

Dear Justice Jackson,

May I submit to you the following suggestions in connection with the forthcoming trial of major war criminals:

1. I wonder whether it would not be advisable to strengthen the "Jackson Doctrine" by arguments borrowed from Nazi legal literature.

I have in mind specifically your theory that the German State was nothing but an instrumentality of the party, which was again nothing but a gang of criminals. Strangely enough this theory, which is on the very basis of the "Jackson Doctrine" finds the most striking confirmation in the writings of the leading Nazi legal authority Professor Carl Schmitt. He makes this point in various writings, especially in his monographs on "State, People, Movement" and "The Three Ways of Legal Thinking". In these two monographs he, as the authoritative leader of the Nazi legal philosophers, makes the unequivocal statement that the State has not existence per se but is nothing but a servant of the people (Volk), which again is nothing but an instrumentality of the movement, (National Socialist Party). Certainly their moral connotations are different from yours, but the gradation of values is the same. It seems to me that a paragraph in the indictment referring to this authoritative statement may prove useful for the purpose of the trials.

2. It is obvious that while we are concerned with the final outcome of the trials we are no less concerned with the strength of the argument and the case as presented by the prosecution. I believe that there is probably in the offices of the prosecution a "devil's advocate" who is thinking in terms of defence.

It would appear that the defendants may hardly be able to contradict the facts. The evidence will probably be overwhelming. It can, therefore, reasonably be expected that it will concentrate its efforts on legal points. Here are these points:-

(a) The irresponsibility of State agents for State acts.

This is the traditional doctrine in both international and constitutional law. Hans Kelsen has recently based his theory of war crimes on these "inmunities". How can this theory be repudiated?

*as referred to under Poa 1*

I believe that the "Jackson Doctrine" gives an answer to this question while, on the other hand, a more elaborate study on this subject would seem to be most useful.

(b) The problem of illegality and criminality of Aggressive War.

There seems to be a gap in the "Jackson Doctrine" concerning the criminality of an aggressive war. In your article in the New York Times magazine, you speak about "illegal war". The problem arises whether illegal war is also a criminal war or there must be some specific elements in the illegal war to make it criminal. What are the implications of an illegal war and what are the implications of a criminal war? Here again it is very interesting to note that the above-mentioned legal Nazi authority, Carl Schmidt in his study on "The Tendency Towards the Discriminating Definition of War", *(The War Weidung from deservius, caudem Kellogg's gift)* takes a very definite stand against different types of war, as for instance, the just war, or the unjust war, war of aggression and war of self-defence, and so on. A more detailed and thorough discussion of all these problems may prove necessary in order to avert future attacks on <sup>the</sup> part of the defence who could quote some leading authorities in the Allied countries as favouring this view.

3. While emphasis on the Briand-Kellogg Pact is justified, a closer analysis, not only of the Pact itself, but specifically of the American note and the numerous reservations made by the signatories would seem to be imperative.

4. A special difficulty may arise out of the fact that neither the diplomatic correspondence preceding this conflict nor the individual charges and counter-charges made by the belligerent parties had specific reference to all the elements of the "Jackson Doctrine". Will it not be interpreted by the defence as proof that not only the belligerents specifically the United Nations have ever thought to use the Briand-Kellogg Pact as a factor in the struggle against the Axis? Will it not be stated by the defence that this would mean a commitment on the part of the United Nations not to stress these points?

5. I do not know whether in the numerous articles dealing with

the problem of war crimes, the basic problem of the implications of illegal war was at all discussed. It would seem to me that an illegal war is no war at all, in the sense that it does not immunise perpetration of individual crimes from the punishment inherent in such a crime. What I had in mind was the following: if a private citizen shoots another private citizen he commits murder and will be accordingly punished. But if these two citizens are in uniforms and are taking part in opposite armies as soldiers and they commit the same act of murder, it is no murder any more but hostilities - a perfectly legal action. If a citizen penetrates into the house of his neighbour and takes away his belongings, he commits theft and will be punished accordingly, but if the thief is in uniform in an enemy country and penetrates into his house and takes away whatever he deems useful, he is just requisitioning. If a private citizen meets on the street his friend or enemy and puts him into a room, locks him up and keeps him there, he is kidnapping, but if the same person is in uniform and he takes people back from their homes and puts them in concentration camps or in prison-camps, he is just taking <sup>prisoners</sup> ~~persons~~, a perfectly legal act. Now it would seem that the moment we recognise that there are illegal wars, everyone of these individual situations reverses to the original and elementary criminal act and the whole war, divested of its glory, becomes nothing but a series of common law crimes for which the instigators, the perpetrators and their accomplices have to be responsible in accordance with the criminal law of every civilized country.

I believe that this argument will probably play an important part in the controversy, and here again a more thorough study of all these problems may prove quite useful.

These are a few suggestions which I consider useful to submit to you and I need not say that I am prepared to discuss it with yourself or with your assistants at a place and at a time at your convenience.

Yours very truly,