In a reply to critics of the trial he finds that it has made 'undiscriminate vengeance' obsolete.

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In the first place the Nuremberg trial is taking place before an International Military Tribunal, American participation in which was undertaken by the President as Commander in Chief. True, most of the judges are men eminent in law rather than military affairs. Why it would be "consistent" and "undramatic" to arraign world notorious characters like Goering, Ribbentrop, Keitel, Raeder and others before a half dozen generals, but objectionable to arraign them before leading jurists sitting in the same capacity, we are not told.

But the worst feature of this formula is its perfect prescription for letting big men go and punishing little ones. Most of the top Nazis are not "in the ordinary sense murderers." Their fingers pulled no triggers. They turned on no gas in extermination chambers. They beat to death none of our crashing airmen. The top Nazi only made plans and gave orders and left murder in the ordinary sense to little men. Many of these little men have been tried before American military courts, convicted and executed. But the real challenge was always what to do with high-ranking plotters and planners and top-level criminals. That is the challenge the Nuremberg trial is answering.

But the Atlantic Monthly article offers a different plan: "For those who were not chargeable with ordinary crimes but only with political crimes, such as planning an aggressive war, would it not be better to proceed by an executive determination—that is, a proscription directed at certain named individuals?"

It may be due to my experience over here, but I shudder to read this advocacy, especially by a Federal judge, of "proscription"—taking life or liberty—even from enemies, by "executive determinations" that charge the political criminals.

The Nuremberg evidence shows the device used by Hitler and Himmler in sending an endless procession of untried men to death or concentration camps.

Whatever defects may be charged to the Nuremberg trial, its danger as precedent and its offensiveness to American ideas of justice, liberty and law are as obvious as dangers from killing or punishing people for political crimes by executive order. That it can be "better" or less offensive to notions of justice to kill men without a trial rather than with a trial is a proposition hardly defensible to my mind.

The consequence of giving the top Nazis a genuine trial is, of course, labor, inconvenience and expense. We have had to listen to their excuses, and let the world hear them all, which at times has been provoking. But it does seem to me that it was the decent and orderly way to proceed and it has produced worthwhile by-products as well.

If we had stood those twenty-two defendants against the wall and shot them "by executive determination," in ten years the United States would be defenseless against the suspicion that we did not give them a trial because we could not prove their guilt or because they could prove their innocence. Our position would be as weak as that of the Nazis regarding the Roehm purge, in which, by executive order, they killed without trial and on charges of political crimes many of their opponents. Whatever cause they may have had, they did not submit to any public inquiry and they cannot today escape the inference of mere murder. Such a procedure on our part would lay the foundations for martyrdom and a resurgence of nazism in Germany.

Whatever we ultimately do with these men we will do after an open hearing and upon evidence recorded for the world's scrutiny. We as well as the Nazis can be judged on this record, and we do not shrink from the judgment.

Another lesson of the Nuremberg trial is that captives can be given a dispassionate hearing even in the immediate aftermath of war. Every defendant at Nuremberg has counsel chosen by himself or assigned by the tribunal. Counsel have access to their clients and to all witnesses here in Nuremberg. Every document used by the prosecution has been furnished to the defense in German. Every document requested by the defense, if approved by the tribunal as relevant, has been produced by the prosecution if in its possession. (Continued on Page 99)
IT is to the credit of the judges and lawyers of western Europe that they seem universally to recognize that, if it be true that people in their own lands, undiscriminating and vengeful executive action must give way to fair trials even to those who are labeled 'war criminals.' Lawyers were often leaders of the resistance. As intellectuals they were marked for death but they had the courage to speak of them bear marks of violence. At a dinner given recently by the Paris bar nearly half the members present had been before the German concentration camps, in hiding during the occupation or in exile. In Czechoslovakia I was greeted at Prague In, the London office of England, France and fourteen members of Parliament—all former concentration camp inmates. The same is true in Belgium, the Netherlands, Denmark and Norway. But they have generally counseled proceeding against torturers, collaborating murderers with caution and moderation. One never hears among them the "shoot em at sight" philosophy, even though they have suffered in a way we cannot know.

The trials of Quisling in Norway and of Karl Hermann Frank in Prague and in Paris have been conspicuously dignified and fair. Strangely enough, among the vast and varied mail I receive here, complaint against the trial and exhortation to shoot the defendants at once come chiefly from Germany and the United States—rarely from the occupied countries which suffered most. Of course, this moderation and fairness cannot be vouched for in some of the Eastern states, but even there the example may not be lost. But, say the critics, it would be all right to try the Nazis for war guilt, but all right all right to try them for making aggressive war. I happen to be convinced that in the London bar an American lawyer, named Forsythe, signed by judges of the highest courts of England, France and the Soviet Union, as well as by the judges of countries extended to by eighteen nations, we merely codified what was existing international law when we said that to wage and plot a war of aggression is a crime.

