sists of telling us how surprised he was at being chosen President. I begin to worry, Senator Sparkman, lest this epidemic of modesty about national presidential candidacies is beginning to infect this Society! [Laughter]

I accepted the invitation to speak with the understanding that I would make nothing but an extemporaneous speech. And then my friend, Leonard Brockington, said, "I never knew an extemporaneous speech yet that was worth the paper it was written on."

When I came to deal with the problem, I found no way to put footnotes in an extemporaneous speech. So I shall depart from the extemporaneous tradition to make a few observations about "United Nations and War Crimes."

THE UNITED NATIONS ORGANIZATION AND WAR CRIMES

By Mr. Justice Robert H. Jackson

Associate Justice, Supreme Court of the United States

It is the distinction of this Society to have fostered, even during discouraging times, American faith in the ultimate supremacy of law in the international field. This is our native, and I trust not too naïve, hope. We have a deep-seated craving for legitimacy. By the nature of our federal system of government, legal doctrine is woven into the fabric of our political thought. We loathe war guilt. Our loathing for guilt of unjust war has many times influenced our foreign policy. Our forefathers began it by appealing to the "laws of nature and of nature's God" to legitimatize their Revolution. In 1812, they felt they were resisting unlawful impressment of American seamen. Both the Union and the Confederate sides in our Civil War sought to justify their belligerence by Constitutional doctrines. Our participation in World War I was substantially attributable to a legal philosophy about freedom of the seas. The illegality of Hitler's resort to war as an instrument of policy was the legal concept on which this Government discriminated between belligerents and sent lend-lease and other aid to those who resisted his military aggressions. We are now bearing the brunt of hostilities in Korea, our participation predicated in large part upon the legal proposition that the Communist aggression is a flagrant violation of international law.

If aggression is so wrong that international law calls upon our youth to die in remote parts of the world to stop it, these innocents have, I submit, a moral right to ask, "What will you do about those persons guilty of it?"

The response to the question by the General Assembly of the United Nations Organization was to affirm "the principles of international law

recognized by the Charter of the Nuremberg tribunal." Its International Law Commission then formulated what it considered to be those principles, but felt constrained not to express any appreciation or appraisal of them.

An attack upon the United Nations' decision has recently been made by Viscount Maugham, former Lord Chancellor of Great Britain, who appeals to the United Nations to retreat from the Nürnberg Charter principles. His objection, if I read aright, is not so much to what actually was done at Nürnberg [1] as to what he thinks the text of the Charter would have permitted. In his own words:

> It is when an attempt is made to derive from the Nuremberg Charter and Judgment general principles to guide the nations in the event of future wars that persons skilled in international law must cry a halt.[2]

His cry, however, is based upon a misunderstanding of the intent of the Charter of London which I wish to correct in the interest of historical truth. His claim is that the London Charter, by the breadth of its definition, made a war criminal of every person who served Germany in the war, even as a conscript, because the definition of *crimes against peace* includes "waging of a war of aggression." More than twenty times in a hundred pages the idea is repeated that "waging" war includes everybody "from

[1] "In my opinion, then, it was very necessary to try those believed on good grounds to be guilty of these atrocities, to punish the torturers, the murderers and thieves not only because they polluted the air, but in a hope that never again would any country be guilty in a future war of offences against all sane notions of humanity." Maugham, U. N. O. and War Crimes, p. 29. "It is, in my opinion, indisputable that the victorious States who have become the military occupiers of the enemy country have the power to confer a *military* jurisdiction to punish the persons who had committed any of these so-called 'crimes'; but they could not enlarge or alter the rules of International Law." *Ibid.*, p. 46. See also pp. 51, 59, 81. "I wish to state after a long consideration of the case tried at Nuremberg (I. M. T.), and of the careful Judgment and after some personal attendance at the trial, that it was, in my view, conducted by the Judges of the occupying forces with judicial fairness and a desire to give the accused reasonable facility in defending themselves against the charges specified in the Indictment, provided the defences raised did not attempt to contradict the terms of the Charter." *Ibid.*, p. 62. ". . . [W]hatever the defects in the Nuremberg Charter, the Tribunal when dealing with the individual defendants did not think it necessary to rely on presumptions of guilty knowledge or of responsibility, and that the sentences pronounced, severe as they were, did not depart from ordinary principles of justice." *Ibid.*, p. 55. "I wish at this point to make it clear, at the risk of repetition, that the Judges at Nuremberg avoided delivering any sentence on any of the nineteen convicted defendants to which under the Charter a reasonable legal critic could object. The world war which came to an end in 1945 was no doubt proved to be an aggressive one. The twenty-two defendants in the trial were persons of position and influence, and those who were found guilty of the crime under Count Two of participating in the war must doubtless have been aware that the war was an aggressive one . . . ." *Ibid.*, p. 82.

