The day before the opening of the trial of the German leaders at Nuremberg on 20 November 1945, the defence lawyers jointly presented a motion to the Tribunal addressing the crimes against peace charges. In this submission, signed by Göring’s lawyer Otto Stahmer, they stated that while public opinion had demanded that those who waged unjust wars be held to account, this idea had not yet been accepted as international law. They added that neither the League Covenant nor the Kellogg–Briand Pact had suggested as much: when the League, for example, had decided upon the lawfulness of uses of force, ‘it always condemned such action … merely as a violation of international law by the State, and never thought of bringing up for trial the statesmen, generals, and industrialists of the state which recurred to force’. This meant that the Tribunal, when dealing with aggression, was imposing ‘a penal law enacted only after the crime’ – and, as a retroactive imposition, this was ‘repugnant to a principle of jurisprudence sacred to the civilized world, the partial violation of which by Hitler’s Germany has been vehemently discountenanced outside and inside the Reich’.

Although the Tribunal rejected this motion, a number of defence lawyers thereafter broached some of the themes within it, including Hermann Jahrreiss, counsel for Alfred Jodl. It was he who led the most sustained challenge against the prosecution’s central argument that the Kellogg-Briand Pact provided the legal basis for the crimes against peace charges, and he who compelled the British Chief Prosecutor, Hartley Shawcross,
and Shawcross’s chief legal advisor, Hersch Lauterpacht, to defend their position.

What was the significance of Kellogg-Briand Pact? As Shawcross asserted, this treaty, signed in 1928, was an important landmark in public international law, signalling a shift in the status of certain wars from lawful to unlawful. But as Jahrreiss countered, the treaty had no lasting effect, and was anyway never intended to establish personal liability for aggression. Turning to wording of the Pact itself, the two operative articles state:

Article I. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article II. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.6

Although the parties to the Pact condemned recourse to war, renounced it as an instrument of national policy, and agreed that the solution to disputes should not be sought except by pacific means, it did not, as claimed by its legions of supporters, ‘outlaw war’. Instead, it made a careful distinction between legitimate and illegitimate conflicts. The intention, Humphrey Waldock wrote, ‘was to forbid all unilateral resort to war for purely national objects whether on just or unjust grounds but to permit war as a collective sanction either under the Covenant or the Pact itself.’7 He also observed that the Pact did not forbid wars conducted in self-defence: this issue was not referred to in the treaty, but was instead addressed in the accompanying ‘notes’ — essentially reservations — on self-defence. These not only cast a revealing light over states’ attitudes to war in the 1920s, but also demonstrated a more general tendency: if law prohibits all wars except those of national self-defence and international sanction, then nations push


to expand the definitional scope of self-defence to cover new contingencies.

The American reservation on self-defence, delivered by Secretary of State Frank Kellogg in a speech before the American Society of International Law, and later formalised in a note of 23 June 1928, was swingeing. He stated that:

There is nothing in the American draft of an antiwar treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense.8

Kellogg’s assertion that each nation should be sole judge of its actions was a direct repudiation of the view that states were at least nominally accountable to the international community for their actions. Furthermore, although he did not specifically mention the Monroe Doctrine, he made it perfectly clear through diplomatic channels that his conception of American self-defence under the Pact covered not only the United States, but also Latin America. In Britain, meanwhile, the Foreign Secretary Austen Chamberlain, advanced what was dubbed the ‘British Monroe Doctrine’.9 On grounds of self-defence, this note, dated 19 May 1928, exempted from the Pact’s remit ‘certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety’.10 The ‘certain regions’ were never publicly identified, although an internal British Foreign Office memorandum stated that they covered Egypt, Nejd, the Hejaz, Iraq, Persia and Afghanistan – the Middle Eastern routes to India.11 As the jurist Clyde Eagleton grumbled at the time, these and other powers’ self-defence

11 ‘Draft treaty for the renunciation of war …’, 29 June 1928, 3: ADM 116/2673, TNA.
exceptions from the Pact ‘destroy its whole meaning’.  

As for enforcement, the Pact did not propose sanctions. Instead, it was expected that the treaty would be effectuated through complementary mechanisms already in existence, such as the League Covenant and Locarno treaty systems. The Preamble’s third clause did, however, state that the parties were: ‘Convinced … that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty.’ The effect of this denial, as Kellogg explained, was that a breach of the Pact ‘would automatically release the other parties from their obligations to the treaty-breaking state’. Or, in other words, states were free to stop renouncing war and start waging war against the violator. The treaty therefore made little practical contribution to the maintenance of peace, although it did exonerate Britain and France for declaring war on Germany in September 1939.

