

**RETROSPECTIVITY AT NUREMBERG:  
THE NATURE AND LIMITS OF A SCHMITTIAN ANALYSIS**

**By**

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## ABSTRACT

This doctoral thesis firstly examines the issues surrounding the retrospective deployment of criminal law in the context of international War Crimes Trials, specifically the empirical model presented by the Nuremberg Trial of the Major War Criminals 1945-46 at the end of the Second World War. Secondly, it evaluates the theoretical perspectives and ambiguities within the writings of Carl Schmitt during the period from 1912 until the immediate aftermath of WWII. Thirdly, it extrapolates an analytical model from Schmitt's work with which to scrutinise and evaluate the utilisation of *ex post facto* criminal law at Nuremberg.

Established literature deals comprehensively with the prevailing state of international law prior to Nuremberg, whilst there is also a wealth of documentary evidence and academic commentary, both laudatory and critical upon the prelude to the Trial proceedings and the ensuing juridical process. This thesis, however, focuses upon the deficits inherent within the hitherto largely undifferentiated notion of 'retrospectivity' and the formulation of an appropriate typography of the retroactive strands latent within it. Following an elucidation of the historical significance and provenance of the doctrine: *nullum crimen sine lege nullum crimen sine lege praevia; nulla poena sine lege praevia*, that is, 'no crime and no punishment without previously established law', it explores and evaluates the salient provisions of the Nuremberg Charter unilaterally enacted by the Allies on 8<sup>th</sup> August, 1945, under which the entire trial proceedings were subsequently governed. The segments of the Charter ostensibly reliant upon the deployment of *ex post facto* criminal law are extracted, analysed and linked to the relevant strands of retrospectivity, identified within the postulated typography.

The thesis also explores the defining qualities and assumptions of a Schmittian approach to domestic and international law and the extent to which this is derived from the seminal theory of Thomas Hobbes. Several monographs and numerous articles have been devoted to scrutiny of the writings of Schmitt but none have dealt specifically with his international law perspective towards retrospectivity or, in consequence, the nature and limits of such analysis. Extrapolation of an analytical model/interpretative scheme and application of it to the specific issues arising from the concept of retrospectivity, in the particular context of Nuremberg, also facilitates formulation of a critique of the viability of this stance. In an age of seemingly burgeoning *war crimes* and *crimes against humanity*, the need to punish alleged perpetrators is manifest. This thesis, however, suggests that even a Schmittian perspective is capable of illuminating the toxic ramifications of violation of the 'rule of law' in furtherance of this perceived imperative.

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I dedicate this thesis to my beloved father, Leslie who died in 2010 and to all others, like him, who never allow their humanity to succumb to power.

**CHAPTER ONE**

**INTRODUCTION: INTO THE VORTEX**

## CHAPTER 1

### INTRODUCTION: INTO THE VORTEX

At the end of the Second World War (1939-45), it befell the nations emerging triumphant from this devastating conflict – Britain, United States, France and Russia - to exact retribution against the Nazi perpetrators of some of the worst atrocities the world had ever, to that point, witnessed. With the death cries of millions of murdered human beings ringing in their ears, the victors swiftly instigated a host of investigative and juridical processes as the preamble to indictment of those they adjudged bore primary responsibility for the carnage of the war. Culminating in the Nuremberg Trial of the Major Nazi War Criminals (1945-46),<sup>1</sup> proceedings of momentous import to the provenance, implementation and evolution of international law, these proceedings were to secure a measure of vindication for the victims' sacrifice – the majority by then beyond the grave.

At the centre of the vortex the Trial process bestirred was the doctrine of *nullum crimen, nulla poena sine lege*, that is, 'no crime and punishment without pre-existing law',<sup>2</sup> and pervading the proceedings was the alleged violation of this putative embargo against *ex post facto* crime creation and punishment. It is this *legality* principle, conjoined with the complex ramifications it connoted for the sanctity and survival of the 'rule of law' within the international realm that comprises the foundation and catalyst for the ensuing

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<sup>1</sup>*Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946*, 42 vols. U.S. Government Printing Office, Washington, D.C. (Nuremberg: International Military Tribunal, 1947), 2 IMT 99 (cited throughout this work by the Volume number, followed by IMT and page number). The Trial transcript is also available online at: <<http://www.yale.edu/lawweb/avalon/imt/menu.htm>>. Throughout this volume and thesis, where short quotations from published works appear in the body of the text, these have been uniformly italicised for emphasis but are not italicised in the originals from which they have been transcribed.

<sup>2</sup> On the issue of retrospectivity in the context of criminal law, see for example Kif Augustine Adams 'What is Just?: The Rule of Law and Natural law in the Trials of Former East German Border Guards' *Stanford Journal of International Law* Vol. 29, (1992-1993), 271-314; Jill E. Fisch 'Retroactivity and Legal Change: An Equilibrium Approach' *Harvard Law Review*, Vol. 110, (1997), 1055-1123; Kenneth S. Gallant *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2008); James Popple 'The right to protection from retroactive criminal law' *Criminal Law Journal* Vol. 13, No.4, August 1989, 251-62; Jeremy Waldron 'Retroactive Law: How Dodgy was Duynhoven?' *Otago Law Review* Vol. 10, (2004), 8; A. D. Woosley 'What is wrong with retrospective law?' *The Philosophical Quarterly*, Vol 18, No.70 (Jan.1968), 40-53; Beth van Schaak, 'Crimen Sine Lege: Judicial Lawmaking at the intersection of Law & Morals' February 2008 accessible online at [http://works.bepress.com/beth\\_van\\_schaack/1](http://works.bepress.com/beth_van_schaack/1)

discussion and evaluation.<sup>3</sup> More specifically, what this thesis seeks to formulate is one particular interpretative model through which the instantiation of retrospective penalisation at Nuremberg is susceptible to scrutiny and analysis. This entails an inquisition, first, into the empirical convolutions and normative controversies the above process was destined to engender, from embryonic emergence of the Allies' agenda to consummation of their juridical strategy. Next, the legal and political philosophy of Carl Schmitt, the 'Crown Jurist' of the Third Reich, whose oeuvre coincided with one of the most tempestuous phases ever in German history.<sup>4</sup> Last, from a Schmittian perspective, the dilemmas that the Nuremberg proceedings educed and the treatment of the *legality* principle concomitant with them.

Inextricable from the debate about the violability of the *legality* principle is the doctrinal tension between accounts of law derived from the positivist tradition and dichotomous perspectives reliant on immutable precepts of natural law. Evaluation of the respective predilection of the parties to the proceedings for one or other of these jurisprudential resources and the subsequent instrumentalisation of each appears, at first glance, a well-worn path.<sup>5</sup> No less intensively scrutinised is the extent to which the Allies utilised *ex post facto* penalisation to secure the conviction of the defendants and the impact of their meticulously-crafted strategy upon the intrinsic legal legitimacy of the Nuremberg proceedings.<sup>6</sup> Evident though it is that an impressive body of literature has accumulated

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<sup>3</sup> On the pivotal components of the 'rule of law' see A.V. Dicey *Introduction to the Study of the Constitution* (London: Macmillan, 1915), where Dicey enunciates three core principles: firstly that no man can be punishable except for a distinct breach of existing law; secondly that no man is above the law, regardless of rank or social standing; thirdly that a case may always be brought before the courts to protect the rights of private persons. It is the first of these that is crucial to any putative embargo on retrospective penalisation.

<sup>4</sup> Carl Schmitt was an influential German theorist who delivered insights crucial to the survival of the ill-fated Weimar Republic (1919-1933) and the subsequent rise to dominance of the National Socialist regime in 1933. He concentrated initially on the promotion of authoritarian rule within the legal-constitutional order of Germany but when threatened by the SS in 1936, turned his attention to the international realm. An account of his legal and political theory is contained *infra*: Chapters 3-5.

<sup>5</sup> See for example Gordon W. Forbes, 'Some Legal Aspects of the Nuremberg Trial' *Canadian Bar Review* Vol. 24, (1946), 584; George A. Finch, 'The Nuremberg Trials and International Law' *American Journal of International Law*, Vol. 41 (1947), 20; A.L. Goodhart 'The Legality of the Nuremberg War Trials' *Juridical Review* Vol. 58, (1946), 8; Leo Gross 'The Punishment of War Criminals: The Nuremberg Trial' *Netherlands International Law Review*, Vol. 4, (1955), 356; Jerome Hall 'Nulla Poena Sine Lege' *Yale Law Journal* Vol. 47 No.2, (1937-38), 165; F.B. Schick 'The Nuremberg Trial and the International Law of the Future' *American Journal of International Law*, Vol. 41 (1947), 770; Quincy Wright 'The Law of the Nuremberg Tribunal' *American Journal of International Law* Vol. 41 (1945), 49.

<sup>6</sup> See for example Peter Calvo-coressi *Nuremberg* (London: Chatto & Windus, 1947); J.H. Morgan *The Great Assize* (London: John Murray, 1948); Werner Maser *Nuremberg: A Nation on Trial* (London: Penguin Books 1979); Bradley F. Smith *Reaching Judgment at Nuremberg* (London: Andre Deutsch Limited, 1977); Telford Taylor *The Anatomy of the Nuremberg Trials* (New York: Alfred A. Knopf, 1992).

around the retrospective issues the Trial generated, the analytical approaches these texts propound tend, however, to treat the concept of retrospectivity as an undifferentiated term of art. As such, they contain little deliberation of the *ex post facto* strands potentially concealed within it. To this end, Chapter 2 provides an account of the Trial process, with focus on the putatively retrospective elements of the Charter that the Allies devised and implemented, in August 1945, as the legislative instrument by which the ensuing proceedings were to be governed. Consideration of the hitherto unexplored facets of ‘retrospectivity’ appears in the closing stages of this chapter, in concert with the typography this exposition evokes.<sup>7</sup>

What Chapters 3 and 4 then sequentially explicate is the chequered journey that Carl Schmitt traverses through his native Germany from the 1910s until the late 1930s, by which stage the epicentre of his theoretical endeavours shifts from domestic to international arenas. It is on the latter dimension that Chapter 5 focuses with an account of the invective Schmitt launches against the transformation of the concept of war and with it, the fateful reconfiguration of the global legal order it augured. Evaluation of this analysis, in counterpoint to the legal and political theory Schmitt espouses in the domestic domain, facilitates the formulation of an interpretative model through which the Nuremberg proceedings may be construed. What this entails is an analytical and discursive exploration of the intellectual arguments that Schmitt advances, either explicitly or by implication, for preservation of the ban on retrospective penalisation or its transgression. Integral to synthesis and evaluation of a Schmittian model is detailed elucidation of its essential nature accompanied by an exacting dissection to enable identification of the potentialities and limits, if any, latent within it. Contiguous with this process is examination of the pre-World War II doctrinal status of the *legality* principle and the consequences of its violation.

Just as the Nuremberg proceedings continue to engender a voluminous quantity of secondary literature, Schmitt too has attracted a wealth of critical scrutiny, not least in the form of several influential monographs from highly esteemed authors.<sup>8</sup> None of

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<sup>7</sup> This typography of retrospectivity was published within the following: Susan M. Twist, ‘Rethinking retrospective criminality in the context of War Crimes Trials’, *Liverpool Law Review* Vol. 27, (2006), 31-66

<sup>8</sup> For example Gopal Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt* (London and New York: Verso Press, 2000); Joseph W Bendersky *Carl Schmitt Theorist for the Reich* (Princeton, New Jersey: Princeton University Press, 1983); Paul Gottfried *Carl Schmitt Politics and Theory* (New York and London: Greenwood Press, 1990); John Mc.Cormick *Carl Schmitt’s Critique of Liberalism Against*

these, however, comprise a systematic treatment of Schmitt's approach to the validity of *ex post facto* penalisation in the international theatre, though Balakrishnan, in particular, discusses aspects of this within the municipal context of Nazi Germany.<sup>9</sup> Without specific reference to Schmittian theory, Sampford expressly confines the scope of his work to the internal legal-constitutional orders of nation states.<sup>10</sup> For his part, Gallant, in a masterly treatment of the *legality* principle as it operates within international law and the complex interrelationship between the relative hierarchy of municipal law and its universalistic counterpart, includes no more than the briefest allusion to what he deems an authoritarian perspective of retrospectivity.<sup>11</sup> What is still lacking, therefore, is a detailed assessment of the doctrinal components of Schmitt's legal and political theory and extrapolation of them in both domestic and international contexts, specifically designed to illuminate - or expose - Allied strategy at Nuremberg in relation to the *legality* principle.

The themes this thesis seeks to encompass - revolving as they do around the putative embargo on retrospective penalisation and the inferences that consideration of them evokes - aspire to pique the attention of those, for example, engrossed in the pursuit of human rights agendas. No less so do they impinge on the intellectual and discursive practice of international criminal law; Schmittian jurisprudential theorists and those who derive scholarly or political fascination from study of mainstream liberal legality and its deficits. Equally pertinent to the debate that has, at intervals, elicited powerful contributions from Hans Kelsen,<sup>12</sup> Lon Fuller<sup>13</sup> and Herbert Hart<sup>14</sup> concerning, for

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*Politics as Technology* (Cambridge: Cambridge University Press, 1997); Jan-Werner Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (New Haven and London, Yale University Press, 2003); William E Scheuerman *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge, Massachusetts: MIT Press, 1994); William E Scheuerman *The End of Law* Lanham: Rowman & Littlefield Publishers Inc, 1999); Kam Shapiro *Carl Schmitt and the Intensification of Politics* (Lanham: Rowman & Littlefield Publishers Inc, 2008); George Schwab *The Challenge of the Exception* (New York: Greenwood Press, 1989).

<sup>9</sup> See *ibid*: Balakrishnan, 198-201.

<sup>10</sup> Charles Sampford *Retrospectivity and the Rule of Law* (Oxford: Oxford University Press, 2006)

<sup>11</sup> Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2008), 44-45. Notably, Gallant refers specifically to the stance that Schmitt appeared to advocate in the domestic context of Nazi Germany.

<sup>12</sup> Hans Kelsen 'The Rule against Ex Post Facto Laws and the Prosecution of Axis War Criminals' *The Judge Advocate Journal*, Vol.2 (Fall-Winter, 1945), 46.

<sup>13</sup> See Lon L. Fuller 'Positivism and Fidelity to Law – A Reply to Professor Hart' *Harvard Law Review* Vol. 71, (1958), 630; also Lon L. Fuller *The Morality of Law* Revised edition (New Haven and London: Yale University Press, 1969).

<sup>14</sup> See H.L.A. Hart 'Positivism and the Separation of Laws and Morals' *Harvard Law Review*, Vol. 71, (1958), 593; also H.L.A. Hart *The Concept of Law* Second edition (Oxford and New York: Oxford University Press, 1994).

example, the legitimacy of post-WWII disposition of ‘grudge informers’ during the Nazi regime, the account that ensues aims, above all, to engage those intrigued by the relative pre-eminence of law and power. It is on this pivotal issue that the empirical and normative dilemmas educed by the Nuremberg proceedings appear fatefully to dovetail with the provocative insights that emanate from scrutiny of Carl Schmitt’s legal and political theory.

What this analytical enterprise, therefore, demands is exploration of the jurisprudential justification for the Nuremberg process, as well as meticulous perusal of the textual evidence that bears witness to the system and philosophy that Schmitt propounded. Feasible as it is to elicit comprehension of the issues under investigation from a purely doctrinal approach to these sources or by implementation of a socio-legal or historical inquiry, neither is the optimal methodology here. Preferable instead is an approach that facilitates interrogation not merely into the textual content of Schmitt’s work but also enables critical consideration of the socio-political context and beliefs underlying it. Beneath the bedazzling philosophical arguments that overtly characterise his writings lurk still more enigmatic subtexts that Schmitt appears deliberately to veil. Emblematic of the challenges this thesis needs to confront are also the ostensible inconsistencies that suffuse his scholarly output. Conflated with the dilemmas – doctrinal or otherwise - that retrospectivity invokes, the complexity of Schmitt’s work forestalls a purely descriptive account of them.

What, in contrast, this project requires is an interpretative hermeneutical approach that has at its core a rapier of lacerating penetration with which to forensically evaluate the available text-based evidence. Only by critical examination of these texts to discern whether within them rest the quintessential qualities of coherence, contextual groundedness, existential vibrancy and contemporary relevance is it possible to unmask and elucidate the nuances, the inner shades of meaning within the philosophy that Schmitt professes to articulate. Armed with this ‘hermeneutics of suspicion’,<sup>15</sup> no longer is it appropriate to accord unqualified credence to the claims enunciated in his work as an entirely self-ingenuous reflection of the agenda that underpins them. Only through a process of assiduous extrapolation and deduction from the theoretical

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<sup>15</sup> On this point, see Paul Ricoeur *Hermeneutics and the Human Sciences: Essays on Language and Interpretation* ed. and trans. J.B. Thompson (Cambridge: Cambridge University Press, 1981), 231.

vacillations Schmitt exhibits, during the period under scrutiny, is it feasible to formulate an interpretative model through which to construe the treatment of *ex post facto* penalisation at Nuremberg. More crucial still is this methodology when endeavouring to conjecture the approach that a *consistent Schmittian* would adopt, if confronted by empirical and normative challenges of equivalent profundity and significance.

Fitting it is, perhaps, to analyse the post-WWII juridical disposition of the Nazis from the perspective of their contemporary compatriot whose experiences and perceptions were hewn from the single concrete reality that enmeshed them all. To the same fate that awaited the ‘Major Nazi War Criminals’ at Nuremberg, Carl Schmitt was almost himself condemned. Hardly surprising it is, therefore, that the Trial process, and all it connoted, acquired for him a peculiarly intense piquancy. It is these proceedings and the manifold dilemmas they evoked in relation to the *nullum crimen, nulla poena sine lege* doctrine that this thesis endeavours to explain and assess.

**CHAPTER 2**

**NUREMBERG: UNVEILING AND SCRUTINY OF THE PERVASIVE  
RETROSPECTIVE STRANDS**

## CHAPTER 2

### NUREMBERG: UNVEILING AND SCRUTINY OF THE PERVASIVE RETROSPECTIVE STRANDS

#### Introduction

This Chapter seeks to give an account of a trial, underpinned by the most gruesome evidence ever, at that stage, to be brought into a judicial forum. One where contemporaneous attention was understandably focussed on atrocities without parallel in recorded human history; where a watching world desperately sought reassurance that ‘justice’ had been exacted; that the Nazis had met their nemesis and the world was safe once more. The atrocities for which the Defendants were indicted and ultimately convicted were established by evidence, often produced by their own hand.

Though the empirical basis for the Trial was essentially incontrovertible, the legal foundation for the proceedings bequeathed a legacy as fraught as the factual content was appalling. It is this aspect which is dealt with here: a story of a momentous clash on several levels - a struggle between the perceived political rectitude of the Allies against the tyranny of the Nazis; between the objective notions of morality and malignity. This conflict was distilled into a more finely-tuned debate concerning the juristic essence of the Trial. Here was a multi-layered confrontation: between the common law system of Britain/US *and* the civil law regime of Continental Europe; between two jurisprudential traditions, a positivist as opposed to a natural law approach; in the final analysis, between the supremacy or the subversion of the Rule of Law itself:

‘The Nuremberg Trial of 1945 was not remarkable only because it was something new in the history of international law. It was a great drama in which the most fundamental moral and political values were the real personae. For persons of liberal convictions and a strong commitment to legalistic politics, it was a genuine moral crisis.’<sup>1</sup>

At the heart of the debate lay the sanctity of the doctrine *nullum crimen sine lege, nulla poena sine lege*: ‘no crime without law, no punishment without pre-existing law’.<sup>2</sup> This

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<sup>1</sup> Judith Shklar *Legalism: Law, Morals, and Political Trials* (Cambridge: Harvard University Press, 1964), 155. Throughout this volume and thesis, where short quotations from published works appear in the body of the text, these have been uniformly italicised for emphasis but are not italicised in the originals from which they have been transcribed.

<sup>2</sup> Sheldon Glueck *War Criminals: their Prosecution and Punishment* (New York: Alfred A Knopf, 1944), 95 referring in 1944 to the prospect of a Convention being especially enacted to establish an International

principle had its roots in Roman jurisprudence and later found favour in legal regimes around the world. It was, for example, codified in Article 4 of the French Penal Code, Article 116 of the 1919 Weimar Constitution of Germany and Section 9 Paragraph 2 of Article 1 of the Federal Constitution of the United States. When it fell to the US Supreme Court to construe the clauses of the Constitution that prohibited *ex post facto* legislation, Chief Justice Marshall defined an *ex post facto law* as one which renders an act punishable in a manner which was not punishable when it was committed.<sup>3</sup> Similarly, in Britain, Erle CJ sitting in the case of *Midland Railway Co. v Pye*<sup>4</sup> declared that ‘*it manifestly shocks one’s sense of justice that an act, legal at the time of doing it, should be made unlawful by some new enactment*’. Only two years after the conclusion of the Trial, endorsement of the precept was to be found in Article 11 (2) of the Universal Declaration of Human Rights 1948.<sup>5</sup> Retrospectively enacted criminal law and imposition of *ex post facto* punishment putatively violated this doctrine.<sup>6</sup> Linguistically definable as *retrospectivity*, *retroactivity*, *ex post facto* and *post factum* law, the *legality* principle - or the categorical embargo on retrospective penalisation - was to feature prominently in the legal legitimacy of the Nuremberg process.<sup>7</sup> Two pivotal questions arose: firstly, *were* the Allies reliant to any extent upon the utilisation of retrospective criminal law? Secondly, if *ex post facto* law *was* deployed during the Trial, did this serve to undermine the validity of the proceedings?

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Military Tribunal: “It would be insisted by purists that such a statute would run counter to the doctrine ‘no crime and no punishment without pre-existing law’, a principle deemed to be a minimum standard in Western civilisation” (quoting in the latter regard the *Digest of the Opinions of the Judge Advocate General of the Army*, 1912 (1917), 511 (8B)); see *inter alia* Hans Ehard ‘The Nuremberg Trial Against the Major War Criminals and International Law’, *American Journal of International Law*, Vol. 43, No.2, (1949), 223-245 for a concise summary of the issues implicit within the ‘*nulla poena*’ maxim; also Hans Leonhardt ‘Nuremberg Trial: A Legal Analysis’, *The Review of Politics*, Vol.11, No.4 (Oct. 1949), 449-476.

<sup>3</sup> *Fletcher v Peck* 6 Cranch 138 *per* Marshall C.J. A fuller definition was provided by the Supreme Court in *Calder v Bull* 3 Dallas 386.

<sup>4</sup> 30 L.J.C.P. 313.

<sup>5</sup> An account of the post-Nuremberg developments in international law in relation to the *nullum crimen nulla poena sine lege* maxim appears in the latter stages of this Chapter.

<sup>6</sup> It could be argued that the common law, including the criminal law, developed for many years in England, untrammelled by the principle of non-retroactivity. However, it appeared to be accepted in *Kneller v DPP* [1973] AC 435, that the English Courts no longer claimed the right to create new criminal offences, this despite the fact that the Court, in that case, seemed to invent the offence of outraging public decency.

<sup>7</sup> These terms are used interchangeably throughout this thesis. Any subtle distinction that arguably exists between the terms ‘retroactivity’ and ‘retrospectivity’ has no impact upon the defendant in terms of the legitimacy or outcome of the proceedings.

These issues were to elicit a struggle for ascendancy between the positivist and natural law traditions. The one subscribes to a system of legal cognition based upon a regulatory substantive code fundamentally detached from notions of morality. Derived from positively given provisions - including, on some readings, long-established custom – an overlap between the ‘is’ of positive law and the ‘ought’ of morality may, on occasions, coincidentally occur. Never, however, is the validity of legal norms wholly conditional upon compliance with natural law in the sense of immutable and universally binding concepts that hover above the positive legal system. Paramount within legal positivism is the presumption that a sovereign or quasi-sovereign entity issues commands to subjects as private persons – backed when appropriate by sanctions – that must be obeyed:<sup>8</sup>

‘Positivism considers...law to be a unified system of rules created deliberately and explicitly by states as an expression of a state’s act of will and decision. The identification of law as a system of rules is essentially a *descriptive* task that makes reference to formal criteria devoid of questions of morality or regarding how law “ought to be”.’<sup>9</sup>

In contrast, natural law is characterised in its classical form by recognition of a non-conventional linkage between the notions of law and morality; indeed, by the affirmation of a conceptual interrelationship. To this end, Aquinas asserts that the validity of human law rests on its conformity to the content of the natural law, conceptualised as universal and immutable principles, available at all times and in all places for those whose responsibility it is to enact and develop the law.<sup>10</sup> Fundamental also is the natural reason of human beings through whose rational and reflective nature the discoverability of the criteria for justice emerges from a process innate within them.<sup>11</sup> Augmenting the ubiquitous quality of natural law is its transcendence over positive law. To the extent that positive law deviates from the precepts of a transcendent natural law, this renders it unworthy of the status of ‘law’. Integral and indivisible from the process of human law-making is this crucial and inextricable manacling of legal

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<sup>8</sup> Numerous interpretations of positivism exist ranging from the command theory of Bentham and Austin to the soft positivism, for example of Hart. Positivist theory is modified by requirements of ‘due process’ which are designed to forestall the arbitrary implementation of law and imposition of sanctions.

<sup>9</sup> Michael Salter ‘Methodological Issues within the Nuremberg War Crimes Trials’, *Law and History Current Legal Issues* Vol. 6, (2003), 375, 388-389.

<sup>10</sup> See Thomas Aquinas *On Law, Morality and Politics* (Indianapolis: Hackett Publishing Co, 1988).

<sup>11</sup> Eternal law comprises those laws by which the universe is scientifically ordered. These are immutable and constant. Classic natural law likewise recognises the existence of ‘divine law’, the precepts of which are determinable only through divine revelation.

norms and standards to morality. Discrepancies between the two denude the putative norm of validity:

‘This law of nature, being co-equal with mankind and dictated by God himself, is of course superior to any other. It is binding all over the globe and in all countries and at all times; no human laws are of any validity if contrary to this; and such of them as are valid, derive all their force and all their authority, mediately or immediately, from this origin.’<sup>12</sup>

Epitomised by this dichotomy between positivist and natural law perspectives, the Nuremberg process was to occur on myriad levels. What was ostensibly a contest between ideologies, of competing values, of ‘goodness’ and ‘evil’, masked another dark and fascinating conflict, centred upon legal rules and principles. Was the Trial governed by principles, dispassionately fashioned and implemented? Rather, were the legal precepts upon which the Tribunal was founded, formulated from a cold pragmatism, by which the eternal tension between ends and means was to witness the subordination of ethics to expediency? *If* legal niceties were sacrificed along the way, was this necessary in furtherance of the greater good? This Chapter seeks to explore this enduring dilemma.

Following a brief synopsis of the Trial in Section 1, the second section then seeks to set the Nuremberg proceedings in their historical context. In the dying embers of the Second World War, the Allies had begun to formulate their proposals for disposition of the Nazi ‘war criminals’. The Trial was to represent the embodiment of their aspirations to subject the perpetrators of wartime atrocities to the full force of ‘justice’. The Charter, appended to the London Agreement of 8<sup>th</sup> August 1945, was the legislative device by which this was achieved.<sup>13</sup> It is impossible to over-emphasize the significance of this Charter and much of the ensuing discussion is occupied by a detailed scrutiny and evaluation of its content and legitimacy.

Section 3 contains a survey of the pre-emptive devices deployed by the Allies. These were intended to eliminate or nullify routes, which would have otherwise availed the Defence had they remained extant at the date of the proceedings. More specifically, Article 3 of the Charter forestalled any incursions into the jurisdiction of the Tribunal,

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<sup>12</sup> William Blackstone *Commentaries on the Laws of England* (Chicago: The University of Chicago Press, 1979), 41.

<sup>13</sup> The Nuremberg Charter is available online at: <<http://www.yale.edu/lawweb/avalon/imt/menu.htm>>

whilst Articles 7 and 8 precluded reliance by the Defendants upon the arguably established defences of ‘acts of state’ and ‘superior orders’. The procedural and evidential provisions of the Charter also enabled the Tribunal to reject any Defence submissions founded upon the *tu quoque* defence. Had not potential defences been ousted or nullified by the Allies’ stratagem, judicial proceedings would never have been a viable option for the victorious nations. If the effectiveness of the Trial were measurable simply in terms of its conviction rate, the process would have been doomed to failure from the moment of its inception. Hence, discussion of the substantive charges laid against the Defendants is prefaced by consideration of those ‘pre-existing’ defences and their peremptory abrogation by the Charter.

Sections 4 and 5 then focus upon the provisions of Article 6. Situated at the core of the Trial, this segment of the Charter comprises the ‘offences’ of *conspiracy*, *war crimes*, *crimes against humanity* and *crimes against peace*. Reflective of the Allied rationale underpinning the proceedings, it is the conspiracy indictment which is initially placed beneath the spotlight. Attention is then transferred to the remaining three components of Article 6, the debate dealing sequentially with the escalating retrospective connotations of each ‘offence’. Attribution of individual responsibility under international law constitutes the nub of Section 6. Without personal accountability for the indicted ‘offences’, the Defendants would surely have been acquitted. This issue was therefore pivotal to the proceedings. Perversely, the notion of *organisational guilt*, comprised within Articles 9 and 10 of the Charter, was destined to create problems no less easy to resolve. Section 7 highlights the controversy engendered by this concept.

Finally, Section 8 focuses on the aftermath of the Trial: the subsequent evolution of international law, in part, founded upon the Nuremberg legacy; the uncomfortable debt of gratitude owed to the judicial process instigated by the Allied nations in the wake of the Second World War. The Chapter concludes with a brief visit to an array of unresolved issues arising from the Trial. In essence, was legal legitimacy ultimately sacrificed upon an altar of utilitarian pragmatism?

## 1 The Trial

‘That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgement of the law is one of the most significant tributes that Power has ever paid to Reason.’<sup>14</sup>

‘The Defence of all Defendants would be neglectful of their duty if they acquiesced silently in a deviation from existing international law and in disregard of a commonly recognised principle of modern penal jurisprudence.’<sup>15</sup>

Two comments in juxtaposition, the first the ringing endorsement of the United States Chief Prosecutor Robert Jackson, the other the stinging rebuke of Defence Counsel on behalf of all the Defendants. Therein lies exposed for the scrutiny of posterity the intrinsic ambiguity of the Nuremberg Trial of the Major Nazi War criminals, a trial of twenty two Defendants<sup>16</sup> commencing on 20<sup>th</sup> November 1945 and culminating in the Judgment of the International Military Tribunal on 30<sup>th</sup> September and 1<sup>st</sup> October 1946. At its conclusion, three Defendants were acquitted<sup>17</sup> and nineteen convicted, twelve of whom were sentenced to death.<sup>18</sup> With the exception of Bormann, who was tried in absentia,<sup>19</sup> and Goering who committed suicide, the remainder were executed, in private, by hanging on 16<sup>th</sup> October 1946.<sup>20</sup>

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<sup>14</sup> Opening address of Justice Robert Jackson, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946*, 42 vols. U.S. Government Printing Office, Washington, D.C. (Nuremberg: International Military Tribunal, 1947), 2 International Military Tribunal 99 (cited throughout this work by the Volume number, followed by IMT and page number). The Trial transcript is also available online at: <<http://www.yale.edu/lawweb/avalon/imt/menu.htm>>

<sup>15</sup> Motion adopted by all Defence Counsel 19<sup>th</sup> November 1945 1 IMT 169, available online at <<http://www.yale.edu/lawweb/avalon/imt/proc/v1-30.htm>>

<sup>16</sup> Hermann Goering, Joachim von Ribbentrop, Wilhelm Keitel, Alfred Rosenberg, Julius Streicher, Fritz Sauckel, Alfred Jodl, Arthur Seyss-Inquart, Rudolf Hess, Walter Funk, Erich Raeder, Baldur von Shirach, Albert Speer, Constantin von Neurath, Karl Doenitz, Hjalmar Schacht, Franz von Papen, Hans Fritzsche, Ernst Kaltenbrunner, Hans Frank, Wilhelm Frick and Martin Bormann (tried in absentia).

<sup>17</sup> Schacht, Fritzsche and von Papen.

<sup>18</sup> Goering, Ribbentrop, Keitel, Jodl, Rosenberg, Frick, Seyss-Inquart, Sauckel, Bormann, Kaltenbrunner, Frank and Streicher.

<sup>19</sup> This was permitted under Article 12 of the Charter which formed part of the London Agreement dated 8<sup>th</sup> August 1945: Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis: 13 US Dept of State Bull 222 (1945); Trial of War Criminals (Dept of State Publication 2420, Washington, 1945), 13.

<sup>20</sup> Rebecca A West *A Train of Powder* (New York: Viking Press, 1955), 52: ‘It might be right to hang these men. But it would not be right to photograph them when they were being told that they were going to be hung. For when society has to hurt a man, it must hurt him as little as possible and must preserve whatever it can of his pride, lest there should spread in that society those feelings which make men do the things for which they get hanged’; Articles 26 and 27 of the Charter *supra* n. 13, provided that the Judgment of the International Military Tribunal (established pursuant to the provisions of the Charter) would be ‘final and not subject to review’ thereby precluding any appeal against conviction whilst the Tribunal was vested with the right to impose on conviction ‘a sentence of death or such other punishment as shall be determined by it to be just’.

## 2. The Historical context

International impetus for a supranational judicial disposition of the perpetrators of war crimes was first evident in embryonic form in the immediate aftermath of the First World War (1914-1919). On 25<sup>th</sup> January 1919, the Allied ‘Commission on the Responsibility of the Authors of War and on Enforcement of Penalties’ met to discuss the course of action to be initiated against those nationals of enemy States, alleged to have committed ‘offences’ associated with the instigation and conduct of war.<sup>21</sup> The Commission recommended to the Preliminary Peace Conference in Paris that those persons should be tried ‘*who had committed acts which had provoked the war and accompanied its inception or who had acted in violation of the laws and customs of war and the laws of humanity*’.<sup>22</sup> No absolute stipulation was made regarding criminalisation of ‘wars of aggression’ under international law. However, it was advocated that, for the *future*, an appropriate ‘offence’ be introduced, attracting criminal sanctions. A further proposal urged the establishment of a ‘High Tribunal’, comprising three members from each of the five major Allied Powers<sup>23</sup> and one from each of the other victorious Powers. Its designated purpose was to be the arraignment of the German former Head of State, Kaiser Wilhelm II for what was labelled ‘*a supreme offence against international morality and the sanctity of treaties*’.<sup>24</sup>

The American delegates, Robert Lansing and James Brown Scott, were fundamentally opposed to the concept of an international court on the basis that ‘*precedent was lacking*’, opining that such a Court was ‘*unknown in the practice of nations*’.<sup>25</sup> This stance was derived from *The United States v Hudson*,<sup>26</sup> which established the principle

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<sup>21</sup> *Commission on the Responsibility of the Authors of War and on Enforcement of Penalties*, American Journal of International Law Vol. 14, (1920), 95ff.

<sup>22</sup> *Commission on the Responsibility of the Authors of War and on Enforcement of Penalties*, American Journal of International Law Vol. 14, (1920), 95ff.

<sup>23</sup> Great Britain, Italy, France, Japan and the United States.

<sup>24</sup> Article 227 of the Treaty of Versailles was referred to in the Judgment of the Tribunal at Nuremberg on 30th September 1946: 22 IMT 466, as founding an international tribunal ‘to vindicate the solemn obligations of international undertakings and the validity of international morality.’ The ultimately abortive High Tribunal was to have applied ‘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 human conscience’. These concepts were criticised by the US representatives as being overly vague. The Treaty of Versailles is available online at <http://www.yale.edu/lawweb/avalon/imt/parti.htm>

<sup>25</sup> *Commission on the Responsibility of the Authors of War and on Enforcement of Penalties*, American Journal of International Law Vol. 14, (1920), 95ff.

<sup>26</sup> *The United States v Hudson* US Law Reports, 7 Cranch 32. Robert Lansing was the American Secretary of State and James Brown Scott, a leading scholar on international law, who had also acted as the US delegate to the Conference which had preceded the Hague Convention 1907.

that ‘*the legislative authority of the American Union must first make an act a crime, affix a punishment to it and declare that the Court shall have jurisdiction of the offence*’. Concern was similarly expressed at the proposed prosecution of a Head of State<sup>27</sup> on the grounds that ‘*the essence of sovereignty consists in the fact that it is not responsible to any foreign sovereignty*’.<sup>28</sup> Such comments foreshadowed the type of criticisms which were to be levelled at the Nuremberg process some twenty six years later.

Notwithstanding their initial resistance, the American contingent reluctantly deferred to the insistence of the British representative, Lloyd George, that the Kaiser be subjected to criminal sanction. This enabled the presentation of the Commission’s Report with ostensible unanimity. Compromise was achieved by Articles 227 to Articles 230 of the Treaty of Versailles<sup>29</sup> pursuant to which the Kaiser was to be submitted to trial by a High Tribunal, the establishment and composition of which had been previously recommended by the Commission. The Allied powers were invested with authority to try before military tribunals those accused of violating the laws and customs of war and the German Government was required to deliver up its own nationals for the purpose of trial. It was further stipulated that where accused persons had perpetrated actions against more than one nation, the alleged offenders could be tried by a military tribunal, comprising members of military courts of the affected Powers.

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<sup>27</sup> Hans Kelsen *Peace through Law* (New York & London: Garland Publishing, 1973), 84-85. Kelsen refers to the personal privilege of exemption from the criminal and civil law jurisdiction of another State as referable to acts committed abroad by the Head of State in his capacity as a private person and which exemption subsists only as long as the Head of State is actually in office. It would never, therefore, afford protection to a deposed or retired Head of State and would thus not have availed the Kaiser at the end of the First World War or Hitler at the end of the Second World War had he survived to stand trial. This is in contrast with the liability of a Head of State for *acts of state* for which Kelsen argues the Head of State is not responsible even after his deposition, abdication or expiration of his office since the act complained of was performed whilst he was still in office. Otherwise, such an act would never have been an act of State. ‘Non-responsibility of the Head of state for his *acts of state* is the consequence of the rule of international law that no state can claim jurisdiction exercised by ‘its courts over acts of another State.’ A more detailed discussion upon the doctrines of ‘head of state’ and ‘acts of state’ immunity appears later in this Chapter.

