December 19, 1945

TO:  JACOB ROBINSON
FROM: HENRI SINGER

Thursday and Friday, I worked on your paper on "Legal Problems on the Crimes Against Humanity and on your memo to Major Walsh." I thought to be able to submit Monday, in addition to my remarks, a tentative outline of a brief on Crimes Against Humanity.

In the meantime, your new outline for such a study has been circulated among us.

Although on some points, this new version seems to forecast certain of my remarks, I think that, for a general clarification of ideas, my paper nevertheless conserves an interest perhaps more than retrospective.

It is for this reason, that I am forwarding it to you.
December 19, 1945

TO: DR. HOLSTEIN, DR. JACOBY, DR. N. ROBINSON, MRS. SCHAPIERE
FROM: RICHARD MINES

Attached please find my remarks on Jacob Robinson's first paper on "Legal Problems of the Crime Against Humanity" and his memo to Major Welsh of November 21, 1945.

My remarks might perhaps be of interest for a general clarification of ideas even after the circulation of Jacob Robinson's new outline of a study on these problems.

Yours

[Signature]
Ad 1. Constituent elements of the crime.

It does not seem to be completely accurate to say that while the penalties are defined, the elements of the crimes against humanity are not. The contrary would rather seem to be the case.

The constituent elements of the crimes falling within Art. 6a are no less specified than those of the crimes falling within 6a and 6b.

6a specifies, on the one hand, "murder, extermination, enslavement, deportation, and other inhuman acts committed against civilian population before or during the war," on the other hand, "or persecution 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."

Therefore, of course, no need to define the essence or the constituent elements of murder, extermination, enslavement and deportation.

The question of what is the essence of the crime may arise solely with regard to "inhuman acts" and "persecution on political, racial, etc."

I think, however:

a) That these crimes are, by their very nature, not to be reduced to definite constituent elements, simply because of the variety of the acts which might come within the definition of "inhuman acts" or "persecution."

b) That, in any case, the court has given a discretionary power to declare what might constitute an inhuman act or an act of persecution. The measure of appraisal is exactly that of the conscience and of the moral and legal concepts of the judges.

Whatever efforts be made to delimit the "essence" of these acts, are bound to be vain and, to my mind, such attempt at definition or delimitation
might even, under certain circumstances, prove harmful.

The question whether the IIL would rest its decision on a recital of all the successive stages of the Jewish destruction or on their final cumulative effect only, is of course beyond any guess.

What we know from the practice of criminal courts, continental or Anglo-American, might induce us to think that the IIL would probably follow the practice of all other criminal courts which have a tendency to sift the issues of facts and of law and to set their decisions only on those which are the least vulnerable.

One thing can be asserted with a reasonable degree of certainty: The court, bound by the indictment, is compelled to answer all the counts, whether retaining or rejecting.

Should we try to build up a brief showing the successive stages of the crime of Genocide committed against the Jewish people?

First of all, though even as doing, we will never have the certainty that the IIL will follow us in the process of selection of grounds for its decision.

Secondly, as a matter of fact, I wonder whether we should enter upon such a job. At best, it would be a shortened version of our indictment, in incorporated eight charges which we submitted and which was more than by reference in the general indictment, namely in Count One.

Ad 4th. What is the Law of the Case?

I do not hesitate to state that the Charter and nothing but the Charter.

Not so only because Justice Jackson proclaimed it forcefully and categorically in his opening speech (after all, we should never forget that independently.

4) In answer, should I be allowed to confess that I do not see very well the terminology between the words "Crimes Against Humanity" and "Inhuman acts", the former being the over-all subsuming definition of the crimes falling within the provisions of Art. 8(a), and the latter being designed to define a class of acts which, in the judgment of the court, may be considered as inhuman.
of Justice's role in the setting up of the whole judicial machinery functioning at Nuremberg, he is a great judge, but because of the very fact of the creation of the Charter.

Were the Tribunal to be bound by or apply general principles of international law overriding those embodied in the Charter and evidently implicitly conflicting with the provisions of the Charter, the whole struggle for the establishment of a special international instrument for the trial of such criminals would appear in vain.

Presumably because of the intent and the need to discard certain principles or rather shortcomings of international law, a special agreement and charter were entered upon. To set aside the plea of heads of state, of acts of state, to mitigate the admission of the defense of superior orders, to reach acts committed before the outbreak of the war and within the range of the sovereignty of the state, a special instrument was necessary. How could we now admit that something beyond this instrument, and which might conflict with its intent and purpose, could be allowed to be invoked and retained by the I.C.T.R. Such an attempt would be simply tantamount to an attempt to reduce to naught the very basis upon which the court is founded.

It is about a commonplace to state that, without the Agreement and the Charter there is no court, no power, no jurisdiction, no trial procedure, no penalties, in short, no law in its technical sense.

That the Charter is to be considered as the only law of the case results from two facts:

a) The provisions of Article 13 empowering the Tribunal to draw up Rules of Procedure.