[2] *Id.*, at p. 74. See also p. 97.

Field Marshal to the last joined recruit, from Lord High Admiral to the humble snotty or seaman."[3]

Lord Maugham's construction strains the text, which is not the way definitions of crime are usually to be read. It never occurred to me, and I am sure it occurred to no one else at the conference table, to speak of anyone as "waging" a war except topmost leaders who had some degree of control over its precipitation and policy. He admits that in practice this definition was never given his extravagant construction, that the prosecution indicted only the very highest leaders, and that the Tribunal convicted only those proved to be knowingly responsible for aggression. The author also complains that such authorities as Secretary General Trygve Lie[4] and Professor Sheldon Glueck,[5] as well as the International Law Commission,[6] also disagree with his interpretation. Lord Maugham seems to miss a logical inference from the fact that nobody agrees with his view of the matter. It may be he, rather than everyone else, who is out of step.

The International Law Commission considered the words "waging of a war of aggression" and reported that "it understands the expression to refer only to high-ranking military personnel and high state officials." I bear witness, as one who had knowledge of its history, that this is a correct representation of the intention of the framers and of the policy of the prosecution.[7]

While some of Lord Maugham's passages, considered alone, seem to condemn any trial on the charge of aggressive warmaking, others look in a contrary direction. He says, "The view that the actual *authors* of a clearly aggressive war should be found guilty of war crimes does not offend my ideas of justice . . . ."[8] Again, he points out a way

[3] ". . . [F]or conscription was of course in force in Germany, and even if those guilty of waging the war were confined to those who were members of the forces, or even to those who merely marched in an army or fired a shot at the enemy, it is certain that they would greatly exceed the figure of a million." *Id.*, at pp. 18–19. "In doing so it [the Charter] lumped together in the same general condemnation those deemed to be the real author or authors of the war, who knew, no doubt, what they were doing and why they were doing it, with the hordes of Germans of all sorts and kinds, rich and poor, educated and scarcely able to read or write, filling an important role in the war or acting merely as humble pawns pushed about wherever they were ordered, men with no real option to decline the duties which were placed on them, and with little chance of keeping their wives and children alive if they refused to obey; for these persons could nearly all of them be proved to have participated in waging the war." *Ibid.*, p. 39. "The clause is obviously not limited to authors of the war." *Ibid.*, p. 48. ". . . [I]n words at least it turned half the male population of Germany into criminals . . . ." *Ibid.*, p. 52. "The same terrible question arises as to all these men from Field Marshal to the last joined recruit, from Lord High Admiral to the humble snotty or seaman." *Ibid.*, p. 75. For repetition of the concept in some form, see also pp. 22, 24, 30, 31, 32, 53, 56, 57, 58, 73, 76, 96, 97, 102, 106, 107.

[4] *Id.*, at p. 97.

[5] *Id.*, at p. 77.

[6] *Id.*, at p. 24.

[7] International Conference on Military Trials, London, 1945 (Dept. of State Pub. 3080).

[8] Maugham, *op. cit.*, p. 82.

