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Crimes Against Peace

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This article, intended as a chapter of a book, was originally entitled, "Crimes Against Peace in International Law: An Attempt at Clearification from Nürnberg to the Present." Other chapters of the book, which was incomplete at the time of Professor García-Mora's death, will appear throughout the year in other legal periodicals. His intended book was to explore not only the law of extraditable offenses, but also the concept of political (nonextraditable) offenses. * Late Professor of Law, Fordham University School of Law.

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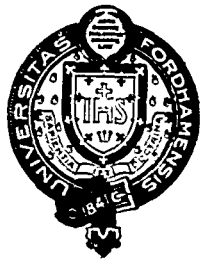

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CRIMES AGAINST PEACE†

*MANUEL R. GARCÍA-MORA**

OF the three charges contained in the Charter of the International Military Tribunal that sat at Nürnberg,[1] the so-called "crimes against peace" have undoubtedly caused the greatest controversy. Technical questions concerning the novelty of this charge and the retroactive character of the law applied by the Tribunal were vigorously contested by international jurists at the time.[2] And even after the execution of the Nürnberg Judgment, difficulties remained regarding the nature of crimes against peace and the application of the Nürnberg precedent in future international law.[3] Today, after almost two decades, these problems persist.

In addition, crimes against peace are likely to be regarded as political offenses, thus giving rise to the denial of extradition where the offenders have taken refuge in a foreign country. This particular problem arose in the post-war era when the prosecution of the Nazi leaders responsible for the war was undertaken. Moreover, these problems are specially relevant in connection with contemporary schemes designed for the maintenance of peace. It is necessary to determine, therefore, 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. These crimes will then be viewed from the standpoint of political 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

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1. For text of the Charter, see 1 Trial of the Major War Criminals Before the International Military Tribunal 10 (1947) [hereinafter cited as International Trial].

2. For a refutation of some of these objections, see Glueck, The Nuernberg Trial and Aggressive War, 59 Harv. L. Rev. 396, 407-18 (1946). For a contrary view, see Raja Gabaglia, Guerra e Direito Internacional 114-15 (1949).

3. See Kelsen, Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law, 1 Int'l L.Q. 153 (1947). See also Rousseau, Droit International Public 578-79 (1953); Stone, Legal Controls of International Conflict 358-63 (rev. ed. 1959); Schwarzenberger, The Judgment of Nuremberg, 21 Tul. L. Rev. 329, 344-51 (1947).

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 . . . ."[4] Essentially the same perspective may be seen to infuse the Charter of the International Military Tribunal for the Far East,[5] under which the Japanese leaders were tried and punished; and the Control Council Law No. 10 enacted on December 20, 1945,[6] by the Four Powers occupying Germany, for the trial of the so-called minor war criminals.[7] The application of the Nürnberg provision was generally revealed as inept for the specific circumstances of the cases.[8] The principles involved proved embarrassing to the presiding judges and led them to base their determinations 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.[9] The Tribunal succinctly stated that, in its opinion, "aggressive war is a crime under international law."[10] Unfortunately, however, the Nürnberg Judgment did not adequately deal with this assertion, thus leaving the matter subject to much speculation and doubt. Instead, the Tribunal contented itself with stating that "the law of the Charter is decisive, and binding upon the Tribunal,"[11] 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."[12] It did say, however, that "to initiate a war of aggression . . . is not only an international crime; it is the supreme international

4. Charter of the International Military Tribunal at Nuremberg art. 6, para. (a); see note 1 supra.

5. Charter of the International Military Tribunal for the Far East art. 5, 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 planing, 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, [1948] Ann. Dig. 356, 357-58 (No. 118) (Japan).

6. For the text of this law, see Taylor, Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10, at 250 (1949).

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

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

9. For the text of this Agreement, see Sohn, Cases on United Nations Law 858-59 (1956).

10. 1 International Trial 224. See also 22 International Trial 467. Long before 1945, Professor H. Donnedieu de Vabres had maintained that "a war of aggression is a crime." de Vabres, Les Principés Modernes du Droit Pénal International 426 (1928).

11. 1 International Trial 218.

12. 22 International Trial 461.

crime . . . ."[13] 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 aggressive war 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 is, therefore, an international crime; the declaration adopted by the Assembly of the League of Nations on September 24, 1927, 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 "war of aggression constitutes an international crime against the human species."[14] This is an impressive list indeed, but it should be added, however, that, apart 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 binding force. And even in respect to the Kellogg-Briand Pact, no specific condemnation of aggressive war nor an individual criminal liability for this offense is found therein.[15] The assumption, therefore, that a war 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 was 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

13. Id. at 427.

14. 1 International Trial 222.