<sup>28</sup> *Commission on the Responsibility of the Authors of War and on Enforcement of Penalties*, American Journal of International Law Vol. 14, (1920), 95ff. The US position was based upon the decision of the US Supreme Court in *Schooner Exchange v McFaddon* 7 Cranch 116 (1812) cited in Moore, *A Digest of International Law* Vol II para 175 p.4 (1906) in which the Court emphasized ‘the exemption of the sovereign and the sovereign agent of a state from judicial process’.

<sup>29</sup> 28<sup>th</sup> June 1919 Treaty of Peace with Germany, available online at <http://www.yale.edu/lawweb/avalon/imt/parti.htm>

However, the process articulated in the Treaty of Versailles withered on the vine when the Government of the Netherlands refused to extradite the Kaiser under Article 227 of the Treaty. The Dutch contended that the offence for which he was to be indicted, being essentially of a political nature, was not recognised as an extraditable criminal offence within the national law of the Netherlands.<sup>30</sup> Furthermore, the newly installed Weimar regime in Germany asserted that there would be a serious risk of destabilisation were the Allied powers to insist that accused German nationals be extradited. Instead, agreement was reached in February 1920 whereby the German Supreme Court in Leipzig would itself try forty five nominated Defendants,<sup>31</sup> of whom ultimately just twelve were tried and six convicted. Disproportionately lenient sentences were imposed and the travesty was compounded when, with the complicity of their gaolers, two of the prisoners were permitted to escape before serving their full terms of imprisonment.

In consequence of this debacle, a Commission of Jurists recommended to the disillusioned Allies on 14<sup>th</sup> January 1922 that they ought in future to reserve conduct of any further trials to themselves. Requisite authority, on this point, was derived from Articles 228-230 of the Treaty of Versailles.<sup>32</sup> Ultimately, however, no additional requests for extradition were ever made by the Allied Powers. The much vaunted pursuit of a judicial resolution of the post-war disposal of alleged war criminals was thus effectively derailed by the prevailing political climate. This echoed the reservations expressed by the US President, Woodrow Wilson to the International Law Society in 1919, when he commented upon the potential dangers of “victors’ justice”. Indeed, his remarks presaged the difficulties confronted by the Allied Powers in 1945, when a similar task befell their representatives.

The Treaty of Versailles was to provide the impetus for other far-reaching developments. With its swingeing reparation provisions and unilateral restrictions on

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<sup>30</sup> Wilhelm II had sought refuge in Holland following the surrender of Germany. The Allies effectively acquiesced in the refusal of Holland to extradite the Kaiser in contrast to the stance which they had taken in the Treaty of Versailles. This could be seen as an admission that the offence with which the Kaiser was to be tried (acting against the sanctity of treaties) would likewise have been deemed a political offence under the British Extradition Act thereby rendering the perpetrator non-extraditable. If the Kaiser had been charged instead with common criminal offences, such as murder or robbery, it would have been less easy for the Government of the Netherlands to have refused to honour the demand for extradition.

<sup>31</sup> Kraus-Rodiger: *Urkander zum Friedensvertrag von Versailles* vom 28 Juni 1919, (1920-1921), Vol. 1, 972, quoted in Robert K. Woetzel, *The Nuremberg Trials in International Law* (New York & Washington: Frederick A. Praeger), 32.

<sup>32</sup> This is discussed further *infra*: Chapter 5.

rearmament, it was regarded by some factions within Germany as inherently unjust.<sup>33</sup> It was this festering resentment that was to contribute towards the ethos of the German Labour Party, inaugurated on 5<sup>th</sup> January 1919. As a chilling portent for the future, Adolf Hitler became a Member on 12<sup>th</sup> September of the same year. The Programme of the Party, announced on 24<sup>th</sup> February 1920<sup>34</sup> demanded abrogation of the Treaty of Versailles and the formation of a national Army. This heralded the subsequent militaristic nationalism which was to be a hallmark of the regime within Germany, during the years prior to the Second World War. Point 4 of the Programme declared that no Jew could be a member of the German race, signifying the trenchant racialism which was subsequently to underpin National Socialist dogma and policy. On 29<sup>th</sup> July 1921, the Party was renamed the Nationalsozialistische Deutsche Arbeiterpartei (NSDAP) when Hitler was appointed as Chairman. The Sturmabteilung (SA) was founded in 1921 as a private para-military force and the Schutzstaffel (SS) was created in the guise of personal bodyguard to Hitler in 1925, a year which also witnessed the publication of *Mein Kampf*. Hitler used this polemical treatise as a vehicle for espousing those political views and objectives, so influential in the future development of Nazism.

The ensuing eight years witnessed increasing popular support for the Nazi regime within Germany and, on 30<sup>th</sup> January 1933, Hitler was appointed as Chancellor of the Reich. Following a fire which occurred in suspicious circumstances at the Reichstag Building in Berlin on 28<sup>th</sup> February 1933, a decree was passed on the same day suspending the detailed constitutional guarantees embodied in the Reich Constitution.<sup>35</sup> After a large number of Communist party members were taken into 'protective custody', the Enabling Act was passed on 24<sup>th</sup> March 1933 giving full legislative powers to Hitler and his Cabinet. On 26<sup>th</sup> April 1933, the Geheime Staatspolizei (Gestapo) was founded as a secret police force and on 14<sup>th</sup> July 1933, the National Socialist Party was decreed the only legal political party. On the night of 30<sup>th</sup> June 1934, the SS was authorised to murder the SA Leader, Ernst Roehm and other prominent members of the SA. Hitler sought to 'justify' this action, on the pretext that an SA

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<sup>33</sup> Article 231: 'The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.'

<sup>34</sup> *Office of the US Chief of Counsel for Prosecution of Axis Criminality, Nazi Conspiracy and Aggression*, Vol 4, (Washington DC Printing Office, 1946), 208-211 (Doc.1708-PS).

<sup>35</sup> 11<sup>th</sup> August 1919: Reichgesetzblatt 1919, 1383ff.

putsch against the Nazi leadership was imminent. On 3<sup>rd</sup> July 1934, this pre-emptive strike upon the SA was retrospectively ratified.<sup>36</sup> The new enactment declared that the steps taken during the ‘night of the long knives’ to suppress attempts at treason, constituted legal emergency measures in defence of the State.<sup>37</sup> Significantly, the Nazis demonstrated a formidable capacity to embrace and utilise retrospective legislation, in furtherance of their own interests. This cynical tendency was again manifest in the decision to amend Sections 2 and 170a of the existing 1919 German Penal Code, on 28<sup>th</sup> June 1935.<sup>38</sup> No act of manipulation was beyond the remit of the National Socialist regime; self-preservation was paramount. If expedient, therefore, the rule of law could be imperilled, contorted, or decimated at the whim of arbitrary political contrivance:

‘Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of the penal law and sound public feeling shall be punished, even if his deed is not punishable according to the law.’

‘If an act deserves punishment according to the common sense of the people but is not declared punishable in the Code, the prosecution must investigate whether the underlying principle of a penal law can be applied to the act and whether justice can be helped to triumph by the proper application of the penal law.’<sup>39</sup>

Not long after its proclamation, Hans Frank, president of the Academy of German Law freely conceded that by this means:

‘the liberal foundation of the old penal code “no penalty without a law” was definitely abandoned and replaced by the postulate “no crime without punishment” which corresponds to our conception of the law. In the future, criminal behaviour, even if it does not fall under formal

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<sup>36</sup> This is an example of a curative retrospective ‘enactment’ intended to benefit the perpetrators. See: Lon L. Fuller ‘Positivism and Fidelity to Law – A Reply to Professor Hart’, *Harvard Law Review* Vol. 71, (1958), 630, for a discussion as to the validity of this type of retrospective ‘legislation’; Cf: Charles Sampford *Retrospectivity and the Rule of Law* (Oxford: Oxford University Press, 2006) where retrospective legislation is generally presented as acceptable, if curative rather than prejudicial to the perpetrator.

<sup>37</sup> *Law relating to National Emergency Defence Measures 3 July 1934*: Reichsgesetzblatt, 1934, 1529. Similarly, in 1933, the Nazi Government had retrospectively changed arson from a non-capital crime to a crime invoking the death penalty after the Van der Lubbe Reichstag fire Case.

<sup>38</sup> However, the 1871 German Criminal Code was never repealed nor was the 1919 Reich Constitution formally abolished. As will emerge in Chapter 3, Article 116 of the Constitution prohibited *ex post facto* criminal punishment. It is surprising, perhaps, that the Nazis troubled themselves to amend the 1919 German Penal Code, also a prohibition on the use of retrospective criminal law provisions, whilst leaving Article 116 nominally in force.

<sup>39</sup> Reichsgesetzblatt, 1935, 839. The original Section 2 stipulated that, ‘For no act may be punished unless such punishment is prescribed by Statute before the crime was committed.’ This unequivocally precluded the use of *ex post facto* criminal law. Significantly, Proclamation Number 3 of the Control Council of Germany 1945 abolished the doctrines of analogy and retroactivity.

penal precepts, will receive the deserved punishment if such behaviour is considered punishable according to the healthy feelings of the people.’<sup>40</sup>

From this, the Nazis made manifest their intention to depart from the absolute embargo on retrospective imposition of punitive sanctions, enshrined in Article 116 of the 1919 Weimar Constitution. By revision of the Penal Code and selective disregard of those provisions within the Constitution that failed to coincide with their ideology, the Nazi regime firstly embraced the deployment of *ex post facto* criminalisation and retrospective imposition of punitive sanctions and also distorted the concept of civil law analogy.<sup>41</sup> During the Nuremberg Trials, it was the first of these that was destined to prove particularly significant, to the extent that the Defendants found themselves estopped from asserting the *ex post facto* import of the ‘offences’ for which they were indicted.<sup>42</sup>

In September and November 1935, the Nuremberg Laws deprived Jews of their German citizenship achieving ‘*what had been one of the main goals of the radical right in Germany for more than half a century: the reversal of German emancipation*’.<sup>43</sup> This draconian act of denationalisation constituted one step in a series of increasingly repressive measures implemented from 1933 onwards by which the Nazis effectively took control of every aspect of public life. The role of the judiciary was emasculated,<sup>44</sup>

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<sup>40</sup> Statement of Hans Frank, 14 September 1935, translated and printed in *Justice Case*, 3 T.W.C. at 1022. The extent to which this was dependent on the legal interpretations offered by their Crown Jurist’, Carl Schmitt, is explored *infra*: Chapters 3, 4 and 5.

<sup>41</sup> On this point, see Kenneth Gallant *The Principle of Legality in International and Comparative Law* (Cambridge: Cambridge University Press, 2009), 37-38; 49. Gallant explains *ibid*: 48, that it was generally accepted in post-French Revolution Continental Europe that in the absence of a legitimate legislative enactment in force at the date of the commission of the act done, the legality principle, that is, the embargo on the use of retrospective criminal law would be deemed infringed. ‘The concept of analogy was a controversial and important exception to the legality principle in civil law systems in that it was acceptable to use the technique of criminalising acts not covered by the statute if they fell ‘within the reason of the statute’. This was because unlike the common law system dependent on the doctrine of precedent, a decision which retrospectively created a crime by analogy would not necessarily be followed by similar decisions in the future. The danger of replicating a bad decision would thus not ensue. However, what the Nazis did in 1935 was to depart from a moderate interpretation of analogy where ‘one looks to see whether the act involved bears close resemblance to an already-forbidden act’. Instead, analogy was to be used to determine which law was to be used to punish the act, without any limitation on the scope or type of crime involved. Notably, however, this identical distortion of the analogy concept was integral to the Soviet position during the 1920s.

<sup>42</sup> A further discussion of the quasi-estoppel issue and its interrelationship with the defence of *tu quoque* appears below in this chapter.

<sup>43</sup> Roderick Stackelberg, and Sally Winkle *The Nazi Germany Sourcebook* (London and New York: Routledge Press, 2002), 186. The Nuremberg Laws included the Reich Citizenship Law, 15<sup>th</sup> September 1935 and the First regulation to the Reich Citizenship Law, 14<sup>th</sup> November 1945.

<sup>44</sup> *Hitler’s Table Talk*: Original in Federal Ministry of Justice, Ref No. R 22 Fr. 5/112, 20<sup>th</sup> August 1942 (London: Wiedenfeld & Nicolson, 1953), 641: ‘The judge’s primary duty is to secure law and order for

Hitler perceiving the ‘*role of the judiciary as serving the purposes of the State and not some more lofty concept of legality and justice*’.<sup>45</sup> Furthermore, both executive and legislative power was concentrated in the hands of Hitler, as ‘*Germany accepted the dictatorship with all its methods of terror and its cynical and open denial of the Rule of Law*’.<sup>46</sup>

Consolidation of power at home enabled Germany to pursue a policy of expansionism abroad, its invasion of Poland, on 1<sup>st</sup> September 1939, provoking a declaration of war by France and Great Britain two days later. During the ensuing period of almost six years until the German surrender on 8<sup>th</sup> May 1945, Nazi aggrandisement and the abnegation of the Rule of Law danced a deadly duet for which millions of people paid the ultimate price.<sup>47</sup> On 25<sup>th</sup> October 1941, the US President, Roosevelt, and the British Prime Minister, Churchill, exhorted Germany and her Allies to desist from perpetration of such actions as lay beyond the ambit of conventional warfare.<sup>48</sup> The Declaration of St James’ Palace adopted by nine European Powers on 13<sup>th</sup> January 1942 made reference to the Nazi regime of terror. This was characterised by imprisonment, mass expulsions, execution of hostages and other atrocities, all the subscribing parties affirming that:

‘Acts of violence perpetrated against the civilian populations are at variance with accepted ideas of war and political offences as these are understood by civilised nations. (The Allies) place among their principal war aims the punishment through the channels of organised justice of those guilty or responsible for those crimes, whether they have ordered them, perpetrated them or participated in them.’<sup>49</sup>

This adumbrated the Allies’ determination to censure not only perpetrators of war crimes in the conventional sense but more significantly the commission of acts designated as *political* in nature. It was irrelevant to the Allied Powers that such political ‘offences’ may have had no doctrinal foundation under international law.

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the community. Should the government act shamefully, the law is in no position to prevent it. There must be the closest collaboration between the State incarnate and the Body Judicial. In my opinion, it is vital that no judge be appointed who has not had previous experience in the party. A judge must have profound experience of the matters in which he will be called upon to pass judgment’.

<sup>45</sup> Werner Maser *Nuremberg: A Nation on Trial* (London: Penguin Books 1979), 177.

<sup>46</sup> Judgment: 22 IMT 422.

<sup>47</sup> Six million Jews perished being three-quarters of European Jewry, many of whom were exterminated in the death camps of Aushwitz-Birkenau, Belzec, Treblinka, Chelmno, Sobibor and Majdanek. Several million Soviet prisoners of war were starved to death or executed whilst it is estimated that some ten million non-combatants across Europe also died as a result of Nazi policies.

<sup>48</sup> US Department of State Bulletin (1941), 317.

<sup>49</sup> History of the United Nations War Crimes Commission and the Development of War, Appendix B, (1946), 109-113.

Rhetorical denunciation itself seemingly sufficed to transmute every reprehensible action perpetrated by the Nazis into a ‘crime’ attracting the full force of ‘organised justice’. By this means, the Allies demonstrated their receptiveness both to the concept of individual accountability for *all* putatively unacceptable actions committed within the sphere of warfare *and* to the appropriate punishment of such transgressions.<sup>50</sup> No contemporaneous attempt was, however, made to stipulate the proposed mechanism for implementation of their objectives. Nor, in the event that substantive precedent were lacking, were any criteria specified by which the ‘wrongfulness’ of the alleged acts, would be categorised and assessed.

This unfolding drama, played out against the backdrop of the standards of behaviour upheld by all ‘civilised nations’ was destined to become the Prosecution mantra during the Nuremberg Trial:

‘From this record shall future generations know not only what our generation suffered but also that our suffering was the result of 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 upon military alliances but grounded and firmly grounded in the rule of law.’<sup>51</sup>

‘When you have declared that crime is always a crime...you will thereby have affirmed that there is only *one standard of morality* which applies to international relations as well as to individual relations and that on this morality are built prescriptions of law *recognised by the international community*; you will then have truly begun to have established an international justice.’<sup>52</sup>

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<sup>50</sup> However, it has been pointed out that even if the warnings given to the Nazis during the war had the import claimed by the Allies, those warnings related at most to *war crimes* alone and certainly not to *crimes against peace*. *Supra*: Finch ‘The Nuremberg Trials and International Law’, 28: ‘In Dr Lachs’ collection of texts, (Manfred Lachs, *War Crimes* London: Stevens & Sons, 1945, 94-98), there is an *aide memoire* of the British Government issued August 6, 1942, stating that “in dealing with war criminals whatever the court, it should apply the laws already applicable and no special *ad hoc laws* should be enacted.” This seems to refute the argument that because the defendants were duly warned that they would be tried for *war crimes*, they were estopped from pleading that the *ex post facto* character of the provisions of the Charter had enacted a special *ad hoc* law on the different issue of *crimes against peace*’.

<sup>51</sup> British Chief Prosecutor, Sir Hartley Shawcross: 3 IMT 92 endorsing comments made by Justice Robert Jackson in his opening address 1 IMT 52, 53: ‘I do not mean mere technical of incidental transgression of international conventions. We charge guilt on planned and intended conduct that involves moral as well as legal wrong. The refuge of the Defendants can be only their hope that International law will lag so far behind the moral sense of mankind that conduct which is crime in the moral sense must be regarded as innocent in law’.

<sup>52</sup> François de Menthon, Chief Prosecutor of France 5 IMT 370. Similar remarks had been made by Justice Jackson in his *Report to the President on Atrocities and War Crimes; 7<sup>th</sup> June 1945*, available online at: <<<http://www.yale.edu/lawweb/avalon/imt/jack01.htm>>>: ‘Those acts which offended the conscience of our people were criminal by standards generally accepted in all civilised countries and I believe that we may proceed to punish those responsible in accord with both our own traditions of fairness and with standards of just conduct which have been internationally recognised.’

Confirmatory statements by Roosevelt<sup>53</sup> and Churchill followed in August and September 1942<sup>54</sup> and a United Nations Commission for the Investigation of War Crimes was established towards the end of 1942. In November 1943, Roosevelt, Churchill and the Soviet Leader, Stalin, promulgated their Moscow Declaration. This ordained that any persons, consenting in atrocities, massacres and executions, would be returned to the countries in which their activities had been perpetrated. Trial and punishment would then ensue, in accordance with the laws of those nations.<sup>55</sup> Offences crossing international frontiers and possessing no specific geographical location would be punishable *'by a joint decision of the Governments of the Allies'*.<sup>56</sup> Seconded to provide advice upon aspects of the law relating to the Nuremberg Trials, OSS Consultant Sheldon Glueck commented that the reference to a 'joint decision' *'hinted that disposition of the Nazi ringleaders might be by executive action'*.<sup>57</sup> This was in contrast to perpetrators being subjected to criminal trial under international law. At both the Yalta Conference in January 1945<sup>58</sup> and at Potsdam later that year, the Allies reiterated their determination to bring to justice the perpetrators of Nazi 'war crimes'. Scant effort was, however, displayed to explain the criteria by which such 'offences' would be defined.

François de Menthon, the French Chief Prosecutor at Nuremberg, was prepared to be persuaded by this prevailing denunciatory mood. For him, the telling factor was the incremental momentum, favouring punishment of those complicit in the commission of

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<sup>53</sup> 7 US Department of State Bulletin (1942), 709-710, 'the time will come when (the criminals) will have to stand in courts of law in the very countries which they are now oppressing, to answer for their acts.' It is noteworthy that, at this stage, the Allies seemed to be envisaging trials in *national* courts, rather than in the forum of an *international* military tribunal.

<sup>54</sup> The comments of Churchill were reported in the *New York Times*, September 9, 1942, p.4, col.8. and are quoted in Sheldon Glueck *The Nuremberg Trial and Aggressive War* (New York: Alfred A Knopf 1946), 111, 'those who are guilty of Nazi crimes will have to stand up before tribunals in every land where the atrocities have been committed, in order that an indelible warning may be given to future ages, and that successive generations of men may say "so perish, all do the like again".'

<sup>55</sup> From 1945 onwards, the UNCWC attempted some implementation of the provisions of the Moscow Declaration dated 1<sup>st</sup> November 1943. In his Report to the President on 7<sup>th</sup> June 1945, Jackson commented that the prosecution at Nuremberg would not interfere with the offenders who under the Moscow Declaration would be returned to the scene of their crimes for trial by the local authorities, comprising localised offences or atrocities against persons or property usually of civilians of countries formerly occupied by Germany.

<sup>56</sup> The Moscow Declaration: 9 US Department of State Bulletin (1943), 310-311. This is also available online at <<http://www.yale.edu/lawweb/avalon/wwii/moscow.htm>>

<sup>57</sup> *Supra*: Glueck *The Nuremberg Trial and Aggressive War*, 13.

<sup>58</sup> President Roosevelt took with him a Memorandum regarding the proposed trial and punishment of Nazi War criminals prepared by Members of the US State Department. However, the question of the disposition of war criminals was not specifically addressed and when the President returned to Washington in February 1945, the situation remained unresolved.

*all* heinous actions associated with warfare. No distinction was to be drawn between transgressions perpetrated in violation of pre-existing laws regulating the conduct of war and acts condemned as ‘criminal’, merely through the will of the international community. In his view, there was no sound basis upon which the Nazis could deny their awareness of the implications and likely consequences of *all* their actions in the event of ultimate defeat. This typified the stance to which the Prosecution had frequent resort:

‘The Defendants at the time when they committed their crimes knew the will of the United Nations to bring about their punishment. The warnings which were given to them *contained a definition which precedes the punishment*. The Defendants moreover could not be ignorant of the criminal nature of their activities. The warnings of the Allied governments in effect translated in a political form the fundamental principles of international and of national law which permit the punishment of war criminals to be established on positive precedents and positive rules. They no doubt hoped that the repetition of the factual circumstances which hampered the punishment of the criminals in 1919 would permit them to escape their just punishment. Their presence before this tribunal is the symbol of the constant progress which international law is making in spite of all obstacles.’<sup>59</sup>

But did this purported vindication of Allied strategy on the basis that these warnings ‘*contained a definition which precedes the punishment*’, unveil aspects of the prosecution case which had better been left concealed? If the position in relation to international criminal law had indeed properly crystallised at the date of commission of the alleged ‘offences’, it should not have been necessary for *any* warnings to be issued to the Nazis. The criminality of their transgressions would already have been beyond dispute. The Allies’ attempts to forewarn the Nazis of the repercussions of their actions would not have rested upon the intrinsic content of the warnings themselves to *define or create* the ‘offences’ for which the perpetrators were later to be punished. Such admonitions should have been entirely superfluous save, perhaps, as a device for communicating the specific provisions of international law which the Nazis had supposedly violated.

Alternatively, if the Defendants were to be tried for the commission of acts which had *never* before been criminalised under international law, the Allies knew that they would undoubtedly encounter difficulties in convincing potential critics of the legitimacy of the judicial process. It was therefore incumbent upon the Allied Powers to demonstrate that the warnings themselves were able to transform appropriate pre-existing principles

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<sup>59</sup> 5 IMT 414.

into offences attracting the sanctions of the criminal law. Were it to be hypothetically conceded that punishment could be validly imposed only where the act allegedly committed by the perpetrator had been previously criminalised, it necessarily followed that the Prosecution needed to demonstrate the existence of an appropriate ‘offence’ *as a precondition* to the legitimate imposition of a commensurate penalty.

To this end, the British Chief Prosecutor, Sir Hartley Shawcross, sought to echo and amplify the relevance of the warnings issued to the Nazis. On the basis that during the war, the Defendants were aware of the overtly expressed international censure of their actions, it was entirely acceptable that they should face trial. There may have been no suitably constituted tribunal with the capacity to impose punitive sanctions upon them; indeed, it was conceded that no recognisable avenue existed under international law by which they could be compelled to account for their alleged transgressions. However, the absence of a juridical forum was immaterial. Although the *enforcement* mechanism may have been innovatory, the definition and categorisation of the Defendants’ actions as ‘criminal’ was *not* similarly susceptible to any imputation of retroactivity. To this extent, a distinction could properly be drawn between procedural-administrative issues and the *nullum crimen* rule, whereby no person be held criminally liable for acts not expressly proscribed in a pre-existing statute:

‘There is no substantial retroactivity in the provisions of the Charter. It merely fixes the responsibility for a crime already clearly established as such by positive law upon its actual perpetrators. It fills a gap in international criminal procedure. There is all the difference in saying to a man, ‘You will now be punished for what was not a crime at all at the time you committed it,’ and saying to him, ‘You will now pay the penalty for conduct which was contrary to law and a crime when you executed it although owing to the imperfection of the international machinery, there was at that time no court competent to pronounce judgment against you.’<sup>60</sup>

However, had the Nazis been interrogated during the War upon the Allied intent to impose post-conflict punitive sanctions for violations of international criminal law, arising *inter alia* from their decision to wage war, is it not plausible that their contemporaneous riposte may have been formulated in the following terms:

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<sup>60</sup> Shawcross: 3 IMT 106. Shawcross therefore refuted the imputation that the Defendants were being subjected to retrospective criminal law but asserted that even were it to be deemed that there was an element of retroactivity, ‘we proclaim it to be most fully consistent with that higher justice which in the practice of civilised states has set a definite limit to the retroactive operation of laws’.

- Whilst we are vaguely aware that our opponents are threatening to punish war criminals, any such sanctions will neither be possible nor justifiable in the absence of pre-existing crimes recognised by international law for which we can be held accountable and punishable as individuals
- In respect of any actions on our part which on an unfavourable interpretation of pre-existing international law *are* deemed criminal, we are not guilty and are not liable to be sanctioned because:
  - (i) we are ignorant of the alleged conduct cited by our opponents
  - (ii) in relation to any alleged conduct of which we do have some knowledge, such actions are ‘acts of state’ and/or we are acting in deference to ‘superior orders.’
- In respect of the remainder of the charges levelled against us by our opponents, we are not guilty and are not liable to be sanctioned because
  - (i) they are not crimes under international law
  - (ii) even if they are crimes under international law, liability rests with the State and not with ourselves as individuals
  - (iii) even if crimes exist for which individual responsibility does exist, we are ignorant of the commission of them
  - (iv) in respect of those of which we do have some knowledge, they are ‘acts of state’ and/or we are acting in deference to ‘superior orders.’
- Thus, our enemies’ threats can be totally discounted as unsupportable propagandist rhetoric. There is no legal basis upon which we could ever be prosecuted, far less convicted by a Tribunal convened by our opponents and by which we, as the vanquished, would be subjected to punishment at the unilateral behest and control of the victors.

On 8<sup>th</sup> August 1945, the London Agreement,<sup>61</sup> concluded by the US, Great Britain, France and the USSR, ordained the establishment of an International Military Tribunal.<sup>62</sup> This empowered the IMT to deal judicially, on an *ad hoc* basis, with ‘war criminals’ of the category mentioned in the 1943 Moscow Declaration, whose crimes had no particular geographical location. Embodying the Allied consensus, the Charter appended to the London Agreement comprised the detailed substantive, procedural and evidential provisions, by which the entire process was to be regulated. During the subsequent Trial, the Prosecution depicted the Charter as a definitive and incontrovertible declaration of pre-existing law:

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<sup>61</sup> *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*: 13 US Dept of State Bull 222 (1945); *Trial of War Criminals* (Dept of State Publication 2420, Washington, 1945), 13. This is also available online at <http://www.yale.edu/lawweb/avalon/imt/proc/imtchart.htm>

<sup>62</sup> The International Military Tribunal was innovatory. Although the Commission (*Commission on the Responsibility of the Authors of War and on Enforcement of Penalties*, American Journal of International Law, Vol. 14, (1920), 95ff) had recommended the establishment of a High Tribunal, to try Wilhelm II, this was never fulfilled in practice. The High Tribunal was, therefore, an ultimately abortive precursor of the IMT.

‘The Charter only established a jurisdiction to judge what was already an international crime, not only before the conscience of humanity but according also to international law even before the Tribunal was established.’<sup>63</sup>

But even in this effort to laud the unassailability of the Charter, more than a suggestion of natural law based authentication was apparent. Prior international law was given credence almost as a secondary consideration. The ‘offences’ indicted against the Defendants were unashamedly, in the first instance, a ‘crime’ before the conscience of mankind. Strongly evocative of a sense of unimpeachable morality, this stance owed little to positive law and much to an overarching code of ethical rectitude.

Debate concerning the legitimacy of the Charter was to infuse the entire proceedings and the Tribunal was, therefore, unable to avoid an assessment of its validity:

‘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 those countries to legislate for the occupied territories has been recognised by the civilised world. The Charter is not an arbitrary exercise of power on the part of the victorious nations but in the view of the tribunal, as will be shown, is the *expression* of international law existing at the date of its creation and to that extent is itself a contribution to international law.’<sup>64</sup>

Unlike the rhetoric advanced on behalf of the Allied nations, this evaluation rested upon the role of the Charter as a codifying legislative instrument. However, the significance of the President’s linguistic usage should not be overlooked. The term ‘*expression of international law*’ may have been used inadvertently. Equally, it may have been selected after due deliberation as a desire on the Members’ part to minimise criticism which would inevitably ensue were it to assert that the Charter was unequivocally declaratory of international law. The validity of this apparent assumption as to the legal basis for the Charter was ultimately to prove less than convincing.<sup>65</sup> If, however, the Tribunal wished to uphold and reinforce the inherent legitimacy of the proceedings, it had little scope for manoeuvre. Insofar as pertained to the unassailability of the Charter, this entailed endorsement of the Allies’ stance. Yet not surprisingly, Defence Counsel, not least of them, Pannenbecker, on behalf of the Defendant Frick, were contemptuous of the Prosecutors’ position. From their perspective, no basis existed to sustain a

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<sup>63</sup> De Menthon: 5 IMT 388.

<sup>64</sup> Judgment: 22 IMT 461.

<sup>65</sup> Further details of the substantive Law existing at the date of commission of the charges contained in the Indictments laid against the Defendants at the Nuremberg Trial Proceedings and the controversy in relation to the same are discussed later in this Chapter.

contention that the Charter merely effected a codification of pre-existing law and eradication of deficiencies in international penal procedure:

‘To revert in this way to provisions of material criminal law in existence at the time the act was committed does not mean that it would be impossible for this Tribunal to call the accused to account for offences which are punishable under all circumstances. There are, however, a number of restrictions resulting from this which in the opinion of the Defence it would be better to accept rather than violate a principle so essential to just procedure as is the prohibition of retroaction in criminal laws.’<sup>66</sup>

How - in the absence of pre-established positive law - was it feasible for the Charter to standardise and/or declare it? In the event that relevant substantive legal precedent was missing, the Charter was irremediably flawed. Law was derived from concrete positive provisions, not from some nebulous concept of pre-ordained ‘right’. For this reason, the Prosecution was unable to sustain the position upon which it sought to found its case, the more so because little mention was contained upon the face of the Charter, nor the Indictments, that the alleged ‘offences’ were contrary to prior international law:

‘But nowhere does either of these documents (the Charter or the Indictment) declare that the offences charged are offences *against international law*, an elementary fact which every commentator appears hitherto to have overlooked.’<sup>67</sup>

Flawed this assertion is, however, to the extent that Count Three of the Indictment - under which the charge of *war crimes* was laid against the majority of the Defendants - did allude both to prior Treaty provisions and customary international law. Presumably, therefore, had relevant substantive precedent existed in support of the remaining offences contained in Counts One, Two and Four of the Indictment, the Allies would have been extremely remiss not to cite it.<sup>68</sup> It was, in part, their apparent inability to do

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<sup>66</sup> Pannenbecker: 18 IMT 166. Indeed, he did not accept that there was any prior material law upon which the Defendants could justifiably be prosecuted by the IMT.

<sup>67</sup> *Supra*: Morgan *The Great Assize*, 7.

<sup>68</sup> Seemingly, and somewhat perversely, the Allies made a conscious decision to eliminate most references to substantive law from the Charter. On this point, Jackson remarked that ‘every word will come back to plague us before we get through with the trial,’ whilst this was confirmed by David Maxwell Fyfe, on behalf of the British contingent during the pre-Charter negotiations, ‘what we want to abolish at the trial is a discussion as to whether the acts are violations of international law or not. We declare what the international law is so there won’t be any discussion on whether it is international law or not’: *History of the United War Crimes Commission and the Development of the Laws of War* compiled by the United Nations War Crimes Commission (HMSO, London, 1948), 82 and 99 respectively. The Charter appended to the London Agreement was, in Jackson’s terminology, to ‘fulfil in a sense the function of legislation’: *ibid*: 331. In this aim, the Allies proved less than successful and it is possible that a more transparent approach might have served them and indeed the interests of justice rather better. ‘In spite of the labour spent at the London Conference on this formula, it failed to prevent the defendants from challenging the law laid down by the Four Powers. It also failed to restrain the Tribunal itself from

so that fuelled criticism as to the legal validity of the Charter and the process it spawned.

The fundamental dichotomy between the protagonists as to the intrinsic validity of the Charter was to colour the entire judicial process. Critical was the extent to which Defendants were, in fact, indicted on the basis of a codification of *pre-existing* law or for a raft of innovatory offences, the primary intention of which was to create a foundation for the *future* development of international law?<sup>69</sup> At the root of both these inquiries lay a crucial dilemma as to the fundamental nature of ‘law’ itself. Were strictures governing conduct within civil society non-existent or unenforceable unless enshrined within a closed set of codified legal norms? Could law be properly located in custom and practice of such longevity and provenance to have attained the status of binding, legally enforceable fetters, regulating the behaviour of each human being, one to another? Did it derive from a transcendent divine source which promulgated all-pervasive and binding moral dictates? And, relatedly, was a quality of innate rationality invariably located within the hearts and minds of humankind in which was embedded sufficient insight to discern the eternal and immutable standards of a ubiquitous ethical code?

At the date of their initial incarceration, such abstract musings in relation to the origins of law or the legitimacy of the exact method selected for their future disposition, perhaps failed to occupy the forefront of the Defendants’ concerns. However, as the Allied plans gathered momentum and crystallised in the form of the Charter, they might well have harboured some sense of grievance at being subjected to a judicial process wholly instigated, devised and orchestrated by their former enemies.<sup>70</sup> Nonetheless, given that in 1944 Churchill had advocated a ‘political solution’ for the disposition of war criminals,<sup>71</sup> the Defendants should perhaps have deemed themselves fortunate that

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delving into this very controversial matter’: *supra*: Gross, ‘The Punishment of War Criminals: The Nuremberg Trial’, 356, 368.

<sup>69</sup> This issue is encapsulated in the maxim ‘*nullum crimen sine lege, nulla poena sine lege praevia*’: ‘no crime without law, no punishment without pre-existing law’, which originated in Roman jurisprudence and which will be considered later in this Chapter in the context of Article 6 of the Charter.

<sup>70</sup> See Nicholas Doman ‘Political consequences of the Nuremberg Trial’, *Annals of the American Academy of Political Science*, Vol. 246, (July 1946), 81-90, 82: ‘The Trial is the first unmistakable instance of compulsory jurisdiction by an international court involving more than a routine matter of international relations’.

<sup>71</sup> On 8<sup>th</sup> September 1942 in the House of Commons, Churchill exhorted in relation to the Nazis, ‘So perish all who do the like again.’ These comments were reported in the *New York Times*, September 9, 1942, p.4, col.8. On 26<sup>th</sup> September 1944 in the House of Commons, Churchill stated that ‘the

any form of judicial process was contemplated.<sup>72</sup> Indeed, in deciding that a full trial under judicial procedure was not viable for the principal Nazi leaders, the British War Cabinet had tentatively endorsed Churchill's stance.<sup>73</sup> During an after-dinner toast at the Teheran Conference in November 1943, Stalin was similarly reputed to have supported the option of a political solution for fifty thousand German officers: '*I drink to the quickest possible justice for all war criminals. I drink to the justice of a firing squad*'.<sup>74</sup> This was, however, contrary to the official position he adopted whereby he appeared to lend support for a trial of those primarily responsible for the Holocaust.

Momentum, ultimately, swung towards a juristic rather than a political solution for reasons that Calvocoressi, a former member of the British Prosecuting team, expressed during his post-trial analysis of the Nuremberg process in 1947:

'Two needs had to be satisfied. The one was the punishment of guilty men, a last act of the war; the other was the affirmation of the Rule of Law, a first act of the peace. Summary action could meet the first need but not the second. Indeed, so far as affirming the Rule of Law, it would have dealt yet one more blow at it.'<sup>75</sup>

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governments are resolved to do their utmost to prevent Nazi criminals finding a refuge in neutral territory from the consequences of their crimes...It is not our intention to allow the escape of these men without exerting every resource which a civilised power can contemplate.' Churchill was still propounding a political solution as late as 1945.

