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

I. Analysis of Article 6(a)

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 powers, in
Article 6, paragraph 2, section (a), 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 against 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 international treaties, agreements or assurances, 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 civilian population of or in occupied territory, murder
of captured persons, destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) **GROSS CRUELTY, INHUMANITY; namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in execution of or in conn


tion with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country


crimes perpetrated.


Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or in conc


nexion with a common purpose 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) It is essential for this crime whether the act committed are or


are not in violation of domestic law of the country where committed. This


would mean that, in each case where such crime 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


State cannot be held bound by punishment provided for it in national legis-


lation (cf. also Art. 27 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 U.N. only (cf. also 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 implicated persons, extending
at least from the Nazi advent to 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.H., only
those which were perpetrated "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

junction 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

Axis territories against Allied nationals. What remains outside of these

"war crimes" or "crimes against humanity" is:

" Crimes committed against any person anywhere in Germany and territories

occupied by her without creating hostility, before the war, and against

German, Axis or subject nationals or civilians persons and Allied

nationals (meaning as the action was not covered by existing laws and

custome 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.

c) 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 victims, while (2) covers only

acts connected with the political, racial or religious specificities of the

victims.
B. The originals and their responsibility

d) Only major war criminals can be arraigned before the I.G.T.

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

Four Power Agreement (these offences have no particular geographic location).

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

point of view major war criminals.

b) 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 sufi-

cient that he stood in the services of any Axis government or had an official

position there.

c) 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," "instigators" or "accomplices") is of importance only for the

subsidiary responsibility (last par. of art. 6).

II. Crimes against Humanity in the Judiciary

The Indictment of the International Military Tribunal in Case No. 2,
the United States of America, the French Republic, the United Kingdom of Great
Britain and Northern Ireland and the Union of Soviet Socialist Republics against
Hermann Goering and others, gave prominent place to the prosecution of
this part. Reference is made to Count One ("The General Plan of Conspiring"),
Section III ("Statement of the Offense"); paragraph 1 on page 3; Section IV D
("The Acquiring of Dictatorial Control over Germany: Political"), paragraph 3(b)
on pages 5-6; Section IV F 6 ("Aggressive War Against the U.S.A. in Violation
of Non-Aggression 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 Offense"); subsection 1 (a) on
pages 12-13; paragraphs 2 (a) and 2 (b) on pages 14-15; Section VIII F
("The Execution of Collective Punishments") on page 20; Count IV ("Crimes Against
 Humanity"), Section 2 ("Statement of Offense"), paragraph (b) 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-Semitic
activities insofar as Stretcher and Fritzche are concerned.
III. Evidence Submitted by Defense Against Proposals

The Opening Statement of Justice Jackson (Kosciuszko) contains a
section on "Cries Against the Jews," (pages 21-23). Major Walsh presented a
special pleading on the Prosecution of the Jews on December 1, 1941. Members
of the American branch of the Prosecution dealing with other aspects of Nazi
crimes (treatment 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 aggression. The French
and the Russians, dealing with war crimes in the broader sense of the word,
also dealt extensively with the crimes against the Jews. Moreover, the members
of the Prosecuting office, 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. Issues and Scope of the Defense

It would seem that, 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 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. We have in mind the motion submitted at the very beginning of the Trial. In accordance with the Court's decision the decision of the Court.

Reduced to its basic elements, the motion of November 20, 1945 takes exception to the composition of the Court and makes a plea for non-application of supplementary legislation. It is interesting to note that only the plea of incompetence of the Court was rejected, but particularly as to the plea that 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 end, 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 parties.
(1) Whether or not the existence of all elements of this crime, as defined by 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 counsels. 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 entire groups of human beings in cold blood. Does it take mere name by exercise that murder is treated as a crime?"

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

"Before beginning a recital of the 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 waging of aggressive wars, thus violating Article 6 (c) of the Charter.

"It had long been a German theory that the first world war ended in Germany's defeat because of a collapse in the rear of the interior. In planning for future wars it was determined that the home front must be secured to prevent a repetition of the 1914 debacle. Mobilization of the German people was essential to successful planning and waging of war, and the Nazi political principle that was established — "Two roads, one vehicle, one Master."
"Free trade unions must be abolished, political parties (other than the National Socialist Party) must be outlawed, civil liberties must be suspended, and opposition of any kind must be met by army, loyalty to God, Church, and scientific truth are declared to be incompatible with the Nazi regime. The anti-Jewish policy was a part of this plan for nationalization, because it was the deviation of the laws that the Jews could not contribute to Germany's military progress, but on the contrary would hinder it. The Jews must therefore be eliminated."