Despite contrary indications at the Nuremberg and Tokyo tribunals, the Pact did not renounce ‘aggression’; it renounced recourse to war ‘as an instrument of national policy’. Some, such as the British legal advisor Cecil Hurst, thought the difference was ‘mainly one of words’, but Frank Kellogg, attuned to the currents of Senatorial opinion, knew the distinction was important. Recalling the debate about the bedevilled word ‘aggression’ in Article 10 the League Covenant — which had been interpreted by many American politicians as meaning that the League would compel the United States to act against its own interests — Kellogg insisted on its omission from the Pact. Nor, it should be added, was there the slightest suggestion in either the Pact itself or the accompanying correspondence that war was a crime, involving any form of individual liability. So when Hartley Shawcross, opening the case on ‘crimes against peace’ at the Nuremberg Tribunal, stated that ‘aggressive war had become, in virtue of the Pact of


15 This formulation could equally well describe self-defence, but self-defence was exempted by reservation.

16 Hurst, 16 January 1928: FO 371/12789, TNA.
Paris … illegal and a crime’, the Pact’s strictest interpreters, including Kellogg himself, might have contested both the claim that ‘aggressive war’ was illegal, and that this form of war was a crime.

**The prosecution takes the stand**

So how did Shawcross build his case on crimes against peace on the foundation of the Kellogg-Briand Pact? His opening address, drafted by Hersch Lauterpacht, who dealt with the legal sections, and James Passant of the Foreign Office’s Research Department, who contributed the historical sections, was delivered at Nuremberg on 4 December 1945. This addressed crimes against peace in two stages: first, that aggression was a crime; and second, that individuals were liable for it.

Shawcross began by arguing that the unrestricted right of states to wage war was partly eradicated by the League Covenant, and all but abolished by the Pact. The Covenant, he explained, had merely brought to the fore an earlier *stare decisis* ‘as it existed at the dawn of international law, at the time when Grotius … established the distinction … between a just war and an unjust war’. But, he added, if there had been any ‘truly revolutionary’ enactment, it was the Pact, which, a decade before 1939, had abolished war as a permissible means of enforcing or changing the law, and established beyond doubt the fact that aggression was ‘illegal and a crime’. (This latter point, which deliberately conflated two distinct legal concepts, was Lauterpacht’s; he stressed that the British should counter the argument that the charge was an innovation by asserting that the Pact ‘not only rendered aggressive war unlawful; it condemned it and thus created the basis for a declaration that aggressive war is not only unlawful, but also criminal’.)

Moving to the second stage of the argument, Shawcross addressed liability for aggression. The Nuremberg Charter, he said, had not only instituted individual

---

17 IMT, vol. 3, p. 103.
18 Ibid., p. 97.
19 Ibid., p. 98.
20 Ibid., p. 103.
21 Lauterpacht to Dean, 20 August 1945, 1: FO 371/51035, TNA.
responsibility for this crime, and it also rejected the idea that the accused could claim
immunity on the grounds that they had acted on behalf of the state. This, he said, was
because the state was not an abstract entity: its actions were the actions of men. ‘It is a
salutary principle’, he stated, ‘that politicians who embark upon a particular policy – as
here – of aggressive war should not be able to seek immunity behind the intangible
personality of the state. It is a salutary legal rule that persons who, in violation of the law,
plunge their own and other countries into an aggressive war should do so with a halter
around their necks.’ This was why the Charter’s authors had refused ‘to reduce justice to
impotence by subscribing to the outworn doctrines that a sovereign state can commit no
crime and that no crime can be committed on behalf of the sovereign state by
individuals acting in its behalf’. Instead, they had drafted Article 7 of the Charter,
which stated that the defendants’ official position ‘shall not be considered as freeing
them from responsibility or mitigating punishment’ – a stricture that penetrated the
force-field of sovereign immunity, and exposed national leaders to the dictates of a
higher law.

