiction, a court-martial, a military commission or a court of prize, owes its genesis to some creative act of the State whose authority it purports to exercise. A court of International Arbitration or International Justice comes into existence in the same way, excepting that the basic legislation upon which its jurisdiction is predicated, is enacted by way of treaty and not by domestic statute. In the United States, the act of sovereign authority by which a Court is commissioned varies in the detail of its manifestation, but its expression is essentially the same. In the case of the United States District Court, for example, the Congress passed an Act which established the Court. Congress derived its power to do so from the organic law which we call the Constitution. The Court, qua Court, being now established, its incumbents are appointed thereto by the President, who derives that power also from the organic law and from legislation enacted thereunder. The appointment is confirmed by the Senate, also pursuant to organic law. Upon such confirmation, a formal commission issues from the President to the designee, which commission serves as the badge of the Judge's authority.

Whether a judge is appointed by the Executive or by the ballots of the electorate, is immaterial to our discussion; in either event, this designation finds vindication as an authorized expression of the national will as declared in its legislation. Absent some legislation, whether basic (constitutional) or secondary (statutory) he just does not exist as a "Judge"; and this is true of his "Court" as well.

What holds true for us, is true of all nations whose governments we recognize. No tribunal exercises a compulsory jurisdiction implicating a legal power to administer sanctions, unless it has been created under the authority of law and unless its members have been accredited thereto by some one duly authorized to sign and deliver the commission. A court not so based and manned may exercise a *de facto* authority by force majeure; *de jure*, it simply does not exist; the proceedings before it do not and cannot partake of the character of a "trial."

So we ask, "By what warrant does the IMT sit?" By what act of legislation was it established? We know that no Act of Congress created the Court; we have heard of no Act of Parliament which did so; and while we profess no familiarity with the public records

of the Soviet Union or of the French Republic, we do know that the IMT does not look to such records to vindicate its existence.

Then upon what foundation does the IMT profess to rest? The answer to the question must be found, if anywhere, in the "Agreement" executed in London on the 8th of August, 1945, purportedly among France, Great Britain, United States and Russia, which agreement professes to be signed "by their representatives duly authorized thereto." This agreement provides that there should be established

"after consultation with the Control Council for Germany, an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location" etc.

The Charter of the Tribunal, annexed to the Agreement, determines its membership and defines its jurisdiction.

No useful purpose would be served at this time by scrutinizing the Charters and plotting the reach and scope of the authority therein delimited to the IMT. For, at the very threshold of our inquiry, we are confronted by a challenge to the efficacy of the Agreement as a predicate for the existence of the IMT. We have already observed that compulsory judicial process derives validity only from an act of sovereignty; a Court that commands a legal sanction for its judgments, is not the child of an "Agreement."

But aside from this, our own Constitution recognizes legislative force in International agreements or conventions, only when they constitute "Treaties" duly confirmed by the Senate. The Agreement of London was an Executive affair; it was never ratified by the Senate; and neither by the Constitution nor by any statute enacted thereunder is the Executive empowered to create either national or extra-national courts.

It is not necessary for us to contend, that under our Constitution, it is impossible for us to participate in the functioning of a treaty-created international tribunal whose judgments would bind our government. We presently waive inquiry into the question whether such a tribunal could exercise a compulsory jurisdiction, civil or criminal, over our individual citizens. We instinctively repudiate the suggestion, that if such tribunal could lawfully exercise such criminal jurisdiction over our own citizens, it could cast any American in judgment without a trial by a common law jury and without observance of the basic American canons of due process of law. We have not explored and do not propose to explore the gamut of jurisdiction which may constitutionally be vested in any treaty-created

tribunal. For the bald fact is, that the IMT was not created by treaty.

Nor may we be permitted to ignore the defect in the representative authority of the person who purported to place the signature of the United States upon the Agreement of August 8. That person was Mr. Justice Jackson. Judge Jackson apparently never questioned his own authority; but we do know, that he was not a minister, ambassador or consul and that his appointment was never confirmed by the Senate. The Presidential use of personal emissaries to negotiate strategic arrangements for the conduct of the war, is one thing; the use of such envoys to arrange for the establishment of international tribunals, is quite another. It is not the intent of the Constitution that those who personify the United States abroad, should be the personal agents of the Executive; they represent the United States only when their appointment has been confirmed by the Senate.

