

United States Military Tribunal at Nuremberg, The Justice Trial

[Source: War Crimes Reports, vol. 6, 1948, p. 1. Cited in Lauterpacht, H. (ed.), *Annual Digest and Reports of Public International Law Cases: Year 1947*, London, Butterworth & Co. Ltd., 1951, pp. 278, 288-289; footnotes omitted.]

N.B. As per the disclaimer ^[1], neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

***In re* Altstötter and Others (The Justice Trial),
Nuremberg, Germany, United States Military Tribunal,
December 4, 1947**

THE FACTS. The fourteen accused were judges, public prosecutors or high officials in the Reich Ministry of Justice. They were charged before a United States Military Tribunal with enacting and enforcing statutes, decrees and orders of an essentially criminal nature and with working with German Security Police organizations for essentially criminal purposes, in the course of which, by distortion and denial of judicial process, they committed crimes against civilian inhabitants of occupied territories, prisoners of war and German nationals. [...]

Held: that Altstötter and nine other accused were guilty of various charges. The four other accused were acquitted. [...]

(10) *Effect of Aggressive War on the Right of the Aggressors to Rely on Rules of Warfare.* “It is persuasively urged that the fact that Germany was waging a criminal war of aggression colours all of these acts with the dye of criminality. To those who planned the war of aggression and who were charged with and were guilty of the crime against the peace as defined in the Charter, this argument is conclusive; but these defendants are not charged with crimes against the peace, nor has it been proven here that they knew that the war which they were supporting on the home front was based upon a criminal conspiracy or was per se a violation of international law. The lying propaganda of Hitler and Göbbels concealed even from many public officials the criminal plans of the inner circle of aggressors. If we should adopt the view that by reason of the fact that the war was a criminal war of aggression every act which would have been legal in a defensive war was illegal in this one, we would be forced to the conclusion that every soldier who marched under orders into occupied territory or who fought in the homeland was a criminal and a murderer. The rules of land warfare upon which the prosecution has relied would not be the measure of conduct and the pronouncement of guilt in any case would become a mere formality. [...]

Discussion

1. How does *jus in bello* contrast with *jus ad bellum*? Is *jus in bello* merely an extension of *jus ad bellum*? Why did the UN International Law Commission decide not to concentrate on the codification of *jus in bello*? [See Quotation, Part I, Chapter 2. II. 2. a) cc) the prohibition of the use of force ^[2]] What is *jus contra bellum*?

2.

a. Is the Court correct in this case in deeming that the argument presented improperly mixes *jus ad bellum* and *jus in bello*? That violations of *jus ad bellum* do not automatically imply violations of *jus in bello*? If the Court had agreed with the argument presented that a violation of *jus ad bellum* conclusively establishes guilt for these charges, is the contrary true that the other party to the conflict is incapable of committing violations because its war is “just” and therefore may use all means to secure its rights? What impact would a proven violation of *jus ad bellum* have upon a charge of committing a crime against peace?

b. What are the dangers of mixing *jus ad bellum* and *jus in bello*? Would it not make respect for IHL impossible to obtain? In practical terms, how is one to ascertain and then establish which party to a conflict is resorting to force in conformity with *jus ad bellum* and which is violating *jus contra bellum*? Do not victims on both sides in the conflict need the same protection? Are the victims all responsible for violations of *jus ad bellum* committed by their side?

3. If *jus ad bellum* is completely separate from *jus in bello*, which limitations are placed upon *jus ad bellum* in relation to IHL and vice versa? (P I, Preamble ^[3])

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