Harvard Law Review Memo

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I.M.T. found that there was planning to wage wars at least as early as Nov. 5, 1937 and probably before that. Opinion 16, 34

I.M.T. specifically found that the war initiated against Poland on Sept. 1, 1939, was an aggressive war which developed in due course, on the basis of systematic preparation, into further aggressive wars which embraced almost the whole world. Opinion 34

I.M.T. found that Austria was occupied pursuant to a common plan of aggression, opinion 21-24, 145.

I.M.T. found that Bohemia & Moravia were occupied by (over)
military force. Opinion 24-27, 160. Such findings were necessary to sustain the conviction of von Schirach and von Neurath of Crimes against Humanity in the respective countries. (Harvard Law Rev. Note 48)

IMT found "Continued planning, with (CROSSED OUT the) aggressive war as the objective, has been established beyond doubt.

IMT convicted 8 defendants and acquitted fourteen of participation in the common plan. Of the eight convicted, four were military men (Goering, Keitel Raeder, & Jodl), two foreign ministers (von Neurath and Ribbentrop) and two high in Nazi circles (Hess and Rosenberg)
The most significant thing about the achievement of the Nuremberg verdict is that it emphasized the basic determination of the Charter: that aggressive war is a crime and all who participate in a conspiracy to that end are answerable. Harvard Law Rev p. 868.

(CROSSED OUT IMT evidenced)

IMT seemed to adopt view
(a) that criminal statutes are to be interpreted restrictively;
(b) lack of sympathy for the conspiracy concept.

Importance of getting at the substance of things.

Refutation of the coincidence argument. In the IMT Goering (Tr. 12976, July 4) argued that the defendants had never conspired together; and that some were not originally
members, while others had (CROSSED OUT been) long been high officials of the party. Jackson's reply; "It contradicts experience that this was merely a coincidence that men of such diverse backgrounds and talents should so forward each other's aims." They all had different roles because of the grand nature of the enterprise. But all made "integrated and necessary contributions to the joint undertaking...The activities off all these defendants...blend together into one consistent and militant pattern animated by a common objective to reshape the (CROSSED OUT may) map of Europe by force of arms."

Harvard Law Rev. p. 870

(CROSSED OUT The standard set in the Harvard ley Law Rev. Article the IMT is)
IMT standard which we must apply is to inquire whether the defendants, with knowledge of Hitler's aims, gave him their cooperation – (opinion pp. 55-56) This is the standard to judge participation in the common plan. But as to what constitutes (CROSSED OUT the plan) a common plan, the IMT rejected the prosecutions broad theory. *The IMT said that (CROSSED OUT the conspiracy mus) a conspiracy to wage aggressive war must be clearly outlined in its purpose with a concrete plan to wage war as its subject.
Further must not be too far removed from the time of decision and action. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan. (Opinion pp.50-55, Harvard Law Rev. p. 871)

(But it can be argued that this was only rejecting the broad conception of conspiracy that any significant participation in the affairs of the Nazi party or government was criminal – it is not in point as to specific acts of participation here charged.)
The prosecution in substance was arguing that the Nazi government itself was an open conspiracy and that anyone who participated in it was guilty. It does not follow that the phases of the plan in which these defendants participated is not clearly outlined in its criminal purpose.

Hebert
But even accepting the IMT's restricted definition of conspiracy – does it follow that the [CROSSED OUT defendants wer 14 defendants] acquittal of 14 defendants was fairly justifiable under the evidence?

Note IMT found that a common plan to prepare and wage war existed probably before November, 1937 – that plan was clearly outlined in its criminal purpose and not too far removed from the time of action. So query did not of these fourteen defendants cooperate in that common plan with knowledge of its aims?

Harvard Law Rev. 872

(Hebert Note: If IMT decided that there was common planning to war i.e. conspiracy possibly prior to Nov, 1937, [CROSSED OUT a time at which the definite decisions to attack] does it not follow that plan to attack a specific country is not a necessary element – plan to wage war if and wherever necessary
to achieve political objectives will suffice – whole question therefore turns on knowledge which in turns means knowledge of what? See analysis below of Shalcht's case)

Uniform defense in IMT was lack of knowledge that aggressive war was contemplated. (That will be the uniform defense in our case.)

Keitel argued that the military supported Hitler in rejecting the noarmament provisions of the Treaty of Versailles but that he did not foresee the danger of aggressive war because rearmament was not adequate for such a war even in 1939. (Krauch makes substantially same contention.)

