TO: Major William F. Walsh

FROM: Jacob Robinson

RE: The Legal Aspects of Part V (Persecution of the Jews).

1. The Charter of the ICT.

Article 6: The Tribunal established by the Agreement referred to in Article 1 hereto for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons, whether 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 offenses coming 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 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 civilians or prisoners of war or persons 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) CRIMES AGAINST HUMANITY—namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds 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 common plan or conspiracy to commit 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).

A. THE CRIME

Here are the basic elements of this crime:

a) It is irrelevant for this crime whether the acts committed are or not in violation of domestic law of the country where perpetrated. This would mean that in cases where such crimes constitute violation of domestic law of the country where perpetrated reference to that legislation — if at all admissible — cannot be of decisive character, particularly, the Court cannot be held bound by punishment provided for in national legislation. The Court is thus sovereign and the sources and limitations of its power lie in the Four Power Agreement and the Charter of the I.M.T. only.

b) The Charter did not tackle nor solve the problem of the possible exception of "agreement." The defendants say argue that the acts committed were legislative acts or acts in pursuance of legislation. The discussion of this problem is reserved for later consideration.

c) The victims of this crime are civilians;

d) 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 specification it should be reasonably understood that "before the war" refers to the period extending from the last advent to power till the beginning of the war against Poland.

e) Whatever the definition of "crimes against humanity" may be, not all of them come under the jurisdiction of the I.M.T., only those which were perpetrated in execution of or in connection with any crime within the jurisdiction of the Tribunal. It is obvious that the term "crimes against humanity" refers either to "crimes against peace" (Art. 6 (b)) or to "crimes against peace" (Art. 6 (c)). The prosecution has to undertake the job of proving that the "crimes against humanity" were executed in execution of or in connection with either of these crimes. The conviction of crimes against humanity with war crimes is sufficient. As a matter of fact, "war crimes" cover all the crimes against humanity committed during the war in occupied territories or in non-territories against allied nationals. What remains outside of these "war crimes" is:

- Crimes, committed against German (or Axis) nationals or aliens before and during the war in or outside Germany, in execution of or in connection with the planning and preparation of a war of aggression;

f) It is not clear what special meaning is attached to the two classes of "crimes against humanity":

(1) Murder, extermination, enslavement, deportation, and other inhumane acts.
(2) Persecution on political, racial or religious grounds:

It is obvious that (1) constitutes nothing but grave cruel manifestations of (2), some of which (murder and deportation) being classed both under 2 (b) and 2 (c):

g) To say that "crimes against humanity" are "inhuman acts" in nothing but a teleological and does not contribute to a definition, which therefore must be based on something else.

B. The Originals and Their Responsibility

a) Only "major war criminals" can be arraigned before the庭.

A definition of the major war criminals is contained in the preamble of the Four Power Agreement ("war criminals have no particular geographic location"). The brief will have to prove that the defendants are also from the specific point of view major war criminals.

b) A second element of this discussion in the "brief" is proof

that the defendants were acting in the interests of the European Axis countries.

(Chart, art. 6, par. 1).

c) Next we have to establish in what capacity they were acting: as individuals or as members of organizations and of which ones.

d) It shall furthermore be established the specific functions of each of the defendants ("leaders," "organizers," "instigators" or "accomplices").

II. The Indictment

The Indictment (page 3) states the case of the crimes against humanity in the following words:

"The common plan or conspiracy contemplated and gave birth to en masse as typical and systematic means, and the defendants determined upon and committed, Crimes against humanity, both within Germany and within occupied territories, including murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations before and during the war, and persecutions on political, racial or religious grounds, in execution of the plan for promoting and perpetuating aggressive or illegal wars, many of such acts and persecutions being violations of the domestic laws of the countries where perpetrated."

As compared with art. 6 (a) of the Charter of the 智, the deviations are as follows:

a) It contains an introductory sentence ("The common plan or conspiracy contemplated and gave birth to en masse as typical and systematic means, and the defendants determined upon and committed").

b) It contains the specification "both within Germany and within occupied territories."
c) It is specified that these crimes were perpetrated in execution of (strangely enough the words 'or in connection with' are omitted) the plan for preparing and prosecuting aggressive and illegal wars.

d) The last sentence ("many of such acts and persecutions being violations of the domicile laws of the countries where perpetrated") is somewhat confusing. (APPENDIX A (4))

III. Conclusion

It is suggested to revise Section B (Argument and Conclusion) in the light of the analysis made in this paper.

