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Some Preliminary Remarks

on

Legal Problems of the Crimes against Humanity

by

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- 1) The elements or constituent elements of crimes against humanity will become clear through a legal definition. The definition must contain:
 - the characterization of the act
 - the element of time
 - the element of place
 - the characteristics which make the crimes crimina sui generis.
- 2) The definition has to show that these crimes, being prima facie crimes, through the cruelty and brutality (inhumanity) of their execution, outrage the moral sense of mankind.
- 3) But these crimes are considered as belonging to the competence of the IMT only if they were committed in execution of, or in connection with, any crime within the jurisdiction of the Tribunal.
- 4) Therefore they are crimes (for this Tribunal) only if the other three Counts are acknowledged as crimes by the Tribunal. (Or will it seem sufficient if the Tribunal finds that the acts under Count 1-3 were committed, but the Tribunal, for legal reasons, is not able to declare them criminal?)

5) The definition for "crimes against humanity" would be the following:

"Crimes against humanity are:

Brutal and cruel acts, or persecutions on political, racial or religious grounds,

which outrage the moral sense of mankind,

committed, before or during the war,

in Germany, Austria, Czechoslovakia, Italy, on the

high seas and in the countries occupied after September 1, 1939,

in connection with or in execution of the common plan for committing crimes against peace."

6) It is not sufficient for the Tribunal to show that the crimes against the Jews under Count Four are just "crimes" but that they are "crimes against humanity." Therefore, the Tribunal has to go through the successive stages, with their brutal, inhumane and criminal dolus and purpose. The indictment marks the stages in Count One as

"the program of action against the Jews:

disfranchisement, stigmatization, denial of civil rights,

subjecting their persons and property to violence, deport-

ation, enslavement, enforced labor, starvation, murder and

mass extermination."

The concept "systematic persecution" in Count Four contains the following stages:

"They were deprived of their liberty, thrown into concentration camps, where they were murdered and ill-treated ~~ill-treated and murdered~~ ^{better}. Their property was confiscated.

Since September 1, 1939 the persecutions were redoubled."

But Part (B) of Count Four concurs with and overlaps Part (A), which speaks of the "adopted policy of persecution, repression and extermination of all civilians in Germany" who were or were suspected of being hostile to the Nazi Government. Here the indictment enumerates:

"Murder, extermination, enslavement, deportation and other inhumane acts before and during the war."

The systematic course of conduct, the systematic persecutions since 1933, have to be shown. That means the stages, because the system was built upon them.

- 7) By this procedure the Tribunal may find several "crimes against humanity with regard to Jews" instead of the one crime of annihilating the Jewish people, as a crime against humanity.

But the concept of "persecution" (systematic persecution) should open the way to the conception of one crime based on einheitlichen Vorsatz with the single stages being crimes in themselves. This does not mean a collective crime consisting of several crimes, but one crime for the existence of which the stages are necessary parts, although every stage is in itself criminal.

All this goes in addition to the crime in Count One.

(will be continued)

PRELIMINARY REMARKS

The outline concerning "Legal Problems of the Crimes against Humanity" includes a large number of most serious questions of international law in connection with the indictment against top Nazis.

I believe that the discussion of these questions will only complicate the judicial situation. In his report to the President, Robert Jackson said:

"There is, of course, real danger that trials of this character will become ensnared in voluminous particulars of wrongs committed by individual Germans throughout the course of the war and in the multitude of doctrinal disputes which are part of a lawyer's paraphernalia."

In my opinion, both the enumeration of particular crimes and the doctrinal disputes should be omitted if we wish the verdict to be announced shortly.

