The legal problems of the crimes against humanity with special consideration of the anti-Jewish crimes

1. Analysis of Article 6 (c)

The Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom, Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics of August 8, 1945, for the prosecution and punishment of the major war criminals of the European Axis provided in Article 6, paragraph 2, section (c), special provisions for crimes against humanity. Article 6 reads as follows:

"The Tribunal established by the Agreement referred to in Article 1 hereof 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, whether as individuals or as members of organizations, committed any of the following crimes."

The following acts, or any of them, are crimes falling within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) CRIMES AGAINST PEACE, namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of treaties, agreements or understandings, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) WAR CRIMES, namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilians, members of civil or military groups, or any other person, on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) GENOCIDE AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or personnel on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a plan or in any way responsible for any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plans.

While our main interest is concentrated around (a), a proper analysis of this section is obviously impossible without reference to the two previous sections: (a) and (b).

1. The Crime

Here are the basic elements of this crime:

a) Is it legitimate for this crime to be put outside our or our part in violation of domestic law of the country where committed? This would mean that, in cases where such crimes constitute violation of domestic law of the country where perpetrated, reference to this legislation -- if at all advisable -- cannot be of decisive character, particularly, the S.S. cannot be held bound by punishment provided for it in national legislation (cf. also Art. 37 of the Charter). On the other hand, the circumstances that the law of the country of perpetration did not provide punishment for
such acts or any of them does not preclude the court to impose penalties on the defendants. The law of the Agreement is thus sovereign and the sources and limitations of the powers of the Court lie in the Four Power Agreement and the Charter of the I.C.T.R. only (cf. para art. 27 of the Charter).

b) The victims of this crime are civilians;

c) The time of the perpetration of this crime is “before or during the war.” There can hardly be any difficulty in defining the meaning of the expression “during the war.” In view of the lack of any limitation in time, it should be reasonably understood that “before the war” refers to the whole period of such activities by the investigated persons, extending at least from the start of power till the beginning of the war against Poland.

d) However, the definition of “crimes against humanity” in general may be, not all of them come under the jurisdiction of the I.C.T.R., only those which were perpetrated “in connection with or in connection with any crime within the jurisdiction of the Tribunal.” It is obvious that the last sentence refers either to “war crimes” (Art. 6(b)) or to “crimes against peace” (Art. 6(a)). The prosecution has to undertake the job of proving...
that the "crimes against humanity" were actually in connection with or in con-
connection with either of these crimes. "War crimes" cover all the crimes against
laws and customs of war committed during the war in occupied territories or in
slave territories against Allied nationals. What remains outside of these
"war crimes" as "crimes against humanity" is:

Crimes committed against any person whatever in Germany and territories
occupied by her without creating hostilities, before the war, and against
German, Axis or satellite nationals or civilian persons and Allied
prisoners (meaning so the action was not approved by existing laws and
customs of war) during the war in or outside Germany, in connection of
or in connection with the planning and perpetration of a war of aggression
or war crimes.

1. The two classes of "crimes against humanity" are:

   (1) Murder, extermination, enslavement, deportation, and
       other inhumane acts.

   (2) Persecution on political, racial or religious grounds.

   It is obvious that (1) refers to any inhumane act whether or not con-
   nected with specific characteristics of the victim, while (2) covers only
   acts connected with the political, racial or religious particularities of the
   victim.
B. The Originals and their Responsibility

d) Only "major war criminals" can be arraigned before the I.C.T.R.

A definition of the major war criminals is contained in the preamble of the

Nuremberg Agreement ("those offenses have no particular geographic location").

The prosecution will have to prove that the defendants are from this specific

point of view major war criminals.

d) A second element in the proof is that the defendants were "acting

in the interests of the European Axis countries" (Charter, Art. 6, par. 1).

This means that the nationality of the criminal is of no import; it is suf-

ficient that he stood in the services of any Axis government or held an official

position there.

d) It is irrelevant whether the criminals acted as individuals or as

members of organizations.

d) The specific functions of each of the defendants ("leaders,"

"organizers," "instructors" or "accomplices") is of importance only for the

subsidiary responsibility (last para. of Art. 6).
II. Crimes against Humanity in the Judgement