This is an application of the particular practice of United States courts where rules of trial procedure are drawn up by the U.S. Supreme Court.
1) In France, for example, such a practice would constitute a clear violation of the principle of the separation of powers.
The defendant is not allowed to raise issues whether of fact or of law which are not relevant to the case. The court is empowered to rule on what is relevant, hence admissible in pleadings (briefs) and what is not. For instance, a defendant would not be admitted under the shelter of "fair trial" or "due process" to plead and to be heard on an issue of a statute of limitations where it is obvious that it is not relevant for the case, or on a question of law overruled either by statute or by judicial precedent and inconsistent with newly enacted legal provisions.

These principles and practices ought to prevail, and to my mind will prevail, all the more before the T.T.

Whatever might be said of the deviations from the provisions laid down in Articles 19-20 of the Charter and introduced by the rules of procedure drawn up by the court, it is permissible to doubt whether such highly trained Anglo-American jurists as Lord Justice Lawrence and Francis Piddle would, under the cover of "fair trial," admit in pleadings or in evidence issues of law which might be new issues inconsistent with the basic rules established by the Charter.

We should also remember the very clear and authoritative comment on what is meant under "fair trial" made by Justice Jackson in his Report to President Truman:

"...These hearings, however, must not be regarded in the same light as a trial under our system, where defense is a matter of constitutional right. Fair hearings for the accused are, of course, required to make sure that we punish only the right man and for the right reason. But the procedure of these hearings may properly be obstructive and dilatory tactics resorted to by defendants to our ordinary criminal trials."

True, a no-show disqualifying note is reflected by Lord Justice Lawrence's statement at the opening of the trial. He declared that everybody who takes part in the trial has to discharge his duty in accordance with the "sound principles of law and justice," and that the four signatories having ignored
judicial process, the trial should in no way depart "from those principles and traditions which alone give justice its authority and the place it ought to occupy in the affairs of all civilized states."

However, to see in this statement a hint of the possibility of exceeding by the Court the limits of the provisions of the Charter, in the case of "principles and traditions" of international law conflicting with the Charter, would appear the more unwarranted that, in the same statement, Lord Justice Lawrence indicated clearly that the Charter is the law of the Court both as to substance and trial procedure.

(2) Personal vs. Group Responsibility (Arts. 9 & 10)

It does not seem to me that there is a "versus."

The over-all framework of the crime for which the defendants are indicted is the Crime of Conspiracy. All the specific crimes enumerated in Arts. 6 are the implementation of this basic criminal undertaking. That the idea of conspiracy underlies the whole legal structure of the crimes charged is twice underlined in this Article, namely, in (A) and in the final paragraph which embraces (A), (B), and (C).

May I be allowed to recall the very elementary statement on the gist of the Crime of Conspiracy which, after all, is a purely original common law creation (in New York, modified by statute):

"It is not necessary that each conspirator should know all the details of the project or that the agreement should require each conspirator to participate in the carrying out of every such detail. It is even not necessary that each conspirator should know the exact part to be played by his fellow conspirators. It is sufficient that there should be a common understanding of the end to be achieved and an agreement to do whatever may be or become necessary to achieve that end...One who conspires with others to commit an unlawful act is criminally liable for all the consequences that naturally flow from it and is liable for the
...acts of each and all who participate with him in the execution of the unlawful purpose. Even though the conspirators have not planned all the details of their agreement and did not know what the result would be, nevertheless their joint participation in the commission makes each one liable, and this is true even though some of the conspirators were not actual participants or were absent when the act took place.

I believe that this definition of the crime of conspiracy takes care of the controversy of personal vs. collective responsibility recently aroused in the American press; it also takes care of the question of "hierarchical relationship."

Whether the accused acted as an individual or as a member of a group, or both, matters little. What does matter is whether the individual or the group was related to the "combination," even if the accused did not lift his little finger to aid the carrying out of the conspiracy; in such a case the only issue would be the gradation of the penalty.

Furthermore, I confess that I do not see what difficulties are inherent in the respective application of Articles 9 and 10, to use again judicial slang, they "speak for themselves."

As far as 5, 6, 7, 8, 9, 10, 11, A study on all these points might of course be of interest. The only question is whether the belong in a brief concerning Crimes Against Humanity.

If we consider that the Charter is the only source of law and that its provisions are binding upon the Court and of a narrow construction, I would be afraid that an elaborate study on all these points might cloud the issue instead of simplifying them.

As has been said in the Crime, page 9: "...The Crime, Page 9.

Now can the defendants take shelter behind the plea that the acts committed were legislative acts or acts pursuant to legislation, when Article 6 (c) expressly provides "whether or not in violation of domestic law of the country where perpetrated." Does this not mean that even though the
act was not punishable by the domestic law or even authorized, the act is
nevertheless criminally reachable under the provisions of the Charter. This
seems to me to be the normal construction of "whether or not in violation, etc."

Summarizing, I believe that the brief we have to prepare, if at all,
should stick only to Article 6 (c) and be a rather condensed brief on what
we deem may come within the two branches of this section 6.

An outline of such a study will follow within a short time.