Nuremberg

Student Materials

- Decided by the International Military Tribunal in September—October 1946
- Key topics: criminal law (principles, aggression); use of force (prohibiting force)

Learning Objectives

- Understand and apply:
  - non-retroactivity (including *nullum crimen sine lege* and *nulla poena sine lege*)
  - early law on the use of force

- Analyze and evaluate:
  - how states established individual criminal responsibility
  - the legitimacy of early international criminal tribunals

Background Information

After World War II, the major Allied Powers (France, the UK, the US, and the USSR) signed a treaty creating an International Military Tribunal at Nuremberg to prosecute Nazi German leaders for international crimes. The Allied Powers gave the Nuremberg Tribunal authority to prosecute "crimes against peace," which they defined as the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances."[1] They also allowed the Nuremberg Tribunal to prosecute crimes against humanity and war crimes. The Nuremberg Tribunal dated the beginning of World War II to the German invasion of Poland in 1939.

Many critics argued that the Nuremberg prosecutions for crimes against peace (now commonly called aggression) were retroactive justice. These critics argued that the Allied Powers were prosecuting and punishing German leaders for an act that was not criminal when it was committed. Nuremberg defense lawyers made two key claims:

[1] Nuremberg Charter (1945), Article 6(a).

- They argued that international law did not prohibit (or even define) "a war of aggression" in 1939.
- They argued that even if aggression was illegal, international law did not include individual criminal responsibility in 1939.

These arguments were (and continue to be) a major challenge to the legitimacy of the Nuremberg tribunal.

As you read this ruling, pay careful attention to how the Tribunal addresses these two separate questions:

- Was "aggression" illegal in 1939 under international law?
- Could individuals be held responsible for aggression in 1939?

In particular, pay careful attention to how the Tribunal invokes and uses various sources of law.

Relevant Legal Texts

Pact of Paris (1928)[2]

Article I

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another.

Article II

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Nuremberg Charter (1945)[3]

[2] Note that the Pact does *not* mention aggression, individual criminal responsibility, or punishment for Pact violations.

[3] Included in the London Agreement (1945), a treaty signed by France, the UK, the US, and the USSR.

Article 6

The Tribunal established … for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, … committed any of the following crimes:

> (a) *Crimes against peace*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of the forgoing …

Judgment

The Tribunal begins by stating that it is bound by the Nuremberg Charter. It argues that the Allied Powers had authority to "legislate for the occupied [German] territories" and that it need not consider whether aggression was a crime before 1945. Yet it also argues that it will nonetheless rule on this issue "in view of the great importance of the questions of law involved."

> The jurisdiction of the Tribunal is defined in the [Nuremberg] Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal.
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> The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.
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> The signatory powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the Court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law.

> The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime; and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the [Nuremberg Charter]. But in view of the great importance of the questions of law involved, the Tribunal has heard full argument from the prosecution and the defence, and will express its view on the matter.

The Tribunal then discusses the principle of non-retroactivity. It describes the defense's claim that aggression was not a crime when World War II began and that no punishment for aggression was provided by international law. It then emphasizes that German leaders must have known that they were breaking international law when they decided to go to war in 1939:

> It was urged on behalf of the defendants that a fundamental principle of all law—international and domestic—is that there can be no punishment of crime without a pre-existing law. "*Nullum crimen sine lege, nulla poena sine lege.*" It was submitted that *ex post facto* punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.
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> In the first place, it is to be observed that the maxim "*nullum crimen sine lege*" is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the government of Germany, the defendants, or at least some of them, must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts.

The Tribunal then describes the status of international law in 1939, when Germany decided to begin World War II:

> This view is strongly reinforced by a consideration of the state of international law in 1939, so far as aggressive war is concerned … The question is, what was the legal effect of [the Pact of Paris]? The nations who signed the pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the pact, any nation resorting to war as an instrument of national policy breaks the pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the pact. As Mr. Henry L. Stimson, then Secretary of State of the United States, said in 1932:
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> > War between nations was renounced by the signatories of the [Pact of Paris]. This means that it has become throughout practically the entire world … an illegal thing. Hereafter, when nations engage in armed conflict, either one or both of them must be termed violators of this general treaty law … We denounce them as law-breakers.