<sup>72</sup> It could be deemed that a form of precedent for a 'political solution' is to be found in the treatment, accorded to Napoleon, following his escape from Elba. He had earlier voluntarily undertaken to retire to the island. Notwithstanding this pledge, he later re-entered France with an armed force. This caused the Congress of Vienna, on 13<sup>th</sup> March 1815, to issue a Declaration that due to his breach of that earlier agreement he had 'destroyed the sole legal title upon which his existence depended. In so doing, he had placed himself outside the protection of the law': British and Foreign Papers (1814-15), 665. 'The right is founded upon reasons of moral and political justification': *supra*: Finch *The Nuremberg Trials and International Law*, 20, 34. However, in contrast, *The Report of the Subcommittee on the Trial and Punishment of War Criminals*, American Journal of International Law Vol. 37 (1943), 663, 666 declared that, 'Formalised vengeance can only bring about an ephemeral satisfaction, with every possibility of ultimate regret; but vindication of law through legal processes may contribute substantially to the re-establishment of order and decency in international relations'; see Herbert Wechsler 'The Issues of the Nuremberg Trial', *Political Science Quarterly*, Vol. 62, No.1 (March 1947) 11-26 where he posits that most of those who objected to the Trial did so on the basis that they would have preferred summary disposition; that is, not that they viewed the trial process as too stringent but too lenient.

<sup>73</sup> In November 1943, a meeting of the Cabinet had failed to reach a conclusion upon summary execution. In February 1944, the Cabinet did soften the Churchill recommendation that Nazi war leaders should be executed and replaced it with a proposal to strictly confine such 'world outlaws' without trial.

<sup>74</sup> Joe Heydecker and Johannes Leeb *The Nuremberg Trial* (Cleveland and New York: The World Publishing Company, 1958), 77. Stalin did apparently retract his statement after Churchill walked out and claimed that he had intended his comments to be interpreted as a joke; see *supra*: Gallant *The Principle of Legality in International and Comparative Law*, 73, where Gallant conjectures that Stalin probably wished only a show trial. It is also possible that Stalin wished to take the opportunity of ameliorating his own image in the eyes of those who would seek to condemn him for his own style of governance within the Soviet Union during WW11 and in the years that preceded it.

<sup>75</sup> Peter Calvocoressi *Nuremberg* (London: Chatto & Windus, 1947), 25. These sentiments endorsed those of the Russian Chief Prosecutor, Rudenko in his opening address: 7 IMT 146, 'It is for the first time that

This had already been signalled by the newly installed US President, Harry Truman, in the closing phase of the war.<sup>76</sup> In his assessment, the prospect of a ‘political solution’ was unacceptable, the only viable mode of disposition for the leading Nazi protagonists resting in the establishment of an international tribunal. Throughout the Nuremberg process, these views were to find a voice in his Chief Prosecutor, Robert Jackson, who was destined to fulfil the role of America’s mouthpiece with the rhetorical resonance, born of a consummate orator. With characteristic eloquence, he too endorsed an option that was judicially rather than overtly politically oriented:

‘To free them without trial would mock the dead and make cynics of the living. On the other hand we could execute them or otherwise punish them without a hearing. But indiscriminating executions and punishments without definite findings of guilt would violate pledges already given and would not sit easily on the American conscience or be remembered by our children with pride.’<sup>77</sup>

‘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. We must never forget that the record on which we judge these Defendants today is the record on which history will judge us tomorrow. To pass these Defendants a poisoned chalice is to put it to our own lips as well.’<sup>78</sup>

Notwithstanding these aspirations, one of the underlying frailties of the Nuremberg process has remained its susceptibility to the charge of ‘victors’ justice’.<sup>79</sup> This criticism carried especial potency due to the limited authority vested in the Tribunal to try only nationals of *Axis States* suspected of war crimes, rather than persons of *every*

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before a Court of Justice appear criminals who, having taken possession of a whole state, made this State an instrument of their monstrous crimes’.

<sup>76</sup> Truman was U.S. President from 1945-53, having come to office on 12 April 1945, following the death of the incumbent President Roosevelt. He commented to reporters, ‘I felt like the moon, the stars and all the planets had fallen in on me.’ In contrast, the previous incumbent, Franklin Roosevelt, had agreed with Churchill that the highest German leaders should be subject to a political solution.

<sup>77</sup> Justice Jackson’s *Report to the President on Atrocities and War Crimes*; 7<sup>th</sup> June 1945: available online at <<<http://www.yale.edu/lawweb/avalon/imt/jack01.htm>>>

<sup>78</sup> Jackson: 2 IMT 101.

<sup>79</sup> This type of contention was countered by De Menthon 5 IMT 370: ‘the practice and the doctrine of international law have always given to belligerent states, the right to punish enemy war criminals, who fall into their power. It is an immutable rule of international law which no author has ever contested. It is not a new doctrine. It was born with the birth of international law.’ However, as Schick persuasively argues, ‘it is unfortunately not possible to prove that any German Government of the Hitler regime ever consented to the Nuremberg Trial. It would seem therefore that the London Agreement, and the Charter attached thereto constitute a unilateral act of the Allied Powers committed without regard to the long established principles of States or the generally recognised accepted rules of international law’: F.B. Schick ‘The Nuremberg Trial and the International Law of the Future’ *American Journal of International Law* Vol. 41 (1947), 770, 778. In turn, this view was not shared by Quincy Wright ‘The Law of the Nuremberg Tribunal’ *American Journal of International Law* Vol. 41 (1945), 49, ‘Every state does have authority to set up special courts to try any person within its custody who commits war crimes, at least if such offences threaten its security’.

*nationality* thus accused.<sup>80</sup> To this extent, the Nuremberg trials were ‘*a judicial anomaly*’.<sup>81</sup> This situation was exacerbated by the selection of the four presiding Tribunal Members and their alternates from four victorious nations,<sup>82</sup> rather than States which had retained neutral status throughout the War.<sup>83</sup> Countering this, Glueck sought to uphold the legitimacy of the Nuremberg process on the basis that:

‘The impracticability of a proposal to permit the Germans to proceed against their own nationals becomes glaringly apparent. If the German Courts were to resort to the Statutes and decrees of the Third Reich, the United Nations would indirectly be subscribing to such perverted Nazi inventions as the grossly unfair racial discriminations in German legislation and the flagrant and real (not merely formal) *ex post facto* Nazi criminal law. On the other hand, to employ German law with many objectionable elements removed would leave many gaps and loopholes and create numerous complex problems.’<sup>84</sup>

In support of the Allies’ decision to instigate judicial proceedings in an international forum in preference to the national courts of Germany, Glueck drew a comparison between the Nazis’ blatant or ‘*real*’ utilisation of *ex post facto* criminal law and the technical or ‘*formal*’ application of retrospective legislation enacted by the Allies.<sup>85</sup> But is not the cogency of this argument reliant upon five tendentious suppositions, the attempted resolution of which raises issues fundamental to any dispassionate assessment of the legitimacy of the Nuremberg Trial:

- (i) It was/is feasible to categorise legislation as retrospective in either a ‘*real*’ or ‘*formal*’ sense
- (ii) It was/is legitimate to utilise legislation which was retrospective in a ‘*formal*’ sense rather than a ‘*real*’ sense

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<sup>80</sup> By the London Agreement, a total of twenty three nations subscribed to the principles of the Charter, being the four major powers, forming the prosecution at Nuremberg, together with Denmark, Norway, Belgium, the Netherlands, Poland, Czechoslovakia, Yugoslavia, Greece, Australia, New Zealand, India, Ethiopia, Honduras, Panama, Haiti, Paraguay, Uruguay, Luxemburg and Venezuela.

<sup>81</sup> *Supra*: Calvocoressi *Nuremberg*, 26.

<sup>82</sup> Great Britain (Sir Geoffrey Lawrence; alternate William Birkett); US (Francis Biddle; alternate John Parker); France (Donnadiou de Varbres; alternate Robert Falco); USSR (I.T. Nikitchenko; alternate Lt. Col. Volchov). The legitimacy of the Nuremberg process was also impugned on the grounds that, for example, Major-General I. Nikitchenko was both a Soviet representative involved in drafting the Charter and a presiding Judge at the IMT as was the French Alternate Robert Falco whilst Robert Jackson was the driving force behind the ethos and content of the Charter whilst also acting as the US Chief Prosecutor during the Nuremberg Trial. See *supra*: Glueck *The Nuremberg Trial and Aggressive War*, 94, ‘If an American subject were in the toils for a crime allegedly committed against German law, he would not be heard to complain in a German Court that no judge of his nationality sat on the tribunal trying him’

<sup>83</sup> States such as Sweden, Switzerland or Spain although Glueck comments that ‘it is extremely questionable whether Fascist Spain could have been relied upon to undertake such an enterprise and to carry it out impartially; and small Switzerland in the shadow of Germany, that would one day develop into a military colossus, might well have shied away from the task’: *ibid.*: 95.

<sup>84</sup> Sheldon Glueck *War Criminals: their Prosecution and Punishment* (New York: Alfred A. Knopf, 1944), 83.

<sup>85</sup> *Ibid.*

- (iii) The Charter was untainted by the inclusion of any provisions rendering it retrospective in the ‘real’ sense
- (iv) If the Charter incorporated provisions which were retrospective in a merely formal sense, this did not impair the overall legitimacy of the proceedings
- (v) The process to which the Defendants were subjected was therefore beyond reproach

These pivotal issues were to emerge in direct or oblique form throughout the Nuremberg process. But in the aftermath of the War, any legal niceties arising from the Allies’ designated course were deemed of less than pressing immediacy. Any repercussions from the invocation of *ex post facto* legislation – albeit in the circumstances, a somewhat unlikely concession - could be addressed within the battleground of the Trial forum, not as a prelude to its inception. Whether driven by the elation of victory, the constraints of pragmatism, or a desire to present an image to the waiting world that justice was of supreme importance, the Allies were determined to command an international audience to witness the ignominy of the Nazis in defeat. Once the feasibility of trial in Germany had been discarded, the Allies deemed that their choice lay between a ‘political solution’ and judicial proceedings before a tribunal of purportedly international constitution.<sup>86</sup> Because of their reluctance to be upbraided for adopting authoritarian methods akin to those embedded within the Nazi regime,<sup>87</sup> the only viable option that remained was trial of the alleged perpetrators before a newly constituted forum.<sup>88</sup>

However, what if the Charter that underpinned the proceedings did comprise a latticework of retrospective provisions, either ‘real’ or ‘formal’? Was it plausible in such circumstances to conclude that the Nuremberg process conferred upon the Defendants safeguards, any more effective than a political solution of the type sporadically advocated by various proponents throughout the War? On this point, Harlan Fiske Stone, the sitting Chief Justice on the US Supreme Court declined even to administer the oath to the American members of the IMT, on grounds that certain

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<sup>86</sup> For a sympathetic view towards the political motivation and consequences underlying the Nuremberg proceedings, see *supra*: Doman ‘Political consequences of the Nuremberg Trial’, 81-90: ‘the Nazis are not on trial because they lost the war but because they started it’.

<sup>87</sup> This might have transformed ‘Nazi war criminals into martyrs’: Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, January 22, 1945, reported in the *Report of Robert H Jackson, United States Representative to the International Conference on Military trials, London, 1945* (Washington, D.C.: Department of State Division of Publications, 1949), 6.

<sup>88</sup> In the absence of a trial, there would, in the words of John Mc.Cloy from the U.S. War Department, have been ‘damage to democratic principles of justice’: quoted in Bradley F. Smith *The American Road to Nuremberg* (Stanford: Hoover University Press, 1982), 199.

aspects of the proceedings were little more than ‘*a high grade lynching affair*’.<sup>89</sup> From some perspectives, at least, the juridical process *was* flawed. How likely was it, however, that a ‘political’ solution would have guaranteed any higher degree of legitimacy vis-a-vis the treatment of those alleged to have transgressed international criminal norms? If a ‘political’ mode of disposition were deemed the sole comparator for assessing the legal validity of the Nuremberg trial, this would have rendered the relative merit of the Allies’ preferred judicial option conditional upon the empirical *outcome* of each process and the *means* by which such denouement was attainable. In the context of the Nazi ‘war criminals’, the term ‘political solution’ appeared to be used as a linguistic euphemism for summary execution. Assuming that capital punishment constituted retribution in its most draconian form, the ten Defendants, either acquitted or sentenced to varying terms of imprisonment at Nuremberg could scarcely, therefore, have raised protest about the legitimacy of the trial process. Nor could any more credible complaint have been compellingly advanced by the remaining Defendants, whose ultimate fate had been merely deferred rather than ameliorated.<sup>90</sup> For those Defendants, the judicial machinery of the Nuremberg process would have yielded a conclusion which differed, to no material extent, from their summary execution without trial.

Using the same ‘political’ comparator, what of the *means* deployed in the conception and implementation of the trial process? Feasible though it is to excoriate the specific methods utilised to facilitate the judicial process, does not this evaluation suggest that *any* juristic devices utilised within the framework of legal proceedings, were eminently preferable to the capriciousness and vagaries of some arbitrary political will.<sup>91</sup> But drawing such analogy to the discretionary caprice of political decree hardly serves as a persuasive testimonial to the Nuremberg process, for the darkest chamber is illuminated even by the faintest light. Does not the validity of the proceedings instead hinge upon the extent to which the Allies fulfilled criteria objectively consonant with the provision

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<sup>89</sup> Stone, quoted in Jeffrey D Hockett, ‘Justice Robert H. Jackson, the Supreme Court and Nuremberg Trial,’ *Supreme Court Review* Vol. 8, (1990), 258.

<sup>90</sup> Following imposition of sentence, the Defendants, who had been serving members of the Armed Forces, unsuccessfully petitioned the IMT to be shot rather than hung.

<sup>91</sup> See Michael Biddiss ‘The Nuremberg Trial: Two Exercises in Judgment’, *Journal of Contemporary History*, Vol.16, No.3, (July 1981), 597-615 at 612: ‘Proceedings of the Nuremberg type are attractive to men of power really only when the identity of the victors and vanquished are conveniently settled in advance’.

of a 'fair trial'? Were the Defendants subjected to a process dependent wholly, or in part, upon legal provisions and evidential devices of dubious provenance and uncertain legitimacy?<sup>92</sup> Was it therefore, overly simplistic to assert that:

'The law in force is not only the law of the past, the only one to which the defendants appeal, but that the law in force is also that which the judges invoke in a concrete manner from the bench. Where no written law exists one can only speak of former tendencies and ascertain whether they are still valid and can be invoked.'<sup>93</sup>

To augment the validity of the trial proceedings, Jackson insisted that the defendants should enjoy '*the presumption of innocence*',<sup>94</sup> and within the limited confines of the evidential burden of proof, this was beyond question. This aside, however, was not his acclamation disingenuous in seeking to mask the intrinsic deficiencies of a judicial process, to which the Allies had chosen to pin their banner of justice:

'The prosecuting nations are attempting to apply to international affairs the rule of law and justice which is applied to nationals of these nations in varying forms. They are endeavouring in international affairs to substitute "reason and justice" for "might is right".'<sup>95</sup>

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<sup>92</sup> 1 IMT 10: when the Allied nations conceived the Charter during the summer of 1945, they emphasized the need for the 'just and prompt punishment of the major war criminals of the European Axis.' The usage of the word, 'prompt' was perhaps ill-chosen in circumstances where the Allies were trying to convey to onlookers, a message as to the unequivocal legitimacy of the process. It was possibly overly-aligned with notions of swift retribution, only a breath away from summary execution. The Allies would undoubtedly have countered this assertion by stressing that a trial was necessary at the earliest opportunity, whilst the trail of evidence was intact and memories fresh.

<sup>93</sup> Dubost: 19 IMT 563. However, this argument overlooks the insistence of the Tribunal and the Allies that the Charter was declaratory or at least an expression of existing international law, reflecting *inter alia* the domestic criminal code of all civilised countries. How could the IMT at one and the same time be bound by a Charter, deemed inviolable by the Members, yet free to invoke law afresh, as Dubost appeared to suggest. This was just one example of many instances, throughout the proceedings, where the approach adopted by the Prosecutors created more questions than it solved.

<sup>94</sup> Jackson: 2 IMT 102, 'despite the fact that public opinion already condemns their acts, we agree that here they must be given the presumption of innocence and we accept the burden of proving criminal acts and the responsibility of these Defendants for their commission'.

<sup>95</sup> Gordon W. Forbes 'Some Legal Aspects of the Nuremberg Trial' *Canadian Bar Review* Vol. 24, (1946), 584, 598; Forbes' statement echoes the prophetic words of King George VI in his speech to the British people at the outbreak of WWII.

### 3. The pre-emptive provisions

#### A. Article 3 of the Charter

The Allies were keen to emphasize their commitment to the fairness of the judicial process that they had engineered.<sup>96</sup> Putatively contrary to this, however, they determined that the Charter, and by extension, the Tribunal, would be impregnable to incursions into its intrinsic validity.<sup>97</sup> This role they reserved for Article 3, a provision devised to resolve difficult issues by legislative fiat:<sup>98</sup>

#### Article 3

Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel. Each Signatory may replace its members of the Tribunal or his alternate for reasons of health or for other good reasons, except that no replacement may take place during a trial, other than by an alternate.’

What Article 3 did was vest the Members with sufficient authority to facilitate the peremptory rejection of a Motion by Defence Counsel that ‘*an opinion be submitted by internationally recognised authorities in international law upon the legal elements of the Trial under the Charter*’.<sup>99</sup> Such objections emanated from inadequacies they perceived in the substantive precedent that the Allies claimed underpinned some, if not all, of the offences with which the Defendants were charged. Numerous aspects of the Charter blatantly contravened the maxim, ‘*nulla poena sine lege*’ and concern was particularly warranted in the context of *crimes against peace*.

‘The Defence of all Defendants would be neglectful of their duty if they acquiesced silently in a deviation from existing international law and in disregard of a commonly recognised principle of modern penal jurisprudence.’<sup>100</sup>

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<sup>96</sup> Jackson’s *Report to the President on Atrocities and War Crimes*; 7<sup>th</sup> June 1945: available online at <<<http://www.yale.edu/lawweb/avalon/imt/jack01.htm>>>: ‘The trial must not be protracted by anything obstructive or dilatory but we must see that it is fair and deliberative and not discredited in time to come by any mob spirit’.

<sup>97</sup> On the pre-Nuremberg law and the validity of the *nulla poena* doctrine as an established principle, see the excellent account in Hans Leonhardt ‘Nuremberg Trial: A Legal Analysis’ *The Review of Politics*, Vol.11, No.4 (October 1949), 449-476.

<sup>98</sup> Unsurprisingly, this notion was entirely repudiated by the Prosecution. Shawcross anticipated this suggestion 3 IMT 106, dismissively stating ‘let the defendants and their protagonists claim that the Charter is, in this matter, an *ex parte fiat* of the victors’.

<sup>99</sup> Notes to Motion adopted by all Defence Counsel 1 IMT 169. The Motion was rejected on 21<sup>st</sup> November 1945. This is available online at <<http://www.yale.edu/lawweb/avalon/imt/proc/v1-30.htm>>

<sup>100</sup> Motion adopted by all Defence Counsel 19<sup>th</sup> November 1945: 1 IMT 48.

This, in the opinion of Defence Counsel, was exacerbated by *'the peculiarity of the Trial which departs from the commonly recognised principles of jurisprudence'*:

'The judges have been appointed exclusively by States which were the one party in this war. This one party to the proceedings is all in one: creator of the statute to the tribunal and of the rules of law, prosecutor and judge. It used to be until now that this should not be so; just as the United States of America ...always demanded that neutrals or neutrals and representatives of all parties should be called to the Bench. This principle has been realised in exemplary fashion in the case of the Permanent court of Justice at The Hague.'<sup>101</sup>

The Members held that the Motion was a plea to the jurisdiction of the Tribunal and hence, contravened the provisions of Article 3. If successful, such a submission would have struck at the very core of the legality of the Charter and for this reason, they rejected it. The jurisdiction of the Tribunal was unimpeachable and any contrary conclusion would have rendered the entire proceedings nugatory. No challenge was to succeed that mounted a challenge either to its fundamental authority or to the source from which its juridical power was derived and to that extent, the inclusion of Article 3 was not only explicable but essential. With striking simplicity, this provision effectively assured the inviolability of the Charter and crystallised with adamant resilience any retrospective elements contained within it.<sup>102</sup>

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<sup>101</sup> Motion adopted by Defence Counsel: 1 IMT 48.

<sup>102</sup>This notwithstanding, the prosecutors remained sufficiently concerned about the legitimacy of the proceedings that their opening speeches were coloured by the ever-present spectre of retrospectivity.

## **B. The defences of ‘acts of state’ and ‘superior orders’**

The inclusion within the Charter of Articles 7 and 8 similarly exemplified the strategy of legislative fiat to which the Allied Powers were prepared to resort. In drafting the Charter, there was a perceived need to incorporate the full range of offences which were to form the basis of the indictments to be laid against the Defendants.<sup>103</sup> The Allies also felt constrained to forestall the potential defences upon which reliance would undoubtedly have been placed in the absence of appropriate pre-emptive provisions. To this end, Articles 7 and 8, both of which gave rise to considerable controversy during the trial process, precluded the tendering of defences whereby immunity would accrue either from acting as a Head or representative of State or in pursuance of ‘superior orders’.

### **Article 7**

The official position of Defendants, whether as Heads of State or responsible officials in governments, shall not be considered as freeing them from responsibility or mitigating punishment.

### **Article 8**

The fact that the defendant acted pursuant to order of his government shall not free him from responsibility but may be considered in mitigation of punishment if the tribunal determines that justice so requires.

The Allies had presciently anticipated that the Defendants’ only realistic avenue for securing evasion from liability would be achievable by a conflation of the doctrines of ‘acts of State’ and ‘superior orders’. Accordingly, by an adroit exercise in expediency, the insertion of Articles 7 and 8 provided the Members of the IMT with the necessary armoury with which to nullify any Defence argument asserted in contravention of those provisions.

The defences of ‘acts of state’ and ‘superior orders’ were closely affiliated. In both instances, the perpetrator sought to assert that his actions were conducted in deference to the authority of a higher entity, in the former case the sovereignty of the State and in the latter the superior exercising command. In the absence of the Charter, reliance upon the two doctrines would thus have enabled the Defendants to seek exoneration on dual

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<sup>103</sup> Article 6 of the Charter of the IMT (Crimes against Peace, War crimes and Crimes against Humanity) referred to below, embodied in Counts One, Two Three and Four of the Indictment signed in Berlin on 6<sup>th</sup> October 1945 by the Chief Prosecutors of the four Allied Powers and lodged with the IMT on 17<sup>th</sup> October 1945 as a prelude to the opening of the Nuremberg Trial. The Charter is available online at: <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>.

grounds. Either their actions were pursuant to an *implicit* directive from the State or an *explicit* order from any officer or representative enjoying a higher status in the hierarchical structure of the State.

**B (i) Article 7: the doctrine of ‘acts of state’**

In general terms, and notwithstanding the existence of a principal/agent relationship, personal accountability was habitually ascribed to an agent for his own criminal misdeeds. However, in the sphere of international law, a markedly different situation had evolved:

- (i) *Serving* Heads of State and lesser individuals *in office* acting as instruments for and on behalf of their State, were immune from criminal prosecution and, indeed, civil suit for *all* acts committed during the period of their administration
- (ii) Individuals, *no longer in office*, who had acted as instruments for and on behalf of their State - not least of whom were *former* Heads of State - were immune from criminal prosecution and civil suit for any acts carried out in an *official*, though not a private or personal capacity.
- (iii) In all situations where the Head or former Head of State and/or instruments of the State were thus immune from criminal prosecution, liability was deemed to rest more properly with the State itself. However, this was of scant assistance to the aggrieved in that it was, and has since remained ‘*a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state. This immunity extends to both criminal and civil liability*’.<sup>104</sup>

Prior to the inception of the Nuremberg process, it was thus established that a *servant* Head of State was not subject to the Law of Nations. Such person was immune from prosecution *ratione personae*, that is, by an immunity attaching to his or her person in respect of *all* matters, whether or not referable to the State. Entitlement to act with

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<sup>104</sup> *Regina v Bow Street Metropolitan Magistrate Ex Parte Pinochet Ugarte* [2000] 1 AC 147 per Lord Browne-Wilkinson; *Schooner Exchange v Mc Faddon*; also *The People v McLeod* 25 Wend. 481, N.Y. (1841) cited in Moore, *A Digest of International Law* 1906, Vol. 2, 26 known as *The Caroline Case*.

impunity was derived from the sovereign immunity of the State itself. It followed that had Hitler been apprehended during his tenure of office, he would have been entirely invulnerable to legal action.<sup>105</sup>

However, the position in relation to a *former* Head of State was more complex. Immunity, here, was derived *ratione materiae*, that is, by reason of the subject-matter. This was designed to avoid the institution of legal action against members of previous government administrations. The underlying rationale was to safeguard the sanctity of the State rather than the individual perpetrator and the fact that the Head of State was afforded protection from prosecution was a peripheral consequence, not the primary purpose. No immunity was conferred for acts of a private, as opposed to an official nature. Moreover, the doctrine of State immunity shielded not only the former Head of State but also all State functionaries whose authority was subsequently challenged, whether government ministers, military commanders, police chiefs, or subordinate public officials:

‘The immunity is the same whatever the rank of the office-holder. It is immunity from the civil and criminal jurisdiction of foreign national courts but only in respect of government or official acts. The exercise of authority by the military and security forces is the paradigm example of such conduct.’<sup>106</sup>

Otherwise, it would have necessitated only the simplest of manoeuvres to circumvent the immunity afforded to the former Head of State. The successful pursuit of more lowly officials would have culminated in an unacceptable impingement upon the sovereignty of the State. A close overlay thus came to exist between the liability of *former* Heads of State seeking immunity from prosecution for acts committed on behalf of the State whilst in office, and that of lesser officials of government pleading immunity on similar grounds:

‘The immunity (of former Heads of State) finds its rationale in the equality of sovereign states and the doctrine of non-interference in the internal affairs of other States. Given its scope and rationale, it is closely similar to and may be indistinguishable from aspects of the acts of state doctrine. State immunity is a creature of international law and operates as a plea in bar to the jurisdiction of the national court, whereas the act of state doctrine is a rule of domestic law

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<sup>105</sup> Interestingly, Mussolini and Tojo of Italy and Japan respectively would not have been able to avail themselves of Head of State immunity *ratione personae* because they were never Heads of State.

<sup>106</sup> *Regina v Bow Street Metropolitan Magistrate Ex Parte Pinochet Ugarte* [2000] 1 AC 147 per Lord Millett.

which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state.’<sup>107</sup>

Legal recognition was accorded to State sovereignty, as early as 1812, in *Schooner Exchange v Mc Faddon* when the Court emphasized ‘the exemption of the sovereign and the sovereign agent of a state from judicial process’.<sup>108</sup> The issue re-emerged in *The People v Mc.Leod*,<sup>109</sup> in which the New York State Court refused to comply with an order of the Federal Court that required the release of the British defendant. He consequently stood trial for the murder of an American citizen, killed during an offensive action by a British force against the American steamer *Caroline* whilst moored on the American side of the Niagara River. A furore of debate ensued and in an effort to placate the British Government, the US Secretary of State Webster wrote to the Attorney General Crittenden on 15<sup>th</sup> March 1841:

‘All that is intended to be said at present is that since the attack on the *Caroline* is avowed as a national act, which may justify reprisals, or even general war...yet that it raises a question entirely public and political, a question between independent nation; and that individuals connected in it cannot be arrested and tried before the ordinary tribunals, as for the violation of municipal law.’<sup>110</sup>

What these comments, in essence, represented was the traditionally accepted impregnability of State sovereignty, which the US Federal Court had sought to uphold in the *Caroline* case.

The late 19<sup>th</sup> century invigoration of the nation state attained its zenith in the prelude to the First World War. The notion of State sovereignty had, by that stage, become firmly embedded in inter-State relations. Only during the ‘inquest’ conducted in the *aftermath* of the War was any attempt made to dilute the purported invincibility of State immunity. This took the form of potential criminal proceedings before a High Tribunal of the *former* German Head of State, Kaiser Wilhelm II. His alleged ‘crime’ was a

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<sup>107</sup> *Regina v Bow Street Metropolitan Magistrate Ex Parte Pinochet Ugarte* [2000] 1 AC 147 per Lord Millett. In support of his contention, he cited *Duke of Brunswick v King of Hanover* [1848] 2 H.L. Cas.1; *Hatch v Baez* 7 Hun. 596 and *Underhill v Hernandez* (1897) 168 U.S. 250.

<sup>108</sup> *Schooner Exchange v McFaddon* 7 Cranch 116 (1812) cited in Moore *A Digest of International Law* (1906) Vol. 2 para 175, 4.

<sup>109</sup> 25 Wend.481, N.Y. (1841) cited in Moore, (1906), *A Digest of International Law* Vol. 2, 26 also known as *The Caroline Case*.

<sup>110</sup> *The People v Mc.Leod* 25 Wend.481, N.Y. (1841). In a debate in the Senate mentioned by Calvocoressi, Senator Calhoun criticised the attitude of Webster positing that ‘if the act in question is criminal, the servant cannot claim immunity by attributing the act to his state and cannot escape personal responsibility. The special and unusual provisions of international law with regard to principal and agent did not extend to criminal actions’: *supra*: Cavocoressi, *Nuremberg*, 69. This presaged the stance adopted at Nuremberg over a century later.

*'supreme offence against international morality and the sanctity of treaties'*<sup>111</sup> but, because the extradition procedures proved abortive, the legitimacy of this proposal was never tested in practice. In the absence of relevant judicial proceedings, the validity of this proposed incursion into the traditional immunity afforded to a former Head of State was left undetermined. These tenuous inroads into State immunity were effectively consigned to obscurity, only to be resurrected by the Allies at Nuremberg.

In light of the historic importance of State sovereignty, any contention that the Charter was merely declaratory of previously established precedent appeared unsustainable. Firstly, no unequivocal authority existed whereby violation of international law by the 'offending' State would deprive its agents of the protection afforded by the sanctity of that State. Secondly, even *had* the requisite doctrinal evidence been available to support a position that State sovereignty no longer conferred immunity from criminal prosecution this gave rise to a further but equally significant issue. Did 'offences' irrefutably exist under international law which would potentially culminate in forfeiture of the shield of immunity? If so, how grave must alleged transgressions have been before immunity accorded to State functionaries was sacrificed?

In the absence of the Charter, the Defendants would seemingly have been protected by their former office. It would have been open to them to seek total immunity for their actions on the basis that they fell squarely within the prerequisite criteria for reliance upon 'acts of state' doctrine. However, the Charter did exist and was accepted by the Tribunal as a definitive statement of the law pertaining to the Nuremberg process. In such circumstances, why did the Prosecution feel constrained to offer any additional explanation in purported vindication of Article 7? The Allies could simply have rested their case, without more, upon the authority conferred by the Charter. Perhaps the answer lay in the uncertain foundations upon which the Prosecution case was constructed. This was exemplified by the Allied propensity, both prior to and during the proceedings, to anticipate and silence any dissenting voices and, as early as June 1945, Jackson had endeavoured to pre-empt any potential objections arising from the nullification of the 'acts of state' defence. This contention was predicated upon the rather suspect supposition that the doctrine had simply perished through disuse:

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<sup>111</sup> This is contained in Article 227 of the Treaty of Versailles 1919 and is discussed further *infra*: Chapter 5.

‘Nor should such a defence be recognised as the obsolete doctrine that a head of state is immune from legal liability. There is more than a suspicion that this idea is a relic from the divine right of kings. We do not accept the paradox that legal responsibility should be the least where the power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke who proclaimed that even a King is still “under God and the law”.’<sup>112</sup>

Delivered over three hundred years prior to the Nuremberg Trial, the dicta of Lord Justice Coke were seized upon by Jackson, as the nucleus of his argument relating to the ‘acts of state’ doctrine. Regardless of the notion of State sovereignty, no Head of State automatically enjoyed immunity from prosecution. Although the principle enunciated by Coke LJ in the early 1600s still retained validity, the notion of ‘Head of State’ immunity had been reduced to a condition of obsolescence. It was, in essence, a relic of the divine right of kings. On this point, Jackson was presumably alluding to the pre-17<sup>th</sup> century position. However, he attempted neither to distinguish judicially made precedent of far more recent inception than the precept upon which he was seeking to place reliance nor to explain the manner in which such later authorities had been consigned to a status of redundancy. To that extent, his rationale was logically flawed. It was also unfathomable on any basis other than as a tenacious, though unconvincing effort to dispense with a doctrine for which precedent seemingly existed.<sup>113</sup>

In his closing submissions to the IMT during the Trial, Sir Hartley Shawcross displayed a similar determination to justify the elimination of a defence based upon ‘acts of state’:

‘Now it is true that there is a *series of decisions* in which the courts have affirmed that one State has no authority over another sovereign state or over its head or representative. Those decisions have been based upon the precepts of the comity of nations. They do not in truth rely upon any sacrosanctity of foreign sovereignty...They really afford no authority for the proposition that those who constitute the organs of state are entitled to rely upon the metaphysical entity which they create and control when by their very directions, that state sets out to destroy that *very comity* on which the rules of international law depend.’<sup>114</sup>

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<sup>112</sup> Jackson’s *Report to the President on Atrocities and War Crimes*; 7<sup>th</sup> June 1945: available online at <<<http://www.yale.edu/lawweb/avalon/imt/jack01.htm>>>He reiterated his comments during his opening address: 2 IMT 143.

<sup>113</sup> Dubost: 19 IMT 563, encountered similar obstacles in mounting a convincing argument that the doctrine of ‘acts of state’ had been supplanted in international law by the date of commission of the Nazi atrocities. Evidently unable to cite precedent for the prior nullification of the ‘acts of state’ doctrine, he sought to rely instead upon ‘pressure from the universal conscience that gave rise to new developments in international custom’.

<sup>114</sup> Shawcross: 20 IMT 464: ‘In the international field, the source of law is not the command of a sovereign but the Treaty agreement binding upon every State which has adhered to it.’ During his opening submissions: 3 IMT 103, he quoted M. Litvinoff of the USSR in the following terms, ‘Absolute sovereignty and entire liberty of action only belongs to such states as have not undertaken international

By endeavouring to pierce the shield generally afforded by the notion of State sovereignty, Shawcross evidently hoped to construct a sufficiently persuasive argument to oust the established notion of ‘acts of state’ immunity. He contended that because Nazi Germany had flouted every established principle of international law in its conduct towards other nations, it had forfeited the right to be accorded recognition as a sovereign state. Any other stance would have yielded the absurd and unsustainable outcome of enabling the Defendants to escape judicial retribution. They were agents of the State and in that capacity had enabled the State to violate international law. It would constitute an affront to justice were the Defendants to be allowed to shelter behind the distortion of State sovereignty which *they* had been instrumental in creating:

‘It is more reasonable to assume that by invading neighbouring countries in flagrant breach of treaty obligations and for purposes of aggression, conquest and the mass extermination of the subjects of neighbouring States, an offending sovereign destroys any implied consent that he be exempt from the jurisdiction of others and strips himself and his agents of any mantle of immunity he may have claimed by virtue of international *comity*.’<sup>115</sup>

From a positivist standpoint, however, the position that Shawcross advanced and Glueck endorsed was impeachable. It relied upon a putative assumption that the doctrine of ‘acts of state’ was derived not - as had been historically accepted - from the acknowledgment and subsequent preservation of the notion of State sovereignty.<sup>116</sup> Rather, it stemmed from a more illusory aspiration to foster mutual respect or ‘comity’ between nations. Where inter-state civility foundered due to the enmity unilaterally engendered by one former ally towards another, it was absurd to permit a national of the offending State to shelter behind the doctrine of ‘acts of state’.

In terms of its exposure of the apparent travesty in according continuing legal protection to agents and functionaries of a transgressing State, this argument may have been

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obligations. Immediately a state does accept international obligations, it limits its sovereignty’. A critic of the Nuremberg process could presumably argue that on those occasions when ‘inconvenient’ precedent existed, the prosecution disregarded or distinguished it whilst when no precedent existed, the prosecution had recourse to the provisions of the Charter and specifically to Article 3 which precluded any challenge being made to the intrinsic validity of the Charter or the IMT itself.

<sup>115</sup> *Supra*: Glueck *The Nuremberg Trial and Aggressive War*, 52. See also *supra*: Glueck *War Criminals: their Prosecution and Punishment*, 136, in which Glueck comments that, ‘The act-of-State dogma applied generally could easily render the entire body of the laws and customs of warfare a dead letter; any government could easily arrange to have all of its subjects violations of the laws of nations in warfare declared acts of state. The result would be that most lawless aggressive States could never lose. If they won the war their militarists who had ordered and executed even the most flagrant atrocities would not of course be punished. If they lost the war, they could claim immunity on the ground that *under their own law*, their criminal deeds would be “acts of state”.

<sup>116</sup> The doctrine of sovereignty connotes that positive law is always derived from a superior power.

ostensibly compelling. This, however, flew in the face of established precedent. More significantly, it sought to disregard, or at least circumvent, the hitherto accepted sanctity of State sovereignty. Yet, on this point, Article 7 of the Charter buttressed the argument on which Shawcross placed reliance, in that the official position of the Defendants neither freed them from responsibility nor mitigated their guilt. Insofar as the greater good was threatened by strict adherence to the notion of State supremacy, the Charter implicitly decreed it redundant.<sup>117</sup>

‘Legal purists may contend that nothing is law which is not imposed from above by a sovereign body having the power to compel obedience. That idea of the analytical jurists has never been applicable to international law.’<sup>118</sup>

Against this background, Defence Counsel Jahreiss had the unenviable task of tendering legal submissions which would at least serve as a catalyst for sensible debate:

‘For Europeans at any rate the State has, during the last four centuries, achieved the dignity of a super-person. Of course acts of state are acts of men. Yet they are in fact acts of state, that is, acts of state carried out by its organs and not the private acts of Mr Smith or Mr Muller. What the prosecution is doing when in the name of the world community as a legal entity, it desires to have individuals legally sentenced for their decisions regarding war and peace is to look upon the state as a private individual; indeed more than that. What it is doing is destroying the sanctity of the state. Such an indictment is incompatible with the very nature of sovereignty and with the feeling of the majority of Europeans.’<sup>119</sup>

Without becoming embroiled in the type of conceptual contortions employed by the Prosecution, Jahreiss chose instead to base his argument upon prior entrenchment of the ‘acts of state’ doctrine. This, he asserted, was an adjunct to the evolution of the concept of state sovereignty over the previous four centuries.<sup>120</sup> In so doing, he implicitly

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<sup>117</sup> Stanley L. Paulson ‘Classical Legal Positivism at Nuremberg’ *Philosophy and Public Affairs*, Vol.4, No. 2, (Winter, 1975), 132-158: ‘The IMT reaffirmed Article 7 of the Charter and rejected the classical positivist doctrine of absolute sovereignty. Speaking directly to Article 7, the Tribunal contended that the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state’.