The Indictment of the International Military Tribunal in Case No. 1,
the United States of America, the French Republic, the United Kingdom of Great
Britain and Northern Ireland and the Union of Soviet Socialist Republic against
Hermann Wilhelm Goering and others, gave prominent place to the presentation of
the facts. Reference is made to Count One ("The Census Plan of Conspiracy"),
Section III ("Statement of the Offence"), paragraphs 1 on page 3; Section IV D
("The Acquiring of Totalitarian Control over Germany: Political"), paragraph 3(a)
on page 56; Section IV F 6 ("Aggressive War Against the United States, in Violation
of Non-Annexion Pact") on page 9; Section IV G ("War Crimes and Crimes
Against Humanity Committed in the Course of Executing the Conspiracy for Which
the Conspirators are Responsible"), paragraphs 1 and 2 on page 10; Count III
(War Crimes), Section VIII ("Statement of the Offence"), subsection 1 (a) on
pages 12-23, paragraphs 2 (a) and 2 (b) on page 14-15; Section VIII F
("The Execution of Collective Punishments") on page 22; Count IV ("Crimes Against
Humanity"), Section 2 ("Statement of Offence"), paragraph (a) on pages 26-27.

In addition, Appendix A ("Statement of Individual Responsibility for Crimes
Set out in Counts Two, Three and Four") contains reference to anti-Jewish
activities, insofar as Stretcher and Pritzele are concerned.
The Opening Statement of Justice Jackson (Elieserovitch) contains a

Section 3. Crimes against the Jews, (pages 21-29). Major Walsh presented a

special section on the Prosecution of the Jews on December 14, 1945. Members
of the American branch of the Prosecution dealing with other aspects of Nazi
crimes (Treaty of civilians population in occupied territories, concentration
camps, looting of art treasures, etc.) dealt extensively with Jewish aspects
of these specific events. The case presented by the British Prosecutors also
made frequent references to the Jews as victims of Nazi oppression. The French
and the Americans, dealing with war crimes in the successor nations of the
world, also dealt extensively with the crimes against the Jews. Moreover, the members
of the Prosecuting offices, dealing with individual defendants, submitted
strong evidence for their individual responsibility. No less convincing proof
was submitted by parts of the brief dealing with the criminal organizations.

IV. Decision and Plan of the Defense

It could be seen, in view of the overwhelming evidence referring to both
facts and responsibilities, this sort of the trial should appear to be water-
tight. It could, however, be an act of negligence to ignore the possible
objections and exceptions to be presented by the defense. The sooner we can anticipate the line of the defense, the better for the rebuttal.

So far, the defense, while occasionally betraying its future line of argument, has submitted only one document explaining straightforwardly their argument. To have in mind the motion submitted at the very beginning of the Trial, is in accordance with the Court's attitude.

It is worthwhile to say a few more words on this motion and the provisional(?) decision of the Court.

Reduced to its basic elements, the motion of November 20, 1945 takes exception of the composition of the Court and makes a plea for non-application of ex-post-facto legislation. It is interesting to note that only the plea of incompetence of the Court was rejected, but further no act of the motion may contain other arguments which may be opened to the defendants, they may be heard at a later stage. This means that whatever the ultimate decision of the Court may be, the plea of ex-post-facto and, in a way, the plea against the whole of article 6 will be brought before and heard by the Court.

It is obvious that the legal problems involved in the crime against Humanity (specifically, against the Jews) can logically be divided into two parts.
(1) Whether or not the existence of all elements of this crime, as defined in Article 6 (c) of the Charter, has been proven to the satisfaction of the Court;

(2) Whether or not the definition of the crime does not collide with some paramount and mandatory legal principles able to override the wording of Article 6 (c).

The first question is more of a factual nature, the second involves a discussion of certain legal principles.

7. The Connection of Crimes against Humanity with the Other Crimes

As pointed out above, both the facts of the Jewish case and the evidence in regard to the responsibility of the individual defendants and criminal organisations are so overwhelming that they will hardly be attacked by the defence counsel. The only point which will probably give rise to discussion is the question of the connection between the anti-Jewish crimes and the other two crimes, as defined by Article 6 (a) and (b).

The indictment makes the following statement (p. 3) on the connection between the Crimes against Humanity and aggressive war:
The opening statement of Justice Jackson referred only briefly to the local problem of the Crime Against Humanity. In fact, here is what it contains:

"The Fourth Count of the Indictment is based on Crimes Against Humanity. Chief among these are mass killings of unarmed human beings in cold blood. Does it take these acts by surprise that murder is treated as a crime?"

Major Wild, in his statement before the Court on the prosecution of the Jews, discussed the problem of the connection between this crime and the basic crimes under (a) and (b) in the following language:

"Fascists began a recount of acts leading to the elimination of the Jews, the prosecution is prepared to show that these acts and policies within Germany from 1933 to the end of the war related to the planning, preparation, initiation, and execution of aggressive war, thus falling within the definition of "Crimes Against Humanity," Article 6 (c) of the Charter.