Drawing together the skeins of his argument, Shawcross stated that although some
aspects of the Nuremberg Charter were novel, the criminalisation of aggression was ‘not
in any way an innovation’ but simply a ‘logical development’ of the law as it stood. The
Charter had simply set up a competent jurisdiction for the punishment of ‘what not
only the enlightened conscience of mankind but the law of nations itself had constituted
an international crime before this Tribunal was established and this Charter became part
of the public law of the world’. Embroidering this theme, he added that: ‘[The Charter] merely fixes the responsibility for a crime already clearly established as such by positive
law upon its actual perpetrators. It fills a gap in international criminal procedure.’

(Shawcross’s understatement – ‘merely fixes the responsibility’ and ‘fills a gap’ – was

23 Ibid., p. 104.
24 London Conference, Report of Robert H. Jackson, United States representative, to the
25 IMT, vol. 3, p. 94.
26 Ibid., p. 104.
27 Ibid., p. 94.
28 Ibid., p. 106.
intended to convey the idea that the Charter was just connecting crime to punishment, rather than making new law after the event.) Thus, even though the Kellogg–Briand Pact did not specify punishment for an unlawful act of aggression, its renunciation of war implied the need for punishment – a punishment that it was incumbent upon the Tribunal to devise.

The defence responds

Enter Jahrriess. Taking a strictly positivist line, he deployed the doctrine of absolute sovereignty against the prosecution’s double premise that aggression was a crime and that individuals were personally liable for it. This approach enabled him to repel naturalist interpretations of the law, which as Stanley Paulson later observed, ‘would have left open the possibility that a legal order other than the positive legal order, for example, international law, had the better claim to legitimacy’.29

Jahrreiss began by challenging Shawcross’s proposition that the Kellogg-Briand Pact represented a major shift from one set of international arrangements (war as an institution of international law) to another (war as ‘high treason’ against international law).30 This interpretation of the Pact was flawed, he argued, because it failed to take into account the states’ reservations on the right to self-defence, and thus demonstrated their unwillingness to submit to general obligations. Summarising the approach of the signatories, and particularly that of Frank Kellogg, Jahrreiss maintained that: ‘War in self-defense is permitted as an inalienable right to all states; without that right, sovereignty does not exist; and every state is sole judge of whether in a given case it is waging a war of self-defense.’31 In other words, he was claiming, first, that the signatories’ assertion of the right of self-defence stripped the Pact of its potential to alter the legal status of war, and second, that the German leaders were, pace Kellogg, the ‘sole judge’ of the nature of the wars they had waged. If that were the case, crimes against peace had no standing.

Developing the argument further, Jahrreiss thought that Shawcross did not pay sufficient

---

31 Ibid., p. 469.
heed to later developments – namely, the international community’s failure to prevent aggression against Manchuria in 1931-33, Ethiopia in 1935-36 and Finland in 1939. The ineffectiveness of the Pact (and the League of Nations security system) in the face of outright breaches of its terms meant that by the start of the Second World War, ‘the whole system of collective security, even in such scanty beginnings as it had made, had collapsed’. He added that this collapse was acknowledged and declared expressly, or by equivalent action, by three world powers’ in 1939 – Britain by stating as much, the Soviet Union by reverting to classical international law, and the Americans by declaring their neutrality. Jahrreiss’s observation about the frailty of the Pact was unexceptional in itself, but it paved the way to a more radical argument: that repeated violations of the Pact had nullified it as a working instrument within international law. As he stated, ‘in the actual relations between states there existed – quite a number of years prior to 1939 – no effective general ruling of international law regarding prohibited war’. He was therefore making the case against the Pact (and hence, crimes against peace) by invoking the doctrine of rebus sic stantibus.

The implications of this were profound. If, as Shawcross had suggested, the Pact marked the transition to a new order, then the collapse of collective security marked the reversal of that process, with states returning to the arrangements in existence prior to 1928. As Jahrreiss explained: ‘The clearer it became that the whole system … failed to function in those particular cases which were of decisive importance, namely, where steps would have had to be taken against a great power, the more the idea of neutrality asserted itself with fresh vigor.’ From 1935 onwards, he noted, Switzerland, followed by Belgium, Denmark, Finland, Luxembourg, Norway, the Netherlands and Sweden, declared their neutrality – citing the failure of the League as the reason for doing so. The discredit attaching to the League and the Pact thus put international law ‘back into its old position’ – back to the time when the dual concepts of belligerency and neutrality still held sway. (Jahrreiss’s arguments may have been taken from Carl Schmitt’s legal brief for Friedrich Flick, which stated that by autumn 1939, ‘all neutral states, including the United