The Tribunal notes that the Hague Conventions of 1907—which created laws of armed conflict—do not expressly describe violations as crimes. Yet state routinely prosecuted individuals for war crimes in domestic military trials:

> But it is argued that the pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhuman treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offences against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention. In interpreting the words of the Pact, it must be remembered that international law is

> not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law, and not with administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices of States, which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.

The Tribunal discusses numerous actions that occurred before the drafting of the Pact of Paris (1928):

> The view which the Tribunal takes of the true interpretation of the Pact is supported by the international history which preceded it. In the year 1923 the draft of a Treaty of Mutual Assistance was sponsored by the League of Nations. In Article I the treaty declared "that aggressive war is an international crime," and that the parties would "undertake that no one of them will be guilty of its commission." The draft treaty was submitted to twenty-nine states, about half of whom were in favour of accepting the text. The principal objection appeared to be in the difficulty of defining the acts which would constitute "aggression," rather than any doubt as to the criminality of aggressive war. The preamble to the League of Nations 1924 Protocol for the Pacific Settlement of International Disputes ("Geneva Protocol"), after "recognising the solidarity of the members of the international community," declared that "a war of aggression constitutes a violation of this solidarity and is an international crime." It went on to declare that the contracting parties were "desirous of facilitating the complete application of the system provided in the Covenant of the League of Nations for the pacific settlement of disputes between the states, and of ensuring the repression of international crimes." The Protocol was recommended to the members of the League of Nations by a unanimous resolution in the Assembly of the forty-eight members of the League. These members included Italy and Japan, but Germany was not then a member of the League.
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> Although the Protocol was never ratified, it was signed by the leading statesmen of the world, representing the vast majority of the civilized states and peoples, and may be regarded as strong evidence of the intention to brand aggressive war as an international crime.
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> At the meeting of the Assembly of the League of Nations on 24th September, 1927, all the delegations then present (including the German, the Italian and the Japanese) unanimously adopted a declaration concerning wars of aggression. The preamble to the declaration stated:

> The Assembly: Recognizing the solidarity which unites the community of nations;
> Being inspired by a firm desire for the maintenance of general peace;
> Being convinced that a war of aggression can never serve as a means of settling international disputes, and is in consequence an international crime …
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> The unanimous resolution of 18th February, 1928, of twenty-one American republics at the sixth … Pan-American Conference, declared that "war of aggression constitutes an international crime against the human species".
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> All these expressions of opinion and others that could be cited, so solemnly made, reinforce the construction which the Tribunal placed upon the Pact of Paris that resort to a war of aggression is not merely illegal, but is criminal. The prohibition of aggressive war demanded by the conscience of the world finds its expression in the series of pacts and treaties to which the Tribunal has just referred.
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> It is also important to remember that Article 227 of the Treaty of Versailles provided for the constitution of a special tribunal … to try the former German Emperor "for a supreme offence against international morality and the sanctity of treaties." The purpose of this trial was expressed to be "to vindicate the solemn obligations of international undertakings, and the validity of international morality." In Article 228 of the Treaty, the German government expressly recognized the right of the Allied Powers "to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war."

The Tribunal then shifts to the issue of individual criminal responsibility. It begins by summarizing the argument that the decision to go to war is an act of state, for which individuals cannot be responsible:

> It was submitted that international law is concerned with the actions of sovereign states and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the state. In the opinion of the Tribunal, both these submissions must be rejected.

The Tribunal then argues that individuals have duties under international law:

That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized. In the recent case of *Ex parte Quirin* …, before the Supreme Court of the United States, persons were charged during the war with landing in the United States for purposes of spying and sabotage. The late Chief Justice Stone, speaking for the Court, said:

> From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals.

He went on to give a list of cases tried by the courts, where individual offenders were charged with offences against the laws of nations, and particularly the laws of war. Many other authorities could be cited, but enough has been said to show that individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

The provisions of Article 228 of the Treaty of Versailles already referred to illustrate and enforce this view of individual responsibility.

Finally, the Tribunal argues that the defendants cannot claim immunity from international criminal prosecutions and punishment:

> The principle of international law, which under certain circumstances protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares:
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> > The official position of defendants, whether as heads of state, or responsible officials in government departments, shall not be considered as freeing them from responsibility, or mitigating punishment.
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> On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who

violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.