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JUDGEMENT ON NUREMBERG

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Judgement on Nuremberg

An Historical Enquiry into the Validity of Article Six of the London Charter as an Expression of
Contemporary Law

A thesis submitted in partial fulfilment of the requirements for the Degree of Master of Arts in History in
the University of Canterbury by

Steven Daniel Eaton

Christchurch, New Zealand, 1994

Preface by Robert H. Countess, PhD

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Preface to the first Edition

by Robert H. Countess, Ph.D.

Setting.

Recently, my name has been associated with the above Master's Degree thesis awarded in 1994 to Daniel Eaton by the University of Canterbury in Christchurch, New Zealand.

This association has been posted on the Internet by certain people within a group known as the New Zealand Jewish Council [NZJC] and with commentary by certain people not members of this NZJC, but apparently sympathetic to its ideological goals and destructive methods. In addition, my name has been associated with the Eaton Thesis [=ET] in a rather disparaging and character assassination manner, so that I now believe I ought to make a somewhat formal response, even though I do not believe for a moment that my professional reputation will be elevated among the NZJC and its sympathizers in so doing.

There are all too often in historical eras small minded people and organizations with both hidden and also not so hidden agendas and these people behave badly both privately and publicly in order to entice or threaten scholars so as to achieve the agendas of narrow minded and ethno-centrally readily identifiable racist groups.

Based upon my readings and personal experience, the NZJC is one of these harmful groups and its agendas are nothing short of evil, because they seek **control** rather than cordial influence of the New Zealand academic community and taxpayer funded institutions of higher learning. During the National Socialist era of 1933-45, similar **control** of German universities was achieved by political ideologues and government interference -- a state of affairs still true for post-War Germany even until this very day. Meaningful dissent was generally ruled out and persistent dissenters were dismissed from their posts by the Nationalist Socialist State.

The New Zealand Jewish Council is, sadly, emulating the National Socialist Party's model for higher education and the recent attack on Dr. Joel Hayward and his Master's thesis of 1993, also at University of Canterbury, by the NZJC in and before 2000 resulted not only in an enormous financial cost to the taxpayers of New Zealand but enormous damage to New Zealand itself as a modern Western liberal democracy with a putative commitment to strong defense of academic freedom in the marketplace of ideas. Of course, enormous damage physically, financially, emotionally, and professionally, was inflicted on Dr. Hayward in having to defend himself against the vitriol and spirit of hate exuded by the NZJC and its fellow travelers.

Unashamedly, the NZJC attempted to turn back the historical clock in its brazen effort to have Dr. Hayward's Master's thesis annulled and his degree rescinded. Again, one need only refer to the National Socialist analogue wherein by law [RGBl, I, 985] a university degree could be revoked for being judged as "*Unwürdigkeit*" [unworthiness] and based upon a Hitlerian law.

Living as I do in the United States, I am confident that most academics in the USA would find both the Hitlerian law and the NZJC efforts to rescind Dr. Hayward's highly graded and esteemed thesis to be both woven out of the same oppressive fabric and thus to be condemned. **The New Zealand Jewish Council has, therefore, bedded down under the blankets of Hitlerian accouterments.**

As if the blatant attack on academic freedom at Canterbury University -- and the Council's highly publicized victory against that academic freedom -- were not enough to satisfy an

average appetite for devouring intellectual freedom, the NZJC has now **discovered** at the Christchurch university two additional threats to the NZJC's narrowly racist goals. These "threats" are Professor Vincent Orange and Daniel Eaton's Masters Thesis. As of mid-2002, the NZJC has mounted a new attack and seeks, it appears, nothing less than two more heads on the guillotine of the Council's circumscribed chopping block.

If the citizens and Parliament and university governors of New Zealand allow this additional destruction of traditional Western academic life, then one may well conclude that New Zealand has moved itself intellectually back toward the dark age that descended on Eastern Europe from 1917 on, a horrible period when some of the New Zealand Jewish Council's forefathers led the 1917 revolution in raping, murdering, genociding, holocausting and "Gulagging" tens of millions of Christian Slavs, thus ushering in a Judeo-Marxist Dark Age that lasted until 1989. **Thus, I see the gradualist evolving of a ruthless academic suppression and repression in New Zealand by anti-intellectual types enshrined in the NZJC and this shameless effort ought to be seen as a red alert danger signal to New Zealanders and I wish them the greatest success in turning back this single agenda onslaught. If not turned back -- as the Bolshevik onslaught was not turned back -- the NZJC will celebrate its complete control of the Humanities in the universities of New Zealand, with those of neighboring Australia similarly targeted for control by the NZJC's brotherhood there.**

Historical Prologue.

The NZJC seems hellbent on bringing to New Zealand some of the intellectual darkness and intimidating tactics and ethnic-cleansing spirit of "the Mother Country" -- that is, the State of Israel. In that nation, a law from the 1980s, I am told, exists that can imprison a person for up to five years for what is popularly called "Holocaust Denial."

To those of us with Western minds instead of an Asiatic mindset, the making of a person liable to prison for a scholarly dissent from orthodoxy in historiography is plainly fanatical and a mockery of the Western and European -- that is, a non-Asiatic -- tradition. The Jewish State of Israel functions under its own version of fanatical, self-serving *shari'a* and dissenters there can expect to be treated as ruthlessly as under Moslem *shari'a* in Taliban Afghanistan or *ayatollah* run Iran or Saudi Arabia.

What I see exhibited by the NZJC is **history denial** and the NZJC fanatics as **history deniers**. However, I do not suggest that these deniers be persecuted or prosecuted or even dismissed from their positions in tax funded schools. I believe both the National Socialists and the **NZJC-nazis** were/are both wrong conceptually and programmatically in their persecution of dissenters.

Unfortunately, the popular term "Holocaust Denial" seems to stem from the ruthless academic religious fanatic at Emory University in Atlanta, Georgia -- a racist Jewess by the name of Deborah Lipstadt. Her academic speciality is a narrowly circumscribed and rather recondite sub-category of Jewish Studies, namely the Jewish Holocaust Story [= JHS].

Her book *Denying the Holocaust* not only enriched her bank account greatly, it enabled her to become "the Grande Dame" of what the Jewish Professor Norman Finkelstein calls "the Holocaust Industry" -- with his book by the same title.

Any ably trained historiographer can quickly recognize after only a few pages of Lipstadt diatribes against dissenters such as I am --that is, dissenting from the "fixed in concrete" dogmas of the Jewish Holocaust Story -- **that Ms. Lipstadt has no profound grasp of serious historiography and the problems of writing seriously about accuracy in the recent past.**

For her, there is no dissent other than some scholars arguing over whether 5.1M. Jews died or 5.9M. or 6M.; or whether Jews really walked passively to their deaths into assembly line like homicidal gassing chambers or fought to the very last breath to avoid extermination. **Also, for her and her fellow greedy-for-Mammon gain cohorts, she will allow for dissent as to how many billions of dollars or euros or rubles ought to be shelled out by the guilty Goyim still breathing on Planet Earth and their children in perpetuity into Jewish bank accounts.**

I will quickly concede that Ms. Lipstadt is an expert in Holocaustology—that Jewish speciality wherein Jewish misbehavior and crimes are omitted, but wherein Gentile misbehavior and crimes are **absolutized into eternity**. Her strengths are in literature and poetry and novels and Jewish religious mysticism, but she is a stranger to a rigorous investigative approach to the terribly complex factors of the 1939-45 conflagration wherein two titanic States -- Germany and the Soviet Union -- were engaged in a life-and-death battle for the survival of people and ideas. She enjoys, in addition, a Jewish-bought position -- the Dorot Chair -- at a Christian university, an amazing contradiction in and of itself!

For Lipstadt and her superficially trained and maintained ilk, "history" is seemingly a **univocal** term -- that is, the opposite of the philosophical term **equivocal**. Univocal means that the term is clear in its referent; equivocal means that the term used is unclear and that explanation is required. It is tragic that a Lipstadt has never studied deeply enough to learn that "History" is equivocal.

Recently, while teaching in a European graduate school, I explained this briefly to my students and they all quickly grasped it when I demonstrated the following:

H-1 Any event. John sneezed.

H-2 Any significant event. King John sneezed and then had a heart attack and died and his kingdom fell to his rival.

H-3 Any recorded event. On materials such as stone or papyrus or wood or word processor.

H-4 Any chronology of events. King John and Queen Johanna produced twelve children who produced x children etcetera.

H-5 A chronology of significant events with interpretation provided by the historiographer and perhaps with lessons suggested for avoiding past mistakes of others.

Now indeed, the Jewish Holocaust Story is an example of works that can be called H-5 and, as such, is open to dissent and revision by those both competent and not competent to speak convincingly about their new evidence and interpretations of past events such as H-1-4. **But, sadly, for people such as Ms. Lipstadt and the NZJC and intellectual featherweights like Elie Wiesel [with his long list of honorary doctorates], there is only the orthodox, Hollywood, Israeli point of view about the events and results of World War Two.**

So, when at Canterbury University, the world's first ever Master's thesis [1993] displayed dissent from the dogmas of Lipstadt's H-5, the NZJC resorted to pressures and intimidation and legal tactics and threats to silence Hayward's dissent. The shameful tale of his apology from a bent over position has largely become part of the public record. Students of European history may recall Roman Emperor, King Henry IV in 1077 at Canossa, Italy when Pope Gregory VII forced Henry to stand three days in the snow to show his total submission to the Roman Pontif. Hence, the phrase "going to Canossa" bespeaks pain and embarrassment of someone with dignity who sacrifices it to retain his position of limited authority.

Thus, I speak of Joel Hayward as being forced by the NZJC "to go to Canossa" to satisfy this Council's lust for power.

This fine scholar, courageous thinker, decent human being, faithful husband, compassionate father and efficient breadwinner, as well as confessing Christian Presbyterian, has been silenced, smeared, pilloried, hounded, pained, and embarrassed by a shameless gaggle of hatemongering Jews who so disdain, for example, the place name "Christchurch" that they pronounce it, I am told, "Chi-chi." **NZJC anti-Christian-ism** knows few restraints!

Having resigned in June, 2002 from his university, Dr. Hayward is picking up the pieces of his most promising professional life, and people of good will everywhere wish him the very best future in spite of the McCarthyist smear attacks of the NZJC and its ilk. I most certainly wish him the very best future.

The Eaton Thesis.

A certain NZJC sympathizing wag named, I believe, Zimmerman [or is it, Carpenter?] alleging himself to be an academic of some sort at a US tax payer funded Nevada university, wrote against me with typical "Lipstadian" bile that my Theses & Dissertations Press has become one of the leading publishers for "Holocaust denial." Although this hack has no obvious grasp of the H-5 problem, and although he certainly did not mean to make a compliment, he did in fact bring to prominent light that TADP has become, in only three years, the primary publisher of scientific-historiographical books on the Jewish Holocaust Story [see tadp.org and the thematic statement that "*Internet macht frei!*"].

One might even state with no fear of contradiction that TADP is without peer in this field in terms of the quality and quantity of first class books, along with a sister journal, the *Vierteljahreshefte fuer freie Geschichtsforschung* [or, VffG—the Quarterly Journal for Free Historical Research edited by the internationally known expert, Doktorand Germar Rudolf, widely recognized for his expertise in a certain branch of physical chemistry and who was at the Max Planck Institute of Stuttgart until the same types who comprise the NZJC "crimethink" nazis forced him out of the Institute]. In addition, Doktorand Rudolf is now Editor of an English language quarterly due to appear in 2003, *The Revisionist*, and likely to become the leading Historical Revisionist journal.

Again, I do sincerely thank the Carpenter or Zimmer-Mann for bringing this to the world's attention and I am more than enough pleased to have conceived of TADP as a publisher of otherwise unpublished master's and doctoral theses and to have founded it with the collegial support of Doktorand Rudolf.

Historical Background. Very briefly, I learned of the Eaton thesis from his Canterbury fellow student, Joel Hayward. And when the latter visited Alabama in January of 1994 to do research at the USAF Archives in Montgomery, he came to Huntsville -- "the Space Capital of the World," some have called it -- some three hours drive by car. He brought me a copy of his own thesis and allowed me to make a copy for the Berlin Professor Ernst Nolte -- an esteemed acquaintance of mine since 1989 when first meeting him at the *Freie Universität Berlin*. Dr. Nolte was, as I recall, rather impressed with the content and scope and size of the Hayward thesis and, when I suggested that German university students ought to be engaged in similar research and writing, I remember Germany's greatest historian of Contemporary History remarking that "It is not possible." And, of course, Nolte was right. **The Hitlerian mentality for suppressing punishing dissenting views about the Jewish Holocaust Story is alive and well and is also the law in the modern German nation of our day.**

Professor Nolte is well known for his *Intentionalist* position on the JHS wherein he explained to me one time in logical progression that 1.) Hitler wanted to achieve a physical annihilation of Jews; 2.) Hitler had the power to do so; and 3.) Therefore, Hitler succeeded in exterminating millions of Jews. The esteemed Berlin professor's early training was in Classics but he moved successfully into modern European History. However, I must emphasize that his method in **deducting** the JHS from a Hitlerian animosity toward Jews and then moving into an **actual** extermination of millions is faulty logic in a field of study where the physical sciences **must** be given priority. Dr. Nolte is what Professor Faurisson calls "a paper historian" -- or what others might call "an ivory tower historian." Nolte has not taken the time to visit the various SS camps and to study the scientific problems entailed in the Jewish Holocaust Story. For him -- as honorable and brilliant and successful as he is as a scholar and a great human being -- the rigorous questions of physics, chemistry, architecture, building construction, ground water table problems, and the like **are not as central to his stance as is deductive logic.**

Interested in my concept of a Theses & Dissertations Press for the purpose of publishing academic works not normally put into print, Hayward and I discussed an eventual publication of his own Masters Thesis, but written permission was never actually granted to me for several reasons. My desire today is, of course, that TADP yet publish his original work in all of its 360 pages and

title of *The Development and Significance of Holocaust Revisionism*. Along with it would go the two pages by Professor Vincent Orange in which he assessed the thesis, its method of approach, and author. If I were to be authorized to publish it, I would invite Dr. Hayward to compose a Foreword to the Published Edition and set forth the circumstances created by the NZJC that forced upon him his "Canossa" apology of 1999-2000 wherein Dr. Hayward asked for forgiveness from the NZ Jewish Community for pain *etcetera ad nauseam* for writing the thesis from a "so insensitive-to-Jewish-sensibilities" perspective.

I would add, as a Publisher, my own evaluation of the squalid state of affairs in New Zealand, an otherwise beautiful land with large numbers of decent human beings. In that evaluation, a sort of Publisher's Preface, I would point out that Dr. Hayward did not owe anyone an apology about anything **unless convincing evidence of error in data and error in logical deduction or induction based on the evidence were to be brought forth for public examination.**

I would point out that Dr. Hayward's "Conclusion" chapter's twelve concluding observation, **based as they were, on evidence**, were not really new conclusions but were simply placed in the context of a Graduate School's academic framework and were guided in part, at least, by his major Professor, the esteemed historian Vincent Orange -- who also needs neither now or in future to make apology or defense to the scholarly world **and certainly never to the Jewish racists who comprise the New Zealand Jewish Council.**

These twelve conclusions were/are supportable by physical evidence and logical analysis; plus, author Hayward made crystal clear his disapproval of Nazism and its treatment of Jews within its extent of physical control. **What more could the scholarly world ask for?**

My advice to Dr. Hayward during his "trial by fire" created by the NZJC was that he ought not to apologize for anything, but that instead he should publicly declare that the NZJC must bring forth hard evidence and strong logical analysis to demonstrate that he had erred in one or more or all of his twelve conclusions. **I still hold the view that if he had taken that advice, he would have won a major victory on behalf of New Zealand scholarship and would have earned enormous respect by careful scholars worldwide and would still be teaching at Massey University in Palmerston North, New Zealand, to students who came to know and appreciate and respect his talents.**

Alas, he did not take my advice and today he lives in pariah status in the minds of many Kiwis.

With Daniel Eaton's thesis completed by early 1994, I received both a hard copy and a computer disc of it. In a fax dated 25 October 1994, he gave written permission for TADP to publish.

Simply put, Mr. Eaton's thesis, *Judgement on Nuremberg*, comprises 267 pages with Endnotes and Bibliography. In his "Acknowledgements" he begins with a tribute to Joel Hayward "to whom I owe my enthusiasm for the subject. I also owe him thanks for his scrupulous proof reading and criticism of this text." [p.i] Then follows a tribute to Professor Vincent Orange as his mentor.

Outside observers must, of course, be grateful that so enlightened a scholar of Twentieth Century European History as Dr. Orange ostensibly is, was a model at Christchurch's University of Canterbury for young students to emulate. What greater tribute to academic greatness than for Master's students to pen such accolades as are found both the Hayward and Eaton theses?

In his "Abstract" [p. ii], Mr. Eaton states his conclusion that "Despite Allied claims to the contrary, the disposal of the *major* Nazi war criminals was indeed an 'arbitrary exercise of power.' As such, it had historical precedents which include the imprisonment of Napoleon in 1815 and the planned political trial of the Kaiser in 1919."

On page 2 he wrote that "This thesis will argue that no law existed in 1945 to give the victorious Allies the legal right to punish the Nazis for the full extent of their misdeeds." Eaton argues, logically and historically, that *nulla lex, nulla poena* [= Where there is no law, there is no transgression since a crime cannot be committed logically where there is no law prohibiting that crime (my paraphrase of this hallowed principle)]. Thus, he wrote that "In anything other than a purely subjective moral sense, a crime, by definition, is an act punishable by law. Criminal law, by nature, requires a prescribed jurisdiction and punishment."

In view of this clearly stated thesis problem, thoughtful outside observers must be scratching their heads as to what it is that motivates the New Zealand Jewish Council to make a public attack on the Eaton Thesis [= ET] and his thesis mentor. One must ask if Mr. Eaton displayed in the body of ET some wanton disregard for scholarly discipline and some flagrant dismissal for history of International Law.

One thing is crystal clear for citizens of the USA with regard to *nulla lex, nulla poena*, and that is that in accordance with Section 9 of *The Constitution of the United States of America*, the Congress can pass "*ex post facto law*." US citizens are constitutionally provided the guarantee **that whatever activity they engage in today cannot tomorrow be declared illegal and thus punishable by congressional law passed and enacted AFTER the fact of the activity itself.**

The thesis by Mr. Eaton focused precisely upon whether or not the jurisprudence of the International Military Tribunal as embodied in the London Agreement signed by the victorious Allies on August 8, 1945 -- the USA, Great Britain, the USSR, and France. The principles of this document provided the juridical basis for the trials that followed and the punishments. Article 6 declared that the Tribunal would be concerned not only with "violations of the traditional laws and customs of war, defined as 'war crimes', but also [with] 'crimes against peace' and 'crimes against humanity'." [p.13]

In his "Conclusion" beginning on page 192, Eaton draws together all the historical data he considered relevant at the time of his research and his simple conclusion follows the colon: "**THE STRONGEST HAS THE RIGHT**".

Hence, Eaton argued on pages 223-4 that "By May 1945, the Allies had proved themselves to be the strongest. Four months after victory they drew up the London Agreement and Charter. It must be granted that the Allied aim, in trying the enemy at the end of the war, may legitimately have been political, while at the same time the process by which individuals are brought to 'justice' may be legal. Also, all law necessarily relies on a measure of might for implementation. However, when the process by which the enemy is brought to 'justice' is not governed by predetermined law [,] then it becomes political, reliant solely on the might and whim of the victor... In so far as the Nuremberg trial of 1945-1946 was a political act [,] it was simply an extension of the war, the last battle in a clash of political ideologies, a battle which, although not fought with the traditional machinery of war, proved for Germany's Nazi leaders far more deadly."

University of Canterbury's own Professor Alex Conte, an expert on International Law, has been quoted as saying that Daniel Eaton's thesis is only one of numerous works to question the legal basis adopted by the Allies for the Nuremberg proceedings.

In addition, University of Canterbury Chancellor, Dame Phyllis Guthardt is quoted in response to the ET: "There is no suggestion of an investigation into the Eaton thesis. There is no evidence of fraud or dishonesty; there had been no criticism of it, and it had never been embargoed or withheld."

What more could the New Zealand Jewish Council ask for? Answer: the head of Daniel Eaton on a platter, it would seem!

Having had this thesis in my possession for some eight years and having read it from the historian's vantage point rather than from that of someone trained in Civil or Criminal or International Law, but as one who had worked with Master's level students on their theses at Tennessee State University [during 1972-3], I can well understand why Professor Vincent Orange approved Daniel Eaton's work and why the University of Canterbury graduated Daniel Eaton in 1994.

At the same time, in order to put into practice my advice to Dr. Hayward, I shall declare in December of the year of our Lord 2002, that if the New Zealand Jewish Council has new data and better logical analysis to bring forth for public, scholarly scrutiny to demonstrate that Daniel Eaton erred in any major historical datum or deliberately falsified any document or misused human logical analysis in any fundamental manner, I shall return to the research sources the

NZJC adduces and, if I conclude that Daniel Eaton erred significantly, I shall submit a revised but negative conclusion of his thesis. Thereupon, I would submit to Professor Vincent Orange that he would also have erred in failing to guide the young scholar under his charge.

But until the NZJC provides convincing evidence to the contrary, I shall hold the Eaton Thesis in high esteem and I shall oppose all attempts at degrading it by the NZJC and its sympathizers for what they are: small minded, vicious, envious, hate filled, racist, anti-intellectual ideologues in service of "the Holocaust Industry" and on the emotional payroll of the Jewish State of Israel.

Newspapers such as *The New Zealand Herald* and reporters such as Ms.Amanda Warren should be ashamed of themselves of printing such shallow hit-pieces against Daniel Eaton, Dr. Vincent Orange, and the University of Canterbury as has been done in recent months. Now is the time for this print media outlet to issue an apology to Mr. Eaton, Dr. Orange, and, of course, to Dr. Joel Hayward for printing such superficial articles by journalists with **no minimal grasp of the historiographical problems encountered by scholars in the routine pursuit of their daily obligations.**

Signed: Robert H. Countess, Ph.D.
Date: 14 December 2002
Email: boblpinc@earthlink.net

----- Judgement on Nuremberg-----

What has been will be again,
What has been done will be done again ;
there is nothing new under the sun
Ecclesiastes

ACKNOWLEDGEMENTS

It was Joel Hayward who first introduced me to Nuremberg and it is to him that I owe my enthusiasm for the subject. I also owe him thanks for his scrupulous proof reading and criticism of this text.

My thanks to Dr. Vincent Orange of the University of Canterbury for his supervision and encouragement. In the currents and eddies of thesis-writing he proved a gifted navigator.

To all the interloanes staff at the University of Canterbury Library, without whose dedication and patience this thesis would have been impossible, I wish to express my appreciation.

I am indebted to my parents and grandmother for their encouragement, patience and last but not least their financial support.

I also want to thank my friends for the benefit of their thoughts. Their pleasant distractions regularly took me, perhaps more often than was wise, from history's courtroom to the bar.

ABSTRACT

In 1945 the Allies declared that the process controlling the punishment of the *major* Nazi criminals was legal rather than political and thus not reliant on an "arbitrary exercise of power". They claimed that the crimes with which Germany's Nazi leadership were to be indicted were provided for in existing international law.

This assertion was made despite the fact that it contradicted the pre-war, war-time and early post-war war crimes policy and activities of the Allied nations. This thesis, in examining the process by which the Allies reached agreement on the punishment of Germany's Nazi leadership, concludes that the Allies evidenced scant regard for the system known as international law. Rather, the process appears more as an effort to justify Allied war-crimes policies and gain post-war public support.

In 1945 no law existed to give the victorious Allies the legal right to punish, to the full extent, what they saw as Nazis' misdeeds. The Allies thus chose to leave the realm of international law and enter into the political domain. In effect they created the necessary law. However, in order not to create law by which they themselves might in the future be judged, the Allies chose to do so not through accepted channels for the creation of either national or extra-national legislation.

Despite Allied claims to the contrary, the disposal of the *major* Nazi war criminals was indeed an "arbitrary exercise of power". As such, it had historical precedents which include the imprisonment of Napoleon in 1815 and the planned political trial of the Kaiser in 1919.

S. D. E.

[1]

PROLOGUE

"OUR SUFFERING WAS THE RESULT OF CRIMES"

From this [Nuremberg] record shall future generations know not only that our generation has suffered but also that our suffering was the result of crimes, crimes against the laws of peoples which the peoples of the world upheld and will continue in the future to uphold ; to uphold by international co-operation, not based merely on military alliances but grounded, and firmly grounded, in the rule of law. (1)
Sir Hartley Shawcross, Chief Prosecutor for Great Britain, 1945.

It is taken for granted that the Nazi régime, the holocaust, and the individual atrocities which constituted it, were criminal. The year-long war crimes trial before the International Military Tribunal at Nuremberg (IMT, November 1945-October 1946) proved it and a long succession of subsequent war crimes trials have reinforced it.

As Sir Hartley Shawcross, Britain's Chief Prosecutor at Nuremberg, predicted during his opening speech in 1945, the names of Göring, Bormann, Streicher, Jodl, Hess, Frick, Ribbentrop, Goebbels and Hitler, amongst others, are now synonymous with the term "war criminal". (2) Today the term "crimes against humanity", so inextricably intertwined with the holocaust, is almost as familiar in popular usage as murder. However, even today, "crimes against humanity" is far from having the benefit of international and national

[2] legislation which would provide it with the necessary legal accuracy which has come to be expected of legislation covering major national common crimes. (3) As M. Cerif Bassiouni has said : "Popular perceptions and expectations have thus outdistanced positive law." (4)

At the close of the Second World War, the legal case against the leading Nazis was not as clear cut as it now seems. In anything other than a purely subjective moral sense, a crime, by definition, is an act punishable by law. Criminal law, by nature, requires a prescribed jurisdiction and punishment. (5) This thesis will argue that no law existed in 1945 to give the victorious Allies the legal right to punish the Nazis for the full extent of their misdeeds. In fact, the laws by which the Allies, after the cessation of hostilities, claimed to justifiably prosecute Germany's Nazi leadership, were in fundamental contradiction to the pre-war and war-

¹ *The Trial of German Major War Criminals by the International Military Tribunal Sitting at Nuremberg Germany (Commencing 20th November, 1945). Opening Speeches of the Chief Prosecutors.* (London: HMSO, 1946) p. 47.

² Ibid.

³ M. Cerif Bassiouni, *Crimes Against Humanity in International Law.* (Dordrecht: Martinus Nijhoff Publishers, 1992) p. xiv.

⁴ Ibid. Bassiouni is Professor of Law at the International Human Rights Law Institute, DePaul University, and President of both the International Association of Penal Law and the International Institute of Higher Studies in Criminal Science.

⁵ R.F. Roxburgh, 'The Sanction of International Law.' *American Journal of International Law*, 1920, 14: 26.

time policies of the Allied nations.

The law had not, however, as has sometimes been argued, simply been caught on the back foot by the extraordinary scope of Nazi barbarity. As this study will demonstrate, Allied attempts to punish the Nazis after the end of the Second World War raised few legal issues that had not already been discussed after the First World War in 1919. Nuremberg, rather than being an application of existing international law, was an arbitrary exercise of

[3] power on behalf of the victorious Allies, an extension of the war which constitutes the last battle in a clash of political ideologies. The Nuremberg trial of 1945-1946 was a political rather than legal exercise, a frantic, though understandable, attempt to crush National Socialism forever.

Prior to the First World War, the development of a uniform international criminal law of war, from which war crimes gain their definition, had culminated in the Hague regulations of 1907. These regulations limited the conduct of belligerents while in the act of waging war and provided internationally agreed limitations on the war-time administration of occupied territories. Although the 1907 Hague convention defined what was criminal, it did not prescribe punishment and jurisdiction remained in the hands of the nation whose serviceman had committed the offence.

The limitations of the Hague regulations were, to a certain extent, offset by customary international law codified in the military manuals of all civilised nations. These manuals contained provision for the trial and punishment of captured enemy combatants involved in the violation of the laws and customs of war. ⁽⁶⁾ Nonetheless, they were not part of statutory international law and were themselves often disregarded when they conflicted with what practical military men saw as national interest, often

[4] called "military necessity". In this respect, the accusing finger was most often pointed at Germany. Typical of a general sentiment is the statement of an international lawyer, Hugh Bellot, read before the Grotius Society in 1916. Bellot argued that in Germany the "doctrine of military necessity" was "paramount to all other considerations" and had "ridden rough-shod over the established usages of war, over the principles of International Law and even over conventional obligations." ⁽⁷⁾

Writers and lawyers regularly cited the issuing of the infamous *Kriegsbrauch im Land Krieg* by the German General Staff in 1902. The *Kriegsbrauch* stated that the laws and customs of war were more morally than legally binding and that the "tendency of thought of the last century was dominated essentially by humanitarian considerations which not infrequently degenerated into sentimentality and flabby emotion", and that such a development was "in fundamental contradiction with the nature of war and its object." ⁽⁸⁾ Bellot declared that only "Prussians" could issue "such a cynical and stupid confession of bad faith and deception". ⁽⁹⁾

It appears, however, that whether or not the German attitude expressed in the *Kriegsbrauch* may have been issued in "bad faith", it contained a large measure of Prussian pragmatism ; a pragmatism which, if not shared by lawyers, was at least common amongst soldiers, regardless of their nationality. In June 1913, prior to the outbreak of the

[5] Great War, Lord Fisher, a retired Admiral of the Fleet, wrote a letter to Winston Churchill, First Lord of the Admiralty. In this letter he discussed the use of submarines (then a new weapon most developed by Germany) within the context of the laws and customs of war. He observed that "the essence of war is violence, and moderation in war is imbecility." ⁽¹⁰⁾ The essential paradox of "military necessity" was well summed up after the war in 1919 by Harold Picton in a book entitled *The Better Germany in Wartime* :

What is and what is not allowable in war seems so largely a matter of "military necessity" that the layman is reluctant to comment, for, in the last resort, it is only the needlessly barbaric that is condemned in war. ⁽¹¹⁾

The general recognition of "military necessity", as an excuse for the violation of international law as

⁶ G.A. Finch, 'The Nuremberg Trial and International Law.' *American Journal of International Law* 1947 41[1]: 20 ff.

⁷ H.H.L. Bellot, 'War Crimes: Their Prevention and Punishment.' *The Grotius Society*. Vol. II, 1917, p. 31.

⁸ Quoted in *Ibid.*, p. 41. See also H.H.L. Bellot, 'War Crimes and War Criminals.' *Canadian Law Times* 1916 36[1]: 760-761.

⁹ *Ibid.*, p. 761.

¹⁰ John Terraine, *Business in Great Waters: The U-Boat Wars of 1916-1945*. (London: Leo Cooper Ltd., 1989) p. 5.

¹¹ Harold Picton, *The Better Germany in Wartime*. (London: National Labour Press Ltd., 1919) p. 126.

expressed in the laws and customs of war, may also be seen from the records of the London Conference of 1945. The conference was attended by legal representatives of France, the Soviet Union, the United Kingdom and the United States. It resulted in an agreement and charter for the prosecution of the major war criminals of the European Axis. In discussing what should and should not be prosecuted, Robert H. Jackson, leading the American delegation, stated :

[6]

we left out of our draft the destruction of villages and towns, because I have seen the villages and towns of Germany. I think that you will have great difficulty distinguishing between the **military necessity** of that kind of destruction [done by the Allies] as distinguished from some done by the Germans, assuming the war to be legitimate. ⁽¹²⁾

However, despite the concern expressed by Jackson, reference to the "destruction of villages and towns" and the recognition of "military necessity" remained part of the charter for the IMT. ⁽¹³⁾

Any grand dreams which statesmen and lawyers might have entertained in 1907 concerning the statutory mitigation of wartime barbarism soon faded as the Europeans in particular experienced the horrors of the Great War. Though there was some debate in 1919 as to whether a body of statutory international law existed by which the Allies might punish German individuals, after the cessation of hostilities, for violations of the laws and customs of war, the Allies obtained the necessary jurisdiction through an international treaty signed at Versailles. For better or for worse, the Treaty of Versailles created the legal precedent for a similar operation by the victor nations after the Second World War. However, although the Treaty of Versailles represented a great step forward in the

[7] prosecution of violations of the conventional laws and customs of war, other legal issues discussed at the 1919 Paris Peace Conference remained unresolved. These issues, such as the "laws of humanity" and the criminality of aggressive war, were, not surprisingly, destined once again to surface after the Second World War.

The principle which had lain behind the development of the laws and customs of warfare was that while war itself remained legal it was desirable to keep it as humane as possible. Nevertheless, spurred by the horror of the Great War, the inter-war period saw several attempts, foremost amongst which was the 1929 Pact of Paris, to make the act of war itself a crime. Such law had been lacking in 1919 and had formed the basis of considerable heated debate between the Allied governments.

The efforts to punish German war criminals after the First World War have been declared a failure by a vast majority of contemporary commentators and later historians. This notwithstanding, by 1945 the Allies were once again in a position to take firm action against Germany. With the experience of two world wars behind them, the victorious powers were now more determined than ever to mete out stern retribution and to ensure that there would not be a third. Ironically they found their legal tools were in little better condition than they had been a quarter of a century earlier.

[8]

In November 1945 the four principle Allied nations began a year long trial of a group of twenty-two men (one in absentia) deemed to be the major war criminals in the European theatre of operations. The trial was authorised by the London Agreement and Charter of August 8, 1945. The only published record describing the negotiations leading up to the signing of the agreement and charter is the *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945* (1949). The report contains a transcription of the stenographic notes made by Jackson's secretary. Although these notes are only edited summaries of the meetings between the conferees, in combination with a number of aide mémoires and reports contained in the same volume, they are a valuable source for historians wishing to understand the motivation and understanding of those most involved in the formulation of the charter for the IMT. A book by Professor A.N. Trainin, a Soviet delegate at the conference, *Hitlerite Responsibility Under Criminal Law* (1944), along with later articles written by Jackson, go far to fill in any gaps.

¹² R.H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945: a documentary record of negotiations of the representatives of the United States of America, the Provisional Government of the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics, culminating in the agreement and charter of the International Military Tribunal*. Department of State Publication No. 3080 (Washington DC: GPO, 1949). Hereafter International Conference. Document LI. Minutes of Conference Session of July 25, 1945. p. 380. Italics and brackets mine.

¹³ **Appendix 1**, Charter of the International Military Tribunal, August 8, 1945, note the wording of Article 6 (b).

These sources are, however, insufficient by themselves to assess the Allied policies which led to the formation of the IMT. An examination of the various declarations and statements relating to Allied war-time and immediate post-war policy on the punishment of German offenders helps to place the London Conference within a broader context. An

[9] examination of historical precedents and contemporary opinions contained in legal books and journals provides an even broader context. For an analysis of precedents dealing with international aggression immediately prior to and during the Second World War the present writer has primarily referred to the texts of relevant treaties and the works of respected historians of the period.

In examining Allied war crimes policy following the First World War, reliable transcriptions of treaties such as that of Versailles have been used. Also of immense value, regarding Allied policy in 1919 and the contemporary understanding of war crimes in international law, are two documents entitled *Violations of the Laws and Customs of War. Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities. Conference of Paris 1919* (1919) and a book by Paul Mantroux, *Paris Peace Conference 1919 : Proceedings of the Council of Four (March 24 - April 18)* (1965). The latter work is of a similar nature to Jackson's report cited above. Paul Mantroux was the official interpreter at the meetings between Wilson, Lloyd George, Clemenceau and Orlando, the heads of the four principle Allied powers. Mantroux's book, first published in French in 1955, consists of his unofficial notes of the conference and is the only published account of the conference sessions during which war crimes were discussed.

[10]

With regard to the formation of the IMT the present writer has, as far as possible, attempted to separate the views expressed by the various nations involved. However, the emphasis on American opinions, primarily those of Robert H. Jackson, though to some extent unavoidable, is far from accidental. Although the Soviets had taken an early initiative in demanding the trial of the major Nazi offenders, the Americans by the end of the war had become the major proponents of a trial by international tribunal. Thus, it was the Americans who called the London Conference which resulted in the signing of the agreement and charter bringing into being the IMT. It was also the Americans who prepared the initial draft agreement which formed the basis for discussion in London.

American draft number four of the executive agreement was transmitted to representatives of Britain, France and the Soviet Union in early June 1945. An historian, Bradley F. Smith, has described the act as the end of "the exclusively American Road to Nuremberg".⁽¹⁴⁾ Draft four provided the "battle field on which the diplomatic-legal struggle would be decided" and "when the dust finally settled in September 1945, there stood the London Charter and the indictment with most of the basic points of the U.S. proposal still in place."⁽¹⁵⁾

The United States was the driving force behind Allied war crimes policy which resulted in the trial at Nuremberg.

[11] On May 2, 1945, President Truman appointed Robert H. Jackson, Attorney General and Associate Justice of the Supreme Court, as the "Representative of the United States and Chief of Counsel in preparing and prosecuting charges of atrocities and war crimes against"⁽¹⁶⁾ the major war criminals. Jackson was given authority to assemble his own team of experts from various government departments and draw up and sign an agreement with the other Allied Powers. Thus he was largely responsible for the abovementioned fourth draft. The Tusas in their book on the subject describe the trial of the major war criminals as Jackson's "moral and legal crusade."⁽¹⁷⁾

¹⁴ B.F. Smith, *The Road to Nuremberg*. (London: André Deutsch, 1981) p. 246.

¹⁵ Ibid.

¹⁶ op. cit., International Conference, Document III. Executive Order by President Truman, May 2, 1945. p. 21.

¹⁷ Ann and John Tusa, *The Nuremberg Trial*. (New York: Atheneum, 1984) p. 69. Introduction: "Hiding In The Thickets Of The Law"

[12]

INTRODUCTION

"HIDING IN THE THICKETS OF THE LAW" ⁽¹⁸⁾

men - individuals as well as nations - have a wonderful capacity always to identify justice with their own interests. ⁽¹⁹⁾
Joseph L. Kunz, 1939

On August 8, 1945, representatives of the United States, Great Britain, the Soviet Union and the Provisional Government of the French Republic signed a charter and agreement in London. The agreement provided for the establishment of the International Military Tribunal (IMT) for the prosecution and punishment of the major war criminals of the European Axis. The principles contained in the charter were those which governed the 1945-1946 trial of the major Nazi war criminals at Nuremberg.

The London Charter, August 8, 1945

The charter, which was annexed to the agreement, outlined the constitution and jurisdiction of the tribunal and general rules for the conduct of the trial. The tribunal was to be composed of one member (and an alternate) from each of the four signatory powers. There was no stipulation as to the status, civil or military, of these members. Article 6 declared that the defendants were to be charged on three broad counts. These included not

[13] only violations of the traditional laws and customs of war, defined as "war crimes", but also "crimes against peace" and "crimes against humanity". ⁽²⁰⁾ It is the legal status of these three principles, as expressed in the London Charter, which will be the focus of this thesis. The law, as laid down by the charter, allowed not only for the prosecution of high-ranking government officials, but of organisations both military and civil, for offences against any one or combination of these three principles.

¹⁸ Robert Bolt, "A Man For All Seasons", text from Tom Maschler (Ed), *New English Dramatists* 6. (Middlesex: Penguin Books Ltd., 1963) p. 60.

