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II. Jurisdiction and Powers of the IMT

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(1) In seeking to define the scope and powers of the IMT, no small consideration ought to be given to the fact that the IMT is a war court. On the structural plane, it partakes of the character of what is known in the American military and judicial precedents, since its creation by General Scott in 1847, during the occupation of Mexican territory, as "Military Commission."

The controlling features of a war court of this kind are well known. Although a court in the broad sense of the term, it does not belong to the judicial branch of government, being an agency of the executive power called into existence by special order of the head of the executive or of its military representative as Commander-in-Chief. By analogy with court martial, it has no common law power whatsoever, having only such powers "as vested in it by express statute or may be derived from military usage," and belongs to the class of minor courts "of special and limited jurisdiction and scope whose competency cannot be stretched by implication..." (William Winthrop, Military Law and Precedents, paragraphs 54-55, Second Edition, Washington, published by the War Department).

Created for a special purpose, for the trial of specific offenses and specific offenders, having only as much power as has been granted it, composed usually of military men, a Military Commission may, however, consist in part of civilians, at the discretion of the authority creating it; its action is commonly even more summary than that of a regular court martial.

(2) That the IMT as a joint military commission, in conformity with the above principles, draws all its powers from the instrument to which it owes its existence, is clearly embodied in the London Agreement of August 8, 1945. Article 2 of the Agreement reads: "The constitution, jurisdiction and functions of the International Military Tribunal shall be those set out

in the Charter annexed to this Agreement, which Charter shall form an integral part of this Agreement." This wording seems conclusive. It stresses without ambiguity<sup>in fact</sup> that the source of the powers and of the law governing the IMT is to be sought in the instrument by which it was created to the exclusion of any other source.

The exclusiveness of the Charter as a source of both procedural and substantive law of the Tribunal is affirmed in one of the first sections of the instrument. Indeed, the right of challenging, recognized before courts-martial and military commissions, is expressly denied by Article 3 of the Charter to the prosecution as well as to the defendants and their counsel; this is a clear demonstration of the will of the framers of the Agreement and Charter to confer upon judges, prosecution and defendants, only so much rights and powers as expressly granted, without allowing general principles of domestic or international law to stretch these express grants, to override them or conflict with them.

(3) Without engaging in a detailed recollection of the difficulties, inadequacies and shortcomings of international law which have motivated and required the establishment of a special international instrument setting up the IMT, it<sup>is</sup> however, necessary to recall three basic problems which were intended to be solved:

- a) To create an international court to deal with a specific class of war criminals, namely, those whose offenses, according to the Moscow Declaration of November 1, 1943, had no particular geographical location;
- b) To set aside completely or to mitigate the sphere of application of certain traditional and out-dated defenses currently admitted in international law, such as "heads of state," "superior orders," "acts of state," whose impact could have assured impunity precisely to those who bore the responsibility of instigating, initiating and organizing the whole process of aggression and atrocities;

- c) To set up, by a special international agreement, new norms of substantive international criminal law enabling the projected trial body to reach and to mete out punishment for the whole intricate process by which the Nazi top gang succeeded in seizing power and consolidating it through a regime of terror within Germany, as a means and an integral part of a master plan to carry out the same process of destruction of human liberties and democratic ways of life far beyond the German borders through wars of aggression and devices of wholesale annihilation or weakening of peoples and racial groups.

It thus follows that, while partaking by its structure of the character of a joint military commission, and while it is not without precedent, at least in the form of abortive drafts and provisions inserted into international treaties (Sheldon Glueck, War Criminals, Their Prosecution and Punishment, N.Y., 1944, p. 91 ff), the IMT, incontrovertibly, presents a character of novelty. It is novel in that it is called to apply international criminal provisions derogatory to certain prevailing concepts of international law, for instance, proclaiming and enforcing personal criminal responsibility instead of collective civil liability of a state responsible for crimes committed against nationals of another country in the carrying out of a war of aggression; also, responsibility for reprehensible acts committed by Germany against her own nationals, while its sovereign right to legislate and to make regulations within her boundaries was not denied by the society of nations. It is obvious that, for the application of such unprecedented concepts of international criminal law, the judges of the International Military Tribunal cannot look to precisely those prevailing principles, rules and views which the international agreement creating the tribunal sought to set aside or override.