<sup>118</sup> Shawcross: 20 IMT 465.

<sup>119</sup> Dr Hermann Jahreiss upon the legality of the charges preferred against the Defendants: 17 IMT 478. He went on to comment upon the stance taken by the US delegates to the Commission, which was in apparent contradiction to the attitude of the prosecution towards the doctrine of ‘acts of state’ adopted at Nuremberg. Jahreiss also drew a clear distinction between ‘the law in force’ and the ‘law of the future, such as it should be conceived in the light of morality and progress.’ It was only the former, that is, the international law ‘in force’ that was binding upon States.

<sup>120</sup> *Supra*: Paulson ‘Classical Legal Positivism at Nuremberg’, 132-158: ‘He (Jahreiss) assumed that the acts of the defendants were within the scope of the powers delegated to them and could be imputed to the state as acts of state, thereby granting the defendants legal immunity. He then used this assumption in the international context, arguing that it would be contrary to the doctrine of national sovereignty to grant a foreign or international forum the power to hold an individual responsible for acts imputed to the individual’s state as acts of state. If liability under positive law could be imposed by a foreign or

accepted the validity of customary law evolving from long established practice, either as judicially applied or legislatively ratified. However, was not this stance inconsistent?<sup>121</sup> For in the context of *other* legal issues arising from the Charter,<sup>122</sup> Jahreiss insisted that the only valid norms were those consigned to writing and directly derived from the legislative process of the State.

Furthermore, Jahreiss' reliance upon the '*feeling of the majority of Europeans*' more tellingly betrayed his preparedness to depart from the strict positivist stance, to which he had otherwise declared his rigid adherence. The rationale which he elsewhere articulated for strict reliance upon codified precedent arose from the desirability of achieving absolute certainty and precision. In other contexts, customary law failed to satisfy his criteria for legal validity. Therefore, his sudden amenability to embrace principles emanating from the mere sensibilities or *feelings* of certain portions of humanity was still less consistent with the general positivist tenor of his approach. Moreover, his argument failed to elucidate the specific categories of persons from whom such attitudes were claimed to emanate; given that the European Prosecutors were of French, British and Russian nationality, Jahreiss omitted to clarify whether he was seeking to discredit precepts entrenched within *those* legal systems as opposed to those integral to German law.

Alternatively, he may have been seeking to distance his arguments from any association with such precedent as had evolved within the Anglo-American common law systems. He was doubtless aware, for example, that in the context of the conspiracy charge comprising Count One of the Indictment, it was imperative for a persuasive distinction to be drawn between the civil law regimes of the majority of Europe and the Anglo-American common law tradition. Jahreiss may have displayed a consistent stance with regard to the geographical provenance of the legal systems to which he asserted allegiance. However, his general representations in relation to the validity of Article 7 would perhaps have been more compelling, had not his reasoning been at variance with

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international forum, that would set limits, on what is by definition unlimited, the legal power of the sovereign state'.

<sup>121</sup> See Chapter 5 on this point in that Carl Schmitt would argue that the basis for the arguments raised by Jahreiss could be re-constructed as reliance on the *nomos* of the *jus publicum europaeum* rather than customary law *per se*.

<sup>122</sup> 17 IMT 481: in the context of the 'offence' of *crimes against peace*, Jahreiss defined law (or *lex*, as he termed it) as that derived from legislative provisions.

the position of strict positivism (excluding the efficacy of customary legal norms) that he, otherwise, adopted during the Trial.<sup>123</sup>

Significantly, Hans Kelsen endorsed Jahreiss' emphasis upon the existence and importance of the notion of State sovereignty.<sup>124</sup> It was not permissible for an individual of one State to be prosecuted by a court of the injured State. This was tantamount to '*a violation of general international law that no State is subject to the jurisdiction of another State*'.<sup>125</sup> A countervailing argument might indicate that the defence, being available only in peacetime, was otiose in the situation which prevailed during the Second World War. But this type of limitation on the ambit of the 'acts of state' doctrine was open to criticism on the basis that the presence or otherwise of warfare was irrelevant to the availability of the defence:

'There is no sufficient reason to assume that the rule of customary law under which no State can claim jurisdiction over the acts of another State is suspended by the outbreak of war and that consequently, it is not applicable to the relationship between belligerents.'<sup>126</sup>

An additional reason possibly existed for ouster of the doctrine. Where a State operated beyond its own sphere of competence, by infringing the sovereign rights of another State, how was it viable for an individual to claim legitimate immunity for acts committed on behalf of the 'offending' State? This rationale comprised the Members' preferred approach:

'The very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state, if the state in authorising action moves outside its competence under international law.'<sup>127</sup>

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<sup>123</sup> The significance of customary norms is considered *infra*: this Chapter in relation to Article 6 of the Charter and also in Chapter 5 in the context of the concept of *nomos* as deployed by Carl Schmitt.

<sup>124</sup> Like Glueck, Kelsen was both a legal theorist and an OSS consultant seconded to give advice upon aspects of the Nuremberg process.

<sup>125</sup> Hans Kelsen *Peace through Law* (New York & London: Garland Publishing, 1973), 82. Article 7 is more restrictive in scope than the draft clause excluding the doctrine of 'acts of state' proposed by Glueck, in which he expressed the view that the defence should only be eliminated where the accused 'knew or under the circumstances ought to have known that the act involved is illegal': *supra*: Glueck *War Criminals: their Prosecution and Punishment*, 139.

<sup>126</sup> Hans Kelsen 'Collective and Individual Responsibility in International Law' *California Law Review*, Vol. 3, (1943), 530, 539-541. Hans Kelsen *Peace through Law* (New York & London: Garland Publishing, 1973), 85; Kelsen also maintains (*ibid*: 86) that, 'if individuals are to be punished for acts which they have performed as 'acts of State' by a court of another State, or by an international court, as a rule the legal basis of the trial must be an international treaty concluded with the State whose acts are to be punished. By such treaty, the jurisdiction over these individuals would be conferred upon the national or international court'.

<sup>127</sup> Judgment: 22 IMT 467.

However, this justification was flawed. Imposition of individual responsibility was deemed feasible whenever a State acted beyond its legal competence. Immunity in such circumstances was not available. The Members simplistically assumed that the transgressing State had contravened inter-state laws and had therefore exceeded its legal competence. Because the State's actions were illegal, the right to sovereign privilege had been sacrificed. It followed that an individual purporting to act on behalf of that State could no longer shelter behind the notion of State sovereignty. If the State, as principal, was guilty of violations of international law, then so also were agents acting at the implied behest of that State. However, the Members had created a circularity of argument whereby the pivotal issue of the pre-existence of pertinent international law remained undetermined. By breaching established law, States supposedly acted outside the aegis of their authority but how was that law to be defined and identified? The problem essentially lay in the determination of the nature and extent of the law which Germany and its agents had allegedly violated. If the Members were to adequately vindicate their nullification of the 'acts of state' doctrine, they could not simply *assume* the existence of relevant pre-existing law.<sup>128</sup>

Yet, even if logically unsustainable the Tribunal had, at least, displayed a fleeting willingness to undertake a legal critique of the 'acts of state' doctrine. It was clearly open to the Members, without more, to determine that the unassailability of the Charter placed beyond challenge the nullification of pre-existing defences. But this sortie into the skirmish of substantive argument was to represent the merest chink in the Tribunal's generally impenetrable stance towards the intrinsic validity of the Charter. The Members were presumably aware that any attempt to vindicate Article 7, by reliance upon the pre-existing legal position, would have culminated in exposure of the

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<sup>128</sup> Indeed, such issues were still troubling the Courts some sixty five years later, when the English House of Lords was required to adjudicate upon the extradition of the former Chilean Head of State, Pinochet: *Regina v Bow Street Metropolitan Magistrate Ex Parte Pinochet Ugarte*: [2000] 1 AC 147. The universal criminal illegality of 'torture' proved crucial in the Court's decision to permit Pinochet's extradition. The House was however divided as to whether the offence was a *jus cogens* established by customary international law or in the majority view a conventional offence. On the latter premise, extradition was only possible in respect of acts of torture committed after the Torture Convention had been incorporated into English law on 29<sup>th</sup> September 1988 by section 134 of the Criminal Justice Act 1988. Schick points out that the ouster of the 'act of state' doctrine in this type of situation had not, at the date of the Nuremberg Trial, 'become a generally accepted rule of international law. In the past, the practice of States has not supported such an assumption, (*namely that he who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state, if the state in authorising action moves outside its competence under international law*) and at present, the Allied and Associated Powers have plainly rejected the incorporation of this idea into the Charter of the United Nations:' *supra*: Schick 'The Nuremberg Trial and The International Law of the Future', 770, 792.

innovatory rather than declaratory nature of the Charter. Emphasis upon the substantive precedent which pre-dated the Charter would have highlighted the inconsistency between the doctrine of 'acts of State' established by the former, as opposed to the preclusion of this defence effected by the latter. The Tribunal encountered the same conundrum as the Prosecution, in endeavouring to justify a provision of the Charter manifestly inconsistent with the law of which it purported to be declaratory.

Neither did the IMT nor indeed the Prosecution dare concede, whether directly or obliquely, that the Charter comprised wholly new law. Such an approach would have served to unmask the full retrospective implications of Article 7. As a legislative, rather than a judicial act, no doubt would have remained that the Charter bore all the characteristics of an Act of Attainder.<sup>129</sup> Kelsen encapsulated this in his invective against '*the typical fiction of the problematical doctrine whose purpose is to veil the arbitrary character of the acts of a sovereign law-maker*'.<sup>130</sup> In an effort to salvage the validity of Article 7, was a 'natural law' type approach relevant where the positive norms (or lack of them) then existing '*emasculated both reason and justice*'?<sup>131</sup> Was it legitimate in such circumstances to '*replace bad law with good law*'?<sup>132</sup> Though arguably feasible, the empirical reality remained that the Charter nullified pre-existing defences, with *retrospective*, rather than prospective effect. The Members' decision to adjudge Article 7 unimpeachable denied the Defendants the facility of a defence which, had they been tried at any stage prior to August 1945, might well have afforded them blanket immunity from conviction. It was clear that the pragmatic consideration of securing the convictions of the Defendants proved more telling than any allegiance to, or consistency with, the niceties of substantive precedent.

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<sup>129</sup> J.H. Morgan *The Great Assize* (London: John Murray, 1948), 7. A Bill of Attainder is an Act passed to enable the prosecution of specific individuals.

<sup>130</sup> Hans Kelsen 'Will the Judgment in the Nuremberg Trial constitute a precedent in international law?' *International Law Quarterly Review* Vol. 1 No.2, (Summer 1947), 153, 161-162. This suggestion was staunchly refuted by Shawcross 3 IMT 93: 'It is not difficult to be misled by such criticisms that the Charter is reminiscent of bills of attainder, and that these proceedings are no more than an act of vengeance, subtly concealed in the garb of judicial proceedings which the victor wreaks upon the vanquished. These things may sound plausible but they are not true. It is indeed, not necessary to doubt that some aspects of the Charter bear upon them the imprint of significant and salutary novelty.' Shawcross quashed any hint of attainder by insisting, albeit unconvincingly, that 'the Charter does no more than constitute a competent jurisdiction for the punishment of what constituted an international crime before this Charter became part of the public law of the world'.

<sup>131</sup> *Supra*: Glueck *The Nuremberg Trial and Aggressive War*, 59.

<sup>132</sup> *Ibid.*

## **B (ii) Article 8: the defence of ‘superior orders’**

In embracing Article 8 of the Charter, the Prosecution adopted a similarly pre-emptive rationale. A defence seemingly well-established, at least in a limited form, at the date of commission of the offences for which the Defendants were indicted, was effectively nullified.<sup>133</sup> Once again, therefore, the proceedings were conducted in the shadow cast by imputations of a retrospective application of the criminal law. The *ex post facto* elimination of pre-existing defences denied the Defendants an escape route which, had not the Charter interposed, they may feasibly have believed to exist.

Article 8 of the Charter stipulated that whilst obedience to superior orders may, in appropriate circumstances, be utilised in mitigation of responsibility such compliance would never constitute a *defence*. Following the First World War, the Commission on the Authors of War and Enforcement of Penalties had ordained that ‘*it will be for the Court to decide whether a plea of superior orders is sufficient to acquit the person charged from responsibility*’.<sup>134</sup> It was thus confirmed that whenever the circumstances so demanded a defendant could be totally exculpated. A leading textbook of the day<sup>135</sup> had also accepted that persons who breached the law in compliance with superior orders could *never* be fixed with liability at all. Responsibility rested with those who had given the orders rather than with those who followed them. Further, the British Manual of Military Law<sup>136</sup> and the US Rules of Land Warfare,<sup>137</sup> whilst lacking the force of

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<sup>133</sup> *Supra*: Paulson ‘Classical Legal Positivism at Nuremberg’, 132-158: ‘Can a soldier legally justify disobedience on grounds that the act in question is immoral? According to the doctrine of absolute sovereignty, he cannot; to contend otherwise is to allow a legal obligation to be overturned on extra-legal grounds – here, on moral grounds. As an expression of the sovereign, the commanding officer’s order, coupled with legally unlimited power to enforce obedience, is sufficient to establish a legal obligation and the obligation is unconditional’.

<sup>134</sup> *Commission on the Responsibility of the Authors of War and on Enforcement of Penalties*, American Journal of International Law, (1920), 95ff.

<sup>135</sup> Lassa Oppenheim *International Law* Vol. 12 (London: Longmans, Green and Co, 1906), s. 253, although no specific authorities were cited in support of the author’s interpretation of the law. The same statement of the law in relation to ‘superior orders’ was repeated after the death of Oppenheim in subsequent editions of the book, and it was only in the Sixth Edition of the book, published in 1946, that Oppenheim’s editor, Hersch Lauterpacht endorsed the doctrine that superior orders did not provide a blanket defence in all situations. Again, the timing of this amendment seems particularly significant given that the Second World War had by then ended.

<sup>136</sup> The *British Manual of Military Law 1914 paragraph 443* stipulated: ‘it is important to remember that members of the Armed forces who commit violations of the recognised rules of warfare such as are ordered by their government or by their commanders are not war criminals and cannot therefore be punished by the enemy.’ The Lord Chancellor recommended in 1919 that this provision in the ‘Military Manual’ should be removed but no action was taken in this regard for 25 years. This timely revision anticipated the establishment of the IMT. Glueck, commented in 1944, *before* the revision of these

legally binding precedent, prescribed similar codes of responsibility until their timely revisions in 1944.<sup>138</sup>

The legal position within Germany, both prior to and during the Nazi regime, likewise generally imposed liability for breach of the criminal law upon the superior officer who gave the command, rather than upon the person who complied with such order. However, this was subject to a recognised exception whereby the latter could be held accountable as an accomplice, in circumstances where *'he knew that the act of the superior referred to an act which had as its purpose a general or military crime or misdemeanour'*.<sup>139</sup> In 1921, the concept of 'superior orders' as a potential defence was construed in a similarly restrictive form when the issue came before the German Supreme Court in *LLandoverly Castle*. The defendant Patzig was convicted on the basis that:

'It is certainly to be urged in favour of military subordinates that they are under no obligation to question the order of their superior officer and they can count upon its legality. But no such confidence can be held to exist *if such an order is known universally to everyone including the accused to be without doubt whatever against the law.*'<sup>140</sup>

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provisions: 'Considering the serious possibility that practically all violators of the laws and customs of warfare to the injury of American and English national and interests would have a valid defence, *we may well inquire whether the rule should be changed*': *supra*: Glueck *The Nuremberg Trial and Aggressive War*, 142. Glueck also highlighted what he perceived to be a lack of harmony between the official Army Rules which recognise blanket non-liability and the pre-existent judicial US and British precedent which he adjudged to palliate but not in every situation to eliminate the liability of the person asserting the defence of 'superior orders'.

<sup>137</sup> *US Rules of Land Warfare 1914, Article 366*.

<sup>138</sup> 'Individuals and organisations who violate the accepted laws and customs of war may be punished therefore. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defence or in mitigation of punishment': Para 341.1 (change of 15 Nov 1944). The British Ministry of Defence *Manual of Military Law*, 12 ed. (1972), Part I, para 23, and the United States Department of the Army *Law of Land Warfare*, FM 27-10 (1956), para 509 (a), maintained this 1940 position.

<sup>139</sup> *Section 11 of the Soldiers Act and the German Military Code 1882*: Reichsgesetzblatt, 1926 37, p.278; also *Art. 47 of the German Military Code of Justice 1940*.

<sup>140</sup> *LLandoverly Castle* (1921) H.M.S.O. Cmd.450. Kelsen comments that because within a legal autocracy such as Nazi Germany, legal power in relation to the conduct of war is almost unlimited, the Government is nearly always in a position to justify its acts from the point of view of national law. 'Consequently, it is difficult to repudiate the plea of superior command by the argument that the command was 'illegal', in case the command has been issued by the government or is based on a command by the government. The argument of illegality of command as justification for repudiating the plea of superior command is practically restricted to cases of command issued by relatively subordinate organs without authorisation on the part of their government': Hans Kelsen *Peace through Law* (New York & London: Garland Publishing, 1973), 106-110. However, he was obviously aware that the availability of the defence would constitute inordinate difficulties in the context of prosecution of alleged 'war criminals' and concluded that a treaty conferring jurisdiction upon an international court, may exclude the plea of superior command if this would seem necessary to the development of international justice.

This indicated that the availability of the defence was reliant upon the Defendant's subjective perception of his own actions. Knowledge could only be notionally imputed to him where there was *universal* awareness of the illegality of the order. Additionally, the defendant himself had to be *included* within the category of persons with possession of the requisite degree of knowledge. Unless, therefore, the illegality of the order was glaringly apparent to the accused, the defence retained its validity:

'The knowledge is according to *LLandoverly Castle* decision evidently imputable only in the very rare case where the rule of international law is simple and universally known. The rule is little better than one which completely exempts *all* subordinates acting upon *any* orders of their superiors.'<sup>141</sup>

The amendments to the British Military Manual and the US Rules of Land Warfare were intended to eliminate the previously accepted notion of non-liability. In substitution, a code of conduct was introduced under which obedience to superior orders would no longer confer unqualified immunity. Thereafter, at worst, such adherence would be capable of operating in *mitigation* of punishment. Compliance would furnish an effective *defence* only where the illegality of the order was neither within the actual knowledge of the perpetrator nor of such a manifestly or palpably illicit nature that such knowledge ought to be imputed to him. With the introduction of threshold criteria of stricter application than the *LLandoverly Castle* 'universal knowledge' test, the importation of an objective element this entailed further reduced the likelihood of any circumstances arising, in which the defence could be successfully pleaded. Nonetheless, the revised versions of the British and US Rules of Warfare - amended against the backdrop of World War II – continued to recognise and preserve a circumscribed version of the defence.

With scarcely a backwards glance at the pre-Charter position,<sup>142</sup> the Prosecutors' attitude emphasized the importance of dispensing both with the doctrine of 'acts of state' and the defence of 'superior orders'. In meeting the demands of a changing world, the Allies were expediently prepared to use the Charter as an instrument by which to secure the Defendants' convictions for the indicted offences. The Prosecution had deftly

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<sup>141</sup> *Supra*: Glueck *War Criminals: their Prosecution and Punishment*, 153- 154.

<sup>142</sup> The Prosecution was at liberty to adopt an approach based upon the presupposition that the Charter could not be impugned and that the legal position prior to the Charter was thus irrelevant. There was thus strictly no obligation to consider the pre-Charter position.

created a tapestry of interwoven provisions and were determined to ensure that no thread be allowed to unravel, lest the fulfilment of their dominant purpose be jeopardised. However, in so doing, Jackson was implicitly forced to concede that immunity *had* previously been established for perpetrators of crimes at an international level. This was effectively tantamount to an admission that the defences precluded by Articles 7 and 8 of the Charter had been historically accorded legal recognition. How else could purportedly criminal activities have gone unpunished? Surely, if those defences had not already been afforded legitimate status, then suspected international felons would never have been permitted to evade liability for their transgressions, on the basis of compliance with a ‘superior order’ or performance of an ‘act of state’. Yet Jackson acknowledged that such persons had, indeed, escaped with total impunity:

‘The Charter recognises that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of state. These twin principles working together have heretofore resulted in immunity for practically everyone concerned in the really great crimes against peace and mankind. Those in lower rank were protected against liability by the orders of their superiors. The superiors were protected because their orders were called acts of state. Under the Charter, no defence based on either of these doctrines can be entertained. Modern civilisation puts unlimited weapons of mass destruction in the hands of men.<sup>143</sup> It cannot tolerate so vast an area of legal irresponsibility.’<sup>144</sup>

Jahreiss was predictably less sanguine when confronted with the seemingly impenetrable barrier represented by the Charter. He asserted that the authoritarian political regime prevailing within Nazi Germany at the material time was such that the Defendants were not permitted to devote even *perfunctory* consideration, far less make any *moral* decision upon the lawfulness of their actions. The dictatorial source from which the edicts emanated had, in his view, removed those orders entirely from the aegis of Article 8. The potential implications of disobedience were beyond the realm of reasonable contemplation. Any attempt to preclude or restrict the defence of ‘superior orders’ was, therefore, wholly inconceivable in the particular circumstances in which the Defendants had allegedly perpetrated their misdeeds:<sup>145</sup>

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<sup>143</sup> The Allies had unleashed two atomic bombs upon Japan during the summer of 1945.

<sup>144</sup> Jackson: 2 IMT 150.

<sup>145</sup> *Supra*: Paulson ‘Classical Legal Positivism at Nuremberg’, 132-158: ‘Jahreiss’ primary interest was in the legal status of the orders of Hitler himself. These directives, decisions, instructions, and the like were defective if judged by traditional standards, the standards, for example, of the Weimar Constitution. But the so-called Enabling Act 1933 swept away the old standards. The Act in effect authorised Hitler to change statutory and even constitutional law by decree, thereby giving credence to the abolition of the separation of powers in Germany. The result, Jahreiss argued, was a doctrine of absolute sovereignty personified in Hitler’.

‘There must under any government exist orders that are binding on the members of the hierarchy under all circumstances, and therefore represent the law to the official concerned, even though outsiders may find that they are defective as regards content or form...’<sup>146</sup>

The Prosecution had, in his view, adopted a stance laced with internal inconsistency in that it was logically unsustainable to advance an argument founded upon the despotic nature of the Nazi regime, whilst expecting Hitler’s functionaries to flout his orders. Each person in the chain of command was controlled by an overwhelming sense of trepidation; their independent will had been suppressed or destroyed by a programme of indoctrination and domination:

‘No functionary would have had the right, let alone the duty, to examine its legally binding nature with the aim of obeying or refusing to obey it, depending on the result of the examination. Would it not be a contradictory process if both the following assertions were to be applied at the same time in the rules governing this trial? First, the Reich was the expression of the despotism of this one man and for that reason was a danger to the world. Secondly, every functionary had the right - in fact the duty - to examine the orders of this man and to obey or not to obey them, according to the result of this examination.’<sup>147</sup>

De Menthon inadvertently fuelled the cogency of Defence Counsel’s argument when he embarked upon a powerful denunciation of the dictatorial ethos of Nazi Germany. However, his compelling submissions were apparently made, either without full appreciation of, or indifferent to, the fact that he was simultaneously undermining the validity of the Allies’ decision to incorporate Article 8 within the Charter. The greater the emphasis placed by the Prosecution upon the tyranny of Nazism, the less plausible became the preclusion of a defence based upon adherence to ‘superior orders’:

‘The individual has no value in himself and is important only as an element of the race. Anyone whose opinions differ from the official doctrine is asocial or unhealthy. That is the totalitarian doctrine which reduces the individual to non-existence save by the race and for the race, *without freedom of action or any definite aim*; totalitarian doctrine which excludes every other concept, every other aspiration of objective save those connected with the race; totalitarian doctrine which eliminates from the individual every other thought save that of the interest of the race.’<sup>148</sup>

Although Jahreiss’ efforts to circumvent rather than surmount Article 8 were conceptually ingenious, he ultimately failed to deflect the Members from their intransigent attitude towards the issue of ‘superior orders’. His submissions on this point could hardly have been assisted by the blatant duplicity and hypocrisy displayed by the

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<sup>146</sup> Jahreiss: 17 IMT 484-485.

<sup>147</sup> Jahreiss: 17 IMT 488.

<sup>148</sup> De Menthon: 5 IMT 374.

Nazis themselves. This was exemplified by a disingenuous declaration made, in May 1944, by their Propaganda Minister Joseph Goebbels:

‘There is no international rule of law which lays down that soldiers who have committed common crime can escape punishment by adducing in their defence that they were following the orders of their superiors. This applies particularly when such orders contravened all *ethical principles of humanity* and the established customs of warfare.’<sup>149</sup>

From this, it was evident that the Nazis had self-servingly denied the existence of a universal defence based upon adherence to ‘superior orders’. Indeed, they sought to justify their stance by reliance upon the same ‘*ethical principles of humanity*’ which, in pursuance of their wholly unprincipled designs, they otherwise cynically disregarded.<sup>150</sup> Yet, during the Trial, the Defendants insisted that their conduct was explicable and indeed excusable on the basis that *they* had acted in adherence to ‘superior orders’. In essence, they wished to avail themselves of a defence perversely denied to Allied servicemen, whose actions were more properly capable of vindication on the basis of compliance with ‘superior orders’. If the stance adopted by the Prosecution was in some respects riddled with inconsistencies, the same charge could be laid at the door of the Defendants.

In the final analysis, the Members’ approach to Article 8 conformed to an implacable determination throughout the proceedings to quash potential incursions into the validity of the judicial process:

‘When it suits their defence, they say they had to obey; when confronted with Hitler’s brutal crimes which are shown to have been within their general knowledge, they say they disobeyed. Superior orders even to a soldier cannot be considered in mitigation where crimes have been committed consciously, ruthlessly and without military excuse of justification. Participation in crimes such as these has never been required of any soldier and they cannot now shield themselves behind a mythical requirement of soldierly obedience at all costs as their excuse for commission of these crimes.’<sup>151</sup>

Save for a brief but contentious assertion that the provisions of the Article were ‘*in conformity with the law of all nations*’, the IMT refrained from embroiling itself in the

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<sup>149</sup> *Deutsche Allgemeine Zeitung*, 28<sup>th</sup> May 1944 quoted in Werner Maser *Nuremberg: A Nation on Trial* (London: Penguin Books 1979), 174.

<sup>150</sup> This expedient usurpation by the Nazi regime, of precepts derived from a transcendent moral code, also incidentally highlighted the inherent vulnerability of the ‘natural law’ doctrine to cynical manipulation and abuse.

<sup>151</sup> Judgment: 22 IMT 523.

general debate concerning the validity of Article 8.<sup>152</sup> Axiomatic it is, however, that insofar as the defence of reliance upon superior orders was *entirely* precluded, the provisions of Article 8 of the Charter were at variance with *any* reasonable interpretation of the position prevailing prior to their enactment.

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<sup>152</sup> Judgment: 22 IMT 466.

### **B (iii) The Defences of ‘acts of State’ and ‘superior orders’: the conceptual and retrospective convergence**

Empirical factors aside, the ‘defences’ nullified by Articles 7 and 8 shared a common conceptual basis in that both were underpinned by the notion that the State existed as a sovereign entity, fundamentally invulnerable to legal challenge and therefore immune from prosecution. The overarching character of the State effectively cloaked its representatives with a veil of comparable privilege in conferring upon them the right to act with impunity in their capacity as instruments or functionaries of the State. The representatives at each strata of the chain of command were endowed with authority emanating from the pervasive sovereignty of the State and therefore needed to entertain no compunction in fulfilling the requirements of their official position. They could confidently issue edicts on behalf of the State in the knowledge that they would be sheltered by an invisible but impenetrable shield by which they were rendered legally impregnable. The State alone was empowered to restrain their conduct and they were imbued with the mantle of delegated sovereignty for the duration of the official tenure assigned to them by the State. The Head of State was the primary beneficiary of the transcendental protection, thereby, afforded but the immunity enjoyed by the State was diffused along the hierarchical structure of internal organisation, such that each participant in the process of government was likewise able to bask in the security imparted by the sovereignty of the State.

However, other than the Head of State who was endowed with the ability to issue orders without any reciprocal duty to obey them, every other person within the chain of command was required not only to give such orders but also to comply with them. It was, therefore, necessary to confer a dual immunity upon State representatives whereby they could act with impunity both when issuing orders and executing them. The concepts of ‘acts of state’ and ‘superior orders’ were effectively the obverse and reverse sides of the same coin, dependent upon the perspective of the person seeking to rely on the immunity thereby afforded. Such person could be simultaneously *both* fulfilling an order given by a superior official for which if later challenged, he would wish to assert the defence of ‘superior orders’ *and* carrying out an ‘act of state’ upon which defence he would place reliance, were subsequently his subordinate to impugn him.

Whenever an edict was issued by a Head or representative of State, such order possessed the characteristics of a cameo carved by a glyptographer, embossed and standing in relief from its surroundings, namely the State on whose behalf the act was conducted. Where the person giving that command was subsequently challenged, the action was then transformed into a negative image, an intaglio, wherein the subject of the design, namely the order, was excised by the engraver leaving the surroundings or State in relief. The immunity of a subordinate, whether at the base or at any other point of the hierarchical pyramid, was likewise derived from the omnipotent authority of the State. As such, the right afforded him to act with impunity similarly resembled an intaglio, in which the sovereignty of the State appeared in relief as the supreme entity from which his entitlement to plead the defence of 'superior orders' emanated. The defences of 'acts of state' and 'superior orders', both spawned from the notion of State supremacy, thus dovetailed together in a manner reflective of their shared conceptual derivation.

Confluence of the two doctrines clearly existed at both an empirical and conceptual level. But was this echoed in the retrospective ramifications flowing from the parallel treatment accorded them by the Charter? On this point, the Allies had, with precision and forethought, devised a legislative strategy, which effectively nullified two pre-established defences. It could therefore be argued, perhaps with some justification, that the provisions of Articles 7 and 8 of the Charter were irremediably besmirched by their retrospective import. If a person were to commit homicide to save the life of an innocent third party, he would do so in the tacit realisation that should he be later charged with murder, the circumstances would vindicate his conduct. His action would not only be mitigated but justified by the exigencies of the situation to which he had reacted. At his subsequent arraignment, he would doubtless deem himself subject to law-making of an unacceptably capricious nature were a defence, extant at the date of commission of the homicide, be suddenly denied him. On another view, however, the actions of the Defendants may have been so intrinsically heinous that the perpetrators could not possibly have presumed that, at the conclusion of the War, they could legitimately avail themselves of *any* of the pre-established defences. In the specific circumstances presented by *these* Defendants, was it perhaps plausible to conclude that the nature of the alleged Nazi atrocities divested them of the right to rely upon defences, well-founded by substantive precedent?

However, preclusion of a valid defence solely on the grounds of the presumptive but as yet, unproven unconscionability of the Defendants was difficult to justify. Each accused must be equal before the law. It was hardly conducive to the sound operation of justice to pre-empt the potential use of a defence merely on the basis that the perpetrators ought subjectively to have been aware that their actions had attracted unprecedented universal condemnation. The existence and availability of any defence should have been objectively determinable at the date of commission of the alleged 'offence' to which it related. Once established, such defence should not thereafter have been susceptible to eradication at the sole discretion of the prosecuting authority. Neither the will of the international community - nor any other factors born of expediency or convenience - should have sufficed to legitimise the retrospective removal of defences, wholly or partially recognised under international law.

Had the Defendants been charged with offences identical to those contained in the Indictment but, instead, at a time when the defences invalidated by Articles 7 and 8 of the Charter had remained intact they would, in all likelihood, have secured an acquittal. Retrospective nullification of established defences *was* unquestionably a vital causative factor in achieving the Defendants' convictions. In resorting to *ex post facto* legislation to nullify the defences of 'acts of state' and 'superior orders', the Allies had arguably deployed a ruthlessly utilitarian device to devastating effect. Their overarching rationale:

'no rule of international law...provides immunity for those who obey orders which –whether legal or not in the country where they are issued – are manifestly contrary to the very law of nature from which international law has grown and are illegal by every test of international law, of common conscience and of elementary humanity.'<sup>153</sup>

Once again, the controversy that raged over the legitimacy of Articles 7 and 8 highlighted the latent battle for supremacy between the application of positivist or natural law doctrine.<sup>154</sup>

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<sup>153</sup> Shawcross: 19 IMT 428.

<sup>154</sup> *Supra*: Gallant *The Principle of Legality in International and Comparative Law*, 375: 'Retrospective destruction of defences has been rejected by some jurisprudence for a long time. Moreover, allowing retroactive removal of defences would allow the targeting of specific persons retroactively. *Ibid*: 376, 'The abolition of defences that decriminalises acts is functionally equivalent to the creation of crimes when it comes to taking currently non-criminal acts and criminalising them'.

### C. The defence of *'tu quoque'*

At a more prosaic but no less important level, it was necessary for the Allies to prescribe the rules of evidence and procedure governing the conduct of the trial.<sup>155</sup> Unhindered here by the spectre of retrospectivity, the Allies surely envisaged that they were sailing into calmer waters. However, any initial optimism proved evanescent.

Articles 17-21 were designed to enable the Tribunal to regulate the content, volume and nature of the evidence to be adduced by the parties with the objective of guaranteeing the expeditious progress of the trial. The Members were vested with authority to admit evidence of a 'probative value', and power to adjudicate upon irrelevant evidence. Accordingly, the IMT was enabled, for example, to exclude Defence submissions in relation to the alleged injustice of the Treaty of Versailles to which Germany had been a signatory in 1919. Alfred Seidl, Counsel for Rudolf Hess, abortively sought permission to elaborate upon the impact of the Treaty on the economic climate within Weimar Germany. This, he claimed had facilitated the rise of National Socialism. His submissions were predicated upon the notion that he be granted the same latitude as the prosecution in determining the content of the material upon which he wished to address the Tribunal. Several weeks had been expended in providing the IMT with the Prosecutors' interpretation of the development of Nazis and he demanded that a similar courtesy be extended to him.<sup>156</sup> This assertion, the Tribunal repudiated on the basis that Seidl was purporting to challenge the validity and enforceability of a Treaty to which Germany had acceded:

'Those are all facts which the Prosecution is perfectly entitled to prove. What you are now referring to is an argument that certain clauses of the Treaty of Versailles were unjust. And that is an argument which the Tribunal is not prepared to listen to. It is not a statement of fact; it is an argument.'<sup>157</sup>

As with Seidl, the benchmark of justice for Defence Counsel Kranzbuehler, was the degree of equivalence afforded by the Members to both prosecution and defence. He

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<sup>155</sup> These were ultimately embodied in Articles 16-24 of the Charter of the IMT.

<sup>156</sup> *Supra: Maser Nuremberg: A Nation on Trial*, 286, 'The savage sanctions of Versailles after the First World War produced the opposite of what the victors anticipated. Their results – were so patently obvious that the IMT forbade the Defendants and their counsel to mention them as justification or compromise'.

<sup>157</sup> The rebuttal of the President of the IMT to remarks made during the closing submission of Alfred Seidl 17 IMT 553. Seidl had taken over the defence of Hess from February 1946 and also represented Hans Frank.

directed criticism at the provisions of the Charter that he asserted permitted prior censorship by the prosecution but not the defence:<sup>158</sup>

‘I ask the Tribunal just to imagine what would have happened if, before the presentation of their case by the Prosecution, I had said that I should like to speak about the relevancy of the documents for the prosecution.’<sup>159</sup>

Clear though it is that the Members endeavoured overall to uphold the highest traditions of justice and fairness,<sup>160</sup> evidential problems of the type highlighted by Seidl and Kranzbuehler augured ill for the situation which was to develop in relation to the *tu quoque* defence. Admissibility of this defence would have facilitated the Defendants’ absolution on the spurious basis that the ‘offences’ for which they had been indicted had also been committed by others.<sup>161</sup> On this point, the Members faced a dilemma in attempting to achieve a satisfactory balance between competing factors. On the one hand, they wished to minimise criticism arising from their *de facto* procedural and evidential conduct of the Trial. By contrast, however, they were determined that the expeditious conduct of the proceedings would not be compromised by the admission of evidence they adjudged inappropriate. It was on this basis that the IMT ruled the defence of *tu quoque* inadmissible.

This stance not only caused sporadic consternation for the Tribunal in terms of its direct application, but was destined to prove still more problematical in the context of the retrospectivity issue. In the former case, the individual circumstances of each alleged offence compelled the IMT, on occasions, to embrace the acceptability of a defence

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<sup>158</sup> *Supra*: Maser *Nuremberg: A Nation on Trial*, 273.

<sup>159</sup> Otto Kranzbuehler: 13 IMT 231.

<sup>160</sup> On this point, see Justice Birkett ‘International Theories Evolved at Nuremberg’, *International Affairs* (Royal Institute of International Affairs 1944), Vol.23, No.3 (July 1947), 317-325, in which he emphasizes the rigour of the proceedings in an evidential and procedural sense.

<sup>161</sup> Under the *tu quoque* concept, the Defence would have been enabled to plead that the German action towards Norway was akin to the proposed offensive by Britain and availed them selves of a similar position in relation to the invasion of Poland by the USSR in contravention of the Non-Aggression Pact between Germany and the USSR dated 23rd August 1939. Finch maintains that, ‘if the *dictum* of the 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*’: *supra*: Finch ‘The Nuremberg Trials and International Law’, 20, 27; see also James Owen *Nuremberg: Evil on Trial* (London: Headline Publishing Group, 2006), 172 quoting an extract from the Nuremberg Trial Transcript, 22 March, 1946, comprising an exchange between Rudenko, Chief Prosecutor for USSR and Dr Stahmer Counsel for Goering: ‘On our part, we plead that if harsh treatment and excesses occurred on the German side, they were caused by the fact that similar violations occurred also on the other side, and that consequently, these offences must be judged differently and not be considered as grave as would be the case if the opposite side had conducted itself correctly.’ Stahmer’s submissions were rejected.

founded upon the *tu quoque* concept. In the latter instance, the Prosecutors asserted that because the Nazis had repealed the previous embargo upon the use of retroactive criminalisation within Germany, the Defendants were debarred from challenging the validity of the Charter on the grounds of retrospectivity.

The first fundamental inconsistency of the Tribunal's approach was aptly exemplified in relation to Karl Doenitz.<sup>162</sup> He asserted that his actions towards armed merchant vessels in the arena of submarine warfare had been consistent with identical conduct perpetrated by the US Navy. Both had occurred sequential to a similar interpretation of the provisions of the London Naval Agreement 1930 and the Naval Protocol 1936, designed to regulate warfare at sea.<sup>163</sup> Whilst Doenitz was nevertheless convicted on the first three counts of the Indictment,<sup>164</sup> the IMT felt compelled to accept his position in the sphere of submarine warfare<sup>165</sup> despite the implicit acceptance of the *tu quoque* defence thereby occasioned:

'In the actual circumstances of this case, the tribunal is not prepared to hold Doenitz guilty for his conduct of submarine warfare against British merchant ships.'<sup>166</sup>

Secondly, when countering Defence assertions concerning the validity of the Charter, the Tribunal permitted the Prosecution to tender submissions which epitomised an intriguing inversion of their general rejection of the *tu quoque* concept. In seeking to rebut imputations of retrospectivity by the Defence, the Prosecution displayed a willingness to violate the rationale which had underpinned the Members' embargo upon invocation of the *tu quoque* defence. To that extent, the Tribunal was complicit. The Defence submitted that due to the absence of relevant pre-existing precedent, the

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<sup>162</sup> 18 IMT 312 – 372.

<sup>163</sup> This was corroborated by Admiral Chester Nimitz, commanding the US fleet in the Pacific during the War in his response to Interrogatories served during the Trial at the behest of Doenitz' Counsel, Otto Kranzbuehler.

<sup>164</sup> The Indictments are available online at: <<http://www.yale.edu/lawweb/avalon/imt/proc/count.htm>>

<sup>165</sup> Rebecca A West *A Train of Powder* (New York: Viking Press, 1955), 52: 'The fact was that we and the Germans alike had found the protocol unworkable...The Allies admitted this by acquitting the Admirals and the acquittal was not only fair dealing between victors and vanquished; it was a step towards honesty. It was written down for ever that submarine warfare cannot be carried on without humanity and that we have found ourselves to be inhumane. We have to admit that we are in this trap before we can get out of it. The *nostra culpa* of the conquerors might well be considered to be the most important thing that happened at Nuremberg. But it evoked no response at the time and it has been forgotten'.

<sup>166</sup> Judgment: 22 IMT 558.

proceedings were irremediably flawed and inherently unjust.<sup>167</sup> In contrast, the Prosecution contended that they were entitled to resort to any devices of which the Defendants had similarly availed themselves during their reign of terror.<sup>168</sup> A *quasi-estoppel* had purportedly arisen against the Defendants by the Nazis' own invocation of *ex post facto* law,<sup>169</sup> pursuant to the 1935 Amendment to the German Penal Code.<sup>170</sup> The Prosecution, therefore, entertained no compunction about seeking to repudiate any defence submissions, whether founded upon precepts of morality and fairness or alleged Allied violations of international law:

'I cannot deny that these men are surprised that this is the law. These Defendants did not rely on any law at all. Their programme ignored and defiled the law. International law, natural law, German law, any law at all was to these men simply a propaganda device to be invoked when it helped and ignored what they wanted to do. That men may be protected at all in relying upon the law at the time they act is the reason we find laws of retrospective operation unjust but these men cannot bring themselves within the reason of the rule which in some systems of jurisprudence prohibits *ex post facto* laws. They cannot show that they ever relied upon International law in any state or paid it the slightest regard.'<sup>171</sup>

Jackson, thereby, asserted that Hitler's governance had subverted the Rule of Law to such devastating effect that the creation, application and administration of 'justice' had been rendered entirely arbitrary. Within the perverted world occupied by National Socialism, the law was useless save to the extent that it could be manipulated to facilitate the overarching culture of repression and domination. Legal provisions were enacted on an '*ad hoc*' basis to address the changing needs of the despotic regime of Nazi Germany. The existence of 'law' only retained utility insofar as it could be deployed as an instrument of control or advanced to 'justify' the decisions which were deemed necessary to sustain and reinforce a totalitarian dictatorship. De Menthon reinforced this negation of the Rule of Law, at both domestic and international level:

'In the middle of the 20<sup>th</sup> century, Germany goes back, of her own free will, beyond Christianity and civilisation to the primitive barbarity of ancient Germany. The absolute primacy of the German race, the negation of any international law whatsoever, the cult of strength, the

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<sup>167</sup> This begs the question whether a submission of this nature should have been permitted by the IMT given the express exclusion of the *tu quoque* concept.

<sup>168</sup> For a further discussion of this point from a Schmittian perspective see *infra*: Chapter 5.

<sup>169</sup> This, being law which did not exist at the date of commission of the act complained of, ostensibly contrary to the principle, *nullum crimen sine lege, nulla poena sine lege*.

<sup>170</sup> Reichgesetzblatt (1935), 839.

<sup>171</sup> Jackson: 2 IMT 144.

exacerbation of community mysticism made Germany consider recourse to war, in the interests of the German race, logical and justified.’<sup>172</sup>

Jackson conceded that an initial premise did exist whereby men were deserving of the protection of the law. Such safeguards arose only where the exact nature and extent of the legal code, by which the alleged perpetrator was bound at any given point in time, were determinable. However, this ostensible embargo upon retrospective penalisation was capable of circumvention. The veto upon retrospectivity was derived not from an absolute and inviolable rule. Rather, it was a malleable precept which was dispensable whenever the *perpetrator* had evinced a total disregard for the Rule of Law.

Stripped of rhetorical varnish, however, Jackson’s stance was highly contentious, founded at best upon the following premise. Perversion of the law, in furtherance of repression, debarred wrongdoers from any right of demur in the event that identical devices were later deployed against them, to secure their own convictions for breach of the criminal law. This opened the door, for example, to the admissibility of illegally obtained evidence, wherever this replicated similar methods utilised by the Defendants. If the perpetrators adopted a procedure of trial which denied the accused the right of representation, they would be forced to speak in their own defence, without the benefit of Counsel, at their own subsequent judicial disposition. If they countenanced the admissibility of perjured evidence in order to secure the convictions of their opponents, then they would have no grounds for complaint when they were later impugned by false testimony.

At worst, Jackson’s assertions were open to the challenge that any deviation from legally established precepts of justice by one group of protagonists, within a situation of strife, automatically conferred upon the remaining participants a prerogative to respond with impunity, by commensurate means. A murderer would, therefore, be unable to protest were he to be submitted to summary execution without trial. A thief would be precluded from complaint were all his own possessions to be arbitrarily confiscated to compensate his victim. An assailant could be attacked with impunity by his former victim; a paedophile’s children would have no redress, if indecently assaulted by the father of a child whom he, the initial sex offender had previously molested. Jackson may not have intended to validate vigilante ‘justice’. But his approach, by implication,

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<sup>172</sup> De Menthon: 5 IMT 377.

embraced the advent of a regime that permitted the displacement of the Rule of Law in furtherance of expediency or revenge:

‘International law knows of no crimes. It forbids certain acts. But it provides no punishment for them. It follows that no international court can punish any person with the rules of international law except by a flagrant breach of the rule of “nulla poena.” To depart from this rule would mean to let international jurisprudence sink to the depth of Nazi jurisprudence amongst whose discoveries is the abandonment of a rule which the rest of the civilised world quite rightly continues to hold in esteem.’<sup>173</sup>

Defence Counsel may have felt some degree of justification in using similar grounds to challenge the legitimacy of Jackson’s ‘estoppel’ argument. To the extent, however, that the Prosecution had presented an accurate portrayal of Nazi ethos, they were unable to gainsay its factual veracity. Promulgation and implementation of the Nazis’ particular brand of ethnocentricity was undertaken without scruple and, though their Fuehrer evaded trial by dint of suicide, the Defendants’ conduct mirrored the callous disregard which Hitler had consistently demonstrated towards the Rule of Law :

‘I shall shrink from nothing. No so-called international law, no agreements will prevent me from making use of any advantage that offers.....These so-called atrocities spare me a hundred thousand individual action against disobedience and discontent.’<sup>174</sup>

Given the somewhat specious nature of the Allies’ estoppel argument, did this mean that the presumptive amorality of the Defendants deprived them of the full range of legal safeguards afforded by the strictures of due process? Was it justifiable to transpose the concept of estoppel, drawn from Anglo-American contract and property law, to the Nuremberg proceedings where the defendants faced punitive sanctions arising from breach of *criminal* legal norms? Did not this equate to an unacceptable reversal of the burden of proof? Untroubled by niceties of this type, the strategy the Allies elected to pursue suggested that only the innocent and morally pure were deserving of due process. An ethically ambivalent victim was unable to demand that his assailant face judicial retribution. Entitlement to impartial justice was conditional upon an arbitrary *pre-determination* of the moral fibre of a potential defendant.

Notwithstanding the flaws in Jackson’s rationale, the adjudicating Tribunal in *United States of America v Alstoetter* was later to adopt a similar approach.<sup>175</sup> These

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<sup>173</sup> G. Cohn ‘*The Problem of War Crimes Today*’ 26 *Translations of the Grotius Society* (1941), 125, 143.

<sup>174</sup> Rauschning, *Hitler Speaks* (1939), 21 and 90.

<sup>175</sup> [1948] 3 T.W.C. 1

proceedings involved the disposition of sixteen Defendants, all of whom were former members of the Reich Ministry of Justice and Special Courts. Ultimately, of those indicted, ten were convicted.<sup>176</sup> *Alstoetter* was to raise the issue of the judiciary's responsibility for enforcement of laws which, though contemporaneously legal under the municipal regime of Germany were, from an objective standpoint, grossly unjust. The Defendants claimed that they were being tried through the mechanism of *ex post facto* law, without which it would have proved impossible to indict them. However, consistently with the approach adopted at Nuremberg, the Tribunal accepted the intrinsic legitimacy of the 'estoppel' argument. It was deemed paradoxical for the Defendants to '*claim protection under the principle nullum crimen sine lege, though they withheld from others the benefit of that rule during the Nazi regime*'.<sup>177</sup> In both proceedings – the Nuremberg Trial of the Major Nazi War Criminals and *Alstoetter* - the concern of the respectively empanelled judges was to forestall the pursuit of any route likely to facilitate the exoneration of the Defendants. But at what overall cost to the legal legitimacy of the juridical process was this achieved?<sup>178</sup>

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<sup>176</sup> Four of the remaining defendants were acquitted, one died before the verdict and there was one mistrial due to serious illness.

<sup>177</sup> [1948] 3 T.W.C. 1

<sup>178</sup> It is noteworthy that *Proclamation Number 3 of the Control Council of Germany in 1945* abolished the doctrines of analogy and retroactivity which had been introduced by the Nazis in 1935.

#### 4. The ‘conspiracy’ indictment

As seen, the retrospective implications of the Charter were, therefore, to insinuate themselves into aspects of the proceedings which, at first glance, should have been immune from controversy. Any problems encountered in the formulation of the Charter were further exacerbated by the need to reconcile the *common law* tradition represented by Britain/US, with the *continental* or *civil law* regime to which France/USSR adhered.

Whilst evidential and procedural disparities between the two legal systems did exist, resolution of those issues was ultimately to prove an inconvenient distraction rather than an insuperable impediment. However, one incongruity was less easy to surmount.<sup>179</sup> This was the distinction within the common law and continental traditions, exemplified by the concept of *conspiracy*:<sup>180</sup>

‘Conspiracy is an old and well-established concept in Anglo-American law; the defining characteristic is an agreement or understanding between two or more persons to commit a criminal act. Proof of individual guilt rests on a demonstration that the defendant knowingly and voluntarily participated in a crime. Even in countries where conspiracy law has been long established, it is still a highly debatable form of prosecution.

In the realm of international law, the risks are infinitely greater. Many legal systems, including those of continental Europe do not recognise the crime of conspiracy and have none of the safeguards surrounding the offence in British and American law. The legal systems of France, Germany and the Soviet Union, and other continental countries, do have laws directed against certain types of criminal combinations or group activities. What they do not have are provisions for adding any sort of conspiracy charge to the prosecution of a criminal act that involves more than one person. Since the Nuremberg process rested on joint action by four powers, two of which were continental states, the inclusion of a conspiracy charge posed monumental difficulties, not the least of which was the unfamiliarity of the German Defendants with the conspiracy system.’<sup>181</sup>

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<sup>179</sup> See *supra*: Lawrence ‘The Nuremberg Trial’, 151-159: ‘The very existence of the crime of conspiracy is foreign to the laws of France and Germany, a fact which introduced great difficulty to our deliberations’.

<sup>180</sup> *Conspiracy* is an inchoate offence, by which the perpetrators are subject to punitive sanctions, in the absence of the commission of any *substantive* offence. The underlying rationale is the preventative benefit, namely that where the perpetrators of a conspiracy are prosecuted before a substantive offence occurs, the risk of endangerment to the community is accordingly reduced. Further, it is feasible to regard those who plan a substantive offence, no less blameworthy, than those who ultimately execute the substantive offence itself. This line of argument was adopted by Rudenko, the Chief Prosecutor for the USSR: 7 IMT 150, ‘When several criminals conspire to commit a murder, every one of them plays a definite part. One works out the plan for murder, another waits in the car and the third actually fires at the victim. But whatever may be the part played by any individual participant, they are all murderers and any court of law in any country will reject any attempts to assert that the first two should not be considered murderers, since they themselves had not fired the bullet.’

<sup>181</sup> See Bradley F. Smith *Reaching Judgment at Nuremberg* (London: Andre Deutsch Limited, 1977), 18, in which Smith also fully describes the background to the conception and implementation of the conspiracy indictment.

Derived from the third clause of Article 6(a) of the Charter, Count 1 of the Indictment specifically charged all the Defendants that: <sup>182</sup>

‘With divers other persons, during a period of ten years preceding 8<sup>th</sup> May 1945, <sup>183</sup> participated as leaders, organisers, instigators or accomplices in the formulation or execution of a common plan or conspiracy or which involved the commission of crimes against peace war crimes and crimes against humanity as defined in the Charter of the Tribunal and are individually responsible for their own acts and for all acts committed by any persons in the execution of such plan or conspiracy.’

The conspiracy indictment was destined to provoke both considerable contemporaneous dispute and subsequent debate. Laden with retrospective ramifications, Count One, in some respects, represented a microcosm of the innumerable problems destined to bedevil the entire Nuremberg process. Had not the IMT adjudged the Charter to be unassailable, the issue for the Members would probably not have resided in the question, ‘*whether*’, but rather ‘*to what extent*’ the charge of conspiracy entailed the utilisation of *ex post facto* legal provisions. In view of the manifestly contentious aspects of the ‘conspiracy’ indictment, on what basis did the Allies nonetheless conclude that the benefits of its inclusion outweighed the deleterious implications thereby engendered?

Problems first emerged during the formative stages of the Nuremberg process, with regard to the censure of the proposed Defendants for actions committed *prior* to the onset of war in 1939. In the course of the pre-trial negotiations, it was deemed appropriate to utilise the Anglo-American concept of conspiracy to address the culpability of the pre-war complicity of individual Nazis.<sup>184</sup> The Allies also intended that *conspiracy* would constitute a vital thread with which to bind the entire

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<sup>182</sup> Article 6 (a) of the Charter reads: (The following acts or any of them are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility) ‘namely planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

<sup>183</sup> In the context of war crimes, it was axiomatic they had to have been committed during the subsistence of the War, namely 1939-1945 and in relation to crimes against humanity, the IMT ultimately curtailed the time frame to the same period.

<sup>184</sup> On this point, see for example, the comments of Otto Kranzbuehler on behalf of the Defendant, Karl Doenitz: 18 IMT 358: ‘All the more important is the question of the retroactive effects of joining the conspiracy, as has been illustrated by the British Prosecutor by the example of the perpetrators of railway sabotage. This idea of guilt, retroactive on past events, is very difficult for the German jurist to understand. The continental concept of law is reflected by the formulation of Hugo Grotius: "To participate in a crime a person must not only have knowledge of it but also the ability to prevent it".’

proceedings<sup>185</sup> and, prior to the London Agreement, Jackson seized the opportunity of describing his all-embracing vision of the judicial process envisaged for the disposition of the Nazis:

‘Our case against the major Defendants is concerned with the Nazi master plan, not with individual barbarities and perversions which occurred independently of any plan.’<sup>186</sup>

The Charter was silent as to the exact definition of conspiracy.<sup>187</sup> It was, nonetheless, apparent that the concept of conspiracy, envisaged by the Anglo-American participants in the Nuremberg process, had no basis of recognition in the civil law systems of Europe and thus of Germany:

‘This construction (being that of the prosecution) is based on the legal concept of Anglo-American law which determines the responsibility of a *plurality of persons* differently and in a more far-reaching way than the German penal code, which contains the principles of law to which the accused were subject at the time when they committed the deed. The German penal code places decisive weight on determining the extent to which the acts committed at a latter date correspond to the common plan. Since in the serious crimes which are being prosecuted before this Court the determination of the form of guilt in the original plan is necessary in order to permit punishment, later acts of commission by others can be charged against a defendant only to the extent to which they corresponded to arrangements to which the defendant deliberately agreed. A defendant who participated in certain plans cannot be held responsible for subsequent plans of a wider scope, or for acts of commission which far exceeded the original plans without his co-operation. The Defence therefore advocates the concept that, as far as the actions of others are concerned for which a defendant is to be made liable, proof must be required that these actions, in the manner of their execution, corresponded to the intention of the defendant.’<sup>188</sup>

Describing the lack of any coherency of purpose or design on the part of the Defendants as a ‘*dispiracy*’,<sup>189</sup> Jahreiss adverted to the fact that ‘*the Defendants are strung together*

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<sup>185</sup> The use of this concept of conspiracy was formulated by Colonel Murray Bernhays, a member of the personnel branch of the US Army General Staff and was mentioned in his memorandum dated 15<sup>th</sup> September 1944 entitled ‘Trial of European War Criminals.’ This strategy engendered the criticism that ‘acts done in times of peace, years before the outbreak of war’ cannot, in law, ‘be “offences” cognisable by a military court deriving its jurisdiction from the fact of war’: *supra*: Morgan *The Great Assize*, 39; see also *supra*: Taylor *The Anatomy of the Nuremberg Trials*, 36 who challenged the conspiracy element of the Charter on grounds that the offence ‘was arguably not an element of the internationally recognised laws of war’. The US Supreme Court held, as recently as 2006, that conspiracy to commit a violation of the law of war still does not exist as a crime in international criminal law: *Hamdan v Rumsfeld*, 548 U.S. 557 (2006).

<sup>186</sup> Jackson’s *Report to the President on Atrocities and War Crimes*; 7<sup>th</sup> June 1945: available online at <<<http://www.yale.edu/lawweb/avalon/imt/jack01.htm>>>

<sup>187</sup> Judgment: 22 IMT 467, ‘Conspiracy is not defined in the Charter.’ The ‘offence’ of conspiracy in its traditional form involved voluntary complicity, accompanied by knowledge, in a planned act of an illegal nature.

<sup>188</sup> Pannenbecker on behalf of the Defendant Frick: 18 IMT 166.

<sup>189</sup> The IMT was compelled to accept that the evidence had shown ‘the existence of many separate plans rather than a single conspiracy embracing them all’.

*in a conspiracy by legal concepts rooted in Anglo-Saxon law and alien to us*.<sup>190</sup> Jackson was, however, dismissive of Defence submissions that the utilisation of the conspiracy concept within the Charter had again raised the spectre of the imposition of *ex post facto* law. Seemingly indifferent to the implications of retrospectively applied criminal law, he was content with a transposition of the intricacies of the vexed legal position into the realities of Nazi warfare:

‘Little gangsters may plan which will carry a pistol and which a stiletto, who will approach a victim from the front and who from behind and where they will waylay him. But in planning a war, the pistol becomes a Wermacht, the stiletto a Luftwaffe. Where to strike is not a choice of dark alleys but a matter of world geography.’<sup>191</sup>

Unprepared to be deflected from his central purpose of enmeshing the Defendants in a ‘master plan’, Jackson would not be drawn into controversy or discussion concerning those aspects of the conspiracy element of the Charter which the Defendants deemed retrospective. He, perhaps, hoped that his graphic metaphor concerning the wartime activities of the Nazis, would cause sufficient distraction from the substantive legal issues to convince concerned onlookers of the intrinsic legitimacy of the *conspiracy* aspect of the Charter. The breadth of his vision of conspiracy was startling, not least because it implicitly acknowledged that the Charter effectively embraced concepts, lying even beyond the Anglo-American definitional basis for the offence:

‘Counsel for many of the Defendants seek to dismiss the conspiracy or common planning charge on the ground that the pattern of the Nazi plan does not fit into the concept of conspiracy allocable in German law to the plotting of a highway robbery or a burglary. The Charter *forestalls resort* to such parochial and narrow concepts of conspiracy taken from local law by using the additional and non-technical term ‘common plan.’<sup>192</sup>

The incorporation of the Common Plan element, as mentioned by Jackson, was initially intended not only to mollify the French and Soviet contingent but also to underpin each and every act of alleged criminality perpetrated by the Defendants. However, the formulation of a ‘common plan’ had never previously been established as a crime within international law nor recognised by any Continental legal system. This was to provide ample ammunition for the Defence. On this point Martin Horn, on behalf of the Defendant Ribbentrop, alluded to the lack of recognition afforded to the Anglo-Saxon concept of conspiracy within the established precepts of the German and Continental

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<sup>190</sup> Jahreiss: 17 IMT 490.

<sup>191</sup> Jackson: 19 IMT 420.

<sup>192</sup> Jackson: 19 IMT 419.

legal systems. He was then quick to highlight Jackson's crucial concession that the notion of a 'common plan' charged in the Indictment and framed in accordance with Article 6 of the Charter '*went beyond the punishable facts of a conspiracy according to Anglo-Saxon law and thereby created a conception which is not yet juridically formulated*'.<sup>193</sup> Not merely were the defendants being tried on the basis of a concept without standing either under international law or the domestic law of Germany but more radically, one beyond the ambit of the common law tradition from which it had ostensibly been drawn.<sup>194</sup>

Perhaps in deference to the reservations of the French Member Donnadiou de Varbres, the Members restrictively interpreted the germane element of Article 6 of the Charter.<sup>195</sup> To this end, the Tribunal limited the liability of the defendants for conspiracy to the paragraph (a) offence of *waging aggressive war*.<sup>196</sup> Accordingly, *conspiracy* was not to apply to the remaining 'offences' defined within paragraphs (b) and (c), these being the commission of *war crimes* and *crimes against humanity*:

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<sup>193</sup> Martin Horn on behalf of Von Ribbentrop: 17 IMT 593. 'By the conception 'common plan,' the Charter and the Indictment obviously understand that something reaches beyond the sphere of conspiracy'.

<sup>194</sup> Jackson controversially defined *conspiracy* to incorporate the following: 'No meeting or formal agreement is necessary. There need only be some concert of action with a common design to accomplish a common purpose. One may be liable even though he does not know who his fellow conspirators were or what acts they committed and though he did not take personal part in them or was absent when criminal acts occurred. There may be liability for fellow conspirators although the acts were not intended or anticipated, if they were done in execution of the common plan. It is not necessary that one be a member of the conspiracy at the same time as other actors, or at the time of the criminal acts. When one becomes a party to it, he adopts and ratifies what has gone before and remains responsible until he abandons the conspiracy with notice to his fellow conspirators': *supra*: Jackson *The Nuremberg Case*, 109.

<sup>195</sup> The supplemental unlettered segment of Article 6 of the Charter reads: 'Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.' De Varbres had advocated that conspiracy was only legally sustainable where the participants in the Plan were of equivalent status which was clearly not pertinent to the Nazi regime where the Defendants were effectively participating in a Plan initiated and conceived by Hitler. By imposing convictions for conspiracy, the IMT implicitly rejected the notion that the conspirators had to be of equal status; for an insight into the difficult deliberations conducted by the Members on the conspiracy indictment, see *supra*: Owen *Nuremberg: Evil on Trial*, 316, which reproduces an extract from the memoirs of the US Member, Francis Biddle, 'Reaching our decision on the charges'. From the beginning, Donnadiou de Varbres argued with a great deal of force that these counts should be thrown out. Conspiracy he said was a crime unknown to international law. Aggressive war could be recognised as a crime even though not specifically embedded in a statute; but you couldn't go much beyond that and create a new crime of conspiracy, not recognised by continental law. ...To the French, it was a shocking idea that under the English law of conspiracy, an individual could be punished. The substantive crime, they insisted absorbs the conspiracy, which becomes useless once the substantive crime is committed, and we have no need to resort to a theory which involves psychological as well as moral difficulties'.

<sup>196</sup> In formulating their Judgment, the Members of the IMT had to be satisfied that the act in question namely that of waging aggressive war was indeed a crime for which the Defendants were individually accountable under international law and this issue is further discussed below.

‘A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it. Hitler could not make aggressive war by himself. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. The relationship of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organised domestic crime. The Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war. The Tribunal will consider only the common plan to prepare, initiate and wage aggressive war.’<sup>197</sup>

However, by confining *conspiracy* to the waging of aggressive war, the Tribunal’s decision served only to diminish, rather than entirely eliminate, the overall retrospective import of Article 6. Further, it failed to disguise the fact that had the provisions of the Charter been applied in their entirety in the manner which the Allies had originally intended, the Defendants would have been still further entangled in a web of *post factum* legislation. In the context of *conspiracy*, the potentially retrospective aspects of Article 6 thereby remained partially unfulfilled but to what extent did this serve to mitigate the *ex post facto* dimension, integral to the Charter?

Significantly, of the 22 Defendants indicted under Count One of the Indictment for conspiracy just 8 were convicted, all of whom were also found guilty of waging aggressive war under Count Two.<sup>198</sup> Nonetheless, in facilitating the admission of copious evidence and by necessitating full legal submissions by both prosecution and defence Counsel, the inclusion of the conspiracy charge did serve to produce a detailed historical record of the pervasive influence of the Nazis throughout every aspect of pre-war Germany. The Tribunal ultimately rejected the argument that a common plan had originated in the formulation of the National Socialist Party Programme in 1920,<sup>199</sup> the publication of *Mein Kampf* in 1925 or in any other decision regulating the Nazi regime prior to 1937. In the context of the alleged conspiracy to wage aggressive war, the IMT was, however, prepared to be persuaded by the tangible documentary evidence

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<sup>197</sup> Judgment: 22 IMT 470. The Members held that any one who ‘co-operated’ with Hitler after becoming aware of his aggressive intent was thereafter implicated in a common plan or conspiracy to wage aggressive war. This notion of co-operation was sufficiently vague as to provoke criticism in respect of those Defendants who were convicted under Count One.

<sup>198</sup> Goering, Ribbentrop, Keitel, Jodl, Rosenberg, Raeder, Hess and Neurath. The seven Defendants, Bormann, Kaltenbrunner, Frank, Streicher, Schirach, Fritzsche and Schacht charged under Count One of the Indictment, in the absence of Count Two, were all exonerated under Count One.

<sup>199</sup> *Office of the US Chief of Counsel for Prosecution of Axis Criminality, Nazi Conspiracy and Aggression* Vol. 4, (Washington DC Printing Office, 1946) 208-211 (Doc.1708-PS).

constituted by the Hossbach memorandum, overriding contemporaneous doubts - since dispelled – regarding its authenticity:<sup>200</sup>

‘The Prosecutors clearly did not falsify the Hossbach memorandum...the Hossbach record was a legitimate though not necessarily accurate document and the Court used it and other records of Hitler’s conferences as crucial parts of an evidentiary practice that pointed towards a series of Nazi aggressive war plans. The result may not have been good history but it was defensible practice. By doing so, the Court disposed of the grand conspiracy charge and opened the way for preparation of a final Judgment.’<sup>201</sup>

In the event that the *legal* legitimacy of the ‘conspiracy’ indictment was conceded, sufficient *factual* evidence, therefore, existed to substantiate the ‘offence’ of *conspiracy to wage aggressive war*. Closer scrutiny of the conceptual basis for the offence, however, serves to expose the latent retrospective elements intrinsic to this segment of Article 6. Upon the premise of a system of legal cognition confined to codified provisions or derived from established custom, that is, a variant of a positivistic type of approach, the Allies faced an almost insuperable barrier in imputing the Nazis with the requisite contemporaneous awareness of their culpability:

- (i) *At the date of commission* of the acts for which the Defendants were subsequently indicted, neither conspiracy nor the formulation of a common plan was a concept recognised under *international law*.
- (ii) *At the date of commission* of the acts for which the Defendants were subsequently indicted, neither conspiracy within the *Anglo-American* tradition, nor the formulation of a common plan was a concept recognised under *German domestic law*.
- (iii) Neither the concept of conspiracy as defined within the *Anglo-American* tradition nor the formulation of a common plan had *ever* existed in Germany. No reasonable justification therefore existed to ascribe to the Defendants, knowledge of a concept wholly unfamiliar to their own civil law system.

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<sup>200</sup> Ann Tusa and John Tusa *The Nuremberg Trial* (New York: Atheneum, 1984), 181-182. The presentation dealt with the preparatory stages to be accomplished in readiness for the forcible annexations of Austria and Czechoslovakia and gave a clear exposition of the benefits which this action would yield to Germany. The Hossbach memorandum is available online:

<http://www.yale.edu/lawweb/avalon/imt/document/hossbach.htm>. This recorded a presentation by Hitler to an assemblage of his highest military and diplomatic officials in November 1937. More specifically, the Hossbach memorandum was a written note alleged to have been compiled by Hitler’s military aide, Colonel Friedrich Hossbach. In it was described a meeting, of November 1937, at which Hitler discussed plans and prospects for German territorial aggrandisement.

<sup>201</sup> *Supra*: Smith *Reaching Judgment at Nuremberg*, 142.

- (iv) *At the date of commission* of the acts for which the Defendants were subsequently indicted, the concept, ‘*common plan*’, with its connotations of ‘co-operation’ had not even been juridically formulated within Anglo-American law.<sup>202</sup> It was thus entirely innovatory, lacking precedent within any legal system in the world with which the Defendants could possibly have been acquainted.
- (v) The IMT ultimately circumscribed the scope of the ‘conspiracy’ indictment. However, had the Tribunal interpreted Article 6 in the manner originally intended by the Allies, namely to encompass conspiracy to commit war crimes and crimes against humanity, the retrospective implications would have been still more apparent.<sup>203</sup> On this point, the Members’ decision did ameliorate the *ex post facto* elements of the Charter. However, in diminishing the practical impact of the conspiracy indictment upon the Defendants, the Tribunal partially thwarted the stated objectives of the Allies. Essentially, satiation of the Allies’ aims depended upon the undiluted application of the Charter; *post factum* provisions were therefore indispensable to their own ‘common plan’.
- (vi) Even had conspiracy been a recognised concept under international law, individual responsibility had arguably not been previously established. Without such personal accountability, the Defendants could not have been fixed with guilt for the ‘offence’ of conspiracy.<sup>204</sup>
- (vii) At the date of the commission of the acts for which the Defendants were subsequently indicted, no judicial forum existed under international law before which they could have been arraigned.
- (viii) The Defendants were precluded by Articles 7 and 8 from reliance upon the pre-established defences of ‘acts of state’ and ‘superior orders’.
- (ix) The Tribunal’s decision to exclude the defence of *tu quoque* debarred the Defendants from citing strategies on the part of the Allies, which would

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<sup>202</sup> As such, Jackson’s contention that, ‘The Charter concept of a common plan really represents the conspiracy principle in an international concept’ was based more upon rhetorical contrivance than substantive legal principle: *supra*: Jackson *The Nuremberg Case*, 147.

<sup>203</sup> The substantive offences of *war crimes* and *crimes against humanity* are discussed below.

<sup>204</sup> The issue of individual responsibility is discussed below.

possibly have fallen within the ambit of *conspiracy* or certainly a *common plan* to wage aggressive war.<sup>205</sup>

Would resort to a 'natural law' type of approach have served the Allies more favourably than a stance predicated upon pre-existing substantive precedent? In such circumstances, the Prosecutors would have found it necessary to demonstrate that *conspiracy* or the formulation of a *common plan* were founded upon concepts contrary to fundamental standards of morality and ethical rectitude. They would have then have to surmount the additional hurdle of establishing that any such nebulous principles possessed the force of legally binding provisions within the criminal law. The Allies were, however, to encounter sufficient difficulties in establishing that the *substantive* offences of *crimes against peace* and *crimes against humanity*, respectively contained in Articles 6 (a) and (c) of the Charter, contravened such transcendent values. The feasibility of fulfilling a similar objective in the context of the *inchoate* offence of *conspiracy* was, therefore, still more elusive.

The price arguably paid by the prosecution for its limited achievement in the sphere of conspiracy, lay in the consequential expose during the trial of the utilisation of a legal concept which lacked prior recognition or standing within continental law. During the period when the IMT adjudged the *common plan* to wage aggressive war to have been conceived and implemented by the Nazi regime, no conceptual basis for the *conspiracy* indictment existed. The Defendants had unquestionably undertaken a pre-conceived programme of German aggrandisement. Did, however, any sustainable legal basis exist, upon which they could have realistically predicted that their nemesis in relation to the *formulation* of those plans, would lie in an international Tribunal before which they would be decreed guilty and subjected to punitive sanctions for breach of the criminal law?

During the war years, the world witnessed six years of unspeakable inhumanity, preceded by a protracted period of escalating international tension. The Allies - chiefly

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<sup>205</sup> Under the *tu quoque* concept, the Defence would have been enabled, for example, to plead that the German action towards Norway, was akin to the proposed offensive by Britain against Norway. The Defence could have availed themselves of a similar position in relation to the invasion of Poland by Germany, the USSR having similarly invaded Poland, in contravention of the Non-Aggression Pact between Germany and the USSR, dated 23rd August 1939.

the American contingent - were accordingly intent upon censuring the Defendants upon the basis of categories of offences, which would hopefully serve as a deterrent to the planning and perpetration of future warmongering. With the utmost pragmatism, it appeared that despite the lack of any sound underlying legal foundation, the Allies had resolved to fix the Defendants with culpability for *conspiracy*. Fulfilment of this objective was the paramount factor and the validity of the means of attainment they relegated to purely secondary significance. If the utilisation of retrospective legislation facilitated their aims, criticisms arising from the application of *ex post facto* provisions were merely an inconvenient obstacle. This could readily be surmounted by a directive from the Tribunal that the Charter was of inviolable status and, to this end the Members appeared to support the Prosecution by reaffirming the unassailability of the Charter. In restrictively interpreting Article 6, however, the Tribunal exhibited a striking duality of approach which, in practical terms, served drastically to curtail the scope and application of the *conspiracy* charge.

In essence, the Tribunal paid lip service to the impregnability of the Charter but at the same time minimised the impact of the Allies' use of *ex post facto* provisions. Viewed empirically, this might have ameliorated the full retrospective implications of Count One. The question remains, however, whether the Members' intervention ultimately salvaged the legal legitimacy of the *conspiracy* aspect of Article 6? Or was their delimiting interpretation of this element of the Charter purely palliative? And was the issue arising from the validity of the *conspiracy* indictment more properly determinable by scrutiny of the design, from the outset, of the prosecuting nations - an objective from which they were never seen to waver throughout the Trial:

'A major explanatory factor in the majority of the decisions that underpinned the Nuremberg process was ethical revulsion at Nazi war crimes, a desire to vindicate the perceived superiority of the Allied cause, and an attempt to remodel and upgrade international criminal law in a way that both extended the ethical values associated with the rule of law and provided greater legal sanctions to deter future genocidal regimes.'<sup>206</sup>

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<sup>206</sup> Michael Salter 'Methodological Issues within the Nuremberg War Crimes Trials' *Law and History Current Legal Issues* Vol. 6 (2003), 375, 390.

## 5. Article 6: the substantive ‘offences.’

With limited success the Allies, as seen, endeavoured to implicate the Defendants in an elaborate scheme of conspiracy. They debarred any challenge to the jurisdiction of the Tribunal and effectively forestalled reliance upon the envisaged defences. Additionally, a framework was constructed for various procedural stipulations and evidential requirements, within which parameters the IMT retained the residual discretion necessary to ensure a fair and expeditious trial.<sup>207</sup>

The victorious nations accordingly laid the foundation for the formulation of the three substantive offences for which the Defendants were to be indicted. These were, in varying degrees, to engender critical scrutiny arising from such issues as:

- (i) The jurisdictional authority of victorious States in the context of belligerent occupation<sup>208</sup> and, more specifically, the rights of an *ad hoc* international Tribunal to intervene in the internal regulation of a State against its own nationals.<sup>209</sup>
- (ii) The existence of valid legal precedent for the ‘crimes’ for which the Defendants were to stand accused.<sup>210</sup>
- (iii) Attribution of individual responsibility to those Defendants, for acts which had hitherto been ostensibly cloaked by the transcendent entity of the State.<sup>211</sup>

The provisions of Article 6 embodied the three substantive offences with which the Defendants were charged. With the possible exception of the commission of ‘war crimes’ under paragraph (b), these were to have significant implications with regard to the utilisation of retrospectively applied criminal law. It remains to be seen whether ‘a

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<sup>207</sup> Articles 6 (part), 3, 7-8 and 17-21 of the Charter respectively.