But it has been said that there are courts exercising a criminal jurisdiction under the National flag which do not rest their authority upon statute. These tribunals bear at least a superficial resemblance to the IMT. They are known as Courts-Martial and Military Commissions. We propose now to examine these.

#### *The Court Martial.*

The defendants at the dock in Nuernberg may in a sense, be regarded as prisoners of war, even though all of them were not in the armed services of Germany. May the IMT be regarded as a General Court Martial?

It happens that the American practice governing the composition, jurisdiction, procedure and sanctions of a Court Martial has in fact, been legislated by the Congress in the Articles of War, as they have been amended from time to time. While it may be that this legislation is largely a codification of what we might call the "common law" of armed conflict among civilized nations, it remains true that Courts Martial, whether as a creation of common military law, or of the statutes, had and have a very distinctly circumscribed function. And it may be further remarked that the law of Courts Martial, like the law of Prize or Salvage, has a definitely international aspect and that in its fundamentals, it is the same in all civilized countries.

The distinctive feature of a Court Martial, whether General or Special, is that it is not a part of the judicial establishment of the country. Its closest analogue is the administrative tribunal, whose

findings are advisory to the head of some bureau or department. The sentence recommended by a Court Martial, even though it be of death, is the performance of an administrative act; the execution of the sentence, after approval by the proper commanding officer, is the execution of an administrative determination. True it is, that the Court Martial is bound to follow a regulated procedure; it is bound to hear evidence and to advise only upon record evidence; but even so, it is an administrative tribunal adopting a form of juridical procedure for administrative purposes.

Both in its composition and scope of jurisdiction the IMT differs radically from a General Court Martial. The membership of such a Court is exclusively that of Commissioned Officers; and it exercises jurisdiction (excepting in certain non-germane cases) exclusively over the members of its own armed forces. The offenses of which it takes cognizance, are military offenses; that is, offenses against regulations governing the conduct of its own military forces. The IMT is not a Court Martial.

#### *The Military Commission.*

In essence, the Military Commission is but a variant of the Court Martial. Its provenance is more obscure than that of the Court Martial, even though it is a comparatively modern development. The first recorded occasion in American history of the convening of such a tribunal was in 1847 during our military occupation of Mexico. By a General Order issued from Military Headquarters, it was provided that

“Assassination, murder, poisoning, rape, wanton destruction of churches . . . and destruction . . . of public or private property, whether committed by Mexicans or other civilians in Mexico against individuals of the U. S. military forces . . . should be brought to trial before Military Commissions.”

Later another tribunal named the “Council of War,” was created to try offenses against the laws of war. The Council of War fell into disuse and its functions were thereafter assumed by the Military Commission.

The Military Commission, like the Court Martial, is an administrative tribunal; it takes jurisdiction of offenders charged with violations of martial law or of regulations of a military government, or of the laws of war. The parallel between the Court Martial and the Military Commission is close indeed. A Military Commission is constituted by the same general commanding officers as are

authorized by the Articles of War to convene General Courts Martial. The Military Commission has invariably been composed of Commissioned Officers. There is no statute which so requires; but there is no statute which governs the composition of Military Commissions; and while the existence of the Military Tribunal has been "recognized" in Congressional legislation, it seems always to have been upon the implication that the Military Commission is but a special type of Court Martial. Nor is there anything in the decision of the Supreme Court in the Yamashita case which points to any other conclusion.

The Military Commission assumes jurisdiction of an offense, only when it has been committed within the field of command of the convening commander. The act charged against the defendant, must have been committed during the war or during the period of military occupation. The persons who may become amenable to the jurisdiction of the Military Commission are

- a. Individuals of the enemy's armed forces who have violated the laws of war.
- b. Inhabitants of the enemy's country occupied and held by the laws of war.
- c. Inhabitants of places under martial law.

Is the IMT a Military Commission? Let us first note that it does not pretend to be such. There was no reason to have named it the International Military "Tribunal," if it was intended to establish a genuine Military Commission. Granted that a rose may smell as sweet regardless of what you call it, it is not likely that where serious questions of legitimacy were bound to arise, the sponsors of this instrumentality would have surrendered the advantages of so respectable a label, had they felt that they could claim a right to it. The IMT was not convened by the commanding military officer; it is not composed of Commissioned Officers; it purports to take cognizance of offenses either wholly unknown in that forum or far beyond the orbit of its jurisdiction. Nor does it purport to be an administrative tribunal; it does not recommend a sentence to any convening Commander. What ever else it may be, the IMT is not a Military Commission.

We are thus forced to the conclusion that the IMT has no legitimacy; it was born of no lawful marriage. It was not constituted under the law of the several nations whom it purports to represent. If the IMT were sitting not in Nuernberg, but in Philadelphia, how would its bailiffs and gaolers make their return to

the Writ of Habeas Corpus? How would its members respond to the Writ Quo Warranto?

The Nuernberg locale may save this Tribunal from the impingement of such writs; it cannot shield it from objective scrutiny into its legitimacy. Least of all can the verdict of history be averted by such jejune expedients as that to be found in Article Three of the Charter, which provides

“Neither the Tribunal, its members nor their alternates can be challenged by the prosecution or by the defendants or their counsel.”

To what purpose was such a provision included in the Charter? Were those who drafted the Charter fearful that the IMT could not survive a challenge to its jurisdiction? If they feared no such result why did they gag the defendants? In what Anglo-American country is a defendant on trial for his life, debarred from challenging the jurisdiction of the Court? In what Anglo-American country will a Court so challenged, refuse to examine the basis of its jurisdiction? How can we talk of a “Trial” unless the Tribunal, before which the proceedings are being conducted, proceeds as a “Court”? Is not the right to level a challenge to the jurisdiction as essential a right, as the right to cross-examine witnesses or to interpose any other point in law in bar of the prosecution? Because this cloture is so inexpressibly foolish, it is bound to become terribly mischievous.

## II

### BY WHOSE COMMISSION DO THE MEMBERS OF THE IMT SIT?

Were we to grant that the IMT was duly established, we would still be required to scrutinize the credentials of those who purport to be its members.

For obvious reasons, our discussion will not center upon the American members of the IMT. Mr. Biddle and his alternate were appointed to the IMT by Mr. Truman, who purported to do so, in his capacity of President of the United States.

The President derives all his power of appointment from the Constitution and from the legislation enacted thereunder; and from no other sources.

By Sec. 2 Art. 2 of the Constitution the President has the power to “nominate and by and with the advice and consent of the Senate” to “appoint Ambassadors, and other public Ministers and Consuls, Judges of the Supreme Court and all other officers of the

United States, &c." Mr. Biddle is obviously neither an Ambassador, Minister of Consul. He is perhaps a Judge; but of no Court of the United States. Were he any of these, his appointment would be wholly invalid, seeing that it was not confirmed by the Senate. On the other hand, if Mr. Biddle is neither a Judge nor an officer of the United States, Mr. Truman, as President of the United States, had no power of appointment in the first instance.

Resort to the Agreement of August 8, will prove nothing. Even if the Agreement had the force of a Treaty, it would not avail. It is true that the ambit of the treaty-making power has never been defined. It is nevertheless fairly clear that the constitution of the United States cannot be amended by Treaty. Life tenure could not be granted to the President by Treaty; the Writ of Habeas Corpus and Trial by Jury could not be abolished by Treaty; nor could the prerogative of the Senate to withhold confirmation of a judicial appointment be abrogated by Treaty. As a matter of fact, the Agreement of August 8 is wholly silent upon the point; it does not purport to determine how the parties thereto shall proceed to the appointment of their representatives.

Here again, we are forced to conclude, that the appointment of Mr. Biddle and his alternate was the private act of an individual who happened at the time, to be President of the United States.

### III

#### DOES THE INDICTMENT CHARGE A JURIDICALLY COGNIZABLE OFFENSE?

The indictment embraces four counts. We proceed to examine these.