32 Ibid., p. 464.
33 Ibid., p. 475.
34 Ibid., p. 473.
36 Ibid., p. 473.
States of America, confirmed their neutrality in the sense of old international law. … the Kellogg Pact had not succeeded, at least for Europe, in replacing the traditional view of war with a new order.35)

Jahrreiss’s approach, which attempted to dismiss the Kellogg–Briand Pact as a working component of international law, served two purposes. The first was to undermine Shawcross’s argument that it provided a legally valid and non-retroactive basis for the aggression charge in international law. The second was to destroy the premise that in 1928 the international system had sloughed off the old arrangements based on belligerency and neutrality and replaced them with new arrangements based on lawful and unlawful wars – the basis upon which the entire Nuremberg project rested. By winding the international law clock back, Jahrreiss aimed to present Germany as a belligerent on an equal footing with other belligerents, rather than the sole perpetrator of an illegal war. The experiment of trying to replace ‘the “anarchic world order” of classical international law by a better, a genuine, order of peace’38 (an experiment which culminated in the Pact) was well and truly over – a state of affairs, he said, which was reflected in the view of the majority of international lawyers that there was ‘no distinction as to forbidden and nonforbidden wars’.39 Under that regime, Germany could not be held guilty for aggression because the concept did not exist.

Having dealt with Shawcross’s first argument, Jahrreiss began to address the other main plank of the prosecution’s case: the idea that individuals could be held responsible for crimes against peace. Even if a state were found to have committed an unlawful act, high officials operating on its behalf would still be shielded from personal responsibility. Thus, during the 1930s, he argued, ‘not even the possibility was mentioned’ of instituting proceedings against those responsible for aggression in Manchuria, Ethiopia or Finland, because ‘this cannot take place as long as the sovereignty of states is the organizational basic principle of interstate order’.40 In other words, individual responsibility was just as retrospective as the prohibition on aggression. It was clear where Jahrreiss’s argument was heading: because the perpetrators of other wars in the 1930s were not held

39 Ibid.
40 Ibid., p. 478.
personally responsible for aggression, the leaders of Germany should not be either. After all, he reasoned, ‘only the Reich – not the individual, even if he were the head of the State’ was accountable for crimes committed in its name. The indictment at Nuremberg was thus ‘incompatible with the very nature of sovereignty and with the feeling of the majority of Europeans’ — and, he later added, Americans who in 1919 had opposed prosecution of the ex-Kaiser for aggressive war on just such grounds. By holding individuals accountable for decisions on war and peace, the prosecution was in effect ‘destroying the spirit of the state’. So long as state sovereignty was the organising principle of the international order, Jahrreiss argued, the prosecution of individuals for acts of state could not take place. Consequently, the Charter’s assertion of individual over state liability was a revolutionary break with existing international law. It was ‘laying down fundamentally new law’, and thus enacting laws with retroactive force.

Shawcross answers the defence

Responsibility for taking up Jahrreiss’s arguments fell mainly to Hartley Shawcross, whose closing statement was initially drafted in Nuremberg by the British prosecutor Mervyn Griffith-Jones and then worked up in London by Shawcross and Lauterpacht. In it, Shawcross was compelled to return to the act of state doctrine (to which, it should be noted, all states including Britain subscribed in practice). He nevertheless rejected Jahrreiss’s argument that only states, not individuals, were subject to international law — insisting ‘there is no such principle’. True, he allowed, various courts had affirmed that one state had no authority over another state or its leaders, but, he added: ‘Those decisions have been based on the precepts of the comity of nations and of peaceful and smooth international intercourse. They do not in truth depend upon any sacrosanctity of foreign sovereignty, except insofar as the recognition of sovereignty in itself promotes international relations.’ Shawcross was thus not attacking the act of state doctrine in

41 Ibid.
42 Ibid., p. 479.
43 Ibid.
44 Ibid., p. 480.
45 Ibid.
principle, but rather, **qualifying it by suggesting** that it was acceptable when it contributed the comity of states, but unacceptable when it did not.

