U.S.A. AND OTHERS V. ARAKI AND OTHERS

SEPARATE OPINION OF THE PRESIDENT

1 November 1948

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The Law

The Charter is binding as it is International Law, the Potsdam Declaration and the Instrument of Surrender put into operation by the martial law of the Supreme Commander of the Allied Powers in occupation of Japan.

The Supreme Commander stated in his proclamation of the Tribunal and Charter - the martial law referred to - that he acted in order to implement the term of surrender that stern justice should be meted out to war criminals.

By the Instrument of Surrender the Japanese Emperor and Government undertook to carry out the provisions of the Potsdam Declaration in good faith and to issue whatever orders and take whatever action might be required by the Supreme Commander for giving effect to the declaration.

This imposed on the Japanese Government the obligation, among others, of apprehending and surrendering

persons named by the Supreme Commander as required for trial on charges of war crimes.

The Emperor and Government of Japan understood the term "war criminals" to include those responsible for the war.

The Instrument of Surrender also provided that the authority of the Emperor and the Japanese Government to rule the state should be subject to the Supreme Commander who would take such steps as he deemed proper to effectuate the terms of surrender.

Under International Law belligerents have the right to punish during the war such war criminals as fall into their hands. The right accrues after occupation of the enemy territory. As a condition of the armistice a victorious belligerent may require the defeated state to hand over persons accused of war crimes. The Potsdam Declaration and the Instrument of Surrender contemplate the exercise of this right. But guilt must be ascertained before punishment is imposed; hence the provision for trials.

The occupying belligerent may set up military courts to try persons accused of war crimes; and to assure a fair trial may provide among other things for civilian judges, the right of appeal, and publicity. (Oppenheim on International Law, 6th Edn. Vol. II, p. 456.)

Under the Charter the Supreme Commander has made provision for these things. He may review a sentence and reduce a heavy sentence to a light one; a sentence of death to, say, one of imprisonment for a brief period.

Crimes Against Peace

The Assembly of the League of Nations in 1925 and 1927 declared a war of aggression an international crime and that all such wars were and should be prohibited. In 1928 the Sixth Pan-American Conference declared that a war of aggression constituted a crime against the human species and that all aggression was illicit and prohibited. Then followed the Pact of Paris of 1928 signed or adhered to by sixty-three states, including the Allied Powers and Japan. This Pact, unlike the declarations referred to, does not contain the word "crime" or the word "criminal"; but having regard to the language of the Pact - the solemn condemnation of war, the renunciation of war as an instrument of national policy, and the agreement not to resort to it to settle or solve disputes or conflicts, and to the natural and probable, if not the inevitable consequences of recourse to war - the conclusion is irresistible that the illegality of aggressive war and its criminality were perceived and acknowledged. But there is the right of recourse to war in self defence, as appears from the negotiations that led to the Pact.

On 13th April 1928 the United States Government sent a note to Great Britain, Germany and Japan enclosing a draft treaty with a preamble and three Articles. Articles I and II were in the same terms as the corresponding Articles of the Pact as it now stands. The Note observed that the language of Articles I and II was practically identical with that of a treaty proposed in June 1926 by the French Foreign Minister,

M. Briand. On 20th April 1928 the French Government forwarded to Great Britain, Italy, Germany and Japan, and the United States a draft in which the rights of legitimate self-defence were especially reserved and which contained a condemnation and renunciation of recourse to war as an instrument of national policy, that is, as an instrument of individual, spontaneous and independent action on a nation's own initiative.

The Japanese Government on 26th May 1928 replied to the United States' Note that they sympathized with the aims of the proposal, which they took to imply the entire abolition of the institution of war. They added that they understood the proposal contained nothing that would refuse any independent state the right of self-defence.

On 23rd June 1928, the United States Government in a Note to the Governments of Japan and other countries, stated there was nothing in the American draft which restricted or impaired in any way the right of self-defence; that right was inherent in every sovereign state and implicit in every treaty; every nation was free at all times, and regardless of treaty provisions, to defend its territory from attack or invasion, and it alone was competent to decide whether circumstances required recourse to war in self-defence; express recognition by the treaty of this inalienable right, however, gave rise to the same difficulty encountered in any effort to define aggression: it was the identical question, approached from the other side;

inasmuch as no treaty provision could add to the natural right of self-defence, it was not in the interests of peace that a treaty should stipulate a juristic conception of self-defence, since it was far too easy for the unscrupulous to mould events to accord with an agreed definition.