JACOB HOBSON
THE DECATED STATEMENT OF JUSTICE SERGEI II. TASHCHEN
FOR THE UNITED NATIONS BEFORE THE INTERNATIONAL
MILITARY TRIBUNAL IN BERLIN, AUGUST 24, 1945.

THE LAW OF THE CASE

The end of the war and capture of these prisoners presented the victorious Allies with the question: whether there is any legal responsibility on high-ranking men for acts which I have described. What such wrongs either be ignored or redressed in hot blood? Is there an standard in the law for a deliberate and reasoned judgment on such conduct?

The Charter of this Tribunal evidences a faith that the law is not only to govern the conduct of little men, but that even rulers are, as Lord Chief Justice Coke put it to King James, "under God and the law." The United States believed that the law long has afforded standards by which a juridical hearing could be conducted to which would make sure that we punish only the right man and for the right reasons. Following the instructions of the late President Roosevelt and the decision of the Halsey conference, President Truman directed representatives of the United States to formulate a proposal International Agreement, which was submitted during the San Francisco Conference to Foreign Ministers of the United Kingdom, the Soviet Union, and the Provisional Government of France. With many modifications, that proposal has become the Charter of this Tribunal.

But the Agreement which sets up the standards by which these prisoners are to be judged does not express the views of the signatory nations alone, other nations with diverse but highly respected systems of jurisprudence, also have significant allegiance to it. These are Belgium, The Netherlands, Denmark, Norway, Czechoslovakia, Luxembourg, Poland, Greece, Yugoslavia, Albania, Australia, Haiti, Honduras, Panama and New Zealand. You judge, therefore,
under an organ of which represents the wisdom, the sense of justice, and the will of nineteen governments, representing an overwhelming majority of all civilized peopled.

The Charter by which this Tribunal has its being embodies certain legal concepts which are inseparable from its jurisdiction and which must govern its decisions. These, as I have said, also are conditions attached to the grant of any hearing to defendants. The validity of the provisions of the Charter is conclusive upon us all whether we have accepted the duty of judging or of prosecuting under it, as well as upon the defendants, who can point to no other law which gives them a right to be heard at all. My able and experienced colleagues believe, as do I, that it all contribute to the expedition and clarity of this trial if I expound briefly the application of the legal philosophy of the Charter of the facts I have recited.

While this declaration of the law by the Charter is final, it may be contended that the prisoners on trial are entitled to have it applied to their conduct only most charitably if at all. It may be said that this is not law, not authoritatively declared at the time they did the acts it condemns, and that this declaration of the law has taken them by surprise.

I cannot, of course, deny that these men are surprised that this is the law they really are surprised that there is any such thing as law. These defendants did not rely on any law at all. Their program ignored and defied all law. That this is no all appear from many acts and statements, of which I cite but a few. In the Fuehder's speech to all military commanders on November 19, 1939, he reminded them that at the moment Germany had a pact with Russia, but declared, "Agreements are to be kept only as long as they serve a certain purpose." Later, in the same speech he announced, "A violation of the neutrality of Holland and Belgium will be of no importance."

A Top Secret document, entitled "Warfare as a
Problem of Organization,* dispatched by the Chief of the High Command to all
Commissaries on April 19, 1939, declared that "the normal rules of war toward
 neutrals may be considered to apply on this basis whether operation of rules
 will create greater advantages or disadvantages for belligerents." (Document
 No. L-211, p. 26 of translation.) And from the files of the German Navy Staff,
 we have a "Memorandum on Intensified Naval War," dated October 15, 1939, which
 begins by stating a desire to comply with International Law. "However," it
 continues, "if decisive successes are expected from any measure considered as
 a war necessity, it must be carried through even if it is not in agreement with
 international law." (Document No. L-26, p. 3.) International Law, natural law,
 German law, any law at all, to these men simply a propaganda device to be
 invoked when it helped and to be ignored when it could condemn what they wanted
 to do. That men may be protected in relying upon the law at the time they act
 is the reason we find laws of retrospective operation unjust. But those men
 cannot bring themselves within the reason of the rule which in some systems
 of jurisprudence prohibits ex post facto laws. They cannot show that they ever
 relied upon International Law in any state or period in the slightest regard.