¹⁹ J.L. Kunz, 'The Problem of revision in international Law.' *American Journal of International Law*. 1939 33 [1]: 45.

²⁰ A charge of conspiracy formed an individual count in the final indictment, bringing the total number of counts to four. The charge of conspiracy allowed the Allies, once a specific organisation was found criminal, to punish any of its individual members. However, conspiracy in the charter was not a separate criminal offense and will thus not be dealt with in this thesis. As this thesis will argue "crimes against peace" and "crimes against humanity" were not cognizable under international law. Thus, a conspiracy to commit either of these acts cannot be regarded as a criminal conspiracy. For the relevant text of the charter see **Appendix I**. Charter of the International Military Tribunal, August 8, 1945.

Subsequently, during 1946 two other formulations covering the same three principles were developed : the Tokyo Charter, Article II, and Allied Control Council Law No. 10, Article 5 (which will receive brief mention later in this study). The London Agreement and Charter, although it used the words "European Axis", defined the law for the IMT only. The only defendants to come before the IMT were German, no Italians ever came before an international tribunal, a point the Allies never attempted to explain. On January 19, 1946, the Allied powers issued General Order No. 1 which outlined the constitution, jurisdiction and functions of the International Military Tribunal for the Far East (IMTFE). The IMTFE was composed of members from Australia, Canada, China, France, India, the Netherlands, New Zealand, the Philippines, the Soviet Union, the United Kingdom and the United States. Between May 3, 1946, and April 16, 1948, it presided over the Tokyo trial of the major Japanese war criminals. However, of the three

[14] formulations defining crimes, the London Charter was the first. It thus served as the prototype and legal foundation for subsequent formulations.

Motion of the Defence Counsel, November 19, 1945

On November 19, after the reading of the indictment at Nuremberg, the defence put forward a motion adopted by all the defence counsel. The motion was an attempt to contest the validity of the charter and thereby the jurisdiction of the tribunal. It was primarily concerned with the charge "crimes against peace" but also stated that "other principles of a penal character contained in the Charter are in contradiction with the maxim *Nulla Poena Sine Lege*." (21) The motion stated :

This is repugnant to a principle of jurisprudence sacred to the civilized world, the partial violation of which Hitler's Germany has been vehemently discountenanced.... This principle is to the effect that *only he can be punished who offended against a law in existence at the time of the commission of the act and imposing a penalty.* (22)

The defence counsel went on to point out that the recently established Allied Control Council for Germany had "enacted a law to assure the return to a just administration of penal law in Germany" and that it had declared the

[15] restoration of the principle of no punishment "without a penal law in force at the time of the commission of the act". "This maxim", declared the motion, "derives from the recognition of the fact that any defendant must needs consider himself unjustly treated if he is punished under *ex post facto* law." (23)

The Judgement of the Tribunal, September-October 1946

In its judgement, delivered on September 30 and October 1, 1946, the tribunal replied that the "making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered" and that the "undoubted right of these countries to legislate for the occupied territories" had "been recognised by the civilized world." (24) However, the tribunal emphasised that the charter was "not an arbitrary exercise of power on the part of the victorious nations", but, in the tribunal's opinion, was "an expression of international law at the time of its creation ; and to that extent it is itself a contribution to international law." (25) The basis for this assertion was the belief that in the creation of an international military tribunal the Allies had simply "done together what any one of them might have done singly ; for it is not to be doubted that any nation has the right to set up special courts to administer law."(26)

The tribunal's judgement contains the basis for the

21 Motion Adopted by all Defense Counsel. *The Trial of the Major War Criminals Before the International Military Tribunal (Nuremberg)*. (London: HMSO, 1946. 42 Volumes) Vol. I, p. 169. Hereafter IMT.

22 Ibid., Italics mine.

23 Ibid.

24 *Judgement of the International Military Tribunal for the Trial of German Major War Criminals (With the Dissenting Opinion of the Soviet Member) Nuremberg 30 September and 1st October, 1946*. (London: HMSO, 1946) p. 38.

25 Ibid.

26 Ibid.

[16] establishment of the IMT in a nut shell. The IMT claimed its validity from the fact that the Allies had won the war and Germany had "unconditionally surrendered". However, unconditional surrender is a product of force, and as the sole basis for the formation of the IMT makes any trials the tribunal might conduct an "arbitrary exercise of power". For some time prior to the Second World War the international community had been making efforts to replace the rule of force as a means of mediation between nations. (27) By as early as August 1941, "the abandonment of the use of force" in international arbitration, and the development of a system of "general security" based in international law, had joined the "destruction of the Nazi tyranny" as a major Allied war aim. (28) The Allies proclaimed that the Nuremberg trial was an expression of this "abandonment of the use of force". As Sir Hartley Shawcross, the Chief Prosecutor for Great Britain, said in his opening speech before the tribunal sitting in Nuremberg :

There are those who would perhaps say that these wretched men should have been dealt with summarily without trial by "executive action"; that their power for evil broken, they should be swept aside into oblivion.... Not so would the Rule of Law be raised and strengthened on the international as well as upon the municipal plane ; not so would future generations realise

[16]

that right is not always on the side of big battalions ; not so would the world be made aware that the waging of aggressive war is not only a dangerous venture but a criminal one.... And so we believe this Tribunal... will provide a contemporary touchstone and an authoritative and impartial record to which future historians may turn for truth, and future politicians for warning. (29)

It is not difficult to see why the Allies found it preferable to claim that the charter for the IMT was not an "arbitrary exercise of power" to which, as victors, they were perfectly entitled, (30) but an "expression of international law as it existed at the time of its creation." The international law cited is that which gives nations the right "to set up special courts to administer law." Thus, the tribunal claimed that the setting up of an international tribunal for the trial of Axis (though in actual fact only German) war criminals was simply doing in a combined or collective manner what any one of the Allies might have done singly. The value of such claims is well summed up in the statement of Robert H. Jackson, the American representative at the London Conference and Chief Prosecutor at the trial :

[18]

If punishment is to lead to progress, it must be carried out in a manner which world opinion will regard as progressive and as consistent with the fundamental morality of the Allied cause. (31)

The Agreement and Charter in International Law

Despite such efforts to justify Allied action, it is worth noting that both the London Agreement and Charter and the later indictment made no claim to be in accord with international law. Neither was the agreement, signed in London, a law-making treaty (pages 211-213). It was simply an executive agreement. A critical reading of the section of the judgement, quoted above, reveals that the opinions expressed by the IMT members concerning the state of international law were obiter dictum or extra-judicial and thus not necessary to the judgement of the tribunal. It was, therefore, not incumbent upon the prosecution to prove that the offences were crimes in international law and, as pointed out in 1948, by J.H. Morgan, neither was it necessary to prove that they were not *ex post facto*. (32) For this reason the tribunal were able to leave answering the motion of the defence counsel until the very end of the trial.

27 George A. Finch, 'The Nuremberg Trial in International Law.' *The American Journal of International Law*. 1947 41[1]: 26.

28 The Atlantic Charter, Principle 6 and 8, made public on August 14, 1941, text in J.A.S. Grenville, *The Major International Treaties 1914-1845: A history and guide with texts*. (New York: Methuen, 1987) pp. 198-199.

29 *The Trial of German Major war Criminals by the International Military Tribunal Sitting at Nuremberg Germany (Commencing 20th November, 1945). Opening Speeches of the Chief Prosecutors*. (London: HMSO, 1946) p. 47. Hereafter Opening Speeches.

30 Hans Kelsen, 'The Legal Status of Germany According to the Declaration of Berlin.' *American Journal of International Law*. 1945 39[3]: 518; Edmund H. Schwenk, 'Legislative Power of the Military Occupant Under Article 43, Hague Regulations.' *Yale Law Journal*. 1945 54: 393- 416.

31 R.H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945: a documentary record of negotiations of the representatives of the United States of America, the Provisional Government of the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics, culminating in the agreement and charter of the International Military Tribunal*. Department of State Publication No. 3080 (Washington DC: US GPO, 1949). Document V. American Memorandum Presented at San Francisco, April 30, 1945. p. 34.

32 J.H. Morgan, *The Great Assize*. (London: John Murray, 1948) p. 6. Morgan was Professor of Constitutional Law at the University of London, an author on international law, the late Deputy Adjutant-General and Vice Chairman of the British Government 'War Crimes' Committee of 1918-1919.

Yet the problem that the jurists on the tribunal felt the need to overcome, in the portion of their judgement cited above, was that posed by the traditional concept of jurisdiction. Indeed, as the Soviet jurist, Professor A.N. Trainin, a signatory of the London Charter and Agreement on behalf of his government, stated in 1945 :

[19]

In literature on the subject, all the problems of international criminal law are usually reduced to one - the question of jurisdiction. ⁽³³⁾

In 1945 there were two concepts of jurisdiction applicable to war crimes. Firstly, that rooted in the concept of territoriality. This concept has been described by W.B. Simons in *The Nuremberg Trial and International Law* (1990) as "rooted in the idea of territory and the control thereover as paramount" :

So, where acts complained of as war crimes are actually localized within the injured state's territory and the victims are members of that state's armed forces - or at least from among its nationals - the territorial triangle between the state seeking to establish liability, the accused, and the victim(s) had come to be recognised by international law as sufficient to establish jurisdiction. ⁽³⁴⁾

Thus, the 1943 Moscow Declaration on war crimes was able to state that German officers, soldiers and members of the Nazi Party responsible for atrocities, would be sent back to the countries where their crimes were committed and tried according to the laws of those liberated countries (page 47). ⁽³⁵⁾ It was this jurisdictional principle which allowed the Soviet Union, in 1943, to take the lead amongst

[20] the Allies in trying captured members of the notorious *Einsatzgruppen* for various atrocities, primarily their alleged use of "gas vans" in and around the area of Kharkov (page 48).

However, it should also be acknowledged that during times of war the primary legal foundation for war crimes prosecution was, as it still is, the right of belligerents to enforce the established laws of war upon individual captured members of enemy forces. International institutions such as the Hague conventions and regulations of 1899 and 1907 to some extent provided for the codification of such customary international law. ⁽³⁶⁾ The stance taken by the very conservative American delegation involved in the Commission on Responsibility in 1919 (page 81) after the Great War certainly implied that in such cases the nationality of the offended party, irrespective of the soil on which the crime was committed, was the primary issue in establishing jurisdiction for trial by a military tribunal. ⁽³⁷⁾

Whatever the case, it appears that the legal norm in the trial of war criminals was the trial of offending individual by the nation offended. This was to be done either by military commission or by the civil courts of the country where the offence was committed. However, the major war criminals, whose offences had no particular geographical location or affected more than one of the

[21] Allied nations or indeed were committed against German nationals, did not fit neatly into the traditional jurisdictional framework. Thus, the Allied Powers felt at liberty to solve the dilemma jointly through the creation of the International Military Tribunal which "defined the law it was to administer, and made regulations for proper conduct of the Trial" and in so doing saw that they had done nothing more than do "together what any one of them might have done singly".

The subject of the present dissertation will be an examination of whether the 1945 London Agreement and Charter, in its plan to try the major Nazi war criminals, was in fact "an expression of international law as it existed at the time of its creation" and thus simply a joint attempt to undertake measures that any individual nation amongst the victorious Allies could, quite legally, have undertaken against criminals who offended within their territory. Yet the problem of personal jurisdiction raises another issue also, that of jurisdiction

³³ A.N. Trainin *Hitlerite Responsibility Under Criminal Law*. (First published as *Ugolovnaya Otvetstvennost Gilterovtzev*. in 1944 in Moscow for the Institute of Law, Academy of Sciences of the USSR, edition cited London: Hutchinson and Co., 1945) p. 6.

³⁴ G. Ginsburgs and V.N. Kudriavtsev (Ed.), *The Nuremberg Trial and International Law*. (Dordrecht: Martinus Nijhoff Publishers, 1990) pp. 43-44. For further discussion see L.S. Sunga *Individual Responsibility in International Law for Serious Human Rights Violations*. (Dordrecht: Martinus Nijhoff Publishers, 1992) pp. 19-20.

³⁵ **Appendix 4**. The Moscow Declaration on War Crimes, November 1, 1943.

³⁶ *op. cit.*, *Individual Responsibility in International Law for Serious Human Rights Violations*, p. 20-21.

³⁷ *Violations of the Laws and Customs of War. Reports of the Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities. Conference of Paris 1919*. Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32. (Oxford: Clarendon Press 1919) p. 70-71. Also to be found as 'Report of the Commission on the Responsibility of the Authors of the war and on Enforcement of Penalties.' *American Journal of International Law*. 1920 14 [1]: 140-142.

over subject matter. This issue was raised by the defence counsel when it attacked not only the jurisdiction of the Allies in setting up a tribunal to judge members of a foreign government, but also the legality of the counts indicted.

In analysing the International Military Tribunal in terms of international law as it existed at the time of its creation, historians of the period have been unnecessarily

[22] vague. The explanation for this phenomenon most certainly lies in the realm of emphasis. The majority of historians who have dealt with the Nuremberg trial have broached the international law issues but have generally declined to dig much deeper. The primary emphasis of these academics has been on international diplomacy along the road to Nuremberg (and in several cases the actual trial proceedings) rather than international law, although admittedly the two cannot be wholly divorced from each other.

It is not surprising that historians have chosen to make diplomacy their primary focus. The Nuremberg trial represents a mammoth effort in terms of international co-operation, an effort made even more intriguing by its proximity to the onset of the Cold War. However, in the process historians have placed so much emphasis upon the diplomacy that legality has, although perhaps unintentionally, become viewed with some cynicism or even contempt. Historians have often expressed doubts as to the strict legality of the IMT, yet the ends are almost universally, and perhaps rightly, seen to justify the means. A recent address by Kenneth W. Abbot of the Northwestern University Law School, to the American Society of International Law in 1992, is perhaps applicable to this approach. Abbot maintained that "the attitude of international relations scholars towards international law has been... actively negative" :

[23]

as shown in quotations like these : "[T]he tradition of positive international law is regarded with something approaching contempt by students of international politics"; or... "[p]olitical scientists... tend to dismiss any emphasis on the role of institutions as a vestige of the discredited ideas of the formal, legal, institutional school of thought." ⁽³⁸⁾

In arguing that despite some legal technicalities "justice" was done at Nuremberg, an historian, Leo Kahn, states that although the charge of "aggressive war" was legally "controversial", the issue is not as relevant as it seems. Kahn points out that the inclusion of "crimes against peace" actually made little difference to the outcome of the trial." ⁽³⁹⁾ Of the twelve men convicted of "crimes against peace", only one, Rudolf Hess, was not also convicted on charges of "war crimes" and "crimes against humanity". Though such arguments have some validity they fail to recognise the central role played by the charge of "aggressive war" ("crimes against peace"). In 1945, the charge "crimes against peace" was recognised as the "supreme international crime". Without this charge it is probable that the United States would never have participated in the trial of Germany's Nazi leadership, a point made clearly by Jackson at the London Conference. Indeed, as the present writer has already pointed out, the United States was the driving force behind Allied war

[24] crimes policy. Had the Americans not been involved it is unlikely that the Nuremberg trial would ever have taken place.

Historians have generally begun without a working definition of international law by which to measure their findings. Neither have they attempted to reconstruct the state of international law as it stood at the time of the creation of the IMT. Few have failed to refer to the debate, between lawyers and politicians, over the fate of Germany's Nazi leadership which grew in intensity toward the end of the war. Yet in the final analysis, historians have consistently failed to commit themselves to any conclusion except praising Allied co-operation and stating that Germany's Nazi government was thoroughly "evil" and deserving of its final fate at the hands of the Allies at Nuremberg. In the view of the present writer, such an approach fails to put sufficient emphasis upon the political importance of the destruction of National Socialism through a trial procedure. This thesis will argue that the Nuremberg trial was, in terms of the principles upon which it was founded, a wholly political rather than a legal exercise.

Using the traditional approach, historians have undoubtedly done much to broaden our understanding of Allied diplomacy during the war and in the immediate post-war period. Indeed, the Nuremberg trial was a remarkable

[25] achievement in terms of international co-operation, through which an entire régime is now remembered

³⁸ Kenneth W. Abbot, 'Elements of a Joint Discipline.' Proceedings of the American Society of International Law. *Proceedings of the 86th Annual Meeting*. Washington D.C. April 1-4, 1992. p. 167

³⁹ *Ibid.*, pp. 154-155.

as not only evil, but, as Shawcross rightly predicted, criminal. However, this approach has done little but set in concrete the popular conception of history as monochromatic. The Second World War, depicted thus, remains a conflict between the powers of good and evil comparable with the didactic folklore of primitive societies, rather than an accurate rendering of arguably the most significant international conflict in modern history.

In order to examine the Nuremberg trial within the framework of international law as it existed in 1946, it is first of all important, by way of introduction, to gain some understanding of the system known as international law. M.N. Shaw, Professor of Law at the University of Leicester, defines law as :

that element which binds the members of the community together in their adherence to recognised values and standards.... Law consists of a series of rules regulating behaviour, and reflecting, to some extent, the ideas and preoccupations of the society within which it functions. ⁽⁴⁰⁾

This definition may be carried over to international law, with the critical distinction that the principal subjects

[26] of international law are nation-states rather than individual citizens. ⁽⁴¹⁾ Individuals, for the most part, come under the jurisdiction of municipal law (national law) except for explicit provision in certain specific cases. Thus, an international lawyer, Hans Kelsen, wrote in 1947 that :

The establishment of collective responsibility by international law, however, only establishes a rule with important exceptions. There are norms of general international law by which the person against whom a sanction is to be directed is individually determined as the person who, by his own conduct, has violated international law. These norms establish individual responsibility. ⁽⁴²⁾

The punishment of individuals, by an international court, for "crimes against peace", "war crimes" and "crimes against humanity" demands not only that these actually be crimes under international law and within the jurisdiction of an international tribunal, but that any provisions in international law for such offences must provide for individual responsibility and thus individual punishment. In this respect the rules of international law must be distinguished from international morality. The two may meet at certain points, yet the former discipline is legal in form and content whereas the latter is a branch of

[27] ethics. ⁽⁴³⁾

The key to understanding the nature of international law lies within the unique characteristics of the international system. In 1945, as now, this system relied primarily on the sovereign equality of all states :

While the legal structure within all but the most primitive societies is hierarchical and authority is vertical, rather like a pyramid with the sovereign person or unit in a position of supremacy on top, the international system is horizontal consisting of 160 or so independent states, all equal in legal theory (in that they possess the characteristics of sovereignty) and recognising no one in authority over them. ⁽⁴⁴⁾

Thus, in domestic systems the law is above the individual, whereas in the international system, where there exists no higher authority than the nation itself, law exists only as between states, which themselves create that law.

The primary or binding material sources of international law are international treaties and international custom. ⁽⁴⁵⁾ The distinguished author and practitioner in the field of international law, J.G. Strake, writes :

⁴⁰ M.N. Shaw, *International Law*. (Cambridge: Grotius Publications Ltd., 1991) p. 1. This work is a popular textbook and is recommended by *The British Year Book of International Law*. as a university manual.

⁴¹ Ibid.

⁴² Hans Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals.' *International Law Quarterly*. 1947 1[2]: 534. Kelsen was a distinguished international lawyer and Lecturer in Political Science at the University of California at the time of writing; drafted Austrian Republican Constitution, 1920-30; Member and Permanent Reporter, Austrian Court of Constitution, 1920-30; Professor of Law at the Universities of Vienna, Cologne, Prague, and the Graduate Institute of International studies in Geneva; Oliver Wendell Holmes Lecturer 1940-41 at the Harvard Law School.

⁴³ op. cit., *International Law*. p. 2.

⁴⁴ Ibid., p. 6.

⁴⁵ These customary rules crystallise by a process of generalisation and unification of the various usages of various international organs and independent states (from their state laws, practices and diplomatic relations etc.), see J.G. Strake, *Introduction to International Law*. (9th Ed. London: Butterworths, 1984) p. 34. Strake was at the time of writing the professor of Humanitarian Law at

[28]

Until recent times international law consisted for the most part of customary rules. These rules had generally evolved after a long historical process culminating in their recognition by the international community. The preponderance of customary rules was diminished as a result of the large number of 'law making' treaties concluded since the middle of last century, and must progressively decline to negligible proportions....⁽⁴⁶⁾

This, of course, raises the important issue of consent. Nations in general tend to obey international law despite the temptation to pick and choose between which laws to obey and which to violate. Indeed, certain rewards may accrue from the observance of international law, not least the tendency, noted by Shaw, that :

It may encourage friendly or neutral states to side with one country involved in a conflict rather than its opponent, and even take a more active role than might otherwise have been the case. In many ways, it is an appeal to public opinion for support and all states employ this tactic.⁽⁴⁷⁾

Law and diplomacy (or politics) are, therefore, closely related. Yet states "do observe international law and will

[29] usually only violate it on an issue regarded as vital to their interests,"⁽⁴⁸⁾ in the case of war this is called "military necessity". A question arises as to the basis of this obligation. The issue is not as straightforward as it may seem. The nineteenth century stressed the importance of the contract ; a state could only be bound by its own consent. It is clear that this concept was still very much alive during the first half of this century. Thus, Viscount Maugham (formerly Lord Chancellor) noted in 1948, with full agreement from J.H. Morgan, that :

The question which arises in a court where a rule of International Law is in question is not which of two opposing opinions of jurists and others is to be preferred, but whether one of these opinions has been accepted and applied between civilised states. *The basis of international law is the consent of states, which no doubt can be established in a number of ways ; but the consent must be established.* The fact that some or even many jurists, including judges and Ministers of State, think that states should follow a particular rule is interesting, and may help the development of international law ; but jurists cannot impose a law on states. *I am disposed to think some of the counsel who made eloquent speeches at Nuremberg were inclined to forget this fact.*⁽⁴⁹⁾

[30]

However, there are many states which have come into existence since the end of the Second World war, and by no amount of inventiveness can it be said that these states have consented to all the rules of international law formed prior to their establishment. A current approach to this problem is to refer to the doctrine of consensus which reflects the influence of the majority in creating new norms of international law.⁽⁵⁰⁾

As already noted, historians have often made reference to the war-time and post-war dispute between lawyers and politicians over what was to be done with the major Nazi war criminals. This dispute carried over into the courtroom in the form of the motion put forward by the combined defence counsels. It would doubtless be naive to simply claim that the Allies' only motivation for the Nuremberg trial was a desire for justice. As we have seen, international law and international politics are too closely linked, but it is possible to separate the two in as far as the methods of achieving moral and political goals are concerned. There are thus two possible ways of viewing this dispute. The dispute may be seen either as a case of law versus politics (which was essentially the case put forward by the defendants and their counsel) or it may be seen as entirely legal (the standpoint maintained by the prosecution and many of those involved in the formulation of Allied war crimes policy which culminated in the London Agreement and Charter).

[31]

Indeed, in almost every international dispute both sides proclaim their adherence to the principles of

the International Institute of Humanitarian Law in San Remo; member of the Panel of International Arbitrators of the International Court of Justice at the Hague; General Editor of the *Australian Law Journal*.

⁴⁶ Ibid.

⁴⁷ op. cit., *International Law*. p. 8.

⁴⁸ Ibid., p. 9.

⁴⁹ op. cit., *The Great Assize*. Preface by Maugham, p. vii. Italics mine. See also C.A.H. Bartlett, 'Liability for Official War Crimes.' *Law Quarterly Review*. 1919 35 [April]: 179.

⁵⁰ op. cit., *International Law*. p. 10-11.

international law and proclaim that they are acting in accordance with its provisions. ⁽⁵¹⁾ Writing about international disputes, Hans Kelsen noted in 1943 the view that all conflicts between states are either economic or political in character, "but that does not exclude the possibility of treating the dispute as a legal dispute. A conflict is economic or political with respect to the interests which are involved ; it is legal (or non-legal) with respect to the normative order controlling these interests". He continued :

Legal disputes are disputes in which both parties base their respective claims... on positive international law ; whereas [in] political disputes... at least one party bases its claim on other principles or on no principles at all... a positive legal order can always be applied to any conflict whatever. Only two cases are possible ; either the legal order contains a rule obliging one party to behave as another demands ; or the legal order contains no such rule. In the first case the application of the legal order admits the claim ; in the second it rejects it. ⁽⁵²⁾

Kelsen clarified his argument thus :

[32]

If a person - a private individual or a State - is legally not obliged to behave in a certain way toward another person, the former is legally free to to behave in this respect as it pleases to behave. What is legally not forbidden is legally permitted. If international law, customary or conventional, does not oblige State A to permit immigration to citizens of State B, State A is legally free to permit or not to permit immigration to citizens of State B, and it does not violate the right of State B by not permitting immigration to the latter's citizens. ⁽⁵³⁾

Approaching the subject of the London Agreement and Charter from this perspective will enable the historian to evaluate whether the Nuremberg trial was a legal or political exercise. However, the situation is more complex, as another writer, Joseph L. Kunz, stated in 1939 :

This difference is not between "legal" and "political," or between "justicable" and "non-justicable" conflicts ; for every international conflict can be decided judicially. The real difference is between static and dynamic conflicts, between conflicts as to the law actually in force, and as to the change in positive law. ⁽⁵⁴⁾

[33]

In espousing the same general thesis, a 1946 article in the *Cornell Law Quarterly* noted that international law was required to fulfil three functions : assisting or carrying out accepted rules (executive), changing or creating new interrelations (legislative), adjudging or interpreting existing ones (judicial). ⁽⁵⁵⁾

It is important to understand that international law is basically static at least in terms of "positive" or statutory law, and static conflicts are essentially judicial. This was to a large extent the basis of the argument put forward by the IMT as support for its authority. Yet international law, if it is to be relevant to contemporary situations, must be organic, able to adapt to meet new threats to society by changing and creating new interrelations (the legislative function). As will be seen in later chapters, this argument was used strongly in defence of the IMT by men such as Justice Robert H. Jackson who was both instrumental in framing the Charter and Chief prosecutor for the United States. Thus, Jackson and the IMT issued conflicting justifications of the Nuremberg trial, although the tribunal did claim that its charter was a contribution to international law. One cannot argue that the law exists and needs to be, or is legally being created at the same time. In this thesis, the present writer will assert that neither of these standpoints provide an adequate justification of the London Charter and Agreement for the formation of the IMT.

[34]

In essence dynamic conflicts, the conflicts of revision, the conflicts of not what the law is but what it should be, are not judicial, they create an international legislative problem. ⁽⁵⁶⁾

Where the pretensions of states are based in positive law, no problem of revision arises.... A problem of revision arises only if all the parties recognise that a treaty or situation is perfectly valid in positive law, but where at least one party not only desires a "change", but a change of the law in force.... As the problem of revision is so essentially political and

⁵¹ Ibid., p. 2.

⁵² Hans Kelsen, 'Compulsory Jurisdiction in International Disputes.' *American Journal of International Law*. 1943 37: 401, 403, 404.

⁵³ Ibid., p. 402.

⁵⁴ op. cit., *American Journal of International Law*. 1939 33[1]: 44.

⁵⁵ Harrop A. Freeman, 'The United Nations Organisation and International Law.' *Cornell Law Quarterly*. 1946 31 [3]: 253.

⁵⁶ op. cit., *American Journal of International Law*. 1939 33 [1]: 44.

legislative in character, the attempt of some writers to render it a completely juridical problem must be completely doomed to failure. ⁽⁵⁷⁾

Though the international system allows for revision through legislation, it will be argued in this thesis that the Allies made no attempt to work within the system of international law. Nuremberg relied solely on the force of the majority. Due to the nature of the international system, it is granted that power is necessary to create new positive law. Indeed, although "law can never be identical with force, force is needed not only to apply the law, but also to create it as positive law." ⁽⁵⁸⁾

A recent and well-respected work on the Nuremberg

[35] trial, by Ann and John Tusa (1984), stated in its concluding chapter that :

What the historian finds is that those who framed the Charter and wrote the final judgement at Nuremberg believed that the law was as they recorded and applied it. They did not consciously invent it. Though they may have found it ill-defined or previously unapplied, they were convinced it was there. ⁽⁵⁹⁾

This argument is representative of the "judicial" function of international law (see page 33). However, as will be shown in this thesis, not only was the law not there but the Allies were well aware of the enormous difficulties in the criminal prosecution of Germany's Nazi leaders. Few doubted their moral rightness, or that the law needed a major overhaul, yet the method by which the Allies agreed on the trial shows scant regard for the system known as international law.

The Nuremberg trial was little more than an arbitrary exercise of power, although, as already noted, the means were (and still are) widely regarded as justified by the end result. Change is often identified with progress and stability seen as the antithesis of justice. Thus, it has often been argued that, whether the Nuremberg trial was in accord with international law or not, it meted out

[36] "justice" and the "legal" principles upon which it was based represented progress in international law towards the abolition of force as a means of arbitration between nations. However, Sir Thomas More's explanation to William Roper, in Robert Bolt's play "A Man for All Seasons", is perhaps applicable :

I'd trust you with my life. But not your principles. You see, we speak of being anchored to our principles. But if the weather turns nasty you up with an anchor and let it down where there's less wind, and the fishing's better. And 'look' we say 'I'm anchored !' 'To my principles !' ⁽⁶⁰⁾

It is clear that progress is only a subjective valuation, and whereas few doubt that those in the dock received justice, practical politics has always claimed to have justice on its side. As Kunz wrote, perhaps prophetically, in 1939 : "men - individuals as well as nations - have a wonderful capacity always to identify justice with their own interests." ⁽⁶¹⁾

With the gradual unveiling of incomprehensible barbarities committed against millions of innocent civilians, the immediate post-war years were perhaps not the context in which to raise legal arguments. Nevertheless, in considering the difficult questions of

[37] morality, justice and legality involved in the formulation of the Nuremberg principles it is helpful to reflect on another passage from Bolt's play :

Roper : So you'd give the Devil the benefit of law ?

More : Yes ! What would you do ? Cut a great road through the law to get after the Devil ?

Roper : I'd cut down every law in England to do that !

More : And when the last law was down, and the Devil turned round on you - where would you hide, Roper, the laws all being flat ? This country's planted thick with laws from coast to coast - Man's laws, not God's - and if you cut them down - and you're just the man to do it - d'you really think you could stand upright in the winds that would blow then ? Yes, I'd give the Devil the

⁵⁷ Ibid.

⁵⁸ Ibid., p. 46.

⁵⁹ Ann and John Tusa, *The Nuremberg Trial*. (New York: Atheneum, 1984) ò_òó_óp. 488.

⁶⁰ op. cit., *New English Dramatists* 6. p. 62.

⁶¹ op. cit., *American Journal of International Law*. 1939 33 [1]: 45.

benefit of the law, for my own safety's sake. ⁽⁶²⁾

Although Bolt's play was first performed almost thirteen years after the IMT's final judgement, Winston Churchill would most certainly have had a greater appreciation of More's note of caution than Roper did. On hearing the judgement of the IMT in 1946, which included twelve death

[38] sentences, Churchill said to General Lord Ismay that we "must take care not to lose the next war." ⁽⁶³⁾

⁶² *op. cit.*, *New English Dramatists* 6. p. 60.

⁶³ See end of chapter one.

[39]

CHAPTER ONE

PLEDGES OF PUNISHMENT

It shows that if you get into a war, it is supremely important to win it. You and I would be in a pretty pickle if we had lost. ⁽⁶⁴⁾

Winston Churchill to General Lord Ismay, 1946.

Official Allied policy during the Second World War made a clear distinction between minor and major German war criminals. Minor criminals were individual soldiers and administrators in the occupied territories who had carried out, or been directly responsible for, violations of the laws and customs of war. Major criminals were those whose transgressions had no particular geographic locality. Major war criminals were, therefore, to a large extent policy-makers. The former were regarded as punishable by law according to the universally recognised laws and customs of warfare, the latter by combined Allied policy which remained undefined until after the war had been won.

A fundamental post-war change in direction came about with the London Agreement and Charter of August 8, 1945, exactly three months after V-E Day. Accordingly, until the fate of Europe had been decided, the American, British, French and Russian governments made no united declaration of the culpability of Germany's policy-makers under

[40] international law. In fact the British and American governments, whose people had not experienced a German army of occupation, made no declaration at all. The main purpose of this chapter is to provide a brief analysis of the development of Allied war crimes policy and to place the London Agreement and Charter within the context of contemporary events. The London Conference, at which the agreement and charter were signed, will be dealt with later in chapter three.

Warnings of Retribution

Throughout the course of the Second World War the individual leaders of the United States, Britain and the Soviet Union made a variety of statements condemning the German perpetrators of war crimes. The first

⁶⁴ *The Memoirs of General the Lord Ismay*. (London 1960) p. 157 quoted in M. Gilbert, *Never Despair: Winston Churchill 1945-1965*. (Toronto: Stoddart Publishing Co., 1988) p. 285.

British and American declarations made no mention of law or trials. They simply spoke of retribution. Indicative of the kind of statements made is the well-worn announcement of October 25, 1941. Franklin D. Roosevelt, President of the United States, declared that "frightfulness can never bring peace to Europe. It only sows seeds of hatred which will one day bring fearful retribution." Simultaneously, Winston Churchill, Prime Minister of Great Britain, stated that "[r]etribution for these crimes must henceforward take its place among the major purposes of the war." (65) Following the launch of Operation Barbarossa in June 1941, the Soviets also became vocal in the denouncement of German atrocities. On November 27, 1941 and January 6, 1942, the

[41] Soviet Government circulated notes concerning German atrocities committed against Soviet war prisoners and announced that they were keeping detailed records. (66)

The first Soviet denunciations of Nazi atrocities dealt only with actions in violation of universally recognised laws of war such as the use and treatment of war prisoners. Rather more unorthodox though was Moscow's routine of underlining the systematic and orchestrated nature of German barbarities. This naturally led to Soviet insistence that the German government should bear the primary responsibility for the perpetration of wartime atrocities. On November 25, 1941, in accordance with this stance, V.M. Molotov, the People's Commissar for Foreign Affairs, sent his first note on the appalling "atrocities committed by the German authorities against Soviet prisoners of war" to all the governments with which the Soviet Union had diplomatic relations. Molotov's note stated :

The Soviet Government... places the full responsibility for these inhuman acts of the German military and civil authorities on the criminal Hitlerite Government of Germany. (67)

However, although the Soviet Union repeatedly demanded the punishment of the German Government, there was no indication of how this punishment was to be dealt out.

[42] This came later, on October 14, 1942, as a Soviet response to the formation in London on October 3 of the 17-member United Nations War Crimes Commission. The Soviet note listed Hitler, Göring, Hess, Goebbels, Himmler, Ribbentrop and Rosenberg amongst those most guilty. It also stated that the Soviet Government considered "it essential to hand over without delay for trial before a special international tribunal, and to punish according to all the severity of criminal law," any of the leaders of Fascist Germany who in the course of the war had fallen into the hands of States fighting against Hitlerite Germany." (68) The Soviet authors of the note probably had Rudolf Hess, then a prisoner of the British and the only German leader in Allied hands, foremost in their minds. (69) Needless to say, Britain won the war. He then joined twenty other Germans in the dock at Nuremberg.

Later, on May 11, 1943, the Soviets released a further communication. This circular placed the finishing touches to the overall picture of what they regarded as appropriate retribution for the Nazi's systematic policy of violence. It specified, for the first time, that private persons and German industrialists who had exploited or maltreated Soviet citizens and participated in the economic plundering of the Soviet Union were to be treated as criminals. (70) Accordingly, the cast of potential defendants was growing. However, there was no specification of how the Soviet

[43] authorities might deal with this additional group of offenders. It should be noted though that the circular referred only to abuses committed on Soviet soil or against Soviet citizens and that such crimes could safely be entrusted to national tribunals under the aforementioned principle of territorial jurisdiction discussed in the introduction to this study. (71)

65 M. Lachs, *War Crimes: An Attempt to Define the Issues*. (London: Stevens and Sons, 1945) p. 94.

66 Ibid.

67 Published in *Soviet War News*, November 27, 1941. No. 120.

68 See the Declaration of the Soviet Government issued on October 14, 1942, published in *Soviet War News*, October 16, 1942. No. 338. Italics mine.

69 Note Stalin's enquiry about Hess at the Yalta Conference discussed below.

70 Note sent by Molotov, to all the Governments with which the U.S.S.R. had diplomatic relations, on "The forcible mass deportation into German-Fascist slavery of Soviet civilians, and on the responsibility for these crimes of the German authorities and private individuals who exploited the forced labour of Soviet citizens in Germany." Published in *Soviet War News*, May 13, 1943.

71 G. Ginsburgs and V.N. Kudnavtsev (Ed), *The Nuremberg Trial and International Law*. (Dordrecht: Boston: M. Nijhoff, 1990) p. 17.

The St. James' Declaration, 1942.

As we have seen, the Soviet Union was, in terms of early war crimes policy, leading the Allied pack. This was perhaps to be expected because she was the only one of the Big Three to have experienced the ravages of a German army of occupation. Those other nations who lived under the heel of German occupation forces and the accompanying Nazi barbarism had already made their position clear on January 13, 1942. Representatives of Belgium, Czechoslovakia, Free France, Greece, Yugoslavia, Luxembourg, The Netherlands, Norway and Poland met in exile at St. James' Palace in London. They declared that "through the channel of organised justice" those guilty of war crimes "whether they have ordered them, perpetrated them or in any way participated in them," should be handed over to "justice" and be "judged" and the "sentences" carried out. ⁽⁷²⁾

The wording of the St. James' Declaration certainly referred to judicial proceedings. It also could be taken to include government officials as well as military men,

[44] although the reference was not explicit. As a whole the declaration was rather vague. However, section (1) of the declaration makes a clear distinction between violations of the laws of war and "political offences" and when speaking of international law the preamble mentions only the Hague convention of 1907 concerning the laws and customs of warfare. These two points would tend to suggest that the declaration was primarily concerned with what the Moscow Declaration (page 47) later, in 1943, dealt with as minor war criminals whose crimes were committed in a specific geographic location. As we have seen in the introduction to this study, the prosecution and punishment of such minor criminals was certainly provided for in existing international law (see also the Kharkov trial below, page 49). Whatever interpretation of the St. James Palace declaration one chooses to take, conspicuously absent from the list of signatories were the United States, Great Britain and the Soviet Union. The Big Three had participated as observers only. On August 6, 1942, the government of the United Kingdom issued an aide-mémoire in response to the St. James' Declaration which stated that :

in dealing with war criminals, whatever the Court, it should apply the laws already applicable and no special *ad hoc* law should be enacted. ⁽⁷³⁾

[45]

Hence, the British were also apparently looking towards judicial means of punishing the perpetrators of German atrocities. Nevertheless, when such a statement is read in the wider context of the British war crimes stance in general and a later British aide-mémoire presented to Judge Samuel Rosenman by Sir Alexander Cadogan on April 23, 1945 (pages 112-114) regarding major war criminals, it becomes clear that here the British are referring only to minor war criminals engaged in conventional crimes already established as such in the internationally accepted laws and customs of warfare.