He was also obliged to shore up the Kellogg–Briand Pact against what he called Jahrreiss’s ‘remarkable suggestion’ that it (and other later treaties) had been negated by the collapse of collective security before the Second World War. 48 Did aggressions in Manchuria, Ethiopia, Austria and Czechoslovakia really deprive these treaties of binding effect because the aggressors had achieved a temporary success? No, he argued: ‘It may be that the policemen did not act as effectively as one could have wished them to act. But that was a failure of the policeman, not of the law.’ 49 This argument was sound enough, but Shawcross then stepped onto less firm ground while addressing the argument about the Pact and self-defence. Jahrreiss had suggested that the signatories of the Pact had collectively denuded it of its purpose by each asserting their right to conduct wars of self-defence. Shawcross admitted that the parties to the treaty had reserved for themselves the exclusive right to judge when to exercise the right of self-defence; but he dismissed as ‘wholly fallacious’ and a ‘parody of legal reasoning’ both the argument that this had destroyed the Pact 50 and the implication that Germany, acting as judge of its own actions, had therefore not violated it.

According to Shawcross, the Pact accorded states the right to determine in the first instance when self-defence was necessary, but this did not mean that the state was the **final judge** of legality of its conduct. 51 Just as an individual would be answerable if he abused his right to self-defence, so the state would be answerable if it transformed self-defence into an instrument of conquest. 52 It may have seemed logical to argue that states possessed the initial but not the ultimate right to determine the legitimacy of their own actions, thus making space for international determinations on a state’s conduct. After all, determinations were occasionally made after the event – Nuremberg itself being an example. Yet Shawcross’s points did not accord with the spirit or the substance of the Pact itself. Instead he (abetted by Lauterpacht) was disingenuously stretching the terms

48 Ibid., p. 461.
49 Ibid., p. 460.
50 Ibid., p. 461.
51 Ibid.
52 Ibid., pp. 461-462.
of the treaty beyond their original intent in order to repel the defence argument.

**Trying Japanese leaders**

Before the opening of the Tokyo Tribunal, Takayanagi Kenzo, Professor of English and Comparative Law at Tokyo University, wrote an article for the *Nippon Times*, in which he predicted — correctly as it turned out — that the prosecution might argue the following line:

[H]owever irreproachable the accused might have been in their private morals and non-responsible as they might be according to the canons of national or international law of the pre-subatomic era, they should be sacrificed at the alter of Human Progress. Philosophers and moralists who view the matter in this light might feel inclined to brush aside the classical defences of lawyers as technical niceties of the horse-and-buggy days obstructing the progress of mankind.  

As it transpired, at the Tokyo Tribunal, as at Nuremberg, the charge of crimes against peace charge generated the most heat. The defence lawyers, taking a positivist line, maintained that because aggressive warfare had not been criminalised before the Second World War, individuals could not be prosecuted for initiating it. The prosecution, taking a natural law stance, argued that the principle of individual responsibility for aggression was generated spontaneously from public conscience, which would harden into law through its application to cases such as those at Tokyo.

One of the most outspoken participants in the trial was the Chief American Prosecutor Joseph Keenan, who pushed the natural law concepts in the prosecution case to their limits. As a Catholic, he believed that the law derived its authority from God and was conceived to uphold the *status quo*. The Nuremberg and Tokyo trials, he would later argue, were founded upon the ‘Christian-Judaic absolutes of good and evil’ — an idea which had hitherto been downplayed at the tribunals in deference to the communist and non-Christian allies. Keenan argued that this spiritual agenda infused the prosecution’s

---

philosophy, which was designed to enable men to fashion ‘one world’ subordinate to principles similar to those ‘which communicate a providential design to the movements of the cosmos’.55

The other noteworthy aspect of Keenan’s approach was that he saw the law as a transformative force, advocating legal innovation to meet new circumstances, and rejecting tendencies within the legalistic order to ‘resist changes caused by new impacts of ethical standards and ideals’.56 He was particularly opposed to the view that ‘law existed only if it had sanction of a physical character’,57 maintaining instead that ‘the extrinsic facts of specific legislative codification, judicial recognition, or enforcement were not essential elements of law’.58 International society, he believed, could ‘administer justice without positive law … just as racial and national society has done for hundreds, in fact, thousands of years’.59 It was from this perspective that he addressed the crimes against peace charge:

The concept of aggressive war may not be expressed with the precision of a scientific formula, or described like the objective data of the physical sciences. Aggressive war is not entirely a physical fact to be observed and defined like the operation of the laws of matter. It is rather an activity involving injustice between nations, rising to the level of criminality because of its disastrous effects upon the common good of international society.60