The Third Count of the Indictment is based on the definition of war
 crimes contained in the Charter. I have outlined to you the systematic course
 of conduct toward civilian populations and combat forces which violate inter-
 national conventions to which Germany was a party. Of the criminal nature of
 these acts at least, the defendants had, as we shall show, clear knowledge.
 Accordingly, they took pains to conceal their violations. It will appear that the
 defendants Keitel and Jodl were informed by official legal advisers that the
 orders to hand Russian prisoners of war, to abduct British prisoners of war,
 and to execute communist prisoners were clear violations of International Law.
 Nevertheless, these orders were put into effect. The same is true of orders
 issued for the assassination of General Giraud and General Reynaud, which
failed to be executed only because of a case on the part of Admiral Cour, who was himself later executed for his part in the plot to take Hitler’s life on July 20, 1944.

The Fourth Court of the Enactment is based on crimes against humanity. Chief among these are mass killings of countless human beings in cold blood. Does it take these men by surprise that murder is treated as a crime?

The First and Second Courts of the Enactment add to these crimes the crime of plotting and taking part in aggression and war in violation of nine treaties to which Germany was a party. There was a time, in fact I think this time of the First World War, when it could not have been said that war making was a crime in law, however reprehensible it may be.

Of course, it was under the law of all civilized peoples a crime for one man with his bare knuckles to assault another. But did it come that multiplying this crime by a million, and adding fire arms to bare knuckles, made it a legally innocent act? The doctrine was that one could not be regarded as criminal for committing the usual violent acts in the conduct of legitimate warfare. The age of imperialism expansion during the Eighteenth and Nineteenth Centuries added the fall doctrine, contrary to the teachings of D’Artagnan and International Law scholars such as Grotius, that all wars were to be regarded as legitimate wars. The sum of these two doctrines was to give war making a complete immunity from accountability to law.

This was intolerable for an age that called itself civilized. Plain people, with their earthly common sense, revolted at such fictions and legalisms as contrary to ethical principles and demanded checks on war immunity. Statesmen and international lawyers at first cautiously responded by adopting rules of warfare designed to make the conduct of war more civilized. The effort was to set legal limits to the violence that could be done to civilian populations and to combatants as well.

The common sense of men after the First World War demanded, however, that
the law's condemnation of war reach deeper, and that the law condemns not merely uncivilized ways of waging war, but also the waging in any way of uncivilized wars — wars of aggression. The world's statesmen again went only as far as they were forced to go. Their efforts were timid and cautious and often less explicit than we might have hoped. But the 1930's did notice aggressive war.

The reestablishment of the principle that there are unjust wars and that unjust wars are illegal is traceable in many steps. One of the most significant is the Roland-Elizalde Pact of 1929, by which Germany, Italy, and Japan, in common with practically all the nations of the world, renounced war as an instrument of national policy, bound themselves to seek the settlement of disputes only by peaceful means, and condemned recourse to war for the solution of international controversies. This pact altered the legal status of a war of aggression. As Mr. Stimson, the United States Secretary of State put it in 1932, such a war "is no longer to be the source and subject of rights. It is no longer to be the principle around which the duties, the conduct, and the rights of nations revolve. It is an illegal thing. Any that may act, we term made obsolete any legal precedents and have given the legal profession the task of reexamining many of its codes and treaties."

The General Treaty of 1929, for the Pacific Settlement of International Disputes, signed by the representatives of forty-eight governments, declared that "a war of aggression constituted an international crime." The Eighty Assembly of the League of Nations in 1929, in unanimous resolution of the representatives of forty-eight member nations, including Germany, declared that a war of aggression constitutes an international crime. At the Sixth Pan-American Conference of 1928, the twenty-one American Republics unanimously adopted a resolution stating that "war of aggression constitutes an international crime against the human species."
A failure of these basic to hand, or to understand the force and meaning of this evolution in the legal thought of the world is not a defense or a mitigation. If anything, it aggravates their offense and makes it the more flagrant that the law they have flouted be vindicated by juridical application to their baseless conduct. Indeed, by their own law — and they needed any law — these principles were binding on these defendants. Article 4 of the Nuremberg Constitution provided that "the generally accepted rules of international law are to be considered as binding integral parts of the law of the German Reich." (Document No. 2050-PS.) Can there be any doubt that the outbreak of aggressive war was one of the "generally accepted rules of international law" in 1939?

