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Legal Findings of the International Military Tribunal at Nuremberg

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INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG"

Query: Is it necessary to discuss the extent to which aggressive wars were also "wars in violation of international treaties, agreements or assurances"?

Answer: "The Charter defines as a crime the planning or waging of war that is a war of aggression or a war in violation of international treaties. The tribunal has decided that certain of the defendants planned and waged aggressive wars against twelve nations, and were therefore guilty of this series of crimes. This makes it unnecessary to discuss the subject in further detail, or even to consider at any length the extent to which these aggressive wars were also 'wars in violation of international treaties, agreements or assurances.' The treaties are set out in the Appendix of the indictment and those of importance are the 1899 Hague Convention in which the signatory powers agreed: "before an appeal to arms . . . to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly powers." In the Hague Convention of 1907, a similar clause was inserted in the Convention Relative to Opening of Hostilities providing "The Contracting Powers recognize that hostilities between them must not commence without a previous and explicit warning, in the form of either a declaration of war, giving reasons, or an ultimatum with a conditional declaration of war." Germany was a party to each of the conventions. There is no doubt but that Germany violated certain provisions of the Versailles Treaty. "It is unnecessary to discuss in any detail the various treaties entered into by Germany with other powers. Treaties of Mutual Guarantee were signed by Germany at Locarno in 1925, with Belgium, France, Great Britain and Italy, assuring the maintenance of the territorial status quo. Arbitration treaties were also executed by Germany at Locarno with Czechoslovakia, Belgium, and Poland. Conventions of Arbitration and Conciliation were entered into between Germany, the Netherlands and Denmark in 1926; and between Germany and Luxemburg in 1929. Non-aggression treaties were executed by Germany with Denmark and Russia in 1939. The Pact of Paris was signed on the 27th August 1928 by .... powers. .... in the opinion of the Tribunal this Pact was violated by Germany in all the cases of aggressive war charged in the Indictment. It is to be noted that on the 26th January 1934 Germany signed a Declaration for the Maintenance of Permanent Peace with Poland, which was explicitly based on the Pact of Paris, and in which the use of force was outlawed for a period of ten years. The Tribunal does not find it necessary to consider any of the other treaties referred to in the Appendix, or the repeated agreements and assurances of her peaceful intentions entered into by Germany."

Query: What is the jurisdiction of the Tribunal?

Answer: "The jurisdiction of the Tribunal is defined in the Agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal."

Query: What was the authority for making the Charter?

Answer: "The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law. The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law."

Query: Was a war of aggression a crime before the London Agreement?

Answer: "The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime; and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement. But in view of the great importance of the questions of law involved, the Tribunal has heard full argument from the Prosecution and the Defense, and will express its view on the matter. It was urged on behalf of the defendants that a fundamental principle of all law - international and domestic - is that there can be no punishment of crime without a pre-existing law. 'Nullum crimen sine lege, nulla poena sine lege.' It was submitted that ex post facto punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders. In the first place, it is to be observed that the maxim nullum crimen sine lege is not a limitation of

sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the government of Germany, the defendants, or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts. This view is strongly reinforced by a consideration of the state of international law in 1939, so far as aggressive war is concerned.... ....the Kellogg-Briand Pact was binding on sixty-three nations, including Germany, Italy and Japan at the outbreak of war in 1939.... The nations who signed the Pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact.... But it is argued that the Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war.... Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offences against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention. In interpreting the words of the Pact, it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law, and

not with administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.

"The view which the Tribunal takes of the true interpretation of the Pact is supported by the international history which preceded it. In the year 1923 the draft of a Treaty of Mutual Assistance was sponsored by the League of Nations. In Article I the treaty declared 'that aggressive war is an international crime', and that the parties would 'undertake that no one of them will be guilty of its commission'. The draft treaty was submitted to twenty-nine states, about half of whom were in favor of accepting the text. The principle objection appeared to be in the difficulty of defining the acts which would constitute 'aggression', rather than any doubt as to the criminality of aggressive war. The preamble to the League of Nations 1924 Protocol for the Pacific Settlement of International Disputes ('Geneva Protocol') after 'recognizing the solidarity of the members of the international community', declared that 'a war of aggression constitutes a violation of this solidarity and is an international crime.' ....Although the Protocol was never ratified, it was signed by the leading statesmen of the world, representing the vast majority of the civilized states and peoples and may be regarded as strong evidence of the intention to brand aggressive war as an international crime. At the meeting of the Assembly of the League of Nations on the 24th September 1927, all the delegations then present (including the German, the Italian and the Japanese), unanimously adopted a declaration concerning wars of aggression." The preamble to the declaration stated that a war of aggression can never serve as a means of settling international disputes and is in consequence an international crime. "The unanimous resolution of the 18th February 1928 of twenty-one American republics at the sixth Pan-American Conference, declared that 'war of aggression constitutes an international crime against the human species.' All these expressions of opinion, and others that could be cited, so solemnly made, reinforce the construction which the Tribunal placed upon the Pact of Paris, that resort to a war of aggression is not merely illegal, but is criminal. The prohibition of aggressive war demanded by the conscience of the world, finds its expression in the series of Pacts and Treaties to which the Tribunal has just referred." It is also important to remember Article 227 of the Treaty of Versailles which provided for the constitution of a special Tribunal, composed of representatives of five of the Allied and Associated Powers to try the former German Emperor "for a supreme offence against international morality and the sanctity of treaties." In Article 228 of the Treaty, the German Government expressly recognized the right of the Allied Powers "to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war."

Query: Is international law concerned only with the actions of sovereign states? Where the act in question is an act of state, are those who carry it out protected by the doctrine of the sovereignty of the states?