##### Count One — *The Common Plan or Conspiracy*

Briefly, this is a charge, in the form familiar to those who practice in our Federal Courts, that the defendants conspired to commit the offenses charged in Counts TWO, THREE AND FOUR. Now, "Conspiracy" is a highly technical crime in any event; it is one of the metaphysical refinements of legalism. Here you make a crime out of a mental concert, regardless of whether or not the objective of the concert was ever wholly or even partially accomplished. Even though no substantive offense was committed, even though the conspirators changed or abandoned their purpose, the "Conspiracy" would, under our statutes, have been committed.

In practice, the conspiracy count has been used as a device to

charge the speech and conduct of one conspirator upon the others. The ethics of such a procedure are highly dubious; but with them we are not presently concerned. For a conspiracy charge is only as good as the substantive charges that follow it. An agreement to commit an act which is not a crime is not a criminal conspiracy.

Count Two — *Crimes Against Peace*

Here perhaps, it would be best to quote verbatim.

“All the defendants, with divers other persons, during a period of years preceding 8th May, 1945, participated in the planning, preparation, initiation and waging of wars of aggression, which were also wars in violation of international treaties, agreements and assurances.”

We are not concerned here with the morals of the matter. What should or can be done to those who launch wars of aggression, is a problem which, in the sequel, we will not attempt to evade. At the moment, we are engaged in probing the juridical basis for the indictment. We submit that, indictments whose issue may be the execution of the defendants, must charge, not a breach of morals, but what in a juridical sense, is known as a “crime.”

It seems to be the prevalent orthodoxy to posit the existence of the “natural crime”; of which, murder and robbery are cited as examples. It is our ungrateful task to point out that the collocation “natural crime” is juridically meaningless. Even in a theocracy where the publication of heresy is a “crime” it is such, only because a theocracy is not only an established creed but a sovereign State. Either every infraction of the mores of a given place or time is a “crime” or no moral offense is, in ipse, a crime. Juridically speaking, all “crimes” are offenses against some sovereign, partaking of the nature of lese majeste or treason. Whether it is the King’s peace or the People’s peace that is disturbed matters not; in either case, it is the Sovereign’s dominion that is infringed. Absent a sovereign, as was once the case in Spitzbergen, there can be no “crime.”

Just what is it that makes a “crime” of any homicide? Some moral prescription, perhaps? Hardly. Is accidental homicide a crime? Sometimes yes and sometimes no. Is the criterion an ethical one? Certainly not. The degree of negligence which will inject criminality into an accidental homicide is the creature of law; in many jurisdictions, of statutory law. Does the existence of premeditation stamp any given homicide as “natural Murder,” or as a crime? Read the Penal Law of the State of New York; under it

you will find several instances where premeditated homicide is "justifiable homicide." Well then, to what must we refer if we are to ascertain whether any instance of homicide is a crime? Obviously to the law of the place where the homicide was committed, or which, under some law, is authorized to take cognizance of it. And in what sense, do we now use the word "law"? Law, in this sense, is simply the prescription of the sovereign. We repeat: juridically speaking, the collocation "natural crime" is meaningless.

We do not suggest that there is anything either novel or profound in these observations; they are implicit in every demurrer to an indictment for insufficiency. What is novel and disturbing is the naive assurance that considerations so elementary may be successfully by-passed by the sophomoric expedient of labelling them "legalistic." They are as "legalistic" as the writ of habeas corpus or trial by jury.

We need not labor the point: We are not engaged in exploring the philosophy of abstract law. The trial in Nurnberg is not an adventure in legal dialectics,—it is a grim affair presaging death to the defendants; it is predicated upon an "indictment" as that word is understood in the concrete processes of the law. We are here endeavoring to probe the legal adequacy of that indictment, not its moral sufficiency. Does the indictment charge any juridically cognizable offense?

Unless the meaning of the word "law" is to be expanded so as to embrace every postulated consensus of moral and sociological judgment, so that "law" comes to mean whatever people in general are supposed to believe is right, there can be no pretense that there is or ever was any "law" prohibiting the waging of wars of conquest. The history of neither of the two great English speaking democracies is free from such episodes; the moral condemnation which we now visit upon wars of "aggression" is, in the perspective of history, but a development of yesterday. That such a development was bound to come may readily be granted; it may even be conceived that such a development is the necessary antecedent of the World State, as the only effective means for realizing it.