"This view is clearly borne out by the statement contained in Document 1939-26, which I now offer in evidence. This document is a transcript of a similar speech at a meeting of the S.A. in Paris-Germany on October 4, 1942, and was page 4, paragraph 3 of the translation, I read:

"We must not allow the Jews to loot us for themselves. If this means giving them the burden and degradation of war -- we will have to bear it in every way as nearly submissive, obedient, and trouble-free service, as could have been reached by the 1919 stage when the Jews were still in the German national body."

"The treatment of the Jews within Germany was therefore as much a part of the plan for aggressive war as was 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 for war of aggression."

"It is obvious that the persecution and murder of Jews throughout the conquered territories of Europe are not actions as defined in Articles 6 (b) of the Charter. It further violates Article 6 of the Regulations of the Nuremberg Convention of 1937, to which Germany was a signatory."

"Finally, honor and 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 defense will not consider this evidence as sufficient, and that it will question the existence of this connection."

"Should it be considered desirable by the prosecution to expand 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 both settings and circumstances that any other motives were behind these policies. It may, therefore, give rise to the following problem:

I. The provision of article 6(c) stating that only such crimes against humanity as committed in "connection with" other crimes fall within the jurisdiction of the Tribunal to be understood as exclusive or complementary, in other words, so only such crimes against humanity fall within the jurisdiction of the Tribunal whose exclusive jurisdiction was the war of aggression or does it follow that one of the motives was the prevention of war or the cessation of war crimes? While an attempt may be made to prove the first contention, it must be defended. The use of the word "in", "in connection with" or "connection with" is not a fortuitous one. Had the drafters had in mind only such crimes against humanity for which the single motivation was aggressive war, 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 "connection" or "connection with"...
are proved. Indeed, illegal acts or persecutions made in "connection with"
the planning, preparation or waging of aggressive war are shown nothing else.
but that any connection with the crime defined in Art. 6 (c) is sufficient
to make it subject to the jurisdiction of the Tribunal.

VI. Peace tacts Plan (General Considerations)

From the section of November 1946, we can learn that the defense will
concentrate on one problem — the problem of peace treaties legislation.
To this, 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 in the Agreement and the Charter not
include the phrase "in aid of States" as stated, i.e., to include
mention any reference to the "peace treaty" Plan, while containing reference
to such phrase as "in aid of States" and "superior orders?" The
reason lies in the formulation of the offenses 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 the plan of
"in aid of States" and superior orders. Furthermore, these two plans were recog-
nized in criminal law as evolved by various military codes. To me,
therefore, necessary to deal with these latter questions in the subsequent
consideration of the Charter.
It could hardly be suggested that the legislative powers are not aware of the fact that the definitions of Article 6 can be conceived as per se illegal legislation. The authors of this Agreement were fully aware of the dynamic character of the new principles of International Criminal 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 trials, we are going to create them."

And we reach the conclusion that the lack of reference to the plea of per se illegal in the text of the Agreement, far from strengthening this plea, makes it even weaker.

VII. The Exceptional 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 law to override the Four Power Agreement?

Is the Four Power Agreement the only source of law for the I.C.T.

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 exists 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, rules of law, or definitions of terms of law other than those contained in the Agreement itself, unless, in view of the specific character of the Tribunal, the possibility of having recourse to them, in view of the precedent of Article 29 of the Charter of the Permanent Court of International Justice, nothing could have hindered the signatories to insert an analogous provision in the Charter of the I.C.Y., empowering it to apply, along with the Agreement and the Charter, some sources like "general principles of customary international law," on setting up distinguished authorities in this field, although it must be recognized that analogies are allowed so 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 decisive proof that the Agreement compels the Tribunal to act exclusively within the limits of the Charter, without recourse to any sources 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.Y., may be carried by the contention that there appears 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 up these gaps. However, this theory is based on a rather mechanical approach to the problem of interpretation. No legislative or contractual acts ever contained 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 formal methods of interpretation, of which the most important is the interpretation based on the general purposes 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 Crim. Thou (page 17) and Four (page 25) of the Insolence, the same formula is used in a characterization of those two crimes, namely, that "Those articles and crimes constituted violations of international conventions, as well as of internal penal law, and of the general principles of criminal law as derived from the criminal law of all civilized nations."
The question arises, what was the process of editing the two last types of legal sources in the statement of offense (the first refer to an article mentioned in Art. 6 (a) and (b))? Is the article 6 self-sufficient? It is obvious that those 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 embodied 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 one device or other 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 Agreement and Charter must override those references.

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

Inasmuch as all other plea amount in the legal mind of an Anglo-Saxon lawyer are concern, some of these have been explicitly ruled out, some implicitly. A few words about the last, referring to so-called acts of State. What 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 perpetrating persons. 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 them free from responsibility, in connection with the kind of crimes described in Art. 5 — while negatively phrased — a positive assertion to the effect that high officials are responsible for acts of State. In fact, not only Article 7, but the whole of Article 6 would have no meaning at all if we would 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 implicitly and explicitly, the whole theory of acts of State cannot stand in face of the Agreement.