Any resort to war — to any kind of a war — is a resort to means that are inherently criminal. War inevitably is a course of killings, assasins, deprivations of liberty, and destruction of property. An honestly defensive war is, of course, legal and serves those lawfully conducting it from criminality. But inherently criminal acts cannot be defended by showing that those who committed them were engaged in a war, even war itself is illegal. The very minimal legal consequence of the treaties making aggressive war illegal is to strip those who incite or wage them of every defense to the law every genre, and to leave war makers subject to judgment by the generally accepted principles of the law of crimes.

But if it be thought that the Charter, whose declarations necessarily bind us all, does contain no law I still do not shrink from denouncing the strict application by this Tribunal. The rule of law in the world, flouted by the baselessness, incited by these defendants, had to be restored at the cost to my country of over a million casualties, not to mention those of other nations. I cannot subscribe to the perverted reasoning that society may advance and strengthen the rule of law by the expenditure of morally innocent blood but that progress in the law may never be made at the price of morally guilty lives.

It is true, of course, that we have no judicial precedent for the Charter. But International Law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties and agreements between
nations and of accepted customs. Yet every custom has its origin in some single act, and every agreement has to be initiated by the action of some state. Unless we are prepared to abandon every principle of growth for International Law, we cannot deny that our own day has the right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law. International law is not capable of development by the normal processes of legislation for there is no continuing international legislative authority. Innovations and revisions in International Law are brought about by the action of governments designed to meet a change in circumstances. It grew, as did the Common Law, through decisions reached from time to time in adapting settled principles to new situations. The fact is that when the law evolves by the case method, as did the Common Law and as International Law must do if it is to advance at all, it advances at the expense of those who wrongly guessed the law and learned too late their error. The law, so far as International Law can be decreed, has been clearly pronounced when those acts took place. Hence, I am not disturbed by the lack of judicial precedent for the inquiry we propose to conduct.

The events I have earlier related clearly fall within the standards of crimes set out in the Charter whose perpetrators this Tribunal is convened to judge and punish fittingly. The standards for war crimes and crimes against humanity are too familiar to need comment. There are, however, certain novel problems in applying other precepts of the Charter which I should call to your attention.
Specific remarks as to the draft as it stands

A. First part, considered main body of brief, is much weaker than the annex.
   Depression of not concise discussion leading to clear-cut issues of neither
   major nor minor importance rather than courtroom brief character. To be
   re-drafted with due consideration to this last remark.

2. Sections I, II, III appear both too long and too dogmatic. To be merged
   into one section and presented, if at all, in more concise form.

3. In any case, II and III to be united.

4. See no necessity, in general, of section II.

3. Section I to be transferred, with whatever modifications, to that part
   of the brief dealing with plead and defence.

4. Section II. Would be good to complete it by a summary analysis of the role
   assigned to the Jews destruction in the preparation of waging a war of
   aggression, that is, a recital of summarized facts supported by outstanding
   declarations of Nazi high leaders. A. U. S. work might be utilized in re-
   drafted form, proved in some parts and completed in others. It seems that
   such a recital would be of greater strength if given in the body of the brief
   than as an annex.

Remarks page by page

P. 6, last 3 lines: To be rephrased, most important to underscore
   that the defences are precisely charged with crimes against Jews. The word
   "preference" has employed here and in other passages, does not seem
   to be fitting.

P. 7, 3rd line: "...special sections..." Is the term "sections"
   combined with "preliminary fitting?"

P. 7, last line
   Second line of p. 8: Weak. To be rephrased.

P. 8, line 6: "an ordinance of the Court" preferable to phrase
   tentatively: "the order of the Court" denying the
   motion revealed the Court's opinion in the matter."
REMARKS ON DRAFT OF THE BRIEF ON CRIMES AGAINST HUMANITY

General Remarks

1. No Annex. Part VI of the main draft (p.13) to be merged with the Annex.
2. Too many sections: better to have three sections only and to number the successive arguments in each section.
3. Would adopt the following general plan of the brief:

Three parts:

A. Crimes against Humanity as far as applied to crimes against Jews

1. Elements
   (a) First branch: criminal acts against civilian population in Germany and occupied countries; if committed during war in occupied countries, would constitute war crime.
   Second branch:
   (b) Exclusiveness of crime.

2. Discussion of the requisite "in execution of or in connection with preparation of a war of aggression." Special emphasis to be laid on this section which is the main point to be developed in the brief.

