Obama’s preventive war and the end of Nuremberg—Part 1

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The following is the first in a two-part series. Part 2 *will be published tomorrow, Friday February 19.*

US President Barack Obama’s Nobel Peace Prize speech in Oslo last December was widely seen as a glorification of militarism, rather than a promotion of peace. In several analyses, the *World Socialist Web Site* reviewed the speech, in the context of the continuation and escalation by the Obama administration of the aggressive militarist foreign policy of the Bush regime.

The speech marked a turning point in world affairs. Obama specifically embraced the illegal doctrine of “preventive” war in the use of American military power. In this respect, to the extent that his presidency supposedly represented the liberal alternative to the foreign policy of the Bush regime, it is now absolutely clear that, within the American political establishment, there is unequivocal bi-partisan repudiation of the Nuremberg principles, which outlawed, and made criminal, the planning and launching of aggressive war.

This article proposes to review the meaning of the Obama speech in the context of the history and development of international law.

International law and aggressive war

In the western world, during the reign of Christian kings, there existed an accepted doctrine and custom between states, known as “just war”, or *“bellum justum”*. This medieval doctrine expressly made provision for the possibility of a “just aggression”. The principle was used as justification for territorial conquest and expansion. The Catholic Powers specifically legitimised their conquest of the New World by reference to the doctrine of “just war”. In general, the idea of “just war” was underpinned by the conception of the right of a superior civilisation over an inferior one, and the authority of the Christian Church over all peoples of the globe.

At the end of the Thirty Years’ War in Europe, the Treaty of Westphalia of 1648 laid the groundwork for the relationship between sovereign states in the modern era. The “Westphalian Settlement” recognised as a principle of legality the right of a sovereign state to use force to assert its political interests against other sovereign states. On that foundation, there developed customs about the declaration of war and the conduct of war, but aggression was not outlawed. At the same time, the Westphalian Settlement recognised the principle of state sovereignty—that the internal affairs of a sovereign state were immune from foreign intervention.

In the course of the eighteenth century, through the cultural and intellectual force of the Enlightenment, the idea of the sovereign right to wage war came under attack, in particularly sustained form by the German philosophers Immanuel Kant and Christian Wolf. In his famous 1795 work, *Toward Perpetual Peace; A Philosophical Sketch (Zum Ewigen Frieden; Ein Philosophische Entwurf)*, Kant formulated an idea of global peace based on conceptions of world federalism and the outlawing of the use of force. Kant proposed that states, as well as individuals, should be subjected to international law, as “cosmopolitan law” (“Weltburgerrecht”).

In a series of “Preliminary Articles”, Kant set out a number of steps, which he considered should be immediately implemented to prevent war. Among these were included:

1. No secret treaty of peace shall be held valid in which there is tacitly reserved the basis or possibility for future war.
2. Standing armies shall be totally abolished.
3. National debts shall not be contracted with a view to the external friction of states.
4. No state shall by force interfere with the constitution or government of another state.

Kant also set out three definitive articles as a foundation upon which to build world peace.

1. The civil constitution of every state should be republican.
2. The law of nations shall be founded on a federation of free states.
3. The law of world citizenship shall be limited to conditions of “Universal Hospitality”.

By “Universal Hospitality”, Kant meant complete and unrestricted freedom of movement of all peoples around the world.

Kant’s ideas found no institutional or political embodiment or practice in the affairs of nations, and it was not until the early part of the twentieth century that his ideas were considered again, through developments in international jurisprudence.

The Westphalian system, which sanctioned the use of force between states, remained in place through the eighteenth and nineteenth centuries, and was the customary basis for the declarations of war in World War I.

International law in the aftermath of World War I

There was no breach of international law by Austria-Hungary or Germany in their launching of aggressive war in 1914. Furthermore, there was no principle in international law at that time of individual responsibility for state acts.

Upon Germany’s defeat in 1918, Kaiser Wilhelm II fled to Holland and the allies sought to extradite him to place him before a tribunal for war crimes. Article 227 of the Versailles Treaty accused the Kaiser of “the supreme offence against international morality and the sanctity of treaties”. The indictment sought to try the Kaiser not simply for breaches

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of the laws of warfare, i.e., the lawful conduct of military activities and occupation, treatment of prisoners etc., but for the waging of "aggressive war." Article 227 stipulated that the Kaiser and high-level German military and political figures be tried before an international tribunal made up of judges representing the victorious powers. In addition, the Versailles Treaty required Germany, without any foundation in existing law or custom, to hand over 900 named individuals accused of violating the laws of war. Holland refused to extradite the Kaiser on the ground that international law, as it then stood, did not envisage the incrimination of heads of state for breaches of international law.

At that time, the only legal subject in international law was the state. The German government refused to hand over the 900 individuals, but did conduct its own trial at the Supreme Court in Leipzig. Only a handful were ultimately tried, and those who were convicted received light sentences.

