

LEGAL PROBLEMS OF THE CRIMES AGAINST HUMANITY

(to be read in conjunction with my memorandum to Major Walsh, the Jackson statement, the Four Power Agreement and the Charter of International Military Tribunal, — "Law of the Case" in the opening speech of Justice Robert H. Jackson)

1. It is to be assumed that at a certain point the International Military Tribunal will have to decide the problem of:

- a) the essence of crimes against humanity falling within the jurisdiction of the Tribunal, as distinct from "war crimes" [Art. 6 (c) & (b)], or its constituent elements
- b) the penalty to be imposed on those guilty [Art. 27 of the Charter]

A curious situation arises: while the penalties are provided for the elements of the crimes are absent from the Charter and Agreement.

2. Alongside and partly prior to this legal problem the following preliminary question arises (in regard to the anti-Jewish crimes specifically):

Has the Tribunal to go through all the successive stages of the Jewish tragedy and establish their criminality, or

Should it take account of the cumulative effect of all the measures taken, which is practical annihilation. The implications of this alternative are obvious.

Should the Tribunal limit itself to the cumulative effect of the crimes it can evade all the pitfalls inherent in the second solution. In that case, the basic problem of the essence of crimes against humanity and their ~~own~~ punishment will be circumvented. Such a solution would be regrettable. It is therefore important to build up a theory to the contrary.

3. A solution of this problem can be found after a discussion of the following preliminary problems:

a) What is the function of the Agreement and Charter -- do they constitute the exclusive source of substantive, procedural or jurisdictional "Law of the Case." Two answers are possible. Arguments in favor of the affirmative and negative solutions. Should the affirmative solution prevail the problem would then seem solved. But what if the result of the analysis would be negative?

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Here an investigation of the following problems would be imperative:

aa) Are there some legal maxims behind and above the Agreement-Charter and, if so, which ones? Fair trial (in addition to Section IV, Art. 16 Charter?), non ex post facto legislation (has Art. 6 of the Agreement to meet this objection or is it a priori ruled out), personal vs. group responsibility (Arts. 9 and 10 of the Charter) and others; if so, what is their hierarchical relationship.

bb) What is implied in the numerous references of the indictment to "violations of international conventions, internal penal laws, general principles of criminal law." Note the absence of reference to the "law of nations" (exemplificative or limitative enumeration) and the source of the "general principles of criminal law," as analogy to Art. 38 of the Statute of the Permanent Court of International Justice.

4. Can the enumeration of the sources of law, frequently referred to in the indictment, be considered as sufficient for the ex-lege materialis of substantive provisions covering the "crimes against humanity." In the affirmative case the three sources will have to be examined. Among the "international agreements" <sup>the</sup> following legal acts should not be overlooked, and their relevance as source of obligation for the German Reich overruling national legislation should be discussed:

- (1) The "votum" of the Assembly of the League of Nations (1922) concerning protection of minorities;
- (2) The reiteration of this principle at the Assembly 1933.

5. Should the Tribunal consider the individual legal enactments of the Nazis against the Jews as within the purview of the I N T, a higher law system must be adduced than the then prevalent national law and this can be only the law of nations broader in its scope than international agreements. (Cf. Art. 4 Weimar Constitution).

6. What is the place of the law of nations in the system of the Agreement-Charter. Cf. the Jackson report and its relevance to an answer of this question.

7. Provided that the I N T cannot ignore the law of nations (as a larger notion than "international agreements") what are the sources of the law of nations:

- aa) the system of Art. 38 PCIJ (INTERNATIONAL COUNCIL OF THE JUDICIAL)
- bb) the system of the preamble of the Fourth Hague Regulation.

8. Proof must be adduced to the effect that internal legislative and other acts cited in the Brief belong to "volkerrechtsgebundene Staatsrecht" and such are not only

- aa) overruled by the law of nations;
- bb) become illegal and
- cc) constituting violation of law of nations become criminal.

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9. The "exigencies of public conscience" as source of the law of nations. Is the conviction of the IAT an adequate expression of the "exigencies of public conscience" or some more objective manifestations are required. Discuss the relevance of "humanitarian intervention" as "usage," the Declaration on Rights of Man and Citizen of the New York Session of the Institut de Droit International, the underlying ideas of the Charter of the United Nations and its antecedents -- all of them as giving expression to the "exigencies of public conscience."

10. For the connection of Art. 60 with Art. 6 a in regard to anti-Jewish crimes, the following reasoning is suggested (Annex A).

11. Attention should be given (and <sup>their</sup> ENIA whole theories reexamined!) to Sheldon Glueck's theory of the general principles of criminal law and Quincey Wright's theory of offences against universal law.