B. Apply to potential plea in defense

1. Ex post facto
   (a) Exclusiveness of crime.
   (b) Exclusiveness of crime.
   (c) Exclusiveness of crime.

C. Entries as few as possible.
P. 9, par. 3, line 2 "take exception at the composition of the Court" Preferable to phrase: decide jurisdiction and powers of the Court.

P. 9, Sec. V, line 3 "are so overwhelming that they will hardly preferable to phrase "are so overwhelming that it can be said that they will hardly be."

P. 11, last par. lines 12-13: Weak. To be rephrased.

P. 12, par. 2, line 7 "While an attempt may be made " Something to placing or should be rephrased.

P. 13, Sec. V, line 4- to end: Should be rephrased. Tentatively: "May do the agreement and the Charter not declare that the ex post facto plea is not admissible, while the plan defense of heads of states and superior orders are expressly set aside? The reason is to be found in the fact that the Charter as a whole, and particularly the creation of new offenses as contained in Art. 6 are a formal assumption of the ex post facto doctrine."

May be preferable to omit the last three sentences which do not seem very decisive. In any case, they should be rephrased much for clarity's sake.

P. 11, par. 2: Very weak. To be rephrased.

P. 14, Sec. VII, 5 last lines: To be rephrased up as to fit into style of a brief.

P. 15, par. 1, last line: "without taking any recourse at all " To be rephrased.

P. 16, Some doubts as to accuracy of the developed theory of interpretation similar as conflicting with the usual circumstances doctrine of interpretation which does not permit to go beyond the letter of a statute where the letter is not ambiguous or obscure on its face and especially, does not permit interpretation by analogy to fill in gaps and lacunae.

P. 16, last par. and P. 27: Have the impression that this argumentation does not stand out enough in relief. Maybe it is not admissible to stress that the Court is not bound by the instruction since the brief is developed to support the prosecution.

P. 28, par. 2, line 2: The term 'competent' is not fitting here.
The plea of "ex post facto" before the Court.

The motion of the defense counsel of Nov. 28th raises a vigorous plea for application to the times before 1857 of the decision of "ex post facto". The order of the Court implies that this question may be heard at a later stage. It would therefore seem useful now to discuss the problems of the applicability of this decision to the times before 1857. The question may be raised.

p. 14-17.

2. Discovery
1. Controversion
При этом в области все сопровождающиеся
упоминания о вопросе о образовании сис- 
темы управления, в смысле основной
должности Совета существующих на данный момент как основных функций, не только образо-
вательных, но и других вопросов, не столько свободы судебного усмотрения,
как требования конституции этих функций – это
является основной нормой суда. Вопрос,
который был вопросом конституции, как
tо сильно выглядит в итоге в свою очередь
как методологическое
права.
2. Правила общества организованы по специаль- 
ным методикам (таким же) в отношении,
а значит, механизмы деятельности, которые
включают правовые решения, такие как
обязательно вытекающие из необходи-
мости, что они не должны принимать
реальных абстрактных, а ближайшие, что
права и обязанности не могут встать
3. Такой абстрактный и независимый
официальный JMT и Charter, с одной
и Charter, с одной
другой стороны, такая
объекты такие и как только включать
общественные, правовые, воспроизводящиеся на
case
17 / 18

4. The first was Hitler's first victims
and ever since they have been in the
frontline of resistance to Nazi's aggression.

5. Churchill:

"The cause against this began in the
Nazi's in the day of peace and multiplied
by them a hundred times in time of war...
the wholesale systematic murder of the
fifth of those years on English soil alone
(1939-1945)."

6. "The causes for which we are fighting were
the same, because we are fighting for the same
purpose. For all those, who believe in God,
the position can be as well."

7. "The cause for which we are fighting is
the same, because we are fighting for the same
cause."

The page is written in Russian and English, with a mix of handwriting and printed text.
General non-applicability of the first-facts principle in international criminal law (Pt. 3-3)

This passage is difficult to read due to the handwriting. The text seems to discuss the non-applicability of the first-facts principle in international criminal law.

The text appears to be in Russian:

"То же касается компетентности исполнения компетентности фактов во внешней деятельности, при этом важен не только вопрос о том, что является соответствующим доказательством, но и вопрос о том, какое значение имеет это доказательство, и в каких случаях и в каких условиях факты могут быть устанавливаемыми компетентными документами..."