(4) The exclusiveness of the Charter as source of law runs throughout all its basic provisions. Paramount among these provisions is, undoubtedly,

Article 6, in that it defines both the jurisdiction of the IMF and the crimes of which it may take cognizance. In making of the planning, preparation, or waging of a war of aggression a crime against international peace (6 A); in declaring crimes against humanity punishable whether committed before or during the war, whether or not in violation of the domestic law of the locus of their perpetration, (6 C), the framers of the instrument manifestly aimed at overcoming and discarding defenses drawn from the so-called ex-post-facto rule, or from the principle that there cannot be penalty without violation of a pre-existing penal statute, or from the principle of the sovereignty of the state and of its collective civil liability exempting the personal criminal responsibility of those who control its acts.

The whole concept of Article 6, both in spirit and in letter, compels the conclusion that neither prosecution nor defendants nor counsel nor judges may go beyond this newly enacted positive law to extend it or to dilute it by evoking, though even collaterally, general principles of domestic law or of international law overriding or conflicting with the provisions of the Charter. The inescapable conclusion is that the Tribunal is bound by the instrument to which it owes its very existence and cannot transcend its limits.

Defenses based upon ex-facto would scarcely be more admissible than the defense of "head of state" or "superior order" completely discarded or admitted with reservation by Articles 7 - 8 of the Charter. An attempt to shelter a defendant behind a rule which was deemed to be a prevailing international concept before the enactment of the Charter, irrespective of the patent fact that the defendants did not give the slightest consideration to principles governing relations between civilized nations, could scarcely be admitted <sup>any</sup> more than an attack upon the fairness of the trial on the ground e.g. of violation of the American constitutional guarantee against self-incrimination, or an attack upon the evidence based upon the ground e.g. of a violation of the Anglo-American rule excluding hear-say evidence.

Just as Articles 17 to 26 circumscribed the trial procedure of the Tribunal beyond which no judge, no prosecutor and no defendant can go without expressly violating Article 13 of the instrument, just so much has the substantive law to be applied by the IMT been defined limitatively in Article 6, and all that overrides its provisions, conflicts or is inconsistent with them, whether invoked as a direct defense or collaterally, cannot be admitted.

(5) In outlining the exclusiveness of the Charter as source of law and powers, we do not mean to say that the judges of the IMT are not invested with a large discretionary power. The measure of discretion given to them is, indeed, a very great one. It is in their sense of justice and conscience that they will have to find the conviction whether or not, within the strictly delimited framework of Art. 6, there was a violation of international treaties, agreements or assurances; whether or not there existed a common plan or a conspiracy to carry out a master plan of world domination through ruthless biological war; the very definition of what constitutes a war of aggression is left to them; too, the definition of what constitutes an inhuman act or persecution on political, racial or religious grounds, coming within the radius of crimes against humanity, is largely a matter of discretion. Again, it is left to them to define, in accordance with usual standards of criminal law of civilized nations, who may be considered organizer, leader, instigator, or accomplice; the important task of proclaiming a group as criminal in character is also a matter of discretion left to the judges of the IMT.

What we mean to say is that, while invested with a large discretion <sup>as</sup> to the qualification of the acts declared criminally punishable by the provisions of the Charter, no judge can allow the injection of issues of law whose result would tend to overthrow the basic concepts of the Charter, namely, to lead to the conclusion, even collaterally, that an act made a crime by the Charter is not legally a crime, or that a power granted by the Charter is not a legal

power, or that the trial procedure prescribed by the Charter may be extended or stretched.

For, to admit this would be tantamount to a denial by the judges of the IMT of the very basis upon which is rested their right to sit as a court representing the conscience of civilized nations.