> of discouraging aggressive war . . . . It is that of indicting any and trying those and those only who have been truly responsible for planning or waging a war proved to be aggressive and as having thus committed a war crime in the conventional sense.[9]

Elsewhere it appears that all he is concerned about is that the crime be limited to what he calls the "real authors" of the aggression,[10] an attitude with which there can be no disagreement and which I am sure is the intention of the General Assembly in approving the principles of the Nürnberg Charter.

However, approval of the Nürnberg Charter by the United Nations Organization does not solve the real problem, which is, where do we go from here? We must now regard the Nürnberg experience as a basis and guide for inquiry, not as a final answer to the stubborn practical and juridical problems inherent in the effort to punish war crimes.

I have never thought that the Nürnberg Charter, either alone or as expounded and applied by the Tribunal, is complete or adequate as a permanent international penal statute. It was drawn in the wake of war by men assigned to a specific task of a magnitude and immediacy which left no time or disposition to consider universal needs. Only those who worked on it can know the pressures for haste and summary action. Such prodding is easily disregarded when it comes from uninformed or interested sources. But let me remind you that scholars are also subject to hysteria, not that I have any personal complaint, but because it bears upon my plea that you give these problems study and deliberation while the scholarly minds of the country are relatively calm. While abroad, I was deluged with copies of the *Chicago Tribune* purporting to quote one whom this Society respects, Dr. Hans J. Morgenthau, as follows:

> I am doubtful of the whole setup under which these trials will be conducted. What, in my opinion, they should have done is to set up summary courts martial. Then they should have placed these criminals on trial before them within 24 hours after they were caught, sentenced them to death, and shot them in the morning.
>
> That's what should have been done. What has been done is only a makeshift, an effort to give the same kind of action legal aspect. The purpose is to get rid of these criminals. There is no doubt of their guilt. Therefore the quicker and more summary the action the better.

The Nation, which bears at its masthead the legend "America's Leading Liberal Weekly Since 1865," said as the trial started:

> In our opinion the proper procedure for this body would have been to identify the prisoners, read off their crimes with as much supporting data as seemed useful, pass judgment upon them quickly, and carry out the judgment without any delay whatever.

[9] *Ibid.*

[10] *Id.*, at pp. 52, 57, 77, 80, 81, 109.

Nothing would have been easier than to have yielded to such demands. Popular feeling, fanned by such statements, was running high at the end of the war—in America as well as abroad. And let me read you some statistics which I saw in the *London Times* that reached my desk today, which will give you some idea of the feeling in Europe:

> *Paris, April 11, 1952.*
>
> Mr. Matinaud-Deplat, the Minister of Justice, today gave the following statistics of condemnations and executions for war-time collaboration with the Germans: Condemned to death by the courts, 2,853; executed, 767 (remainder reprieved by President Auriol); condemned to death by courtsmartial, 179; executed, 79; summary executions without legal trial by members of the resistance, 8,348 (5,234 executed during the occupation and 3,114 after the liberation but before French courts were re-established); executed by decision of non-legal departmental committees at the moment of liberation, 1,325; total executed, 10,519.
>
> The Minister said that 38,266 convicted collaborators had been sentenced to prison terms by the courts since the liberation. Of these 2,400 were still in prison. The rest had either completed their terms or had them reduced. Of those still in prison 30 per cent had criminal records. His department was reviewing the records and intended to show particular leniency to young prisoners.

Whatever criticisms may be made of the trials conducted by the Americans under the London Charter or under Control Council Law No. 10, we have never to face the claim that we executed any persons without giving them full opportunity to meet the accusation with every means of defense. And the number of acquittals, and acquittals on particular counts, will demonstrate that the cases were judged with discrimination.