On August 21, 1942, as a response to the the St. James' Declaration, President Roosevelt also made a public statement in which he addressed the issue of war crimes. After specifically mentioning German crimes against civilian populations in occupied territories, committed by German occupation authorities, he stated that it seemed "only fair that they will have to stand in courts of law in the very countries which they are oppressing and answer for their acts." ⁽⁷⁴⁾ As with the above-mentioned British statement the link with the later Moscow Declaration is obvious and it is clear that Roosevelt is here referring only to minor war criminals engaged in conventional crimes. Such crimes were legally punishable under the principle of territorial jurisdiction. The present writer's examination of the 1943 Kharkov trial amply illustrates the contemporary legal practice for such trials (page 48).

[46]

Such fine distinctions in the wording of public declarations by Allied leaders have often led to confusion amongst historians. A good example, in regard to the above statement by Roosevelt, is found in William J.

⁷² Text published in op. cit., *War Crimes: An Attempt to Define the Issues*. p. 95.

⁷³ Ibid.

⁷⁴ Ibid., p. 96. May also be found in F.D. Roosevelt, *The Public Papers and Addresses of Franklin D. Roosevelt*. (Ed. Samuel I. Rosenmann, New York: Harper, 1950, 13 Vols) Vol. 10, p. 330.

Bosch's *Judgement on Nuremberg* (1970) which is otherwise a very fine and important study. Bosch confuses this early declaration by Roosevelt with decisions on "Axis leaders" and "international" trials. ⁽⁷⁵⁾ In conjunction with another statement made a few weeks later, which mentions "punishment" for "ring-leaders", Bosch saw that as early as August 1942 Roosevelt was making statements to the effect that the major criminals would be placed on trial. But, as we have already seen, Roosevelt's August 21 statement was referring to minor criminals and the statement made a few weeks later, though speaking in terms of punishment, made no mention of trials or international law only "atrocities which have violated every tenet of the Christian faith." ⁽⁷⁶⁾

The Moscow Declaration, 1943

Finally, between October 19 and 30, 1943 the Foreign Secretaries of the United States, the United Kingdom and the Soviet Union met in Moscow in response to pressure from their smaller allies, to decide some tangible policy on war crimes. The time was ripe because the tide of war had clearly turned and the leading policy-makers of the Big Three could be far more confident of victory and the chance to implement their resolutions. The result was "The Moscow

[47] Declaration on War Crimes", the first piece of concrete Allied policy representing a united front dealing with German barbarities. President Roosevelt, Prime Minister Churchill and Marshal Stalin, "speaking in the interests of the 32 United Nations", had at last reached agreement on the punishment of German war criminals. On the signing of an armistice, the minor Nazi criminals would be "sent back to the countries in which their abominable deeds were done, so that they may be judged and punished according to the laws of those liberated countries". ⁽⁷⁷⁾ Regarding the major war criminals the declaration stated :

The above declaration is without prejudice to the case of the German criminals whose offenses have no particular geographical location, and who will be punished by joint decision of the Governments of the Allies. ⁽⁷⁸⁾

The declaration made a clear distinction between two classes of criminal, the former punishable by law in accordance with the principle of territorial jurisdiction and the latter by policy decision. The fact that the Allies felt the need to make this clear distinction, between punishment by legal process and punishment by political process, would seem to suggest that the latter class of criminals had performed acts which were somehow not subject to law. However, the wording was sufficiently vague not to commit the Allies to any specific plan of

[48] action. Indeed, as we shall see, those who became advocates of an international court were able to argue that their position was not contrary to the Moscow Declaration.

The Kharkov Trial, 1943

Six weeks later the Russians took the lead and on December 15, in accordance with the Moscow Declaration, the first trial of minor Nazi war criminals opened in the Ukrainian city of Kharkov. The trial was held before the Military Tribunal of the 4th Ukrainian Front. Those indicted, for crimes (with a specific geographic location) committed in and around Kharkov, were "Senior Corporal of Auxiliary Police Reinhard Retzlaff, Official of the 560th Group of the German Secret Field Police ; Wilhelm Langheld, an officer of the German Military Intelligence Service ; Untersturmführer SS Hans Ritz, Deputy Commander of the SS Company of "Sonderkommando SD," and their accomplice, the traitor to his country Bulanov, who served as motor driver in the Kharkov "Sonderkommando SD." ⁽⁷⁹⁾

Their acts, as dictated by the Moscow Declaration which relied on the principle of territorial jurisdiction,

⁷⁵ William J. Bosch, *Judgement on Nuremberg: American Attitudes Toward the Major German War-Crime Trials*. (Chapel Hill: University of North Carolina Press, 1970) p. 21.

⁷⁶ *Ibid.*, p. 22.

⁷⁷ **Appendix 4.** The Moscow Declaration on War Crimes, November 1, 1943.

⁷⁸ *Ibid.*

⁷⁹ *The Trial in the Case of the Atrocities Committed by the German Fascist Invaders in the City of Kharkov and the Kharkov Region, December 15-18, 1943*. (Moscow: Foreign Languages Publishing House, 1944) p. 3. Hereafter Kharkov Trial. (The book is basically an edited transcript of the trial, one of two very similar extant texts, the other being I.F. Kladov, *The Peoples Verdict: A full report of the Proceedings at the Krasnodar and Kharkov German Atrocity Trials*. New York: Hutchinson and Co., 1944)

were prosecuted in accordance with Soviet law. As the transcript of the trial points out : "By virtue of Art. 296 of the Criminal Code of the Ukrainian Soviet Socialist and the Ukase of the Presidium of the Supreme Soviet Socialist Republics of April 19, 1943".⁽⁸⁰⁾ The verdict also expressly mentioned the violation of "international conventions and

[49] rules governing the conduct of war signed and ratified by Germany."⁽⁸¹⁾ In this manner, international law - as embodied in the IV Hague Convention (1907) and the two Geneva Conventions (1929) concerning sick, wounded and captured soldiers - was recognised as the secondary basis for the trial. In his analysis of the trial, the Czechoslovak member of the United Nations Commission for the Investigation of War Crimes, Dr. Bohuslav Etcher, noted in 1944 that :

According to Soviet penal law, the murder of civilians or war prisoners is a crime. Such murder is also forbidden by international law, although without any personal penalties. International law thus supports and strengthens the operation of the national criminal law.⁽⁸²⁾

This statement is illuminated by the words of the Soviet jurist, A. N. Trainin, who wrote a few months after the trial that :

It was precisely in this sense that Article 29 of the Geneva Convention of 1929 laid it down : "The Governments of the high contracting parties will likewise adopt, or propose to their legislative institutions for adoption, in the event of their criminal laws being inadequate, the necessary measures to prosecute in war time

[50]

any action contravening the decisions of the present convention."

In full accord with this decision of Article 29 of the Geneva Convention, an Edict of the Presidium of the Supreme Soviet of the U.S.S.R. on April 19, 1943, endowed the Soviet courts with the appropriate weapon for immediate combat against war crimes.⁽⁸³⁾

As was evident from the trial proceedings and verdict, the primary purpose of the Kharkov trial was the indictment of the National Socialist government of Germany. The State Prosecutor opened the morning session on the final day of the trial (December 18) with a passionate speech in which he made it clear that :

Hitler, Göring, Goebbels, Himmler and their ilk - these are the principal inspirers and organizers of the wholesale murder and atrocities committed on Soviet soil, in Kharkov, in Krasnodar and in other cities.⁽⁸⁴⁾

Thus, an article in the American *Foreign Policy Bulletin* stated that no one, "least of all the Russians, would claim that the three Germans executed at Kharkov were the original instigators of the crimes of which they were accused. On the contrary, one of the main purposes of the Kharkov Trial was to obtain from the accused an indictment

[51] of their superiors - Himmler, Rosenberg and Hitler were mentioned - who had planned the brutalities they had perpetrated. Against these and other Nazi leaders the Russians, along with the Governments of all occupied countries, have long been preparing elaborate lists of accusations".⁽⁸⁵⁾ However, the article added that international law made no accommodation for a trial of members of the German government by the courts of foreign governments. It concluded that punishment would have to be based not on law but on policy.⁽⁸⁶⁾ This conclusion was obviously very much in accord with the aforementioned Moscow Declaration. So too was the conclusion of A. N. Trainin in his book *Hitlerite Responsibility Under Criminal Law* (1944) which devotes several pages to the Kharkov trial. Though optimistic that Germany's Nazi leadership would

⁸⁰ Ibid., p. 84.

⁸¹ Ibid., p. 82, also pp. 14, 73. Note all mentions of international law lay great emphasis on Germany's voluntary participation in the various specified international conventions.

⁸² B. Etcher, *The Lessons of the Kharkov Trial*. (London: Russia Today Society, 1944) p. 9.

⁸³ A. N. Trainin, *Hitlerite Responsibility Under Criminal Law*. (First published as *Ugolovnaya Otvetstvennost Gilterovtzev*. in 1944 in Moscow for the Institute of Law, Academy of Sciences of the USSR, edition cited London: Hutchinson and Co., 1945) p. 88.

⁸⁴ Kharkov Trial, p. 72. The Krasnodar trial in July 1943 is sometimes seen as the first trial of Nazi war criminals, i.e., *The Encyclopaedia of the Holocaust*. (New York: Macmillan, 1990) p. 1489. However, a reading of the transcript of the trial will realise that all 13 defendants were Soviet citizens. A transcript may be found in op. cit., *The Peoples Verdict*. pp. 7-44.

⁸⁵ V.M. Dean, 'Russians Take the Lead in Trying War Criminals.' *Foreign Policy Bulletin*. 1943 23 [10]: 1.

⁸⁶ Ibid., p. 2.

eventually be punished, he wrote that a trial was not necessary. In his words "the fate of Hitler and his clique can be settled by the political verdict of the victorious democratic states." (87)

Although Trainin did not specifically state that a trial would be difficult in terms of international law, his entire 108-page work on Nazi criminal responsibility was rather progressive in that it was primarily devoted to suggesting what the law should be rather than what it actually was. Trainin frequently referred to Germany's "criminal" actions yet it becomes clear to the reader that his use of the word criminal contained rather more of the

[52] moral than legal sense. His work also contained, in early form, reference to concepts such as "crimes against peace", conspiracy, criminal organisations and criminal propaganda which later turned up in the London Agreement and Charter and later at Nuremberg. (88)

Nevertheless, in all his hopefulness, Trainin did acknowledge that in terms of existing law "it is essential to emphasise that not a single human law can punish Hitler and his clique in the full measure of their misdeeds." (89) It must be conceded, however, that what Trainin actually meant by this statement is somewhat unclear. He was perhaps simply stating that no punishment could be great enough to compensate for the wrongs perpetrated during the Nazi régime. Whatever Trainin meant by the above statement, it is clear from the records of the 1945 London Conference that the delegates there saw the whole of Trainin's book as an "attempt to construct the idea of an international crime" while recognising significant shortfalls in existing law (page 116).

The Yalta (Crimea) Conference, 1945

Following the Moscow meeting Stalin, Churchill and Roosevelt met for the last time during the war, at Yalta in the Crimea between February 4 and 11, 1945. The Tusa book *The Nuremberg Trial* (1983) states correctly that the question of war criminals was discussed only briefly at Yalta. However, the Tusas make the mistake of attributing

[53] to Yalta, a war-time conference, the adjustment of the Moscow declaration regarding the major war criminals into a "specific commitment to a trial." (90)

A book by Elliot Roosevelt (the President's son), although necessarily approached with caution, provides a primary source for parts of the conference. Apparently at one point Stalin, raising his glass in a toast, had said : "I propose a salute to the swiftest possible justice for all Germany's war criminals - justice before a firing squad. I drink to our unity in dispatching them as fast as we capture them, all of them, and there must be at least fifty thousand of them." (91) Churchill, enraged at such an off-hand remark, replied : "Any such attitude is wholly contrary to our British sense of justice ! The British people will never stand for such mass murder. I take this opportunity to say that I feel most strongly that no one, Nazi or no, shall be summarily dealt with, before a firing squad, without proper legal trial, no matter what the known facts and proven evidence against him." (92) At this point President Roosevelt interjected in an attempt to ease the tension and jokingly stated that perhaps Stalin's number was too high, he would be satisfied with 49,500.

In reading this account the historian would be wise to bear in mind four notes of caution. Firstly, the number of toasts and the alcoholic tolerance of the conferees. Secondly, Elliot Roosevelt's confession that later, in

[54] private, his father had said that it was all in jest and Churchill was wrong to take it seriously. Thirdly, although Stalin has been noted for quick decisions involving the lives of thousands of people, no plans,

87 op. cit., *Hitlerite Responsibility Under Criminal Law*. p. 95.

88 Bradley F. Smith. *The Road to Nuremberg*. (London: André Deutsch, 1981) pp. 122, 131, notes that men such as McCloy, the Assistant Secretary of War (United States) and Davies, who along with Judge Rosenmann was in charge of United States policy on war crimes, both made use of Trainin in their various proposals for trying the major Nazi war criminals. It was primarily the tireless efforts of such Americans which resulted in the Allied decision to hold trials. The concept of criminal propaganda though not evident in the London Charter was realised at Nuremberg in the conviction and execution of the Streicher whose only crimes were written and oral propaganda.

89 op. cit., *Hitlerite Responsibility Under Criminal Law*. p. 95.

90 Ann Tusa and John Tusa, *The Nuremberg Trial*. (New York: Atheneum, 1984) p. 63.

91 Elliot Roosevelt, *As He Saw It*. (New York: Sloan and Pearce, 1946) p. 188, in op. cit., *Judgement on Nuremberg*. p. 23.

92 Ibid.

written or otherwise, exist to back up such policies. Fourthly, the conversation was quite vague as to exactly which criminals were being referred to, a fact which without exception has been overlooked by historians who have quoted from the account. Churchill's outrage, in combination with the high number of criminals referred to and the general British favouring of a political solution to the problem posed by the major criminals right up until the London Conference in late 1945, would tend to suggest that he at least was referring to minor war criminals. Whatever the case, the whole episode serves, at best, to illustrate a lack of agreement on the matter.

What actually went on at Yalta was somewhat of a mystery to contemporaries. As late as the third week of May 1945 many of those Americans most involved with war crimes policy had never seen the provisions of the Yalta transcript that covered war crimes. ⁽⁹³⁾ After the conference, the British maintained that the task of developing policy on the topic had been handed to the foreign ministers of the three nations at Yalta, a view corroborated by Telford Taylor in his most recent work on Nuremberg. ⁽⁹⁴⁾ The Americans immediately unearthed the State Department Records of the session in question (sixth

[55] plenary session, February 9). In his celebrated work on Nuremberg, Bradley F. Smith concludes that the records made no reference to that decision or any other regarding war criminals. ⁽⁹⁵⁾

An account of the sixth plenary session can be found in *Foreign Relations of the United States, Diplomatic Papers. The Conferences of Malta and Yalta 1945*, which tends to corroborate this conclusion. ⁽⁹⁶⁾ Page 841 marks the first reference to the major criminals. The reference is made by Churchill. However, the conversation appears very disjointed and is marked by an evasive attitude or perhaps lack of interest by the other conferees. Churchill in one breath says that he thinks they should be "shot once their identity is established" and in the next that they should be given a "judicial trial". The inconsistency may be explained by the fact that between the two statements there is a brief interjection by Stalin who asks about Hess. It seems probable that in speaking of trials Churchill is referring to men who, like Hess, were already in custody. In May 1941 Hess had flown to England and was interred there for the duration of the war. Such a trial could be conducted under the laws of Britain on whose territory Hess was captured, although for what crimes one cannot be sure. The second mention of major war criminals comes on page 854. The matter is once again raised by Churchill who is promptly cut off by Roosevelt who indicates that they are not yet ready to discuss the matter.

[56]

It can safely be concluded that nothing of any real significance came out of Yalta regarding war crimes policy. Indeed, the published report of the conference only makes brief and very general mention of war criminals. It simply states that they should be brought to "just and swift punishment". ⁽⁹⁷⁾ There is no mention of trials. It would be safe to assume, therefore, that in February 1945 the provisions of the Moscow Declaration still stood as the primary expression of Allied policy.

The Potsdam Conference, 1945

Five months later, in July 1945, the heads of the same powers met again in Potsdam. The war in Europe was now over and Roosevelt had died and been replaced by Truman. Once again war crimes entered the agenda. At this meeting the three governments stated their intention to bring war criminals to "trial" at the "earliest possible date." ⁽⁹⁸⁾ The protocol of the conference dedicated a total of seven words to war crimes and there is nothing to suggest that the use of the term trial in this context meant anything other than that

⁹³ *Morgenthau Diary*, vol. II, pp. 1487-1489, in op. cit., *The Road to Nuremberg*. p. 157, including the Attorney General, Justice Jackson, later the American representative at the London Conference and Chief Prosecutor for the United States at Nuremberg.

⁹⁴ Telford Taylor, *The Anatomy of the Nuremberg Trial*. (New York: Knopf, 1992) p. 32, Taylor was on the American prosecution team during the I.M.T. trial in 1946 and subsequently headed up the Nuremberg Military Tribunal (N.M.T.) trials from 1947-1949.

⁹⁵ op. cit., *The Road to Nuremberg* pp. 158-159, and neither did the British records. Bradley F. Smith is here corroborated by the *Report of the Crimea Conference 11 February, 1945*. Miscellaneous No. 5[1945]. A Report of the British Secretary of State for Foreign Affairs to Parliament (London: HMSO, 1945). This report contained no reference to war criminals whatsoever.

⁹⁶ *Foreign Relations of the United States, Diplomatic Papers. The Conferences of Malta and Yalta 1945*. Department of State Publication 6199 (Washington: G.P.O., 1955). pp. 841-862.

⁹⁷ Report of the Crimea Conference (Yalta Conference), February 11, 1945. Section II, The Occupation and Control of Germany, text in J.A.S. Grenville, *The Major International Treaties 1914-1945: A history and guide with texts*. (New York: Methuen, 1987) p. 227.

⁹⁸ Potsdam Conference Protocol, August 2, 1945. Section VI, in op. cit., *The Major International Treaties 1914-1945*. p. 234.

specified in the Moscow Declaration concerning minor war criminals. In addition, those present at the London Conference a month later clearly saw the Potsdam Conference as concluding in favour of, in the words of Justice Jackson, "a political decision as to what they will do with these prisoners".⁽⁹⁹⁾

[57]

Changing Policies

It follows, then, that as late as July 1945 the Allied Powers had not changed their stance on the major war criminals from that upheld during the war. This war-time and now post-war stance clearly implied that they were not subject to international law but Allied policy which relied on victory for implementation. It was not until after this victory that Allied government officials changed their minds and began to insist that it was not force majeure but international law that entitled them to punish their German counterparts. The obvious benefits of such claims have already been discussed in the introduction to this study.

Indeed, sometime after September 1944, American policy-makers had begun to veer more towards favouring a trial procedure of some kind. However, the judicial method did not receive presidential approval until April 1945.⁽¹⁰⁰⁾ Even then, this non-specific approval was seemingly not due to a desire to act in accord with international law. Rather, it appeared as an attempt not to be seen as shooting the top Nazis out of hand. This is evident from the fact that at the time the British put forward an "arraignment proposal"⁽¹⁰¹⁾ similar to that contained in Article 227 of the Treaty of Versailles in 1919 outlined in chapter two of this study. In a memorandum dated April 9, Britain's Lord Chancellor, Lord Simon, declared that he had presented the proposal to the Americans because he was convinced "that Agreement could not be obtained between the

[58] Big Three to shoot them [the top Nazis] out of hand."⁽¹⁰²⁾ The American Justice Department referred to the British plan as a mere "investigation leading to political action"⁽¹⁰³⁾ which, described thus, was certainly in line with the policy outlined in the Moscow Declaration. Nevertheless, President Truman, in agreeing that some kind of trial procedure was necessary, indicated to Judge Rosenmann, whom he placed in charge of United States war crimes policy, that a compromise with the British was necessary and that the plan put forward by Lord Simon was not out of the question.⁽¹⁰⁴⁾

The desire for at least a judicial veneer was, as we have seen, inherent also in the Soviet suggestion of an "international tribunal" as early as October 1942. The contemporary writings of the Soviet legal authority, A.N. Trainin, certainly confirm this. However, such legal writings also reveal that although the Soviets had not spelled out their wishes in detail, they seemed to be looking towards some form of liberal, progressive and very rigorous criminal prosecution uninhibited by the formalities of western legal practice.

By May 8, 1945, Germany had surrendered unconditionally. It was not until three months after V-E Day, at the London Conference, that the Allies decided to try the leaders of the defeated nation by international tribunal and labelled their war as criminally aggressive

[59] ("crimes against peace") in violation of international law. Germany's planning and waging of a war of aggression was seen as the primary crime which comprehended all the others. This assertion was based primarily on the "renunciation of war as an instrument of national policy" contained in the Pact of Paris (the Kellogg-Briand Pact concluded on August 27, 1928) of which Germany was a signatory. However, the Pact of Paris made no mention of criminality, penalties or individual responsibility except the statement in its preamble that "any signatory Power which shall hereafter seek to promote its national interests by resort to

⁹⁹ R.H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945: a documentary record of negotiations of the representatives of the United States of America, the Provisional Government of the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics, culminating in the agreement and charter of the International Military Tribunal*. Department of State Publication No. 3080 (Washington DC: GPO, 1949). Hereafter International Conference. Document LI. Minutes of Conference Session of July 25, 1945. p. 385.

¹⁰⁰ *op. cit.*, *The Road to Nuremberg*. p. 195.

¹⁰¹ *Ibid.*, p. 179.

¹⁰² *Ibid.*, p. 186.

¹⁰³ *Ibid.*, p. 182.

¹⁰⁴ *Ibid.*, p. 193.

war should be denied the benefits furnished by this treaty." (105) The Pact of Paris was simply a "renunciation of war as an instrument of national policy", (106) there was no mention of types of war, aggressive, defensive or otherwise. American Secretary of State Kellogg, in his negotiations with France preceding the signing of the Pact, had specifically declined the French proposal to limit the pact to wars of aggression. (107)

Thus, by the standards of the pact, all wars, aggressive or defensive, were denounced. Added to this there is to be found no mention of Germany's criminal liability, or the Pact of Paris, in any document or speech issued by any of the three great Powers at the outbreak of war in 1939. Indeed, the United States' repeated proclamations of neutrality beginning on September 5, 1939,

[60] would suggest anything but that Germany was a criminal nation. The proclamation stated that "the United States is on terms of *friendship and amity* [italics mine] with the contending Powers" including Germany. (108) America thus denied aid to either side. To claim retroactively that German pre-war aggression was an international crime involving personal responsibility would be inconsistent with the official attitude of the Government of the United States at the time the acts were committed. America had continued to recognise the German government, receiving its representatives in Washington. The Germans also continued to receive American representation Berlin. To assert that German aggression was criminal is to assert that America had compounded international crime. It would also be to assert that America had initially denied aid to the victims of criminal aggression.

American Neutrality

The laws of neutrality developed in a world environment where states were sovereign and to a large extent relied for their existence on their own forces and the balance of power. Wars were regarded as a necessary evil inherent in international life. Belligerents fought for their own rights and interests of state as they interpreted them. Non-participants regarded their behaviour as neutral and in their own best interests, their policy guided by a desire to conserve their own resources. This concept of war and neutrality first became discernable

[61] during the fifteenth century and by the late eighteenth and nineteenth centuries was practically ubiquitous. (109) However, during this century advances in communication and transportation have increased the interdependence of states and the principle of neutrality has been challenged by the idea of the conventional outlawry of law as seen in documents such as the League of Nations Covenant and the Pact of Paris.

Strictly speaking, neutrality denotes non-participation in war. In the present instance, however, we are faced with an important question : what is the legal status of "aggressive" war ? There are, for the present purpose, two broad categories. War may be either regarded as a duel : a legal, though perhaps distasteful, instrument of national policy, or, it may be regarded as an illegal and thus criminal. Those involved in the formulation of the London Agreement and Charter of August 1946 opted for the latter. However, opting for the latter causes complications for the neutral state.

The regarding of war as a legal instrument of national policy most adequately embodies the concept of war and neutrality. (110) In such a case war implies a legal condition allowing two or more belligerents to engage in a conflict by armed force. Non-participants who consider themselves neutral are, at least in action, impartial and indifferent to the results, abstaining from assisting or hampering

[62] either side while at the same time conserving their own vital interests. (111) The war is not illegal and they have no obligation to intervene. Such was the United States' declaration of neutrality in 1939. Yet, the Allied post-war policy, embodied in the Nuremberg principles, of discriminating between the criminal and the victim is inconsistent with the concept of neutrality as implemented by the United States until her entry

105 **Appendix 3.** Pact of Paris (Kellogg-Briand), August 27, 1928.

106 Ibid.

107 Ibid., p. 88.

108 Text found in *American Journal of International Law*. 1940 34 [Supplement, Official Documents]: 21-27.

109 Quincy Wright, 'The Present Status of Neutrality.' *American Journal of International Law*. 1940 34: 394.

110 Ibid., p. 392.

111 Ibid., pp. 392-393.

into the war. Accordingly, as will be seen from the proceedings of the London Conference in 1945, the American delegation to the conference (after the war was over) saw the concept of a criminally aggressive war as essential to their abandonment of neutrality.

The American declarations of neutrality in regard to Germany's attacks on Poland, France, Great Britain (and most of the Dominions), Norway, The Netherlands, Belgium and Luxembourg would, in the light of the Nuremberg principles, suggest that in weighing up the situation in terms of her legal obligations (especially the Pact of Paris) and political interests, the United States chose to accept the situation and allow it to continue. It is significant that the United States (along with the other Allied Powers) only felt obligated to uphold the Pact of Paris several months after the war in Europe was over and well after her abandonment of neutrality.

Even later, when America began to deviate from the

[63] path of strict neutrality and passed the Lend-Lease Act on March 11, 1941, the decision was not based on the Pact of Paris but the supreme right of self-defence. America's whole prewar and war-time stance seems out of keeping with the post-war American position summed up by Robert H. Jackson, the United States representative to the London Conference, on July 2, 1945 :

there is involved in this [proposal to try the 'major' war criminals] the basis in which the United States engaged in its lend-lease operation, the belief that this war was illegal from its inception. ⁽¹¹²⁾

As we have seen, a careful study of the Allies' war-time warnings regarding war crimes reveals the very opposite to the assertion made in the above statement of Justice Jackson. Never once before or during the war did an Allied leader publicly raise the specific charge of aggression (or for that matter "crimes against humanity") as a *legal* offence. In fact, the United States did not completely reverse its neutral stance until eight months after the act which IMT claimed to be the ultimate international crime - aggressive war. Allied threats were limited to the punishment of violations which came under the universally accepted laws and customs of warfare ("war crimes") and even then only the Soviets ever hinted that anyone other than the *minor* war criminals would come before

[64] courts. Far from condemning as criminal German aggression which led to the outbreak of war, it appears that the Allies had repeatedly and openly condoned these actions. The actions of the Allies certainly did not imply any notion of the criminality of aggression.

The Nuremberg judgement contained an historical narrative of the events upon which it found Germany guilty of the "supreme international crime", that of planning and waging aggressive war. The narrative however failed to register the attitudes of the prosecuting governments toward the events at the time they took place. The examples of Czechoslovakia and Poland involving Britain, France and the Soviet Union will, at present, suffice to illustrate this point. We have already seen the American proclamation of "friendship and amity" with Germany given four days after the latter's aggressive invasion of Poland on September 1, 1939. German covert aggression toward Czechoslovakia in September 1938 was celebrated by the Munich Agreement between the aggressors and two of the powers which were later to prosecute at Nuremberg, Britain and France. Regarding Germany's overt aggression toward Poland the Tribunal failed to mention the vital role of the Soviet Union.

Britain, France, Germany and Czechoslovakia

In September 1938, in an effort to keep the peace, Britain and France compelled Czechoslovakia to consent to

[65] Germany's initial aggression. Germany's aggression was never once labelled as criminal. Indeed, if it had then Britain and France would have been taking part in a criminal act. On September 29 Chamberlain, Daladier, Hitler and Mussolini, without any kind of diplomatic consultation with the Czechs, agreed to transfer the Sudetenland to Germany. ⁽¹¹³⁾ On his return to London Chamberlain was jubilant over the

¹¹² Justice Robert H. Jackson in op. cit., International Conference, Document XVII. Minutes of Conference Session of June 29, 1945. p. 113.

¹¹³ A text of the Munich Agreement may be found in op. cit., *The Major International Treaties 1914-1945*. pp. 187-188.

appeasement of Germany and the "the Miracle of Munich" was the phrase of the hour, ⁽¹¹⁴⁾ hardly a fit title for what in 1946 became a contributon to the supreme crime. Yet Chamberlain was optimistic that one day the Czechs would see that "what we did was to save them for a happier future." ⁽¹¹⁵⁾ However, one wonders if Britain and France's active role in the dealings over the Sudetenland and concerted pressure on Czechoslovakia to capitulate was, if judged by the Nuremberg principles, any more justifiable than Germany's pressure on the Czechs to consent to complete liquidation six months later.

In regard to the Czech crisis we are left with two choices : either in 1938 Britain and France did not regard Germany's aggression as criminal or they did regard it as criminal but chose to acquiesce. Whatever the case, criminality was never mentioned. George A. Finch, a respected international lawyer, wrote a year after the trials concluded : "If aggression against Czechoslovakia was an international criminal act, then all the participants

[66] in the Munich Agreement were equally guilty." ⁽¹¹⁶⁾

The Soviet Union, Germany and Poland

In the matter of aggression toward Poland the IMT stated that it was :

fully satisfied by the evidence that the war initiated by Germany against Poland on the 1st September, 1939 was most plainly an aggressive war, which was to develop in due course into a war which embraced almost the whole world, and resulted in the commission of countless crimes, both against the laws and customs of war, and against humanity. ⁽¹¹⁷⁾

No mention was made of the role of the Soviet Union before, during and after the event. Mention is made of the secret treaty of non-aggression between Germany and the Soviet Union on August 23, 1939, but only in so far as Germany violated it in June of 1941 when she invaded. No mention is made of Article 2 of the Secret Additional Protocol of the pact which when combined with the actions of both signatory nations, almost before the ink was dry, gives a convincing picture of a joint plan to attack Poland :

Article 2. In the event of a territorial and political rearrangement of the areas belonging to the Polish State the Spheres of influence of

[67]

Germany and the U.S.S.R. shall be bounded approximately by the line of the Rivers Narew, Vistula, and San. The question of whether the interests of both parties make desirable the maintenance of an independent Polish State and how that State should be bounded can only be definitely determined in the course of further political developments. ⁽¹¹⁸⁾

The pact, not surprisingly, also provided that the Soviet Union would under no circumstances attack Germany. With Poland being right on the Soviet border, any German attack on Poland would undoubtedly have led to Soviet action. British and French promises to aid Poland in the event of German aggression lead one to the natural assumption that without a prior arrangement with the Soviets (the August 23, 1939 pact) Germany would not have invaded Poland. If Germany had failed to consult the Soviets, there would have begun a massive war on all fronts. Whatever the case, on September 1 Germany invaded Poland. Sixteen days later, on September 17, the Soviets also invaded Poland in violation of the pact of non-aggression between the two nations signed on July 25, 1932. ⁽¹¹⁹⁾ On the day of the invasion the Soviet Government informed the Polish Ambassador that Poland no longer existed and at a meeting in Moscow on September 27, in perfect accord with the Soviet-German pact signed a month

[68] earlier, the Soviet Union and Germany partitioned Poland in the Frontiers and Friendship Treaty signed

¹¹⁴ K. Robbins, *Munich 1938*. (London: Cassell, 1968) p. 328.

¹¹⁵ *The Times*, August 1, 1938. Quoted in above *Munich 1938*. p. 320.

¹¹⁶ G.A. Finch, 'The Nuremberg Trial in International Law.' *American Journal of International Law*. 1947 41[1]: 26. See also Professor Quincy Wright who referred to the Munich Agreement as the "Dictate of Munich" and a violation of the legal obligations of Britain and France, in 'The Munich Settlement in International Law.' *American Journal of International Law*. 1939 33: 28-29.

¹¹⁷ *Judgement of the International Military Tribunal for the Trial of German Major War Criminals (With the Dissenting Opinion of the Soviet Member) Nuremberg 30 September and 1st October, 1946*. (London: HMSO, 1946) p. 27.

¹¹⁸ Text from op. cit., *The Major International Treaties 1914-1945*. pp. 195-196. The rivers Narew, Vistula and San roughly divide Poland in half.

¹¹⁹ *Ibid.*, pp. 145-147.

by their respective foreign ministers. ⁽¹²⁰⁾

Soviet relations with Germany appear to give no evidence to the effect that the Soviets felt they were dealing with an international criminal. Quite the opposite : the Soviet Union participated in the liquidation of Poland. In 1947, Finch wrote that if "the *dictum* of the Nuremberg Tribunal that the Aggression against Poland constituted an international criminal act for which the perpetrators were individually liable is good law, then there follows an irrefutable implication that Soviet Russia and its officials were *participes criminis*." ⁽¹²¹⁾

Conclusion

At this point it might well be asked where the origins of the decision to formulate a charge of criminal aggression lie. It certainly formed no part of the original terms of reference of the United Nations War Crimes Commission established during the war and it is well to remember that the Soviets played no part in the Commission. The idea for such a charge can be traced back to the aforementioned Soviet Jurist A.N. Trainin and his work *Hitlerite Responsibility Under Criminal Law*, first published in 1944. This is not surprising as we have already seen how the Soviets were the early leaders in the area of war crimes policy. Trainin's work devotes a whole

[69] chapter (chapter 5) to what its author regarded as the primary crime, crimes against peace. As has already been noted, Trainin's work advocated that the punishment of Germany's major criminals should not be limited by traditional legalisms. He claimed that :

The extremely poor development of the problems of international criminal law is, of course, far from accidental. Its origins lie in the general character of international judicial relations during the epoch of imperialism. ⁽¹²²⁾

This justification for a modification in the law followed by the criminal prosecution of Germany's leaders bears remarkable similarity to that of Robert H. Jackson, Chief Counsel to the United States, who prior to the London Charter and Agreement wrote a report to the President which stated that :

The legal position which the United States will maintain, being thus based on a common sense of justice, is relatively simple and non-technical. We must not permit it to be complicated by sterile legalisms developed in the age of imperialism to make war respectable. ⁽¹²³⁾

Later both Jackson and Trainin were involved in the Allied conference in London, which resulted in the founding of the

[70] International Military Tribunal. Both also signed the London Charter and Agreement, as representatives of their respective nations. During the conference Trainin's book was referred to on several occasions, and at the conference session on August 2, it was specifically decided to change the previously-used term "the crime of war" to "crime against peace" in accordance with Trainin's book. ⁽¹²⁴⁾

As we have seen, in terms of the "supreme offense" which comprehended all the others, there is no evidence to the effect that any of the four prosecuting powers at Nuremberg saw the actions of Germany's leaders as criminal at the time of their perpetration. To the contrary, there is some evidence to suggest that the prosecuting powers, especially the Soviet Union, were partners in crime. Such assertions certainly reinforce any argument on the retroactive effect of the legal principles enacted at Nuremberg. A British historian, Martin Gilbert, records that Lord Ismay, a British General, was with Churchill at Chartwell when the verdicts of the Nuremberg trial were announced. Ismay later recalled Churchill's reaction : "if you get into a war, it is supremely important to win it. You and I would be in a pretty pickle if we had lost." ⁽¹²⁵⁾ Another

¹²⁰ For an account of Soviet-German dealings over Poland see William Carr, *Poland to Pearl Harbour: The Making of the Second World War*. (London: Edward Arnold, 1985) pp. 67-88.

¹²¹ *op. cit.*, *American Journal of International Law*. 1947 41[1]: 27-28.

¹²² *op. cit.*, *Hitlerite Responsibility Under Criminal Law*. p. 11.

¹²³ R.H. Jackson, 'Atrocities and War Crimes: Report From Robert H. Jackson to the President.' *Department of State Bulletin*. 1945 12 [June 10]: 1076.

¹²⁴ *op. cit.*, International Conference, Document XVII. Minutes of Conference Session of June 29, 1945. pp. 416-417. For other references to Trainin's book see, for example, pp. 295, 379.

¹²⁵ *The Memoirs of General the Lord Ismay*. (London 1960) p. 157 quoted in M. Gilbert, *Never Despair: Winston Churchill 1945-*

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historian of the period, A.J.P. Taylor, also records from the same conversation Churchill's perhaps wise verdict that we "must take care not to lose the next war." ⁽¹²⁶⁾

1965. (Toronto: Stoddart Publishing Co., 1988.) p. 285.

¹²⁶ A.J.P. Taylor, *The Second World War: An illustrated history*. (London: Hamish Hamilton, 1975) p. 233.

[71]

CHAPTER TWO

LESSONS FROM THE PAST

The crimes with which Nazis are charged at Nürnberg, while worse in degree and broader in scope resemble in nature those most historians attribute to Napoleon and the Kaiser - crimes against peace, humanity and the laws of war. ⁽¹²⁷⁾

Fortune, December 31, 1945.

In any systematic study of the Allied disposal of Germany's Nazi leadership and the place of that disposal within contemporary international law, it is necessary to begin with some consideration of historical precedent. The primary subject of this chapter is the punishment of war crimes following the Great War and its lessons for the punishment of German offenders after the cessation of hostilities in May 1945.

As this chapter will show, Allied efforts to punish German war criminals after the Second World War produced remarkably few concepts which had not already been debated during 1919. After the Second World War many of these concepts were not only revived but brought to fruition. However, whereas in 1919 the United States formed the main opposition to many of these concepts against the demands of France and Great Britain, by 1945 the situation had

[72] reversed and the Americans were the advocates of a progressive trial plan which was, at first, condemned by her European partners. As Justice Jackson stated at the London Conference on July 19, 1945 :

I must say that sentiment in the United States and the better world opinion have greatly changed since Mr. James Brown Scott and Secretary Lansing announced their views as to criminal responsibility for the First World War.... But I don't think we can take the 1918 view on matters of war and peace. At least in the United States we have moved far from it with such measures as lend-lease and neutrality. ⁽¹²⁸⁾

¹²⁷ 'The Nürnberg Novelty.' *Fortune* 1945 31 [December]: 140-141.

¹²⁸ Justice Robert H. Jackson in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945: a documentary record of negotiations of the representatives of the United States of America, the Provisional Government of the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet*

In the preface to the published records of the London Conference, Jackson made it clear that, in 1945, in regard to major war criminals, "no treaty, precedent, or custom determined by what method justice should be done." ⁽¹²⁹⁾ In essence this statement was a confession that there had been no law on the matter. International law is made up of treaties, precedents and customs which dictate what should be done in the administration of justice in specific instances. Given this predicament, the Allies had a choice : they could either retroactively create the legislation necessary or decide in favour of executive action. As we have seen in the introduction to this study the London Agreement and Charter of August 8, 1945, then

[73] proclaimed as the sole source of authority and guidance for the Nuremberg Trial, was an executive agreement and thus insufficient for the creation of international law.

At the time of Jackson's statement there were two schools of thought on the matter of punishing major Nazi war criminals. One advocated prompt executive action, the other some form of judicial proceeding. Both claimed that their advocated course of action was in line with the Moscow Declaration. The conflict between the two camps of late-war and post-war opinion is well documented in Bradley Smith's book *The Road to Nuremberg* and Ann and John Tusa's *The Nuremberg Trial*. Yet on the subject of major criminals, the Moscow Declaration had refrained from speaking in terms of courts and trials. Instead it had spoken of government decisions. Such government decisions, of course, had precedents. These precedents went right back to classical times with the execution of enemy leaders by the victor. ⁽¹³⁰⁾

However, more recent examples prove far more useful in making comparisons with the situation following the Second World War.

