IN THE
INTERNATIONAL COURT
OF
JUSTICE

Spring Term, 2010
WE HAVE NEITHER GIVEN NOR RECEIVED UNAUTHORIZED HELP

International Military Tribunal
Prosecution
V.
Herman Goering
Defendant

Brief for the Defendant

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Submitted to the Honorable James A. Morrison

Statement of Issue:

Herman Goering is being indicted for three offences:

1) **Crime against Humanity**
2) **Crime against Peace**
3) **War Crime**

Statement of Legal Standard:

We, the defense, stand before the court to argue that Herman Goering is not guilty of the above charges. We will prove that Herman Goering was indicted on *ex post facto laws,* arguing that these charges were "**adopted after [the] act [wa]s committed making it illegal although it was legal when done."**

Summary of the Argument:

Prosecution contends that the defendant, Herman Goering, has committed crimes against humanity, crimes against peace, and war crimes between the years 1939 and 1945. To support their claim, prosecution highlights Goering's political status in the Nazi regime. They argue that he was "the moving force in the Nazi regime, second only to Adolf Hitler himself.[1]" We are not here today to neither dispute the facts of the case nor determine his status in the regime. We are here to address the legal issue. Herman Goering is charged with three crimes that were not yet grounded in International Law at the time.

Argument

I. CRIMES AGAINST HUMANITY

The Prosecution presents their argument by defining "**crimes against humanity**." They define the term by using the definition offered by the London Charter, which states that a crime against humanity includes "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[2]" However, the terms used in this definition are not exclusive to this case and can be applied to other countries. **Point to case:** the United States. The United States during the time of slavery dehumanized, enslaved, and committed inhumane acts toward African Americans. Yet, these atrocious crimes were left unaddressed by the International Community. The United States, following slavery, continued its crimes against humanity by advocating for Eugenics, in the early 19th century. In the 1920's, Martha Sanger was the leader of the Negro Project, which sought to "purify the bloodlines and improve the race by encouraging the '**fit**' to

[1] D'Auria and Watroba, Prosecution's Brief, Spring 2010

[2] "Nuremberg Trial Proceedings Vol. 1 Charter of the International Military Tribunal." *The Avalon Project, Documents in Law, History, and Diplomacy*. N.p., n.d. Web. 3 May 2010. <http://avalon.law.yale.edu/imt/imtconst.asp>.

reproduce and the '**unfit**' to restrict their reproduction. They sought to contain the '**inferior**' races through segregation, sterilization, birth control and abortion.[3]" In mentioning these cases, it is clear that this is **NOT** the first time that crimes of this sort have occurred, as the prosecution chooses to paint the picture. This is also **NOT** the first time that the International Courts had the opportunity to deem these crimes unlawful under the statutes of International Law. Oliver Wendell Holmes states: "**If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.**[4]" The International world was **NOT** oblivious to the future consequences. They knew that by overlooking the crimes, in the U.S., they were paving the way for others to commit inhumane acts. If people like **Margaret Sanger** were punished under the law for advocating the "Negro Project," people like Hitler could have been restrained and prevented from continuing the process of purifying the race.

This is an area in which prosecution fails to make its case. They argue that courts immediately found Herman Goering's crimes to be horrific and unacceptable, implying that this is a first time event. Prosecution fails to realize that this is not the first time that crimes of this sort have occurred. During the eugenics movement in 1920's "more than 100,000 people were sterilized[5]" in order to purify the race in America. Was that not Hitler's aim? Courts established precedent the moment they ignored the crimes occurring in the United States because they deemed them acceptable for future countries to do. The Nazi regime was simply following the precedent set by the international world.

II. WAR CRIMES

In further, the prosecution is charging Goering with war crimes, arguing that "throughout Germany's occupation of foreign territories during the War, military forces murdered and tortured civilians, ill-treated them, and imprisoned them without legal process.[6]" This said, if Goering is being tried for war crimes, then the two-allied leader who killed almost 1 million people should be tried and hanged. Winston Churchill authorized the indiscriminate bombing in Dresden. In 1945, Churchill and Roosevelt allowed for the bombing in Dresden in order "to hit the enemy where he will feel it most, behind an already partially collapsed front, to prevent the use of the city in the way of further advance, and incidentally to show the Russians when they arrive what Bomber Command can do,[7]" which concomitantly led to thousands of deaths. Harry Truman authorized the nuclear strike on Nagasaki and Hiroshima, killing 70,000 residents on the first day. They

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[3] Green, Tanya. "Margaret Sanger." *The Negro Project*. Concerned Women of America, 10 May 2001. Web. 3 May 2010. <http://www.citizenreviewonline.org/special_issues/population/the_negro_project.htm>.