15. Monaco, Manuale di Diritto Internazionale Púbblico 168 (1960). But see Pompe, Aggressive War, An International Crime 253-54 (1953).

16. Stone, op. cit. supra note 3, at 325; see 2 Guggenheim, Traité de Droit international public 42-43 (1954); 2 Podestá Costa, Derecho Internacional Público 322-23 (3d ed. 1955); Schwarzenberger, op. cit. 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, [1948] Ann. Dig. 356, 375 (No. 118) (Japan). But see Wright, The Law of the Nuremberg Trial, 41 Am. J. Int'l L. 38, 72 (1947).

17. Memorandum of Ricardo J. Alfaro on the Question of Defining Aggression, U.N. Doc. No. A/C.4/L.8 (1951).

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 war of aggression against Poland, Belgium, Denmark, Norway, Holland, Luxembourg, Yugoslavia, Greece, the Soviet Union, and the United States.[21] 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.[22] 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 war 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

18. Stone, Aggression and World Order: A Critique of United Nations Theories of Aggression 136 (1958). The Tokyo Charter did not offer a definition of aggression either. However, the Tribunal did formulate some kind of a criterion. Thus, in describing the war of aggression which Japan launched on December 7, 1941, against Britain, the United States, and the Netherlands as "unprovoked attacks, prompted by the desire to seize the possessions of these nations," the Tribunal continued, "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 part of the Tokyo Judgment, see Sohn, op. cit. supra note 9, at 915.

19. See Formulation of the Nürnberg Principles, International Law Comm'n, Report, U.N. Gen. Ass. Off. Rec. 5th Sess., Supp. No. 12 (A/1316), at 11-14 (1950).

20. These aggressive actions were regarded as steps in the plan to wage aggressive war. See 22 International Trial 433-39. However, some of the decisions of the American Military Tribunals established at Nürnberg under Control Council Law No. 10 regarded the seizure of Austria and parts of Czechoslovakia as aggressive in the case of Austria and as aggressive invasion in the case of Czechoslovakia, and, in both cases, as crimes against peace. See, e.g., United States v. von Weizsaecker, 14 Trials of War Criminals Before the Nuerenberg Military Tribunals 314, 336-37 (1949). For an excellent discussion of this distinction, see Woetzel, The Nuremberg Trials in International Law 223-24 (1960).

21. 22 International Trial 439-58.

22. 1 International Trial 216.

plan or conspiracy for the accomplishment of the preceding acts.[23] Although, at first, it may appear that each one of these acts constitutes a separate and distinct crime against peace,[24] 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.[25] 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 of specific wars of aggression.[26] The vague and clumsy drafting of these two counts left the Nürnberg Charter open to wide and flexible interpretation which was sometimes productive of highly undesirable results. The separate discussion of the two counts will adequately support this conclusion.

Wholly apart from the fact that the Charter did not define conspiracy,[27] 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.[28] Yet it must not be assumed that the Tribunal regarded conspiracy within the meaning of Anglo-American criminal law.[29] 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, secret rearmament by Germany, and the planning and waging of aggressive actions.[30] 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.

> [T]he conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party program, such as are found in the 25 points of the Nazi Party, announced in 1920, or the political affirmations expressed

23. Charter of the International Military Tribunal at Nuremberg art. 6, para. (a); see note 1 supra.

24. Greenspan, The Modern Law of Land Warfare 445 (1959).

25. The Tribunal said: "We shall . . . discuss both Counts together, as they are in substance the same." 1 International Trial 224.

26. Id. at 29, 42. The counts actually overlap. See Leventhal, Harris, Woolsey & Farr, The Nuernberg Verdict, 60 Harv. L. Rev. 857, 881-82 (1947).

27. The Tokyo Judgment defined conspiracy as "an agreement" to wage aggressive war. Sohn, op. cit. supra note 9, at 910.

28. For discussion, see Stone, op. cit. supra note 3, at 361.

29. See generally Perkins, Criminal Law 527 (1957); Williams, Criminal Law § 212 (2d ed. 1961).

30. 1 International Trial 224-25.

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.[31]

It can be readily seen, therefore, that the crime of conspiracy cannot be isolated from the crime of waging concrete wars of 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 the crime of describing 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,"[32] 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"[33] leading up to the commission of aggressive wars. The Tribunal sharply stated:

> It is not necessary to decide whether a single master conspiracy between the defendants has been established by the evidence. . . . [T]he 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.[34]

Conceivably, therefore, conspiracy could exist even though no specific combination for the accomplishment of the unlawful act was present.[35] 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.[36] 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 was only had when connected with the planning and preparation for specific wars

31. Id. at 225.

32. Perkins, op. cit. supra note 29, at 530.

33. Brownlie, International Law and the Use of Force by States 201 (1963).

34. 1 International Trial 225.

35. In United States v. Von Leeb, 11 Trials of War Criminals Before the Nuerenberg Military Tribunals 462, 488-89 (1948), a United States Military Tribunal stressed the necessity of proving the existence of a concrete plan in order to constitute the crime of conspiracy to commit a crime against peace.

36. Stone, op. cit. supra note 3, at 361.

of aggression under count two.[37] It thus becomes clear that the conspiracy count was rather unnecessary and superfluous, since the criminal liability of the defendants could have been adequately judged on the basis of planning and preparation for specific wars of aggression under count two of the indictment.[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.[39]

The second count of the Nürnberg Indictment embraces in its widest sweep all the component steps leading 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 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 are essentially reduced by the Judgment to "preparation" and "waging" of aggressive war.[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 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."[41] It will 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. 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

37. It is also interesting to note that, though count one also charged conspiracy to commit war crimes and crimes against humanity, the latter conspiracy variant was disregarded by the Tribunal. See 1 International Trial 226.

38. Brownlie, op. cit. supra note 33, at 201.

39. Brand, The War Crime Trials and the Laws of War, 26 Brit. Yb. Int'l L. 414, 419-21 (1949).

40. See Kelsen, Principles of International Law 135 (1952), where the view is advanced that "planning," "preparation" and "initiation" of war are new international crimes.

41. 1 International Trial 224.

42. Brownlie, op. cit. supra note 33, at 196.

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 stated: "But rearmament of itself is not criminal under the Charter. To be a Crime against Peace under Article 6 of the Charter it must be shown that Schacht carried out this rearmament as part of the Nazi plans to wage aggressive wars."[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 be noted additionally 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 connection 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 "planning" and "preparation." The opinion of the Tribunal in respect to Admiral Donitz 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 war could be found.[45] 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.[46]

It finally remains to observe that, although the crime of waging aggressive war would seem to be fairly broad in that 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

43. 1 International Trial 309.

44. Thus, the Tribunal acquitted Speer who became head of the armament industry. "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 involve engaging in the common plan to wage aggressive war as charged under Count One or waging aggressive war as charged under Count Two." 1 International Trial 330-31.

45. Id. at 310-11; see 22 International Trial 556-57.

46. Besides military men, such civilians as Frick, Rosenberg and Von Neurath were convicted under count two. See 22 International Trial 544-47, 539-41, 579-82.

both to possess concrete knowledge of his aggressive plans and to collaborate intimately with him.[47] 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.[48] 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 do not possess.[49] It may thus be submitted that, in assessing the guilt of the defendants under the charge of aggressive war, the Nürnberg Tribunal adopted a fairly narrow test of responsibility, thereby substantially limiting the scope of the crime.[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.[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.[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.[53] Similarly, crimes against humanity consist of acts generally recognized as criminal by the penal law of all civilized States.[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

47. See 22 International Trial 468-69.

48. This was the assumption of the International Law Commission in formulating the Nürnberg Principles; see note 19 supra.

49. This point was repeatedly stressed in the trials of the so-called minor war criminals by American Military Tribunals. See United States v. Von Leeb, 11 Trials of War Criminals Before the Nuerenberg Military Tribunals 462, 488-89 (1948). In United States v. Krupp, 9 Trials of War Criminals Before the Nuerenberg Military Tribunals 393 (1950), the prosecution did not discharge its burden of proof on this point, and, therefore, the charge of crimes against peace was dismissed by the Tribunal.

50. de Vabres, Le Procès de Nuremberg Devant les Principes du Droit Pénal International, 70 Hague Recueil 477, 528 (1947).

51. See authorities cited note 3 supra.

52. Charter of the International Military Tribunal at Nürnberg art. 6, paras. (b)-(c); see note 1 supra.

53. See García-Mora, War Crimes and the Principle of Non-extradition of Political Offenders, 9 Wayne L. Rev. 269, 270-75 (1963).

54. See García-Mora, Crimes Against Humanity and the Principle of Nonextradition of Political Offenders, 62 Mich. L. Rev. 927 (1964).

post facto legislation could not possibly be applied to them.[55] Crimes against peace, on the other hand, were rather novel in 1945, thus giving rise to the charge[56] of ex post facto legislation; and, even after Nürnberg and the other war crimes cases, they have remained largely undefined, and, therefore, considerable controversy and doubt still attend their determination. Subject to this qualification, 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 hopeful 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

55. See generally Paoli, Contribution à l'Étude des Crimes de Guerre et des Crimes Contre l'Humanité en Droit Pénal International, 49 Revue Général de Droit International Public 129 (1945).

56. For the view that this charge was not really new, see Maridakis, Un précédent du Procès de Nuremberg tiré de l'histoire de la Grèce ancienne, 5 Revue Hellénique de Droit International 1 (1952).

57. U.N. Gen. Ass. Off. Rec. 2d Sess., Res. No. 177 (A/519) (1947).

58. See Principle VI, which incorporates the Nürnberg provision. For text, see note 19 supra.

59. For text, see International Law Comm'n, Report, U.N. Gen. Ass. Off. Rec. 6th Sess., Supp. No. 9 (A/1858), at 10-14 (1951) [hereinafter cited as Draft Code]. This Code was revised in 1954. For the Amendments, see Sohn, op. cit. supra note 9, at 998-1001.

60. For a discussion of the Draft Code from the standpoint of individual responsibility, see García-Mora, International Responsibility for Hostile Acts of Private Persons Against Foreign States 36-46 (1962).

of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punishable,"[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 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 category of the general offenses described in the Code.[62] 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.

Secondly, 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-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations."[63] It may significantly be added that such other acts as any threat to resort to an act of aggression,[64] preparation for the employment of armed force against another State,[65] incursion of armed bands into foreign territory,[66] fomenting civil strife,[67] and encouragement of terrorist activities against another State[68] are also regarded as offenses against the peace and security of mankind and, foreseeably, as acts of aggression. The comments on every one of these offenses specifically state that the offenses thus defined can only be committed by the authorities of the State, although the criminal responsibility of private persons is similarly envisaged.

Third, included in the Draft Code are notions of conspiracy, incite-

61. Draft Code art. 1.

62. Id. art. 2, paras. (10)–(11). In paragraph (9), genocide is also included as an offense.

63. Id. para. (2).

64. Ibid.

65. Id. para. (3). "Preparation" was used here in the same sense as it was used by the Nürnberg Tribunal. Thus, in this offense, "preparation" includes "planning."

66. Id. para. (4).

67. Id. para. (5).

68. Id. para. (6).

ment, attempt, and complicity to commit the offense which are difficult to grasp, unless related to the actual determinations of the Nürnberg Tribunal.[69] The Draft Code thus states 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 incitement to commit any of the offences defined in the preceding paragraphs of this article; or
>
> (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.[70]

The comment on this provision clearly indicates that the notion of "conspiracy" was taken from the Nürnberg Charter and, therefore, carried with it the uncertainties of the Nürnberg Judgment. The notions of "incitement," "attempt," and "complicity" are not found in the Nürnberg Judgment 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,[71] 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,[72] the Draft Code, on the other hand, apparently proceeds on a differentiation between State and individual responsibility. This observation can 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 responsible at a different stage than that at which the responsibility of the State arises.[73] 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 states:

> In including "complicity in the commission of any of the offences defined in the preceding pargraphs" among the acts which are offences against the peace and security

69. Brownlie, op. cit. supra note 33, at 207.

70. Draft Code art. 2, para. (12).

71. Convention on the Prevention and Punishment of Genocide, Dec. 9, 1948, art. 3, U.N. Gen. Ass. Off. Rec. 3d Sess., 1st pt., Res. No. 260, at 174 (A/81) (1948) (effective Jan. 12, 1951).

72. For discussion, see Bowett, Self-Defense in International Law 266, 267 (1958).

73. Cf. Wright, The Prevention of Aggression, 50 Am. J. Int'l L. 514-22 (1956).

of mankind, it is not intended to stipulate that all those contributing, in the normal exercise of their duties, to the perpetration of 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.[74]

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.[75] It is clear, therefore, that a member of the government committing any of the crimes enumerated in the Code will be criminally liable only if, in light of the prevailing circumstances, it was quite possible for him to act contrary to superior orders.[76]

And, secondly, while the criminal responsibility of the State is enforced by sanctions provided for by the Charter of the United Nations,[77] 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.[78] 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.[79] 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.[80] This would seem to suggest that the trial of persons is to take effect without any reference to principles of State responsibility.[81] The combined operation of these principles would seem to establish beyond any vestige of doubt that a criminal individual liability may exist without

74. International Law Comm'n, Report, supra note 59, at 13.

75. Draft Code art. 4. This is identical with Article 8 of the Nürnberg Charter. See International Law Comm'n, Report, supra note 59, at 13.

76. This is brought out in Draft Code art. 4, comment, in International Law Comm'n, Report, supra note 59, at 13.

77. U.N. Charter ch. VII.

78. Draft Code art. 5.

79. International Law Comm'n, Report, supra note 59, at 11.

80. Draft Statute for an International Criminal Court art. 2, in Report of the Committee on International Criminal Jurisdiction, U.N. Gen. Ass. Off. Rec., 7th Sess., Supp. No. 11 (A/2136), Annex I, at 21-25 (1952). See generally, Carjeu, Quelques Aspects du Nouveau Projet de Statut des Nations Unies pour une Jurisdiction Criminelle Internationale, 60 Revue Général de Droit International Public 401-15 (1956).