Napoleon's Imprisonment after Waterloo, 1815

Amongst the most notable instances occurring last century was the imprisonment of Napoleon after Waterloo. At Waterloo the Allies defeated the man whose policies and actions had for years kept Europe in turmoil, but once defeated and captured he was never tried. Instead,

[74] on March 13, 1815, Napoleon was proclaimed to be "an Enemy and Disturber of the tranquillity of the World" by agreement of the Allies at Vienna and made subject to "public vengeance". ⁽¹³¹⁾ He was then incarcerated on St. Helena in October of the same year. The act of agreement was purely political although, just as with the major criminals after World War Two, it seems to have been thought by some that Napoleon might be liable to the jurisdiction of British courts after his abdication, as he would no longer be a sovereign. Admiral Keith, who had custody of Napoleon, "was chased around his own fleet through an entire day by a lawyer with a writ on account of Napoleon." ⁽¹³²⁾ weight of authority regarded the jurisdiction of courts of foreign states as incompetent.

A document brought to light in 1951 further illuminates the legal aspects of the Napoleon case. ⁽¹³³⁾ The document is dated "Encombe, Wednesday morning, 1815" and constitutes a lengthy, confidential letter from Britain's Lord Chancellor Eldon to the Earl of Liverpool, Prime Minister of Great Britain. ⁽¹³⁴⁾ In this letter the Lord Chancellor outlines the legal status of the imprisonment of Napoleon for the private information of the Prime Minister. He frankly admits that the imprisonment of Napoleon is not a legal matter. To the contrary, he saw it as an act which in terms of the "Law of Nations" would be "excessively difficult to justify", ⁽¹³⁵⁾ primarily a

Socialist Republics, culminating in the agreement and charter of the International Military Tribunal. Department of State Publication No. 3080 (Washington DC: GPO, 1949). Document XXXVII. Minutes of Conference Session of July 19, 1945. p. 299. (Hereafter International Conference.

¹²⁹ op. cit., International Conference, Preface, p. v.

¹³⁰ R.A.B. Mynors (Ed.), *XII Panegyrici Latini*. (Great Britain: Oxford University Press, 1964) VII. 10. 5.

¹³¹ 'The Imprisonment of Napoleon: A Legal Opinion by Lord Eldon.' *The American Journal of International Law* 1951 45 [July]: 573 n. 8.

¹³² A.P.P. Rosebery, *Napoleon, the Last Phase*. (London: A.L. Humphreys, 1906) p. 59.

¹³³ John Hall Stewart, 'The Norton Napoleon Collection.' *The Journal of Modern History* 1951 23 [2]: 158-162.

¹³⁴ op. cit., *The American Journal of International Law* 1951 45 [July]: 572.

¹³⁵ Ibid., p. 575.

[75] violation of French sovereignty, made necessary in order to secure the safety of the world. ⁽¹³⁶⁾ A description of the document, in the catalogue of the collection to which it belongs, reads : "Eldon is obliged to advise that any law of Nations to the contrary must be abrogated and that Napoleon must be perpetually imprisoned for the safety and general peace of the world at large." ⁽¹³⁷⁾

Punishing War Criminals after the Great War, 1919

An even more recent example is that of the Kaiser following the Great War. On the eve of the Armistice he and several of his top ranking officers ⁽¹³⁸⁾ fled to the Netherlands where they arrived on November 10, 1918. ⁽¹³⁹⁾ Despite their obvious power to do so the Allies did not force his extradition. Protected by Holland, the Kaiser and his associates not only went untried but unpunished. An article published in the popular American magazine *Fortune*, in response to the London Charter of August 8, 1945 noted that :

The crimes with which the Nazis are charged at Nürnberg, while worse in degree and broader in scope, resemble in nature those most historians attribute to Napoleon and the Kaiser - crimes against peace, humanity and the laws of war. ⁽¹⁴⁰⁾

was there no Nuremberg-style proceeding after Waterloo, or, for that matter, after the Great War ?

[76] In the case of Napoleon we have seen that there was no trial because there was no law on which to base such a trial. The primary issues were sovereignty and jurisdiction, the same issues encountered after the Great War.

During both world wars, the Allied and Associated Powers had frequently proclaimed their determination to bring to justice those Germans responsible for war crimes. However, in May 1945, unlike November 1918, Germany had surrendered unconditionally. On June 5, 1945, with the signing of the Declaration of Berlin and the abolition of the Dönitz government contained therein, Germany ceased to exist as a sovereign state recognised in international law. ⁽¹⁴¹⁾ In 1918, the Allies did not take over the government of Germany and thus any dealings on war crimes had to be in strict accord with the area of law that existed between nations - international law. As the present writer will argue, international law did not provide for the trial of Germany's leader for actions performed in his sovereign capacity. The only crimes provided for were those traditionally known as violations of the laws and customs of war.

After the Armistice in November 1918, the Allies, especially Great Britain and France, declared that the culprits from Kaiser to private must be tried before courts appointed by the Allied Governments. ⁽¹⁴²⁾ Nevertheless, due

[77] in part to the demand's weak foundation in international law, the majority of these trials never took place.

A) The Commission on Responsibility, 1919

On January 25, 1919, the Preliminary Peace Conference, which included three out of the four nations who later prosecuted at Nuremberg (Russia was not represented), created a committee of 15 members. This Committee was to enquire into responsibility for the war, breaches of the laws of war by Germany and her

¹³⁶ Ibid., pp. 173-175, contains a copy of the letter.

¹³⁷ Ibid., p. 572.

¹³⁸ Fourteen officers accompanied the Kaiser to Holland. Amongst them were General von Plessen, General von Gontard, Lord Chamberlain von Platen, Major-Generals von Frankenberg, von Litorff, von Grimmen, Colonel Count Moltke and Major von Hirschfeld. Joachim von Kurenborg, *The Kaiser: A Life of Wilhelm II, Last Emperor of Germany*. (London: Cassell and Co., 1954). pp. 308, 310.

¹³⁹ *Daily Express*, November 12, 1918, p. 1.

¹⁴⁰ op. cit., *Fortune* 1945 31[December]: 140-141.

¹⁴¹ Hans Kelsen, 'The Legal Status of Germany According to the Declaration of Berlin.' *American Journal of International Law*. 1945 39 [3]: 519.

¹⁴² G.G. Battle, 'The Trials Before The Leipsic Supreme Court of Germans Accused of War Crimes.' *Virginia Law Review*. 1921 8 [1]: 2.

allies, the degree of responsibility borne by members of the armed forces and possible creation of a tribunal to try the offenders.

The Allied commission on the "Responsibility of the Authors of the War and on Enforcement of Penalties" met for their first session on February 3, 1919. Their conferences resembled in many ways the London Conference of the four major powers in August 1945, and indeed made some similar recommendations. However, a close scrutiny of these recommendations reveals some very important differences.

The commission was comprised of a group of distinguished international lawyers, two from each of the five major Allied powers (the United States, Britain, France, Italy and Japan) and one each from five lesser powers (Belgium, Greece, Poland, Rumania, and Serbia). Both Edouard Rolin-Jaquemyns, the Belgian member, and Mineitero Adatci, one of the Japanese members, went on to

[78] be judges at the Permanent Court of International Justice. The American James Brown Scott and Rolin-Jaquemyns were members of the esteemed Institut de droit international and editors of the *American Journal of International Law* and the *Revue de Droit International et de Législation Comparée* respectively. Of all the delegations at the meetings of the commission the Americans were generally the most dominant and indeed they stood out amongst their major Allied counterparts in terms of reputation in the field of international law. Robert Lansing was Chairman of the Commission, owner of one of the largest international law firms in the United States and had taken part in more international arbitrations than any other American. Scott, in addition to his above-mentioned achievements, was the author of several books on international law and recognised as a leading scholar in the field. He had also been a delegate to the Second Hague Peace Conference in 1907.

The Commission's report recommended the setting up of an international "High Tribunal" constituted primarily of members appointed by the five major Allied powers. ⁽¹⁴³⁾ These five powers included the United States, Great Britain and France - three of the four prosecuting powers at Nuremberg in 1946. The law to be applied to the Tribunal would be "the principles of the law of nations as they result from the usages established among civilised peoples, from the laws of humanity and from the dictates of public conscience." ⁽¹⁴⁴⁾ The Commission stated that this Tribunal

[79] should be set up to try criminals whose crimes had more than one geographic location and were "violations of the customs of war and humanity", i.e. :

- a) "persons belonging to enemy countries who have committed outrages against a number of civilians and soldiers of several Allied nations". ⁽¹⁴⁵⁾ The example given of such an outrage was the misuse of prisoners of war and civilians in forced labour.
- b) Persons whose orders were executed in more than one geographical location ("battle front") which "affected the conduct of operations against several of the Allied armies." ⁽¹⁴⁶⁾
- c) All enemy authorities, "civil or military... including the heads of states", who ordered violations of the "laws or customs of war." ⁽¹⁴⁷⁾ This included any individuals who had knowledge of such orders, and having the power to intervene, allowed the offences to occur.

Thus, the international High Tribunal would, in effect, be a mixed military commission (see discussion of military commissions page 204 ff) set up to try violations of the already recognised laws and customs of war committed against more than one of the Allied Powers. However, the commission also stated that acts such as starting the war and violations of treaties were "not strictly war crimes". ⁽¹⁴⁸⁾ The commission saw a war of aggression as morally reprehensible "but by reason of the purely optional

¹⁴³ *Violations of the Laws and Customs of War. Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities. Conference of Paris 1919.* Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32. (Oxford: Clarendon Press, 1919) p. 24. Hereafter Commission Report. Also published as 'Report of the Commission on the Responsibility of the Authors of the War and Enforcement of Penalties.' *American Journal of International Law*. 1920 14 [1]: 95-154. p. 122. Hereafter AJIL.

¹⁴⁴ Commission Report, p. 24; AJIL, p. 122.

¹⁴⁵ Commission Report, p. 23; AJIL, p. 121..

¹⁴⁶ Idem.

¹⁴⁷ Idem.

¹⁴⁸ Commission Report, p. 21; AJIL, p. 118.

[80] nature of the institutions at the Hague... a war of aggression may not be considered as an act directly contrary to positive law, or one which can be successfully brought before a tribunal such as the Commission is authorized to consider under its terms of reference." (149)

The opinion of the commission on aggression and the violation of treaties would appear to be corroborated by the Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War prior to the Second World War in 1939. (150) The advisory committee, which was made up of American university law school professors (151) and representatives from the Department of State, based its draft on the assumption that all wars, regardless of their origin produce the same legal consequences for their participants. This view was again validated by a group of international lawyers who met later in 1939 in an effort to draft a convention on "The Rights and Duties of States in Case of Aggression". The report of the conference stated that owing to "fundamental differences of opinion" the conferees were unable to reach a consensus of opinion amongst themselves. (152) Likewise, with the violation of treaties the 1919 commission was "of the opinion that no criminal charge can be made against the responsible authorities or individuals (and notably the ex-Kaiser)". Instead there should simply be a formal condemnation. (153) A work by Robert K. Woetzel entitled *The Nuremberg Trials in International Law* (1960) claimed that the commission

[81] recommended that persons who committed "[a]cts which provoked the world war and accompanied its inception" be tried. (154) It appears that Woetzel was quoting from page 21 of the commission's report (AJIL, p. 118) which lists topics the under investigation by the Commission. However, as has been shown above, it would be wrong to read them as its recommendations.

The report of the commission, when speaking of the "High Tribunal", outlined offences which, at first glance, appear to be in a similar category to those described later in the 1943 Moscow Declaration as having "no particular geographical location" with the important difference being that the Moscow Declaration talked not of trials but of government decisions. (155) There were, however, some important dissenters in the ranks of the Commission. Amongst them were the American members James Brown Scott and Robert Lansing. (156) The opinion of the American delegation is recorded in the report of the Commission. Scott and Lansing saw no precedent in international law for the formation of the "High Tribunal". (157) However, they conceded that although unusual, such a tribunal could be set up along the lines of a mixed tribunal of combined national military commissions. (158) Such a tribunal would be entitled to try crimes listed in sections (a) and (b) of the Commissions recommendation (see above), but not charge (c). (159) Such a charge included reference to all authorities

[82] "civil or military... including heads of states" and contained elements similar to the conspiracy charge indicted in 1945. The American delegation believed that it was one thing to punish a person who committed, or, possessing the authority, ordered others to commit an act constituting a crime, but was "quite another thing to punish a person who failed to prevent, to put an end to, or to repress violations of the laws or customs of war." (160) In the former case the "individual acts or orders others to act, and in so doing commits a positive offence." (161) In the latter case he is "punished for the acts of others without proof being given that he knew of the commission of the acts in question or that, knowing them, he could have

149 Ibid.

150 The Text may be found published as 'The Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War.' *American Journal of International Law*. 1939 33: 169ff.

151 Including Yale, Cornell, Columbia, New York and Harvard. The conferees were distinguished international lawyers and included names such as G.A. Finch whose work is cited in this thesis.

152 'Rights and Duties of States in Case of Aggression.' *American Journal of International Law*. 1939 33 [Supplement, Official Documents]: 827. No list of participants is given.

153 Commission Report, p. 22-23; AJIL, p. 120.

154 Robert K. Woetzel, *The Nuremberg Trials in International Law*. (London: Stevens and Sons Ltd., 1960) p. 28.

155 Commission Report, p. 23-24; AJIL, pp. 121-122.

156 James Brown Scott was legal adviser to President Wilson and the Commission and Robert Lansing was Chairman of the Commission and U.S. Secretary of State.

157 Commission Report, p. 74; AJIL, p. 145.

158 Commission Report, pp.71, 76; AJIL, pp. 142, 147.

159 Commission Report, pp. 71-72; AJIL, pp. 142-143.

160 Commission Report, p. 72; AJIL, p. 143.

161 Ibid.

prevented their commission." (162) Scott and Lansing held that :

to establish responsibility in such cases it is elementary that the individual sought to be punished should have knowledge of the commission of the acts of a criminal nature and that he should have possessed the power as well as the authority to prevent, to put an end to, or repress them. Neither knowledge of commission or ability to prevent is sufficient. The duty or obligation to act is essential. (163)

Neither did the American delegates agree that a head of state could come within the legal jurisdiction of

[83] a foreign state. (164) In a book published in 1921 by members of the American Peace Commission, Scott gave an address which stated that the President was opposed to any proceeding against the Kaiser and gave his opinion that a sovereign or chief executive of a state was immune from suit in any court "national or international". (165) Scott also reiterated the Commission's stance on what at Nuremberg became known as "crimes against peace". Germany's aggressive war was not a crime "in point of law, although in the forum of morals it assuredly was." (166)

The Americans were also opposed to any prosecution of violations of the "laws of humanity". Mr Lansing, specifically mentioned offences against the laws of humanity in a speech to the American Bar Association in Boston during September 1918. He stated that :

The American representatives are unable to agree with this conclusion, in so far as it subjects to criminal, and therefore, to legal prosecution, persons accused of offenses against 'the laws of humanity,' and in so far as it subjects the chiefs of states to a degree of responsibility hitherto unknown in municipal or international law, for which no precedents are to be found in the modern practice of nations. (167)

The Americans, in their dissenting opinion in the

[84] Commission Report, clarified this position. They regarded the laws and customs of war as "a standard certain, to be found in books of authority and in the practice of nations." However, they saw that the laws and principles of humanity varied "with the individual, which, if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law." (168)

B) Deliberations of the Council of Four, 1919

So much then for the legal experts representing their respective nations on the Commission on Responsibilities, yet their opinions only held weight in as much as they were accepted by the political-diplomatic body known as the Council of Four. The Peace Conference was presided over by the Supreme Council which consisted of the heads of the five principal Allied and Associated Powers together with their Ministers of Foreign Affairs, known as the Council of Ten. However, on March 24, 1919, President Wilson of the United States invited his partners, the Prime Ministers of France, Britain and Italy (Clemenceau, Lloyd George and Orlando respectively, Japan was included only on matters of concern to her) to join him in forming an inner council known as the Council of Four which met at his Paris residence. Between March 24 and the signing of the Versailles Treaty that council wielded supreme authority at the Paris Peace Conference.

[85]

The proceedings of their meetings were secret, a fact which enabled the use of "straight language with small

162 Ibid.

163 Ibid.

164 Commission Report, p. 73; AJIL, p. 135. The Japanese delegation agreed, see Commission Report, p. 79-80; AJIL, p. 152.

165 *What Really Happened at Paris: The Story of the Peace Conference, 1918-1919*. (United States: Greenwood Press, 1976. Reprint from the edition published by Scribner, New York, 1921) p. 238.

166 Ibid., p. 237.

167 S.S. Gregory, 'Criminal Responsibility of Sovereigns for Wilful Violations of the Laws of War.' *Virginia Law Review*. 1920 6[5]: 414. See also op. cit., Commission Report, p. 135.

168 Ibid., pp. 134, 144.

regard for diplomatic niceties." (169) At the end of the Peace Conference the members of the Council agreed not to publish the transcripts of their conversations. No time limit was stated. However, between 1944 and 1946, the American Department of State published the transcripts of the conference made by Lord Hankey in a series known as *Papers Relating to the Foreign Relations of the United States*. However, Hankey had only been present at the Council's meetings from April 19 onwards. War crimes ("the question of responsibilities") were discussed in sessions between April 1 and 8 and therefore missing from the above-mentioned publication. Transcripts of these sessions were not published until 1955, approximately thirty-six years after the Paris Peace Conference, and then only in French. The first English edition, known as the *Proceedings of the Council of Four (March 24-April 18)*, which the present writer will refer to, was published nine years later in 1964. The transcripts themselves were not official but were made by Paul Mantoux, the official interpreter at the meetings. (170)

The stance on war crimes taken by the various members of the Council of Four, although by no means as legally complex, mirrored those of their legal advisors on the Commission on Responsibilities which had already delivered up its report. However, as the various national leaders

[86] had no fear of their words being repeated they were frank indeed. A reading of the transcripts reveals a passionate debate in which Lloyd George and Clemenceau, in terms of reason and legality, steadily lost ground to an adamant President Wilson.

Wilson had a conciliatory attitude towards Germany. Besides his legal objections, he feared driving Germany toward Bolshevism and a resurgence of militarism. However, he still felt morally obliged to punish Germany and his arguments contained great legal weight and lucidity. Lloyd George, on the other hand, was an avid supporter of some kind of trial, a point which he had made part of his election campaign back in England. Clemenceau was also an avid supporter of a trial and Orlando, though opposed in legal terms to a trial felt compelled to go along with any majority decision.

The members of the Council of Four unanimously agreed that crimes against the laws of war were individually punishable, although there was some doubt as to whether they were still punishable on the cessation of hostilities, after a treaty of peace. They also understood that they had two options concerning the Kaiser. As Lloyd George frankly admitted :

We can deal with him in two ways : either decree his internment as a political measure, as the Allies did in 1815 with regard to Napoleon, or have him judged. (171)

[87]

which the topic of war crimes was discussed at some length will do much to enlighten the reader as to the understanding and motivation of the council members. It also sheds light on the various legal aspects of the war crimes issue and gives meaning to the final draft of Articles 227-230 of the Treaty of Versailles. Through a reading of these minutes, it also becomes clear that had they been published earlier, prior to the Nuremberg trial, they would have made the Allied declaration of legality a little less plausible. The following analysis will limit itself to the contentious issue of trying the Kaiser and the violation of treaties. In the afternoon session on April 1, 1919, Lloyd George, as in all the discussions concerning the punishment of war crimes, was the first to raise the "question of responsibilities." (172) However, Wilson immediately took control of the conversation, stating his belief that making a martyr out of the Kaiser would be counterproductive. In contrast to Lloyd George's demand for the punishment of the "man responsible for the greatest crime in history", Wilson felt that the "contempt of the whole world" was enough. (173) Thus, early in the Council's discussions on war crimes, the situation had clearly polarised into two opposing camps. These camps were maintained throughout all intercourse on

[88] the issue, Clemenceau backing up his British counterpart and Orlando remaining, in effect, neutral.

169 Paul Mantoux, *Paris Peace Conference 1919: Proceedings of the Council of Four (March 24 - April 18)*. (Geneva: Librairie Droz, 1964), introduction by Paul Mantoux who was interpreter at the meetings, p. xiv. Hereafter *Proceedings of the Council of Four*.

170 Ibid.

171 op. cit., *Proceedings of the Council of Four*, XXV, April 8, 1919, 3 p.m., Conversation Between Wilson, Clemenceau, Lloyd George and Orlando, p. 145.

172 op. cit., *Proceedings of the Council of Four*. XIV, April 1, 1919, 4 p.m., Conversation Between Wilson, Clemenceau, Lloyd George and Orlando, p. 83.

173 Ibid.

Lloyd George raised the issue again in the afternoon session the next day. Wilson expressed his doubts about the wisdom of the victors judging the vanquished. He did not doubt the Allies' ability to be impartial but saw it as setting up a "dangerous precedent" because not all future victors might be as just. ⁽¹⁷⁴⁾ The same objection was later raised at the London Conference after the Second World War and was in part responsible for Justice Jackson's desire to avoid the London Charter having any "precedent-creating effect" (page). However, as we have seen in the introduction to this study, after the Second World War such objections were brushed aside with the assertion that :

It is accepted law everywhere that the victorious powers may set up tribunals, with defined law, jurisdiction and, procedure, in the territories they have conquered and occupied. ⁽¹⁷⁵⁾

During the Council of Four meetings in 1919, Lloyd George made an almost identical assertion stating that the case was "analogous to that of prisoners who, in conformity with the law of war, may be judged by military tribunal if, after their capture, crimes committed by them are discovered." ⁽¹⁷⁶⁾ However, as the present writer argues in chapter three concerning the situation after the Second

[89] World War, so it was also in 1919 : morally the the trial of the enemy leaders was perhaps defensible, but in terms of law there was no provision for it, a fact which, as we shall see, Lloyd George was later to concede.

In response to Lloyd George's assertion that the Kaiser's breach of treaties was punishable in the same manner as breaches of the laws of war, Wilson reminded Lloyd George that up until the present day "responsibility for international crimes" had been "solely a collective responsibility." ⁽¹⁷⁷⁾

To assert otherwise, "after the fact", stated Wilson, was "retroactive" and "contrary to all judicial tradition." ⁽¹⁷⁸⁾ Wilson believed that Germany alone had the right to judge her ruler and that the Allies must be careful not to allow history to reproach them for "having judged before establishing the juridical basis for the sentence." ⁽¹⁷⁹⁾ Lloyd George, declining to to meet the argument on a judicial level, continued to argue ardently that history was more likely to condemn them for not taking a tough enough stance.

The transcript of the conversation, although reading like a play, does not contain instructions concerning mood and temper. However, judging by the flow of the argument and the wording, it appears that things were becoming unduly passionate and Wilson, seeming to sense that he was getting nowhere, changed tack. He appealed to the reason of his partners, condemning the punishment of crimes in the

[90] heat of passion. At this point Clemenceau interjected, seemingly indignant, stating that nothing is ever accomplished without emotion :

Was Jesus Christ not carried away by passion the day he chased the money changers from the Temple ? ⁽¹⁸⁰⁾

It was clear that Wilson was not going to get any further on this new approach. However, Lloyd George, perhaps sensing the futility of the argument and Wilson's growing impatience, saved the day and brought the discussion back onto the legal plane.

Exploring a new level of frankness, Lloyd George practically conceded that the law to punish the Kaiser did not exist. He thus began to argue that it was time to formulate the law to deal with such grave outrages and that it was not just enough to lay down the law for "next time". The new law must be applied in the present situation or else the Allies would risk not being taken seriously. ⁽¹⁸¹⁾ Clemenceau agreed whole-heartedly

¹⁷⁴ op. cit., *Proceedings of the Council of Four*. XVI, April 2, 1919, 4 p.m., Conversation Between Wilson, Clemenceau, Lloyd George and Orlando, p. 91.

¹⁷⁵ Francis Biddle, 'The Nuremberg Trial.' *Proceedings of the American Philosophical Society*. 1947 91[3]: 294. See also IMT, Vol 1, p. 218.

¹⁷⁶ op. cit., *Proceedings of the Council of Four*. XVI, April 2, 1919, 4 p.m., Conversation Between Wilson, Clemenceau, Lloyd George and Orlando, p. 91.

¹⁷⁷ Ibid., p. 92.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid. p. 93.

¹⁸¹ Ibid.

stating that the "first tribunal must have been summary and brutal, it was nevertheless the beginning." (182) The Prime Ministers of France and Great Britain, having lost the argument on whether the law to punish the Kaiser existed, were now plainly advocating the formulation of retroactive law. The last word in the afternoon session on April 2 went to

[91] President Wilson, who, seemingly shocked, stated that he agreed that terrible offences had been committed but felt that they should act in a manner that would satisfy their consciences. (183)

The subject of war crimes did not make another appearance until the afternoon session on April 8. The subject was once again raised by the British Prime Minister. Initially the Council discussed submarine warfare but the conversation soon swung to the "violation of treaties." (184) The argument had swung full circle and Lloyd George was once again advocating that such acts were violations of international law for which there must be punishment of individuals, namely the Kaiser. Clemenceau was also advocating a trial, as it would make the "greatest impression." (185) Wilson must have been disheartened because they were once again covering old ground. It was no wonder that the same day rumours began to circulate that the President had summoned his ship, the George Washington, to Brest, a move that was taken as a "hint" at the Paris Peace Conference. (186)

Clemenceau and Lloyd George were advocating that the Kaiser be tried for the violation of Belgian neutrality. However, neither referred to any law on the matter. Clemenceau believed that the "consciences of the peoples would not be satisfied if this act were treated otherwise than a crime at common law." (187) Wilson, of course, saw the

[92] invasion of Belgium as a "crime", but felt compelled to remind his companions that the law provided no sanction and that there was "no legal precedent" for the trial of an individual for such a crime. (188) Clemenceau simply replied that precedent was not important, there should be a sanction and an individual should be punished. (189) Lloyd George was quick to agree and proceeded to back up Clemenceau's argument with with an obviously desperate and equally spurious anecdote. The British Prime Minister asked the President to imagine a turn of events in which the Kaiser alone, in time of peace, gun in hand, crossed into Belgium and shot someone. In such a case, said Lloyd George, "the first Belgian gendarme on the spot had the right to stop and arrest him and have him hanged". Why then because he sent a million men into Belgium should he not be punished ? (190)

Needless to say, Lloyd George's attempts to blur the distinctions between the acts of individuals and those of states, though logically and morally sound, failed to convince Wilson, who, once again, brought the conversation back onto the legal plane. He castigated any attempts to "stoop to the level of the criminal by flouting the principles of law". (191) States, he claimed, might have the right to take "political precautions against a political danger" but it would be wrong to claim legal garb for a political action. (192) Lloyd George and Clemenceau responded by reverting to their old argument that precedent should

[93] be created. There should, they advocated, be a trial with Belgium acting as prosecutor, a suggestion which was flatly rejected by Belgium herself who could not countenance putting a sovereign on trial. (193)

182 Ibid.

183 Ibid.

184 op. cit., *Proceedings of the Council of Four*. XXV, April 8, 1919, 3 p.m., Conversation Between Wilson, Clemenceau, Lloyd George and Orlando, p. 144.

185 Ibid., p. 146.

186 H.W.V. Temperley (Ed.), *A History of the Peace Conference of Paris*. Vol. III, Chronology, Notes and Documents (London: Oxford University Press, 1969, reprinted from 1920 edition) p. 14. Wilson was at the time deadlocked with Lloyd George and Clemenceau on several crucial issues.

187 op. cit., *Proceedings of the Council of Four*. XXV, April 8, 1919, 3 p.m., Conversation Between Wilson, Clemenceau, Lloyd George and Orlando, p. 146.

188 Ibid.

189 Ibid.

190 Ibid.

191 Ibid., p. 147.

192 Ibid.

193 op. cit., *Proceedings of the Council of Four*. XXXVI, April 16, 1919, 4 p.m., Conversation Between Wilson, Clemenceau, Viscount Chinda, Baron Sonnino, Messrs. Balfour and Lansing, p. 214.

They then proceeded to describe a lynch court designed in such a way as to ensure a conviction. ⁽¹⁹⁴⁾ At this point Wilson interjected and asked for the opinion of Orlando. Orlando, as already mentioned, held a relatively neutral stance. In his personal opinion, the Allies had no legal right to inflict punishment, though he felt bound to concede that practical necessity dictated that they should "create the law". ⁽¹⁹⁵⁾ However, he qualified his statement with a warning of "the consequences of a violation of established principles." ⁽¹⁹⁶⁾ Wilson followed Orlando with a succinct clarification of the basic points of argument. He stated that there are two distinct categories of crimes being dealt with, the first being violations of the "recognised laws of war" which provide sanctions and the second being the punishment of a head of state, an "unexplored domain." ⁽¹⁹⁷⁾ Clemenceau, seizing on the latter category, reiterated his belief that precedent was unnecessary, stating quite openly that law did not exist on the matter. Clemenceau believed that as Germany's crimes were unprecedented it was excusable if the punishment was also unprecedented. ⁽¹⁹⁸⁾ Further, he stated :

We have today a glorious opportunity to bring about the transfer to international law of the principle of responsibility which is the basis of national law. ⁽¹⁹⁹⁾

[94]

The last word in the discussion went to Orlando. It was an apt and succinct summation of the Council of Four's findings on the matter of punishing the Kaiser and is worthy of quotation in full :

If we consult codes, it will be extremely difficult to find what we are seeking. If we talk in terms of international morality, that is quite a different thing. ⁽²⁰⁰⁾

Lloyd George and Clemenceau were intent upon punishing the Kaiser whatever the means. Lloyd George regarded the means as of "small importance" though Clemenceau felt a trial would "make the greatest impression." ⁽²⁰¹⁾ A close scrutiny of that in order to conduct a trial they would need to formulate retroactive law. They felt compelled, however, to do so due to overwhelming public opinion in their respective nations. Clemenceau's final and most frank statements (quoted above) on the matter bears remarkable similarity to those of Justice Jackson and others concerning Nuremberg. On the evening of April 8, after the meetings of the day were over, President Wilson, realising that agreement

[95] between the members of the Council was seemingly impossible, drafted two clauses on war crimes trials which were eventually to be incorporated into the Treaty of Versailles almost unchanged. In formulating a draft proposal, it is obvious that Wilson had been impressed with Orlando's abovementioned summation. In a similar manner to the compromise suggested by Maxwell Fyfe in 1945 (page 125) Wilson's draft undermined the proposed legal prosecution of the Kaiser while satisfying the demand for punishment. Undoubtedly he also had in mind the fact that Holland was unlikely to oblige in surrendering the Kaiser. ⁽²⁰²⁾ Wilson presented his draft proposal at the morning session the following day. In regard to the Kaiser it stated :

The crime for which it is proposed to bring the Ex-Kaiser to judgement will not be defined as an offence against criminal law, but as a supreme offence against international morality and the sanctity of treaties.
The punishment to be pronounced will be left to the discretion of the tribunal, which will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of

¹⁹⁴ op. cit., *Proceedings of the Council of Four*. XXV, April 8, 1919, 3 p.m., Conversation Between Wilson, Clemenceau, Lloyd George and Orlando, p. 147.

¹⁹⁵ Ibid., p. 148.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid., p. 149.

¹⁹⁹ Ibid.

²⁰⁰ Ibid., p. 151.

²⁰¹ Ibid., p. 145-146.

²⁰² Ibid., p. 150. During the session on April 8 Wilson had stated that there were no legal means of getting Holland to hand over the Kaiser. Lloyd George had replied by saying that they would have to force Holland's hand by refusing her entry into the League of Nations.

international morality. ⁽²⁰³⁾

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C) The treaty of Versailles, 1919

A first glance at the Treaty of Versailles might persuade the reader that the American views expressed in the Commission Report and the deliberations of the Council of Four did not win the day at the Paris Peace Conference. Yet a close scrutiny of the wording of the Treaty shows otherwise. Articles 227-230 of the treaty laid down provision for the trial of war criminals from the Kaiser down to private soldiers. ⁽²⁰⁴⁾

A critical reading of Article 227, in the light of the Commission's report, reveals that the Kaiser was indicted on moral rather than legal grounds. Arraigning the Kaiser for an offence against "international morality and the sanctity of treaties" and declaring that the international tribunal would be guided by "the highest motives of international policy" was, in effect, as Scott noted, an admission that law did not exist for either offence :

If we wished to be critical it would not be difficult. Terms are used in Article 227 without attempting to define them. What is morality ? What is international morality ? What is an offence against international morality ? And what is a supreme offense against this thing, whatever it may be ? It is safe to assume that opinions will differ as to the meaning and application of these terms. ⁽²⁰⁵⁾

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Thus, the authors of the article did not phrase it in the usual manner required of legal documents. Indeed, in a report attached to the ultimatum of June 16, 1919, the Allied Powers stated that the trial of the Kaiser was an act of high policy and its judicial character was merely a matter of form. ⁽²⁰⁶⁾ This Allied stance is corroborated by the wording of the letter requesting Holland for extradition of the the Kaiser. ⁽²⁰⁷⁾ The letter spoke in terms of the "moral" responsibility of the Kaiser for the violation of the "most sacred regulations of human conscience." ⁽²⁰⁸⁾ The Allies stated that they were determined not to be prevented by any (presumably legal) "arguments" and drew attention to the "special character" of their demand for the extradition and trial of the Kaiser. The letter made it clear that it was "not a question of a public accusation with judicial character as regards its basis, but an act of high international policy imposed by the universal conscience" in which legal forms had "been provided solely to assure to the accused such guarantees as were never before recognised in public law." ⁽²⁰⁹⁾

The Allied decision to use a trial procedure in the arraignment of the Kaiser was merely a matter of form and the end result was therefore similar to the Declaration of the Congress of Vienna regarding Napoleon. It also corroborates the principle outlined later in the 1943 Moscow Declaration regarding *major* war criminals. As we have already seen the heads of the Allied powers in Moscow

[98] stated that the major criminals would "be punished by joint decision of the Governments of the Allies." The Germans reacted bitterly to the "Versailles Dictat". Violent agitation arose throughout the country resulting in the Allied decision to allow the establishment of a German State Tribunal to investigate and determine the general subject of war guilt. ⁽²¹⁰⁾ Hearings took place during 1919, and Bethman Hollweg,

²⁰³ op. cit., *Proceedings of the Council of Four*. XXVI, April 9, 1919, 11 a.m., Conversation Between Wilson, Clemenceau, Lloyd George and Orlando, p. 153.

²⁰⁴ Treaty of Versailles. Part VII, Penalties, Articles 227-230. As found in *The Times* [London] June 28, 1919, Supplement p. iv. published the same day as the signing of the treaty (see **Appendix 2**). In Article 229 of the Treaty the op. cit., *Virginia Law Review* 1921 8[1]: 3, incorrectly replaces "nationals" with "national laws", an error which radically changes the meaning of the text. The text in the *London Times* is identical to that of an official text published soon after by His Majesty's Stationary Office as *The treaty of Peace Between the Allied and Associated Powers and Germany, the Protocol annexed thereto, the Agreement respecting the military occupation of the territories of the Rhine, and the Treaty Between France and Great Britain Respecting Alliance to France in the event of unprovoked aggression by Germany. Signed at Versailles, June 28th, 1919*. (London: HMSO, 1919).

²⁰⁵ op. cit., *What Really Happened at Paris*. p. 239.

²⁰⁶ op. cit., *The Nuremberg Trials in International Law*. p. 30 note 29.

²⁰⁷ The full text of the letter may be found in 'Punishing War Criminals.' *Current History Magazine of the New York Times*. 1920 11[2]: 376-377.

²⁰⁸ *Ibid.*, p. 376.

²⁰⁹ *Ibid.*, p. 377.

²¹⁰ op. cit., *Virginia Law Review*. 1921 8[1]: 3. For general background information and contemporary opinion see 'Trial of German

Vansdorff and other German notables testified. Hindenberg and Ludendorff reluctantly submitted to a very limited examination. Then, in January 1920 the Supreme Council of the Peace Conference made an official demand on Holland to surrender the Kaiser.

The Dutch reply came four days later on January 24 in a letter from M. Loudon, Minister of the Dutch Government, to the French Prime Minister and Minister of Foreign Affairs. Holland refused to comply. The letter stated that a supreme offence against international morality and the sanctity of treaties was not provided for in the laws of Holland. ⁽²¹¹⁾ She also stated that as the offences of which the Kaiser was accused were political, rather than criminal, Holland was obliged by its neutral status to give protection to him. The Allies reluctantly accepted the Dutch reply and the subject was eventually dropped. However, the Dutch letter stated that should the League of Nations set up an international body competent to decree in a case of war, on facts qualified as crimes, providing

[99] sanctions beforehand, Holland would comply. ⁽²¹²⁾ This was in line with the recommendation of the Commission on Responsibility in its report and very similar to the position held by Scott, of the American delegation, who stated that in future the sovereign or chief executive might, by agreement between nations, be triable for a crime or offence by an international tribunal. However, he maintained, "It cannot be done now." ⁽²¹³⁾

Despite the total lack of success in bringing the Kaiser to trial, preparations continued for the trial of minor German war criminals, for infractions of the traditionally recognised laws and customs of warfare. Due to the above-mentioned unrest in Germany the Allies had agreed to allow these to be tried before a German court and on May 23, 1921, the first case was brought to trial before the Imperial Court in the German city of Leipzig. Of the 901 persons charged, only 45 ultimately appeared in court and of those only nine were convicted. The sentences ranged from a few months to four years in prison.

Naturally, many within Allied circles were outraged. An article published in the 1921 *Virginia Law Review* noted that it "tended to convince the world that this German court was not administering full and exact justice." ⁽²¹⁴⁾ Thus, it was only natural that later, in 1945, after another bitter conflict in which it appeared that German belligerence was once again the cause, we find that the

[100] failure of these early war crimes trials is seen as justification for stronger measures. A 1945 article in the London *Law Journal* is typical of the post-war attitude when it noted that :

The experiment of letting the national tribunals of the defeated enemy try their subjects for their war offences proved utterly unsatisfactory. This time the United Nations have been more determined. The courts of the victors are trying those charged with acts which horrified humanity. ⁽²¹⁵⁾

Accordingly, Justice Jackson in his opening speech before the International Military Tribunal in Nuremberg stated on November 20, 1945, that either "the victors must judge the vanquished or we must leave the defeated to judge themselves. After the First World War we learned the futility of the latter course." ⁽²¹⁶⁾ The trial of German offenders provided for in the Treaty of Versailles, after the close of hostilities in 1918, was the subject of intense legal debate before, during and after the trials held in Leipzig. This debate was reflected in contemporary literature, primarily legal journals. From this body of literature it appears there was general agreement that the primary obstacle to the trial of the Kaiser was that international law provided

Officers.' *The Independent*. 1920 101[February 14]: 252-253; Hermann Wendel, 'National Martyrs and Matters of Opinion.' from Die Glocke. (July 11) republished in *Living Age*. 1921 31[4030]: 35-37.