Keenan’s reliance on spiritual rather than temporal sources of law, combined with his advocacy of fluid rather than fixed legal prescriptions, raised two questions: was the international order derived predominantly from morality or from law; and were these defining principles God-given or man-made? According to Keenan, the prosecution

55 Ibid., p. 155.
56 Ibid., p. 13.
57 Ibid., p. 72.
58 Ibid.
60 Keenan and Brown, Crimes, p. 58.
postulated an international moral order as the final medium of international social control, based on ‘the spiritual dignity, worth, and value of all men, who constitute a universal brotherhood under the fatherhood of God’, and manifested in the concepts of right and wrong. By contrast, he argued, the defence advocated an international legal order – deriving its legitimacy not from some higher authority, but from human consent – organised around clearly defined and universally accepted agreements to abide by certain rules (he insisted that natural law retained its moral force regardless of human consent). By departing the world governed by states and amoral systems of law for the higher realm governed by God and spiritual values, the advocate of natural law could thereby substitute the transcendent conscience of mankind for positive law.

Keenan set out his case for the prosecution of aggression based upon the concept of unjust wars (in other words, those that disrupted the status quo) and just wars (those that preserved or restored the status quo). ‘The nucleus of crimes against peace is the criminally unjust war’, he wrote, which was ‘always evil per se in the moral sphere and unjust in the judicial, despite the absence of positive legal undertakings to that effect.’ This sense of moral mission was given fullest expression in Keenan’s opening speech before the Tribunal, when he accused the Japanese of launching a ‘war upon civilization’. In his view it was necessary to use the trial to advance international law in order to prevent further unjust wars. Indeed, Keenan asserted this aim over what he regarded as the lesser task of administering justice. Not only did he profess ‘no particular interest in any individual or his punishment’ (because the defendants were mere representatives of ‘a class and group’) but he also rebuked defence lawyers for upholding ‘worm-wood legalisms’ and being willing to ‘sacrifice the common international good’ to secure the defendants’ interests.

---

61 Ibid., p. 72.
62 Ibid.
63 Ibid., p. 73.
64 Ibid., p. 57.
65 Ibid., p. 79.
67 Ibid., p. 463.
68 Ibid., p. 146.
69 Keenan and Brown, Crimes, p. 156.
If this approach smacked of disregard for procedural fairness, Keenan was unrepentant. The prosecution lawyers, he wrote, ‘never lost sight of the fact that the goal of punishing the accused was relatively unimportant, when compared with the grander and wider aim of the trial, (i.e.) to advance the cause of peace and right notions of international law’.  

While Keenan’s approach to international law may have been transformative, its aim was deeply conservative. He believed that pre-war international arrangements had come about because some nations, by virtue of their superior culture, had assumed control of others for the benefit of all. In other words, the most powerful states – with the United States prominent among them – had acquired their spheres of influence and colonial empires on merit. The only way for a country to lawfully alter these arrangements was by slow, evolutionary means, and Japan’s sudden and violent intervention had in his view overturned a legitimate and moral world order. Such aggression had to be stopped because, ‘If Japan had the right to change its geographical and economic status suddenly by war, then every other nation as badly situated, from the economic standpoint, had the same right.’ The consequence of this would be ‘world anarchy’.

**The spirit of Potsdam**

The defence teams, as expected, did indeed adopt a positivist stance, and responded by questioning the jurisdiction of the court and the interpretation of its founding documents. Reprising themes that had already been rehearsed at Nuremberg, they maintained that the charges had been retrospectively conceived or were inapplicable within international law, and asserted either that the evidence did not connect the individual to the crime, or that the individuals could not be held responsible for acts of state. Takayanagi Kenzo, by now defence counsel for Shigemitsu Mamoru, set out his criticisms of crimes against peace and the attendant charges of conspiracy and murder in a speech delivered on 3 March 1948. He began with an examination of *opinio juris* – or rather, its absence – on questions pertaining to the war. As has been noted recently by

70 Ibid., p. 155.
71 Ibid., p. 63.
72 Ibid.
Neil Boister and Robert Cryer, his focus on the perception of obligation as the bedrock of the law foreshadowed the position later taken by H.L.A. Hart in his 1961 book, *The concept of law*. Takayanagi said:

Law is a common consciousness of obligation. Criminal law is a common consciousness of obligation coupled with an obligation to suffer penalties if it is disregarded. Statesmen perform their transcendently important functions under a common consciousness of obligation under international law. But statesmen have not hitherto performed their functions under any common consciousness of obligation to suffer the arbitrary penalties of military law in case the obligations of international law are broken. The absence, as a patent fact, of any such common penal consciousness, prevents the existence of such a penal law. … In the absence of such a law, the imposition of such penalties would be nothing but lawless violence.