The League of Nations, established after the war, claimed amongst its objectives the prevention of future wars. However, its covenant did not specifically outlaw the resort to wars of aggression. Nevertheless, there was a strong movement amongst liberal-internationalist intellectuals in the US and Europe to continue to attempt to seek an international agreement providing for an explicit legal prohibition of aggressive war.

In 1924, James T. Shotwell, a member of the US delegation to the Paris Peace Conference of 1919, spearheaded the creation of a document considered by the League of Nations Council, entitled "Outlawry of Aggressive War". This became known as the "Shotwell Project", and its core conception was that aggressive war should constitute a crime. An aggressor was considered to be a state that first resorts to force and with no recognition of the conception of "just cause".

Opposition to the Shotwell Project, largely from Britain, resulted in its failure to be put up for ratification by the members of the League in 1924. However, the American proponents of the outlawry of aggressive war continued to fight for its international recognition, and in 1928, the so-called Kellogg-Briand Pact was signed in Paris by 15 nations. The pact, which was primarily the creation of American liberalism (based, of course, on the political reality of America's rising economic and industrial dominance and confidence, and its satisfaction with the geo-political status quo), declared an absolute prohibition of war as a political instrument available to nations. By 1939, more than 60 states, including Germany, France, UK, Italy, Japan and the US, had ratified the pact.

The Kellogg-Briand Pact was an important milestone in the development of international law. In subsequent developments, such as the Nuremberg Trials, the outlawing of aggressive war, accepted by the signatories to the Pact, was taken as the decisive normative premise upon which the legality of international tribunals was subsequently founded. (See, for example, L. Gross, "The Criminality of Aggressive War", in *American Political Science Review,* 41 (2) 1947).

The Pact provided that *"nations recognise their solemn duty to promote the welfare of mankind, committing themselves to a frank renunciation of war as an instrument of national policy and condemn recourse to war for the solution of international controversies and recognise that the solution of all disputes or conflicts which may arise among them shall never be sought except by pacific means"*.

The dialectic of Nuremberg

In September 1939, Hitler launched Germany's aggressive war against Poland. Unsatisfied with the international status quo, German imperialism sought to establish a German continental superpower through the conquest of vast territories in eastern and south-eastern Europe, sufficient to match America's global hegemonic status. In the East, Japan similarly sought, by means of aggressive war, to expand its sphere of influence and power to Asia and the Pacific, in direct challenge to the US. The battles, genocide and famines associated with World War II took an estimated 78 million lives.

The Nuremberg and Tokyo war trials, which took place after the war, have always been the subject of controversy and confusion, continuing to the present day. On the one hand, there is the charge that the trials represented "victors' justice". On the other, there is the uncritical liberal view of Nuremberg and its claimed legacy in subsequent international tribunals. In order to appreciate "the meaning of Nuremberg", it is necessary to analyse its contradictory legal and political components.

Towards the war's end, the allied powers discussed the establishment of a new international organisation to regulate the relations between states and maintain stability in the world—over which they would exercise power and control. These discussions, which began at Dumbarton Oaks near Washington D.C. in 1944, were ultimately to lead to the formation of the United Nations, with the victorious powers forming the Security Council to preside over and make the ultimate decisions concerning the new organisation and its conduct in world affairs. These developments were highly political and motivated, primarily, by America's international political and economic objectives: the stabilisation of the world economy, the prevention of revolution, and the expansion of American capital around the globe through free trade.

The UN's structure was grounded in the idea of overwhelming military force as the guarantor of peace against an aggressor state. "Peace," British Prime Minister Winston Churchill declared on 24 May 1944, "will be guaranteed by the overwhelming military power of the new world organisation." As in the Kellogg-Briand Pact, aggressive war was specifically outlawed in the UN Charter, which declared war to be a "scourge" from which the UN intended to "free mankind forever". The use of force by *any* nation was explicitly forbidden by Article 2, Section 4, which remains the law today. Furthermore, reinforcing the unequivocal character of the prohibition on the use of armed force, Article 51 provides that the only exception to the absolute prohibition is in self-defence, *after* an attack by another state. This clearly excludes the use of force on the basis of a threatened or apprehended attack, and therefore, the doctrine of preventive or "pre-emptive" use of force has no basis in international law.

At the same time that the victorious powers were conducting political discussions to formulate the post-war structure of "international regulation", talks were also taking place regarding the possible trial or other treatment of major German and Japanese figures for war crimes. In this domain, questions of legality and international law—as distinct from purely political considerations—assumed a significant place. Churchill was minded to simply shoot all the Nazi leaders without trial. Roosevelt told Churchill that such an act would not sit well in the American conscience, and that there should be some kind of trial. The Soviet view was that the Nazi leaders should be dealt with summarily before a military commission.

In the juridical sphere, the establishment of war crimes tribunals to try individuals for war crimes, including the planning and launching of aggressive war, was theoretically anticipated in a major legal work by the Austrian legal theorist Hans Kelsen. Basing himself on Kant's Enlightenment ideas, Kelsen's 1944 essay "Peace Through Law" proposed that *individuals*, as well as states, should, for the first time in history, be subjects in international law. Furthermore, Kelsen believed that the judicial function needed to play the central role in the area of international war crimes, as distinct from purely normative and executive processes. International law, said Kelsen, if it were to have genuine effect, would need to apply to individuals who could be brought to trial before an impartial judicial authority. Borrowing from Kant's conception of "Weltburgerrecht", Kelsen considered that if international law were going

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to regulate human conduct in international affairs then, in the interests of civilised intercourse, it was essential that there should be individual penal responsibility for its violation in the carrying out of government activities or in the direction of military operations.

According to Kelsen, an international, impartial court, with the power to indict and try individual citizens, who were alleged to have committed war crimes, would be essential to further international peace. The American position—to try the Nazi leaders in a judicial process for individual criminal responsibility—was ultimately institutionalised in the Nuremberg Tribunal. On August 8, 1945 the agreement between the US, the USSR, Britain and France to establish the International Military Tribunal was signed. Although in significantly different form, the Nuremberg process in essence reflected Kelsen's conceptions. In the same week, the US committed two of the most heinous war crimes in history—the nuclear bombing of Hiroshima and Nagasaki - for which no-one was ever indicted. Those crimes, amongst other things, led the Indian judge at the Tokyo War Crimes Tribunal, Radhabinod Pal, to dissent and to express the opinion that "when the conduct of all nations involved is taken into account, the law will perhaps be found to be that only a lost war is a crime" (R. B. Pal "The Dissenting Opinion of the Member for India" in R. J. Pritchard, *The Tokyo War Crimes Trial*, New York, 1987).

The application of the criminal law by a judicial process to individuals charged with waging aggressive war was a momentous, progressive advance in human consciousness, reflected in the sphere of law. In his book *Tyranny on Trial* (Dallas, 1999), Whitney Harris, who served on the prosecution team of chief US prosecutor, and former US Supreme Court judge, Robert Jackson, said the following of the Nuremberg Trial:

"The historic trial at Nuremberg was grounded in the common law of nations. That common law, as codified in international treaties and conventions, and as interpreted and applied by scholars and judges, provided its judicial basis. Correlatively, the trial contributed a powerful new precedent to the growing body of international law. It was a proceeding conducted by lawyers and it constitutes an important step in the long struggle to replace the role of force by the rule of law. The conception of law as a brake on power is one of the chief contributions to civilisation. At Nuremberg for the first time in history, men who had abused power were held to answer in a court of law for crimes committed in the name of war."

The procedure at Nuremberg, which accorded due process and a rigorous forensic examination, as well as full rights of defence to the accused, was largely the result of the efforts of Jackson to ensure that the Nuremberg trial could not be impugned as "victor's justice". In his 1945 address to the American Society of International Law, Jackson stated: "We must not use the forms of juridical proceedings to carry out or rationalise previously settled political or military policy. The process must be juridical, and the proceeding must be fair."

The Tribunal's statutes, drawing upon a well-established body of international law, custom and convention, gave specific definitions of crimes against peace, including conduct that involved the "planning, preparation, initiation and waging of a war of aggression…..or participation in a common plan or conspiracy for the accomplishment of any of the foregoing" (counts 1 and 2 of the indictment).

In his opening speech to the Tribunal, Jackson declared:

"Any resort to war—to any kind of war—is a resort to means which are inherently criminal. War inevitably is a course of killings, assaults, deprivations of liberty, the destruction of property. An honestly defensive war is—of course—legal, and saves those lawfully conducting it from criminality. But inherently criminal acts cannot be defended by showing that those who committed them were engaged in a war, when war itself is illegal. The very minimum legal consequence of the treaties making aggressive wars illegal is to strip those who incite or wage them of every defence the law ever gave, and to leave war-makers subject to judgment by the usually accepted principles of the law of crime."

The Nuremberg principle, making aggressive war criminal, was formally incorporated into international law by Resolution 95 (1) of the UN General Assembly. It was not, however, applied equally after World War II. Individuals responsible for war crimes on the allied side, in particular for deliberate civilian bombing, were never tried according to the Nuremberg laws.

In the post-war period, American foreign policy honoured Nuremberg primarily in the breach, rather than in the observance, with frequent military interventions and invasions in pursuit of US economic and political aims, particularly in Latin America and the Middle East.

America's involvement in Vietnam was clearly in breach of the prohibition on aggressive war, described in the Nuremberg judgment as the "supreme international crime". In the 1970s, Telford Taylor, a retired World War II brigadier-general (who had also served on Jackson's prosecution team and was lead counsel in subsequent Nuremberg trials, including those of leading industrialists and doctors), criticised America's involvement in Vietnam as a flagrant breach of the Nuremberg precedent in relation to both aggressive war and crimes against humanity. (Telford Taylor, *Nuremberg and Vietnam: An American Tragedy*, New York, 1970). In the context of national and imperial rivalries, the Nuremberg principles clearly could not be, in reality, a panacea to militarism and war.

To be continued

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