²¹¹ M. Lachs, *War Crimes: An Attempt to Define the Issues*. (London: Stevens and Sons, 1945) p. 58, quotes from the Dutch letter: "L'offense supreme contre la morale internationale et l'autorité des traités ... ne figure pas dans les nomenclatures des infractions pénales insérées dans les lois des Hollandais ou les traités par elle conclus."

²¹² *Ibid.*, p. 57.

²¹³ *op. cit.*, *What Really Happened at Paris*. p. 238.

²¹⁴ *op. cit.*, *Virginia Law Review* 1921 8 [1]: 16; 'Trial of Sovereigns for State and War Offences.' *Juridical Review* 1931 43 [2]: 176; *The Times* described the trials as a "travesty of justice," and the *Evening Standard* stated "Leipzig, from the Allies' point of view has been a farce." see the *Fortnightly Review*. 1921 116 [September]: 420. For a selection of quotes from the world press on the Leipzig trials see 'Acquittals That Convict Germany.' *Literary Digest*.

²¹⁵ Norman Bentwich, 'The Belsen Trial.' *Law Journal*. (London) 1945 95[4167]: 394. See also Benjamin B. Ferencz, 'Nürnberg Trial Procedure and the Rights of the Accused.' *Journal of Criminal Law and Criminology*. 1948 39 [2]: 145.

²¹⁶ *The Trial of German Major War Criminals by the International Military Tribunal Sitting at Nuremberg Germany (Commencing 20th November, 1945). Opening Speeches of the Chief Prosecutors*. (London: HMSO, 1946) p. 5.

[101] sovereigns with immunity from the jurisdiction of foreign courts. An article in the *American Political Science Review* in 1919 was typical of the general understanding of the state of international law when it pointed out that :

An obstacle to the assumption of jurisdiction would result from the immunities which international law accords to sovereigns. Not only are reigning sovereigns exempt from suit but persons subsequently amenable to suit are exempt from prosecution for acts done in their former sovereign capacity. ⁽²¹⁷⁾

The author gives as examples suits brought by foreigners against the Queen of Portugal in 1851 and the Sultan of Johore in 1894. He also quotes from a suit brought by the duke of Brunswick against the king of Hannover, who was at the time a British subject (no date given). In that case the Lord Chancellor refused jurisdiction saying, "the courts of this country cannot sit in judgement upon an act of a sovereign effected by virtue of his sovereign authority abroad". ⁽²¹⁸⁾ Another example is given in which the United States in 1895 dismissed suits brought against the ex-president of the Dominican Republic and the ex-military governor of Bolivar, Venezuela, for acts done in their official capacities. The article continued stating that in the few cases in which a sovereign had been made a defendant the jurisdiction had

[102] been created by "extraordinary legislation" and that the results had "not been generally commended by historians." ⁽²¹⁹⁾

Fourteen years later, in 1933, once much of the emotion surrounding the post-war debate had died down, the *Tulane Law Review* carried an article which condemned the Allied effort to hold the Kaiser responsible for bringing on the World War, with charges of "a supreme offense against international morality and the sanctity of treaties," as "[d]oomed to failure from the outset" as it involved principles "hardly discussed since the time of Napoleon and certainly not a generally accepted part of international law." ⁽²²⁰⁾

An article in the *Virginia Law Review* in 1920, stated that "it would be folly" to believe that one could prosecute and try the German Emperor for declaring defensive war and for violation of treaties ; to do so was within his rights as sovereign. The article is worth quoting as it bears direct relevance to issues involved in the Nuremberg principles :

As to prosecuting a sovereign for waging unjust war, M. Vattel, the John Marshall of writers upon international law, clearly states the objection to any such effort thus : "The first rule of the law (i.e., the voluntary law of nations), respecting the subjects under

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consideration, is that *regular war, as to its effects, is to be accounted just on both sides*. It is even impossible to point out any other rule of conduct between nations, since they acknowledge no superior judge." ⁽²²¹⁾

However, the article went further claiming that although a sovereign might have the right to declare war, if necessary even violating treaties, he does not possess the right to "commit murder in violation of the rules and customs of war" and for this he must be tried as head of the armed forces. ⁽²²²⁾ The author of the article admits that "[p]recedents in this field are rare" and indeed he points out none. ⁽²²³⁾ His argument is that sovereigns must not be held as sacred and above responsibility, which is at least morally defensible, but in terms of international law as it stood at the close of the war, it appears that he was standing on thin ice when asking for the setting up of a precedent in the Kaiser.

It is interesting to note though that the above article makes an important distinction between the Kaiser and German soldiers in general, a distinction upheld by the Moscow Declaration in 1943. The author concludes, without any hesitation, that the latter may be tried for offences in "violation of the laws and customs of war"

²¹⁷ Quincy Wright, 'The legal liability of the Kaiser.' *American Political Science Review*. 1919 13[1]: 121; see also 'Trial of Sovereigns for State and War Offences.', *Juridical Review*. 1931 43[2]: 175-178; Gordon Ireland, 'The Trial of Ex-Rulers.' *Tulane Law Review*. 1933 7[2]: 279.

²¹⁸ op. cit., *American Political Science Review*. 1919 13[1]: 121.

²¹⁹ Ibid.

²²⁰ op. cit., *Tulane Law Review*. 1933 7 [2]: 281.

²²¹ op. cit., *Virginia Law Review*. 1920 6 [5]: 402.

²²² Ibid.

²²³ Ibid., p. 412.

by military commission of the Allies or by the civil courts of the territory where the crimes were committed. It should be

[104] noted that the author of the article was not alone in these conclusions. An article published in the *Law Quarterly Review* in 1923 stated that :

we find that men who are concerned with offences of the kind render themselves liable to punishment according to the laws of the country in which they are committed, but cannot as a rule be tried in England (see *Macleod v. Attorney-General* [1891] A. C. 455) or America (see *United States v. Davis, Scott's cases*, 294) except for offences committed in those countries respectively, and the same law appears to apply to France (see Frantz Despagnet's *Cours de Droit International Public* (4th ed. by Ch. de Boeck, p. 384), where we are told that the same rule applies to Belgium and Holland and some other countries. ⁽²²⁴⁾

Such a statement bears obvious similarities to the rule laid down later in the Moscow Declaration, as does the statement on tryable offences in the article in the *Virginia Law Review*. This article outlined "offenses in violation of the customs and rules of war committed within hostile lines and on the territory in control of the enemy" for which the culprit "may be sentenced and executed." ⁽²²⁵⁾ Regarding the legality of the trial and execution of enemy soldiers, a very good summary is provided in an article by

[105] Eldbridge Colby entitled "War Crimes" published in the *Michigan Law Review* in 1925, ⁽²²⁶⁾ which, although seeing many shortcomings in the law, supports the general view that captured enemy soldiers may be tried for war offences by their captors. The article discusses precedents which date back to 1847, the Hague conventions of 1899 and 1907 and goes through various national manuals on military law.

Conclusion

In summing up the Legal controversy over the trial of war criminals after the First World War it is important to recognise the primary issues in what was a very complex deliberation.

At the close of the war the German Kaiser was "arraigned" for "a supreme offense against international morality and the sanctity of treaties". He was to be tried in a quasi-legal proceeding before an international tribunal (Treaty of Versailles, Article 227). Certain German individuals were also to be charged with the "violation of the laws and customs of war". These were to be tried before military tribunals (Article 228). Others accused of criminal acts against nationals of the various "Allied and Associated Powers" were to be tried by military tribunals of those powers concerned (Article 229).

As we have seen, the main legal difficulty was the trial of individuals for acts committed in a sovereign

[106] capacity and seems that there were at least some grounds for legitimate legal objection. Such a trial was objected to on legal grounds by the United States delegation to the Paris Peace Conference. Although the Allied powers finally agreed to a trial of sorts for the Kaiser it never eventuated. The overriding opinion in 1919 regarding aggressive war and the violation of treaties was that such acts were well within the legal rights of sovereign nations.

The planned trial of the Kaiser by "High Tribunal", although in some ways resembling the International Military Tribunal, was essentially different. The difference was that the Kaiser was to be charged on moral and political grounds in a quasi legal proceeding, whereas at Nuremberg it was claimed that the defendants were indicted with crimes against international law and the laws and customs of warfare. However, if one takes into account that the London Charter which established the I.M.T. made no mention of international law and that all other statements concerning international law found in the Tribunal's Judgement were extra judicial, then the differences between the planned trial of the Kaiser and the Nuremberg Trial are considerably lessened.

It should also be stressed that in 1919 the charges of aggressive war and violation of treaties were considered moral rather than legal offenses and that there was no

²²⁴ W.M. Adams, 'The American Peace Commission and The Punishment of Crimes Committed During the War.' *Law Quarterly Review*. 1923 39[154]: 248.

²²⁵ op. cit., *Virginia Law Review*. 1920 6 [5]: 405.

²²⁶ Eldbridge Colby, 'War Crimes.' *Michigan Law Review*. 1925 23[5]: 482-511.

[107] charge of conspiracy or of crimes against humanity of the kind indicted after the Second World War. (227) The violations of the laws of humanity mentioned in Article 227 of the Treaty of Versailles were to be punished on a political rather than legal level. Any charges of offences against civilian nationals of the Allied nations were covered under Article 229 of the Treaty of Versailles. There was no effort to prosecute crimes committed by Germans against German nationals, which formed the main body of crimes against humanity at Nuremberg.

On the other hand, the trial of individual soldiers for the more traditional offence of crimes against the laws and customs of warfare, committed against the Allied armies or nationals of the Allied nations met no real legal objection. (228) Such national trials were similar to the Kharkov trial discussed in chapter one of this study. In 1919 the Allies agreed that these could legally be tried before individual military tribunals in accordance with territorial jurisdiction or, in cases where their crimes had no single geographical location, by combined military tribunals composed of members of individual national military tribunals. Thus, the Treaty of Versailles became the first international treaty of peace in which an attempt was made by the victorious belligerent to enforce against the defeated adversary, after the cessation of hostilities, the application of the principle of individual responsibility for the commission of criminal acts in

[108] violation of the laws and customs of war. (229)

²²⁷ although many atrocities against civilian populations did occur op. cit., *American Journal of International Law*. 1920 14[1]: 95-154; op. cit., *Law Quarterly Review*. 1923 39 [154]: 248-250.

²²⁸ Note the attitude of the Americans in the op. cit., *Commission Report*, p. 140.

²²⁹ J.W. Garner, 'Punishment of Offenders Against the Laws and Customs of War.' *American Journal of International Law*. 1920 14: 71. See also Garner's *International Law and the World War*. (London: Longmans, Green and Co., 1920) p. 471.

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CHAPTER THREE

THE LONDON CONFERENCE

If we start discussing on that again, I am afraid the war criminals would die of old age. ⁽²³⁰⁾
General Nikitchenko to the other delegates at the London Conference, 1945.

Representatives from France, the United Kingdom, the Soviet Union and the United States met between June 26 and August 8, 1945. The conference, held at Church House in London, resulted in an agreement and charter for the prosecution of the "Major War Criminals of the European Axis", signed on August 8. However, the conference itself was no mere pre-signing formality. The minutes of the fourteen private conference sessions reveal an often laborious, sometimes heated, several times almost abandoned, sentence by sentence construction of a mutually agreeable method by which to bring "justice" to Germany's major war criminals. The proceedings of the conference were secret and were not published until 1949, approximately four years after the signing of the agreement and charter and more than two years after the final judgement of the International Military Tribunal at Nuremberg.

Formulating a definition of war crimes, Article 6 of

[110] the charter, proved to be the primary stumbling block to consensus. It should be remembered, though, that even in the early stages of drafting, the charter had some 26 articles. Discussion of these articles took up much of the time at the London Conference. The conferees dealt with these articles systematically, and, article by article, reached agreement. As modifications were agreed upon, new drafts would be submitted. Thus, a new draft did not necessarily signify agreement on all the articles contained therein.

Representatives from the four principal Allied nations had, two months earlier, at a conference in San

²³⁰ R.H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945: a documentary record of negotiations of the representatives of the United States of America, the Provisional Government of the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics, culminating in the agreement and charter of the International Military Tribunal.* Department of State Publication No. 3080 (Washington DC: GPO, 1949). Hereafter International Conference. Document LI. Minutes of Conference session of July 25, 1945. p. 389.

Francisco, agreed on an American draft proposal as a basis for initial discussion. ⁽²³¹⁾ This draft proposal was modified several times during the London Conference. As Article 6 of the charter is of primary interest to this thesis and for the purpose of simplifying (though at the risk of oversimplifying) what was a very long and laborious series of discussions, this chapter will begin with the conference session on July 18. At this point in the conference the basis for discussion was a draft prepared by the drafting subcommittee on July 11, 1945.

Article six of this draft began : "The following acts shall be considered criminal violations of International Law and shall come within the jurisdiction of the Tribunal". ⁽²³²⁾ The article continued by listing a series of

[111] offences including, in infant form, all those found in the final charter and agreement discussed in the introduction to this thesis, namely "war crimes", "crimes against peace" and "crimes against humanity".

Final agreement on Article 6 was not reached until the last fifteen minutes of the final conference session on August 2. On December 27, 1947, nearly two and a half years later, and one year after the end of the trial at Nuremberg, Justice Jackson wrote that the London Agreement and Charter had carried "the conception of crime against the society of nations far beyond its former state". ⁽²³³⁾ Two years later, in 1949, Jackson was even more explicit in an article entitled "Nürnberg in Retrospect" published in *The Canadian Bar Review*. After a chronological review of the Nazis' aggressive war, he stated :

If no moral principle is entitled to application as law until it is first embodied in a text... then it must be admitted that the world was without such text at the time the acts I have recited took place. ⁽²³⁴⁾

He went on to clarify his point stating that no "legislative act to which the Germans must bow had defined international crimes, fixed penalties and set up courts to adjudge them." ⁽²³⁵⁾ In other words he was admitting that the Nuremberg principles were based not on international law

[112] but upon an Allied understanding of morality. Further, the assertion that there was no legislation to which the Germans were obliged to bow, was a confession that the Nuremberg trial was an "arbitrary exercise of power" : the Nazis certainly did not go to the dock of their own volition. These statements by Jackson provide a basis for understanding the proceedings of the London Conference which were published, for the first time, in the same year.

As has been demonstrated in chapter one of this study, the desire for at least a *judicial veneer* was inherent in the Soviet proposal for an "international tribunal" as early as October 1942 (page 42). The book *Hitlerite Responsibility under Criminal Law* (1944) by the Soviet jurist and representative at the London Conference, A.N. Trainin, makes it quite apparent that the Soviets in their desire for a trial did not envisage staying within the confines of existing international law. As for the United States, the *judicial method* had received Presidential approval in April 1945, though primarily for reasons of political expediency (page 58). A reading of the minutes of the London Conference makes it clear that the French went into the conference supportive of a trial of some kind but did not see a war of aggression as illegal or individually punishable. They also reveal that the French had doubts about the legal validity of the plan to prosecute on the charge "crimes against humanity". Britain's pre-conference position was clearly spelled out

[113] in an aide mémoire handed, on April 23, 1945, to Judge Samuel Rosenman, in charge of American war crimes policy prior to the appointment of Justice Jackson. The message clearly stated the British view that it was "beyond question" that Hitler and his "arch-criminals" must "suffer the penalty of death for their conduct leading up to the war" and for their methods of waging war. ⁽²³⁶⁾ The note also stated that :

It being conceded that these leaders must suffer death, the question arises whether they should be tried by some form of tribunal *claiming* to exercise judicial functions, or whether the decision taken by the Allies should be reached and

²³¹ op. cit., International Conference, Document IV. American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 1945. p. 22 ff.

²³² op.cit., International Conference, Document XXV. Draft Agreement and Charter, Reported by Drafting Subcommittee, July 11, 1945. p. 197.

²³³ op. cit., International Conference, Preface, p. viii.

²³⁴ R.H. Jackson, 'Nürnberg in Retrospect.' *The Canadian Bar Review*. 1949 27[7]: 777.

²³⁵ Ibid.

²³⁶ op. cit., International Conference, Document II. Aide Mémoire from the United Kingdom April 23, 1945. p. 18.

enforced without the machinery of a trial. ⁽²³⁷⁾

The wording of the note clearly reveals the British view that whatever option was chosen it would simply be a formality, an investigation leading to a predetermined political action (page 57). Thus, the note stated that the British government favoured "execution without trial" as the "preferable course", and that "unprovoked attacks" on various countries :

are not war crimes in the ordinary sense, nor is it at all clear that they can properly be described as crimes under international law. These would, however, necessarily have to be

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part of the charge and if the tribunal had - as presumably they would have - to proceed according to international law, an argument, which might be a formidable argument, would be open to the accused that this part of the indictment should be struck out. ⁽²³⁸⁾

The British government accordingly held that a war of aggression was not an international criminal offence. They also realised that setting up an Allied tribunal would require them to at least seem to act within the confines of international law. According to the British government, a trial based on principles of international law would invite the accused to point out "what has happened in the past and what has been done by various countries in declaring war which resulted in acquiring new territories, which certainly were not regarded at the time as crimes against international law." ⁽²³⁹⁾

Conference Session, July 18, 1945

During the London Conference, the first hint of dispute over the current state of international law and the drafting of Article 6 came during the session on July 18. Professor André Gros, assistant to the French representative Judge Robert Falco, expressed the concern of the French delegation that the draft of Article 6 worked out thus far was open to criticism by "international lawyers in the next months and years to come." ⁽²⁴⁰⁾ However,

[115] due to its complex nature, the matter was passed over and subsequently placed at the top of the agenda for the session the next day.

Conference Session, July 19, 1945

Sir David Maxwell Fyfe, the chairman and British representative, opened the session on the 19th by inviting the French to explain their objections. Gros began by explaining that the French intention in formulating a definition of punishable crimes was no different to that of the other Allies, but that his delegation objected to the definition of crimes proposed thus far. In the eyes of the French government the "launching of a war of aggression" was not a "criminal violation" and that to "declare war a criminal act of individuals" was to go "further than the actual law." ⁽²⁴¹⁾ In this way the French were objecting to the draft agreement and charter submitted by the drafting subcommittee on July 11. In the July 11 draft, Article 6 began : "The following shall be considered criminal violations of International Law and shall come within the jurisdiction of the Tribunal". ⁽²⁴²⁾ In order to avoid legal criticism in later years for judicially punishing "something that was not actually criminal", ⁽²⁴³⁾ the French preferred to rephrase the introductory paragraph leaving out the words "criminal violations" and "International Law". ⁽²⁴⁴⁾ They felt that by doing so the Allies could avoid legal objections but "get the same results." ⁽²⁴⁵⁾ In backing up his claim, that it would be

²³⁷ Ibid. Italics mine.

²³⁸ Ibid., p. 18-19.

²³⁹ Ibid.

²⁴⁰ op. cit., International Conference, Document XXXIII. Minutes of Conference Session of July 18, 1945, p. 286.

²⁴¹ op. cit., International Conference, Document XXXVII. Minutes of Conference Session of July 19, 1945, p. 295.

²⁴² op. cit., International Conference, Document XXV. Draft Agreement and Charter, Reported by Drafting Subcommittee, July 11, 1945. p. 197.

²⁴³ op. cit., International Conference, Document XXXVII. Minutes of Conference Session of July 19, 1945. p. 295.

²⁴⁴ op. cit., International Conference, Document XXXV. Draft Article of Definition of "Crimes", Submitted by French Delegation, July 19, 1945. p. 293.

²⁴⁵ op. cit., International Conference, Document XXXVII. Minutes of Conference Session of July 19, 1945. p. 296.

[116] unwise to "go beyond what is traditional with most lawyers", ⁽²⁴⁶⁾ Gros drew attention to the abovementioned book by Professor Trainin (pages 51-52), who, of course, was present at the meeting as a representative of the Soviet Union. He therefore cornered at least the Soviet delegation by correctly pointing out that Trainin had tried to "construct the idea of an international crime" while recognising that international law did not "make it punishable." ⁽²⁴⁷⁾

Gros then conceded that it may be possible to assert that the launching of a war of aggression was a crime on the part of a state, in so far as a state might violate a specific treaty, but he was firm in his belief that there was certainly no provision in international law for individual responsibility.

In order to win over the French delegation, Maxwell Fyfe began to argue from a moral rather than legal standpoint. He asserted that it would not be just to blame a whole nation for the actions of "15 or 20 people". ⁽²⁴⁸⁾ Gros's answer was categorical : "We think that would be morally and politically desirable but it is not international law." ⁽²⁴⁹⁾ In the same manner that he had referred to the previous work of Trainin, Gros, in order to back up his argument, turned to the report of the American delegates (see chapter two of this thesis, page 81 ff), Scott and Lansing, on the Commission on Responsibilities in 1919 :

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It certainly was the state of the law in 1919 that the acts which brought about the war would not be charged against officers or made the subject of procedure before a tribunal. And the Germans will take for precedent what is still worse for our object - the report of James Brown Scott and Robert Lansing to show that we have no legal basis to say that the launching of a war of aggression shows criminal responsibility of the people who launched the war. ⁽²⁵⁰⁾

Gros, whether he intended it or not, had made a direct attack upon the American delegation headed by Justice Robert Jackson. Jackson was the foremost proponent of the illegality of, and responsibility of individuals for, the waging of aggressive war. His position was a direct reversal of that of the American delegation in 1919.

"My difficulty", declared Gros, "is that this charter is not made to declare new international law". ⁽²⁵¹⁾ The Soviets, having been reminded of Trainin's book, agreed. The second of the Soviet representatives, General Nikitchenko, voiced what was to become a recurring Soviet concern at the conference, that of creating precedent for the future. He espoused that they must be careful to "confine this definition to a legal formula which would form the basis of a trial of these war criminals", rather than "try to draw up this definition for the future." ⁽²⁵²⁾ He

[118] thus expressed his concern that the Allies might in future be hampered by their own construction of law. He continued by warning his Allied colleagues that whatever "formula" the conference concluded on they must not go into too much detail in defining the Nazi's crimes as this might give them "the possibility of considering themselves political criminals." ⁽²⁵³⁾ Nikitchenko concluded by affirming that the Soviet delegation was "ready to support the formula submitted by the French Delegation." ⁽²⁵⁴⁾

In his reply to the French and Soviet opinions, Justice Jackson stated that in general he agreed with much of what they were saying but that he was anxious to give "some real moral meaning to the principles that underlie any prosecution."⁽²⁵⁵⁾ Then, as one would expect, he moved straight on to address the issue of the very different American stance after the Great War. However, instead of turning to international law for justification Jackson digressed into what amounted to a blatant attempt to formulate law which would justify American war-time policy :

I must say that sentiment in the United States and the better world opinion have greatly changed since Mr. James Brown

246 Ibid.

247 Ibid., pp. 295-296.

248 Ibid., p. 297.

249 Ibid.

250 Ibid., p. 297.

251 Ibid.

252 Ibid., p. 298.

253 Ibid.

254 Ibid.

255 Ibid.

Scott and Secretary Lansing announced their views as to criminal responsibility for the First World war. I have no expectation that any rule we could formulate would avoid the criticism of some

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scholars of international law, for a good many of them since 1918 - in language that was used about others - have learned nothing and have forgotten nothing. But I don't think we can take the 1918 view on matters of war and peace. At least in the United States we have moved far from it with such measures as lend-lease and neutrality. ⁽²⁵⁶⁾

Then, moving on to Trainin's book, Jackson stated that the Soviet view was "very close to the view which we entertain in the United States." ⁽²⁵⁷⁾ In his book, Trainin had, as we have seen, advanced a definition of what the law should be rather than what it actually was. However, Jackson was even more explicit as to the contemporary state of international law. As he saw it, there was no prescribed "criminal penalty" for the punishment of individuals in international law. He pointed out that : "In other words, we have no statute which states any penalties or individual responsibilities for any offenses under whatever formula we attempt to arraign them." ⁽²⁵⁸⁾

Differences of opinion over the legal status of aggression in international law remained unresolved during the conference session on July 19. A large part of the second half of the session was devoted to formulating a definition of the term aggression which, as chapter four of this study points out, had previously eluded legal

[119] definition. The London Conference was to prove no different. An analysis of the second half of the July 19 conference session does much to illustrate the reasons why.

The American delegation proposed that a simple definition of aggression be incorporated into the charter. According to the Americans the aggressor should be defined as the state which was the first to blockade, declare war on, or invade another state regardless of any political, military or economic considerations. ⁽²⁵⁹⁾ Not surprisingly the primary opponent to any such definition of aggression being included in the charter was the Soviet Union. By the American definition (and almost any other) the Soviet invasions of Poland in September 1939 (page 66) and Finland in November of the same year (page 156) were plainly aggressive. Further, in 1933 the Soviets had signed the Convention for the Definition of Aggression which had rested on the very same definition (page 145). The Soviets had later violated the convention by invading the territory of all the signatory states. Nikitchenko advocated that the tribunal would "not be competent to judge what kind of war was launched by the defendants". ⁽²⁶⁰⁾ Instead he asserted that it was enough that the policy of the Axis powers had already been defined by the Allies as aggressive and :

The fact that the Nazi leaders are criminals has already been established. The task of the Tribunal is only to determine the measure of guilt of each particular person and mete out the necessary punishment - the sentences. ⁽²⁶¹⁾

[121] The reaction of the British delegation to the proposed definition of aggression was categorical. Maxwell Fyfe was supportive of the American proposal. The illustration given by the British delegate as a reason for the support of such a black and white definition of aggression is telling indeed :

To take an actual case, one that involves my country... Norway for example... we have information that they [the Germans] are going to say that it was done in anticipation of measures which they claim we were about to take to prevent the Norwegians from assisting the Germans by the supply of iron.... If we are going to introduce Norway - we might want to for the atrocities in Norway - I think we are rather opening the door for trouble if there is no definition. ⁽²⁶²⁾

In 1940 Norway had been seen by both sides as strategically vital. Its coast had potential to provide valuable bases for either a British blockade of Germany or a German offensive against shipping in the Atlantic. Thought to be even more important at the time was the fact that the Norwegian port of Narvik was the only passable

²⁵⁶ Ibid. p. 299.

²⁵⁷ Ibid.

²⁵⁸ Ibid., p. 300.

²⁵⁹ op. cit., International Conference, Document XXXVI. Definition of "Aggression," Suggested by American Delegation as Basis of Discussion, July 19, 1945. p. 294.

²⁶⁰ op. cit., International Conference, Document XXXVII. Minutes of Conference Session of July 19, 1945. p. 303.

²⁶¹ Ibid.

²⁶² Ibid., Brackets mine.

[122] winter port in the area through which the Germans could transport, from Sweden, supplies of iron ore crucial to their war machine. Thus, from the beginning of 1940 Britain, France and Germany had begun to formulate plans to invade Norway. Unfortunately for the Allies, Germany, in the words of Justice Jackson at the London Conference, was "a few jumps ahead of a British invasion".⁽²⁶³⁾ As Maxwell Fyfe hinted, an important consideration in the German timing of their invasion on April 9, 1940, was the fear of being preempted by Britain.⁽²⁶⁴⁾

Although the British plans to invade Norway were never implemented, other examples provide adequate proof of Britain's willingness to use aggression as an instrument of national policy. The British-Soviet invasion of Iran in 1941 is a case in point. Notwithstanding the Shah's strivings to pursue neutrality, by 1941 it had become clear to the Allies that Axis influence within Iran was growing steadily. Iran was vital to Allied oil supplies and since Germany's initial success in Operation Barbarossa (in June 1941) there had been a growing fear of a German strike southwards. Britain and the Soviet Union, in accordance with a 1907 Entente dividing Iran into spheres of influence, demanded that the Shah expel all German nationals from the country. He refused to comply and on August 25 an Allied invasion began which in three days had defeated all resistance. "In addition to safeguarding the Allies' oil supplies, the occupation of Iran provided an

[123] additional benefit for the Allies in that over five million tons of war supplies were shipped to the Soviet Union through the Persian Gulf."⁽²⁶⁵⁾

The cases of Norway and Iran show not only that, during the war, the British were as willing to plan and execute aggression (as defined by Jackson, page) as Germany was, but also that by 1945 the British were intent upon shutting off any avenue Germany might have of pointing this out. Further, in regard to the case of Norway brought up by Maxwell Fyfe, in backing the American definition of aggression, the British delegate was understandably determined to make sure that the actual act of war, rather than the planning, was considered criminal. Naturally, however, the final draft of the agreement and charter contained no such definition of aggression as the delegates at the London Conference were also interested in indicting those Germans involved in the "planning" and "preparation" as well as the "initiation" of aggressive war.

Conference Session, July 23, 1945

With the opening of the conference session on July 23 the debate over the inclusion of the words "international law", in Article 6, once again became the focus of controversy. Britain, France and the Soviet Union all preferred to leave it out. They felt the inclusion of the term might prompt debate as to the actual state of international law. The American delegation wanted to leave

[124] the words in for the reason that leaving them out might lead to the same dilemma. The minutes of the conference session reveal a fundamental difference of opinion between the delegates over their function at the conference.

Jackson did not argue that the principles upon which the Allies wished to arraign the major Nazis were part of existing international law. In fact he argued passionately that there was no basis in international law for the Allies dealing with German atrocities committed on German soil against German nationals ("crimes against humanity"), except by virtue of their being part of the preparation for the waging of aggressive war.⁽²⁶⁶⁾ He also conceded that the principle of individual responsibility had a very "weak" base in international law.⁽²⁶⁷⁾ However, unlike the other delegates, he felt that the four powers present should have the right "in view of the disputed state of the law of nations" to "settle by agreement what the law is".⁽²⁶⁸⁾ As usual, Jackson's most outspoken opponent was Gros of the French delegation. Gros correctly stated that to declare their definitions of law for this trial as international law would be to act in the manner of a "codification commission".⁽²⁶⁹⁾ Gros stated that the delegates at the conference did not have the authority to codify new

²⁶³ op. cit., International Conference, Document XXXVII. Minutes of conference session of July 19, 1945. p. 306. See also P. Calvocoressi and G. Wint, *Total War: Causes and Courses of the Second World War*. (London: The Penguin Press, 1972) pp. 106-109.

²⁶⁴ Ibid., p. 107. Also Winston Churchill, *The Second World War*. (London: Cassell and Co., 1948) Vol. I, pp. 424-425.

²⁶⁵ B. Perrett and I. Hogg, *Encyclopaedia of the Second World War*. (London: Longman, 1989) p. 210.

²⁶⁶ op. cit., International Conference, Document XLIV. Minutes of Conference Session of July 23, 1945. p. 331.

²⁶⁷ Ibid., pp. 331, 333.

²⁶⁸ Ibid. p. 329.

²⁶⁹ Ibid. p. 335.

international law and that any agreement would simply be :

[125] a creation by four people who are just four individuals -- defined by those four people as

criminal violations of international law. Those acts have been known for years before and have not been declared criminal violations of international law. It is *ex post facto* legislation. ⁽²⁷⁰⁾

Jackson, in his reply, seemed somewhat surprised : "But we are a codification commission for the purposes of this trial as I see it. That was my commission as I understand it." ⁽²⁷¹⁾ In an effort to mediate between the American and the Frenchman, in what appears to have become a heated debate tinged with frustration, Maxwell Fyfe came up with what proved to be the key, a solution which was adopted, though not word for word, in the final draft. The British delegate proposed that in order to avoid the criticism of international lawyers while remaining firm on what law was to be applied they drop the use of "international law" but maintain "criminal violations", while categorically stating that "this is the law which the Tribunal will apply" and for which there is "personal responsibility". ⁽²⁷²⁾ Maxwell Fyfe was thus the first to suggest the great leap in wording from the legal to the political domain. This was, it must be remembered, in full accord with the Moscow Declaration and the British stance outlined in the aide mémoire discussed earlier in this chapter.

For the purpose of continuity, the present writer's analysis of the conference session on July 23 has focused

[126] solely on the issue of the inclusion (or otherwise) of the term "international law". However, another issue of importance to this thesis, and to which passing reference has already been made, was raised during the early stages of the session. The issue was the Allied prosecution of German atrocities visited on her own population, which, in the final draft, became known as "crimes against humanity". The issue was first raised by the British delegate, Maxwell Fyfe. Though making no mention of international law, he stressed that such a prosecution would be "politically" important to Britain as the ill treatment of the Jews had so shocked the conscience of his people. He continued : "I just wanted to make it clear that we had this in mind because I have been approached by various Jewish organizations and should like to satisfy them if possible." ⁽²⁷³⁾

Justice Jackson's reply was unequivocal :

"It has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business... any more than it is the affair of some other government to interpose itself in our problems." ⁽²⁷⁴⁾

He continued, however, by explaining that the only conceivable way in which the allies could justify such a prosecution was if such atrocities were seen as preparation for an aggressive war. ⁽²⁷⁵⁾ Naturally, in order to prosecute under such a connection, aggressive war must first be seen as illegal.

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The final word on the topic went, as chairman, to Maxwell Fyfe : "Has anyone any disagreement with the view that the acts inside the Reich, in Germany, which were preparatory to the plan of aggression and domination should come into our purview ?" ⁽²⁷⁶⁾ In brackets the minutes show "[No response]", the chairman closed the lid on the topic : "Then we are agreed on that." ⁽²⁷⁷⁾

Conference Session, July 24, 1945.

270 Ibid.

271 Ibid.

272 Ibid., p. 335-336.

273 Ibid., p. 329.

274 Ibd. p. 331.

275 Ibd. p. 331, 333.

276 Ibd. p. 337.

277 Ibd.

To the disappointment of Maxwell Fyfe, ⁽²⁷⁸⁾ the issue of the connection between the fate of Germany's Jews and Germany's preparation for a war of aggression was once again raised at the conference session the next day. Gros was concerned that the link was far too tenuous. He felt that the incursion into German domestic affairs was far better justified by the principle of humanitarian intervention (for discussion of this concept see pages). Though making no reference to international law (which was now unnecessary anyway), Gros claimed that "for the last century there have been many interventions for humanitarian reasons", and that all countries had "interfered in affairs of other countries to defend minorities who were being persecuted." ⁽²⁷⁹⁾ The suggestion was not well received and, as we shall see, formed no part of the final draft.

Jackson was intent upon the central role of aggressive war and was, once again, primarily interested in justifying

[128] his own country's war-time policies. He stated that the issue of aggressive war was of "great interest" to the United States. The illegality of aggressive war was, for his country, an important justification for their departure from a policy of neutrality (intro, page). ⁽²⁸⁰⁾ Jackson did not, however, make any attempt to say why, if officially the United States had seen the German war as illegal from its inception, they had not joined the war earlier.

Conference Session, July 25, 1945

The controversy carried over to the session the following day. A clear rift was developing between the French and American delegations. Gros summed it up succinctly :

The Americans want to win a trial on the ground that the Nazi war was illegal, and the French people and other people of the occupied countries just want to show that the Nazis were bandits. ⁽²⁸¹⁾

Gros pointed out that that part of the reason for this difference was that the actual experience of German occupation was foreign to the United States (note the St. James' Declaration page 43). Jackson explained the difference by stressing that Germany had not declared war on the United States in violation of any treaty between the two nations. ⁽²⁸²⁾ The general illegality of Germany's resort

[129] to war was America's only legal justification for having entered the Second World War on the side of the other Allies. ⁽²⁸³⁾ He continued with a blatant admission that he was not willing to come to any agreement on a definition of crimes which would not justify the war-time policy of the United States :

Now it may be that we are mistaken in our attitude and philosophy and that what Germany has done is legal and right, but I am not here to confess the error nor to confess that the United States was wrong in regarding this as an illegal war from the beginning.... It may become necessary to abandon the effort to try these people on that basis, but there are some things worse for me than failing to reach an agreement which would stultify the position which the United States has taken throughout. ⁽²⁸⁴⁾

Conclusion

The arguments over the content of Article 6 continued into the last fifteen minutes of the last conference session on August 2. The final agreement and charter, signed by the conferees on August 8, reveals the consensus reached. Leaving out all reference to international law, the Allies would prosecute individuals and organisations for "Crimes Against Peace" : the planning, preparation and waging of aggressive war ; "War Crimes" : violations of the

278 op. cit., International Conference, Document XLVII. Minutes of Conference Session of July 24, 1945. p. 361.

279 Ibid., p. 360.

280 Ibid., p. 363.

281 op. cit., International Conference, Document LI. Minutes of Conference session of July 25, 1945. pp. 381-382.

282 Ibid., p. 383.

283 Ibid., p. 383-384.

284 Ibid., p. 384-385.

[130] laws and customs of war (the only count which was unanimously agreed to be legal at the conference), and "Crimes Against Humanity", the count which enabled the prosecution of the German's domestic atrocities committed "before or during the war" and "whether or not in violation of the domestic law of the country where perpetrated." The former part of the construction, "before or during the war", received little discussion during the conference itself. However, the American attitude was spelled out clearly in a memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General on January 22, 1945. The Attorney General, Francis Biddle, was later to become the American Member of the International Military Tribunal. The memorandum stated that :

These pre-war atrocities are neither "war crimes" in the technical sense, nor offenses against international law ; and the extent to which they may have been in violation of German law, as changed by the Nazis, is doubtful. ⁽²⁸⁵⁾

The charter made no mention of international law and, as the foregoing analysis of the London Conference has shown, there was nothing in the formulation of the charter to fortify the argument that it was firmly based in existing international law. Furthermore, there is no evidence from the minutes of the conference to suggest that

[131] the delegates saw the charter as constituting a formulation of international law in itself. The records of the London Conference reveal that there was no intention that the charter for the IMT should be a "contribution to international law", as declared in the judgement of the tribunal (page 15). The minutes show that all the delegates were, at some point, willing to admit that aggressive war was not individually punishable as a crime under international law. Jackson's argument, though more often than not to the contrary, was not based on an analysis of international law but on a justification of America's war-time policy. As for the intrusion into German domestic affairs, labelled "crimes against humanity", the minutes of the conference reveal an acknowledgement that such an intrusion could only be justified by the charge of aggressive war which was, in the eyes of three of the four delegates, not an illegal thing. In addition, the manner in which the conferees agreed upon the charge shows scant regard for international law. Maxwell Fyfe, in particular, was quite open about the political importance of the count, and his argument for it centred around his desire to satisfy certain "Jewish organizations".

Above all, a reading of the minutes of the various conference sessions reveals a surprising lack of discussion on existing international law in terms of treaties, customary law and the practice of nations. Instead, those

[132] conference sessions during which Article 6 was discussed revolved around the working out of a plan, agreeable to each of the four nations present, in which any reference to international law proved dispensable.

²⁸⁵ op. cit., International Conference, Document I. Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, January 22, 1945. p. 5.

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CHAPTER FOUR

"THE SUPREME INTERNATIONAL CRIME"

... to initiate a war of aggression... is not only an international crime ; it is the supreme international crime differing from other war crimes in that it contains within itself the accumulated evil of the whole. ⁽²⁸⁶⁾
International Military Tribunal, 1946.

In the words of Justice Jackson, the Allies' foremost concern in setting up the International Military Tribunal was the prosecution of the "Nazi master plan, not... individual barbarities and perversions". ⁽²⁸⁷⁾ Accordingly, the primary crime, the crime which comprehended all the lesser crimes indicted at Nuremberg, was the planning, initiation and waging of "unjustifiable" war. ⁽²⁸⁸⁾ The judgement of the tribunal stated that "to initiate a war of aggression... is not only an international crime ; it is the supreme international crime differing from other war crimes in that it contains within itself the accumulated evil of the whole."⁽²⁸⁹⁾ Finally the world had come to the realisation that "the central moral problem" was "war and not

²⁸⁶ *Judgement of the International Military Tribunal For the Trial of German Major War Criminals (with the Dissenting Opinion of the Soviet Member), Nuremberg 30th September and 1st October, 1946.* (London: HMSO, 1946) p. 13. Hereafter Judgement.