To p. 1a. As far as I can see, the Charter of the International Military Tribunal makes a distinction between war crimes and crimes against humanity. This distinction is based on time, place of commission of the crimes and definition of criminal acts (crimes against humanity: "persecution on political, racial and religious grounds in execution or connection with any crime within the jurisdiction of Tribunal"). The indictment explicitly follows these distinctions although it recognizes that "this prosecution will rely upon the facts pleaded under Count Three (War Crimes) as also constituting crimes against humanity." Persecution on political, racial and religious grounds is not criminal per se, but only in connection with the ultimate aims of the conspiracy.

The disputable question whether the sentence "in connection with any crime..." belongs to the entire Par. 6(c) or to its second part only has been solved by the indictment itself, in which this sentence is added to p.B only and not to p.A.

To p. 1b. For the punishment of the guilty the difference between war crimes and crimes against humanity is unimportant, for the penalty is a matter of discretionary power of the I.M.T. Moreover, all defendants are accused of conspiracy, which is the most important count of the indictment.

I am not sure whether it is appropriate to prepare a list of various crimes (elements of crimes) perpetrated by Nazi leaders, not only because of its volume -- as mentioned by Justice Jackson -- but also because it is bound to be incomplete. Prof. Lauterpacht and judge de Baer tried to make such an inventory and had to admit, however, that their enumeration could not be complete. I, myself, tried to compile a list of the specific crimes against the Jews. Comparing my list with the indictment I note that only ghettoization, blasphemy, and burning of synagogues are not mentioned in the indictment.

To pp. 2 and 3. The Charter, in my opinion, is a special law, "law of case," and cannot be interpreted extensively. Therefore, it is impossible to discuss the question concerning crimes against humanity in its entirety. We are compelled to confine this question to the framework of the indictment. In particular, the persecution on political, racial and religious grounds is, according to the indictment, a crime only in connection with the preparation to and waging of an aggressive war. It is not admissible to extend the limits of the accusation.

Taking into account the special character of the Charter, we must admit that it can be interpreted only on the basis of its context and treaties referred to as well as the Agreement for its Establishment. In the latter we find reference to the Moscow Declaration of October 30, 1943 and to others made "from time to time." To the Charter is attached Appendix C which includes 26 various treaties and assurances violated by the Nazis. All other treaties, international propositions, etc. cannot be taken into consideration by the I.M.T.

Moreover, I believe that since the desiderata of the Assembly of the League of Nations in 1922 and 1933 were not accepted, they have neither legal nor moral significance.

The numerous references in the indictment to "violation of international conventions" imply treaties which were annexed to the indictment only. Reference to "internal penal laws" and "general principles of criminal law" is made to give a definition for various criminal acts. "General principles of criminal law" may serve for the definition of organizers, instigators, accomplices, extenuating circumstances, as well as other definitions, mentioned in the general part of every Criminal Code.

It should not be overlooked that nowhere is racial persecution recognized as a crime. From the international viewpoint it may be unlawful but not criminal.

The link between the annihilation of Jews and the entire Nazi policy has best been illustrated by your Annex A.

The 1918 Allied Declaration included "inhuman acts committed in connection with the war of aggression" into the category of war crimes without reference to "the principles of the law of nations," mentioned in the Preamble to the Hague Convention. This would lead to the conclusion that "inhuman acts" are not only acts which were indicated in the Hague Convention, but extend beyond this enumeration in connection with war.

Nevertheless, inhuman acts were presented only as acts of physical violation. Now, instead of "inhuman acts" the indictment speaks of "crimes against humanity." This conception is more broad and can be interpreted to the effect that any discrimination may be considered as a crime against humanity; this conclusion, however, cannot be deduced from the Charter of the I.M.T.

Obviously, it is more than desirable that the Court's decision condemn racial laws. In this connection I would like to make the following suggestion:

All racial laws were a means to accomplish ^{the} Nazi conspiracy (Count 1 of the Indictment). These laws were also the material evidence of their crimes.

Inasmuch as the defendants will be sentenced as guilty, all means and evidence of their criminal acts must be destroyed. Therefore, the racial laws should be abrogated, i.e., declared as null and void.