The substantive provisions of the Charter, naturally, were conditioned by the trial machinery and procedures which it also prescribed. Any conviction and sentence required support by three of the four judges, which meant that there could be no conviction that was not approved by either the British or the American judge. The veto given to men trained in the common law made it unnecessary to write into the Charter safeguards and limitations that are inherent in the Anglo-American idea of crime and its legal proof. Lord Maugham objects that the Charter does not expressly require proof of personal responsibility, knowledge of the aggressive purpose, and establishment of guilt beyond reasonable doubt, although he admits that every one of these safeguards was observed in practice. Certainly any wise international criminal statute will be complete within itself and will make explicit much that the London Charter for its purposes safely left to implication. An ideal international tribunal would afford representation to all of the different legal systems of the world. But their fundamental assumptions are not uniform, and, if a tribunal is not to engage in endless bickering, those differences must be reconciled in some organic act. This we tried to do at London for the purposes of the partic-

ular trial in contemplation, and the relatively small amount of disputation over procedural and technical matters at the trial conducted by lawyers of five different legal backgrounds shows that the effort was not hopeless.

If the United Nations Organization were to put international criminal law in statutory form, it certainly must define criminal aggression. It seemed to me that the London Charter should have done so, but, for reasons which you can learn from a study of the minutes of the Conference, my efforts to obtain a definition were unsuccessful. The omission had no serious consequences on the Nürnberg trial. Hitler's wars were aggressive ones under any conception of aggression that any reasonable tribunal could entertain. But it will never do to try borderline cases without precisely declared standards of guilt. We cannot count upon future aggressions to be so crudely and blatantly documented by archives captured from the aggressor. Penal sanctions are apt to miscarry unless they are adapted to more discreet and subtle aggressions.

I doubt that we should expect much progress to come from official initiative in this difficult and more or less technical field. The political state of the world, its bitterness, its suspicions, its contentions, are time-consuming and divisive. I need not now conceal my alarm when I learned from the newspapers that the President had tossed the codification of the Nürnberg principles into the lap of the United Nations Organization. I communicated my concern to Secretary Byrnes and Delegate Austin, but it was too late. I had had enough experience with negotiating on the subject with representatives of other systems of law to know something of its intricacies, its difficulties, its limitations, even under favorable circumstances. While I considered that the London Charter could be vastly improved, I did not expect that the improvement would come from the atmosphere of tension and recriminations that has prevailed of late. It seemed to me that the risk of discrediting a widely accepted Charter, confirmed by a judicial precedent, which went beyond anything in history in its explicitness in outlawing aggressive war, was greater than any chance of improving it.

Happily, danger that precedent would be devalued through stalemate or disagreement was overcome by skillful diplomatic strategy. The General Assembly first unanimously affirmed the Nürnberg principles and only after that appointed a commission to find out what they were. I salute the diplomats upon the superiority of their technique over any that would occur to a pedestrian legal mind.

But my reluctance about an official undertaking to codify the law of war crimes was chiefly motivated by a belief that codification is an enterprise that belongs to maturity rather than to infancy of any branch of legal learning. I think international law may well be in some danger from a crude and premature codification, which is a knotty, intricate and delusive search even in fields of private law where years of judicial trial and error

have exposed the gamut of problems and solutions. Workable codes are the outcome of experience, not imagination. Abstract statements of general principle are mere dogma unless they have been verified in practice. It may be doubted that one instance of aggression sufficiently exhibits future probabilities to be the basis for a permanent international criminal statute.

Trial of war crimes since World War II, however, has yielded a variety of trial experience which does afford to scholars of international law the materials for a useful literature of comparison, criticism and constructive suggestion. We cannot know at what moment the occasion may arise for their repetition. The event which forced them in the past—capture of high-ranking officials who are reasonably believed to be responsible for a war of aggression—would no doubt compel them again. I can tell you from experience at London that deliberate and detached studies upon all aspects of the subject would be invaluable guides to officials who may be compelled to act again in haste.