²⁸⁷ R.H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945: a documentary record of negotiations of the representatives of the United States of America, the Provisional Government of the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics, culminating in the agreement and charter of the International Military Tribunal.* Department of State Publication No. 3080 (Washington DC: GPO, 1949). Hereafter International Conference. Document VIII. Report to the President by Mr. Justice Jackson, June 6, 1945. p. 48. Jackson's report to the President may also be found as 'Atrocities and War Crimes: Report From Robert H. Jackson to the President.' *Department of State Bulletin.* 1945 12[June 10]: 1071-1078.

²⁸⁸ *Ibid.*, p. 51.

²⁸⁹ *op. cit.*, Judgement, p. 13.

its methods".⁽²⁹⁰⁾ However, it is "crimes against peace" which has, since the term was first coined by Professor Trainin, become the the most disputed of the counts indicted at Nuremberg. Due to its central role in the

[134] prosecution of the *major* Nazi criminals it is not surprising that its illegality was the central focus of the motion put forward by the combined defence counsel on November 19, 1945 (page 14).

Thus, the primary purpose of the Nuremberg trial was the punishment of an essentially political act. As we have seen, at Nuremberg the central role of the prosecution of the Nazis' political crimes under the charge of "crimes against peace" was frankly acknowledged by the tribunal. However, the true significance of the charge is not immediately obvious from a straight reading of the charter. It is important to note the close inter-relationship between the various charges of the indictment. This inter-relationship serves to highlight the fundamental importance of the charge of "crimes against peace".

The primary objections expressed concerning the creation of the IMT were based on principles of jurisdiction. The previous chapters of this thesis, in their analysis of the jurisdictional basis of the IMT as a mechanism of international law, relied on a basically two-pronged approach. These two prongs were personal jurisdiction and subject-matter jurisdiction. The Charter of the IMT claimed jurisdiction not only over the persons of the major war criminals, but also over certain subject matters which constituted their crimes. This chapter is primarily concerned with the legal basis for the subject-

[135] matter of Article 6 (a) of the charter, "crimes against peace".

As has already been noted, there is little doubt that "war crimes", as defined in the IMT's charter, were crimes under international law. In the case of "crimes against humanity", the situation is far more complex. Chapter five of this thesis will deal this matter in more depth. However, a few points about the charge are necessarily noted at this point. Violations of the "laws of humanity" were, after the First World War, not generally regarded as crimes sufficiently defined in international law. After the Second World War the Allies once again attempted, this time successfully, to prosecute on the charge "crimes against humanity". This time, however, the charge was dependent upon the prosecution of "aggressive war", another charge which in 1919 had not been regarded as cognisable in international law. This dependency evolved from the fact that the charge as laid down in Article 6 (c) of the charter differed markedly from that which was finally applied by the tribunal. Article 6 (c) of the charter, after listing a series of acts similar to those listed as "war crimes", stated the jurisdictional clause :

against any civilian population, before or during the war ; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal...⁽²⁹¹⁾

[136] It was later found, however, that the Soviet version had a comma, rather than a semi-colon, between the words "war" and "or". The tribunal regarded the Soviet version as correct and subsequently amended the other versions.⁽²⁹²⁾ The change meant that "crimes against humanity", unlike "aggressive war" and "war crimes", did not have a life of its own but became an accompanying or accessory crime to the other two.⁽²⁹³⁾ It thus, in order to be a crime, had to be committed in execution of or connection with a "war crime" or the crime of "aggressive war".

The tribunal also ruled that atrocities that had occurred before the outbreak of the war, though deplorable, were not "war crimes" and not linked to the charge of "aggressive war", despite the belief that a concrete plan for waging an aggressive war existed as early as November 1937. The first acts of aggression referred to in the indictment, though not charged, were the seizure of Austria (March 12, 1938) and Czechoslovakia (March 15, 1939). The judgement of the tribunal held that these acts "did not come suddenly out of an otherwise clear sky"⁽²⁹⁴⁾ but that they were planned as early as November 5, 1937. Evidence of this was found in the transcript of a meeting held at the Reich Chancellery on that day, a meeting at which Hitler proposed the annexation of Austria and Czechoslovakia.⁽²⁹⁵⁾ However, the first act of aggression

²⁹⁰ Henry L. Stimson, United States Secretary of War under Franklin D. Roosevelt, in *Foreign Affairs* January 1947, quoted in Morris Amchan, 'Nuremberg Revisited.' *Federal Bar Journal*. 1971 30[3]: 244.

²⁹¹ **Appendix 1.** Charter of the International Military Tribunal, August 8, 1945. Article 6(c).

²⁹² The Berlin Protocol October 6, 1945. Protocol rectifying the discrepancy in text of Charter, IMT, Vol. I, p. 17.

²⁹³ Jacob Robinson, 'The International Military Tribunal and the Holocaust.' *Israel Law Review*. 1972 7[1]: 5.

²⁹⁴ op. cit., Judgement, p. 13.

²⁹⁵ Ibid., pp. 14-17.

[137] actually charged in the indictment was the invasion of Poland. The Tribunal thus declined to characterise acts as "crimes against humanity" if they occurred before the outbreak of the war on September 1, 1939. ⁽²⁹⁶⁾ The Tribunal made it clear that :

from the beginning of the war in 1939 War Crimes were committed on a vast scale, which were also Crimes against Humanity ; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity. ⁽²⁹⁷⁾

The link made with "war crimes" was undoubtedly intended to strengthen the argument that "crimes against humanity", though exercising jurisdiction over German crimes against German nationals, were simply a type of "war crime" (jurisdiction by "close association", page 180). A reading of both counts reveals many similarities and, thus, certainly strengthens the jurisdictional basis of "crimes against humanity" as analogous with that of "war crimes". However, as this chapter will show, it is doubtful whether in 1945 the waging of aggressive war was juridically cognisable as a crime under international law, yet it was this count which legitimated that of "crimes

[138] against humanity". Thus, a recent collaboration between American and Soviet international lawyers, entitled *The Nuremberg Trial and International Law* (1990) states :

Trying crimes against humanity through the mechanism contained in the Charter to the planning, initiation, or conduct of an aggressive war - the crimes against peace in Article 6 (a) of the Charter - only served to highlight the jurisdictional quagmire posed by automatically assuming that crimes against peace constituted crimes under international law at the time they were committed. ⁽²⁹⁸⁾

As has been outlined in the introduction to this study, the IMT ruled that the contemporary state of international law was irrelevant to its jurisdiction over persons or subject matter. The Tribunal regarded the London Agreement and Charter as the only necessary foundation for its authority. Thus, in practical terms the reliance of "crimes against humanity" on "crimes against peace", which was of doubtful validity in international law, was of no real significance. This reliance only becomes significant if one wishes, as the tribunal did, to claim the justification of international law.

The charter signed on August 8, 1945, by the prosecuting powers declared that the waging of "a war of

[139] aggression, or a war in violation of international treaties, agreements or assurances" by the "European Axis" was a crime "for which there shall be individual responsibility". ⁽²⁹⁹⁾ Such a mandate allowed for the prosecution and punishment of individuals amongst the enemy. However, in its Judgement the Tribunal felt compelled to justify its position in terms of international law.

The *obiter dictum* of the tribunal regarding international law rested on two premises. Firstly, that the waging of aggressive war had been outlawed by the community of nations and, secondly, that acts committed in the planning and waging of such a war were international crimes for which individuals could be punished as criminals. In this chapter the present writer will argue that the criminal law applied at Nuremberg was the Charter, which, although dating from August 8, 1945, was directed against acts which were committed long before its promulgation. The charter thus violates a principle of law long held sacred, that expressed in the latin formula : *nulla poena sine lege or nullum crimen sine lege* ; that is, that an act can only be punished by law if there existed, at the time of its commission, a penal sanction.

When this principle was raised by the counsel for the defence, the tribunal ruled that it was not applicable to international law. However, though the Tribunal did not

[140] feel itself compelled to abide by the principle, it still felt the need to justify itself in terms of law which existed prior to the outbreak of the war. The tribunal's denial of the maxim *nulla poena sine lege* was

²⁹⁶ A technicality which put acts such as the Italian invasion of Ethiopia in 1935-1936 (see this chapter) and German aggression toward Czechoslovakia (which resulted in the agreement at Munich, see chapter one) outside the scope of prosecution. However, the Soviet invasions of Eastern Poland (see chapter one) and Finland (see this chapter) still fell clearly within the time limits placed on aggressive war and "crimes against humanity".

²⁹⁷ IMT, Vol. I, p. 254-255.

²⁹⁸ G. Ginsburgs and V.N. Kudriavtsev (Ed.), *The Nuremberg Trial and International Law*. (The Netherlands: Martinus Nijhoff, 1990) p. 48.

²⁹⁹ **Appendix 1.** Charter of the International Military Tribunal, August 8, 1945. Article 6(a).

incompatible with its definition of international law as originating not only from agreements between nations (enacted or positive law), but also from customary law and the gradual observance of nations. ⁽³⁰⁰⁾ In 1947, Francis Biddle, the American member of the tribunal, when called upon to defend the tribunal's stance on the maxim *nulla poena sine lege* outlined a remarkably positivist position on international law. He stated that "there is no international law which forces a nation to recognise the doctrine." ⁽³⁰¹⁾ Yet a year earlier the tribunal had based much of its argument upon the belief that such positive law was unnecessary. By the standards of the tribunal, a generally recognised custom or usage was enough. Surely the application of the maxim in the municipal code of every civilised nation implies a general usage ? Indeed, it is enshrined in the United States Constitution. Section 10 of Article I declares that "no State shall pass any *ex post facto* law." It was for this very reason that the Americans had objected to the setting up of an international tribunal after the Great War. They were opposed to :

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the creation of a new tribunal, of a new law, of a new penalty, which would be *ex post facto* in nature, and thus contrary to an express clause of the Constitution of the United States and in conflict with the law and practice of civilized communities. ⁽³⁰²⁾

In 1919 the Americans had insisted that if there was no law making certain acts crimes "or affixing a penalty for their commission, they are moral, not legal, crimes" and therefore should not be dealt with by a judicial tribunal. ⁽³⁰³⁾ Thus, the 1919 Commission on Responsibility, whose membership included three out of the four Powers represented on the IMT (Britain, France and the United States), concluded that a "war of aggression" was not punishable according to law as it was not an act "contrary to positive law". ⁽³⁰⁴⁾ This application of the principle *nulla poena sine lege* to international law was also upheld in 1934 by the Court of International Justice at the Hague in an advisory opinion requested by the Council of the League of Nations. Against the votes of the Italian and Japanese judges the court stated that the maxim *nulla poena sine lege* *praevia* must also apply in international law. ⁽³⁰⁵⁾ It is little wonder then that the IMT felt the need to justify its position in terms of the maxim, even if it would not admit the maxim's applicability to the case before it.

It is interesting to note that the *ex post facto* issue

[142] still plagues the modern day prosecution of Nazi war criminals. On May 31, 1990, in response to media revelations that there were a number of Nazi war criminals resident in New Zealand, the Auckland District Law Society's Public Issues Committee issued a report entitled *Nazi War Criminals - Some Legal Issues*. The report stated that "there is absolutely no doubt that, as the law stands at present, suspected war criminals could not be tried here for crimes committed overseas." ⁽³⁰⁶⁾ The report, in considering the amendment of New Zealand's Statute Law, stated that the "principle that crimes should not be created with retroactive effect is both fundamental and of considerable antiquity." ⁽³⁰⁷⁾ It then went on to state that this was applicable to international law also. The specific legislation cited was Article 15 of the International Covenant on Civil and Political Rights (1966) which states that no one "shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed." ⁽³⁰⁸⁾

In its judgement the tribunal held that the legal principle which they were applying was not fundamentally new, but corresponded to a general trend in international relations toward the conviction that aggressive war was criminal. It held that this general trend culminated in the 1928 Pact of Paris which contained a

³⁰⁰ IMT, Vol. II, p. 147.

³⁰¹ Francis B. Biddle, 'The Nürnberg Trial.' *Proceedings of the American Philosophical Society*. 1947 91[3]: 297.

³⁰² Robert Lansing, 'Report of the Commission on the Responsibility of the Authors of the War and Enforcement of Penalties.' *American Journal of International Law*. 1920 14[1]: 147.

³⁰³ *Ibid.*, p. 139.

³⁰⁴ *Ibid.*, p. 118.

³⁰⁵ Hans Ehard, 'The Nuremberg Trial Against the Major War Criminals and International Law.' *American Journal of International Law*. 1949 43[2]: 231.

³⁰⁶ Auckland District Law Society Public Issues Committee, *Nazi War Criminals - Some Legal Issues*. (Auckland District Law Society, May 31, 1990) p. 2.

³⁰⁷ *Ibid.*, p. 4.

³⁰⁸ *Ibid.*, p. 5.

"renunciation of war as an instrument of national policy" and was, by 1933,

[143] adhered to by sixty-five nations, including those represented at Nuremberg. The judgement drew attention to a series international agreements indicating general accord that "aggressive" war was, prior to the charter, considered an international crime. Those agreements cited in the Judgement were the Pact of Paris (1928) backed up by the League of Nations sponsored Draft Treaty of Mutual Assistance (1923), the unratified Geneva Protocol (1924), a League of Nations declaration on September 24, 1927, and the unanimous resolution of the Sixth Pan-American Conference (1928).⁽³⁰⁹⁾ The tribunal also cited the case of *Ex Parte Quirin* before the Supreme court of the United States (1942) and Article 228 of the Treaty of Versailles (1919) to illustrate the principle of individual responsibility.⁽³¹⁰⁾

Defining Aggression

It cannot be denied that up to the outbreak of war in 1939, the twentieth century had been marked by a growing desire amongst nations to develop means for the pacific settlement of international disputes. However, in terms of outlawing aggression, by 1939 no binding agreement had been reached even as to a definition of the term. Neither was the term defined in the London Charter of August 8, 1945. The Tribunal found it unnecessary to define the term "aggressive war" but had no hesitation in recognising it in the case. Biddle continued to argue in 1947 that a

[144] definition was unnecessary.⁽³¹¹⁾ It is equally arguable that it is difficult to know whether a certain party has committed a crime if there is no specific definition of that crime. Definitions have always played a central role in the framing of law ; after all, one needs to know what the law is if one is to punish breeches of it. Indeed, as regards war, history has shown that whoever starts a conflict will always be armed with a more or less credible justification. This fact was recognised during the negotiations between the four powers at the London Conference. At the conference Justice Jackson stressed the need for a definition of aggression :

But I again repeat that in connection with this we should attempt to make some provision as to what constitutes aggression, in which I think all of the American proposals were defective. Otherwise we may get into litigation over whether what we call a policy of aggression was in fact a long-range policy of self-defense.⁽³¹²⁾

Over the years leading up to the Second World War many endeavours were made to reach agreement on a definition of aggression. In 1922 a committee appointed by the assembly of the League of Nations found it necessary to inform the League that no agreement could be reached as to what constitutes aggression.⁽³¹³⁾ In 1923, one of the reasons why the Draft Treaty of Mutual Assistance failed to gain

[145] approval was because of difficulties in defining aggression. In September 1924, before the assembly of the League of Nations, M. Herriot, Prime Minister of France, stated that "under the terms of the draft treaty it is not possible to determine with certainty, or even to determine at all, which state is the aggressor."⁽³¹⁴⁾ In 1928, during an exchange over the drafting of the Pact of Paris, Mr. Kellogg, American Secretary of State, expressly turned down a proposal by the French Foreign Minister, M. Briand, to limit the pact to wars of aggression. He stated that the terms "aggression" and "aggressor" were incapable of practical definition.⁽³¹⁵⁾ On May 5, 1933, in discussing the project of a General Commission of the Disarmament Conference, the British delegate, Mr. Eden, affirmed that a definition of aggression was impossible and the Italian delegate, Sr. Soragna, stated that aggression was enormously difficult to define.⁽³¹⁶⁾ During the afternoon session on the second day of the Nuremberg trial (November 21, 1945) Justice Jackson,

³⁰⁹ op. cit., Judgement, pp. 39-42.

³¹⁰ Ibid., pp. 41-42.

³¹¹ op. cit., *Proceedings of the American Philosophical Society*. 1947 91[3]: 297.

³¹² op. cit., International Conference, Document XXXVII. Minutes of Conference Session of July 19, 1945, p. 300. Doubtless the Allies would have argued that Britain and France's planned invasion of Norway (1940) and the actual Allied invasion of Iran (1941) were "long-range" policies of "self-defense".

³¹³ Antonio S. De Bustamante Y Sirvén, 'Unlawful Aggression and Defense.' *Tulane Law Review*. 1942 17[1]: 61.

³¹⁴ 'War and Neutrality.' *American Journal of International Law*. 1933 27[Supplement]: 727.

³¹⁵ C. John Colombos, 'The Pact of Paris, Otherwise Called the Kellogg Pact.' *Transactions of the Grotius Society*. 1928 14: 88.

³¹⁶ op. cit., *Tulane Law Review*. 1942 17[1]: 61.

after admitting that a lack of definition was "perhaps" a weakness, went on to cite one example of an agreement defining "aggression". He quoted the Convention for the Definition of Aggression, signed in London on July 3, 1933, by the Soviet Union, Rumania, Estonia, Latvia, Poland, Turkey, Persia and Afghanistan, as one of "the most authoritative sources of international law on the subject".⁽³¹⁷⁾ The simple definition stated that the

[146] aggressor was the first state to either declare war on another state or attack without a declaration of war. The crucial question of provocation was not to be considered.

What Jackson now saw as one of "the most authoritative sources of international law" was at the time merely a diplomatic manoeuvre on the part of the Soviet Union. The definition of aggression used in the convention was almost identical to that which the Americans had suggested (and the Soviets had rejected) at the London Conference. Jackson failed to point out that there were no penalties for the violation of the agreement and that it did not prevent the Soviet Union from later forcibly (and with impunity) occupying the territory of all the contracting parties - the Baltic States, Poland, Romanian Bessarabia and a non-contracting party, Finland (page 156 ff). However, with regard to the occupation of Finland the Soviets violated a separate non-aggression pact with that nation (page 157). Also of great importance is the fact that out of the nations represented at Nuremberg, neither the United States, Britain, France nor Germany had taken part in the agreement. The only nation present that had taken part in the agreement had also violated it and was sitting on the benches of both the judges and the prosecutors.

Prescribing Punishment

Leaving aside the definition of aggression

[147] and assuming that such a definition is somehow unimportant, we must now approach the question of how such wars of aggression were, at the time of their commission, considered punishable. As with definitions, prescribing punishment is an indispensable aspect of criminal law and one would expect that a concept as important as the criminality of aggressive war would contain clear and absolute provisions. On the contrary, none of the agreements referred to in the judgement of the tribunal contained any provision for punishment whatsoever.

The tribunal, in its judgement, held that the Pact of Paris established the recourse to aggressive war as punishable. It is true that the Pact implies that any contracting party which thereafter resorts to war commits a breach of contract. There is nothing in the wording of the pact, however, to suggest that such a resort to war was criminal and the most that is said about punishment is that "any signatory power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty."⁽³¹⁸⁾ Such a declaration, if it means anything, certainly implies punishment of the offending state rather than any offending individuals. Thus, the treaty neither designates war as a crime nor does it qualify its renunciation with a sanction other than that of a denial of certain unstated benefits.

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Anticipating such objections, the IMT in its judgement compiled the abovementioned list of previous agreements which designate aggression as a crime. The tribunal claimed that the Pact of Paris simply capped off a long string of previous agreements and declarations which demonstrate a general legal conviction. However, the pact does not specifically outlaw aggressive war. Rather, it outlaws all war. It should also be stressed that a string of draft agreements, unratified protocols and resolutions of regional conferences concerning the criminality of aggressive war, does little to strengthen the argument that the international community regarded such wars as criminal. At best they simply serve to show a lack of agreement on the matter. None of the participating governments had gone beyond a declaratory demonstration. No government was willing to commit itself to an international law viewpoint as to the punishability of aggressive war.

Individual Responsibility

In order to back up its claim that "crimes against peace" were individually punishable, the tribunal cited

³¹⁷ IMT, Vol. II, p. 148.

³¹⁸ **Appendix 3.** Pact of Paris (Kellogg-Briand), August 27, 1928, Prologue paragraph 3.

Article 228 of the Treaty of Versailles and the case of *Ex Parte Quirin* before the Supreme Court of the United States, otherwise known as the Saboteur Trial of 1942. Nonetheless, as we have seen, the Treaty of Versailles made no mention of the criminality of aggression, "crimes against peace" or the liability of heads of states under international law and Article 228 was specifically

[149] referring to violations of the recognised laws and customs of war.

Neither does the case of *Ex Parte Quirin* provide anything in the way of reinforcement to the tribunal's argument. On July 7, 1942, the President of the United States appointed a military commission to try offences against the recognised laws and customs of war. Those indicted were believed to be German saboteurs who had landed on the coast of Long Island and Florida. ⁽³¹⁹⁾ The IMT judgement quotes from the trial thus :

From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals. ⁽³²⁰⁾

As with all war-time statements on war crimes, there is nothing in the above declaration to suggest that it is concerned with anything other than the already recognised laws and customs of war for which individuals were certainly regarded as responsible. Even if for some reason one were able to argue successfully that the reference was in connection to "crimes against peace", it must be stressed that *Ex Parte Quirin* binds only later American adjudication. It has no power to bind either the practice

[150] of other nations or international tribunals.

International law had generally been recognised as applying between nations (except in certain specified cases). The IMT, however, rejected the concept of state sovereignty and regarded the individual as responsible under international law. This rejection was based not on law, but the argument that the state is an abstract entity and crimes are always committed by individuals. The notion has definite merit, yet it proves nothing with regard to legal criminal responsibility in the individual case. All conventions are entered into by human beings. Indeed, the IMT was comprised of individual human beings and the charter upon which it was based was signed by individual human beings. Nevertheless, the indictment during the trial began with the words : "The United States of America, the French Republic, The United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics hereby indict". Neither the members of the tribunal nor those individuals representing their respective nations at the London conference were individually responsible for indicting the major Nazi war criminals.

The Practice of Nations

So far we have considered "crimes against peace" in both positive and customary international law, but the practice of nations is also an important source of

[151] international law. If since 1928 there had been a general legal conviction that aggressive war was criminal and punishable under international law, one would expect to see that general conviction reflected in the practice of nations. After all, there had been no lack of suitable occasions. As was demonstrated above, the Big Four made no reference to German pre-war aggression being criminal at the time. A brief look at other examples such as Manchuria, Ethiopia and Finland (which approximately span the decade between the Pact of Paris and the beginning of the Second World War), reinforces this stance and illustrates contemporary attitudes to international aggression.

A) Japanese Aggression Toward China in Manchuria, 1931-1933

Japan was a latecomer amongst the Great Powers that had at various times seized parts of China. In the past, Britain, France, Germany and Russia had all seized Chinese territory. From the 1920s onwards the Japanese army had been pressing its government for expansion on the Asian mainland. The navy too had been pushing for expansion, but elsewhere, in the Pacific. The competition between the two was partly strategic

³¹⁹ F. Granville Munson, 'The Arguments in the Saboteur Trial.' *University of Pennsylvania Law Review*. 1942 91[Nov]: 239.

³²⁰ *op. cit.*, Judgement, p. 41.

and partly financial. The military budget was shrinking. Because of rapid population growth and economic problems, the need to expand was never questioned by the government. Thus, although the invasion of Manchuria was theoretically planned in secret by the army, the government in Tokyo was thoroughly informed as

[152] the plan developed. ⁽³²¹⁾

At ten o'clock on the night of September 18, 1931, a group of alleged Chinese bandits blew up a section of railway line at Mukden. The American Secretary of War, Henry Stimson, recalled in his book *The Far Eastern Crisis* (1936) that it soon became clear that the incident was a Japanese-engineered pretext for intervention. ⁽³²²⁾ On September 21, the Chinese appealed to the League of Nations under Article 11 of its charter. Article 11 stated that any "war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League" and that it was the "right of each member of the League to bring to the attention of the Assembly or of the Council any circumstances whatever affecting international relations which threatens to disturb international peace". The article also authorised the League to "take any action that may be deemed wise and effectual to safeguard the peace of nations." ⁽³²³⁾

The League decided that for effective action against Japan it needed the practical co-operation of the United States. The United States would not contemplate any such support. It would not even issue a warning, much less a condemnation of Japan. President Herbert Hoover would recall in his memoirs a speech to his Cabinet in October 1931, which stated that :

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The whole transaction is immoral. The offense against the comity of nations and the affront to the United States is outrageous. But the Nine-Power Treaty and the Kellogg Pact are solely moral instruments based upon the hope that peace in the world can be held by the rectitude of nations and enforced solely by the moral reprobation of the world. ⁽³²⁴⁾

Stimson, who was responsible for United States decision-making in the case, recorded that he weighed up America's obligations in the light of the Pact of Paris and the Nine Power Treaty relating to the Far East, in conjunction with various political considerations, and decided that the incident should be left to the League of Nations. ⁽³²⁵⁾

By January 1932 the conflict in China had spread to Shanghai and the Chinese now invoked Articles 10 and 15 of the League Covenant. According to these, if a breach was proven, the sanction article (16) came into force. Article 16 obliged League members to sever all trade, financial and other intercourse with the offending nation. On November 21, 1931, the League had authorised a commission of enquiry which began work in February the following year. Meanwhile, the League refused to apply sanctions until the commission returned with a report. Instead, it simply issued a declaration of non-recognition of the Japanese puppet-state of Manchukuo. The commission's report was

[154] finally delivered in October that year. It found that Japan had no valid reason for invading Manchuria and recommended that the League make attempts at conciliation. ⁽³²⁶⁾ In effect the report said that Japan had achieved the right ends by the wrong means. Nevertheless, in February 1933 the League felt compelled to censure Japan for her activities in Manchuria, ⁽³²⁷⁾ but no sanctions were ever applied. The Chinese thereupon abandoned the League and signed a truce with Japan on May 31, 1933, which provided for a Chinese withdrawal from a demilitarised zone of 5,000 square miles on the Chinese side of the Great Wall. ⁽³²⁸⁾

³²¹ Richard Overy with Andrew Wheatcroft, *The Road to War*. (London: Macmillan, 1989) p. 236.

³²² Henry L. Stimson, *The Far Eastern Crisis*. (New York: Howard Fertig, 1974. Reprinted from the 1936 edition published by Harper and Row) p. 32.

³²³ Text in op. cit., *The Major International Treaties 1914-1945*. pp. 60-61.

³²⁴ Herbert Hoover, *The Memoirs of Herbert Hoover. The Cabinet and the Presidency 1920-1933*. (New York: Macmillan, 1952) p. 368.

³²⁵ op. cit., *The Far Eastern Crisis*. especially pp. 34-44.

³²⁶ op. cit., *The Major International Treaties 1914-1945*. p. 163.

³²⁷ op. cit., *The Road to War*. p. 293.

³²⁸ op. cit., *The Major International Treaties 1914-1945*. p. 163.

The League had signally failed to protect the interests of one of its members over the aggressive actions of another. All parties involved had agreed that the incident fell within the jurisdiction of the League of Nations. No punishment had been dealt out, not even the sanctions provided for by the League's charter. There was no mention of the criminality of aggression, let alone the responsibility of individuals, and the Pact of Paris was all but ignored. In October 1932, the members of the League Council had met with Mr. Gilbert, the American Consul at Geneva, resulting in the sending of identical notes to the governments of China and Japan. The notes reminded them of their obligation under Article II of the Pact of Paris. ⁽³²⁹⁾ Article I and its condemnation of the "recourse to war for the solution of international

[155] controversies" was deliberately avoided. Article II simply reminded the Chinese and Japanese governments of their obligation to solve their present disagreement by "peaceful means." ⁽³³⁰⁾

B) Italian Aggression Toward Ethiopia, 1935-1936

The conquest of Ethiopia was the first step in Mussolini's plan to build a new Roman empire. The invasion programme had been drawn up as early as December 1932 by Emilio de Bono, Minister for the Colonies. ⁽³³¹⁾ A year later, Mussolini instructed him to produce detailed operational plans for a campaign.

The Italians were not greatly concerned about secrecy, and British silence on the matter was interpreted by Mussolini as consent. ⁽³³²⁾

French fears of losing Italian support for their fragile position in Europe led Pierre Laval, the Foreign Minister, to forgo French economic interests in north-eastern Africa, informally pledging "désintéressement politique", a free hand for Italy. ⁽³³³⁾

On October 3, 1935, Italy invaded Ethiopia. Four days later, the League of Nations Council condemned Italy for aggression, obliging member states to apply sanctions according to Article 16 of the Covenant. The United States, not a member of the League, refused to apply any sanctions at all. It feared Italy might lose the war

[156] causing revolution in Italy and a thrust of communism into the heart of Europe. ⁽³³⁴⁾ In December 1935, in an attempt to end the conflict, the British Foreign Secretary, Sir Samuel Hoare, and Pierre Laval agreed on a plan (the Hoare-Laval Pact) requiring widespread concessions by the Ethiopians to Italy. The plan, however, was leaked to the press and had to be dropped due to public outcry primarily in Britain, but also in France. ⁽³³⁵⁾

Nevertheless, by May 5, 1936, Italy was victorious in her campaign, completed by bombing and gassing, and the Italian annexation of Ethiopia was announced. Collective security through the enforcement of sanctions had again failed and two years later Italy received de jure recognition of her conquest in an Anglo-Italian Agreement concluded on April 16, 1938. Once more the United States had stayed out of the conflict and there had been no invocation of the criminality of aggressive war, individual responsibility, or of the Pact of Paris. The League of Nations was regarded as having jurisdiction and the authority to apply punishment in the form of economic sanctions, if it so decided.

C) Russian Aggression Toward Finland, 1939-1940.

After the Munich settlement in September 1938, Russia began to look to the strengthening of her defences. The Russians concluded that their most vulnerable city was Leningrad which could be attacked either through the narrow

[157] Gulf of Finland by a naval power commanding the Baltic, or by land through Finland itself, the border being only twenty miles from Leningrad.

³²⁹ op. cit., *The Far Eastern Crisis*. pp. 65-66.

³³⁰ **Appendix 3.** Pact of Paris (Kellogg-Briand), August 27, 1928, Article II.

³³¹ op. cit., *The Road to War*. p. 160.

³³² Ibid., p. 162.

³³³ Ibid.

³³⁴ Ibid.

³³⁵ op. cit., *The Major International Treaties 1914-1945*. p. 165.

In order to acquire some breathing space in which to build up strength, the Soviets concluded a pact with Nazi Germany in August 1939. A "Secret Additional Protocol" divided Eastern Europe into spheres of influence in the event of "territorial and political rearrangement". Article I gave the Soviet Union a free hand in the Baltic States (Finland, Estonia and Latvia, though not Lithuania).⁽³³⁶⁾ Churchill later recalled that, once Molotov and Ribbentrop made their agreement, "Stalin had wasted no time".⁽³³⁷⁾ The Soviet government quickly concluded agreements with Estonia, Latvia and Lithuania, thus gaining command of the southern shore of the Gulf of Finland (later, in 1940 all three of these states were consumed by the Soviet Union). Finland, however, refused to co-operate with Soviet demands and on November 28, 1939, Molotov denounced the non-aggression pact between Finland and Russia. Two days later, on November 30, confident that Germany would stay out of the conflict, Russia invaded Finland.

That the Soviets were the unprovoked aggressor was acknowledged by all but the Russians themselves. Churchill expressed a world-wide opinion when, in 1948, two years after the IMT had delivered its judgement on Nazi

[158] aggression, he described it as an "exhibition of brutal bullying and aggression."⁽³³⁸⁾ On December 14 the League of Nations, in the last pathetic act of its existence, formally expelled the Soviet Union from its ranks and called upon its members to give aid to Finland. But Allied aid proved late and hesitant and on March 12, 1940, Finland was forced into a treaty with the Soviet Union which accepted Soviet demands for frontier changes and military bases.

Conclusion

In the instance of aggression against Manchuria, Ethiopia and Finland (and indeed all cases of international aggression between the 1928 Pact of Paris and the outbreak of the Second World War), all clear cases of the premeditated use of force as an instrument of national policy (as outlined in the Pact of Paris), no official statement has yet become known in which the governments of the United States, Great Britain, France or the Soviet Union publicly condemned these aggressive wars as criminal under international law. Neither can any statement be found to the effect that these governments even considered that an individual might be personally and criminally liable.

A close scrutiny of aggression prior to the outbreak of the Second World War reveals that the international community regarded the League of Nations as possessing

[159] jurisdiction over cases of international aggression. Such cases as came before the League resulted in the imposition of sanctions under Article 16 or, as in the case of the Soviet Union, outright dismissal from the League. The League neither espoused the criminality of aggression nor the authority to inflict punishment on individuals.

It also appears that the Pact of Paris was not seen as binding in any legal sense. As the IMT indirectly acknowledged and an examination of the practice of nations reveals, the Pact of Paris, standing alone, imposed only moral obligations upon its signatories. In 1933, an editorial comment in the *American Journal of International Law* summed up the situation. The Pact of Paris, it declared,

sets up no authority or procedure for deciding when an infraction has taken place. Moreover, if any signatory violates the moral obligations imposed by the Pact, it incurs no legal liability, but its action merely releases automatically all of the other signatories from their obligations to it under the Pact. The Covenant [of the League of Nations], on the other hand, embodies a system for the enforcement of peace by mutual agreement and coöperation among the members, and provides sanctions for the enforcement of its terms so far as League members are concerned.⁽³³⁹⁾

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Thus, after examination of the laws, customs and practice of nations, it may be concluded that the views

³³⁶ Treaty of Non-Aggression between Germany and the Soviet Union, Moscow, August 23, 1939. Text in op. cit., *The Major International Treaties 1914-1945*. pp. 195-196.

³³⁷ Winston Churchill, *The Second World War*. (London: Cassell and Co., 1948) Vol. I, p.426.

³³⁸ *Ibid.*, p. 429.

³³⁹ C.P. Anderson, 'Harmonizing the League Covenant with the Peace Pact.' *American Journal of International Law*. 1933 27[Supplement]: 107-108. Brackets mine.

expressed in the London Charter in 1945, in regard to "crimes against peace", bore no relation to prior legal conviction and were therefore *ex post facto*. Such a conclusion should come as no surprise. The novelty of the whole trial was openly admitted by those most involved in the formulation of the charter and, more specifically, the charge "crimes against peace" was condemned as retroactive by a majority of contemporary international jurists, ⁽³⁴⁰⁾ many of whom realised the danger of tampering with international law. Indeed, Justice Jackson, albeit indirectly, acknowledged this danger when during the trial he stated that :

One of the reasons this was a military tribunal, instead of an ordinary court of law, was in order to avoid precedent-creating effect of what is done here on our own law and the precedent control which would exist if this were an ordinary judicial body. ⁽³⁴¹⁾

³⁴⁰ For example George A. Finch, 'The Nuremberg Trial in International Law.' *American Journal of International Law*. 1947 41[1]: 25-37; Nathan April, 'An Inquiry into the Juridical Basis for the Nuremberg War Crimes Trial.' *Minnesota Law Review*. 1946 30[5]: 321-323; Hans Ehard, 'The Nuremberg Trial Against the Major War Criminals and International Law.' *American Journal of International Law*. 1949 43[2]: 239; Quincy Wright, 'The Law of the Nuremberg Trial.' *American Journal of International Law*. 1947 41[1]: 66; Hans Kelsen, 'Will the Judgement in the Nuremberg Trial Constitute a Precedent in International Law?' *International Law Quarterly*. 1947 1[2]: 153, 161.

³⁴¹ IMT, Vol. III, p. 543. The view that the Charter does not create legal precedent is affirmed in op. cit., *International Law Quarterly*. 1947 1[2]: 153-171.

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CHAPTER FIVE

THE ODYSSEUS PRINCIPLE

A judicial tribunal only deals with existing law and only administers existing law, leaving to another forum infractions of the moral law and actions contrary to the laws and principles of humanity. ⁽³⁴²⁾
American delegation to the Commission on Responsibilities, 1919.

On October 1, 1946, the IMT stated in its judgement upon twenty-two individuals and six organisations, that the charter on which its authority rested was not "an arbitrary exercise of power on the part of the victorious nations" but was, in the opinion of the tribunal, an expression of existing international law. ⁽³⁴³⁾ As we have seen in chapter four, the tribunal defined international law as deriving from international agreements, customary law and the practice, of nations. Thus, the tribunal held that the subject matter brought under the heading "crimes against humanity" (Article 6c of its charter), along with "crimes against peace" (Article 6a), and "war crimes" (Article 6b), was provided for in pre-existing international agreements and customary law, and that prosecution on such charges had, by the onset of the war, become part of the practice of nations. This chapter will begin with an examination of the Allies war-time pledges to punish German "crimes against humanity" and proceed to an examination of Article

[162] 6 (c) of the charter in terms of previous treaties, customs and the practice of nations.

Pledges of Punishment

The single most important facet of the charge "crimes against humanity", as expressed in the charter is that it

³⁴² Robert Lansing, 'Report of the Commission on Responsibility of the Authors of the War and Enforcement of Penalties.' *American Journal of International Law*. 1920 14[1]: 144.

³⁴³ IMT, Vol I, p. 218.

provided for the punishment of certain prewar and war-time domestic policies of the German government. This point, however, will be expanded below. It is sufficient to say at this point that "crimes against humanity", as defined in the charter, could be committed against "any civilian population", thus including German, and for this reason went further than the provisions of the Fourth Hague Convention of 1907, respecting belligerent occupation of hostile states, which formed part of the traditional laws and customs of war. The charge "crimes against humanity" was therefore conceived primarily as a tool by which the Allies might punish the German government's repression of German religious, political and ethnic minorities, as well as the wholesale slaughter of such minority groups as the Jews.

The first public Allied declaration regarding the plight of the Jews is typical of all Allied war-time proclamations. Such proclamations came close to, but fell short of, a condemnation of "crimes against humanity" as they were conceived of in the IMT's charter. On December 17, 1942, the exiled governments of Belgium,

[163] Czechoslovakia, Greece, Luxembourg, the Netherlands, Norway, Yugoslavia and Poland, along with the French National Committee, all signatories of the St. James' Declaration (January 1942, see page 43) on German atrocities in the occupied territories, joined with the United Kingdom, the United States and the Soviet Union, in issuing a declaration concerning German barbarities against the Jews. The declaration stated that :

the German authorities, not content with denying to persons of Jewish race in all the territories over which their barbarous rule has been extended, the most elementary human rights, are now carrying into effect Hitler's oft repeated intention to exterminate the Jewish people in Europe.... From all the occupied countries Jews are being transported.... The abovementioned Governments and the French National Committee condemn in the strongest possible terms this bestial policy of cold-blooded extermination... those responsible for these crimes shall not escape retribution....⁽³⁴⁴⁾

The Allied proclamation of December 17 certainly threatened punishment in no uncertain terms. It fell short, however, of promising legal action, and although it spoke in terms of "elementary human rights", it did not mention "crimes against humanity". Most importantly, though, there was

[164] nothing in the statement to suggest that crimes committed by the Germans against Jews of German nationality, before or during the war, were to be punished. Important also is the fact that the declaration concerned the Jews alone and was simply an attempt by the Allied governments to relieve mounting pressure from their own Jewish communities demanding action (page 126). The declaration, since it speaks only of the "occupied countries", goes no further than upholding the Fourth Hague Convention of 1907 which outlines the laws and customs of war on land and the rules of belligerent occupation, to which Germany had appended her signature.