It has been said that since the ratification of the Kellogg-Briand Pact, all wars of aggression have been "outlawed" (whatever that word may mean) as to the nations (of which Germany was one) who were signatories to that treaty. By the Pact of Paris, the contracting States joined in "condemning" resort to war as an instrument of national policy and agreed that they would thereafter re-

frain from such resort. By a process of unique ratiocination this Pact or Contract has been transformed into a "law"; a process which for some reason, had never been applied to the scores of treaties of international friendship and alliance that had preceded it in world history; notably the Treaty of Versailles, which established the League of Nations. No verbiage, however mellifluous, can serve to transmute an agreement into a "law";—there may be a law which provides a remedy for the breach of an agreement, but the law is not the agreement nor is it generated by it. Prior to the Pact of Paris, the observance of international treaties rested upon the honor of those who were parties there-to and upon a decent respect for their military potential—and upon nothing else. The Pact of Paris did not change the situation one iota; it no more created "law" than all the treaties that ever preceded it.

Aside from this,—were the Treaty indeed a "law"—the only juridical person who could accomplish its violation would be a government that was party to it. Messrs. Goering et al. were not parties to the Pact of Paris; the German Reich was. There isn't the remotest suggestion in the Kellogg-Briand Pact that a breach of it would constitute a "crime" and there is no reason for believing that a single nation would have signed the document had such a proviso been inserted therein. But even if the Pact had embraced such a provision and even if a Treaty could constitute a "law" the only defendant at the bar for violation of this law could be Germany itself.

We are thus forced to conclude that Count Two of the indictment states no juridically cognizable offense. We proceed to Count Three.

#### Count Three—*War Crimes*

Count Three charges the commission of various "war crimes"—that is, violations of the laws of war.

An examination of the specifications of this count makes it clear that it would be cognizable before a regularly constituted Military Commission of Polish, French, Russian, Greek and other nationality; but not before an American or English Military Commission. These specifications embrace a formidable array of violations of the laws of war, sufficient in the amplitude and depth of their infamy to consign those convicted thereof to the hangman's noose a thousand times over.

In saying this, we are not to be construed as recognizing the application of any "law" in the premises, other than the law of

force majeure. We have already pointed out that a military commission is an instrumentality of the army; it is not a judicial tribunal. The rationale of its jurisdiction is the law of reprisal. The nations have agreed upon certain Marquis of Queensbury Rules; the Commander who catches an opposing belligerent hitting below the belt will decapitate him; but to make sure of the facts he will have the matter tried before his advisory Military Commission. The observance of these conventions of war is recognized as a moral obligation surviving the destruction of all contractual obligations (themselves merely moral obligations as applied to nations) occasioned by the existence of a state of war; but like all other merely moral obligations their infraction is not cognizable before a judicial tribunal.

The difficulty here is that the IMT is not a military commission; before the IMT the Third Count states no case. We proceed to Count Four.

#### Count Four — *Crimes Against Humanity*

Article 6c of the Charter defines crimes against humanity as "murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of any domestic laws of the country where perpetrated."

What we have said concerning the sufficiency of Count Two applies with even greater force to Count Four. In support of Count Two a Treaty is cited; and while the Treaty is an untenable bastion, it at least affords some appearance of foundation.

Here we might legitimately close our inquiry. We had embarked upon an investigation into the juridical basis for the proceedings at Nuernberg; and we have travelled the full course of our projected journey. But it is impossible to dismiss the matter thus. The defendants in Nuernberg are moral criminals if ever there were such: we may not evade the problem posed by them. Must then these vile savages go unwhipt of justice? Is there no available technique for the exaction of retribution from them?

## IV

### OTHER CONSIDERATIONS

We believe we have already adumbrated the possible and permissible; we propose now to confront the problem objectively.