But I, however, our critics pay us the compliment of insisting that we are taking the first new step in enforcing international law, I shall not protest. It was a silly state of affairs and many everywhere punished for inciting a riot and nowhere punished for inciting aggression. I am willing to share the odium of correcting that anomalous situation. It was an immoral doctrine argued as a desperate admission of the fact that wars of aggression must never bring retribution upon their instigators. If there were nations with which the human beings would all agree it is that war makers should be punished for their crime—those who think above and includes all others. The mere fact that four dominant nations without reason and without apology and expressly and clearly stated this principle seems alone to evidence progress. But they are justly proceeding in good faith to make practical application of the principle. Is there not also hope for the future to be derived from the experience at Nuremberg, which discloses much common ground in legal concepts among peoples commonly thought to be far apart in such matters? Popular thought is focused on political frontiers in which there are dramatic differences of interest and of view. Political policy is usual the expression of immediate interest, often shortsighted or temporary ones, while a people's law is more enduring and1 settles and abiding convictions.

DESPITE our diversity of legal traditions and of social and cultural interests, I have found from my Soviet, French and British colleagues at Nuremberg a profound agreement of views of what is right and what is wrong, what is fair dealing and what is foul play, what is undiscriminating and what is to be fostered, are not so far apart, and such differences as do exist are very small in the main. It is in such fundamental accords that I find real hope of understanding between the Western and the Eastern worlds.

But it sometimes is said that the concurrence of other nations—Russia usually being meant—in outlawry of aggression war is but lip service
Lessons of Nuremberg

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and that it has not lived up to the profession and does not mean to. All nations have violated this principle in the past. In fact, it was not clearly recognized as a legal principle until after the first World War. But I think the criminality of war-making is a conviction held as deeply by the Russian people as by our own.

If it were not that most of our legal differences are superficial, it would hardly have been possible for the four Allied nations to have engaged in constant day-to-day cooperation over the period of this trial. Your case is to trial in our way of going about trials, that the greatest differences exist between us. But even here we have sketched our ideas that we have been able to divide responsibility for different phases of the case, and that the interest of all four prosecuting powers have been represented before the tribunal by a single lawyer. This is a tradition of the powers for whom he spoke.

This cooperation is not the less significant because it is among nations traditionally prone to differ and argue to the extent that even partners in the same firm will often disagree violently about the best way to conduct a case. In Nuremberg we do not have to speak of international cooperation in terms of hope. We may speak of accomplishments—it is a going concern despite a worldwide atmosphere of suspicion, hostility, recrimination and stalemate.

If it had not been for this cooperative attitude this trial could not have been so expediently conducted. I know that it is generally thought to be a long and slow-moving trial. But that superficial view discloses in far too glib a way the fact that the orders to destroy records went unheeded as the Nazis look to their heels.

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ETHER these documents would ever have been preserved or made available except for this trial may be doubted. The terrible experience of this generation would soon be forgotten or disregarded, had not documents spelled it out in glibly detailed, but if they had been simply found and published, their part, not once, but many times, would have known whether they were genuine. What makes them now undeniable is that they have been submitted to examination in adversary proceedings, where they have been authenticated by those whose interest was to deny and whose knowledge of their truth or falsity was unquestionable.

As a result, experts will long draw lessons for their specialties from the Nuremberg evidence. The record of the plottings and incitements, preparations and intrigue that preceded and accompanied the second World War is vastly richer than has been available to nations concerning any other war.

SURELY those who draw near treaties will find important lessons in these documents as to why former treaties were futile and how they were circumvented and party and class use of the courts as instruments of political policy was established.

Experts will read the disclosures of secret maneuvers engineered by foreign offices with deep interest. Naval experts will find instruction in naval policy development and deception. Military men will unfold the story of secret maneuvers and its establishment of military control over the German people. Jurists will find admonition in the way the rule of law was set aside, an independent judiciary destroyed, and party and class use of the courts as institutions of political policy was established.

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So I think the great lesson which Nuremberg has taught the world, irrespective of the outcome of this trial, is that while a hearing to make sure you are punishing the right men and for the right reasons does take time, does cost money, does allow them to reiterate their defenses, it is worth while. Undiscriminating vengeance and killings without a case made obsolete by Nuremberg and only the obsolete minded will mourn the loss.