81. Cf. Johnson, The Draft Code of Offences Against the Peace and Security of Mankind, 4 Int'l & Comp. L.Q. 445, 461 (1955).

any degree of connection with State responsibility.[82] 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 is, in respect to crimes against peace, 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 precise conceptions are required to avoid the charges of retroactivity and of violation of the maxim, *nulla poena sine lege*, repeatedly lodged against the Nürnberg trial.[83] These criticisms are likely to arise as long as there is no international legislature to enact the law and no international criminal court to achieve uniformity of decision.[84] But, even conceding such objections, 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 the Constitution of Some States

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. But apart from the Draft Code, it should be mentioned that 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 states:

> 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

82. Cf. Bowett, op. cit. supra note 72, at 268.

83. This is likely to arise in view of the fact that the Draft Code does not provide for the punishment of the offenses. Thus, Article 5 states: "The penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence." Draft Code art. 5. See Stone, Legal Controls of International Conflict 370-71 (rev. ed. 1959).

84. See generally Fenwick, Draft Code of Offenses Against the Peace and Security of Mankind, 46 Am. J. Int'l L. 98, 100 (1952).

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.[85]

In varying formulations, the same principle has been incorporated in the constitutions of many other States.[86] 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 a war of aggression, the domestic legislation of the States may explicitly prohibit it.[87] 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 delinquency. Although some may argue that the matter was definitely settled at Nürnberg, nevertheless, it may be observed that the Nürnberg Judgment stands as a sober 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.[88] This conclusion is not only inescapable, but the world community cannot safely afford to ignore it.[89]

IV. Crimes Against Peace and Political Offenses

That crimes against peace may most accurately be described as purely political offenses and, therefore, nonextraditable, can scarcely be disputed. This position was forcefully suggested by Judge Roling in his

85. Constitution of the Italian Republic, 1947, art. 11. For text, see 2 Peaslee, Constitutions of Nations 279-80 (1950).

86. 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 Philippines, 1947, art. 2, § 3; Constitution of the Republic of Korea, 1948, art. 6; Constitution of the Union of Burma, 1947, § 211; Constitution of Venezuela, Preliminary Declaration.

87. 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, Roumania, and the Outer Mongolian Republic. These laws, however, deal with war propaganda, which is punishable as a criminal offense. For the texts of these laws, see 46 Am. J. Int'l L. Supp. 34, 99-105 (1952). See generally Garcia-Mora, International Responsibility for Subversive Activities and Hostile Propaganda by Private Persons Against Foreign States, 35 Ind. L.J. 306, 322-24 (1960); Grzybowski & Pundeff, Soviet Bloc Peace Defense Laws, 46 Am. J. Int'l L. 537 (1952).

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

89. McDougal & Feliciano, Law and Minimum World Public Order: The Legal Regulation of International Coercion 59-62 (1961).

dissenting opinion from the Tokyo Judgment. As his words bear directly upon the subject under consideration, it may be useful to quote them here in full. Dealing with crimes against peace, he stated:

> Crime in international law is applied to concepts with different meanings. Apart from those indicated above, it can also indicate acts comparable to political crimes in domestic law, where the decisive element is the danger rather than the guilt, where the criminal is considered an enemy rather than a villain, and where the punishment emphasizes the political measure rather than the judicial retribution.
>
> In this sense should be understood the 'crime against peace,' referred to in the Charter. . . .
>
> As long as the dominant principle in the crime against peace is the dangerous character of the individual who committed this crime, the punishment should only be determined by considerations of security.[90]

The above characterization of crimes against peace would seem to be in accord with more recent authoritative opinion.[91] It may be mentioned, in addition, that this opinion is not without precedent to support it, for when the Treaty of Versailles attempted to lay down the basis for the prosecution of Kaiser Wilhelm II and other German leaders for "a supreme offense against international morality and the sanctity of treaties,"[92] and a demand for the surrender of the Kaiser was made to the Dutch Government in whose territory he had taken refuge, the latter refused his extradition on the ground that the Dutch tradition had been always to offer asylum to those conquered in international conflicts.[93] Much the same position was maintained by the neutral nations after World War II when faced with the possible extradition of Nazi officials found within their jurisdiction.[94] Clearly then, there is respectable authority for the view that persons accused of crimes against peace are purely political offenders and, therefore, not subject to surrender. Four reasons of legal policy would seem to give additional support to this conclusion.