*The Use of the Military Commission*

The defendants are charged with the most barbarous infractions of the laws of war. Everyone of these offenses is cognizable by a regularly constituted Military Commission of the country in which or against which these offenses were perpetrated. These countries include France, Holland, Belgium, Denmark, Norway, Czechoslovakia, Jugoslavia, Greece, Poland and Russia. These defendants and a hundred thousand others are amenable to the jurisdiction of scores of military commissions that could be set up across the map of Europe.

Of course, the offenses triable before these commissions would consist exclusively of violations of the laws of war; that is, of those charged in Count Three of the indictment. But the gravity of these offenses is such, that no defendant could survive his conviction thereof.

In this connection it might be pertinent to note the untenability of a position that seems to be taken by some officers of our own army. We have heard it contended that the uniform protects its wearer from the consequences of any act committed by him under an order from his superior officer. The laws of war recognize no such immunity.

An officer or enlisted man who commits a breach of the laws of war in obedience to the command of his superior incurs liability of punishment therefor, if he ever becomes the prisoner of the offended belligerent. Such punishment may range from imprisonment to death; for there is no limitation upon the scope of the sentence committed to the discretion of a military commission—and to the authority of the commanding officer. It can no longer be contended that the officer who ordered or condoned the massacre of American prisoners of war can escape conviction under the laws of war by pleading superiors' orders. He would have offended whether he followed orders willingly or reluctantly. It may be conceded that if he had refused to obey he might have been shot for insubordination; but it has always been known that the military profession was an extrahazardous occupation.

Nor is there any reason in law or logic to immunize a commanding officer from the consequences of his violation of the laws of war because of his rank. There is no reason for granting an immunity to a Chief of Staff—which would not be accorded to a corporal. The situation is simple enough: he who violates the laws of war, incurs the danger of punishment therefore, if he is caught

and brought before a properly constituted military commission functioning within the orbit of its jurisdiction. We did not need the Yamashita case to teach us this much.

*The Use of the Civil Courts of the Various Invaded Nations*

Trespasses which are not military acts, that is—acts performed during the subsistence of a state of war—and in the prosecution of military operations, and which constitute infractions of the law of the place where they were perpetrated, render their actors amenable to the local penal law. Rape, for instance, is not an act performed in the prosecution of military operations. Homicide prior to the establishment of a state of war, is not an act performed during the subsistence of a state of war.

For all such non-military acts, those who directly perpetrated them, and those who instigated their perpetration are amenable to the criminal jurisdiction of the civil courts of the invaded countries.

Let us examine a case in point. The attack on Pearl Harbor was launched prior to the delivery of any declaration of war; that is, while the United States and Japan were in a state of peace. Over two thousand persons were designedly killed within the territorial jurisdiction of the United States District Court for the Territory of Hawaii. Those who committed the homicides wore the Japanese uniform; a circumstance which demonstrably has no bearing on the case. It will hardly be contended that an English soldier visiting the United States, could escape conviction of a crime before a State Court, be the crime that of assault, larceny, rape, or murder, merely because he was an English soldier. We grant no extra-territorial immunity to the Japanese soldier any more than to the English soldier. The men who launched those bombs in Pearl Harbor, prior to the establishment of a state of war, were just as guilty of murder as if they wore no uniforms.

This conclusion must become clear enough if we segregate the attack from its sequel. Supposing then—no state of war was thereafter established: how else could these homicides be regarded, but as murders? But if they were murders at the moment of their perpetration, no subsequent developments could serve to erase their criminality. The fact that the perpetration of these murders with the connivance of the Japanese Government caused us to issue a declaration of war against Japan can hardly serve as a condonation of the crimes.

It is feasible then for a Grand Jury for the Territory of Hawaii to find an indictment for murder against every soldier and officer involved in that act of treachery and to bring within the reach of that indictment every member of the Japanese Government who was party to the act. The application of the long recognized doctrine of constructive presence, will serve to fasten jurisdiction upon the Tokyo instigators of that colossal crime, with the same vise-grip as if they had been acting as bombers on the planes.

A trial of the military and civil leaders of Japan before a common law American jury, upon a simple charge of murder would be an object lesson far transcending in significance, the theatricalities of Nuernberg. It is even more to the point that such a proceeding would be absolutely impregnable to attack—upon jurisdictional or other grounds. The United States District Court for the Territory of Hawaii is a duly constituted court; its presiding Judge is duly commissioned and murder is an offense against the law of Hawaii, of which offense that court has jurisdiction.