Sticking with the theme of lawless violence, Takayanagi then addressed the Potsdam Declaration, which had promised that ‘stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners’. He argued that the Declaration’s reference to ‘justice’ referred to justice *according to the law*, ‘administered by established legal rules and principles, not according to the sense of right and justice of the judge, however good or wise he may be’. The Tokyo Charter, with its illegitimate and retroactive charges, betrayed these principles by offering not justice ‘but the Hitlerite “justice” of vague “popular feeling”: the antithesis of justice according to law’. He argued that the prosecuting powers had, in addition to wilfully misreading the spirit of Potsdam, also misinterpreted the letter of the Declaration. The Allied leaders had declared that the Japanese would be punished for war crimes, not for starting the

---

74 IMTFE, vol. 88, pp. 42111-42112.
76 IMTFE, vol. 88, p. 42129.
77 Ibid., p. 42224.
war, because in July 1945 any hint of punishment for the latter would ‘naturally involve the danger of forcing the Japanese leaders to carry on the war to the very last extremity’. It was therefore ‘horse sense’ that the Allies had not intended the Japanese leaders to construe ‘war crimes’ as including crimes against peace – the latter had been tacked on after the event. (He was not alone in holding this view: at the Foreign Office in London, Frederick Garner, charged with war crimes work, had come to the same conclusion. Having read through the minutes of the Potsdam meeting and the Allied leaders’ declarations, he had found nothing in them stating that enemy leaders would be punished for starting the war.)

Takayanagi then took issue with the idea that the initiation of a war was a crime, and individuals punishable for it. He submitted that although this ‘amorphous, elusive and indefinable’ charge might appeal to ‘uninformed and unreflective minds’, it was in fact ‘a pseudo-juristic doctrine which should be excluded from the holy precincts of the law of nations’. Aggression was, after all, a matter of opinion, and it would be ‘the height of injustice to brand a statesman as a criminal and a felon for the mistakes he might make in his political decisions’. ‘To us,’ he continued, ‘the fact that the contracting parties to a treaty have agreed to make illegal a war not considered as self-defense by the belligerent does not make violations of the treaty a crime. It may be a breach of contract or a tort, but it is not a crime.’ He subjected the charges linked to crimes against peace – conspiracy and murder – to even more trenchant criticism, describing them as ‘new-born little doctrines drawn from odds and ends of municipal law’.

---

78 Ibid., pp. 42126-42127.
79 Ibid., p. 42127.
80 Garner, 2 May 1947: FO 371/66552, TNA.
81 IMTFE, vol. 88, p. 42172.
82 Ibid., p. 42189.
83 Ibid.
84 Ibid., p. 42188.
85 Ibid., p. 42172.
86 Ibid., pp. 42200-42221.
Kellogg and self-defence

The theme of self-defence had already arisen at Nuremberg, but the Tokyo defence lawyers, learning the lessons from the transcripts arriving from Germany, developed it to a far greater extent – their argument that the Japanese leaders thought they were fighting for national survival became the mainstay of their case. That they were able to pursue this line was due in large part to the fact that Japan’s wartime policies had been more piecemeal and reactive than Germany’s, which made self-defence arguments more credible and less easy to dismiss.

The obvious starting point for both prosecution and defence lawyers was the Kellogg-Briand Pact. While the prosecution looked for guidance to Hersch Lauterpacht’s sixth edition of Oppenheim’s International law – a treatise, the defence reprised Frank Kellogg’s comments of 1928 about the unrestricted right of self-defence. Not only had Kellogg maintained that every nation ‘alone is competent to decide whether circumstances require recourse to war in self-defense’, but, they noted, other powerful states had endorsed Kellogg’s reservation. For example, the French Foreign Minister Aristide Briand had signed the Pact ‘Under these conditions’, the Italian Prime Minister Benito Mussolini had signed ‘On this premise’, and the British Foreign Secretary Austen Chamberlain had signed ‘In the light of the foregoing explanations’. Likewise, Baron Tanaka Giichi had stated on Japan’s behalf that: “The proposal of the United States is understood to contain nothing that would refuse to independent states the right of self-defense.” In January 1947, Hirota’s counsel David Smith thus concluded that ‘Japan alone was competent to decide whether the circumstances confronting it required recourse to war in self defense and no international tribunal is competent to re-examine the question anew.’