<sup>208</sup> *Supra*: West *A Train of Powder*, 261: ‘Civilisation could no longer be recognised as a viable idea if Frank the Governor of Poland could not be punished for breaking Polish laws simply because he had murdered Poland and the corpse was incapable of prosecuting him’.

<sup>209</sup> This was relevant to the commission of ‘crimes against humanity’, insofar as related to the commission of atrocities by the Nazis against German nationals or persons living in German- controlled territories such as Austria.

<sup>210</sup> This related particularly to the offences contained in Articles 6 (a) and (c), where arguably no substantive precedent existed at the date of commission of the alleged offences.

<sup>211</sup> The issue of individual responsibility seemed to have been established in relation to *war crimes* as contained in Article 6 (b) but not the offences mentioned in Articles 6 (a) and (c).

*creation of crimes by just four people who are just four individuals – defined by those four people as criminal violations of international law’ was, indeed, ex post facto legislation, as Andre Gros, the assistant to the French representative prophetically counselled.*<sup>212</sup>

## **Article 6**

The Tribunal established by the Agreement referred to as Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are 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 of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing; (\*Counts 2 and 1 of the Indictment)

(b) **WAR CRIMES:** namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave 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; (\*Count 3 of the Indictment)

(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. (\*Count 4 of the Indictment)

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan. (\*Count 1 of the Indictment)

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<sup>212</sup> See comments of Gros, 23<sup>rd</sup> July 1945 in Jackson’s *Report to the President on Atrocities and War Crimes*; 7<sup>th</sup> June 1945, 335 from which it is clear that the French contingent wished it to be left to the IMT to determine which principles of international law should apply to the Defendants. This was in contrast to the position of the other signatories to the London Agreement who declared that it should not be left to the discretion of the tribunal to decide what constituted a violation of international law. It was no part of judicial function to make law.

## a. War crimes

Article 6(b)<sup>213</sup> was to foment the least controversy. The ‘offences’ defined within it<sup>214</sup> were predicated upon the commission of heinous acts, by German nationals, against the civilian populations and the military personnel of other States. These had been previously codified in Articles 46, 50, 52 and 56 of The Hague Convention of 1907<sup>215</sup> and Articles 2, 3, 4, 46 and 51 of The Geneva Convention of 1929.<sup>216</sup> Before the inception of the Second World War,<sup>217</sup> and in the early years of the War itself, it had also been established that violators of international law could, in certain circumstances, be held individually responsible for their actions.<sup>218</sup>

In their closing submissions to the Tribunal, both Jackson and Shawcross rejected Defence assertions to the effect that by the advent of war in 1939, the provisions of The Hague and Geneva Conventions had been rendered obsolete.<sup>219</sup> The Defence claimed that mass deportation had been rendered acceptable in the face of the modern development of totalitarian war requiring the vastest exploitation of labour and materials. Accordingly, the provisions of the Hague Convention were jejune. However, these submissions elicited a retort from Shawcross that ‘*we cannot make these post*

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<sup>213</sup> All 18 Defendants charged with the commission of *war crimes* were convicted with the exception of Hess convicted under Counts 1 and 2 and Fritzsche who was acquitted of all counts charged against him. Von Papen, Schacht, Streicher and Schirach were not charged under Count 3 although both Streicher and Schirach were instead charged and convicted under Count 4: *crimes against humanity*.

<sup>214</sup> The Allied Commission established in the wake of the First World War had defined war crimes in its Report (*supra* n. 21) and identified thirty different types of such crimes.

<sup>215</sup> The Hague Convention 18<sup>th</sup> October 1907 Part IV- Convention Respecting the Laws and Customs of War on Land is available online: <http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm>:

Art. 46: Family honour and rights, the lives of persons and private property as well as religious convictions and practice must be respected.

Art. 50: No general penalty shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.

Art. 52: In summary stipulated that requisitions should only be made from an occupied country proportionate to its resources.

Art. 56: In summary that the property of municipalities should be regarded as private property.

Geneva Convention Relative to the Treatment of Prisoners of War 27<sup>th</sup> July 1929:

Articles 2, 3 and 4 provided for the humane treatment, personal integrity and maintenance of prisoners of war. Art. 46 provided for the disciplinary constraints to be observed by the captors of prisoners of war.

Art.51 recognised that attempted escape even if repeated should not be treated as an aggravating factor if the prisoner of war should be given over to the courts for crimes committed in the course of the escape

<sup>216</sup> The Geneva Convention is available online:

<http://www.yale.edu/lawweb/avalon/lawofwar/geneva02.htm#art1>

<sup>217</sup> *Llandovery Castle* (1921) H.M.S.O. Cmd.450.

<sup>218</sup> *US Ex p. Quirin v Cox* 317 U.S 1 discussed further below in the context of individual responsibility for the offence of waging aggressive war.

<sup>219</sup> The Prosecutors’ stance about the continuing enforceability of the Conventions were implicitly corroborated by the Defendant Jodl’s wartime recommendation that the Nazis pursue a cynical policy of ostensible adherence to those Conventions with the objective of maximising the degree of protection afforded to German prisoners of war whilst in Allied custody.

*factum repeals of international law in favour of the lawbreakers*'.<sup>220</sup> As such, the Prosecution was unprepared to entertain any suggestion by the Defendants that substantive Treaty provisions should be retrospectively subverted. The changing face of warfare was irrelevant to the continuing enforceability of the obligations contained in the Conventions.<sup>221</sup>

Though the stance adopted by Shawcross was entirely understandable, it perhaps did not sit easily with the Prosecutors' cursory repudiation of Defence allegations that *ex post facto* provisions were enshrined in the Charter itself. The Prosecution rejected the notion of *post factum* repeal of existing Conventions in circumstances where such revocation would have availed the Defendants; in contrast, throughout the judicial process, they embraced innovatory legislation utilised to the detriment of the Defence. Their stance was, therefore, contradictory. Perversely, no illogic was perceived to arise from a situation, in which the Allies were seemingly bound by one set of legal precepts and the Defendants by another.<sup>222</sup>

The Defendants' submissions, however, also crumbled under closer scrutiny. Defence Counsel had essentially invited the Tribunal to declare that Treaties, extant at the date of commission of the acts in question, should be abrogated with retrospective effect. Yet, they implored the Members to adjudge that the Charter was impeachable on the grounds that it constituted retrospective legislation. Effectively, both parties adopted an ambivalent position. They wished to utilise *ex post facto* legal provisions whenever conducive to their respective interests but were otherwise implacably opposed to the imposition of *post factum* punitive sanctions.

In the context of Article 6 (b), the provisions of Article 2 of the Hague Convention (Part IV)<sup>223</sup> were also to provoke a measure of debate. The strictures of the Convention

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<sup>220</sup> Shawcross: 19 IMT 469.

<sup>221</sup> This was in sharp contrast with the Allies' own perception of the need for evolution of international law to meet the exigencies of modern warfare, exemplified by developments such as the atomic bomb.

<sup>222</sup> In criticising the approach of Defence Counsel Seidl in the context of Seidl's emphasis upon the purported redundancy of certain aspects of the Hague Convention Dubost: 19 IMT 562, highlighted this alleged ambivalence on the part of the defendants: 'Dr Seidl therefore considers international law as static when he believes that this will enable him to draw favourable conclusions therefrom; (*referable to the ex post facto nature of the Charter*) but when this law condemns his clients, it must be considered still in process of evolution. Dialectics of this kind, which make use of paralogism are specious. Dr Seidl is well versed in the art of sophism but convinces no-one'.

<sup>223</sup> The Hague Convention 1907 Part IV Art.2, 'The provisions contained in the regulations referred to in Article 1 as well as in the present Convention do not apply except between the contracting Powers and

were stipulated as binding upon the contracting powers, only where all the belligerents had been signatory States.<sup>224</sup> However, the IMT ultimately determined the issue by reference to the Preamble to the Convention, wherein indicative of the prevailing position prior to 1907, its stated purport was not the enactment of new law but the *revision* of the ‘general laws and customs of war’. The Tribunal further acknowledged that by the outbreak of war in 1939 the rules of conduct, thus codified rather than introduced by the Convention, had been recognised ‘*by all civilised nations and that it was too well settled to admit of argument that violations of these provisions constituted crimes for which the guilty individuals were punishable*’.<sup>225</sup>

However, the Tribunal’s interpretation of The Hague and Geneva Conventions, in conjunction with the Members’ assumption as to the purportedly binding effect of their provisions upon every participant during a state of international armed conflict, was potentially beset by retrospective implications. Provided that *every* protagonist was a signatory to Conventions regulating the conduct of warfare, enforceability was beyond dispute. In contrast, indiscriminate application of the Conventions, irrespective of the nationality of the participants, was not within the direct contemplation of the subscribing parties to the Conventions at the date of enactment. Any reliance upon the obligations contained within the Conventions would, thus, necessarily have retrospective connotations.

A supplemental source of law was, however, available to the Tribunal: established custom and practice. Count Three of the Indictment specifically mentioned violation of customary law and general principles of law as well as treaty provisions and the Charter itself. This enabled the Members to circumvent obstacles presented by the restricted ambit of The Hague and Geneva Conventions. Customary law underpinned their conclusion that, in the sphere of war crimes *per se*, the Defendants were nevertheless constrained by pre-existing principles of international law. In that event, the Defendants were properly subject to punitive sanctions for the commission of *war crimes*,

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then only if all the belligerents are parties to the Convention.’ Article 1 decreed that the Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land annexed to the Convention.

<sup>224</sup> Not all the nations involved in the Second World War were parties to the Hague Convention and hence the relevance of the discussion relating to the law relating to war crimes *per se* existing outside the ambit of the Convention. The USSR was a party to the Hague Convention but not to the Geneva Convention.

The Hague and Geneva Conventions are available online at:

<<http://www.yale.edu/lawweb/avalon/lawofwar/lawwar.htm>>

<sup>225</sup> Judgment: 22 IMT 497.

regardless of the applicability of The Hague and Geneva Conventions. No further scrutiny was required into the identity of the signatories, nor of the impact wrought by their initial lack of participation in those international Treaty obligations. The issue of retrospectivity could be quickly laid to rest since *war crimes* were unequivocally accepted as criminal ‘offences’ under international customary law. No cognisance was taken of submissions made by Defence Counsel, Alfred Thoma, on behalf of Rosenberg, firstly that international customary law did not exist and next that the condition of emergency threatening the integrity of Germany had negated the obligations to which it was ostensibly bound by Treaty.<sup>226</sup> The Members were disinclined to cede to quasi-decisionist arguments that would potentially derail the positive law basis on which the prosecution sporadically asserted the Charter rested.

Endorsement of the Tribunal’s position was ironically furnished by a memorandum dated 15<sup>th</sup> September 1941 from Admiral Canaris, Chief of Intelligence in the High Command of the German Armed Forces (OKW).<sup>227</sup> This contained a manifest acknowledgment of the existence of binding international law, lying beyond the confines of Treaty obligations and founded upon established custom and practice:

‘The Geneva Convention for the treatment of prisoners of war is not binding in the relationship between Germany and the USSR. Therefore only the principles of general international law on the treatment of prisoners of war apply. Since the 18<sup>th</sup> century these have gradually been established along the lines that war captivity is neither revenge nor punishment but solely protective custody the only purpose of which is to prevent the prisoners of war from further participation in the war. The decrees for the treatment of Russian prisoners are based on a fundamentally different viewpoint.’<sup>228</sup>

Whilst Article 6 (b) was not, therefore, entirely immune from imputations of retrospectivity, it possessed a solid foundation within international law. This applied with equal effect, both to the substantive offence of *war crimes* in the old sense and the attribution of individual accountability for such transgressions. Firstly, Germany was a signatory to The Hague and Geneva Conventions, both of which had been validly transposed into German municipal law:

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<sup>226</sup> Thoma: 18 IMT 69, 123-125.

<sup>227</sup> Referred to as Document EC-338 in the closing submissions of Shawcross: 19 IMT 473.

<sup>228</sup> The defendant Keitel responded to Canaris with a marginal note ‘The objections arise from the military conception of chivalrous warfare. This is the destruction of an ideology. Therefore I approve and back the measures.’ The Measures to which Keitel alluded were the inhumane treatment of Soviet prisoners of war referred to by the Nazis as Bolsheviks in flagrant breach of the Hague and Geneva conventions and the customary rules of warfare as mentioned by Canaris.

‘The generally accepted rules of international law are to be considered as binding integral parts of the law of the German Reich.’<sup>229</sup>

Furthermore, in *LLandoverly Castle*,<sup>230</sup> the German Supreme Court had adjudged that an individual might be subject to punitive sanctions where violations of international Conventions had occurred. This principle was applicable, notwithstanding that such transgressions had not yet been designated as crimes to which specific punishments had been ascribed.<sup>231</sup> The existence of a state of war might well provide justification for certain conduct within the military arena, as necessitated by the exigencies of combat. However, the umbrella of war did not automatically confer *indiscriminate* immunity upon individual perpetrators. On that point, a grudging concession was evoked from Defence Counsel Horn. This was qualified only by his delimitation of the definition of *war crimes*. They were, in his view, confined to acts perpetrated *either* in violation of binding law, as previously established by agreement between the belligerents *or* contrary to generally recognised prescriptive law. In so doing, he entirely rejected the validity of law emanating from the standards of justice recognised by civilised nations. Law was, however, properly derivable from provisions, codified in legislative enactments and, notably, also from long-established custom:

‘Whereas in general classical international law holds responsible the state as a unit only, there always existed in the usage of war the exception that also acting individuals were liable to be held responsible. It can be ascertained that the prevailing practice of states is that the belligerent who has been injured by a war crime may after the war call the offender to account. If several states which have fought shoulder to shoulder in the war form a common court against the war criminals of the conquered adversary, this court has the collective competency of all the states that form the court or have joined its charter.’<sup>232</sup>

Despite the limited context of Horn’s concession, his acknowledgment of the Tribunal’s jurisdiction *was* nonetheless significant. This was particularly so, when conflated with the likelihood that the Members would both approve the authenticity of the documents presented by the Prosecution and accept that they comprised irrefutable proof of the Nazi atrocities. Given these obstacles, the Defendants’ final and ultimately futile recourse lay in submissions, pertaining to the extent and nature of their involvement in

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<sup>229</sup> Article 4 of the 1919 Reich Constitution remained valid under the Nazi regime (cited in the opening address of Jackson as 2050 PS: 1 IMT).

<sup>230</sup> (1921) H.M.S.O. Cmd.450.

<sup>231</sup> This general principle would thus apply *a fortiori* in a situation where the act in question had been afforded criminal status with a prescribed punishment.

<sup>232</sup> Martin Horn on behalf of Von Ribbentrop: 17 IMT 589.

the acts of which they were accused. Only where they had personally participated in the concrete action, from which the complaint emanated, were they individually responsible for the commission of individual war crimes. Neither instigation nor incitement sufficed to found the requisite criminal liability. Persuaded however by De Menthon's submissions during his opening address, the Members rejected this contention:

'Nor can they escape their responsibility by arguing that they were not the physical authors of the crimes. The war crimes involve two responsibilities, distinct and complementary: that of the physical author and that of the instigator. There is nothing heterodox in this conception. It is the faithful representation of the criminal theory of complicity through instructions. The responsibility of the accomplice, whether independent or complementary, to that of the principal author is incontestable. The Defendants bear the full responsibility for the crimes which were committed under their instructions or under their control.'<sup>233</sup>

Had the Defendants been permitted to distance themselves from their alleged transgressions in the manner posited by Defence Counsel, this would have culminated in an entirely unsustainable situation. All would have evaded liability for their misdeeds on the specious basis that they had not committed murder and other atrocities by their own hand. Rather, culpability would have perversely rested in functionaries and subordinates acting entirely at the Defendants' behest and command.

However, the suggestion that the Defendants were possibly able to be convicted for *incitement* of 'offences' which might never have come to fruition, was itself tinged with retrospective connotations. A crucial distinction existed between accessory guilt arising from participation in a 'crime' which actively materialised and the 'offence' of incitement *per se*. In the latter instance, culpability was ascribed on the basis of *instigation* rather than implementation. As seen elsewhere, the Tribunal confined the scope of the *conspiracy* indictment to *crimes against peace* within Article 6 (a). Prior to the Members' intervention, the Charter had putatively sought to impugn the Defendants for *all* forms of complicity, not only in the waging of wars of aggression but also in the commission of *crimes against humanity* and most notably *war crimes*. Had it not been for this restrictive interpretation, it would have been open to the Tribunal to convict the Defendants of *conspiracy to commit war crimes*. Ultimately, it was not. If it were then feasible to equate or extend by analogy the Members' distaste of the *conspiracy* charge – implicitly because of the infringement of the legality principle it connoted – to the notions of *instigation* and *incitement* latent within Article 6 (b), this would have laid

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<sup>233</sup> De Menthon: 5 IMT 418.

bare the Allies' readiness to have recourse to *ex post facto* provisions, even in an area supposedly impervious to such imputation.

Despite this faint tinge of retrospectivity, it was beyond doubt that the decision of the German Supreme Court, in *Llandovery Castle*,<sup>234</sup> recognised the notion of individual criminal responsibility for breach of the provisions of The Hague Convention.<sup>235</sup> The Defendants, therefore, had scant basis upon which to assert that they were not personally accountable for acts perpetrated in flagrant breach of the obligations thereby imposed. In this area at least, the Allies were able to cite specific precedent for the Indictment laid against the Defendants. They could also allude to long-established custom and practice, both to explain the rationale underpinning The Hague and Geneva Conventions, and as a separate legitimate source of enforceable law. The Nazis were bound by the provisions of international law to which their State had pledged allegiance. They were, therefore, unable to take refuge in any subsequent inconsistent domestic legislation enacted by the National Socialist regime in violation of Germany's pre-existing Treaty obligations.<sup>236</sup> To this extent, international law apparently took precedence over the municipal law of the State. However, the specific situation in the context of individual criminal responsibility under The Hague and Geneva Conventions signified nothing in relation to the general interface between international and municipal law. Rather, personal accountability for the commission of conventional 'war crimes' within paragraph (b) more likely rested upon the prior transposition of the Treaties into the domestic regime of Germany, than upon any sweeping concession as to the supremacy of international law.<sup>237</sup>

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<sup>234</sup> *Llandovery Castle* (1921) H.M.S.O. Cmd.450.

<sup>235</sup> The principle, enunciated in *Llandovery Castle*, doubtless applied also to the Geneva Convention 1929

<sup>236</sup> Article 4 of the 1919 Weimar Constitution incorporated Germany's international treaty obligations into the domestic law of the state.

<sup>237</sup> This is borne out by the fact that prior to the Nuremberg process, the international obligations affecting individuals under The Hague and Geneva Conventions were enforced by States. There was therefore no direct contact between the individual and the constraints of international law. The punishment administered against the individual was that dictated by the municipal criminal law of the State by whom the individual was tried; hence the apparent pre-requisite of each subscribing State incorporating the provisions of each Treaty or Convention in its own domestic law, before enforcement against an individual transgressor was possible. To this extent, as noted in the Table in Appendix 2, the direct application of the criminal law by an international Tribunal, in the context of *war crimes*, was procedurally innovative. Always before, as exemplified by *Llandovery Castle* and *Ex parte Quirin*, the perpetrators of *war crimes* were dealt with by the domestic courts of the relevant States, more specifically, Germany and the United States respectively.

What then was the impact upon the Defendants of this incorporation of The Hague and Geneva Conventions into German municipal law? In essence, it meant that at the date of commission of their alleged acts, they either were, or should have been, fully cognisant of their duties to the citizens of other States during a condition of War. There was no basis upon which they could reasonably assert that they were ignorant of their responsibilities. Furthermore, even had they been subjectively *unaware* both of the provisions of The Hague and Geneva Conventions and the duties imposed upon them by customary law, no valid safeguards against prosecution would have been available. If legitimate legal provisions were in place at the date of the alleged war crimes, the state of knowledge necessary to fix the Defendants with criminal liability was ineluctably imputed to them.

## Summary and evaluation of Article 6 (b)

In summary, the concept of *war crimes* as an offence under both international and German domestic law was soundly established by substantive precedent, as was individual criminal responsibility for the commission of those acts. As such, the following aspects of the *war crimes* indictment were largely immune from the taint of retrospectivity:

- (i) The substantive nature of the ‘offence’ - subject only to the previously discussed *caveat* in relation to incitement of, as opposed to direct involvement in such acts.
- (ii) The identity of the potential victims, namely civilians of populations in occupied territories, hostages and prisoners of war, as opposed to nationals of the same State as the perpetrator.
- (iii) The timescale, in that the offences had by their very definition to be committed within the duration of an ongoing state of war.
- (iv) The *lex loci*, namely the place of commission. The prior incorporation of the relevant Conventions into German municipal law had transposed their provisions into the domestic law of Germany. In this specific area, there was thus no incompatibility between international and German law. If *war crimes* were perpetrated within the boundaries of Germany, they were nonetheless recognised as pre-established ‘offences’ within German local law. Further, if *war crimes* were committed elsewhere, no violation of the *lex loci* occurred provided that States, on whose soil the acts were committed, had either previously incorporated The Hague and Geneva Conventions into their own domestic legal regimes or, failing that, were prepared to accept established custom as a valid source of law.
- (v) The attribution of individual responsibility.

However, an element of *inchoate retrospectivity* possibly did exist. Enforceability of The Hague and Geneva Conventions should strictly have been possible, only where *every* protagonist engaged in the Second World War was a signatory to those

Conventions.<sup>238</sup> On this point, however, the situation was salvaged by reliance on prior customary law, upon which the Conventions had themselves been fashioned.

Quite apart, therefore, from the presumed inviolability of the Charter, submissions specifically directed towards the purported retrospective import of Article 6 (b) were doomed to failure. Few members of Defence Counsel even troubled to challenge the legality of the *war crimes* indictment, even where the alleged offences had occurred within German-annexed Austrian territory where the victims were, by then, nominally citizens of the German state.

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<sup>238</sup> A discussion of the concept of *inchoate retrospectivity* appears at the end of this Chapter and in Appendix 2.

## b. Crimes against humanity

In marked contrast with Article 6 (b) the offence of *crimes against humanity*,<sup>239</sup> as defined by Article 6 (c), appeared largely unsupported by conventional or customary precedent:

‘It was the charge, for which there was not even a pseudo-legal basis – that of crimes against humanity – which concerned itself most with past acts and with acts which made the trial both politically necessary and inevitable.’<sup>240</sup>

It was true that the Preambles to The Hague Conventions of 1899<sup>241</sup> and 1907<sup>242</sup> had both briefly strayed into the arena of humanitarian issues. However, neither was universally recognised as binding international law, since the relevant provisions were not incorporated within the operative portion of the text. The Preamble to the earlier Convention did mention ‘*the laws of humanity and the requirements of public conscience*’. However, the governing provisions of the Treaty remained silent as to the role to be afforded to humanitarian transgressions. The second contained an interpretative aid, permitting recourse to ‘*the principles of the law of nation, as established by and prevailing among civilised nations, by the laws of humanity and the demands of the public conscience*’,<sup>243</sup> wherever necessary to fill gaps in the language of international conventions.<sup>244</sup>

In the Treaty of Sevres, negotiated with Turkey in 1920 by the governments of France, Russia and Great Britain to deal, in part, with the Turkish slaughter of ethnic Greek-speaking and Armenian subjects of the Ottoman Empire but never implemented, it was possible to extract another potential source of legal precedent.<sup>245</sup> This referred to ‘*new*

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<sup>239</sup> The appellation ‘crimes against humanity’ was derived from a suggestion by the British expert in international law, Hersch Lauterpacht in *The Law of Nations and the Punishment of War Crimes* (British Yearbook of International Law 21, 1944), 58-95.

<sup>240</sup> *Supra*: Shklar *Legalism: Law, Morals, and Political Trials*, 158.

<sup>241</sup> The Hague Convention 1899 is available online:

<http://www.yale.edu/lawweb/avalon/lawofwar/hague02.htm>

<sup>242</sup> The Hague Convention 1907 is available online:

<http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm> The concept of *crimes against humanity* was used in the declaration dated 15<sup>th</sup> May 1915 by the governments of France, Great Britain and Russia with reference to the slaughter of the Armenian population in Turkey. This would now be termed ‘genocide’ or ‘ethnic-cleansing.’ It is interesting that the atrocities committed by the Turkish State were within the confines of Turkey itself against a minority ethnic group and would not therefore have satisfied the Charter’s Article 6(b) definition of *war crimes* per se.

<sup>243</sup> This segment of the Preamble of the Fourth Hague Convention of 1907 Concerning the Laws and Customs of War on Land was known as the ‘Martens Clause’.

<sup>244</sup> See the further discussion of this below in subsection (ii) *actus reus* of this section (b).

<sup>245</sup> Treaty of Sevres arts 226-28, 230, dated 10 August 1920.

*crimes of Turkey against humanity and civilisation*'. Replaced, however, by the later Treaty of Lausanne<sup>246</sup> and the concomitant Declaration of Amnesty<sup>247</sup> in the wake of WW1, no further allusion was made to *crimes against humanity* with effect that, though manifestly guilty, Turkey escaped prosecution for the mass extermination of its own citizens.

During negotiations prior to the post-WW1 Treaty of Versailles, no specific significance was attributed to any putative emergence of prosecution for acts of atrocity committed against the subjects of one's own state. Nor did tentative references in the Hague Conventions to humanitarian concerns persuade the US representatives, Lansing and Scott, to embrace the concept of *crimes against humanity*.<sup>248</sup>

'The laws of humanity vary with the individual which, if for no other reason should exclude them from consideration in a Court of justice.'<sup>249</sup>

Culpability for the commission of such 'offences' would be subjectively determinable 'according to the conscience of the individual judge'<sup>250</sup> and this, Lansing and Scott refused to countenance. Elevation of the achievable outcome over the legitimacy of the methods utilised in attainment of it was untenable. For them, the need for certainty

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<sup>246</sup> 24 July 1923

<sup>247</sup> 24 July 1923

<sup>248</sup> *Supra: Commission on the Responsibility of the Authors of War and on Enforcement of Penalties*, American Journal of International Law Vol. 14, (1920), 64. The notion of *crimes against humanity* as mentioned in the Report of the Commission of Fifteen clearly sought to differentiate between (i) guilt for offences against the laws and customs of war and (ii) guilt for offences against the laws of humanity. There was no attempt made however to clarify the manner in which the two concepts overlapped or were entirely distinct.

<sup>249</sup> *Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on the Responsibility of the Authors of War and on Enforcement of Penalties*, American Journal of International Law, (1920). Lansing and Scott drew a parallel with John Selden's criticism of the role played by equity in the Anglo-American system, in which he defined it as 'a roguish thing.' Interestingly, Lansing had himself referred to the notion of a *crime against humanity* as early as 1906, in which he distinguished between piracy, described as a *crime against the world* and the slave trade, decried as a *crime against humanity*. R. Lansing 'Notes on World Sovereignty' *American Journal of International Law* Vol. 15, (1921), 13, 25. Roger Clark, in his essay, Crimes against Humanity at Nuremberg, *The Nuremberg Trial and International Law* (Dordrecht, Boston and London: Martinus Nijhoff, 1990), 179 states that to the best of his knowledge, the article by Lansing was 'the first in English-language legal literature to use the term *crime against humanity*'.

<sup>250</sup> *Supra: Commission on the Responsibility of the Authors of War and on Enforcement of Penalties*, American Journal of International Law Vol. 14, (1920), 72.

transcended any benefits that punishment of alleged perpetrators of *crimes against humanity* might produce.<sup>251</sup>

A degree of impetus may have incipiently arisen in the immediate aftermath of the First World War to punish those suspected of the commission of atrocities during warfare. However, no innovative category of offence had emerged to regulate the anti-humanitarian conduct of protagonists within a state of belligerency, far less in peacetime. Furthermore, during the internecine period, any support for the criminalisation of mass atrocities failed to attract sufficient recognition to persuade the world community to instigate translation of any such embodiment of international feeling into legislative form. Raphael Lemkin had, in 1943,<sup>252</sup> coined the term, 'genocide' to address the annihilation of swathes of people on racial, ethnic or religious grounds. This development, however, was reactive to the growing awareness amongst the Allied nations of the Nazis' mass extermination policy, rather than reflective of the pre-existing state of international law. De Ribes specifically confirmed the linkage between the unprecedented scale of the Nazi atrocities and the neologism it had generated:

'The real crime of these men was the conception of a gigantic plan of world domination and the attempt to realise it by every possible means. By every possible means, that is of course above all by the scientific and systematic extermination of millions of human beings and more specifically of certain national or religious groups whose existence hampered the hegemony of the Germanic race. This is a crime so monstrous, so undreamt of in history throughout the Christian era up to the birth of Hitlerism that the term 'genocide' has had to be coined to define it and an accumulation of documents and testimonies to make it credible.'<sup>253</sup>

Despite the manifest lack of precedent in either conventional or customary law, the Allies nevertheless went on to incorporate Article 6 (c) within the Charter and, subsequently, to utilise its provisions to frame Count Four of the Indictment. Significantly, perhaps, and in direct contrast to the terminology deployed to support the

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<sup>251</sup> Roger Clark, in his essay, Crimes against Humanity at Nuremberg, *The Nuremberg Trial and International Law* (Dordrecht, Boston and London: Martinus Nijhoff, 1990), 179: 'Due to the dissent of Lansing and Scott, 'the recommendation by the majority of the Commission did not find its way in to the final peace treaty so that the episode does not advance the subject further, except perhaps to solidify the word usage a little. In a vague fashion, the concept of a crime against humanity had entered the realm of serious public discourse'.

<sup>252</sup> Raphael Lemkin *Axis Rule in Occupied Europe* (Washington, D.C. Carnegie Endowment for International Peace, 1944), 79.

<sup>253</sup> De Ribes: 19 IMT 530. Dubost: 19 IMT 550, 'Goering is the founder of the concentration camps where millions of alleged enemies of the regime found their death and where ultimately genocide was ultimately achieved'.

Count Three indictment for *war crimes*, Count Four omitted any claim of violation of customary international law and prior treaties. More specifically, paragraph (c) was predicated upon a series of innovatory concepts which:

- (i) Ostensibly permitted the Defendants to be held accountable for acts perpetrated during a state of *peacetime* as well as war.
- (ii) Criminalised acts constituting '*persecution on political, racial or religious grounds*'. This aspect of Article 6 (c) potentially embraced a wholly new category of offence, imposing individual criminal responsibility *inter alia* for 'incitement' through the use of propaganda.<sup>254</sup>
- (iii) Embraced the notion of criminal culpability for acts perpetrated against '*any civilian population*' as distinct from the Article 6 (b) definition of victim in terms of '*the civilian population of or in occupied territory*'.
- (iv) By insertion of the clause '*whether or not in violation of the domestic law of the country where perpetrated*', enabled the Defendants to be prosecuted for acts, legal within the *locus in quo*, at the date of commission. The domestic law prevailing there at the material time was overridden. This potentially infringed the *territoriality principle* under which, in general terms, the *lex loci* or place of commission was deemed crucial; if the act in question was not already illegal under the *lex loci*, then it was not feasible to instigate a criminal prosecution.

These innovatory aspects were destined to evoke intense criticism, especially when harnessed to the conceptual vagueness inherent within the notion of *crimes against humanity*:

'The phrase 'crimes against humanity' was previously unknown to the law and has an obvious resemblance to Hitler's doctrines about acts which are contrary to public opinion.'<sup>255</sup>

This stood in marked contrast to Shklar's utilitarian stance towards the invocation of *crimes against humanity*. From her perspective, the Allies' '*necessary and wise*' decision to incorporate paragraph (c) within the Charter underpinned the political

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<sup>254</sup> The use of this concept of incitement through the use of propaganda was aptly demonstrated in the case against the Defendant, Julius Streicher who was convicted and subsequently executed. Streicher and Von Schirach were the only defendants convicted of *crimes against humanity* in the absence of *war crimes*. Indeed, neither was indicted for the commission of *war crimes*. Von Shirach was sentenced to 20 years imprisonment.

<sup>255</sup> H.A Smith *The Nuremberg Trials* (Free Europe, July 1946), 203.

justification for the Trial.<sup>256</sup> Because legalism was subordinate to an overriding imperative to eradicate the perpetrators of Nazi atrocities, this, in her view, outweighed all other considerations. If the external face of the judicial process sufficed to give an *appearance* of justice, the outcome of the proceedings, in terms of conviction and punishment, would vindicate the course along which the Allies had legitimately propelled their engine of post-war retribution. The Trial was the medium by which this objective could most aptly be achieved; the Charter had created a legitimate offence and twenty defendants properly stood indicted for it:<sup>257</sup>

‘It cannot be claimed that this was a Trial comparable with those under more stable systems of law. It was, rather, a legalistic means of eliminating the Nazi leaders in such way that their contemporaries, on whom the immediate future of Germany depended, might learn exactly what had occurred in recent history.’<sup>258</sup>

As with so many other aspects of the Nuremberg proceedings, debate about the legitimacy of Article 6 (c) polarised around the means/ends dichotomy. Did the innovatory category of *crimes against humanity* subordinate legalism to pragmatism and, to what extent, does examination of its constituent elements unravel the intricacies of this debate?

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<sup>256</sup> See *supra*: Shklar *Legalism: Law, Morals, and Political Trials*, 155-156.

<sup>257</sup> The only exceptions were Doenitz and von Papen. Of the 20 Defendants indicted, 16 were found guilty and Raeder, Fritzsche, Schacht and Hess acquitted. Raeder was, however, convicted under Counts One, Two and Three and Hess under Counts One and Two. Fritzsche and Schacht were acquitted of all charges.

<sup>258</sup> See *supra*: Shklar *Legalism: Law, Morals, and Political Trials*, 155-156.

### (i) The timescale

Article 6 (c) was not destined to enjoy an easy passage and the time frame proved to be one of the more contentious areas. Problems, pertaining to the date of commission of the alleged atrocities, arose from the outset due to inconsistencies in the drafting of this provision. The Russian text of the Charter contained a comma, immediately prior to the final section commencing with the words: '*or persecutions on political, racial or religious grounds of or in execution of or in connection with any crime within the jurisdiction of the Tribunal*'. However, the French and English versions showed a semicolon in the same position. All texts were ultimately amended to correspond with the Russian text, such that the delimiting phrase, '*other crimes within the jurisdiction of the Tribunal*' was linked to the first clause of paragraph (c) as well as to the second.<sup>259</sup> This apparently innocuous amendment was to have far-reaching consequences for the overall ambit of paragraph (c).

In delivering Judgment, the Members of the IMT indicated that they were unable to deem any acts *prior* to the outbreak of war as *crimes against humanity* within the remit of the Charter. The Tribunal was not satisfied that such conduct had been perpetrated in the execution of or in connection with the waging of aggressive war under Counts One and Two of the Indictment. Nor could they have been committed in conjunction with war crimes under Count Three, since the very definition of such crimes hinged upon their commission during the state of warfare, which had prevailed only from 1<sup>st</sup> September 1939 onwards. By this inventive interpretation of Article 6(c), the 'offence' of *crimes against humanity* was essentially curtailed. The Members effectively narrowed the compass of paragraph (c) to embrace only those acts occurring during the subsistence of the War – although, paradoxically, this delimitation was not always observed in practice.<sup>260</sup> The conspiracy to wage aggressive war originated in the plans promulgated at the 1937 Hossbach Conference. However, no evidence was adduced to the Tribunal to suggest that the Nazis perpetrated atrocities, as defined by paragraph (c), in connection with any of these proposals to annex or invade Austria, Czechoslovakia and Poland. On the facts, *crimes against humanity* were not interlinked with that proven

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<sup>259</sup> 1 IMT 17: the Protocol, rectifying the discrepancy in the Charter. This Protocol stipulated that the semicolon in the English and French texts should be replaced with a comma.

<sup>260</sup> Some of the material used to substantiate the incitement charge against Striecher had been compiled during the 1920s and 1930s, namely before the onset of the War.

pre-war conspiracy. In essence, they had proliferated pursuant to a supremacist racial ideology, not as a parasitic adjunct to war:

‘To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of or in connection with any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proven that they were done in execution of or in connection with any such crime. The Tribunal cannot make a general declaration that the acts done before 1939 were crimes against humanity within the meaning of the Charter but 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.’<sup>261</sup>

Described as ‘*an astonishing doctrinal innovation, narrowly construed in order to bolster the legal adequacy of the Trial*’,<sup>262</sup> the Members’ decision to restrict the ambit of Article 6 (c), proved momentous. In essence, it enabled the Defendants to evade criminal sanction for the persecution of German nationals and denationalised Jews resident within Germany during the years *preceding* the onset of War.<sup>263</sup> This politic stance dispensed with the ramifications otherwise inevitably arising from the full envisioned implementation of paragraph (c). The issue as to whether the Charter constituted *ex post facto* legislation would surely have engendered still more critical scrutiny, had the Defendants been ultimately susceptible to conviction for *pre-war* transgressions.

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<sup>261</sup> Judgment: 22 IMT 498.

<sup>262</sup> Lawrence Douglas *The Memory of Judgment* (New Haven and London: Yale University Press, 2001), 65.

<sup>263</sup> By way of example, the Nazis targeted opponents of their political regime, gypsies, mentally disabled persons, Jehovah’s Witnesses and Jews.