It happens that the conclusions we may draw from the circumstances attendant upon the Pearl Harbor attack, are equally applicable to the men of Berlin. The Nazi invasions of Poland, Russia, Norway and their subsequent homicides were not preceded by the establishment of a state of war. The civil courts of these countries may therefore take cognizance of the murders ensuant upon these invasions—extradite the men of Berlin together with all their coadjutors throughout the German Reich, and try them for murder in the manner suggested in the case of Pearl Harbor.

### *The Use of Political Action*

If our sole purpose were to enforce a lesson on the amenities of civilized warfare, we would require resort to nothing further than the processes outlined in the two preceding sections. But were we thus to limit the reach of our educational endeavor, we would be chastising the burglar, not for his burglary, but for the indelicate speech which accompanied it. For the fact remains, that had the German Government been most meticulous in the observance of the laws of war and had the invading Nazi hordes dispensed wholesale death and destruction in accordance with the most impeccable standards of military conflict, the defendants in Nuernberg, and a hundred thousand of their assistants, would still richly merit the hangman's noose. For the real offense against which the Nuernberg indictment is levelled, is the moral infamy

of deliberately planning and launching a war against civilization; which is the charge embodied in Count Two.

Because we have no World-State there can be no world law; and because there is no world law, there can be no world crime. An act which is not a crime, is not justiciable before a judicial tribunal. All this we have already seen.

But, because an act is not justiciable, it does not follow that it must be tolerated regardless of its moral infamy; that it must go unpunished despite the desolation it has caused. Within that unit of organized society which we call "State" or "Government" considerations of high public policy require that no individual shall take the law into his own hands; and that, if perchance the law has failed to make provision against the perpetration of certain anti-social acts, that the damaged party bear their incidence rather than become his own law-giver. But such considerations can have no relevancy to the international situation. The sixty-odd "sovereigns" live in a state of international anarchy; nothing binds them other than some rather faint intimations from the categorical imperative—plus a lively respect both for the war-potential of their neighbors, and the aftermath of reprisal. Here, the rule that no one shall take the law into his own hands is wholly unknown; it is still unknown, despite the former League Covenant, and the present Charter of the United Nations.

The only action open to sovereigns inter sese is political action. True it is that nations in controversy may, through political action, submit their quarrel to the judgment of a Court of Arbitration. But here we have nothing to arbitrate. The conditions of the peace which we shall impose upon Germany are not the sentence of a judicial forum; they are the expressions of political action. Those conditions may implicate the confiscation of the means of survival of an entire population; such confiscation might nevertheless be a legitimate expression of political action.

It should be obvious that what cannot be compassed juridically may nevertheless be attained politically. Napoleon was not "tried" by the Allies; the authority which effected his sequestration in St. Helena would have been equally competent to effect his execution. The conclusion is justified, that what saved him from that fate, was the esprit de corps of the royalties of Europe. When the German Reich submitted to unconditional surrender it placed the very lives of its people at the mercy of the victors; it did not do so juridically, it did so politically. The Allies are under no moral

or legal compulsion to "try" the Nazi culprits from whom they would exact retribution. The moral crime of these men, is not a fact that requires to be established by the judicial process. Even in courts, the doctrine of judicial notice is current; and what is that but a rule which dispenses with proof because of the notoriety of the fact?

These men are amenable to direct political action. The conditions of the Peace may legitimately require their imprisonment or their execution; nay, the conditions for the further continuance of the armistice may require the same thing. The acceptance of surrender established no peace; it merely suspended hostilities. No simulacrum of a "trial" is required to reach our objective; the conscience of mankind would be better satisfied by the swift execution of all of these malefactors than by the rhetorical pyrotechnics of Nuernberg.

It is true that the Allies have perhaps unwittingly obstructed their own path. In the early days of the war there was much fulmination against "war criminals" and many were the warnings of coming "trials" for these offenders. Precisely what a "war criminal" was, very few people seemed to know, and these were very uncommunicative. Just how a "war criminal" was to be "tried" was a matter concerning which very few evinced any curiosity; least of all those who were loudest in their threats. The whole subject was enveloped in an aura of verbal grandiosity; at some future day, after the victory had been won, the stage would be set for the world premiere of the dramatic production to be known as the "Trial of the War Criminals."