As with the Allied declarations examined in chapter one of this study, it is easy to misread, and attribute too much to, such carefully-worded proclamations. An article entitled "The Jewish Factor in British War Crimes Policy in 1942" (1977) by an historian, John P. Fox, stated that the declaration of December 17, for the first time, committed the Americans, British and Soviets "to the post war prosecution of those responsible for the Nazi crimes against the Jews of Europe, especially those crimes committed during the course of the war".⁽³⁴⁵⁾ Though this represents an overstatement of the case, since "prosecution" implies legal action and the Allied proclamation in no way implied that pre-war atrocities would be punished, Fox rightly states that the declaration "laid the foundation of what was to be formalized as a new

[165] crime in international law".⁽³⁴⁶⁾

However, members of the Jewish community in Britain and elsewhere had been eager to hear a more inclusive statement than that of December 17. The issue had been a weighty one and was at the time handed to Roger Allen, legal adviser to the Foreign Office. His remarks are recorded in a note dated November 9, just over one month before the abovementioned declaration, and clearly reveal the British stance on the issue. In regard to the punishment of atrocities committed in Germany upon German Jews, Allen believed that they were outside the scope of any Allied commission dealing with war crimes and "might mean

³⁴⁴ Egon Schwelb, 'Crimes Against Humanity.' *The British Yearbook of International Law*. 1946 23: 183-184.

³⁴⁵ John P. Fox, 'The Jewish Factor in British War Crimes Policy in 1942.' *English Historical Review*. 1977 92[January]: 82.

³⁴⁶ *Ibid.*, p. 85.

creating a body of *ad hoc* law." (347) He declared that the indictment of "Nazi internal policy" was a "*political*, not a *legal*, issue, and should be dealt with as such." (348)

Allen's opinion is in line with two important announcements made simultaneously in Washington and London on October 7, 1942. President Roosevelt warned the Nazis of their accountability for atrocities committed "in the Axis-occupied countries", and Britain's Lord Chancellor, Lord Simon, in a speech in the House of Lords, proposed the setting up of an allied Commission "to investigate war crimes against nationals of the United Nations". (349) The Allies therefore envisaged punishing only German atrocities visited upon citizens of Allied countries. Even the Moscow Declaration of November 1, 1943, discussed in chapter one

[166] of this study, in which the British, Soviets, Americans and French first declared their intent to punish the *minor* Nazi criminals by legal action, went no further than mentioning crimes committed against the peaceful populations in occupied countries.

The Berlin Declaration of June 5, 1945, made by the United States, the United Kingdom, the Soviet Union and the Provisional Government of the French Republic, represents a significant step in the direction of an Allied proclamation regarding German "crimes against humanity". Coming a month after the end of the European war, it stated that the four signatory powers were now the "supreme authority" in Germany. Yet when speaking of the intent to punish "war crimes", it used the undefined phrase "war crimes or analogous offences", in Article 11 of its provisions. (350) This phrase makes a clear distinction between two types of offence. It would not be unreasonable to assume that such a statement meant that the Allies intended to punish those responsible for atrocities which fell within the scope of the traditional laws and customs of war, and also certain "analogous offences", which were similar in nature, yet not provided for in the former category. This interpretation mirrors and therefore corroborates that of the Moscow Declaration in chapter one of this study.

Thus, a month after the cessation of hostilities, the

[167] Allies, though determined not to be restricted by a narrow definition of war crimes in their punishment of responsible Germans, were still unwilling to define such an extension of jurisdiction in legal terms. This same reluctance is also evident in the post-war Potsdam Conference Protocol of August 2, 1945. In section two, dealing with the "Political Principles" to be followed in "the treatment of Germany in the initial control period", it was stated that :

War criminals and those who have participated in planning or carrying out Nazi enterprises involving or resulting in atrocities or war crimes shall be arrested and brought to judgement. (351)

This statement, like that contained in the Berlin Declaration, makes a clear distinction between war criminals and those involved in "Nazi enterprises". However, it does speak in terms of "judgement" for both. It is significant though, that this proclamation comes under the heading of "Political Principles" and is therefore consistent with Roger Allen's abovementioned legal advice. It relies for its authority not on international law but on the fact that it is a declaration by the "supreme authority" (note the wording of the Berlin Declaration) in Germany : "supreme" because of victory through force of arms and Germany's unconditional surrender, rather than the international law of belligerent

[168] occupation as expressed in the Fourth Hague Convention of 1907.

The Berlin Declaration and the Legal Status of Germany as of June 5, 1945

According to the Berlin Declaration there was "no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with

347 Full text of Roger Allen's minute dated November 9, 1942, in *Ibid.*, p. 97.

348 *Ibid.*, italics mine.

349 Anatole Goldstein, 'Crimes Against Humanity, Some Jewish Aspects.' *Jewish Year Book of International Law*. 1948: 208-209.

350 Text in Beate Ruhm von Oppen (Ed.), *Documents on Germany Under Occupation 1945- 1954*. (London: Oxford University Press, 1955) pp. 29-35, on p. 34.

351 Text in J.A.S. Grenville, *The Major International Treaties 1914-1945: A History and Guide With Texts*. (London: Methuen, 1987) pp. 231-236, on p. 232.

the requirements of the victorious Powers." ⁽³⁵²⁾ The declaration accordingly proclaimed that the governments of the United States, Great Britain, the Soviet Union and the Provisional Government of France "hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority." ⁽³⁵³⁾ As the distinguished international lawyer, Hans Kelsen, noted at the time, this meant that "German territory, together with the population residing in it," had been "placed under the sovereignty of the four powers." ⁽³⁵⁴⁾ After Germany's unconditional surrender in Rheims on May 8, 1945, ⁽³⁵⁵⁾ and the abolition of the Dönitz government, the legal status of Germany was no longer that of "belligerent occupation" in accordance with Articles 42 through to 56 of the Fourth Hague Convention of 1907. The four Allied powers were the government of Germany and thus the IMT's judgement (below) was able to speak of the Allies' "sovereign legislative power". Indeed, three years after the end of the final

[169] judgement at Nuremberg, Justice Jackson wrote that even if the charge "crimes against humanity" was not part of international law "it must not be forgotten that the Allies had succeeded to the German state's own sovereignty over these defendants by the unconditional surrender." ⁽³⁵⁶⁾ Although the Berlin Declaration did not use the term sovereignty, it was assumed in the IMT's judgement, and Kelsen successfully argues that :

The existence of an independent government is an essential element of a state in the eyes of international law. By abolishing the last Government of Germany the victorious powers have destroyed the existence of Germany as a sovereign state.... Germany having ceased to exist as a state, the status of war has been terminated, because such a status can exist only between belligerent states. Since Germany's surrender, at least since the abolition of the Doenitz Government, the Hague Regulations are not applicable, and the legal status of the territory occupied by the victorious powers cannot be that of belligerent occupation. ⁽³⁵⁷⁾

It follows from this line or argument that any dealings between the Allies and Germany were unlikely to be in accord with international law, the law that exists

[170] between sovereign nations. Once the Allies had become the sovereign government of Germany, they certainly inherited the right to try the Nazis for violations of domestic law, although this would not allow for the clause of Article 6 (c) which read "whether or not in violation of the domestic law of the country where perpetrated." However, in its judgement, the IMT claimed that the its charter was an expression of existing international law. Yet it also stated that :

The making of the Charter was the exercise of the *sovereign legislative power* by the countries to which the German Reich unconditionally surrendered ; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. ⁽³⁵⁸⁾

Thus the tribunal was appealing to domestic law for its jurisdiction over the major Nazi criminals. This was created by virtue of unconditional surrender, the *de facto* inheritance of German sovereignty, not international law. The only international laws to which the tribunal might appeal in order to justify Article 6 (c) of its charter, was Article 43 of the Fourth Hague Convention of 1907, concerning "Military Authority over the Territory of the Hostile State", or the dubious sanction of "humanitarian intervention by war", noted by Professor Gros at the London

[171] Conference and discussed below (in the section under that title). Article 43 of the Fourth Hague Convention stated :

³⁵² op. cit., *Documents on Germany Under Occupation 1945-1954*. p. 29.

³⁵³ Ibid., p. 30.

³⁵⁴ Hans Kelsen, 'The Legal Status of Germany According to the Declaration of Berlin.' *American Journal of International Law*. 1945 39[3]: 518.

³⁵⁵ Text may be found in F.R. Israel (Ed.), *Major Peace Treaties of Modern History 1648- 1967*. (New York: Chelsea House Publishers, 1967) Vol. IV, pp. 2419-2420.

³⁵⁶ R.H. Jackson, 'Nürnberg in Retrospect.' *The Canadian Bar Review*. 1949 27[7]: 777.

³⁵⁷ op. cit., *American Journal of International Law*. 1945 39[3]: 519.

³⁵⁸ IMT, Vol. I, p. 218. Italics mine.

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The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. ⁽³⁵⁹⁾

It is significant that the tribunal did not appeal to this law, (or that of "humanitarian intervention by war") and, as we have already seen, the Hague Regulations were of doubtful applicability anyway. Even if it had been possible for the Allies to claim the sanction of Article 43, it is not difficult to show that the status of belligerent occupation, if justifiable, would not have been desirable. The line in Article 43 of the Hague Convention which reads, "while respecting, unless absolutely prevented, the laws in force in the country", might, if applied liberally, create a justification for the part of Article 6 (c) of the charter which stated : "whether or not in violation of the domestic law of the country where perpetrated." This, however, would require a very liberal interpretation.

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The above-mentioned section of Article 43 is generally seen as referring to *military* necessity ⁽³⁶⁰⁾ and Germany having already unconditionally surrendered, there was no military necessity. Neither was Article 43 a free ticket to divide up a country into administrative zones for political purposes. It did not confer the right to re-organise Germany politically and economically and reduce her territory in favour of her neighbours. No international law provided for such actions, simply because no nation in its right mind would append its signature to such a document. The Fourth Hague Convention of 1907 was designed for the protection of the invaded people, not for their complete political subjugation and reorganisation.

There was no international law by which the Allies could remove National Socialism and replace it with another form of government, no matter how evil the former system was felt to be. Yet the Allies intended to denazify Germany, a political act achieved through intervention by force of arms. The abovementioned Section II.A. of the protocol of the Potsdam Conference, entitled "Political Principles", stated the Allied aim :

To destroy the National Socialist Party and its affiliated and supervised organizations, to dissolve all Nazi institutions....
To prepare the eventual reconstruction of German political life on a democratic ⁽³⁶¹⁾ basis and for eventual

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peaceful cooperation in international life by Germany.... All Nazi laws which provided the basis of the Hitler régime or established discriminations on grounds of race, creed or political opinion shall be abolished. No such discriminations, whether legal, administrative or otherwise, shall be tolerated. ⁽³⁶²⁾

This "Political Principle" from an agreement between the four powers who were, only six days later, to sign the London Charter and Agreement for the foundation of the IMT, certainly sheds some light on how those powers viewed Article 6 (c) of the charter. That article, in a similar manner to the Potsdam protocol, spoke in terms of "persecutions on political, racial, or religious grounds... whether or not in violation of the domestic law of the country where perpetrated." This striking similarity in wording has, to the present writer's knowledge, escaped the notice of historians and lawyers alike. The timing is also interesting to note. The final draft of Article 6 of the IMT's charter was agreed upon on August 2 (page), the same day the Potsdam Protocol was signed by representatives of the same powers. It is therefore not surprising that the Allies were reluctant to declare the punishment of "crimes against humanity" in terms of right conferred by international law. It is significant that not even the London Charter and Agreement qualified itself in terms of international law. Indeed, Control Council Law No. 10,

[174] brought into being on December 20, 1945 (approximately five months after the signing of the charter and one month after the beginning of the trial), providing for the punishment of "war crimes, crimes against peace and against humanity" by military government courts was "an exercise of supreme legislative power in and for Germany" and did not "purport to establish by legislative act any new crimes of international

³⁵⁹ James Brown Scott (Ed.), *The Hague Conventions and Declarations of 1899 and 1907*. (New York: Oxford University Press, 1918) p. 43.

³⁶⁰ J.W. Garner, *International Law and the World War*. (London: Longmans, Green and Co., 1920) Vol. II, p. 85-87.

³⁶¹ It must be remembered that the Soviet understanding of democracy differed greatly from that of the other Allies. The political systems that the Soviets put in place in post-war eastern Europe, including East Germany, were by western standards certainly not democratic.

³⁶² Potsdam Conference Protocol, 2 August 1945, II.A.3(iii), (iv), 4. in op. cit., *The Major International Treaties 1914-1945*. p. 232.

applicability." (363)

From looking at "crimes against humanity", in the light of the protocol agreed on at Potsdam, it is not unreasonable to assume, *a priori*, that during the war the frequently defeated Allies were unwilling to issue any declaration that would, in the event of a German victory (or even partial victory over certain territories) recognise the right of a victorious nation to politically reorganise a vanquished nation and punish the policies of the former government whether or not in violation of the contemporary domestic law. In other words, they did not want to create any unfortunate precedent for the future.

The only international law which could sanction Allied legislation during the occupation of Germany was the Fourth Hague Convention of 1907. However, as Felice Morgenstern noted in 1951 :

belligerent occupation is a legal régime circumscribed by the limits which international

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law places on the authority of the occupant. Within these limits - and these limits only - the acts of the occupant derive from international law a legal force which is binding both on inhabitants and the returning sovereign. Where the limits are exceeded the acts of the occupant are *ultra vires*, and are absolutely void even though the occupant may have the physical power to give them practical effect. (364)

The London Charter, August 8, 1945

The London Charter and Agreement, signed four months to the day after the end of the war in Europe, represents the first occasion on which the Allies declared their intent to try Germany's leaders before an international tribunal for atrocities committed against, and policies detrimental to, their fellow nationals. In the charter signed in London on August 8, 1945, the phrase "crimes against humanity", contained in Article 6 (c), is used as a technical term to describe a specific type of crime. Thus, "crimes against humanity" were distinct from "crimes against peace" and "war crimes", Articles 6 (a) and (b) respectively, bringing to three the number of crimes over which the IMT, according to its charter, was to have jurisdiction. However, from a straightforward reading of the charter it appears that the definition of "war crimes" and "crimes against humanity" overlap and that most "crimes

[176] against humanity" were at the same time "war crimes". In so far as Article 6 (b) and (c) overlap there is no juristic obstacle, because offences in the latter category constitute a reiteration of violations of the laws and customs of war under a different title. Novel considerations only arise in the areas where Article 6 (c) deviates from the provisions of 6 (b).

Despite much of the content of Article 6 (c) being similar to that of 6 (b), its inclusion as a separate entity was clearly intentional. A closer reading of the text brings attention to three phrases which reveal the essential difference between Articles 6 (b) and (c) and thus the need for the separate charge known as "crimes against humanity". These three phrases are : "before and during the war", "against any civilian population" and "whether or not in violation of the domestic law of the country where perpetrated". (365) These qualifications, which do not occur in Article 6 (b), constitute the essential novelty of Article 6 (c) : an unprecedented jurisdiction violating the principle of national sovereignty. A situation in which the victor nation is given a free hand in the punishment of pre-war and war-time domestic atrocities visited by a sovereign government upon its own citizens, whether or not in violation of existing national law. Once this novelty is fully grasped, it becomes clear why the Allies felt the necessity to make "crimes against humanity" a separate count.

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Any confusion of Articles 6 (b) and (c) might lead to dispute over the essentially undisputed legal validity of the former. Thus, though the term "crimes against humanity" may, to the uninitiated, seem to be a very vague heading, it was in reality a highly technical usage allowing the Allies to punish certain domestic acts

³⁶³ *Trial of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10, Nuremberg, October 1946-April 1949.* (Washington: GPO, 1949-1953). American Military Court No. III, Nuremberg, Case 3, Justice Judgement of December 3, 1947, p. 10622.

³⁶⁴ F. Morgenstern, 'Validity of the Acts of the Belligerent Occupant.' *The British Year Book of International Law.* 1951: 219-322.

³⁶⁵ **Appendix 1.** Charter of the International Military Tribunal, August 8, 1945. Article 6(c).

of the German government ; a fact played down by the prosecuting powers at Nuremberg.

Jurisdiction by "Close Association", and the Doctrine of "Humanitarian Intervention"

Though technically Article 6 (c) was completely separate from 6 (a) and (b), the tribunal, in order to back up its claim that its law on "crimes against humanity" was not ex post facto, deliberately associated "crimes against humanity" with "war crimes" and "crimes against peace" (note to chapter four), in order to lend validity to the former. In fact, in the judgement of the tribunal on October 1, 1946, the law relating to "war crimes" and "crimes against humanity" was dealt with in the same breath, wherein primary emphasis was placed on the former and the latter was largely avoided ; a formula made easy due to the actual subject-matter of the two counts being similar. ⁽³⁶⁶⁾ Such a merging of the two counts obscured the fact that jurisdiction rather than subject-matter was the real issue. The judgement made no attempt to justify the jurisdictional basis of "crimes against humanity" as a separate entity. Like Odysseus's escape from Polyphemus'

[178] cave, Article 6 (c) simply rode in under the belly of the other two counts listed in the charter for the IMT.

Occasions on which the Allies made public attempts to justify their jurisdiction over Germany's pre-war and war-time domestic affairs, other than by association with the other counts of the indictment, are few and far between. The issue was generally avoided. One example of particular authority may be found in the January 6, 1946, issue of the popular American magazine *Survey Graphic*. It is contained in an article entitled "Legal Basis for the Nuremberg Trials", by Murray C. Bernays, head of the Special Projects Branch of the United States War Department and author of the initial draft plan to try the major Nazi criminals (page 198). Bernays' brief mention of the Allied right to try domestic crimes relied solely on Germany's unconditional surrender and was thus reliant upon an arbitrary exercise of power rather than international law.

The same article also contained a typical example of an attempt to obscure the distinction between Article 6 (b) and (c). After reeling off a list of murderous deeds contained in "Counts Three and Four of the indictment" (counts three and four were "war crimes" and "crimes against humanity" respectively), Bernays stated that all the acts listed were "felonies under accepted international law. Under that law, the guilty are liable to trial and

[179] punishment". ⁽³⁶⁷⁾

All the acts in Bernays' list (such as murder, massacres, and so forth) were indeed felonies under the internationally recognised laws and customs of war (and domestic law). The real issue, that of who had jurisdiction to try them, was nonetheless obscured by dealing with both counts in the same breath. This camouflaging of the boundary between "war crimes" and "crimes against humanity" (and in the following case "crimes against peace" also) is evident in Justice Jackson's June 6, 1945, progress report to President Truman. The report predates the London conference and came just over a month after Jackson's appointment as the United States representative and Chief Counsel in preparing and prosecuting charges of war crimes, on May 2. It was accepted by both the President and the other Allies as the official American position on the matter. In a section referring to "crimes against humanity", the report neatly wove all the Nazis' crimes together :

Our people were outraged by the oppressions, the cruellest forms of torture, the large scale murder, and the wholesale confiscation of property which initiated the Nazi régime within Germany.... This was not the legitimate activity of a state within its own boundaries, but was preparatory to the launching of an

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international course of aggression.... Our people felt that these were the deepest offenses against International Law described in the Fourth Hague Convention of 1907 as including the "laws of humanity and the dictates of public conscience."... We propose to punish acts which have been regarded as criminal since the time of Cain and have been so written in every civilized code. ⁽³⁶⁸⁾

³⁶⁶ *Judgement of the International Military Tribunal For the Trial of German Major War Criminals (with the Dissenting Opinion of the Soviet Member), Nuremberg 30th September and 1st October, 1946.* (London: HMSO, 1946) pp. 64-65.

³⁶⁷ Murray C. Bernays, 'Legal Basis for the Nuremberg Trials.' *Survey Graphic* 1946 35[January 6]: 8.

³⁶⁸ R.H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945: a documentary record of negotiations of the representatives of the United States of America, the Provisional Government of the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics, culminating in the agreement and charter of the International Military Tribunal.* Department of State Publication No. 3080 (Washington DC: GPO, 1949). Hereafter International Conference. Document VIII. Report to the President by Mr. Justice Jackson,

In his closing speech beginning on July 26, 1946, Sir Hartley Shawcross argued in a similar fashion. He spoke of the Allied right to indict German crimes against the Jews, which although not war crimes, were punishable because of their "close association" to "crimes against peace".⁽³⁶⁹⁾ However, unlike Jackson (although Jackson had admitted as much at the London Conference, page 126), he also added :

Normally international law concedes that it is for the state to decide how it shall treat its own nationals ; it is a matter of domestic jurisdiction.⁽³⁷⁰⁾

Shawcross then continued to state quite frankly that the existing covenant of the League of Nations and the charter of the United Nations Organisation were supportive of "that general position."⁽³⁷¹⁾ Despite this he believed that

[181] international law had "in the past made some claim that there is a limit to the omnipotence of the state" in its dealings with its own citizens.⁽³⁷²⁾ In support of this claim he quoted not from international treaties but from the opinions of Grotius (1583-1645), regarded by many as the father of international law, and the British international jurist, John Westlake (1828-1913), which in general were supportive of the principle of "humanitarian intervention".⁽³⁷³⁾ He then mentioned, as precedent, the "European powers which in time past intervened in order to protect the Christian subjects of Turkey" (though Shawcross does not give dates the incidents are well known and occurred between 1827 and 1878) and concluded that the right of humanitarian intervention by war was "not a novelty" in international law.⁽³⁷⁴⁾

Shawcross's argument deserves some attention. Though he appealed to the more common justification of "crimes against humanity" through its "close association" with "crimes against peace", he, like Gros at the London Conference (page 127), appealed to the doctrine of "humanitarian intervention by war". This appeal represents the strongest part of his argument that the Allies' violation of German sovereignty was in accord with the provisions of international law. His quoting of the opinions of Grotius and Westlake, though they were men of some importance, has little bearing on the actual state of international law. The use as precedent of European

[182] interventions in Turkish domestic affairs, on face value at least, seems more compelling. However, it must be remembered that intervention on moral grounds, and intervention by right of international law are not synonymous.

A 1973 article in the *American Journal of International Law*, on the law of humanitarian intervention, by T.M. Franck (of the Board of Editors) and N.S. Rodley, states that, prior to 1945, other than the military interventions against the Ottoman Empire on behalf of the Christian subject populations, "cases of humanitarian intervention with military force are extraordinarily rare."⁽³⁷⁵⁾

Thus, the above- mentioned charter for the League of Nations and the charter for the United Nations Organisation, in combination with the fact that there was no positive international law authorising "humanitarian intervention by war", and the rarity of its actual occurrence, makes of doubtful validity the argument that "humanitarian intervention by war" had become an accepted part of even customary international law.

After a careful examination of European intervention in the Ottoman Empire, Franck and Rodley, though making no specific mention of Nuremberg, assert that as a whole the Ottoman cases "do not sustain the contention of the authorities who assert a long, credible, and creditable history of humanitarian intervention by force of arms...."

[183] Thus history does not provide a weight of precedents to buttress the legality" of the concept of

June 6, 1945. pp. 49-50.

³⁶⁹ IMT, Vol. XIX, p. 471.

³⁷⁰ Ibid.

³⁷¹ Ibid.

³⁷² Ibid., p. 471-472.

³⁷³ Ibid., p. 472.

³⁷⁴ Ibid.

³⁷⁵ T.M. Franck and N.S. Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force.' *American Journal of International Law*. 1973 67: 283.

humanitarian intervention. ⁽³⁷⁶⁾ The fact that the tribunal never once made reference to the concept as a justification of Article 6 (c) hints that they either did not think of it or they regarded it as of spurious validity in terms of international law.

Franck and Rodley also clearly demonstrated that the violations of Turkish sovereignty, which Shawcross claimed as precedent, were not purely, or even primarily, for humanitarian reasons :

Primarily, these episodes are illustrative of principles applicable to relations between unequal states in a community of law which prefers one socio-religious system over another and in which "civilized" states exercise de facto tutorial rights over "uncivilized" ones. They are therefore of little precedential value in the contemporary world.... Humanitarian intervention has almost invariably been a partisan allegation or self-justification rather than a fact. ⁽³⁷⁷⁾

The susceptibility of the principle of humanitarian intervention to "partisan allegation or self-justification" should come as no surprise. After all, Hitler justified his intervention in Czechoslovakia in 1938 on humanitarian

[184] grounds. On September 23, in writing to Chamberlain, he stated that ethnic Germans and "various nationalities in Czechoslovakia" had been, amongst other things, "maltreated", "tortured" and "economically destroyed". ⁽³⁷⁸⁾ Unfortunately it all sounds painfully familiar. Franck and Rodley concluded that not only was humanitarian intervention not (even by 1973 when their article was published) part of legitimate international law, ⁽³⁷⁹⁾ but that it was almost impossible to devise a means both "conceptually and instrumentally credible" to separate the few cases of legitimately humanitarian intervention from those motivated by political, economic and ideological factors. ⁽³⁸⁰⁾ Thus, Shawcross' reference to the Allied right of humanitarian intervention in Germany on behalf of the oppressed Jews was based on a moral concept non-existent in positive or customary international law. It also bore an agonising similarity to Hitler's pretext for intervention in Czechoslovakia, which was condemned as aggressive in the Nuremberg judgement.

The Fourth Hague Convention, 1907

Unlike the other counts of the indictment, the judgement of the tribunal made no mention of the past history of the law relating to "crimes against humanity". In 1947, the year after the tribunal had delivered its verdict on the major Nazi criminals, Francis Biddle, the American member of the tribunal, admitted the "somewhat nebulous conception" of "crimes against humanity". ⁽³⁸¹⁾ He

[185] believed that the expression was not entirely new to international law, yet he made no reference to past instances of its use. ⁽³⁸²⁾ Justice Jackson, on the other hand, in his abovementioned report to the President, makes mention of the Fourth Hague Convention of 1907 respecting the laws and customs of war on land as evidence of a law of humanity.

The same convention was used by the tribunal in the section of the judgement entitled "The Law Relating to War Crimes and Crimes Against Humanity", though specifically only in relation to the former. However, by underplaying the issue of jurisdiction which in the London charter separated Articles 6 (c) and (c) and made a technical term out of "crimes against humanity", Jackson was able to refer to the Fourth Hague Convention which made mention of the "laws of humanity" in a non-technical sense :

These principles have been assimilated as part of International Law at least since 1907. The Fourth Hague Convention provided that inhabitants and belligerents shall remain under the protection and rule of "the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience." ⁽³⁸³⁾

376 Ibid.

377 Ibid., p. 282.

378 Ibid., p. 284.

379 This general opinion is also upheld in L.S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations*. (Dordrecht: Martinus Nijhoff Publishers, 1992) pp. 41-42, and N.S. Rodley, 'Human Rights and Humanitarian Intervention: The Case Law of the World Court.' *International and Comparative Law Quarterly*. 1989 38[April]: 321-333, especially p. 321.

380 op. cit., *American Journal of International Law*. 1973 67: 282, 284.

381 Francis Biddle, 'The Nürnberg Trial.' *Proceedings of the American Philosophical Society* 1947 91[3]: 301.

382 Ibid.

383 International Conference, Document VIII. Report to the President by Mr. Justice Jackson, June 6, 1945. pp. 50-51.

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In international documents which predate the London Agreement and Charter of August 8, 1945, the terms "humanity", "laws of humanity" and "dictates of humanity" are used in a non-technical sense with no indication that they entail a set of norms different from the laws and customs of war. ⁽³⁸⁴⁾ This is certainly the case with the Fourth Hague Convention. Paragraph two of the preamble stated that the contracting parties were motivated "by the desire to serve... the interests of humanity and the ever progressive needs of civilization". ⁽³⁸⁵⁾ The eighth paragraph, which Jackson quotes, spoke of the "protection and the rules of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience." ⁽³⁸⁶⁾ Thus, the "interests of humanity" were conceived of as the purpose which the laws and customs of war served, and the "laws of humanity" were seen as one of the sources of the internationally recognised laws of war regulating the conduct of the belligerents "in their mutual relations and in their relations with the inhabitants" of the areas being fought over. ⁽³⁸⁷⁾

The "laws of humanity" were not seen as law in themselves. They did not imply a separate category from the laws and customs of war. There was no mention of a ceding of the principle of national sovereignty and it is unlikely that the signatory nations would have agreed to sign the convention if there had been. Furthermore, there

[187] was no mention of the "laws of humanity" in the convention itself, only the preamble. Thus, the judgement of the IMT mentioned the Fourth Hague Convention only in connection with "war crimes", not "crimes against humanity".

However, if one was to argue, somehow, that the "laws of humanity" were a legitimate part of the convention, then in the case of a violation the punitive article (3) of the same convention would come into effect. Article 2 stated that the convention applied only as between "contracting Powers" and Article 3 stated that if one of these Powers should violate the "said Regulations" they are liable to "pay compensation" as the state "shall be responsible for all acts committed by persons forming part of its armed forces." ⁽³⁸⁸⁾ Responsibility for the violation of the convention thus fell squarely on the shoulders of the state not the individual.

The Great War and the Subsequent Commission on Responsibilities, 1919

In January 1919, the Preliminary Peace Conference set up a commission to enquire into German responsibility for breaches of the laws and customs of war during the war of 1914-1918. The commission's report has already been given extensive treatment in chapter two of this study. The report, dated March 29, declared (in Chapter II, "Violations of the Laws and Customs of War") that the Germans had committed outrages "of every description...

[188] against the laws and customs of war and of the laws of humanity." ⁽³⁸⁹⁾

It is interesting to note that a list of charges suggested by the commission included the "[u]surpation of sovereignty during military occupation", ⁽³⁹⁰⁾ an act which, as this chapter has argued, was the basis of the authority of "crimes against humanity" as defined by the charter of the IMT. That aside, though, Annex I of Chapter II contained a summary of the infractions of the laws and customs of war and the laws of humanity. The large majority of the crimes listed were simply violations of the traditionally accepted laws and customs of war. Several of the atrocities listed, however, fall neatly within the category "crimes against humanity" as defined in the 1945 charter, namely those committed by Turkish and German authorities against Turkish ethnic minorities (Armenians and Greek-speaking populations) and atrocities by Austrian troops visited upon

³⁸⁴ op. cit., *The British Yearbook of International Law*. 1946 23: 180.

³⁸⁵ Text in James Brown Scott (Ed.), *The Hague Conventions and Declarations of 1899 and 1907*. (New York: Oxford University Press, 1918. Third Edition) pp. 100-127, on p. 100.

³⁸⁶ Ibid., p. 102.

³⁸⁷ Ibid. p. 101.

³⁸⁸ op. cit., *The Hague Conventions and Declarations of 1899 and 1907*. p. 103.

³⁸⁹ op. cit., *American Journal of International Law*. 1920 14[1]: 113.

³⁹⁰ Ibid., p. 114, no. 10.

Gorizia (at the time of their commission an Austrian town).

As has already been discussed in chapter two, the American members of the commission issued a dissenting report which claimed that the "laws of humanity" were not part of existing law, international or otherwise. The result was that the Treaty of Versailles (Articles 228-230) contained no mention of the "laws of humanity". Neither, for that matter, did the Treaty of St. Germain between the

[189] Allies and Austria on September 10, 1919. ⁽³⁹¹⁾ In fact, all the post-World War One treaties, bar one, avoided mentioning the "laws of humanity". Article 230 of the Treaty of Sèvres, between the Allies (excluding the United States) and Turkey, on August 10, 1920, stated :

The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914. ⁽³⁹²⁾

Article 230 of the Treaty of Sèvres also stated the Allied right to "designate the Tribunal which shall try the persons so accused". In conformity with the majority recommendation of the 1919 Commission on Responsibilities, it gave the Allies the right to try Turkish crimes committed on Turkish territory against persons of a minority racial origin yet Turkish citizenship. Though obviously not identical to the requirements of Article 6 (c) of the 1945 charter for the IMT, it represents a clear example of "crimes against humanity" as defined under that charter. But the Treaty of Sèvres, though signed, was never ratified and thus never came into force. ⁽³⁹³⁾ On July 24, 1923, it was replaced by the Treaty of Lausanne which had dropped the majority of violations of Turkish

[190] sovereignty, including all provisions for the punishment of war crimes. ⁽³⁹⁴⁾ In fact the new treaty was accompanied by a "Declaration of Amnesty" for all offences connected with political events committed between 1914 and 1922, including military and political action. ⁽³⁹⁵⁾

Conclusion

It follows from the arguments laid out in this chapter that the charge of "crimes against humanity", as realised in the IMT's charter, had no basis in either positive or customary international law, nor did it find any precedent in the practice of nations. The basis of the Allies' authority to punish actions normally under German jurisdiction was Germany's unconditional surrender and the subsequent Allied inheritance of sovereignty.

During the war, the Allies had made no mention of any intent to punish German authorities for domestic atrocities. The reason for the lack of public declarations to that effect may have been more for fear of the jurisdictional issue implicit in the charge of "crimes against humanity" being turned against themselves in the event of a German victory (which looked likely at various times during the war), than for its actual non-existence in international law. However, even after the war, the tribunal never made any attempt to explain the history of "crimes against humanity" in terms of international law. The charge of "crimes against humanity" was justified

[191] through its "close association" with "war crimes" and "crimes against peace", thus neatly side-stepping the crucial issue of jurisdiction. An examination of the history of the concept of "crimes against humanity" prior to 1945, certainly gives grounds for doubting its validity as a component of international law.

³⁹¹ Treaty of St. Germain between the Allies and Austria on September 10, 1919. Part VII. Penalties. Articles, 173-176, in op. cit., *Major Peace Treaties of Modern History 1648-1967*. Vol. III, pp. 1596-1597.

³⁹² Text of treaty in op. cit., *Major Peace Treaties of Modern History 1648-1967*. Vol. III, pp. 2055-2213, on p. 2135.

³⁹³ op. cit., *British Yearbook of International Law*. 1946 23: 182.

³⁹⁴ Partial text of treaty in op. cit., *The Major International Treaties 1914-1945*. pp. 79-80. Commentary on p. 50.

³⁹⁵ op. cit., *British Yearbook of International Law*. 1946 23: 182.

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CONCLUSION

"THE STRONGEST HAS THE RIGHT"

it is an appeal to public opinion for support and all states employ this tactic. ⁽³⁹⁶⁾
Professor M.N. Shaw, writing about the states adherence to international law, 1991.

Debate over the retroactive effect of the Nuremberg principles is not a recent development. It stretches back beyond the the motion put forward by the defence counsel on November 19, 1945 ; beyond the articles in law journals and popular magazines which followed the publication of the charter for the IMT. The debate reaches right back to the London Conference and further to the moment the Allies first began to discuss the possibility of an international tribunal. In fact, as this thesis has pointed out, even as early as 1943 and the publication of articles following the Kharkov trial, there were those who claimed that a future trial of Germany's Nazi leadership would require a step beyond the law. However, the debate may be traced even further back, beyond the Second World War. An examination of the Allied negotiations preceding the Treaty of Versailles reveals that the majority of the issues raised after the Second World War had received a thorough airing as early as 1919. Indeed, for discussion

[193] of some of the issues one can even retreat to the early nineteenth century and the imprisonment of Napoleon.

In its judgement in 1946, the IMT made several claims which have been the primary focus of this thesis. The tribunal claimed that its authority rested in the sovereign legislative power inherited by the four major Allied powers following the unconditional surrender of Germany. The tribunal, however, qualified this claim with the assertion that its authority was not solely reliant on an arbitrary exercise of power but that its charter was an expression of contemporary international law, a contribution to international law and that as a tribunal the IMT was no different to the many national military tribunals which had preceded it. With such a declaration the Allies hoped to affirm their intent to begin a new era of peace and collective security not

³⁹⁶ M.N. Shaw, *International Law*. (Cambridge: Grotius Publications, 1991) p. 8.

with a mass slaughter of their opponents but with a civilized trial according to accepted principles of law. A careful examination of Allied war-time and immediate post-war statements and declarations reveals that the official policy of the major Allied powers was to make a distinction between minor and major German war criminals. Allied statements show that they regarded only the former as subject to law, an observation corroborated by Allied reactions to the acts at the time of their perpetration. Aspects of Allied policy such as American neutrality, the

[194] Munich settlement, the Soviet invasions of Poland and Finland, the Japanese invasion of Manchuria, the Italian invasion of Ethiopia, the British-Soviet invasion of Iran and Britains planned invasion of Norway are particularly revealing of the Allied perception of aggression. The Moscow Declaration in 1943 thus declared that the fate of the major Nazi war criminals would be decided not by legal process but by the combined decision of the Allied powers ; a political solution which had precedents dating back to the 1919 Treaty of Versailles, Article 227, concerning the Kaiser and the 1815 Declaration of the Congress of Vienna concerning the disposal of Napoleon.

In 1945, the Allies were, to a large degree, faced with a repetition of the problems they had faced nearly a quarter of a century earlier. In 1919 the Allied Commission on Responsibilities had found that a war of aggression was not a criminal offence for which individuals could be held responsible under international law. The American delegation on the commission added to this the violation of the "laws of humanity". Thus, neither the waging of a war of aggression nor violations of the "laws of humanity" had gained recognition as international criminal offences under the Treaty of Versailles.

The London Conference, attended by representatives of the four major Allied powers in 1945, was the Second World War counterpart of the meetings of the Council of Four in

[195] 1919. An examination of the issues discussed during both meetings reveals remarkable similarities. Indeed, the minutes of the latter conference contain many references to the former. At the 1919 and 1945 meetings the delegates discussed the conflict between the political and legal paths open to them. On the two occasions delegates also discussed the creation of *ex post facto* legislation, individual versus collective responsibility and expressed the fear of creating legal precedent for the future. In 1919 and again in 1945 attempts were also made to justify Allied action through asserting the unique opportunity of strengthening law for the future and the long recognised right of belligerents to set up tribunals in order to try enemy personnel.

Unlike the Council of Four, however, the delegates at the London Conference did not need advice from a separate commission of lawyers on what they could and could not do according to law. The delegates at London were qualified lawyers, their advice came from politicians. However, at both meetings the delegates had to work out a mutually agreeable method by which to achieve goals already established.

Inevitably, the decisions reached by neither conference pleased everyone. However, it is interesting to note that in 1919, as in 1945, the shortfall in the law was recognised and essentially the same solution was posed.

[196] In 1919, President Wilson was responsible for a draft of Article 227 (of the Treaty of Versailles) which dropped all reference to international law thereby undermining the legal prosecution of the Kaiser while satisfying the demand for punishment. In 1945 Sir David Maxwell Fyfe proposed a similar solution by omitting the term international law from the introductory paragraph to Article 6 of the IMT's charter. In both cases the result was a shift from the legal to the political domain. The primary difference was that in 1945, unlike in 1919, the Allies declined to publically admit this shift.