On 20th July 1928, the Japanese Government replied to this Note that their understanding of the draft was substantially the same as that entertained by the United States.

Self-defence

As to the right to judge of the necessity of self-defence, "it is of the essence of the conception of self-defence that recourse to it must in the first instance be left to the unfettered judgment of the party which deems itself to be in danger..... But elementary principles of interpretation preclude a construction which gives to a state resorting to an alleged war in self-defence the right of ultimate determination, with legally conclusive effect, of the legality of such action. No such right is conferred by any other international agreement. The legality of recourse to force in self-defence is in each particular case a proper subject for impartial determination by judicial or other bodies." (Oppenheim on International Law, 6th Edn. Vol. II, pp. 154-5.)

Individual Responsibility

The conduct perceived and acknowledged as illegal and criminal is recourse to war for the solution of

international controversies as an instrument of national policy. Where the war takes place those responsible necessarily include those who decided on it and those who planned it and prepared for it. Preparation embraces crimes against humanity committed to facilitate war. Every state that became a party to the Pact of Paris perceived and acknowledged the illegality and criminality of recourse to war for the solution of international controversies as an instrument of national policy. If, nevertheless, any such state resorts to aggressive war, those individuals through whom it acts, knowing as they do that their state is a party to the pact, are criminally responsible for this delict of state.

The Charter, in providing for the trial of persons accused of this crime and for their punishment if convicted, does not violate International Law or the Natural Law, but gives effect to it, as well as to the Potsdam Declaration and Instrument of Surrender. Such crimes are not distinguishable in this regard from conventional war crimes. In any event, a state's sovereignty is not infringed where it agrees to the punishment of its nationals responsible for the war, either impliedly by subscribing to the outlawry of war, or expressly by, say, an instrument of surrender. (Lord Wright in 62 Law Quarterly Review 57; Professor A. L. Goodhart in 56 Juridical Review 11, 13; Sheldon Glueck, "The Nuremberg Trial and Aggressive War" (1946); Quincy Wright, 51 American Journal of International Law, pp. 38-72; Hans Kelsen in 31 California Law Review 530 at 539-41.)

The view that aggressive war is illegal and criminal must be carried to its logical conclusion, .g., a soldier or civilian who opposed war but after it began decided it should be carried on until a more favorable time for making peace was guilty of waging aggressive war.

There are no special rules that limit the responsibility for aggressive war, no matter how high or low the rank or status of the person promoting or taking art in it, provided he knows, or should know, it is aggressive.

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Conspiracy

Where the facts establish the actual commission of a substantive crime it is usual to charge the commission of the crime and not conspiracy to commit it. However, in the British Commonwealth it is considered legal to charge conspiracy in such a case, although some judges disapprove of this as unfair to the accused.

International law, unlike the national laws of many countries, does not expressly include a crime of naked conspiracy. The Pact of Paris recognizes as a crime recourse to aggressive war. This does not include conspiracy not followed by war. So too, the laws and customs of war do not make more naked conspiracy a crime.

It may well be that naked conspiracy to have recourse to war or to commit a conventional war crime or crime against humanity should be a crime, but this Tribunal is not to determine what ought to be but what is the law. Where a crime is created by International law, this Tribunal may apply a rule of universal application to determine the range of criminal responsibility; but it has no authority to create a crime of naked conspiracy based on the Anglo-American concept; nor on what it perceives to be a common feature of the crime of conspiracy under the various national laws. The national laws of many countries may treat as a crime naked conspiracy affecting the security of the state, but it would be nothing short of judicial legislation

for this Tribunal to declare that there is a crime of naked conspiracy for the safety of the international order.

Article V of the Charter declares participation in a common plan or conspiracy a means of committing a crime against peace, and states that leaders, organizers, instigators and accomplices, participating in the formulation or execution of such plan or conspiracy, are responsible for the acts performed by any person in execution of the plan. This is in accordance with a universal rule of criminal responsibility: when the substantive crime has been committed, leaders, organizers, instigators and accomplices are liable everywhere.