## (ii) The *actus reus* of the offence

The semi-colon debacle, therefore, precluded a finding of guilt against the Defendants arising from pre-war atrocities. Nonetheless, the Members remained empowered to impose punitive sanctions for commission of ‘offences’ of the type detailed in Count Four, perpetrated *during* the War against their *fellow nationals*. References in the initial segment of paragraph (c) to murder, extermination, deportation and enslavement *prima facie* bore all the recognised elements of ‘conventional’ war crimes<sup>264</sup> within the criteria of The Hague and Geneva Conventions. However, paragraph (c) crucially enabled the Defendants to be convicted for offences committed against fellow inhabitants of *Germany* and presumably also the residents of territories such as Austria under ‘legitimate’ *German control* in respect of whom a state of belligerent occupation had never existed. Moreover, when the phrase ‘*against any civilian population*’ was applied in conjunction with the innovatory concept of ‘*persecution on political, racial or religious grounds*’ contained in the second sub-clause of paragraph (c), the novelty of Article 6 (c) became still more apparent.<sup>265</sup>

With regard to the specific nature of the ‘offence’, as indeed with the remainder of paragraph (c), the Prosecution and Tribunal were able, in the last resort, to reiterate the familiar refrain that the Charter constituted the binding and unassailable provision on which the proceedings were founded. The pre-1945 legal position was, thereby, peremptorily subsumed. The purported inviolability of the Charter was frequently to serve the Allies well, in circumstances where the Prosecution case was susceptible to criticism on the grounds of a paucity of substantive precedent. Nor was the IMT unduly inconvenienced by the supposed unimpeachable nature of the Charter. On this point, wherever expedient and as evidenced both by *conspiracy* and indeed other aspects of

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<sup>264</sup> *Crimes against humanity* as ultimately interpreted by the IMT were deemed by the Members to be in violation of both The Hague and Geneva Conventions. In the Hague Convention Part IV the ‘interests of humanity’ were deemed to be the rationale for the laws and customs of war as mentioned in both the Preamble and Article 2 whilst ‘the laws of humanity’ were cited in both the Preamble and Article 8 as one of the sources of the law of nations. There was thus arguably an overlap between the concept of *war crimes* and *crimes against humanity* in the sense found by the IMT although had the IMT found the Defendants guilty upon the basis originally envisaged by the drafters of the Charter, this congruity would less readily have been shown to exist.

<sup>265</sup> This conflation of two or more retrospective strands is considered further below.

*crimes against humanity*, the Members did not hesitate to interpret Article 6 in a manner presumably adjudged more consonant with their notion of justice.<sup>266</sup>

Notwithstanding the emphasis generally accorded to the overarching impregnability of the Charter, the Prosecutors remained characteristically anxious to deflect actual and potential criticism arising from the utilisation of *ex post facto* law in the sphere of *crimes against humanity*. In the absence either of specific provision in the form of Treaties/ Conventions or established pre-existing law derived from long-standing custom, the Prosecutors sought to establish that there was an overarching code of behaviour originating in the earliest annals of humanity. This was deemed to emanate from the most fundamental precepts of decency and morality, encompassing actions so atrocious as to violate the standards of justice recognised by *civilised* nations:

‘To those who tomorrow will render justice in the name of conscience the Defendant Frank and his accomplices would be ill advised to protest against a lack of written texts with appropriate sanctions since though they be not codified in an inter state penal code, they exist in the penal code of every civilised country.’<sup>267</sup>

Neither De Menthon nor his co-Prosecutors saw fit to clarify the meaning of *civilised* in this context, although this categorisation appeared only to extend to European and other Westernised cultures. Presumably, a Germany inculcated with the perverted ethos of Nazism had strayed from this idealised moral code. Ironically, it was those self-same *civilised* states – vaunted by the Allies as upholders of moral propriety – that were disposed to embrace the retrospective imposition of punitive sanctions, in circumstances where none had existed at the date upon which the ‘offences’ allegedly occurred:

‘Jackson used the idea of civilisation as a rhetorical workhorse and also as a term of art. The concept of civilisation was meant to serve as a bona fide source of international law and appeals to it were offered to shore up one of the weakest aspects of the prosecution case; the absence of unambiguous norms in conventional international law criminalising ‘crimes against humanity.’<sup>268</sup>

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<sup>266</sup> Finch observes, ‘it is not clear from the reasoning of the tribunal, in view of its previous holding that it was bound by the Charter as the law of the case, why it felt free to disregard the express terms of the Charter on this particular definition’: *supra*: Finch ‘The Nuremberg Trials and International Law’, 20, 23. Indeed, the Members similarly curtailed the ambit of conspiracy in Article 6 and the Article 9 and 10 concept of organisational guilt.

<sup>267</sup> De Menthon: 5 IMT 371.

<sup>268</sup> *Supra*: Douglas *The Memory of Judgment*, 83.

Presumably cognisant of the fragility of some aspects of the projected course which the Prosecution was to pursue, Jackson had initially sown the seed for this approach as early as June 1945:

‘The feeling of outrage grew in this country. I believe that those instincts of our people were right and that they should guide us as the fundamental tests of criminality. We propose to punish acts which have been regarded as criminal since the time of Cain and have been so written in every *civilised* code.’<sup>269</sup>

No foundation, however, existed upon which to suppose that an international Tribunal, deriving its authority from a legislative instrument interpreted by the IMT and the prosecution as an embodiment of pre-existing law, could apply purportedly ethical principles, lying entirely beyond the remit of the Charter:

‘I do not quite know how the violation of a principle can be called a crime. Unprincipled conduct has hitherto been called a matter of ethics not law.’<sup>270</sup>

No specific provision had been made either in the London Agreement or the Charter itself for the application of ‘*general principles of law*’.<sup>271</sup> To this extent, the provenance of the IMT differed materially from the legislation regulating the operation of the International Court of Justice,<sup>272</sup> or indeed the terminology used in the Preamble to The Hague Convention 1907 (the *Martens Clause*).<sup>273</sup> Though the Martens Clause was

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<sup>269</sup> Jackson’s *Report to the President on Atrocities and War Crimes*; 7<sup>th</sup> June 1945: available online at <<http://www.yale.edu/lawweb/avalon/imt/jack01.htm>> The stance adopted by Jackson, in this Report, was met with vehement objection by positivists such as Kelsen on the basis that ‘one is subject only to a judgment of a competent court on the basis of positive criminal law. And criminal law is either the national law of a definite state or rules of international law providing punishment’: *supra*: Kelsen *Peace through Law*, 157. Yet, subsequent to the Trial, Jackson’s approach was met, in other quarters, with approbation: Finch comments, ‘there could be no more sacred trust than that of upholding the law against primitive and barbarous acts of inhumanity which shock the conscience of all civilised persons and are forbidden by divine as well as human command’: *supra*: Finch ‘The Nuremberg Trials and International Law’, 20, 22. This view is laden with natural law overtones.

<sup>270</sup> *Supra*: Morgan *The Great Assize*, 22.

<sup>271</sup> Interestingly, this lacuna was addressed by Count Four of the Indictment in which the Defendants were arraigned on the basis of methods and crimes which ‘constituted violations of international conventions, of internal penal laws and of the general principles of all civilised nations.’ The Indictment states ‘the said acts were contrary to Article 6 of the Charter.’ However, the Charter and not the Indictment formed the legal foundation for the IMT. The Indictment is available online at: <<http://www.yale.edu/lawweb/avalon/imt/proc/count4.htm>>

<sup>272</sup> In contrast, Article 38 (1) (c) of its establishing Statute empowered the International Court of Justice at The Hague to apply ‘general principles of law’ (as well as international Conventions, international custom and judicial decisions and the teachings of the most highly qualified publicists of the various nations). It is also noteworthy that the International Court of Justice as the principal judicial instrument of the United Nations was not competent to try individuals, Article 34 paragraph 1 of its Statute stipulating that ‘only States may be parties before the Court.’

<sup>273</sup> The Preamble to the Hague Convention 1907, *inter alia*, states that it is made in recognition of ‘the solidarity uniting the members of the society of civilized nations’ and ‘the principles of equity and right

purely intended as an interpretative aid to the Fourth Hague Convention of 1907 – in which it appeared in the Preamble - and was, therefore, not strictly binding on the subjects of international law,<sup>274</sup> what perhaps bolstered the Allies' position was the teleological approach that the Martens Clause ostensibly permitted. This provided a *'reservoir of uncodified law applicable in armed conflict in the absence of complete codification'*.<sup>275</sup> Recourse to the usages established by civilised nations arguably enabled the Tribunal to look beyond the textual provisions of international law at the *'moral bases of humanitarian obligations'*.<sup>276</sup>

Self-evident it was that the atrocities for which the defendants were indicted and which formed the basis of Article 6(c) would have constituted crimes under any 'civilised' penal regime. Had it not been for the perversions of the National Socialism regime, this would have applied with equal force to the criminal code of Germany and, significantly, the crime of murder remained extant throughout the period of Nazi domination:

'One of the myths is to the effect that in Nuremberg the Defendants were sentenced for deeds which were not punishable at the time they were done. The overwhelming majority of the Defendants were sentenced for crimes which are punishable under the laws of any civilised states. Mass murders of Jews, Catholic priests, gypsies, prisoners of war, 'racially undesirables,' etc. are still murder and crimes against eternal immutable law.'<sup>277</sup>

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on which are based the security of States and the welfare of peoples.' The Preamble is available online: <http://www.yale.edu/lawweb/avalon/lawofwar/pacific.htm#art1>

<sup>274</sup> See Beth van Schaak 'Crimen Sine Lege, 'Crimen Sine Lege: Judicial Lawmaking at the intersection of Law & Morals', 27, 123, 'Justice Jackson referenced the Martens Clause in connection with the proposed crimes against humanity charge in his letter to President Truman on the status of what would become the Nuremberg trials. Report to the President by Mr. Justice Jackson, June 6, 1945, in International Conference on Military Trials Report of Robert H Jackson to the International Military Conference on Military Trials, London, 1945 (1949), available at <http://www.yale.edu/lawweb/Avalon/imt/Jackson/jack08.htm> [hereinafter "Jackson Report"]. Tribunals in the post-WWII also applied the Martens Clause to confirm the illegality of certain conduct absent positive law criminalisation. In the Justice Case, for example, the clause was involved for the proposition that the deportation of the inhabitants of occupied territory constituted a war crime under CIL'.

<sup>275</sup> *Ibid*: 27.

<sup>276</sup> *Ibid*: 28.

<sup>277</sup> Robert. M. W. Kempner Mann der Zeit October/November 1966 quoted *supra*: Maser, *Nuremberg: A Nation on Trial*, 268. Kempner was a member of the prosecution team serving under Jackson at Nuremberg. These observations echoed comments made by Shawcross: 19 IMT 448 during his final address, 'But let it be plainly said now that these Defendants are charged only as common murderers. That charge alone merits the imposition of the supreme penalty and the joinder in the Indictment of this crime against peace (Count 2) can add nothing to the penalty which may be imposed on these individuals.' Shawcross made similar allusions in his opening submission: 3 IMT 92, 'The Charter merely develops a pre-existing principle. If murder, rapine and robbery, are indictable under the ordinary municipal law of our countries, shall those who differ from the common criminal only by the extent and systematic nature of their offences, escape accusation?'

But this was *not* the specific offence for which they were in fact indicted and arraigned before the International Tribunal at Nuremberg. Nor were they accused of such other generally recognised crimes as arson, rape, assault and kidnapping by dint of a revival of relevant legal provisions abrogated by the Nazis but prevailing in Germany during the Weimar regime. Had this course been pursued, the Defendants would have faced trial in a domestic forum for acts which were not criminal under German law at the date of their commission. The illegality of the alleged ‘offences’ would have been derived from sections of the German Criminal Code which the Nazis had repealed but which their accusers had revived on a *post factum* basis after the conclusion of the War. Inevitably, however, this would have served to reignite the debate concerning the legitimacy of the retrospective application of criminal law, albeit in a *national* rather than *international* arena.

In the arena of *crimes against humanity*, any underlying lack of conventional or customary precedent was, to the Allies, a merely transient inconvenience to be swept away in the furtherance of their unswerving purpose. *Substantive* precedent for the indicted offences at the date of commission of the alleged acts may have been lacking but neither had new law in the form of the Charter been enacted. From conception to conclusion of the Nuremberg process, ‘*practical reason rather than abstruse conceptualism*’ appeared, on occasions, to underpin the unarticulated strategy of the Prosecution.<sup>278</sup> ‘*Practical reason*’ born of a need to subordinate the means employed to the ultimate outcome to be achieved, irrespective of the precise methods harnessed in the attainment of such objective. ‘*Abstruse conceptualism*’ distilled from the idea that resort to *ex post facto* legislation could never be countenanced within any supposedly ‘civilised society’. If, therefore, utilisation of *post factum* legal provisions was to be embraced, the concept of the intrinsic wrongfulness of retroactive legislation would be an inevitable sacrifice to the cause of expediency. A route laced with pragmatism or darkened by retrospectivity - this was the fundamental dichotomy which Article 6 (c) appeared to present.

However, in its quest to justify the rationale underlying paragraph (c), was a third way more amenable to the Prosecution? Unprepared to acknowledge dependence on an essentially utilitarian approach, the Allies were, likewise, unwilling to concede that lack

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<sup>278</sup> *Supra*: Glueck *War Criminals: their Prosecution and Punishment*, 81.

of substantive precedent rendered the concept of *crimes against humanity* innovatory. Recourse lay, instead, to an ethical code, regulatory of the conduct of humanity from time immemorial; a system of law owing its innate provenance not to human intervention but to the transcendent qualities of beneficence and rectitude. Article 6 (c) may have borne the appearance of retrospectivity but this was illusory:

‘The Charter does no more than constitute a competent jurisdiction for the punishment of what not only the enlightened conscience of mankind but the law of nations itself had constituted an international crime.’<sup>279</sup>

This determination to override obstacles presented by the scarcity of precedent within codified or customary law impelled the Prosecution to have recourse to a presumptive wellspring of indelible morality and ethical rectitude, conceptually immutable but with the facility for dynamism in responding to the challenges posed by an ever-changing concrete reality:<sup>280</sup>

‘The trial does more than anything else to give to international law what Woodrow Wilson described as the kind of vitality it can only have if it is a real expression of our moral judgment.’<sup>281</sup>

What the Defendants had done was to commit ‘*sins against the spirit*’, in ‘*gravest violation of the universally accepted moral law*’.<sup>282</sup> This warranted punitive sanction ‘*before the conscience of humanity*’.<sup>283</sup> The ‘*original sin of National Socialism*’<sup>284</sup> harked back to a primeval state of atavistic barbarism and was properly punishable according to ineffable laws of commensurate longevity. In essence, the ‘offence’ of *crimes against humanity* was based upon a moral code, as ancient as humankind. The Nazis could not, therefore, be heard to complain that they were unaware of its existence. As such, neither lack of ascertainability nor uncertainty furnished any viable excuse. Regardless of whether acts were committed in peacetime or within Germany against fellow nationals of the same State, natural law constraints were binding upon the Nazis

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<sup>279</sup> Shawcross: 3 IMT 93.

<sup>280</sup> This had the potential to comprise a double-edged sword; Sauter, on behalf of von Schirach, argued that ‘the precepts of humanity’ varied dependent on the era in which such concepts fell to be adjudged and were thus an unsafe basis for conviction. See Sauter: 18 IMT 372.

<sup>281</sup> Jackson’s *Report to the President; October 1946*: available online at <<<http://www.yale.edu/lawweb/avalon/imt/jack01.htm>>>

<sup>282</sup> De Menthon: 5 IMT 368.

<sup>283</sup> De Menthon: 5 IMT 387.

<sup>284</sup> De Menthon: 5 IMT 372.

throughout the period when their alleged transgressions occurred. The illegality of their acts and the criminal sanctions their misdeeds engendered were wholly foreseeable:

‘But this tribunal is to adjudge their guilt not on any moral or ethical basis alone but according to law – that natural justice which demands that these crimes should not go unpunished.’<sup>285</sup>

Buttressed both by supra-judicial natural law precepts and - if from their perspective a distinct category - universalistic tenets emanating from the usages of civilised nations, neither the Prosecution nor the Members were prepared to permit the Trial to be sidetracked by a Defence inquisition upon the Allies’ utilisation of Article 6 (c), the *ex post facto* elements of which – from a positivistic perspective - were legion:

‘They (the Allies) do so also that their conduct may be exposed in all its naked wickedness and they do so in the hope that the conscience and good sense of all the world will see the consequences of such conduct and the end to which inevitably it must lead.’<sup>286</sup>

The Prosecutors ascribed paramount importance to the deterrent impact of the Defendants’ exposure and punishment. Because atrocities had occurred without historical parallel, not only was it the function but also the duty of the Tribunal to convey an unequivocal message of the inevitable consequences of such misdeeds. To this end, paragraph (c) appeared to encapsulate the Allies’ determination to create and define a legal code by which human behaviour would be thenceforth regulated:

‘Ultimately the rights of men made as all men are in the image of God are fundamental. And so after this ordeal to which mankind has been submitted, mankind itself, struggling now to re-establish itself in all the countries of the world simple things – liberty, love understanding – comes to this Court and cries ‘ these are our laws – let them prevail!’<sup>287</sup>

Ultimately, however, did the Members’ decision to delimit the scope of Article 6 (c) diminish the effectiveness of the Trial, as an instrument by which the ordeal of the surviving victims of the Nazi regime could be assuaged? Though judicial retribution *was* duly exacted against the Nazis for their wartime transgressions, the strictures imposed upon the concept of *crimes against humanity* afforded only partial reparation to the victims of their atrocities. In the immediate aftermath of the Trial, did bystanders

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<sup>285</sup> Shawcross: 19 IMT 434.

<sup>286</sup> Shawcross: 3 IMT 145.

<sup>287</sup> Shawcross: 19 IMT 527.

ruefully perceive the aspirations expressed by De Menthon, in his opening address, as the heralding of a false dawn?

‘The need for justice of the martyred peoples will be satisfied and their sufferings will not have been useless to the progress of mankind.’<sup>288</sup>

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<sup>288</sup> De Menthon: 5 IMT 425.

### (iii) The victim

The conceptual novelty of *crimes against humanity* did not lie solely in the nature of the alleged offence *per se*. Paragraph (c) defined potential victim as a member of *any civilian population* and this invoked various jurisdictional issues. More specifically, did an international tribunal, or indeed any other external agency, possess the authority or jurisdiction to intervene in the domestic affairs of another sovereign State, which historically had been at liberty to govern its internal affairs in relation to its own citizens as it saw fit?<sup>289</sup>

Examples could be cited of prior humanitarian-motivated incursions into other nation states to relieve the suffering of the indigenous population, as sanctioned by the approval of the international community.<sup>290</sup> However, no precedent existed prior to the Nuremberg process for *judicial* intervention against states arising from humanitarian concerns, far less a trial of *individuals* for alleged criminal violations of international law perpetrated against co-nationals.<sup>291</sup> This presented no obstacle to Shawcross:

‘The fact is that the right of humanitarian intervention by war is not a novelty in international law – can intervention by judicial process then be illegal? The Charter of this tribunal embodies a beneficent principle and it gives warning for the future. I say and repeat again, it gives warning for the future to dictators and tyrants masquerading as a State that if in order to strengthen or further their crimes against the community of nations they debase the sanctity of man in their own country they act at their peril for they affront the international law of mankind.’<sup>292</sup>

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<sup>289</sup> Fourteen of the defendants were convicted both of *war crimes* and *crimes against humanity*. In relation to this category of defendants, the distinction between the two concepts in a jurisdictional sense was exemplified most vividly in the case of Seyss-Inquart (sentenced to death). He was active in both Austria and later in Poland and the Netherlands. Pursuant to the Anschluss, the atrocities committed in Austria were regarded as being perpetrated within the boundaries of Germany. These were therefore defined as *crimes against humanity*. Insofar as related to acts committed elsewhere, these were chiefly punishable as conventional *war crimes*. On the issue of jurisdiction, see *supra*: Leonhardt ‘Nuremberg Trial: A Legal Analysis’, 449-476 at 450.

<sup>290</sup> In 1827, Britain, France and Russia intervened against Turkey. Interventions also occurred on humanitarian grounds in Armenia and Crete in 1896.

<sup>291</sup> An argument which would have been further buttressed from a defence perspective by the ‘acts of State doctrine’ had it not been for Article 7 of the Charter discussed above. Glueck concluded that it was for the successor governments in Germany and the other Axis States to fulfil their obligations to punish those responsible for atrocities committed during the war against their fellow countrymen. ‘There is one class of crimes in connection with which the validity of the United Nations’ jurisdiction must be in doubt: ie crimes by German, Hungarian, Japanese or other Axis nationals against their fellow-nationals. Such offences may be regarded as domestic crimes’: *supra*: Sheldon Glueck *War Criminals: their Prosecution and Punishment*, 206-207. He distinguished such persons from Stateless individuals whom he commented should not be left in a ‘politico-legal vacuum’.

<sup>292</sup> Shawcross: 19 IMT 472.

Despite this trenchant defence of the Allies' position, the retrospective implications of the jurisdictional aspects of Article 6 (c) have continued to evoke criticism:

'It is an extraordinary intrusion of international law into a sphere hitherto totally foreign to it, namely the legal relations between a sovereign government and its subjects. It is also *ex post facto* legislation with a vengeance and its results may be far-reaching and disastrous.'<sup>293</sup>

Conversely, by harnessing the putative significance of international feeling, commentators of a more sympathetic persuasion have implicitly embraced the legitimacy of the Article 6(c) licence to encroach on traditional state autonomy:

'Since the international community sanctioned the intervention of the Allies in the case of the German Defendants at Nuremberg and this sanction constituted a sufficient legal basis for assuming that the acts with which they were charged were violations of international law, the trial of German nationals for crimes against their fellow-citizens was justified under international law. Through its endorsement, the international community indicated that the crime against humanity is a valid delict under international law, and that certain acts which may be war crimes or crimes against international law can be crimes against humanity and offences against the laws of nations in that sense.'<sup>294</sup>

At the outset of the Nuremberg process it, therefore, appeared that the Allies had resolved to hold the Nazis accountable for acts committed, not only against the nationals of other States (traditional *war crimes* if committed during a condition of war), but also the residents of Germany and German-occupied territories.

De Menthon addressed the issue of the Tribunal's jurisdiction by emphasizing the putative rights of the Allies in their capacity of 'occupying States'. In his view, the IMT possessed authority to assume supreme control over German internal affairs, on the basis that Germany's sovereignty had been temporarily suspended on her surrender. The principal obstacle to the proposed judicial intervention by the Allied Powers was thereby eliminated. In the event that Germany had ceased to exist as a legally recognisable entity, the issues both of her sovereignty and her consent to the prosecution of her nationals were rendered otiose. The Allies had assumed total dominion. This conferred upon them the unequivocal authority to act in whatever manner was deemed expedient in the interrogation and prosecution of those alleged to

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<sup>293</sup> *Supra*: Morgan *The Great Assize*, 22.

<sup>294</sup> *Supra*: Woetzel *The Nuremberg Trials in International Law*, 180-181.

have violated international criminal law. The subsisting provisions of German national law immediately prior to the Surrender were, thereby, vitiated.<sup>295</sup>

‘Since the Surrender declaration of 8<sup>th</sup> May 1945 and until the day when a government shall have been established by the agreement of the occupying Powers, there will be no organ representing the German State. Under these conditions, it cannot be considered that a German State juridical order existed. Today, supreme authority is being exercised over the whole German territory in regard to the German population by the Four Powers acting jointly. It must therefore be allowed that the states which exercise supreme authority over the territory and population of Germany can submit this guilt to a Court’s jurisdiction.’<sup>296</sup>

On this basis, the Allies were able to assume sovereignty over the German State during the *interregnum* which followed the Nazi defeat. However, not even this rationale escapes criticism:

‘By the Act of Military Surrender signed by the representatives of the German High Command at Berlin on May 8, 1945, no legislative power has been conferred upon the States to which the German Army surrendered. It was by the Declaration made at Berlin on June 5, 1945 that the four occupant Powers – not all the States to which the German Army surrendered - assumed sovereign legislative power over the former German territory and its population.’<sup>297</sup>

Intentionally, perhaps, the Charter omitted to draw any distinction between the intended prosecution of war criminals of *German* nationality and the citizens of *other Axis States*

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<sup>295</sup> The corollary to this proposition is that in the event that Germany had ceased to exist as a sovereign State at the material date, she was then unable to give her consent to the prosecution of her nationals or confer upon the Allies the jurisdiction to enable such prosecutions to be pursued.

<sup>296</sup> De Menthon: 5 IMT 389. De Menthon felt that *crimes against humanity* were a less precise concept than *crimes against peace* and *war crimes*, positing that they were tantamount to ‘crimes provided for and punishable under the penal laws of all states’.

<sup>297</sup> *Supra*: Kelsen ‘Will the Judgment in the Nuremberg Trial constitute a precedent in international law?’, 169. This does however appear to contradict his earlier proposition, in relation to the issue of the Allies’ jurisdiction to establish an International Military Tribunal. Hans Kelsen ‘The Rule against Ex Post Facto Laws and the Prosecution of Axis War Criminals’, *The Judge Advocate Journal*, Vol. 2 (Fall-Winter, 1945), 46, ‘By the Declaration made in June 1945, the four occupant powers have established their joint sovereignty over the German territory and its population. For the time being no international treaty can be concluded with Germany as a sovereign State. An international treaty to which the four occupant powers in their capacity as the sovereigns over the occupied territory and its population are contracting parties is equivalent to a treaty concluded with Germany. Since the four occupant powers in their capacity as sovereign over the German territory and its population are legitimate successors of the German State, they have an unlimited legislative, jurisdictional and administrative jurisdiction over German territory and its population. They (the Allies) may institute a special court and lay down the principles to be applied in the trials. In relation to the German war criminals, the agreement for the prosecution and punishment of the major war criminals of the European Axis signed on August 8<sup>th</sup> 1945 by the four occupant powers may also be interpreted as a legislative act of the occupant powers issued by them in their capacity as sovereigns over the German territory and its population.’ However, this argument makes no mention of the fact that there were many signatories to the London Agreement other than the four occupant nations and hence the means by which appropriate legislative authority had been conferred upon them. Similarly, according to Schick, ‘it would appear that the legal basis for the IMT could have been created only by means of an international Treaty, preferably an Armistice Agreement, in which it would have been necessary to obtain the consent of the German Government to the trial of German nationals, in accordance with the provisions of the Charter of the IMT’: *supra*: Schick ‘The Nuremberg Trial and The International Law Of the Future’, 770, 780.

suspected of similar transgressions. Only in the former case was it feasible to assert jurisdiction sequential to the condominium established in Germany by the four occupying States, unlike the latter situation in which no purported acquisition of sovereignty on the part of the Allies had ever occurred.

Debate was likewise engendered by the relevance of Article 43 of the Hague Convention Part IV 1907<sup>298</sup> regulating the minimum standard of conduct required in circumstances of belligerent occupation. If the provisions of Article 43 were deemed binding upon the four occupying States at the *conclusion* of hostilities, the Allies would have been confined to the prosecution of those acts committed during the period of occupation. The only exception was a special category of offences, punishable in accordance with the interests of public order, where the timescale was then immaterial.<sup>299</sup> Unless it was deemed possible to incorporate the prosecution of such crimes within the ambit of offences punishable in the interests of public order, *crimes against humanity* did not satisfy the criteria stipulated in Article 43.

By conflation of the following suppositions the Allies were, perhaps, empowered to assume the requisite jurisdiction to investigate and prosecute the Defendants for ‘offences’ committed against their co-nationals:

- Germany ceased to exist as a sovereign nation upon her surrender
- The doctrine of ‘acts of state’ was nullified on the cessation of national sovereignty
- The provisions of Article 43 related only to belligerent occupation during the subsistence of ongoing warfare rather than the absolute surrender of Germany. The status of belligerent occupation, in recognising the continued existence of the sovereignty of the occupied State, was inapplicable to the circumstances prevailing at the end of the War in which Germany had *unconditionally*

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<sup>298</sup> Article 43 Hague Convention 1907 Part IV, ‘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’: available online at:

<http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm#art43>

<sup>299</sup> *Supra*: Woetzel *The Nuremberg Trials in International Law*, 79-81, citing *inter alia*, Jescheck *Die Verantwortlichkeit der Staatsorgane nach Volkerstrafrecht*, 1952, 172, in support of his hypothesis, comments that despite the provisions of Article 43, it may have been possible to prosecute war crimes per se, notwithstanding their commission prior to the commencement of the occupation. He nevertheless emphasizes the importance of the Allies complying with the constraints imposed by the established provisions of international law. ‘The Allies were only justified to function as caretakers for the Germans on the basis of the Hague Convention and within its limitations...The Hague Rules represent customary international law. It does not matter whether a nation has subscribed to them; they are still binding on all countries’.

*surrendered* to the Allied Powers. Article 43 would have pertained only to a situation where Germany had been subjected to the ‘occupying’ Allied forces in the course of *ongoing warfare*. This was not relevant on the facts.

Moral justification *may* have existed for the Allied nations’ presumed authority to establish an international tribunal to try the Defendants for crimes committed against other Germans, before the onset of war and outside the aegis of codified or customary law. However, the legal legitimacy of their actions was less compelling. Upon the surrender of Germany by the Declaration of Berlin in May 1945 and despite the *assumption* of supreme authority by the four occupying Allied nations in June 1945, no legislative powers were at any stage *conferred* upon *all* the States who subsequently became signatories to the London Agreement. Hence, it followed that the sovereignty of the German State may not have been compromised to the extent necessary to validate the jurisdictional prerogative underpinning the London Agreement.<sup>300</sup> This constituted an impediment which singly, or in tandem with the obstacles presented by Article 43 of the Hague Convention, arguably denuded the Allies of the requisite authority under international law. Without this prerogative, no warrant existed to intervene in the affairs of another sovereign nation. As such, it was not permissible to interrogate and prosecute citizens of Germany, for offences perpetrated against their fellow nationals:

‘There is no rule of international law, customary or conventional, by which acts committed before the commencement of hostilities (being those committed by Nazi Germany against her own citizens, in the course of persecutions on political, racial or religious grounds) can be punished by the subsequent military occupants. The prosecuting authorities were unable to establish the contrary of this statement of the law.’<sup>301</sup>

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<sup>300</sup> *Supra*: Schick ‘The Nuremberg Trial and The International Law of the Future’, 770, 780: ‘The argument has been advanced that the regime established in Germany was *sui generis* and has no precedent in international law. If this view is accepted, one might perhaps ask whether it is “the right that flows from victory,” which gave the four Powers authority to establish that a new form of government which is admittedly not supported by prevailing rules of international law’.

<sup>301</sup> See *supra*: Finch ‘The Nuremberg Trials and International Law’, 20, 23. Despite this, Finch: *ibid*: 24, states that had the Trial been confined to Indictments 3 and 4, that is, *war crimes* and *crimes against humanity*, ‘the trials and judgment would have rested upon solid legal principles and practice.’ He therefore fails to adopt a consistent stance throughout to the ‘offence’ of *crimes against humanity*. The lack of precedent for the proposed prosecution of the Defendants for acts committed against other Germans within Germany was echoed by Schick, ‘apart from the fact that the exercise of Allied jurisdiction on the basis of the London Agreement over acts committed by German nationals against any civilian population, must be considered a legal innovation of first magnitude, it is pertinent to note that this disregards a rule of international law which provides that no state shall intervene in the territorial and personal sphere of validity of another national legal order’: *supra*: Schick ‘The Nuremberg Trial and The International Law of the Future’, 770, 785. Notably, the authority ostensibly conferred upon the IMT by Article 6 (c), was contrary to the earlier stance taken in the Charter of the United Nations, in which the Allies incorporated a provision forbidding the intervention of a State ‘in matters which are essentially within the domestic jurisdiction of any State’: Charter of the United Nations, 1945, Article 2, section 7.

It followed that the legal validity of this aspect of paragraph (c) was open to challenge. However, was this mitigated by the Members' restrictive interpretation of Article 6 (c) and to what extent, if any, did this serve to thwart the Allied objective of criminalising atrocities, unparalleled in recorded human history? It will be recalled that the IMT required an inextricable linkage of 'offences' falling within paragraph (c), to other 'offences' within the jurisdiction of the Tribunal. Effectively, *crimes against humanity* were confined, in practical terms, to acts committed during the War. At first glimpse, this was a bitter blow to the Prosecution. However, on further scrutiny it was evident that reservations existed, in some quarters, from the outset of the Nuremberg process. During the negotiations preceding the London Agreement, Jackson commented that '*we do not consider that the acts of a government towards its own citizens warrant our interference*'.<sup>302</sup> If adopted, this stance would have served to exclude from the Indictment any transgressions committed by the Defendants against their fellow nationals. On this point, Jackson clearly entertained initial misgivings, presumably borne from concerns about the future impact of paragraph (c) upon the Allies themselves. The implications flowing from so radical an impingement upon State sovereignty were potentially far-reaching.

This notwithstanding, Article 6 (c) did retain the clauses, '*against any civilian population*' and '*whether or not in violation of the domestic law of the country where perpetrated*'.<sup>303</sup> The question arose, therefore, whether the semicolon debacle conflated with the Tribunal's interpretation of Article 6 (c), served to fulfil rather than frustrate the original aims of the Prosecution. Imperative linkage of *crimes against humanity*

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<sup>302</sup> *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, (London, 1945), 333: available online at: <http://www.yale.edu/lawweb/avalon/imt/jack02.htm> Jackson's misgivings echoed those expressed far earlier, by the British Government in 1944. Despatch for the British Ambassador (Halifax) to the US Secretary of State, 19<sup>th</sup> August 1944 in *Foreign Relations of the United States*, Diplomatic Papers 1944, Vol. 1, General, 1351, 1352, 'His Majesty's Government have considered this question and have decided that in their view, the War Crimes Commission should confine itself to collecting atrocities of this nature eg. those against Jews, only where perpetrated in occupied countries.' Notably, the memorandum went on to say, 'it is felt that a clear distinction exists between offences in regard to which the United Nations have jurisdiction under international law ie *war crimes* and those in regard to which they have not. Atrocities committed on racial, political or religious grounds in enemy territory fall within the latter category. Any attempt to assume formal obligation in regard to punishment of those responsible for such atrocities would give rise to serious difficulties of practice and principle'.

<sup>303</sup> It followed that the *lex loci*, namely the contemporaneous municipal law of Germany, was irrelevant. The Defendants were thus able to be convicted for the perpetration of acts which, under the domestic law prevailing at the date of commission, did not then attract punitive sanctions. This is the subject of the discussion below.

with the Article 6 (a) offence of *waging aggressive war* restricted the scope of paragraph (c), in a manner which appeared to undermine the Allies' initial objectives. The inevitable by-product of the Members' interpretation was the preclusion of a finding of guilt against the Defendants for their proven acts of atrocity committed against their fellow-citizens, save during a state of ongoing warfare. Yet, in reality, the restrictive parsing adopted by the IMT seemingly addressed the Allies' apprehension at creating a precedent for the future in which they would themselves be potentially enmeshed. Indeed, in his closing submissions to the Tribunal, Shawcross was prepared to concede the dependency of *crimes against humanity* upon the Article 6 (a) concept of *crimes against peace*:

'So the crime against Jews insofar as it is a crime against humanity and not a war crime as well is one which we indict because of its close relation with the crime against peace. That is of course a very important qualification on the indictment of the crimes against humanity which is not always appreciated by those who have questioned the exercise of this jurisdiction.'<sup>304</sup>

It remains unclear, however, whether such comments were indicative of an approach which latently underpinned the Allied strategy from the outset of the proceedings or, instead, were belatedly superimposed to pre-empt the likely decision of the Members.<sup>305</sup> If the Prosecution were seen to align itself with the presaged decision of the Tribunal, any potential embarrassment would inevitably be minimised. In any event, and whether or not concordant with the Prosecution's underlying aims, the Members' departure from the intended ambit of the Charter effectively stripped Article 6 (c) of much of its

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<sup>304</sup> Shawcross: 19 IMT 470.

<sup>305</sup> Roger Clark, in his essay, Crimes against Humanity at Nuremberg, *The Nuremberg Trial and International Law* (Dordrecht, Boston and London: Martinus Nijhoff, 1990), 192 takes the view that the inclusion of a semicolon, rather than a comma, in the first instance, was probably a 'mechanical mistake' and that the intention of the drafters was always to adopt a restrictive definition of *crimes against humanity*, circumscribed by the linkage to *crimes against peace*. However, as an afterthought he adds, 'yet the nagging doubt remains that something more substantive was going on and that there had been a change of position.' If this were true, the Allies in the last resort did intend to free the Article 6 (c) concept from the constraints of waging aggressive war. In that event, the substitution of a comma for the semicolon in October 1945 not only denied pre-war victims a chance of retribution but also served to frustrate the apparent aims of the Allies, in submitting the Charter in its August 1945 format.

retrospective impact.<sup>306</sup> Ultimately, therefore, ‘*crimes against humanity were legally digested as an accessory and interstitial transgression*’.<sup>307</sup>

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<sup>306</sup> This avoided the problems highlighted by Schick, ‘whilst one may welcome the noble ideas reflected in the prosecution’s final presentation of the legal merits of the case, and the role of the victorious nations as defenders of the Rights of Man, one is unfortunately constrained to admit that neither the Covenant of the League of Nations, nor the Charter of the United Nations nor the Economic and Social Council – all of which were cited by the Allied Prosecution in support of its case - have been able to formulate in a manner legally binding upon all States, a “Charter of the Rights of Man”’: see *supra*: Schick ‘The Nuremberg Trial and The International Law Of the Future’, 770, 786.

<sup>307</sup> *Supra*: Douglas *The Memory of Judgment*, 56.

**(iv) Relevance of the *lex loci***

The assumed authority of the Allies, to intervene in the affairs of another sovereign State was to encapsulate the wider debate concerning the overall jurisdiction of the Tribunal. Nullification of the ‘acts of state doctrine’ had proved damaging enough to the Defence. It struck at the heart of the notion of State sovereignty. Paragraph (c) continued this trend by ousting the generally accepted principle that punishment could be validly imposed, only where the act in question was contemporaneously illegal under the *lex loci* or place of commission.