In 1919, much in the same manner as in the Moscow Declaration of 1943, the Allied powers acknowledged the distinction between punishment by legal and political process. In 1945, despite the declaration at Moscow two years earlier, this distinction was, at least publicly, not acknowledged. The reasons for this may be several. On both occasions, however, the benefits that would accrue from claiming judicial garb were considerable. Yet in 1945, a declaration acknowledging the departure from international law would have meant certain complications not apparent in 1919. In 1919, in making a distinction between punishment by legal and political process, the Allies also made a distinction between tribunals. The Kaiser was to come before a "special tribunal", whereas those responsible for violations of the laws and customs of war were to come before military tribunals. ⁽³⁹⁷⁾ The IMT was set up to try

³⁹⁷ Appendix 2. Treaty of Versailles, Part VII Penalties, Article 227 and Article 229.

[197] certain individuals not only for "war crimes", the violation of the laws and customs of war traditionally tried by military tribunal, but also for "crimes against peace" and "crimes against humanity". To admit the political nature of the latter two charges would have undermined the essentially undisputed legal prosecution on the charge "war crimes" by the same tribunal (page 210).

For the most part, the plan concluded at the London Conference, and the machinery it produced, worked well. A sharp contrast to the failure in 1919. Whatever the reasons for the difference in acknowledging legal and political methods of punishment, the Allies after two world wars were certainly more determined to succeed in their efforts. As both the 1919 and 1945 solutions were essentially the same in terms of International law, the natural conclusion regarding the reason for the success of the latter effort was the fact of unconditional surrender, which in the IMT's judgement was deemed to be an "arbitrary exercise of power". In 1945 the Allied powers did not have to ask Germany to hand over the individuals or the documents necessary to carry their plan through.

"The Nürnberg Novelty"

Formulating a definition of war crimes, Article 6 of the IMT's charter, proved to be the primary stumbling block to agreement at the London Conference. An examination of the two most contentious principles, Articles 6 (a) "crimes

[198] against peace" and 6 (c) "crimes against humanity", in terms of treaties, customary law and the actual practice of nations preceding the London Conference, reveals that they were foreign to international law. However, in public the Allies continued to claim that the charter was firmly based in international law. The tribunal boldly proclaimed it to a crowded press gallery in their final judgement at Nuremberg. ⁽³⁹⁸⁾ It argued that the charter was "an expression of existing international law at the time of its creation" and that the tribunal itself was, though an international effort, no different from those which each of the allies might set up individually.

Despite these claims, the general public was not completely unaware of the legal controversy surrounding the charter. With the signing of the agreement and charter and the setting up of the IMT, there was much discussion in periodicals and legal journals over its novelty. Worthy of note is the abovementioned editorial article, 'The Nürnberg Novelty', published in the popular American *Fortune* magazine in December 1945 (page 75). The article is especially significant as it provoked a reply from Colonel Murray C. Bernays, head of the United States War Department's Special Projects Branch.

Bernays was responsible for the initial American draft of the plan to try the major Nazi war criminals for which he later won the Legion of Merit. ⁽³⁹⁹⁾ His six page draft had

[199] been delivered to Henry Stimson, the United States Secretary of War, on September 15, 1944. In their book, Ann and John Tusa note that Bernays' plan "was gratifyingly coherent and seductively comprehensive. So much so that many of its elements were to shape the Nuremberg Tribunal - for good and bad." ⁽⁴⁰⁰⁾

The editors of *Fortune* argued that punishment of the *major* Nazi war criminals was essential. Yet, they also argued that this should not be done by means of a trial which would, at best, be based on a faulty interpretation of international law. They claimed that the decision reached at the London Conference to try the major criminals before a court at Nuremberg went against the Moscow Declaration (1943) which had agreed to punish by "joint decision of the governments of the Allies." Bernays' reply came two months later in February 1946. He justified the decision to set up the IMT thus :

two signers of the declaration Churchill and Stalin, and the third's lineal successor, Mr. Truman, were in office when those three governments and France agreed last June that this "joint decision" would be to establish the Tribunal now

³⁹⁸ According to Jackson the "press and radio had a maximum of 249 accredited representatives who reported the proceedings to all parts of the world." See R.H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945: a documentary record of negotiations of the representatives of the United States of America, the Provisional Government of the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics*, culminating in the agreement and charter of the International Military Tribunal. Department of State Publication No. 3080 (Washington DC: GPO, 1949). Hereafter International Conference. Document VIII. Report to the President by Mr. Justice Jackson, June 6, 1945. p. 433.

³⁹⁹ M.C. Bernays, 'The Nürnberg Novelty.' *Fortune* 1946 33[February]: 12.

⁴⁰⁰ Ann and John Tusa, *The Nuremberg Trial*. (New York: Atheneum, 1984) p. 55.

sitting. The Authority of that interpretation is further buttressed by the fact that fourteen more United Nations have formally endorsed the Tribunal's foundation. These eighteen governments did not see any reversal of the declaration in what they and we are now doing. ⁽⁴⁰¹⁾

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Despite Bernay's eloquence and obvious authority, ⁽⁴⁰²⁾ he had avoided the responsible for specific crimes and those whose crimes lacked any "particular geographical location". The declaration had recognised that the small fry should be "judged and punished according to the laws" of the countries where they had offended. Yet, in its closing paragraph, the declaration specifically reserved for punishment by "joint decision of the Governments of the Allies" those whose "offences have no particular geographical location".

As has been discussed in chapter one of this study, the Moscow Declaration implied that the major war criminals were not subject to law but political decision. It follows from this conclusion, in combination with Bernays' letter to *Fortune* (which simply stresses the combined weight of Allied decision making), that the basis for trying the major German war criminals was an *ad hoc* creation of law through the combined weight of the victorious powers. The real link between the Moscow Declaration's "joint decision" and the London Agreement and Charter was better explained by Jackson in a memorandum submitted by the American delegation to the other delegations at the London

[201] Conference on June 30, 1945 :

The United States proposal is based on the idea that the "joint decision" should be reached through hearings having the characteristics of a judicial inquiry rather than a political fiat.... German atrocities in the last war were charged. The public of my country was disillusioned because most of the charges were never authenticated by trial... If there is to be continuing support in the United States for international measures to prevent the regrowth of Naziism, it is necessary now to authenticate, by methods the American people will regard as of the highest accuracy, the whole history of the Nazi movement, including its extermination of minorities, its aggressions against neighbours, its treachery and its barbarism. ⁽⁴⁰³⁾

A book written in 1945 by a Polish lawyer, Dr. Manfred Lachs, entitled *War Crimes : an attempt to define the issue*, corroborates the view expressed by the editors of *Fortune* magazine. Lachs concluded that the court would have difficulty in passing sentence without transcending the limits of strict legality. The point was taken up in an article in *The Times* on 19 October 1945, which, on publication of the indictment, stated that in sentencing

[202] the accused for offences which were not in contravention of any rule of international law but "against a more general morality" the court would be passing from the legal into the political domain. ⁽⁴⁰⁴⁾ Thus, the "Nürnberg novelty" was not that the Allies planned to dish out punishment to certain major war criminals (note the examples of Napoleon and the Kaiser), but that there was a claimed resort to international law, an attempt to pass from what had previously been the political domain into the legal. Justice Jackson summed up the situation somewhat differently :

If these men are the first war leaders of a defeated nation to be prosecuted in the name of the law, they are also the first to be given a chance to plead for their lives in the name of the law.... 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... "under God and the law". ⁽⁴⁰⁵⁾

Jackson's statement is revealing of how the Allies wished the public to view the trial then taking place. However, it is, of course, not completely accurate. The plans to try the Kaiser in 1919, though they never

⁴⁰¹ op. cit., *Fortune* 1946 33[February]: 10, 12.

⁴⁰² The London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, paragraphs three and four, clearly state that the decision to try the major war criminals was an extension of the decision in Moscow to punish "by the joint decision of the Governments of the Allies." See also op. cit., International Conference, Document I. Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, January 22, 1945. p. 3, where Murray C. Bernays' article, 'Legal Basis for Nürnberg Trials.' *Survey Graphic*. 1946 35[January]: 4-9, is mentioned as authoritative regarding America's early planning phases. Also worthy of note is Bernays' article 'Nuremberg: Its vindication of Western justice, its profound lessons in moral leadership, and its deterrence to future aggression.' *Survey Graphic*. 1946 35[November]: 390-91.

⁴⁰³ op. cit., International Conference. Document XVII. Revised Draft of Agreement and Memorandum Submitted by American Delegation, June 30, 1945. p. 126.

⁴⁰⁴ M. Belgion, *Epitaph on Nuremberg*. (London: The Falcon Press, 1946) p. 11.

⁴⁰⁵ *The Trial of the German Major War Criminals by the International Military Tribunal. Sitting in Nuremberg Germany (Commencing 20th November, 1945). Opening Speeches of The Chief Prosecutors*. (London: HMSO, 1946) p. 5, 36. Hereafter Opening Speeches.

came to fruition, were openly political. They took on legal form, however, in order to "assure to the accused such guarantees as were never before recognised in public law." ⁽⁴⁰⁶⁾

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Military Tribunals

Six months after the IMT's final judgement, Francis Biddle, the United States member of the tribunal, wrote in justification :

It is accepted law everywhere that victorious powers may set up tribunals, with defined law, jurisdiction, and procedure, in the territories they have conquered and occupied. ⁽⁴⁰⁷⁾

Biddle's claim harked back to that made by Lloyd George in defence of a legal trial for the Kaiser and bears obvious similarity to that of the IMT in its final judgement. Also, like that of the IMT and Lloyd George, Biddle's reference to "tribunals" was, in order to seem plausible, necessarily vague.

As one would expect, in 1945 there were several types of military tribunal. If, by "tribunals", Biddle was referring to military commissions or courts martial (the two are very similar), then his point concerning the right to set up such "tribunals" was quite correct. However, Biddle was referring to the status of the IMT. As Nathan April, a member of the United States Supreme Court, pointed out in an article published in the *Minnesota Law Review* in April 1946, the IMT differed radically in composition, and scope of jurisdiction, from a court martial. ⁽⁴⁰⁸⁾

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Military Government Courts

It is also possible that Biddle was referring to military government courts, although the IMT never claimed to be such. In order not to be long-winded, and since Biddle was the American member of the tribunal, the present writer will limit his comments to American military government courts.

There were two types of military government courts, those instituted during combat and those instituted later during permanent occupation. The courts in the former category were established by Military Government Ordinance No. 2 and had jurisdiction over "offenses committed by persons in the occupied area with the exception of members of the armed forces of the Allied Nations and the enemy." ⁽⁴⁰⁹⁾ Such offences constituted acts in violation of military government legislation and German law. These offences were, of course, not war crimes. The jurisdiction of the courts in the latter category (permanent occupation courts) was also restricted to non military personnel involved in the violation of "Allied Control Council and military government legislation, and offenses against German law in force in the judicial district in which the court is located." ⁽⁴¹⁰⁾ Thus neither type of military government court provided justification for the IMT.

B) Military Commissions and Courts Martial

⁴⁰⁶ *What Really Happened at Paris: The Story of the Peace Conference, 1918-1919.* (United States: Greenwood Press, 1976. Reprint from the edition published by Scribner: New York, 1921) p. 243.

⁴⁰⁷ Francis Biddle, 'The Nürnberg Trial.' *Proceedings of the American Philosophical Society.* 1947 91[3]: 294. Biddle, in speaking of tribunals, was referring directly to the IMT. He was using this point to illustrate the fact that although those doing the judging were all from the victorious nations they are not therefore legally disqualified as judges. This point is quite correct. The Judges nationality does not necessarily mean their judgement will in fact be biased. The trial of enemy prisoners by military commission, for example, was regarded as just and quite legal, the need for neutral judges was not an issue. This point was clearly made by Benjamin B. Ferencz, Chief Prosecutor in the Nuremberg Military Tribunal Case No. IX (U.S. v. Ohlendorf, et al.): "The fact that members of a defeated nation are tried in tribunals of the victor creates the need for closest scrutiny of the proceedings but does not necessarily or by itself render the conduct of the trials corrupt. Such processes are as old as war itself and have been conducted by the United States since George Washington ordered Major André tried as a British spy." See Benjamin B. Ferencz, 'Nürnberg Trial Procedure and the Rights of the Accused.' *Journal of Criminal Law and Criminology.* --d 1948 39[2]: 144-145.

⁴⁰⁸ Nathan April, 'An Inquiry into the Judicial Basis for the Nuernberg War Crimes Trial.' *Minnesota Law Review.* 1946 30[5]: 317.

⁴⁰⁹ E.E. Nobleman, 'American Military Government Courts in Germany.' *Annals of the American Academy of Political and Social Science.* 1950 267[January]: 88.

⁴¹⁰ *Ibid.*, p. 93.

According to the United States Articles of War, court

[205] martial courts were to be composed exclusively of commissioned officers and exercise jurisdiction only over members of its own armed forces (except in certain non-germane cases).⁽⁴¹¹⁾ The IMT, with the exception of the Soviet members, was composed entirely of civilians. With the military commission, on the other hand, there was no statute governing its composition. Thus, the IMT was at least compositionally not in violation of the laws governing military commissions. Yet, the military commission's jurisdiction was very specifically defined.

This definition involved violations of martial law, violations of the regulations of military government and violations of the traditionally accepted laws and customs of war,⁽⁴¹²⁾ and included (amongst other things) that the offences must have been committed within the field of command of the convening commander and that the sentence must be approved by that convening commander (or his successor).⁽⁴¹³⁾ The IMT made no pretence at adherence to these jurisdictional or procedural rules, nor did it claim to be a military commission. However, the IMT was closer to being a military commission than any other form of tribunal. Major Willard B. Cowles, the Vice Chairman of the Section of International and Comparative Law, Department of the Judge Advocate General (J.A.G.D.), in a 1944 article on military tribunals, modelled his definition on the

[206] military commission.⁽⁴¹⁴⁾ In defining military commissions, Cowles made specific reference to the Moscow Declaration of November 1, 1943, and its decision to try those responsible for specific atrocities (the *minor* criminals). He therefore referred to the Kharkov trial in December 1943 (page 48) in which the Soviet Union tried those Germans responsible for atrocities in and around Kharkov by Russian military tribunal under the "international law of war."⁽⁴¹⁵⁾ Cowles, however, makes no mention of those whose crimes had "no particular geographical location" (note the wording Moscow Declaration).

Cowles' article defines the scope of war crimes tryable by military commission as those in violation of the laws of war. These laws of war are defined as those found in the provisions of "such great treaties as the Hague conventions of 1899 and 1907, the 1929 Geneva Prisoners of War and Red Cross conventions, and the enormous body of the customary practices of war which have solidified into principles and rules of law."⁽⁴¹⁶⁾ He continued :

There is a tendency to believe that what the Nazis are doing to the civilian populations in Europe is unprecedented. It is only so in the extreme degree in which it is being done. The already-existing and well understood principles of the laws of war include most of these offenses, and precedents exist for their punishment.⁽⁴¹⁷⁾

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However, as Jackson was later to point out at the London Conference, the Allies had not envisaged the trial before the IMT "as a trial of isolated criminal acts", but "as a trial of the master planners in which the criminality consists of making and executing the master plan to attack the international peace."⁽⁴¹⁸⁾ By virtue of its charter, the IMT claimed jurisdiction over more than conventional war crimes, Article 6 (b) of the charter. The inclusion of Article 6 (a) "crimes against peace" and Article 6 (c) "crimes against humanity" rule out the IMT as a military tribunal in the previously accepted sense.

Cowles' article was written before the final decision to create the IMT and place the major war criminals on trial. His pre-London Conference definition of the military tribunal is based on the military commission and makes nonsense of Biddle's justification of the IMT, or for that matter the justification given by the IMT itself.

⁴¹¹ op. cit., *Minnesota Law Review*. 1946 30[5]: 317.

⁴¹² Ibid., pp. 317-318.

⁴¹³ Ibid., pp. 317-318.

⁴¹⁴ W.B. Cowles, 'Trial of War Criminals by Military Tribunals.' *Journal of the American Bar Association*. 1944 30[June]: 330-333, 362.

⁴¹⁵ Ibid., p. 330.

⁴¹⁶ Ibid., p. 331, see also p. 362.

⁴¹⁷ Ibid., p. 362.

⁴¹⁸ op. cit., International Conference, Document XVII. Revised Draft of Agreement and Memorandum Submitted by American Delegation, June 30, 1945. p. 127.

In a similar manner to Biddle, Benjamin Ferencz, ⁽⁴¹⁹⁾ in an article published in the *Journal of Criminal Law and Criminology* (1948), attempted to justify both the Nuremberg tribunals (the IMT and the subsequent Nuremberg Military Tribunal). Unfortunately, he falls into the same trap of not defining the term military tribunal. He also fails to read carefully the sources he quotes. In his article

[208] Ferencz quotes a statement by the United States Supreme Court in 1942 which recognised the establishment of military tribunals as being in full accord with Articles I and II of the United States Constitution :

An important incident to the conduct of war is the adoption of measures by the Military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort have violated the law of war. ⁽⁴²⁰⁾

It should be noted that the statement by the Supreme Court refers only to the traditionally accepted practice of tribunals (military commissions) set up to try persons for acts in violation of the laws and customs of warfare. ⁽⁴²¹⁾

The IMT was certainly not a military tribunal in the previously defined sense. This conclusion naturally leads to the issue of "war crimes" (normally tried before military tribunals), which, due to an apparent lack of contemporary controversy, has so far been mentioned only in passing. With the existence of a well defined legal category known as the laws and customs of war and the precedent created by the Treaty of Versailles (noted at the end of chapter two), the natural assumption with regard to Article 6 (b) of the charter is that it was legal at least

[209] in terms of the subject matter which it claimed was criminal and for which there was to be individual responsibility.

Nevertheless, none of the major war criminals had actually entered the territory of the offended nations and committed the crimes themselves. They had been responsible for the formulation of the master plan, the governmental policies or, in some cases, direct orders leading to the actual commission of the acts. Thus, the concepts of planning and "conspiracy" were vital to their conviction. One argument against the legality of the IMT is that, like the Kaiser, as members of a sovereign government many of the major Nazi war criminals were unreachable. Another argument is that the concept of "conspiracy", though well known in Anglo-American municipal law, was foreign to both municipal law on the continent (where the crimes were committed) and international law.

The Treaty of Versailles itself left little room for military officers to escape responsibility for ordering violations of the laws and customs of war. This view was corroborated by the opinions of many contemporary international lawyers ⁽⁴²²⁾ who, by and large, remained silent on the liability of members of civil government (except those actually residing in occupied territories and violating the laws of those territories). Historically, heads of state were not subject to *criminal* responsibility

[210] for their actions, a principle which the present writer has argued was upheld not only with regard to Napoleon in 1815 but also by the Treaty of Versailles (Article 227) despite arguments to the contrary by recent writers. ⁽⁴²³⁾ This thesis, though, has concentrated on Article 6 of the London Charter. The abolition of the immunity of heads of state is contained in Article 7 of that charter and, like the denial of the plea of superior orders contained in Article 8, is irrelevant if the actual acts committed are not criminal, as in the case of "crimes against humanity" and "crimes against peace". However, with regard to "war crimes" and the jurisdiction of the IMT, whether the concept of "conspiracy" was transferable to international law or whether government members of a state could come under the jurisdiction of the courts of a foreign state are both moot points. This thesis has argued that the IMT, as it was not a military tribunal authorised by existing

⁴¹⁹ Ferencz was the Executive Counsel, Office of Chief Counsel for War Crimes and Chief Prosecutor in the Nuremberg Military Tribunal case No. IX.

⁴²⁰ op. cit., *Journal of Criminal Law and Criminology* 1948 39[2]: 145.

⁴²¹ Ibid., similarly Ferencz quotes a later Supreme Court statement made in 1946. This statement talks of the "punishment of enemy combatants who have committed violations of the law of war". It thus differs very little from the earlier statement.

⁴²² C.A.H. Bartlett, 'Liability for Official War Crimes.' *Law Quarterly Review*. 1919 35: 177- 192.

⁴²³ See for example M. Cerif Bassiouni, *Crimes Against Humanity in International Law*. (Dordrecht: Martinus Nijhoff Publishers, 1992) p. 465.

law, was illegal. The important question here is whether an illegal court can try an individual for a legal crime. The answer, of course, is no.

An examination of the specifications of Article 6 (b) make it clear that such a charge would be cognisable before a regular military commission or even a combined military commission of several nations as agreed on at Versailles in 1919. The difficulty here is that the IMT was not a military commission. Before the IMT, Article 6 (b) stated no case. As Nathan April noted in 1946, the specifications

[211] of Article 6 (b) embraced "a formidable array of violations of the laws of war, sufficient in amplitude and depth of their infamy to consign those convicted thereof to the hangman's noose a thousand times over." (424) It was the Allies' insistence on introducing the essentially political articles "crimes against peace" and "crimes against humanity" (the former against the better judgement of the French at the London Conference, page 115 ff) which made Nuremberg a novelty and, in terms of legality, acted against the essentially undisputed charge of "war crimes".

The Authority of the IMT

If the IMT was not created under the authority of any existing law and was without precedent, it may be asked by what authority the IMT was established. The question is answered quite simply. There was no act of Congress or Parliament, nor any treaty which established the tribunal, and while the present writer professes no familiarity with the public records of the Soviet Union or France, it is plain that the IMT did not look to such records for justification. The IMT's foundations may be most clearly seen in an American statement made in January 1945 :

We favour the trial of the prime leaders by an international military commission or military court, established by Executive Agreement of the heads of State of the interested United Nations. This would require no enabling legislation or treaty. (425)

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This declaration certainly brings into dispute any *obiter dictum* of the IMT members concerning the charter's place in international law. It also makes of doubtful validity any claims that the tribunal was intended as a "contribution to international law". As the distinguished international lawyer and vice-chairman of the British government War Crimes Committee (1918-1919), J.H. Morgan, said in 1948 :

International Law is not law at all except in so far as it is 'adopted' by the courts of each particular country.... (426)

Indeed, as has already been noted, there was no Act of Parliament or confirmation by the United States Senate which ratified the London Charter. The Nuremberg trial was not founded on a treaty but on an executive agreement.

There would perhaps have been a stronger basis in international law for the Nuremberg trial if it had been part of a treaty settlement. Nathan April stated in 1946, that "our own Constitution recognises legislative force in International agreements or conventions, only when they constitute 'Treaties' duly confirmed by the Senate. The Agreement of London was an Executive affair ; it was never ratified by the Senate ; and neither by the Constitution nor

[213] by any statute empowered to create either national or extra-national courts." (427) As has been shown in chapter three of this study, the reason for this was, at least in part, the fear of creating legal precedent for the future.

The tribunal gained its authority solely from the London Agreement and Charter of August 8, 1945, and time and time again referred back to its authority. The Chief Prosecutor for the Soviet Union was, therefore,

424 op. cit., *Minnesota Law Review*. 1946 30[5]: 323.

425 op. cit., International Conference, Document I. Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, January 22, 1945. p. 7.

426 J.H. Morgan, *The Great Assize*. (London: John Murray, 1948) p. 37.

427 op. cit., *Minnesota Law Review* 1946 30[5]: 315. That the London Agreement was executive in character is a point not in dispute. A text of the Agreement and Charter may be found in the Department of State, Executive Agreement Series, No. 472 [Publication 2461].

able to state, in accordance with Article 2 of the agreement, that the charter "of the International Military Tribunal is to be considered an unquestionable and sufficient legislative act, defining and determining the basis and procedure for the trial and punishment of the major war criminals." He stated that the references to *nullum crimen sine lege* were therefore "not applicable because of the following fundamental, decisive fact : The Charter of the Tribunal is in force and in operation and all its provisions possess absolute and binding force." ⁽⁴²⁸⁾ Thus, Article 3 of the charter contained the sanction that : "Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Council." ⁽⁴²⁹⁾ Nathan April noted that the denial of the right to question the jurisdiction of a court was unique at least in the modern practice of Anglo-American countries. Indeed, although in American law, civil courts may not review the judgement of military tribunals, they do have

[214] appellate power concerning jurisdiction, that is : 1) whether the tribunal was legally constituted, 2) whether it had jurisdiction of the person, 3) whether it had jurisdiction of the subject matter, 4) whether its sentence was conformable to law, 5) whether its procedure complied with statutory or executive regulations of a jurisdictional nature. ⁽⁴³⁰⁾ It is perhaps not unreasonable to assume, a priori, that the need for such a provision (Article 3) represented the fear that any challenge to the jurisdiction of the IMT might be successful, a point also noted by Nathan April. ⁽⁴³¹⁾

Revising International Law

When speaking of the legal basis for the tribunal and the principles it was to apply, it is important to note that international law, like common law, is organic. The law cannot be just a scholarly collection of fixed principles. Such an argument was used strongly in defence of the IMT by Justice Jackson :

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 newer and strengthened International Law. ⁽⁴³²⁾

Jackson's argument was that international law, if it is to

[215] be relevant to contemporary situations, must be organic, able to adapt to meet new threats to society. This argument was also used by Clemenceau and Lloyd George in 1919. As noted in the introduction to this study, such adaptations come through the introduction of new legislation, which once instituted becomes binding for the future. However, as has been demonstrated at the end of chapter four of this study, Jackson expressed a fear of changing the law for the future. At the London Conference Jackson claimed for the Allied Powers the right to retroactively codify international law :

I think it is entirely proper that these four powers, in view of the disputed state of the law of nations, should settle by agreement what the law is as the basis of this proceeding, and if I am wrong about that, I do not see much basis for putting these people on trial in a quasi-judicial proceeding. ⁽⁴³³⁾

In a report to the President, Jackson also wrote :

We can save ourselves from those pitfalls if our test of what legally is crime gives recognition to those things which fundamentally outrage the conscience of the American people and brought them finally to the conviction that their own liberty and civilization could not persist in

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the same world with the Nazi power... I believe that those instincts of our people were right and they should guide us as

⁴²⁸ IMT, Vol. VII, p. 148.

⁴²⁹ B.F. Smith, *The American Road to Nuremberg: The Documentary Record, 1944-1945*. (Stanford: Hoover Institution Press, 1982) p. 214, or Charter of the International Military Tribunal, I. Constitution of the International Military Tribunal, Article 3. IMT, Vol. I, p. 10.

⁴³⁰ W.F. Fratcher, 'Review by the Civil Courts of Judgments of Federal Military Tribunals.' *Ohio State Law Journal*. 1949 10[3]: 271-300, esp. p. 275.

⁴³¹ op. cit., *Minnesota Law Review*. 1946 30[5]: 319.

⁴³² R.H. Jackson, *The Case Against the Nazi War Criminals*. (New York: Knopf, 1946) p.77.

⁴³³ op. cit., International Conference, Document XLIV. Minutes of Conference Session of July 23, 1945. p. 329.

the fundamental tests of criminality. ⁽⁴³⁴⁾

This is of course, a very dubious standard for the law. Indeed, law formulated in such a manner takes on an ad hoc quality. Jackson's desire to morally underpin international law was in some respects a commendable one. Yet, as Edwin Borchard, of the board of editors of the *American Journal of International Law*, said of Jackson as early as 1941 :

"It should come as no surprise to the Attorney General that many international lawyers do not share his views on international law or how international law is created... It may be unfortunate that the international legal order is not exactly a moral order ; but any system of social control must deal with the materials at hand, and the myriad of factors which condition international relations are not yet sufficiently understood or controllable to construct out of them a moral order... Short of agreement uniformly interpreted [treaties]... law must be based on facts of human and national behaviour over the centuries [customary law and the practice of nations], not on postulates and theories inspired by emotion, however noble." ⁽⁴³⁵⁾

To be sure, Germany's Nazi authorities had ordered and planned the commission of acts which were, to all but the

[217] most hardened, morally reprehensible. It was the Allies' aim to punish these acts. However, the minutes of the London Conference clearly reveal that those responsible for formulating the charter were aware that the majority of the acts for which they demanded retribution were not provided for in existing international law. As noted in the introduction to this thesis, a problem of legal revision arises when at least one party in the conflict admits a shortfall in the law and desires a change of the law in force (page 35). Though not publicly, but at least in the privacy of the London Conference, the Allies admitted the shortfall in existing international law. As the problem of revision through legislation in international law is so intertwined with politics, any attempt to render it completely juridical must be doomed to failure from the outset (page 35). Nevertheless, as we have seen, it is clear from the London Conference, and its results, that the Allies were not interested in tackling the problem within the accepted framework of revision in international law. As Sir Hartley Shawcross argued :

If this be an innovation, it is an innovation long overdue - a desirable and beneficent innovation fully consistent with justice, fully consistent with common sense and with the abiding purposes of the law of nations.... ⁽⁴³⁶⁾

the record of history shows that, in terms of international law, it was

[218] an innovation which was handled inappropriately. Indeed, of all the representatives present at the London Conference only Justice Jackson had any desire to change the law for the future. Yet even Jackson was fearful of creating legal precedent (page 160).

In 1943, the respected international lawyer, Hans Kelsen, noted that all conflicts between nations are "economic or political with respect to the interests which are involved" and legal, or otherwise, with respect to the "normative order controlling these interests" (page 31). No matter how morally praiseworthy the Allied efforts bring to trial the major German war criminals, the "normative order" controlling the Allied effort was clearly political.

The political importance of the destruction of National Socialism was clearly evident at the Potsdam and the Crimea conferences. The protocol of the Potsdam Conference, dated August 2, 1945, under the heading "Political Principles", emphasised the necessity to :

convince the German people that they have suffered a total military defeat and that they cannot escape responsibility for what they have brought upon themselves, since their own ruthless warfare and the fanatical Nazi resistance have destroyed the German economy and made chaos and suffering inevitable.

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To destroy the National Socialist Party and its affiliated and supervised organisations, to dissolve all Nazi institutions, to ensure that they are not revived in any form, and to prevent all Nazi and militarist activity or propaganda. ⁽⁴³⁷⁾

⁴³⁴ Ibid., pp. 48-50.

⁴³⁵ Edwin Borchard, 'War, Neutrality and Non-Belligerency.' *American Journal of International Law*. 1941 35: 618, 619. Brackets mine.

⁴³⁶ IMT, Vol. III, p. 104.

⁴³⁷ Potsdam Protocol, Section II, "The principles to govern the treatment of Germany in the initial control period", Part A, Political

Five months earlier the Report of the Crimea Conference (Yalta Conference), dated February 11, 1945, had declared :

We have agreed on common policies and plans for enforcing the unconditional surrender terms which we shall impose together on Nazi Germany after German armed resistance has been finally crushed... It is our inflexible purpose to destroy German militarism and Nazism and to ensure that Germany will never again be able to disturb the peace of the world... [and to] bring all war criminals to just and swift punishment....⁽⁴³⁸⁾

The clear message of the Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, dated January 22, 1945, is that the Nuremberg trial was not only a desirable and "just" method by which to punish the offenders, but also a way of to gain "maximum

[220] public support" and "receive the respect of history", while justifying American war-time policies and convincing the German people of the evil of their former government.⁽⁴³⁹⁾

The "respect of history" is merely a form of long-range public support. The ability of legal garb to marshal public support is undeniable.⁽⁴⁴⁰⁾ Although this thesis has not set out to discuss the seeming unfairness inherent in the punishment of only German (and Japanese) crimes, a word concerning Allied atrocities will at this point help to illustrate the benefits of a trial by standards of international law over executive action.

Jackson had noted at the London Conference that it would take a great deal of inventive thinking to distinguish, in terms of "military necessity", between the destruction wrought by the Allies on German towns and villages and that wrought by the Germans on Allied civilian areas (page 6). The Allies had matched the Axis Powers more than bomb for bomb. Dresden, Hiroshima and Nagasaki serve as ample reminders. Such wholesale destruction (which was arguably more reaction than self defence) is far easier to justify if one can look back and see it as self defence against, or an attempt to halt, a criminal aggressor intent upon dominating the world. Even better if this criminality is proven in court. It is the instigator of a criminal policy who is regarded as guilty. If the victim picks up the same cudgel, or for that matter a bigger one, it is self-defence or at least a justifiable

[221] reaction. Few people weep when the police find it necessary to shoot a convicted mass murderer who will not lay down his or her weapon. The criminal has been stopped and the end is almost universally seen to justify the means. In the classic spirit of Tom Sawyer's Aunt Polly, we are inclined to say : "You didn't get a lick amiss, I reckon."

The criminality of an opponent's actions will often have the effect of justifying, at least morally, and in some cases legally, the actions of the victim or those intent upon apprehending the criminal. At the London Conference, Jackson stated to the other delegates that :

Our interest in this matter is to see that the representations that have been made to our people that this was a criminal war and was carried out in criminal fashion are followed out by the procedure that is appropriate to trial of that kind of offense.... But we do not want to have a result which in the light of history will fail to justify the procedures which we have taken. We think of this as rather more than trying certain persons for some specific offenses. There is involved in this the whole Nazi drive to dominate the world. There is involved in this the basis on which the United States engaged in its lend-lease operation, the belief that this war was illegal from its inception.⁽⁴⁴¹⁾

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Quotes of a more noble intent may easily be found. Sir Hartley Shawcross, in his opening speech at Nuremberg, eloquently stated :

The British Empire with its Allies has twice, within the space of 25 years, been victorious in wars which have been forced upon it, but it is precisely because we realise that victory is not enough ; that might is not necessarily right ; that

Principles 3(ii) and 3(iii). found in J.A.S. Grenville, *The Major International Treaties 1914-1945*. (New York: Methuen, 1987) p. 232.

⁴³⁸ Report of the Crimea Conference (Yalta Conference), Section II, "The Occupation and Control of Germany", found in op. cit., *The Major International Treaties 1914-1945*. pp. 226- 227. Brackets mine.

⁴³⁹ op. cit., International Conference, Document I. Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, January 22, 1945. p. 6.

⁴⁴⁰ op. cit., *International Law*. p. 8.

⁴⁴¹ op. cit., International Conference, Document XVII. Minutes of Conference Session, June 29, 1945. p. 113.

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lasting peace and the rule of International Law is not to be secured by the strong arm alone, that the British Nation is taking part in this trial. ⁽⁴⁴²⁾

Nobility, however, does not presuppose legality. The expectations placed on the Nuremberg trial of 1945-1946 are well summed up by the Tusas :

The Trial of the Nazi Leaders at Nuremberg was not held just to establish their guilt and decide whether to punish them for committing crimes. It was part of the search for a better way to control strong human impulses, aggression and revenge. It was an attempt to replace violence with acceptable and effective rules for human behaviour. ⁽⁴⁴³⁾

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Yet, when only the victor acts as the plaintiff, legislator, prosecutor, judge and executioner (in that order), after the actual commission of the offence, international law and order is determined by might alone. A "legal process" so conducted comes dangerously close to revenge. A court so established may exercise only a de facto authority by force of the stronger. ⁽⁴⁴⁴⁾ It seems that such lofty aspirations as those expressed by Sir Hartley Shawcross in his opening speech have a hollow ring when viewed in this light. Indeed Adolf Hitler's words, quoted by Shawcross at the very beginning of his speech, take on an ominous new meaning :

I shall give a propagandist cause for starting the war, never mind whether it be true or not. The victor shall not be asked later on whether we tell the truth or not. In starting and making a war not the right is what matters but victory - the strongest has the right. ⁽⁴⁴⁵⁾

By May 1945, The Allies had proved themselves to be the strongest. Four months after victory they drew up the London Agreement and Charter. It must be granted that the Allied aim, in trying the enemy at the end of the war, may legitimately have been political, while at the same time the process by which individuals are brought to "justice"

[224] may be legal. Also, all law necessarily relies on a measure of might for implementation. However, when the process by which the enemy is brought to "justice" is not governed by predetermined law then it becomes political, reliant solely on the might and whim of the victor. The Allied desire to punish certain individuals for the full extent of what was perceived to be the misdeeds of the Nazi régime, led them consciously, though not publically so, to step outside the bounds of legality. In so far as the Nuremberg trial of 1945-1946 was a political act it was simply an extension of the war, the last battle in a clash of political ideologies, a battle which, although not fought with the traditional machinery of war, proved for Germany's Nazi leaders far more deadly.

442 op. cit., Opening Speeches, ps. 47.

443 op. cit., *The Nuremberg Trial*. ps. 14.

444 G.A. Finch, 'The Nuremberg Trial in International Law.' *The American Journal of International Law*. 1947 41[1]: 35. For the same issue raised after the First World War, see 'The Danger of the German Trials.' *The Nation*. (London) 1920 26[February 7]: 629-630.

445 op. cit., Opening Speeches, p. 47.

[In the manuscript, the endnotes occupy pp. 225-253.]

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Appendix 1

Charter of the international Military Tribunal, August 8, 1945. Article 6.

Article 6... The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility :

(a) *CRIMES AGAINST PEACE* : namely, planning, preparation, initiation or waging a war of aggression, or war in violation of international treaties, agreements and 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 and customs of war. Such violations shall include, but not be limited to, murder illtreatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of 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 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.

Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan to or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution, of such plan.

Text as printed in *Trial of the Major War Criminals Before the International Military Tribunal Nuremberg 14 November 1945-1 October 1946*. (Nuremberg : Secretariat of the Tribunal, 1947) Vol. I, p. 11.

*Comma substituted in place of semicolon by Protocol of 6 October 1945.

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Appendix 2

Treaty of Versailles, June 28, 1919. Part VII, Penalties, Articles 227-230.

Article 227.

The Allied and Associated Powers publicly arraign William II. of Hohenzollern, former German Emperor, for a supreme offense against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defense. It will be composed of five judges, one appointed by each of the following Powers : namely, the United States of America, Great Britain, France, Italy and, Japan.

In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed. The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-

Emperor in order that he may be put on trial.

Article 228.

The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishment laid down by law. This provision applies notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies. The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.

Article 229.

Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power. Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the powers concerned. In every case the accused will be

[256] entitled to name his own counsel.

Article 230.

The German Government undertakes to furnish all documents and information of every kind, the production of which may be considered necessary to ensure the full knowledge of the incriminating acts, the discovery of offenders and the just appreciation of responsibility.

Text as printed in *The Times* [London] June 28, 1919, Supplement p. iv. published the same day as the signing of the treaty.

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Appendix 3

Pact of Paris (Kellogg-Briand), August 27, 1928. Prologue, paragraph 3 and Articles I-II.

Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty.

Article I.

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article II.

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Text as printed in F.L. Israel (Ed), *Major Peace Treaties of Modern History 1648-1967*. (New York : Chelsea House Publishers, 1967) pp. 2394-2395.

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Appendix 4

Moscow Declaration on War Crimes, November 1, 1943. Paragraphs 6 and 10.

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At the time of the granting of any armistice to any Government which may be established in Germany, those German officers and men and members of the Nazi Party who have been responsible for or taken a consenting part in the above atrocities, massacres, and executions, will be sent back to the countries in which their abominable deeds were done, so that they may be judged and punished according to the laws of those liberated countries and of the free Governments which will be erected in them....

The above declaration is without prejudice to the case of German criminals whose offences have no particular geographical location, and who will be punished by joint decision of the Governments of the Allies.

Text as printed in 'The Moscow Declaration on War Crimes.' *The Australian Law Journal*. 1943 17 [8] : 248.

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