International Law may be supplemented by rules of justice and general principles of law: rigid positivism is no longer in accordance with International Law. The natural law of nations is equal in importance to the positive or voluntary. (Oppenheim on International Law Vol. I, 6th Edn., pp. 93, 102, 103.)

General

The existence of International Law was questioned by defence counsel.

International Law is essentially a product of Christian civilization and began gradually to grow from the second half of the Middle Ages. (Oppenheim on International Law, Vol. I, 6th Edn., pp. 5.)

Lord Russell of Killowen, then Lord Chief Justice of England, addressing the American Bar Association in 1896 defined International Law as:

> "The sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another."

Sir Frederick Pollock defined the law of nations, or International Law, as a body of rules recognized as binding on civilized, independent states in their dealings with one another, and with one another's subjects.

Sir Frederick added that treaties and conventions might define a portion of these rules, but any conventional law so laid down was binding only on the parties to it. However, he said that there was no doubt that when all or most of the Great Powers had deliberately agreed to certain rules of general application, such rules had very great weight in practice, even among states which had never expressly consented to them, and that agreements of this kind might be expected to become part of the universally received law of nations within a moderate time. He observed that sometimes it

was objected that International Law, so far as it was not included in authentic acts of state, was at the mercy of opinions expressed by private writers, and that from this it was argued that the very existence of any law in international matters was fictitious. In answer he quoted the views of the highest legal authorities of the English-speaking world that the opinions of experienced and approved publicists were valuable, not as mere opinion, but as evidence.

Mr. Justice Gray, delivering the majority opinion of the Supreme Court of the United States in The Paquete Habana (1899, 175, U.S. 677) said:

"Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."

In The Maria (1 Rob. Adm. at p. 363) Lord Stowell relied on Vattel, "not as a Roman lawyer merely delivering an opinion, but as a witness asserting the fact -- the fact that such is the existing practice."

Sir Frederick Pollock also said that modern International Law came and was received in the name of the law of nature to which both spiritual and temporal rulers had long professed allegiance; but suggested that this law of nature was nothing but another name for the general principles of morality: universal reason as manifested in the consent of reasonable men. (XVIII. Law Quarterly Review, 418.)

As to the Martial Law, this is in force without being proclaimed. It is the immediate and direct effect and consequence of occupation or conquest.

"Martial Law", said the Duke of Wellington, "is nothing more or less than the will of the general who commands the army.... I have in another country carried out Martial Law: that is, I have governed a large proportion of a country by my own will. But then what did I do? I declared that the country should be governed according to its own national law; and I carried into execution this, my sole declared will,....."

In 1857, Mr. Cushing, then Attorney General of the United States, quoted this statement by the Duke of Wellington and proceeded to say:

> "Martial Law.... as exercised in any country by the commander of a foreign army is an element of the jus belli..... The commander of an invading, occupying or conquering army rules the invaded country with supreme power, limited only by International Law and the orders of the sovereign or government he serves or represents. By the law of nations occupatio bellica in a just war transfers the sovereign powers of the enemy's country to the conqueror." (VIII Opinions of Attorney-Generals of the United States, 369 (1857); Professor Holdsworth in XVIII Law Quarterly Review, p. 132.); Hyde on International Law Chiefly as Interpreted and Applied by the United States, Second Revised Edition, Volume III, p. 1910.)

It will be noted that, according to Mr. Cushing, the conqueror exercises the sovereign powers of the enemy's country, limited by International Law.

As to the transfer of sovereignty, Oppenheim on International Law, Vol. II, p. 342, takes perhaps a narrower view but this makes no difference in the result. He says

> "..... the administration of the occupant is.....distinctly and precisely military administration.....the occupant is totally independent of the constitution and the laws of the territory, since.....safety of his forces and the purpose of war stand in the foreground of his interest and must be promoted.....But as he is not the sovereign of the territory he has no right to make changes in the laws or the administration, other than those necessitated by the..... safety of his army and the realization of the purpose of war....."

A purpose of this war was the realization of the objectives of the Potsdam Declaration and the punishment of war criminals.

I think there is no doubt as to the existence of both International Law and the Martial Law, and that they support the law of the Charter and the jurisdiction of this Tribunal.

