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 problem of:

   a) the essence of crimes against humanity falling within the jurisdiction
      of the Tribunal, as distinct from "war crimes" [Art. 6 (e) of the
      commentary elements]
   b) the penalty to be imposed on those guilty [Art. 27 of the Charter].

   A crucial alteration 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 prelimi-
   nary 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 is practical manslaughter. 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 pen-
   al punishment will be circumvented. Such a solution would be regrettable. It is therefore im-
   portant to build up a theory to the contrary.

3. A solution of this problem can be found after a discussion of the fol-
   lowing preliminary problems.
a) That 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 could be negative?
Here an investigation of the following problems would be imperative:

a) Are there some legal reasons behind and above the agreement? Charter and, if so, which need fair trial? (in addition to Section 40, Art. 26 Charter?)

b) Are or have clear legislation (the Art. 6 of the Agreement to meet this objection or is it a technical fault and), personal vs, group responsibility (Art. 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 indictment to "violations of international conventions, internal penal law, general principles of criminal law." Note the absence of reference to the "law of nations" (completing or limiting exceptions) and the source of the "general principles of criminal law," as analogy to Art. 38 of the Statute of the Permanent Court of International Justice.

1. On the expression of the sources of law, frequently referred to in the indictment, be considered as sufficient for the specific authorship of substantive provisions covering the "crime against humanity." In the affirmative cases the three sources will have to be examined. Among the "international agreements," following legal acts should not be overlooked, and their relevance as source of obligation for the German Federal overviewing national legislation should be discussed.

1. The "mode of the Assembly of the League of Nations (1923) concerning protection of minorities;"

2. The restoration of this principle at the Assembly 1939."
5. Should the Tribunal consider the individual legal enactments of the States against the Jews as within the purview of the I Y T, a 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. 14 UN Charter).

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 Y T cannot ignore the law of nations (as a larger notion than "international agreements") what are the sources of the law of nations:
   a) the system of Art. 28 ICJU [International Law Commission, Draft Statute, 1955];
   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 "rechtsvertratender Schutzrecht" and such 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 ICJ an adequate expression of the "exigencies of
public conscience" or some more objective manifestations are required.
Discuss the relevance of "humanitarian intervention" as "wrong," 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-Jewish
crimes, the following reasoning is suggested (Annex A).

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