Schacht argued that he could not be charged with having more knowledge that the rearmament was aggressive than Keitel and Keitel contended that he could not be held more accountable than the sophisticated Schacht, who had been Plenipotentiary for War Economy. (All Farben defendants contend that they cannot be held more
accountable for knowledge of the aggressive character of the rearmament than the acquitted IMT defendants – See motion to dismiss

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(A major difficulty is the contention that Hitler's protestations of peaceful intentions were widely believed. High Allied leaders had stated belief in Hitler's peaceful intentions. Mightn't defendant's have believed that [CROSSED OUT Hitler w] was bluffing and would not make war? But weren't defendants, by virtue of their positions and [CROSSED OUT know] nature of the war production in a better position to [CROSSED OUT judge] determine the true aims of Hitler? This interjects a doubtful note in the evidence in IMT case.) Harvard Law Review, p.873 points out that –"xx the gaps in the evidence had not all been filled. Except for the notes of the key conferences with Hitler, there were few documents definitely linking the non-military defendants with preparation for a specific war." The prosecution, therefore, asked
the Tribunal to infer knowledge and intimated the use of an objective standard, i.e., that defendants either knew or are chargeable with knowledge that the war for which they were making ready would be a war of German aggression. (Harvard L. Rev. p. 873)

"The Tribunal, however, insisted on being shown that the defendant did, in fact, know. In some few instances it was willing to infer substantive knowledge." (Hebert Note: This is substantially my position as to the Farben defendants.) "It inferred that Hess discussed war plans in conference with Hitler." (Query: Am I willing to infer that Krauch discussed war plans in conferences with Goering? But is it necessary to infer when the evidence shows that Krauch told Goering in substance that the figures were no good for making war? Isn't that enough?)
"It inferred that Fink knew, or deliberately closed his eyes to the fact, that his Reichs bank was the recipient of the personal belongings of concentration camp victims. But as a general standard the requirement of actual knowledge proved beyond a reasonable doubt was maintained."

This requirement is exceedingly difficult to maintain in the case of the non-military defendant. "In the absence of direct evidence of participating in the planning, and inference of actual knowledge could be drawn only from such unusual circumstances as existed in the case of Hess. The contradictory nature of Nazi propaganda, now belligerent, now conciliatory, and the ever-present claim that rearmament was to "defend" Germany from its neighbors made it easy for defense counsel to stress the naïveté of their clients." (Harvard Law Rev. p873)
"To show their knowledge and to establish when they joined the conspiracy present an almost insolvable problem of proof."

Schacht's case - none of the defendants had made a greater contribution toward increasing Germany's war potential. By 1937 he had financed the vigorous rearmament program and actively organized German economy for war. But rearmament is not a crime - must be carried out part of the Nazi plan to wage aggressive war. Did Schacht know he was helping Hitler on the road to war? Schacht was acquitted because the necessary inference of knowledge of the Nazi aggressive plans was not established beyond a reasonable doubt.

*** What is meant by knowledge of "Nazi aggressive plans" here? Does it mean knowledge of preparations for war against a particular country - that is does it mean concrete plans for a specific aggression? (Defense motion raises this and we will have to pass on this question -)

Does it mean [CROSSED OUT Harvard Law Review] knowledge of ultimate aggression in the event Germany's demands were not satisfied? (This is
the position I take - "Knowledge of Hitler's aims" - "Knowledge of the Nazi aggressive plans" means knowledge that aggression will be the result if German demands are not satisfied.

Harvard Law Review Says: "It is possible that the Tribunal based the acquittal (of Schacht) solely on a ruling that general knowledge, unaccompanied by knowledge of preparations for war at a specific time against a specific country, was insufficient in law. Such a doctrine would seem indefensible. The prosecution contended, however, that Schacht had knowledge of, and participated in, planning and preparing for ultimate aggression in the event that Germany's demands were not satisfied. There are indications in the opinion that the Tribunal - after acquitting Schacht under Count One because, even were the prosecution's theory adopted, it had not been established beyond a reasonable doubt that Schacht knew of general plans for aggressive war. If that was its view, the Tribunal's conclusion
that such knowledge on Schacht's part was not established is difficult to support." (Harvard Law Review p. 875)

(The above quotation supports the view that knowledge of general plans for aggressive war or knowledge of ultimate aggression in the event Germany's demands are not satisfied is sufficient knowledge to create criminal responsibility for participation in the common plan or conspiracy to wage aggressive war. It should also be noted that this passage and note 76 to the Article, support the view that Count two (similar to our count one) charged as aggressive the attacks on Poland and subsequent invasions & that Schacht had not participated in these. Under our count one we must determine whether there was participation etc in the specific aggressive wars [CROSSED OUT dealt with] enumerated in paragraph 2 of the indictment.)
(quote Harvard Law Rev Article as marked on pp. 875-879)

(It is my view that aggression can be planned with the number two man as well as with the No.1 man - this means that Krauch could plan aggressive war with Goering without knowledge of specific plans to wage aggressive wars against specific countries provided that he knows the aim is ultimate aggression. There is no reason to hold that [CROSSED OUT principals in] participants the common plan must be at the Hitler level.)
Crucial question was whether he knew of the plans to occupy Austria by force, if necessary. From the evidence concerning von Papen's activities, probable knowledge of these plans, or at least familiarity with the Nazi aggressive aims, might be inferred. An application of a standard of subjective knowledge, coupled with the necessity of proving guilt beyond a reasonable doubt, had led to Schacht's acquittal.