Punishment

It may well seem that death should be the minimum punishment for a crime so great as initiating or waging war, with its accumulated evil. But the Nuremberg Tribunal did not think so.

After stating that

"to initiate a wage of aggression.....

"is not only an international crime: it is the "supreme international crime differing only "from other war crimes in that it contains "within itself the accumulated evil of the "whole" and adding that

"the charges.....that the defendants planned and waged aggressive war are charges of the utmost gravity",

the Tribunal proceeded to impose life sentences and less on accused found guilty not merely of conspiring to wage, and planning and waging wars of aggression but also of war crimes and crimes against humanity; whereas an accused found guilty simply of crimes against humanity was sentenced to death by hanging.

The crimes of the German accused were far more heinous, varied and extensive then those of the Japanese accused. There was no general ground for clemency in Germany that is not to be found in Japan.

Doenitz was found guilty on Counts 2 and 3 and given ten years' imprisonment.

Von Neurath was found guilty on all four counts and given fifteen years' imprisonment.

Reeder was found guilty on the first three counts and given life imprisonment.

.....

Out of the twelve found guilty of conspiring to wage or waging aggressive war, or both, seven were sentenced to be hanged, but the seven were also found guilty of war crimes and crimes against humanity. The other five found guilty of conspiring to wage or waging aggressive war, or both, were given life sentences or less, although two had also been found guilty of war crimes and crimes against humanity, and two of war crimes.

I suggest that the Tribunal in sparing the lives of these five men, namely, Hoess, Von Neurath, Funk, Raeder and Doenitz, took into account the fact that aggressive war was not universally regarded as a justiciable crime when they made war. Many international lawyers of standing still take the view that in this regard the Pact of Paris made no difference.

Unless the Japanese accused are to be treated with less consideration than the German accused no Japanese accused should be sentenced to death for conspiring to wage, or planning and preparing, or initiating, or waging aggressive war.

Then as to the punishment of war crimes and crimes against humanity: it is universally acknowledged that the main purpose of punishment for an offence is that it should act as a deterrent to others.

It may well be that the punishment of imprisonment for life under sustained conditions of hardship in an isolated place or places outside Japan - the usual conditions in such cases - would be a greater deterrent to men like the accused than the speedy termination of existence on the scaffold or before a firing squad.

Another consideration is the very advanced age of some of the accused. It may prove revolting to hang or shoot such old men.

Immunity of the Emperor

The authority of the Emperor was proved beyond question when he ended the war. The outstanding part played by him in starting as well as ending it was the subject of evidence led by the Prosecution. But the Prosecution also made it clear that the Emperor would not be indicted. This immunity of the Emperor, as contrasted with the part he played in launching the war in the Pacific, is I think a matter which this Tribunal should take into consideration in imposing sentences. It is, of course, for the Prosecution to say who will be indicted; but a British Court in passing sentence would, I believe, take into account, if it could, that the leader in the crime, though available for trial, had been granted immunity. If, as in cases of murder, the court must by law impose capital punishment, the prerogative of mercy would probably be exercised to save the lives of the condemned.

The Emperor's authority was required for war. If he did not want war he should have withheld his authority. It is no answer to say that he might have been assassinated. That risk is taken by all rulers who must still do their duty. No ruler can commit the crime of launching aggressive war and then validly claim to be excused for so doing because his life would otherwise have been in danger.

The suggestion that the Emperor was bound to act on advice is contrary to the evidence. If he acted on advice it was because he saw fit to do so. That did not limit his responsibility. But in any event even a Constitutional Monarch would not be excused for committing a crime at International Law on the advice of his Ministers.

I do not suggest the Emperor should have been prosecuted. That is beyond my province. His immunity was, no doubt, decided upon in the best interests of all the Allied Powers.

Justice requires me to take into consideration the Emperor's immunity when determining the punishment of the accused found guilty: that is all.

In fairness to him it should be stated that the evidence indicates that he was always in favour of peace, but as he elected to play the part of a constitutional Monarch he accepted ministerial and other advice for war, most probably against his better judgment. However, in order to end the war he asserted his undoubted authority and saved Japan.

Sentences

Although I cannot claim to have supported all the sentences decided upon as being the most likely to achieve the main purpose of punishment, still as I am unable to say that any sentence is manifestly excessive or manifestly inadequate I do not record any dissent.