---

88 IMTFE, vol. 36, p. 16678.
90 IMTFE, vol. 36, p. 16679. Original emphasis.
The problem, of course, was that the Nuremberg Tribunal had already re-examined the question of self-defence, and had arrived at a wholly different conclusion. The Judgment, handed down some five months into the Tokyo proceedings, had returned to the Pact and the defence argument pertaining to it, and had concluded the following:

It was … argued that Germany alone could decide, in accordance with the reservations made by many of the Signatory Powers at the time of the conclusion of the Kellogg-Briand Pact, whether preventive action was a necessity, and that in making her decision her judgment was conclusive. But whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced.91

The defence lawyer George Blewett noted that the Nuremberg Judgment was ‘obviously at variance with the past theory’.92 He reasoned that although the signatories of the Pact had never envisaged a Tribunal to determine whether a war was right or wrong, the authors of the Nuremberg Charter realised that to proceed with a trial ‘it was necessary to determine whether there existed that right of self-defense’.93 This, he concluded, was why the Judgment’s interpretation contradicted the view held when the Pact was promulgated.94

The dialogue with Nuremberg continued in other ways. In the course of interpreting the ‘notes’ on self-defence attached to the Pact, the defence lawyers assumed that the prosecutions and judges were familiar with the points made during the Nuremberg debates, and were therefore compelled to evolve novel approaches. This was the likely sub-text of the exchange that took place in early March 1947 between defence counsel Ben Blakeney and the presiding judge William Webb. Blakeney had begun to argue that the Pact’s main signatories had repeatedly violated it, at which point Webb, presumably familiar with Hermann Jahrreiss’s contention that the Pact had fallen into desuetude,

91 IMT, vol. 1, p. 208.
92 IMTFE, vol. 97, p. 47284.
93 Ibid.
94 Ibid., pp. 47284-47285.
intervened: ‘I think Oppenheim deals with this. He says, or Lauterpacht, who wrote the last edition says … that these breaches do not destroy the law’. But Blakeney was ahead of him. ‘That wasn’t quite the principle I was discussing’, he replied, before advancing a reverse *tu quoque* argument instead. As he explained: ‘I am interested in showing to the Tribunal that if the USSR, the United States, Great Britain and other nations have done these things [in the contravention of the Pact] they can not be acts of criminal aggression’. When Webb, still not grasping the point, again raised desuetude, Blakeney replied: ‘I have repeatedly said I am not discussing desuetude, your Honor. … We fully agree that the Pact is still in force and effect regardless of what nations may have done.’

**Conclusion**

The American and British prosecutors who made the case on crimes against peace at Nuremberg and Tokyo were well aware that they were advancing onto new legal terrain. They were thus compelled to make a tactical decision: should they simply declare that the international military tribunals were law-making events and leave it at that, or should they argue that there were heralds for the criminalisation of aggression to be found within international law before the tribunals were convened? While asserting their right to makes new law, their focus on the Kellogg-Briand Pact, and, with respect to Japan, the Potsdam Declaration, shows that they gravitated towards the latter option. They were thus compelled to *reinterpret* – to put it mildly – the meaning, intent and legal status of these documents.

The German and Japanese defence lawyers (joined by American counsel at Tokyo), attempted to exploit this weakness when dealing with the crimes against peace charges. When addressing the Kellogg-Briand Pact, they made some telling points about its inadequacy as a basis for aggression charges incurring personal liability. In addition, they shed light on the Pact’s signatories’ intent (for better or worse) to retain an unqualified right to national self-defence. When considering the Potsdam Declaration, they focussed

---

95 IMTFE, vol. 38, p. 17609.
96 Ibid.
97 Ibid., p. 17615.
98 Ibid., p. 17620.
on the fact that the Allied leaders had declared that the Japanese would be punished for war crimes, not for starting the Asia-Pacific war itself. Although the defence lawyers’ arguments were not given credence in the Nuremberg and Tokyo Judgments, and were rarely acknowledged in the secondary law literature, they must have found their mark. Shortly after the conclusion of the Tokyo Tribunal, the Allies abandoned the crimes against peace charge; it formally expired a few years later in the bosom of the International Law Commission.