First, as the previous discussion of crimes against peace has shown, the offenses included in this category are too vague to give definite and concrete results, and are productive of questionable consequences in specific cases. It may be argued, therefore, that, in the absence of a precise definition of crimes against peace, the persons accused of such offenses do not in fact know the unlawful character of the acts in

90. For the text of this opinion, see Sohn, Cases on United Nations Law 931-38 (1956).

91. See Woetzel, The Nuremberg Trials in International Law 168-69 (1960).

92. Treaty of Versailles arts. 227. For text, see 13 Am. J. Int'l L. Supp. 151 (1919).

93. See Garner, Punishment of Offenders Against the Laws and Customs of War, 14 Am. J. Int'l L. 70, 91 (1920); Wright, The Legal Liability of the Kaiser, 13 Am. Pol. Sci. Rev. 120 (1919).

94. See in this connection the communications of neutral governments in 12 Dep't State Bull. 190 (1945).

question. This argument is particularly relevant in reference to the requirement of *mens rea* as a condition of criminal responsibility.[95] The absence of *mens rea* has been seen to underlie the nature of political offenses. Since it is a basic element of a crime that the offender act with criminal intent, the conclusion seems inevitable that this factor is utterly absent where individuals do not know of the unlawfulness of the acts that they commit.[96] Crimes against peace, therefore, lack an essential element of an ordinary crime and, consequently, must be regarded as political. Even if it be assumed that aggression is a clearly defined crime under international law, there is always a large subjective element in the determination of an aggressor so that the most precise description of aggression is likely to result in highly unjust decisions.[97] Certainly, situations may arise where a leader of a country resorts to a war on the belief that this is the only way to give his country "a place in the sun" or, perhaps, to prevent an imminent attack from foreign territory.[98] While there may be doubts as to the justice of the war in the first instance and to the right of self-defense in the second, the fact still remains that the act in question excludes the *mens rea* on the leader's part, and in criminal law this is likely to be so regardless of whether or not the belief is well-founded.[99] This reasoning is indicative of the kind of consideration that underlies the political nature of crimes against peace. It also illustrates the reason why foreign governments are reluctant to surrender persons accused of such offenses. It may be relevant to add that the determination of an aggressor has to be made after a war has

95. For a discussion of mens rea as an element of crimes, see Perkins, Criminal Law 654 (1957).

96. In United States v. Von Leeb, 11 Trials of War Criminals Before the Nuernberg Military Tribunals 462 (1949), a United States Military Tribunal stated: "We are of the opinion that as in ordinary criminal cases, so in the crime denominated aggressive war, the same elements must all be present to constitute criminality. . . . If a defendant did not know that the planning and preparation for invasions and wars in which he was involved were concrete plans and preparations for aggressive wars and for wars otherwise in violation of international laws and treaties, then he cannot be guilty of an offense. If, however, after the policy to initiate and wage aggressive wars was formulated, a defendant came into possession of knowledge that the invasions and wars to be waged, were aggressive and unlawful, then he will be criminally responsible if he, being on the policy level, could have influenced such policy and failed to do so." Id. at 488.

97. Corbett, Law and Society in the Relations of States 233 (1951).

98. This last possibility has been said to be the exercise of the right of self-defense guaranteed by international law. This point is thoroughly discussed in Bowett, op. cit. supra note 72, at 188-89. For a contrary position, see Garcia-Mora, op. cit. supra note 60, at 118-19.

99. For discussion of such situations in the area of common crimes, see Williams, The Sanctity of Life and the Criminal Law 177 (1957).

terminated, and, thus, there is the ever present danger of imputing a *mens rea* retroactively to the offender.[100] This certainly would be equivalent to a unilateral decision by the victor.[101] The injustice implicit in this determination is reasonably clear, for it involves the punishment of acts to which a *mens rea* could not be imputed at the time of their commission. These are considerations of criminal justice that must attend the prosecution even of the most hardened criminal.

Secondly, the perpetrator of a political offense is fundamentally motivated by reasons of public concern and patriotic sentiments, and not at all by personal considerations.[102] It has been seen that these are precisely the motivations of a political offense. The crimes against peace prosecuted at Nürnberg and other war crimes trials would seem to indicate that, even if the offenders could be regarded as misguided individuals, still, their motivation was inextricably linked with what they regarded as the welfare of their own people. Therefore, as in domestic politics, an alleged international offender may well fight a war of aggression for the sake of his political convictions. In such a case, as long as he remains within the provisions of the laws and customs of war, and does not violate the laws of humanity in the conduct of hostilities, the acts of initiating and waging such a war, by themselves, fall within the scope of purely political offenses. Moreover, the very nature of crimes against peace makes it almost impossible for an offender to commit them for his own personal advantage. Crimes against peace in the manner already seen are intimately connected with high level policy decisions on behalf of the State and, thus, from the standpoint of motivation, their political criminality ought not to be open to doubt. While it is quite true, as the Nürnberg Judgment pointedly observed, that to plunge humanity into a war is the greatest of all crimes,[103] considerable controversy may exist as to the individuals responsible for such a condition,[104] and, as long as doubts remain on this question, the principle of nonextradition to political offenders affords some measure of protection against possible injustice.

Thirdly, a political offense is directed against the political and social organization of the State.[105] More specifically viewed, in a purely political offense, the rights affected are those of the State, and there is no violation

100. Stone, Aggression and World Order: A Critique of United Nations Theories of Aggression 141 (1958).

101. Raja Gabaglia, Guerra e Direito Internacional 113-16 (1949).

102. Re Cámpora, [1957] Int'l L. Rep. 518, 521 (Chile).

103. 22 International Trial 427.

104. See note 98 supra.

105. See In re Gatti, [1947] Ann. Dig. 145 (No. 70) (Fr.).

of the rights of private individuals. Recalling the crimes against peace for which the Nazi leaders were prosecuted, it immediately becomes clear that such acts as initiating and waging a war of aggression, planning and preparation for such a war, and the infinite variety of acts that fall within these concepts are exclusively directed against foreign States. Unlike war crimes and crimes against humanity, which are directed against individuals and which are wholly unnecessary to and unconnected with the preparation and waging of war, crimes against peace aim at changing a given power position between the States and it really makes no difference whether or not the reason for such a policy can be legally justified. These are political decisions of the highest order, in which the very existence of the State may be vitally at stake. Thus viewed, crimes against peace are not merely incidental to an international upheaval; they are in fact the means of bringing about such a disturbance. These offenses are very much in the manner of treason, sedition and espionage, where the State is the exclusive target of the offense, although public officials and private individuals may become incidentally involved. Crimes against peace, therefore, have a political objective and even the most stringent extradition practice is likely to regard them as political.[106]

Finally, in the absence of an impartial international criminal court endowed with jurisdiction to try individuals charged with crimes against peace, and since history indicates that "post-war justice is unilateral,"[107] serious legal questions arise as to whether persons accused of crimes against peace should be surrendered by the asylum State. It was indeed historically in this context that the neutral nations in the last war expressed apprehension.[108] It is also in this context that the principle of nonextradition of political offenders most clearly retains continued validity, for it is necessary to protect individuals not only against the exercise of jurisdiction over such vague and general crimes by Tribunals unilaterally established by the victor, but also against violations of such well-settled safeguards of criminal justice as prohibition of retroactive legislation and of meting out a penalty for which there was no law at the time of the commission of the offense. However, a convincing argument may be made that crimes against peace are excluded from the category of political offenses by The Universal Declaration of Human Rights, which states that the right of asylum "may not be invoked in the case of prosecutions genuinely arising from non-political crimes *or*

106. See the Swiss practice. Federal Extradition Law of Jan. 22, 1892, art. 10, in Harvard Research in International Law, Extradition, 29 Am. J. Int'l L. Supp. 66, 423 (1935) (Swit.) (unofficial translation).

107. Corbett, op. cit. supra note 97, at 229.

108. For communications to this effect, see 12 Dep't State Bull. 190 (1945).

from acts contrary to the purposes and principles of the United Nations."[109] It may be submitted, nevertheless, that the future surrender of persons responsible for crimes against peace may only be accepted by the States—especially by the neutral States—if prosecution is to be had in the objective atmosphere of an international criminal court itself composed of judges not directly identified with the interests of the prosecuting governments.[110] From this standpoint, the expectation will be warranted that justice can be done entirely free from any doubt.[111] Unfortunately, however, this is not the only assumption which will ensure that crimes against peace might be regarded as common offenses for which extradition will be granted. In order to avoid the criticisms to which the Nürnberg trial was subjected, the advance enumeration of the crimes against peace for which individuals are criminally liable is a condition *sine qua non* of an international criminal jurisdiction that seeks to administer justice in the world community on a technically sound legal basis. Perhaps even more important is a reasonable consensus among the members of the world community upon the offenses to be punished.[112] This requirement seems entirely proper if the obligation is imposed upon the States to extradite persons accused of crimes against peace. These are problems that still await clarification and which, as long as they remain unsolved, give powerful support to the view that crimes against peace are political offenses. From a broader perspective, insofar 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.

It is perhaps in recognition of the foregoing considerations that the Peace Treaties which ended World War II imposed 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,[113] Italy agreed to "take all 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

109. The Universal Declaration of Human Rights, art. 14, para. (2) (1948); 43 Am. J. Int'l Supp. 127, 129 (1949). (Emphasis added.)