Did not become a top Nazi official until 1942 after all aggressive wars had been initiated. After 1942 his position in many respects in relation to armament was similar to that of Schacht in the rearmament years. The IMT found that "his activities in charge of German armament production"
were in aid of the war effort in the same way that other productive enterprises aid in the waging of war" and were not part of the common plan within count one.

(Can't this be explained on a ground that the purposes of the common plan had been consummated - all aggressive wars had been launched)

Other acquitted defendants had less knowledge that Schacht - Frick, Frank & von Schirach.

quote p. 881 as marked
Harvard L. Rev. p 881 - "Count one, which embodied the common plan, and Count Two, which charged the defendants with participation in the planning, preparation, initiation and waging of specific aggressive wars in violation of international treaties, were interrelated and to a large extent overlapping. The Tribunal felt, without, without expressly so stating, that knowledge of definite aggressive intentions sufficed for conviction under Count One, even if the defendant had no idea who would be the ultimate victim of the aggression. Under Count Two, however, the allegations of the indictment were limited to twelve specific aggressions; therefore,
knowledge of the specific plans to invade one of the enumerated countries had to be shown.

(Note: IMT indictment charged the defendants with initiating war against Poland, the United Kingdom, and France in Sept. 1939, and other wars thereafter, ending with the war against the United States. Reference was made to Count one for allegations that the wars were, in fact, aggressive, and the proof as to this was offered under Count One. The proof under Count Two was thus limited to setting forth the treaties agreements, and assurances. These are set forth in Appendix C of the indictment and discussed in the opinion at 46-54. The Tribunal made no finding on the initiation of war against the United Kingdom and France.)
"But the test of whether the function was of vital importance in the war was not the sole contention. Despite Speer's considerable importance as head of the German armament ministry, the Tribunal stated that the type of aid given to the war effort by "productive enterprises" did not constitute "waging" war. The ultimate test of responsibility under Count Two, then seems to have been the importance of the activity plus and "aggressive" characteristic of the activity - reaching out into the war zone or zone of occupation." (Query: Can I accept that in my thinking? It seems anomalous to convict on waging war alone - after war is on they were doing their duty as private citizens in response to orders of the state.")
(But this is hard to harmonize with the conviction of Frick & Seyss-Ignant who were convicted of waging aggressive war - because they administered occupied territory of vital importance in the aggressive war being waged by Germany.)

Harvard L Rev. Conclusion p. 903. - In future trials for Crimes against Peace the prosecution would be handicapped if it were confined to limits set in the opinion. If industrialists were among the defendants, the prosecution would be faced with a ruling that "production" is no part of the crime of waging war. It would be faced with the need of proof, a fatal omission in the Schacht case, that rearmament was carried out with actual knowledge
of aggressive war plans.

(Note 203. The extent to which the Nuernberg verdict will be followed as a precedent may be shown by the pending case against the I. G. Farben officials, U.S. v. Krauch. The first count of the indictment charges preparation and waging of aggressive warfare. The issue is whether Farben's executives knew that the war was to be one of aggression. The same question must be faced in connection with Farben's efforts to weaken the United States and Great Britain through cartel agreements, propaganda, intelligence and espionage activities. The other counts charge plunder and spoliation, slavery and mass murder, membership in the SS as to certain defendants, and a common
plan or conspiracy to commit Crimes against Peace as defined in Allied Control Council Law No. 10.

"Like any precedent the Nurnberg opinion is susceptible to interpretation and development. (1) Another tribunal may fuel that knowledge of aggressive intentions may be inferred from an individual's position and his ability to learn the facts; or (2) Or it may distinguish an "open" conspiracy, as in this case where the German Government with its manifold preparations was patently headed for war, from a conspiracy where the leading figures develop programs for aggression in secret. In the latter case, it may be argued, the
customary rules of Anglo-American law should apply. The case of "open" conspiracy where, the common plan is co-extensive with the ruling political group, would seem to be more within the preventative realm of the United Nations Security Council, which can keep informed and take necessary action; than the province of a criminal court.