[4] Holmes, Oliver Wendell. "The Path of the Law." *Harvard Law Review* 10, no. 457 (1897): 457-78

[5] "Eugenics in America: A Brief History ." N.p., n.d. Web. 3 May 2010. <http://www.sntp.net/eugenics/eugenics_america.htm>.

[6] D'Auria and Watroba, Prosecution's Brief, Spring 2010

[7] Bombing of Dresden." N.p., n.d. Web. 3 May 2010. <http://www.spartacus.schoolnet.co.uk/2WWdresden.htm>

killed almost 1M people and were not tried. Why? Churchill and Truman were victors, and that is what distinguished them. If Germany had won the war, the idea of charging Goering would have never surfaced. Isn't justice supposed to be blind? Justice today is far from blind. What we have today is a victor's justice.

> "As far as right goes they think one has as much of it as the other, and that if any maintain their independence it is because they are strong, and that if we do not molest them it is because we are afraid; so that besides extending our empire we should gain in security by your subjection; the fact that you are islanders and weaker than others rendering it all the more important that you should not succeed in baffling the masters of the sea."

Prosecution cites the Hague Convention arguing that that there was a "widespread international agreement on the illegality of War Crimes and Crimes against Humanity.[8]" But was there really a wide spread agreement? Crimes against humanity have clearly occurred in the past, as seen through the slavery movement in the U.S., the Eugenics movement in the 1920's, and the bombings in Dresden. Rather than adhering to the "international agreement" and punishing crimes of this sort, courts are picking and choosing which crimes to address. This serves to prove that the cards are stacked against the defendant, and that this is an unfair trial.

III. QUESTIONABLE AUTHORITY OF THE IMT TO INDICT ON THE BASIS OF WAR CRIMES.

The accounts of war presented in court have been brutal and gruesome, yet giving the International Military Tribunal the authority to try and punish war criminals is a pivotal development in international law, spurns legal convention and walks the international community into uncharted legal territory. Primarily, the defense raises the credibility of the IMT, the use of *jus cogens*, as well as the notion to assign punishment to individuals in the case of treaties into question. The overall legal innovation attempted in this forum today is an injustice to the international community itself, as it leaves it wholly vulnerable to victor's justice.

The desire to seek vengeance for the lost men and women of World War II is understandable, yet to seek this vengeance here in this legal forum is ill fitting.
The prosecution argues that Article 6 of the Charter of the International Military Tribunal dictates its right as the authority to try and punish war criminals of the European Axis.
The constituents that made up that quorum included the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics—all of whom were key stakeholders and beneficiaries of the provisions they drafted.

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[8] D'Auria and Watroba, Prosecution's Brief, Spring 2010

IV. POWERS GRANTED BY GERMAN INSTRUMENT OF SURRENDER ARE LIMITED

An unconditional surrender has been touted as an additional argument for allowing this ad hoc tribunal to form; yet the instrument of unconditional surrender only transfers the power of domestic law over to the allies. Hans Leonhardt, author of "The Nuremberg Trial: A Legal Analysis" states, "Inasmuch as the right to legislate was derived form the unconditional surrender of Germany, the four powers would have been limited to the creation of German municipal law since the allies as legal successors of Germany would not have had more rights than Germany had possessed herself" (Leonhardt 449-450). Now, the argument of unconditional surrender is one of the many liberties it has bestowed upon this court.