"It is said that the first war ended in Germany's favor because of a collapse in the face of the interior. In planning for future wars it was determined that the home front can be secured to prevent a repetition of the 1918 collapse. Unification of the German people was essential to successful planning and coping of war, and the Nazi political structure put in place - "one race, one state, one Fatherland.""
"Free trade unions must be abolished, political parties (other than the National Socialist Party) must be abolished, civil liberties must be suspended, and opposition of any kind must be summarily suppressed. Loyalty to God, Church, and science is declared to be incompatible with the Nazi regime. The anti-Semitism policy is part of this plan for rearmament. It was based on the realization of the fact that the Jews could not contribute to Germany's military program, but on the contrary would hamper it. The Jews must therefore be eliminated."

"This view is clearly borne out by the statement contained in comment 1939-58, which I can offer in evidence. This document is a fragment of a Hitler speech at a meeting of the S.S. Leaders-General at the beginning of October 1, 1943, and from page 4, paragraph 3 of the translation, I read:"

"We have not difficulty that should have made it for ourselves if the hostile public, the business and industrial leaders of our country, would have directed our workers to society, education and social security, to which we have already reached the 1936-19 stage than the Jews were still in the German national body."

"The treatment of the Jews within Germany was therefore such a part of the plan for aggressive war as the building of armaments and the concentration of manpower. It falls within the jurisdiction of this Tribunal as an integral part of the planning and preparation to wage a war of aggression."

"It is obvious that the persecution and murder of Jews throughout the occupied territories of Europe are the results of the definition in article 6 (b) of the Charter. It further violates article 43 of the Regulations of the Hague Convention of 1907, to which Germany was a signatory."

"Finally honourable rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected."

"It is to be expected that the defence will not consider this evidence as sufficient, and that it will question the existence of this connection, which it is considered desirable by the prosecution to extend this problem, certain suggestions to this effect and numerous exhibits in support thereof are attached hereto as Appendix I."
In addition, the defense may argue that even if there is a certain connection between the War of Aggression and anti-Jewish policies, the latter were not inspired exclusively by the former. They will probably try to prove from best settings and otherwise that many other motives were behind these policies. It may, therefore, give rise to the following problem:

I. The provision of Article 5(c) stating that only such offenses against Humanity as committed "in connection with" other offenses fall within the jurisdiction of the Tribunal to be understood as exclusive or complementary. In other words, do only such offenses against Humanity fall within the jurisdiction of the Tribunal whose prosecution against them is not committed or does it suffice when one of the motives was the preparation of war or the continuation of war crimes? While an attempt may be made to prove the first contention, it must be defended. The use of the word, "in connection with," or "in connection with" is not a fortuitous one. Had the drafters had in mind only such offenses against Humanity for which the single motivation was aggressive, they would have said so in so many words. But as the Article stands, there is no doubt that the prosecution is not bound to prove exclusive motivation, but it suffices if prosecution or connection.
are proved. Indeed, irrelevant acts or omissions made in "connection with"
the planning, preparing or waging of aggressive war are seen nothing else
but that any connection with the crime defined in Art. 6 (a) is sufficient
to make it subject to the jurisdiction of the Tribunal.

VI. Instructions Plan (Special Instructions)

From the notion of November 1946, we can learn that the defense will
concentrate on one problem — the problem of the Instructions plan.
To still, therefore, give special attention to this problem in attached
Appendix II. Here we shall confine ourselves to a brief discussion of the
following preliminary question: Why do the Instructions and the Charter not
contain any reference to the Instructions plan, while containing reference
to such phrases as "indefinite or basis of States" and "superior orders"? The
reason lies in the formulation of the offense as contained in Art. 6 of the
Charter. While this formulation explicitly refers to acts committed prior
to the conclusion of the Agreement, it would not exclude so long the acts of
"basis of States" and superior orders. Furthermore, these two phrases were
considered in criminal law, as evolved by previous military codes. To do,
therefore, necessary to deal with these latter questions in the subsequent
Article of the Charter.
It could hardly be suggested that the subsidiary powers were not aware of the fact that the definitions of Article 6 can be conceived as ex-post-facto legislation. The authors of this Agreement were fully aware of the dynamic character of the new principles of international social law as formulated in the Agreement and the Charter. In fact, Justice Jackson made it clear by exclaiming: “If there is no precedent for these treaties, we are going to create them.”

And so we reach the conclusion that the lack of reference to the plan of ex-post-facto in the text of the Agreement, far from strengthening this plan, makes it even weaker.

VII. The Restorative Character of the Charter as Source of Law

But here a second problem may arise. Are there no higher legal principles in the world of such force as to override the Four Power Agreement?

Is the Four Power Agreement the only source of law for the I.M.T., or are there other sources of unwritten law and of such high authority that they may override, as of higher hierarchy, the provisions of the Agreement? The answer to this question is: No! The reason: There exist no such generally recognized rules of international criminal law. The lack of any reference to the Charter
to the right of the Tribunal to use particular sources of law, bases of law
or definitions of bases of law other than those contained in the Agreement.

Itself, alledicated, in view of the specific character of the Tribunal, the
possibility of having recourse to them, in view of the precedent of Article
39 of the Statute of the Permanent Court of International Justice, nothing
would have hindered the Big Four to insert an analogous provision in the
Charter of the I.C.T.R., empowering it to apply, along with the Agreement and
the Charter, some sources like "general principles of customary international
law," or writings or distinguished authorities in this field, although it must
be recognized that analogies — admissible as they are in civil (international
and domestic) law — are usually based in criminal law. There is every reason
to believe that the signatories were fully aware of this precedent. The fact
that they did not use it is the most conclusive proof that the Agreement empowers
the Tribunal to act exclusively within the limits of the Charter, without
taking any recourse at all to extra-Charter sources.

Our view of the Agreement and Charter, as being the only and exclusive
source for the authority, jurisdiction and substantive law of the I.C.T.R., may
be carried by the contention that there appear to be gaps in the Agreement and
Charter; and, if so, there must be a source to which recourse may be taken.
in order to fill in these gaps. However, this theory is based on the rather mechanical approach to the problem of interpretation. No legislative or contractual text can contain answers to all questions that may arise in the process of their application. They all have their gaps. To fill these gaps, we do not need to look for other sources of law, but we use the general methods of interpretation, of which the most important is the interpretation based on the general purpose and objectives of the specific instrument. We put ourselves in the place of the legislators or signatories, and we ask ourselves how we would have solved the problem if we were to formulate it as part of a legislative or contractual text. Applying this basic principle to the so-called gaps of the Agreement and Charter, we shall have no difficulties in solving problems for which there might be no direct answers in the text of this instrument.

Under Article Three (page 11) and Four (page 26) of the Agreement, the same formula is used in a characterization of these two crimes, namely, that

"These criminal and crimes constituted violations of international conventions, with which all states are bound, and the general principles of criminal law as derived from the criminal law of all civilized nations."

These words would read
The question arises, what was the purpose of adding the two last types of legal sources in the statement of offense (the first refers to agreements mentioned in Art. 6 (a) and (b)). Is not Article 6 self-sufficient? It is obvious that these two references did not intend to change the legal basis of the trial by substituting some vague references for the provisions of positive law as embedded in the Charter and the Agreement. It was probably the intention of the prosecution to explain by indication that the crimes established by Article 6 do not in fact present any revolutionary innovation, but are in line with developments in international and domestic penal law. Whatever the purpose of these references might have been, the Indictment cannot have the power to change or supplement the legal concepts and definitions in the Charter and Agreement. Even if by some devious means of interpretation a conflict could be established between the formulations of the Agreement and the Charter on the one hand, and the references in question on the other, it is obvious that the formulations of the Reparations Charter must overrule these references.

The Court is not in any way bound by the Indictment as a whole, nor by some legal theories behind certain statements in the Indictment.
VIII. The Theory of Acts of State

Indeed, as all other pleas amount to the legal mind of an Anglo-American lawyer are concerned, none of these have been explicitly ruled out, some implicitly. A few views about the last, referring to so-called acts of State.

That is the essence of the theory of Acts of State? It is the proposition that the State is responsible for acts of State and not the perpetrator thereof. It is argued that since the State can be made responsible only materially but not morally or by virtue of some criminal law, such acts are outside the jurisdiction of criminal courts. Article 7, stating that the official position of responsible officials in government departments shall not be considered as forming these acts responsibility, is in connection with the kind of crimes described in Art. 6—while negatively phrased—a positive imposition to the effect that high officials are responsible for acts of State. In fact, not only Article 7 but acts of State are thrown to the high officials not only Article 6 but the whole of Article 6 would have no meaning at all if we should stick to the theory of the immunity of acts of States from personal responsibility. There can hardly be an act of State on a higher level than the initiation, preparation, planning or waging of a war, and still, this act of
State, and all those connected with it, is declared to be a crime by virtue of Article 6.

And so, both explicitly and implicitly, the whole theory of acts of State cannot stand in face of the Agreement.