110. Miele, Princípi di Diritto Internazionale 276 (2d ed. rev. 1960).

111. Stone, op. cit. supra note 83, at 370.

112. Wright, Proposals for an International Criminal Court, 46 Am. J. Int'l L. 60, 65 (1952).

113. Peace Treaty with Italy, Feb. 10, 1947, 61 Stat. 1245, T.I.A.S. No. 1648 (1950); 42 Am. J. Int'l L. Supp. 47 (1948).

humanity."[114] Identical provisions are found in the Peace Treaties with Roumania,[115] Bulgaria,[116] Finland,[117] and Hungary.[118] Athough the conception of crimes against peace in the Nürnberg sense has been clearly incorporated in these treaties in a more enduring form, the obligation to surrender persons charged with these offenses is limited to the defeated nations and, thus, it is not a general rule of international law. Even in respect to the defeated nations, the rule has not always been observed.[119] In principle, however, these nations are obliged to surrender fugitives accused of crimes against peace, and, to this extent, the peace treaties go beyond the traditional conceptions of extradition law. But the mere fact that this obligation had to be incorporated into treaties puts beyond surmise that, treaty apart, the State of refuge cannot be legally compelled to grant the extradition of persons charged with crimes against peace, and, therefore, their surrender in future extradition law remains a matter of doubt.

Perhaps of more contemporary significance is the Convention Relating to the Status of Refugees adopted in Geneva on July 28, 1951,[120] by a United Nations Conference of Plenipotentiaries. In excluding from its benefits persons guilty of crimes against peace, the Convention explicitly states:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
> (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 . . . .[121]

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114. Id. art. 45, para. (1)(a).

115. Peace Treaty with Roumania, Feb. 10, 1947, art. 6, para. (1)(a), 61 Stat. 1757, T.I.A.S. No. 1649, 42 U.N.T.S. 34 (1949); 42 Am. J. Int'l L. Supp. 252, 254 (1948).

116. Peace Treaty with Bulgaria, Feb. 10, 1947 art. 5, para. (1)(a), 61 Stat. 1915, T.I.A.S. No. 1650, 41 U.N.T.S. 50 (1949); 42 Am. J. Int'l L. Supp. 179, 180 (1948).

117. Peace Treaty with Finland, Feb. 10, 1947, art. 6, para. (1)(a), 48 U.N.T.S. 228 (1950); 42 Am. J. Int'l L. Supp. 203, 205 (1948).

118. Peace Treaty with Hungary, Feb. 10, 1947, art. 6, para. (1)(a), 61 Stat. 2065, T.I.A.S. No. 1651; 42 Am. J. Int'l L. Supp. 225, 228 (1948).

119. Even in respect to the defeated nations, however, it is not certain that the surrender of persons charged with crimes against peace can be so easily effected, for, 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 Rukavina, [1949] Ann. Dig. 273 (No. 88) (Italy).

120. U.N. Conf. of Plenipotentiaries on the Status of Refugees and Stateless Persons, Final Act and Convention Relating to the Status of Refugees (A/C.2/108), at 17 (1951) (effective April 22, 1954).

121. Id. art. 1, para. (f).

This provision is certainly related to the categories of crimes against peace found in the Nürnberg Charter and undoubtedly assumes that the make-up of these crimes is clear and unmistakable. The Convention should be limited, however, to recognizing the criminality of aggressive war, for it neither punished this crime nor provides for its extradition, thus removing much of the apparent definitiveness of the provision. 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. It may be pertinent to add that, since the only international instruments that have thus far imposed the obligation to surrender persons guilty of crimes against peace are the peace treaties above reviewed, the general rule still remains whereby crimes against peace are political offenses.

V. Conclusion

The preceding pages have unfolded the development of crimes against peace as originally postulated in the Nürnberg Charter down to the present time. It is believed that enough evidence has been adduced to support the proposition that, though the notion of crimes against peace is most vital in a future punishment of aggression, unfortunately, the tribunals that have dealt with these crimes have left them rather vague and uncertain, thus casting serious doubts upon whether there are such crimes in international law.[122] International legislation on the subject has similarly met insuperable difficulties, largely because the generalities of the Nürnberg Charter and Judgment have permeated its prescriptions. From the standpoint of extradition law, the most regrettable result of this situation is the lack of legal obligation on the part of the asylum States to surrender fugitives accused of these offenses. This conclusion is unavoidable in view of the fact that crimes against peace have been classified as political offenses for which extradition is not granted. Although, admittedly, the exclusion of crimes against peace from the category of political offenses may be a useful development as a means of deterring the commission of aggression, to apply this limitation without first determining the exact make-up of these offenses would be likely to result in highly unjust decisions. It is, therefore, the immediate task of international legislation to implant the conception of crimes against peace with as much clarity and precision as it can reasonably muster. Only then is it possible to limit substantially the political nature of crimes against peace, thus ensuring the surrender of offenders.

122. See Woetzel, op. cit. supra note 91, at 170.