V. FLAWED ARGUMENTS BASED ON JUS COGENS

The prosecution uses the Grotian theory of *jus cogens* to further its claim to indict the defendant based on Crimes against Peace and War Crimes, but also to nullify the argument of the implementation of ex post facto law. Yet their argument is uniquely flawed on two counts. Firstly, considering the complicated history of the above two indictments, the prosecution makes quite the leap to define them as peremptory norms recognized by all states. Leonhardt states, "Ever since the seventeenth century the right to wage war, the jus ad bellum, has been appropriated by the sovereign states and notions of raison d'etat rather than of a legally binding order have dominated the conduct of foreign affairs" (Leonhardt 454). Crimes against Peace and War Crimes cannot be explained for by *jus cogens* when history has obviously stood to defend the authority of states under jus ad bellum. Additionally, the prosecution has been so confident that war crimes are justified by the notion of *jus cogens*, as well as Articles 46, 50, 52, and 56 of the Hague Convention of 1907, yet the greatest crimes like slavery and the most brutal act of WWII--the bombing of Nagasaki--severely undermine their argument, for they themselves remain as unprosecuted crimes.

Now, the defense presents to the court its own use of *jus cogens* to support the argument that the prosecution is indicting based on ex post facto law. The prosecution was partially mistaken in stating that the first use of ex post factor was in court in 1948, because according to Francisco Martin and Stephen Schnably of "International Human Rights and Humanitarian Law," *jus cogens* has held constant to include the prohibition of criminal ex post facto laws in international law. Furthermore, Valerie Epps details "The crimes created by the Law and of which the appellant was convicted must be deemed today as having always borne the stamp of international crimes, banned by the law of nations and entailing individual criminal responsibility" (Epps 117). The indictments lobbied against Herm Goering do not meet these standards.

VI. TREATY VIOLATIONS ARE NOT THE BURDEN OF INDIVIDUALS

The most important fact is the prosecution's own admission that there is no penal law to address the indictment of Crime Against Peace. Their loose interpretation of the Treaty of

Locarno and the Kellogg-Briand Pact wrongly bestows the responsibility and punishment of the violation of the aforementioned treaties to individuals, which, unto itself is a misinterpretation of international agreements.

At the end of World War I in 1919, Article 227 of the Versailles Treaty was the first effort of its kind to assign individual culpability to a nation's criminal acts, yet it should be noted that the clause never held. At the time, the German Kaiser was immune from prosecution as a resident of the Netherlands. Such an action not only upholds a distinction between an individual and national's deeds, but a testament to the respect and authority of a nation's sovereignty—a notion so well founded in history, yet obviously not equally respected in this ad hoc tribunal created by the victors.

This International Military Tribunal is simply attempting to legalize the meting out of "victor's justice. Goering decreed during his testimony that "Everybody knows this is not a trial. This is just an arrangement where the victors will take revenge on the defeated" *(*Avalon Project*:* Nuremberg Trial Proceedings Volume 19). If indeed the International Military Tribunal was intent on administering justice, this quorum should be holding the high command of the US and the USSR to the same indictments of Crimes against Peace and War Crime for their role in the atomic bombing of Nagasaki and the massacre of the hundreds of thousands of Germans in Eastern Europe and fire-bombings of Hamburg and Dresden. Additionally, the USSR itself has been complicit in a conspiracy to divide Poland in its aggressive actions against Finland in the Winter War of 1939-1940. Had reciprocal justice been pursued, would this International Military Tribunal still stand, considering it was made up of Allied judges and conveniently excludes the use of aerial bombs in the London Charter.

"[The Nuremberg] war-crimes trials were based upon a complete disregard of sound legal precedents, principles and procedures. The court had no real jurisdiction over the accused or their offenses; it invented ex post facto crimes; it permitted the accusers to act as prosecutors, judges, jury and executioners; and it admitted to the group of prosecutors those who had been guilty of crimes as numerous and atrocious as those with which the accused were charged. Hence, it is not surprising that these trials degraded international jurisprudence as never before in human experience."

VII. Conclusion

Professor Harry Elmer Barnes put it best when he succinctly statedthat "[The Nuremberg] war-crimes trials were based upon a complete disregard of sound legal precedents, principles and procedures. The court had no real jurisdiction over the accused or their offenses; it invented ex post facto crimes; it permitted the accusers to act as prosecutors, judges, jury and executioners; and it admitted to the group of prosecutors those who had been guilty of crimes as numerous and atrocious as those with which the accused were charged. Hence, it is not surprising that these trials degraded international jurisprudence as never before in human experience" (Barnes 148). Never can the injustices committed during war be restored, but to attempt to completely disregard legal tradition will result in an egregious error and exacerbate the preexisting injustices.

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