Materials now available for analysis are extensive and varied. An international trial demonstrated the difficulties of reconciling four contrasting systems of law, but also taught that they are not insurmountable. Certainly our initial efforts show the need for vast improvement of international trial technique. There were many trials under Control Council Law No. 10 which reveal the results of a very different procedure, administered, however, in the spirit of the London Agreement. British trials were conducted under Royal Warrant, and Lord Maugham thinks they are better examples to follow, although I cannot refrain from observing that they seem to have occasioned quite as earnest German and British criticism as have ours. There were also Continental trials, not only of enemies, but of nationals for political offenses akin to treason, perhaps, such as the Quislings and collaborators and there were the denazification trials in Germany. In the Far East there was the Tokyo trial,[11] which went its own way, a way that did not follow Nürnberg in many and important respects. Then, too, there were the military trials, including the famous *Yamashita* case,[12] which applied principles of criminal liability of military officers for atrocities in their area of command more extreme than anything we civilians thought appropriate at Nürnberg.

Another innovation that merits study is the assimilation and implementation of international law by national law. The prime example, for which the disclosures made at the Nürnberg trials may be entitled to some credit, is the Bonn Constitution, which provides:

> Art. 25 The general rules of international law shall form a part of federal law. They shall take precedence over [federal] law and

[11] Hirota *v.* MacArthur, 335 U. S. 876; 338 U. S. 197.

[12] *In re* Yamashita, 327 U. S. 1. See also Johnson *v.* Eisentrager, 339 U. S. 763.

create rights and duties directly for the inhabitants of federal territory.

Art. 26. Activities tending to disturb, or undertaken with the intention of disturbing, peaceful relations between nations, and especially preparing for aggressive war shall be unconstitutional. They shall be made subject to punishment.

Certainly this recognition of the principles which Professor Jessup has pointed out as fundamental in any modern system of international law[13] is highly creditable to West Germany and an example which the victors could well emulate. But it would entail some new perplexities for those who have broad and rigid guarantees of freedoms of speech and press.

While I suppose there is little prospect that an international criminal court will be established in the immediate future, its consideration focuses attention upon problems of jurisdiction, composition and procedure which, I assure you, are among the most troublesome in actual practice in this field. I think that systems of law differ more deeply and stubbornly in methods of trial than in substantive principles. Yet, historians have pointed out that the common law developed procedurally before it did substantively and that a law of rights and liabilities began to develop only when there was a system for adjudicating rights and liabilities. It is not far-fetched to compare the present state of international society to a primitive society which had controversies to be decided long before it had legislatures to frame codes. Whenever courts begin to function on either civil or criminal issues, they develop a body of decisional jurisprudence. We are prone to forget that law is older than legislation.

We would have every reason to expect the nations to welcome an era of submission to international law if the principal Powers of the world shared our legal philosophy. But the Communist Powers do not share our passion for legality or accept our specific concepts of international law. Marxist materialism leaves little room for the operation of moral forces or legal principles. The Western World has learned the futility of military force to solve its problems. Ferrero remarked upon "the destiny of Rome to perish through its conquests." It might aptly be applied to the decline of more modern empires. We have learned that to be victors is a catastrophe second only to being the vanquished, but we are not sure that this teaching has impressed all parts of the world.

I hope to see legal scholarship seriously turn its attention to making peaceful ways expedient, on the basis of material rewards and punishments for those who have no higher standards. We should seek for every device which will take any advantage out of international lawlessness and aggression and will deprive of personal immunities those who whip up needless international conflicts. With the modern improvements in our methods of destruction, our two world wars are only dress rehearsals for the final

[13] Jessup, Modern Law of Nations, p. 2, and *passim*.

catastrophe of our kind of civilization, unless you international law scholars can find ways to provide effective sanctions for a rule of law among nations.

President DICKINSON. Thank you, Mr. Justice Jackson. That was magnificent. It has stirred me as one of your hearers to such heights of enthusiasm that I just caught myself short of thanking you for everything that you had said. You will understand that I exclude your wholly unwarranted animadversions upon an alleged state of mind of the Presidents of this Society at the moment of their induction.

We now turn to the third and last division of the grand resources of our subject, the legislative process, and where could we turn so well as to our good friend, the Senator from Alabama? His subject is "Congress and the Conduct of Foreign Policy." The Honorable John J. Sparkman, Senator of the United States. [Applause]