It does not seem to have occurred to these good people that if adequate retribution was their aim, they were doing their best to defeat it. Less devotion to the charms of metaphor and more submission to the discipline of logic, would have disclosed the impracticability of the juridical approach. Upon even a moderate estimate, it must appear that there are at least a 100,000 coadjutors of the Nazi regime; no one of whom could legitimately escape hanging. Considering the duration of the proceedings at Nuernberg, where only 22 defendants are directly involved, just when could it be reasonably expected to try the last of these 100,000?

It would have conduced to a swifter cleansing of these Augean stables had there been prompt, vigorous and extensive resort to all of the three techniques available to the Allies. And from a purely practical standpoint these legitimate processes of disinfection would have greatly simplified our problems of military occupation.

The course actually selected was probably the most ineffectual that could have been conceived. Doubtless, it was thought to be psychologically the most desirable; a notion that could have been entertained only by those who were wholly unfamiliar with the German mentality. The German regards the proceedings at Nuernberg, as merely political action and views the judicial form of the action as typical Anglo-American hypocrisy. It may be too late to abandon Nuernberg; it is not yet too late to apply proper processes *to the rest of the "war criminals."*

We should like to add a postscript to what has been written. To what purpose, it may be asked, have we undertaken this exploration; or, having so undertaken it, to what purpose would we publicize our findings? As we are all agreed upon the justice of the probable fate of the defendants, why underline the illegitimacy of the procedural *modus operandi*?

We might well answer that the American way knows of no justification of the means by the end; that we do not condone mob lynching even though the defendant has been duly convicted of murder. All the vaunted immunities of our sacred Bill of Rights are merely rights to the application of a prescribed procedure. But we can go further. If our desideratum is the exaction of retribution from those from whom retribution is due, it is obvious that the path we have chosen is the equivalent of reaching Boston from New York, by way of San Francisco, Tokyo, Moscow and London. In the time that has already elapsed since the suspension of hostilities in Europe, at least half of our total task should already have been accomplished. This protraction is well calculated to diminish the rigor of purpose which must be maintained if the ultimate ends of justice are to be served.

Nor will diatribes against the spirit of "legalism" serve as an adequate apologia for the IMT. They come with strange grace from those who resorted to the device of a "conspiracy" count; they sound a trifle muddled when coming from those who decry political action upon the ground that such action would not accord with our spirit of legalism. We might well say, "If you are so concerned about being legalistic, then be legalistic." And the confusions which the nimble rhetoric of Mr. Jackson has generated in the minds of some of our more unsophisticated citizens, who, according to ancient writ, rush in where angels fear to tread, is only too evident. For instance, Mr. Walter Lippman, that well known authority upon criminal jurisprudence, opines that murder

is murder ; an impeccable conclusion with which no reasonable person would care to take issue. Following the Jacksonian formula, he concludes that the killing of Norwegians by the Germans was murder, because such killing violated the Pact of Paris. We have already conceded that the killing of these Norwegians was murder, because the homicides were accomplished while the two nations were at peace. But assuming that murder was established upon the predicate postulated by Mr. Lippman, upon what juridical basis does the IMT take cognizance of an offense committed in Norway against the laws of Norway? We feel confident that Mr. Lippman could not tell us ; we suspect that the redoubtable Mr. Jackson himself might hesitate before attempting to supply the answer.

The objection to political action is stated by Mr. Lippman to be that such action would be in the nature of a "Bill of Attainder" so abhorred by our Constitution. Our admiration for this refreshing exhibition of respect for the Constitution is somewhat dampened, however, by the reflection, that there are some other relevant Constitutional provisions that seem to have been overlooked at Nuernberg ; as for instance, that the defendant must be tried in the district where the crime was committed ; that he must be tried by a common-law jury ; that he must be confronted by the witnesses testifying against him ; and that the crime of which he is accused must not be invented after the fact.