

M E M O R A N D U M

TO : COLONEL CURTIS L. WILLIAMS

FROM : MAJOR B. D. SILLIMAN

27 Oct 45

SUBJECT: DEFENSE ANTICIPATION.

1. General Memorandum Number 5 issued by the Office of the U.S. Chief Of Counsel on 22 October 1945 provides for the creation of Section 7 to study the possible defenses that may be anticipated in this trial. The section chief is Dr. R.W.Kempner who is now in Frankfurt.

2. A partial list of defenses is attached to this memorandum as "Exhibit One". It is obvious that the committee will be concerned not with questions of fact but largely with difficult questions of law. The preparation of scholarly briefs of law on these legal questions will require the use of a comprehensive law library. Such a library is not available in Nuernberg.

3. It is my opinion that briefs on some of these points have already been prepared by Colonel Archibald King, J.A.G.D., Chief of the International Law Division in the Office of the Judge Advocate General, War Department, Munitions Building, Washington, D.C. Colonel Archibald King is one of the world's greatest authorities on international law. Briefs on some of those points may now be in the files of Brigadier General John M. Wier, J.A.G.D., Chief of the War Crimes Division in the Office of the Judge Advocate General.

4. When the section charged with Defense Anticipation has completed a list of the questions of law involved, I recommend that Justice Jackson or Major General William J. Donovan request the office of Brigadier General Wier to prepare the necessary briefs.

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Exhibit One.

DEFENSES.

1. CHALLENGE TO THE JURISDICTION OF THE COURT.
  - A. Have four of the victorious powers the right to set up a tribunal by agreement between themselves?
  
2. CHALLENGE TO THE COURT ON THE GROUNDS OF PREJUDICE.
  - A. Does the appointing authority have the power to appoint one of its own nationals as judge?
  - B. After having assisted in the preparation of the case can the French and Russian judges have a judicial attitude?
  
3. LAW OF CONSPIRACY.
  - A. What are the legal elements of a conspiracy?
  - B. What common action must be shown to establish a joint enterprise?
  
4. SUPERIOR ORDERS.
  - A. Have the four powers the right to change the substantive law and outlaw this defense by agreement? (Article 8 of Protocol).
  - B. Is such a defense valid under present international law?
  - C. Must a subordinate carry out an illegal order? (Llandonderry Castle case).
  
5. HEAD OF THE STATE.
  - A. Is this defense valid under current international law?
  - B. Have the four powers the right to change the substantive law and outlaw this defense by agreement? (Article 7 of Protocol)
  
6. ORGANIZATIONS NOT SUBJECT TO INDICTMENT.
  - A. Can there be a conviction of a group that is not a legal entity?
  - B. Does the court acquire jurisdiction of an organization where no method of giving notice is prescribed by the court or international law?
  
7. ACTS LEGAL UNDER GERMAN LAW.
  - A. Is it criminal to perform an act that is legal under the German law as it existed at the time?