Answer: In the opinion of the Tribunal each of these questions must be answered in the negative. "That international law imposes duties and liabilities upon individuals as well as upon states has long been recognized. In the recent case of Ex Parte Quirin....persons were charged during the war with landing in the United States for purposes of spying and sabotage....the Court said: 'From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals.' He /Justice Stone/ went on to give a list of cases tried by the Courts, where individual offenders were charged with offences against the laws of nations, and particularly the laws of war. Many other authorities could be cited, but enough has been said to show that individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. The provisions of Article 228 of the Treaty of Versailles already referred to illustrate and enforce this view of individual responsibility. The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares 'The official position of defendants, whether as heads of state, or responsible officials in government departments, shall not be considered as freeing them from responsibility, or mitigating punishment.' On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorising action moves outside its competence under international law."

Query: Is the contention of the defendants that in doing what they did they were acting under the orders of Hitler, sufficient to relieve them of responsibility for acts committed by them in carrying out these orders?

Answer: "The Charter specifically provides in Article 8: 'The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment.' The provisions of this Article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though,

as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."

Query: Is the law of conspiracy applicable?

Answer: "Planning and preparation are essential to the making of war. In the opinion of the Tribunal aggressive war is a crime under international law. The Charter defines this offense as planning, preparation, initiation or waging of a war of aggression 'or participation in a common plan or conspiracy for the accomplishment...of the foregoing.' The Indictment follows this distinction. Count One charges the common plan or conspiracy. Count Two charges the planning and waging of war. The same evidence has been introduced to support both counts. We shall therefore discuss both counts together, as they are in substance the same.... The ' common plan or conspiracy' charged in the Indictment covers twenty-five years, from the formation of the Nazi Party in 1919 to the end of the war in 1945.... The Prosecution says, in effect, that any significant participation in the affairs of the Nazi Party or government is evidence of a participation in a conspiracy that is in itself criminal. Conspiracy is not defined in the Charter. But in the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party program, such as are found in the twenty-five points of the Nazi Party, announced in 1920, or the political affirmations expressed in 'Mein Kampf' in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan. It is not necessary to decide whether a single master conspiracy between the defendants has been established by the evidence. The seizure of power by the Nazi Party, and the subsequent domination by the Nazi State of all spheres of economic and social life must of course be remembered when the later plans for waging war are examined. That plans were made to wage wars, as early as November 5th, 1937, and probably before that, is apparent. And, thereafter, such preparations continued in many directions, and against the peace of many countries. Indeed, the thread of war - and war itself if necessary - was an integral part of the Nazi policy. But the evidence establishes with certainty the existence of many separate plans rather than a single conspiracy embracing them all. ....In the opinion of the Tribunal, the evidence establishes the common planning to prepare and wage war by certain of the defendants. It is immaterial to consider whether a single conspiracy to the extent and over the time set out in the Indictment has been conclusively proved. Continued planning, with aggressive war as the objective, has been established beyond doubt. ....The argument that such common planning cannot exist where there is complete dictatorship is unsound. A plan in the execution of which a number of persons participate is still a plan, even though

conceived by only one of them, and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it. Hitler could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated....The relation of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organized domestic crime.

"Count One, however, charges not only the conspiracy to commit aggressive war, but also to commit war crimes and crimes against humanity. But the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war. Article 6 of the Charter provides: 'Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.' In the opinion of the Tribunal these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan. The Tribunal will therefore disregard the charges in Count One that the defendants conspired to commit war crimes and crimes against humanity, and will consider only the common plan to prepare, initiate and wage aggressive war."

Query: Is Section (b) of Article 6 of the Charter defining War Crimes an innovation in International Law?

Answer: "The Tribunal is of course bound by the Charter, in the definition which it gives both of war crimes and crimes against humanity. With respect to war crimes....the crimes defined by Article 6, section (b), of the Charter were already recognized as war crimes under international law. They were covered by Articles 46, 50, 52, and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46, and 51 of the Geneva Convention of 1929. That violations of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument. But it is argued that the Hague Convention does not apply in this case, because of the 'general participation' clause in Article 2 of the Hague Convention of 1907. That clause provided: 'The provisions contained in the regulations (Rules of Land Warfare) referred to in Article I as well as in the present convention do not apply except between contracting powers, and then only if all the belligerents are parties to the convention.' Several of the belligerents in the recent war were not parties to this convention. In the opinion of the Tribunal it is not necessary to decide this question. The rules of land warfare expressed in the convention undoubtedly represented an advance over existing international law at

the time of their adoption. But the convention expressly stated that it was an attempt 'to revise the general laws and customs of war', which it thus recognized to be then existing, but by 1939 these rules laid down in the convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6(b) of the Charter."

Query: Was Germany bound by the rules of land warfare in the territories occupied by her during the war in view of the fact that she had completely subjugated those countries and incorporated them into the German Reich, giving her authority to deal with the occupied countries as though they were part of Germany?

Answer: "In the view of the Tribunal it is unnecessary in this case to decide whether this doctrine of subjugation, dependent as it is upon military conquest, has any application where the subjugation is the result of the crime of aggressive war. The doctrine was never considered to be applicable so long as there was an army in the field attempting to restore the occupied countries to their true owners, and in this case, therefore, the doctrine could not apply to any territories occupied after the 1st September 1939. As to the war crimes committed in Bohemia and Moravia, it is a sufficient answer that these territories were never added to the Reich, but a mere protectorate was established over them."

Query: Is Section (c) of Article 6 of the Charter defining Crimes against Humanity an innovation in International Law?

Answer: "The Tribunal is of course bound by the Charter, in the definition which it gives both of war crimes and crimes against humanity .... With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt. To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but

from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity."