LEGAL PROBLEMS OF THE CRIMES AGAINST HUMANITY

(to be read in conjunction with my memorandum to Major Walsh, the Jackson statement, the Four-Power Agreement, and the Charter of International Military Tribunal, — "Law of the Case" in the opening speech of Justice Robert H. Jackson)

1. It is to be assumed that at a certain point the International Military Tribunal will have to decide the following:

   a) the meaning of crimes against humanity falling within the jurisdiction of the Tribunal, as distinct from "war crimes" (Art. 8 (e) (b) of the constituent elements

   b) the penalties to be imposed on those guilty (Art. 27 of the Charter)

   A serious attention arises while the penalties are provided for the elements of the crimes are absent from the Charter and Agreement.

2. Alongside and partly prior to this legal problem the following preliminary question arises (in regard to the anti-Jewish crimes specifically):

   Has the Tribunal to go through all the successive stages of the Jewish tragedy and establish their criminality, or

   Should it take account of the cumulative effect of all the measures taken, which repeated annihilation? The implications of this alternative are obvious.

   Should the Tribunal limit itself to the cumulative effect of the crimes it can evade all the pitfalls inherent in the second solution. In that case, the basic problem of the essence of crimes against humanity and their punishment will be circumvented. Such a solution would be regrettable. It is therefore important to build up a theory to the contrary.

3. A solution of this problem can be found after a discussion of the following preliminary problems
a) What is the function of the Agreement and Charter — do they constitute the exclusive source of substantive, procedural or jurisdictional "law of the case." Two answers are possible. Arguments in favor of the affirmative and negative solutions.

Should the affirmative solution prevail, the problem would then seem solved. But what if the result of the analysis would be negative?
Here an investigation of the following problems would be imperative:

a) Are there some legal maxims behind and above the agreement—Charter and, if so, which need Fair Trial
   (in addition to Section IV, Art. 35 Charter)?

b) Are all such facts legislation (the Art. 6 of the agreement to meet this objection or is it a specific rule?)(i)
   personal vs. group responsibility (Arts. 9 and 10 of the Charter) and others; if so, what is their hierarchical
   relationship.

b) That is implied in the numerous references of the in-
   dictment to "violations of International conventions,
   internal penal law, general principles of criminal law."

   Into the absence of reference to the "law of nations"
   (comparative or substantive convention) and the source
   of the "general principles of criminal law," as analogy
   to Art. 36 of the Statute of the Permanent Court of
   International Justice.

If so, the enumeration of the sources of law, frequently referred to in the in-
   dictment, be considered as sufficient for the specific author of substantive pro-
   visions covering the "crime against humanity." In the affirmative case the three
   sources will have to be examined. Among the International agreements/following
   legal acts should not be overlooked, and their relevance as course of obligation for
   the German Nazi overwhelming national legislation should be discussed:

(1) The "Code of the Assembly of the League of Nations (1922) concerning
    protection of minorities;"

(2) The restoration of this principle at the assembly 1939.
5. Should the Tribunal consider the individual legal guarantees of the State against the Jews as within the purview of the I N T's higher law system must be addressed than the then prevalent national law and this can be only the law of nations broader in its scope than international agreements. (cf. Arts. 2 Helsinki Constitution).

6. What is the place of the law of nations in the system of the Agreement-Charter? cf. the Jackson report and its relevance to an answer of this question.

7. Provided that the I N T cannot ignore the law of nations (as a larger notion than 'international agreements') that are the sources of the law of nations:

   a) the system of Art. 38 RCC (repr. Art. 15 International Agreement)

   b) the system of the preamble of the Fourth Hague Regulation.

8. Proof must be adduced to the effect that internal legislative and other acts cited in the brief belong to 'international law' and each are not only

   a) overridden by the law of nations;

   b) become illegal and

   c) constituting violation of law of nations become criminal,
9. The "exigencies of public conscience," as source of the law of nations. Is the conviction of the ICT an adequate expression of the "exigencies of public conscience" or some more objective manifestations are required. Discuss the relevance of "humanitarian intervention" as "urge," the Declaration on Rights of Man and Citizen of the New York Session of the Institut de Droit International, the underlying ideas of the Charter of the United Nations and its successors — all of them as giving expression to the "exigencies of public conscience."

10. For the connection of Art. 60 with Art. 6 in regard to anti-Semitic crimes, the following reasoning is suggested (Annex A), their

11. Attention should be given (and XXXX whole theories recommended) to cholesterol's theory of the general principles of criminal law and Quincy Wright's theory of offenses against universal law.