By inclusion of the clause, ‘*whether or not in violation of the domestic law of the country where perpetrated*’, the *territoriality* principle was abrogated. The law prevailing within Germany, at the date of commission of the Defendants’ acts, was deemed irrelevant. Otherwise, the Defendants could have sought exoneration in respect of any actions committed on German soil in conformity with the laws of Nazi Germany. This might possibly have extended to atrocities perpetrated within countries annexed or conquered by Germany, thereby absorbed into the Nazi sphere of operation. Again, the prosecution of the Defendants for acts which were not illegal under their domestic law at the date of commission, and for which no foundation appeared to exist under international law, abounded with retrospective ramifications. The Defendants were *prima facie* entitled to comport themselves in a manner consistent with their own municipal regime, especially in matters which pertained to other German nationals. Significantly, Count Four of the Indictment sought to address this point by alleging that the Defendants permitted ‘*favoured branches or agencies of the State and Party*’ to ‘*operate outside the range even of nazified law and to crush all tendencies and elements which were considered undesirable*’.<sup>308</sup>

The legal regime prevailing in National Socialist Germany might, in most circumstances, have ‘legitimised’ the Defendants’ actions within the domestic arena. However, they were surely steeped in self-delusion if they believed that their actions would have escaped punishment within any environment less depraved, than the Nazi despotism which had afforded them such dubious shelter. Ought the Defendants

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<sup>308</sup> Count Four of the Indictment, together with the other three Indictments are available online at: <http://www.yale.edu/lawweb/avalon/imt/proc/count4.htm>

therefore to have contemporaneously foreseen that they would be ultimately prosecuted for their inhumane acts?<sup>309</sup> From a subjective standpoint, the Defendants' response would presumably have been a resounding denial. In contrast, any reasonable person imbued with the most basic standards of decency and common humanity might have accepted the inherent fairness of the attribution of punitive sanctions to the commission of humanitarian atrocities. Yet, this dichotomy perhaps served to illuminate the attendant uncertainty of any system of adjudication in which punishment could be imposed, not upon an ascertainable set of substantive legal rules but rather upon the perception of *law* as a transcendent entity.

The 'territoriality' principle did pose a major obstacle to the legal legitimacy of paragraph (c). Nonetheless, the supremacy of the *lex loci* was not inviolable. Prior to the inception of the Nuremberg process, States were deemed entitled to prosecute acts either endangering their own security or nationals or interfering with the functionality of their public agencies and instrumentalities. To this extent, the law of the place of commission was immaterial. Clearly however, this did not avail the Allies. Here, they were seeking to exact retribution against the Defendants for acts committed against aggrieved parties, categorised either as German nationals or arbitrarily denationalised Stateless persons. This last definition included persons such as Jews, residing within the boundaries of Germany or her annexed territories.

Where expedient, Germany was herself prepared to recognise certain limitations to the *territoriality principle*, where required to preserve the interests of her nationals. A Decree of 6<sup>th</sup> May 1940 ordained that *irrespective of the law of the State where the act was committed*, foreigners should be subject to trial under the criminal law of Germany for offences committed against German soldiers, officials or members of the Empire's Work Service. Significantly, Article 3 of the German Penal Code decreed that the State would extend protection to its citizens for acts perpetrated beyond its boundaries. This principle also reserved to the State the power to punish German nationals under the *law*

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<sup>309</sup> *Supra*: Gallant *The Principle of Legality in International and Comparative Law*, 360, for an explanation of the role of foreseeability in current international law: 'If an act can reasonably be construed as within the ambit of definition of crimes existing at the time of the act (whether statutory, common law or international law), the actor is sufficiently warned so that a conviction will not violate the customary international law version of *nullum crimen sine lege*. This articulation provides an operational definition of a foreseeable development in criminal law that does not violate the principle of legality'. *Ibid*: 364: 'The doctrine of foreseeability must be carefully applied and circumscribed. Otherwise, it may swallow the principle of legality whole'.

of Germany for any offences committed abroad. In accordance with Article 16 paragraph 2 of the German Basic Law, their extradition to a foreign jurisdiction for the purpose of trial was, therefore precluded.

Alternatively, the principle of *universal jurisdiction* enabled a competent court to adjudicate upon offences of certain categories, most notably *piracy*, irrespective of the place of commission or the nationality of the perpetrator. This could possibly have been extended by analogy to *crimes against humanity*. The prerogative in the context of piracy arose from the intrinsic heinousness of the alleged conduct, as similarly characterised the type of atrocities purportedly criminalised by paragraph (c). However, unlike many examples of piracy, the latter was perhaps complicated by notions of sovereignty or State consent. Further, universal jurisdiction in the arena of piracy had its origins in customary law, rather than a nebulous concept of law emanating from the ‘accepted standards of justice of civilised nations’.<sup>310</sup> Indiscriminate subversion of the *territoriality principle* by reliance upon the concept of universal jurisdiction was, therefore, susceptible to challenge.

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<sup>310</sup> The concept of universal jurisdiction and its application to piracy is further discussed in Chapter 5.

## (v) Summary and evaluation of Article 6 (c)

In light of the above, what conclusions are possible in relation to the legal legitimacy and effect of Article 6 (c)? The facility afforded by the Charter to prosecute alleged offenders for acts lawful within the *lex loci* at the date of commission was likely, without more, to provoke controversy. Yet, as with the remainder of the Charter, Article 6 (c) was ultimately vaunted by the IMT as a codification of pre-existing law. This, however, raised the question of the source and nature of the legal provisions of which it was purportedly declaratory. Within a positivist frame of reference, many facets of the concept of *crimes against humanity* within Article 6 (c) of the Charter were innovatory and, by implication, retrospective. Ironically, however, the same restrictive interpretation of paragraph (c) that reduced its effectiveness as an instrument of retribution simultaneously curtailed its sweeping *retrospective* import. Yet, even here, determination of the legal legitimacy of paragraph (c) rested not merely upon its empirical application in light of the Members decision. Significant also were the retrospective ramifications which *would have* materialised had the IMT adopted an interpretation more aligned to the Allies' overtly stated objectives.<sup>311</sup>

In summary, certain aspects of Article 6 paragraph (c) were *not* susceptible to a charge of retrospectivity. Coalescence of the least innovatory strands of the first limb of paragraph (c) yielded 'offences' scarcely distinguishable from conventional 'war crimes'. They embraced acts of the type detailed in The Hague and Geneva Conventions; more specifically, atrocities perpetrated between 1939 and 1945, against foreign nationals, whether in Germany or elsewhere. Both Conventions had been previously incorporated into German municipal law. Hence, no clash existed between domestic and international law; the issue of *locational retrospectivity* therefore never arose.<sup>312</sup> In essence, it was feasible to adopt an ultra-restrictive construction of the first limb of paragraph (c), not tinged by any stigma of retrospectivity:

- namely, **murder, extermination, enslavement, deportation, and other inhumane acts**
- **committed against any civilian population [to be interpreted as a foreign national];**
- before or **during the war;**

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<sup>311</sup> For discussion of the unfulfilled retrospective aspects of Article 6 (c), see further below.

<sup>312</sup> A further discussion of *locational retrospectivity* appears below and in Appendix 2.

- or persecutions on political, racial or religious grounds in execution of or **in connection with any crime within the jurisdiction of the Tribunal** *[to be interpreted as war crimes under Article 6(b)]*;
- **whether or not in violation of the domestic law of the country where perpetrated** *[interpreted as referable only to war crimes. These were criminally illegal under international conventional law, the relevant Conventions having been incorporated into German municipal law at the date of commission of the alleged offences]*.<sup>313</sup>

Had its scope been no further extended, paragraph (c) would not have been innovatory and, indeed, may have been superfluous. However, the remainder of this provision arguably did invoke aspects of retrospective penalisation. Recapitulation of the novel elements within it highlights the multi-faceted reliance of the Allies upon a legislative instrument, ostensibly rife with *ex post facto* aspects:

- (i) The lack of relevance of the *lex loci*
- (ii) Culpability for *peacetime* offences
- (iii) *Persecution* on political, racial or religious grounds
- (iv) The identity of the victim encompassing *any* civilian population

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<sup>313</sup> A. D'Amato, H. Gould and L. Woods, 'War Crimes and Vietnam: The Nuremberg Defence: The Military Service Register' *California Law Review* Vol. 57, (1969), 1055, 1063: 'With respect to four of the defendants (convicted both of *war crimes* and *crimes against humanity*), Keitel, Sauckel, Jodl and Speer - there is no mention in the verdict of crimes against German citizens and thus their conviction under Count 4 was solely an aggravated version of the traditional *war crimes* indictment. This is not to deny that the *crimes against humanity* charge, was determinative.' With regard to the remaining ten defendants convicted of both offences, 'each defendant convicted under Count 4 could be said to have been convicted under an aggravated-war-crimes-charge amounting to *crimes against humanity*.' It will be recalled that Streicher and Von Schirach were the only two defendants who would, in all likelihood, have escaped conviction for conventional or indeed aggravated *war crimes* within the Article 6 (b) definition or indeed, under the non-innovatory segments of Article 6 (c). Their convictions therefore rested entirely upon the arguably innovatory legal definitions of *crimes against humanity* contained within Article 6 (c).

## Evaluation of facet (i) – the ‘*lex loci*’

### (a) Acts committed on German soil

Paragraph (c) decreed the domestic law of the *locus in quo* immaterial. Containing no geographical constraints, the remit of this provision potentially extended to ‘offences’ committed anywhere in the world. However, the Allies intended paragraph (c) to apply, at least in part, to acts conducted on *German soil*. The majority of the atrocities for which the Defendants were arraigned, namely all those acts lying beyond the ambit of war crimes *per se* and ‘offences’ wholly analogous to *war crimes*, were not contemporaneously illegal under the municipal law of Germany. In respect of acts committed within Germany, the *lex loci* or local law, at the date of commission, was that selfsame German law which decreed the majority of the Nazi atrocities ‘legal’. On this point, therefore, the Charter was *locationally retrospective*.<sup>314</sup> This, in part, subsumed the *jurisdictional retrospectivity*<sup>315</sup> also intrinsic to paragraph (c), pertaining to the *ex post facto* illegalisation of non-humanitarian acts committed within Germany by German nationals against their fellow citizens.

### (b) Acts committed in parts of Europe *outside* Germany:

- Leaving aside any difficulties created by the timescale<sup>316</sup> and identity of the victim,<sup>317</sup> many of the ‘offences’ within the first limb of paragraph (c) would *in substance* otherwise presumably have been illegal under the *lex loci* at the date of commission. On that premise, the issue of *locational* retrospectivity under paragraph (c) would not, for example, have arisen in the context of Nazi wartime deportation of French Jews from France.<sup>318</sup> However, even here, the Defendants could perhaps have protested on the basis that Article 3 of the German Penal

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<sup>314</sup> Unless it were possible under international law to invoke *universal jurisdiction*, and on the premise that the municipal laws of a state had then to yield to the established precepts of international law.

<sup>315</sup> The concept of *jurisdictional retrospectivity* is discussed towards the end of this Chapter.

<sup>316</sup> Such acts on non-German soil would presumably have occurred during the War years rather than prior to the War.

<sup>317</sup> The issue of *jurisdictional retrospectivity* would not generally have arisen here because the acts would have been committed on non-German soil by Germans against non-Germans. However, there may have been situations in which Germans committed ‘crimes against humanity’ on non-German soil against their fellow Germans. Whether this would have been regarded by the Nazis as a matter properly lying within their own jurisdiction is open to speculation. If the act in question exclusively involved Germans, this might well have been their stance.

<sup>318</sup> Such deportation would, in any event, have constituted a *war crime* within Article 6 (b), provided that the deportation was from ‘occupied France’. Further, the intrinsically heinous nature of the act, may also have invoked the principle of universal jurisdiction, by analogy to piracy.

Code and Article 16 paragraph 2 of the German Basic Code respectively reserved to Germany the right to punish German nationals for offences committed abroad and precluded the extradition of such persons to a foreign jurisdiction for the purposes of trial. Thus, when determining the culpability of *German* citizens for acts perpetrated abroad, *German* domestic law deemed the *lex loci* irrelevant. From a German perspective, the right to impose sanctions against *German* nationals lay within the exclusive remit of the State of which they were citizens, that is, Germany herself. Further, what for example, of enslavement of French Jews within Poland? This was possibly tantamount to a conventional *war crime* under paragraph (b). Again, by analogy to piracy, the intrinsically heinous nature of that act could have warranted invocation of *universal jurisdiction* under international law. The *lex loci* would, in such case, have been entirely incidental. If, however, reliance rested solely upon paragraph (c) – with no possibility of invoking *universal jurisdiction* – the domestic law of Poland was decreed wholly irrelevant. Therefore, even if it were not contemporaneously illegal in Poland to enslave foreign nationals within her frontiers, the Charter retrospectively overrode such lacunae in Polish law. The territoriality principle was potentially infringed. Hence, the first limb of paragraph (c) emphatically embraced the notion of *locational retrospectivity*.

- *Persecution on political, racial or religious grounds* within the second limb of paragraph (c) appeared not to have been previously and universally designated a criminal offence. Thus, even if committed outside Germany, such acts would not have been substantively illegal within the *lex loci* at the date of commission. This represented a violation of the territoriality principle, unless once again it was deemed feasible for the Allies to avail themselves of the principle of *universal jurisdiction*, exemplified by the treatment accorded to piracy. It followed that if persecution, on the grounds specified in paragraph (c), was not capable of being deemed intrinsically heinous, *universal jurisdiction* could not be invoked. In that event, the *lex loci* ought then to have been the sole determining factor in dictating the legitimacy of any criminal prosecution. However, paragraph (c) decreed the *lex loci* immaterial; the second limb of this provision was, therefore, *locationally* retrospective.

### **Evaluation of facets (ii), (iii) and (iv) – peacetime acts, persecution and the identity of the putative victim**

Quite apart from the infringement of the territoriality principle, various combinations of *post factum* offences may be extrapolated from paragraph (c):<sup>319</sup>

- (i) Persecution on political, racial or religious grounds against foreign civilians during the War (retrospective in relation to the nature of the offence *per se*).
- (ii) Persecution on political, racial or religious grounds against fellow German civilians during the War (retrospective in relation to the nature of the offence *per se* and the identity of the victim).
- (iii) Persecution on political, racial or religious grounds against foreign civilians in peacetime (retrospective in relation to the nature of the offence *per se* and the timescale for its commission).
- (iv) Persecution on political, racial or religious grounds against fellow German civilians in peacetime (retrospective in relation to the nature of the offence *per se*, the timescale for its commission and the identity of the victim).
- (v) Offences within the first limb of paragraph (c) committed against foreign civilians in peacetime (retrospective in relation to the timescale for their commission).<sup>320</sup>
- (vi) Offences within the first limb of paragraph (c) committed against fellow German civilians during the War (retrospective in relation to the identity of the victim).
- (vii) Offences within the first limb of paragraph (c) committed against fellow German civilians in peacetime (retrospective in relation to the identity of the victim and the timescale for commission).

Offences falling within the *first* limb of paragraph (c) were emasculated by the decision of the Members to require a causal link between the commission of those acts and other offences lying within the jurisdiction of the Tribunal, namely, *war crimes* and *crimes against peace*. Acts of persecution falling within the *second* limb of paragraph (c) were, seemingly, reliant from the outset of the proceedings upon the commission of other

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<sup>319</sup> Retrospective connotations arise from the elements of *peacetime acts*, *persecution* and *the identity of the victim* or any conflation of these three components.

<sup>320</sup> Acts committed during wartime against foreign nationals, of the type lying within the first limb of paragraph (c), were not generally retrospective, if such acts were analogous to conventional ‘war crimes’.

‘offences’ within the jurisdiction of the Tribunal. On this point, the Charter was predicated upon the expectation that the Members would find the political, racial and religious persecution allegedly perpetrated by the Defendants, to have been conducted in conjunction with a pre-war Nazi *conspiracy* to commit one or more of the substantive offences charged under paragraphs (a), (b) and (c). However, once the IMT opted to delimit Count One of the Indictment by confining the ambit of conspiracy to the paragraph (a) concept of *crimes against peace*, no pre-war transgressions survived ancillary to which the paragraph (c) notion of peacetime persecution was able to subsist.

Nonetheless, some ostensibly retrospective elements of paragraph (c) did remain:

- (i) Persecution on political, religious or racial grounds committed against foreign civilians during the War (retrospective in relation to the nature of the offence *per se*).
- (ii) Persecution on political, religious or racial grounds committed against German civilians during the War (retrospective in relation to the nature of the offence *per se* and the identity of the victim).
- (iii) Offences within the first limb of paragraph (c) committed against German civilians during the War (retrospective in relation to the identity of the victim).

Other ostensibly retrospective elements of paragraph (c), however, remained unfulfilled:

- (i) Persecution on political, racial or religious grounds committed against foreign civilians in peacetime
- (ii) Persecution on political, racial or religious grounds committed against fellow German civilians in peacetime
- (iii) Offences within the first limb of paragraph (c) committed against foreign civilians in peacetime
- (iv) Offences within the first limb of paragraph (c) committed against fellow German civilians in peacetime

Inchoate though some *post factum* elements of Article 6 (c) proved in terms of their practical utilisation, they nonetheless arguably tarnished the legal legitimacy of the concept of *crimes against humanity*. This was especially so, when scrutinised in

conjunction with those retrospective elements of paragraph (c), applied by the Members without modification. Throughout all stages from initial conception to eventual implementation, Article 6 (c) thus unquestionably revolved around an axis of *ex post facto* imputation.

### c. The indictment for ‘crimes against peace’

The difficulties surrounding the legal legitimacy of Article 6(c) were manifold.<sup>321</sup> However, they paled into relative insignificance, in comparison with the criticism engendered by the apparent retrospectivity of Article 6(a) of the Charter.<sup>322</sup> Lying at the heart of the debate, were ‘offences’ bearing the appellation *crimes against peace*, incorporating the planning, preparation, initiation or waging of:

- (i) Wars of aggression *or*
- (ii) Wars in violation of international treaties, agreements or assurances.

Throughout the Trial, the Prosecution was to maintain that, ‘*only superficial learning or culpable sentimentality, can assert that there is any significant element of retroactivity, in the determination of the authors of this Charter, to treat aggressive war as conduct, which international law has prohibited and stigmatized as criminal*’.<sup>323</sup> Whether this assertion was borne out, however, by the substantive precedent underpinning the concept of *crimes against peace* was less certain.

From some variants of a positivistic perspective,<sup>324</sup> any challenge to the legal validity of paragraph (a) could be effectively and cogently rebutted, only in the event that the Allies were able to adduce compelling evidence in relation to:

- (i) The pre-existence of convincing conventional or customary precedent for the ‘offence’ of waging wars of aggression under the first limb of paragraph (a) *or*
- (ii) The pre-existence of convincing conventional precedent under the second limb of paragraph (a). More specifically, did any relevant Treaties, agreements or assurances, of the import stated in (iii) below, exist prior to the Charter, of which the Defendants could possibly have been in violation?

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<sup>321</sup> On this, see *supra*: Ehard ‘The Nuremberg Trial Against the Major War Criminals and International Law’, *American Journal of International Law*, 223-245.

<sup>322</sup> The full text of Article 6 appears earlier in this Chapter.

<sup>323</sup> 3 IMT 103.

<sup>324</sup> Positivists, such as Jahreiss, refuse to embrace the admissibility of custom as a valid source of law whereas other advocates of the positivist tradition (of whom Horn was seemingly an example) deem law emanating from both legislation and custom as valid. However, it is the hallmark of legal positivism that natural law, ideas of morality and ‘the accepted standards of justice recognised by civilised nations,’ are all rejected, as valid sources of law.

- (iii) Even in the event that requisite precedent thus existed, did it impose criminal liability upon individual transgressors arising from infringement of any salient provisions?

The situation was further complicated by the lack of exact correlation between Count Two of the Indictment and Article 6(a):

**Article 6(a):**

‘planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances.’

**Count Two:**

‘All the Defendants with divers other persons during a period of years preceding 8 May 1945 participated in the planning preparation initiation and waging of wars of aggression, which were also wars in violation of international treaties, agreements and assurances.’

Despite this lack of convergence, the Tribunal nevertheless seemed to conclude that there was perfect harmonisation between the Indictment and Charter. The Members accordingly deemed co-equal the two elements, namely, *waging of wars of aggression* and *waging wars in violation of previous treaties, agreements and assurances*. However, nowhere in the trial transcript does there appear any reference to a possible alternative semantic interpretation of Count Two. On that premise, the Defendants ought only to have been convicted of *waging aggressive war* in the event that such war was *also* in violation of prior Treaty obligations, that is, by regarding the last sub-clause as a second imperative stipulation which had to be satisfied. If the IMT had adjudged this argument cogent, the Defendants could only have been convicted had the Prosecution established the pre-existence of conventional precedent for the criminalisation of aggressive war. The Members would have been thus unable to rest their decision merely upon a finding that the Defendants had waged aggressive war *per se*, without being additionally satisfied that such warfare was *also* in violation of Treaty obligations. This possible latent ambiguity might have been avoided had Count Two of the Indictment been expressed in terms that:

‘All the Defendants with divers other persons during a period of years preceding 8 May 1945 participated in the planning, preparation, initiation and waging of wars of aggression which offence shall include, but without prejudice to the generality of the aforesaid, participation in the planning, preparation, initiation and waging of wars committed in violation of international treaties, agreements and assurances.’

Yet, had the Indictment been linguistically compliant with the Charter, its retrospective connotations would have been still more evident. Waging wars of aggression would not have had to satisfy the additional criterion of being in violation of prior treaties, agreements or assurances. It would have been apparent on the face of the Indictment, as with the Charter, that waging aggressive war required no conventional precedent to establish its legal legitimacy. However, in practice, any discrepancy between the construction of the Indictment and the phraseology of Article 6 (a) was, ultimately, to have little significance. The Members adjudged the authority of the Charter pre-eminent. This enabled the ‘offence’ of *waging aggressive war* to stand alone, detached from any foundation within prior substantive precedent. It effectively ripped away the prerequisite of establishing an irrefutable doctrinal basis for the first limb of Article 6 (a).

On this point, the Members were perhaps concerned that conventional precedent in the form of prior treaties, agreement or assurances would be found lacking. Neither the Prosecution, nor the IMT, would have welcomed a situation in which the Defendants evaded punitive sanction, due to the rigidity of the legislative and judicial instruments that the Allies had themselves created. The discrete offence of *waging aggressive war* appeared, therefore, a safety net. If the Prosecution failed to adduce any convincing substantive precedent for the ‘offence’ of *waging aggressive war* in violation of Treaties, assurances or agreements, then the ‘offence’ enshrined in the first limb of Article 6 (a) would salvage the Allies’ strategy. The Defendants would be unable to rely upon any doctrinal loopholes; efforts to out-manoeuvre the Prosecution would be to no avail. Yet, in the context of paragraph (a), this determination to impale the Defendants - by ostensibly judicial means - again propelled the Allies towards an arguably unfortunate dependency upon the utilisation of *ex post facto* legislation.

Further, if there were an ‘offence’ of waging wars of aggression, what was intended by the term, ‘aggression’? On this point, the Charter and the Indictment were both derelict, in that neither attempted to define the meaning of this expression. It was, therefore, difficult to determine the precise nature of the illegal criminal conduct for which the

Defendants were being tried.<sup>325</sup> Nor did the Tribunal endeavour to elucidate the concept:<sup>326</sup>

‘By means of this dual section, the indictment skirted a troublesome question in international law—there was no definition of aggressive war. Throughout the trial the Tribunal was faced with a pair of unpleasant alternatives; it could attempt to define aggressive war or it could restrict crimes against peace to violations of agreements and treaties. The tribunal generally chose the latter alternative but this did not provide a complete escape from the legal thicket for there still remained the troublesome question whether international treaties contained or implied criminal sanctions.’<sup>327</sup>

The Tribunal was apparently oblivious to any possible discrepancy wrought by the construction of Count Two. Accordingly, in strict reliance upon the provisions of the Charter, and without recourse to prior Treaty obligations, the Members concluded that the Defendants had perpetrated wars of aggression:<sup>328</sup>

‘The Charter defines as a crime the planning or waging of war, that is a war of aggression *or* a war in violation of international treaties. The Tribunal has decided that certain of the Defendants planned and waged aggressive wars against 12 nations and were therefore guilty of this series of crimes. This makes it unnecessary to discuss the subject in further detail or even to consider at any length the extent to which these aggressive wars were “*also* wars in violation of international treaties agreements or assurances”.’<sup>329</sup>

On this point, the existence of prior substantive law was, therefore, immaterial to the deliberations of the Tribunal; the Members deemed that the Charter constituted absolute authority for the decision which they proposed to make. However, the IMT had

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<sup>325</sup> Indeed, Kellogg himself had successfully objected to the insertion in the 1928 Kellogg-Briand Pact of any reference to ‘wars of aggression, because of the difficulty in defining what that phrase might mean. Jackson: 2 IMT 148: ‘It is perhaps a weakness of the Charter that it fails to define a war of aggression.’ The IMT did not attempt to define ‘aggression’ but differentiated between aggressive actions such as the annexation of Austria and aggressive war such as was waged against Denmark, Norway, Poland, Belgium, Yugoslavia, Greece, the USSR, the USA, Luxembourg and the Netherlands. Those acts defined as aggressive acts were deemed not to infringe Count Two of the Indictment but were held to be in breach of Count One as being part of the conspiracy to wage aggressive war.

<sup>326</sup> Jackson was adamant that the position of the U.S. was, ‘simple and non-technical. We must not permit the definition of aggressive war to be complicated or obscured by sterile legalisms developed in the age of imperialism to make war respectable’: Justice Jackson’s *Report to the President on Atrocities and War Crimes*; 7<sup>th</sup> June 1945: available online at <<<http://www.yale.edu/lawweb/avalon/imt/jack01.htm>>>The difficulties in defining ‘aggression’ were not resolved by the Nuremberg process as was confirmed by the rapporteur of the United Nations International Law Commission in 1950: ‘Any attempt to define aggression would be a pure waste of time’: U.N.O. Document A/CN 425, 26<sup>th</sup> April 1950. This remained a controversial issue throughout the Cold War proxy conflicts.

<sup>327</sup> *Supra*: Smith *Reaching Judgment at Nuremberg*, 16

<sup>328</sup> 15 Defendants were indicted under Count 2, the exceptions being Bormann, Kaltenbrunner, Frank, Streicher, Schirach, Fritzsche and Schacht. Of the 15 Defendants charged, 12 were convicted and Sauckel, Speer and Von Papen acquitted although Sauckel and Speer were both convicted under Counts 3 and 4.

<sup>329</sup> Judgment: 22 IMT 461.

previously asserted that the Charter was *declaratory* of the previous legal position.<sup>330</sup> If the Tribunal was, at that stage, disregarding such precedent as may have been comprised in pre-existing Treaties to determine the Defendants' guilt for the offence of waging aggressive war, this begged the question as to the precise juridical foundation for Article 6(a) of the Charter, insofar as it pertained to the waging of aggressive war as a discrete 'offence'.

Mindful of the difficulties ultimately confronting the Prosecution during the Trial, upon what basis did the Allies deem the concept of *crimes against peace*, indispensable to their overall strategy regarding the proposed disposition of 'war criminals'? From the outset of the Nuremberg process, US policy appeared driven by a desire to criminalise wars of aggression and, as early as June 1945, Jackson had articulated his particular vision of the proceedings. However, despite seeking to camouflage any potential inadequacies under the dubious guise of '*juridical principle*', the legal underpinning for his dramatic rhetoric remained illusory:

'By the time the Nazis came to power, it was thoroughly established that launching an aggressive war or the institution of war by treachery was illegal and that the defence of legitimate warfare was no longer available to those who engaged in such an enterprise. It is high time that we act on the juridical principle that aggressive war-making is illegal and criminal.'<sup>331</sup>

A cloud of concern was to hover over the entirety of the Nuremberg process, emanating from the Prosecution's tacit awareness of the dearth of established substantive precedent for the course it had elected to take. This underlying defensiveness was presaged by Jackson himself in his reference to the purported alignment between the development of the common law and international law. He alluded to the latter as more than:

'a scholarly collection of abstract and immutable principles but an outgrowth of treaties or agreements between nation and of accepted customs. International law grows as did the common law through decisions reached from time to time in adapting settled principles to meet situations. Hence I am not disturbed by the lack of precedent for the inquiry we propose to conduct.'<sup>332</sup>

It could scarcely have escaped Jackson's attention, however, that the provisions of international law were, by their very nature, presumptively binding upon the *entire*

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<sup>330</sup> Judgment: 22 IMT 461: 'The law of the Charter is decisive and binding upon the Tribunal. In the view of the Tribunal, the Charter is the expression of international law existing at the time of its creation and to that extent is itself a contribution to international law'.

<sup>331</sup> Jackson's *Report to the President on Atrocities and War Crimes*; 7<sup>th</sup> June 1945: available online at <<<http://www.yale.edu/lawweb/avalon/imt/jack01.htm>>>

<sup>332</sup> Jackson: 2 IMT 147.

*world*. This global application, therefore, undermined his contention that the evolution of the common law was an appropriate comparator for international law. The majority of the world's population subscribed to diverse other legal systems and the Defendants themselves were internally governed by the *civil law* of Germany. The common law tradition of Britain and most of the English-speaking nations of the world was alien to the Defendants and, indeed, ironically also to the prosecuting nations, France and the USSR. Further, Jackson explicitly conceded that precedent for the Article 6 (a) 'offence' was lacking. This was a remarkable admission, given that the Charter was supposedly declaratory of prior international law. Rhetoric of striking arrogance, unalloyed confidence or moral conviction; any or all could have held true. Unquestionably, however, this was a subordination of the demands of strict legalism to a clinically utilitarian approach, ostensibly underpinned by - or even disguised as - pseudo-moral rectitude.

As adumbrated by the Allies in their pre-trial rhetoric, if not consistently during the Trial itself, the IMT sought to address the lacunae in prior precedent by seizing upon the inviolability of the Charter. However, whilst expedient, this failed to deal satisfactorily with two pivotal issues:

- (i) The pre-existence of any criminal laws in the arena of international justice under which charges could justifiably have been preferred
- (ii) Whether individual responsibility accompanied such violations when viewed against the prevailing backdrop of accountability for breach of international law.

Article 6(a) remained vulnerable to challenge throughout. This, on the basis that by criminalising offences which were not designated as illegal at the date of their commission, the Charter provided a gateway for the *ex post facto* imposition of punitive sanctions. Specifically, the 'offence' of waging aggressive war appeared to violate the principle: '*nulla poena sine lege, nullum crimen sine lege*'. The maxim was purportedly capable of vindication on the basis that '*the antagonism to ex post facto law rests upon this sound principle: if the law can be created after the offence then power is absolute*

*and arbitrary...the very notion which is most repugnant to constitutionalists*'.<sup>333</sup> On this premise, preservation of the Rule of Law was inextricably reliant upon and interwoven with an impregnable embargo on retrospectively implemented criminal law.

In contrast, what if the conceptual origins and practical objectives of the doctrine were instead rooted in precepts of fairness and justice? As such, is it not arguable that in circumstances where the utilisation of *ex post facto* legislation did not, in practice, culminate in injustice it was perfectly legitimate to have recourse to retrospective law-making, both in terms of crime and punishment?:

'Since it is an ethical principle rather than a rule of law, it may be set aside if considerations of justice require it.'<sup>334</sup>

This type of approach was echoed in *United States of America v Alstoetter et al.*<sup>335</sup> There, the Tribunal endorsed the view that the purported embargo upon the utilisation of *ex post facto* law was a principle of justice and fair play. It was, therefore, implicit that the principle could be legitimately circumvented in circumstances where injustice would not flow from its abrogation. During the Nuremberg proceedings, this lay at the very core of the Members' analysis of the *nullum crimen, nulla poena* principle. The maxim was not:

'a limitation of sovereignty but in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue and so far as being unjust to punish him it would be unjust if his wrong were allowed to go unpunished'.<sup>336</sup>

If this were so, the *legality* principle would remain, for ever, susceptible to the vagaries of the sovereign will rather than operate as an instrument of sovereign circumscription.

In passing and, perhaps, unwitting support of the Allies' attempt to subvert the *nullum crimen* doctrine, Defence Counsel Horn made a significant concession. Exceptions to the purported inviolability of the maxim did exist: '*where the cruelty of the act is so evident that there can be no doubt that it is deserving of punishment. This could hold good for acts which were not punished in Germany during the last years solely in*

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<sup>333</sup> Wyzanski *A Familiar Exposition of the Constitution of the United States* (1883), 3 quoted by *supra*: Glueck *Nuremberg Trial and Aggressive War*, 75.

<sup>334</sup> *Supra*: Woetzel *The Nuremberg Trials in International Law*, 112.

<sup>335</sup> '*The Justice Case*' [1948] 3 T.W.C. 1.

<sup>336</sup> 22 IMT 462.

*consequence of the abnormal amorality of the Hitler regime*'.<sup>337</sup> Evidently, however, Horn did not accept that the 'offence' of waging aggressive war fell within the exception which he was seeking to define.<sup>338</sup> On the premise that the crime of *murder*,<sup>339</sup> albeit in veiled form, underpinned *all* the offences specified in Article 6 of the Charter – including *crimes against peace*, it may have been reasonable to conclude that any person imbued with even the most rudimentary notions of decent behaviour, would have been cognisant of the wrongfulness of his conduct. Regardless of any technical retroactivity, he would be accordingly debarred from raising a shield of inequity, in any abortive attempt to seek immunity from sanction under the criminal law.

'It is brazenly claimed that because the civilised world cannot put its finger on some specific section in an international penal code which prohibits the slaughter of millions in an aggressive, unlawful and unnecessary war, such acts were permissible since technically, they were not labelled 'murder' by world law at the time the killings occurred, even though by the laws of all civilised states, unjustified killings are stigmatized as murders. Even to state the German lawyers' proposition is to demonstrate its melange of *imprudence, cynicism and absurdity*.'<sup>340</sup>

Murder clearly was an intrinsic evil, with its '*basic foundation in the Mosaic Law: Thou shalt not kill, thou shalt not steal. Deliberate killing is murder in all civilised countries though killing in self-defence is not*'.<sup>341</sup> But was not murder generally perpetrated within the arena of combat to promote the interests of the protagonists' respective causes and freely condoned, if compliant with the prevailing rules of warfare? Vindication of paragraph (a) by reliance upon the conceptual basis of murder was, therefore, flawed. It failed to address the circumstances in which the killing of one human being by another was expiated, or the parameters within which such evaluation would properly be made. Was there to be a universal standard for both the victor and the vanquished; was the code of 'rightful' conduct to be objectively or subjectively determinable; were participants to know in advance whether homicide in any given situation would be adjudged illegal or did they have to surmise the potential consequences of their actions

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<sup>337</sup> Martin Horn Defence Counsel for Ribbentrop: 17 IMT 602. A discussion of the notion of *restitutional* retrospectivity appears at the end of this Chapter, that is, the retrospective imposition of punitive sanctions for acts which were legal at the date of their commission, only due to the moral ambivalence of the governmental regime then in place. Arguably, this concession relates more cogently to acts of atrocity, within Article 6(b) and (c) of the Charter, rather more than the alleged criminal illegality of waging aggressive war within paragraph (a).

<sup>338</sup> He incidentally took a similar stance with regards to *crimes against humanity* within Article 6 (c).

<sup>339</sup> See *supra*: Forbes 'Some legal aspects of the Nuremberg Trial', 584, 591. This was also the contention of Shawcross in relation to *crimes against humanity*: 3 IMT 92.

<sup>340</sup> *Supra*: Glueck *The Nuremberg Trial and Aggressive War*, 78.

<sup>341</sup> *Supra*: Forbes 'Some legal aspects of the Nuremberg Trial', 584, 591.

and face retribution, if their assessment was later labelled murder, rather than lawful killing? Paragraph (a) was, ultimately, for Horn, substantively retrospective. Utilisation of *ex post facto* law in the context of *crimes against peace* was unjustified and, to this extent, the doctrine of *nullum crimen* remained impregnable.

Jahreiss was equally unyielding in his submission to the IMT upon the legal legitimacy of *crimes against peace*. He launched a lacerating critique upon the Prosecutors' contention that the Charter was an irrefutable and, therefore, unchallengeable embodiment of pre-existing law. He also, parenthetically, addressed the salient issues upon which the IMT would be compelled to adjudicate, were the Tribunal to conclude that no substantive precedent existed at the date of commission of the acts for which the Defendants stood accused. In speculating about the impact of un-codified law, whether wholly undeveloped or in the process of evolution, he emphasized the inherent uncertainty and possible lack of ascertainability of such law at any given moment in time. This rendered it unfeasible for the Defendants to have possessed the requisite awareness of either the offence or the punishment ascribed to it such as to impute to the Defendants the *mens rea* necessary to fix them with criminal responsibility. Reminiscent of the stance which he had adopted in relation to the concept of *conspiracy*, he was careful to use European, rather than Anglo-American penal law, as the benchmark for the Defendants' state of knowledge. In his view, the Nazis' German nationality entitled them to be tried in accordance with precepts accepted by their own legal regime; if not that of National Socialism, certainly the civil law system of Germany:

'It was necessary to consider the validity of the application of retroactive law which had not yet become fixed or even conceived in the conscience of humanity at the time when the act was committed. In that case, the defendant cannot be guilty either before himself or before others in the sense that he was aware of the illegality of his behaviour. Possibly on the other hand the retroactive law was promulgated at a time when a fresh conscience was just beginning to take shape although not yet clear or universal. It is then quite possible for the defendant to be not guilty in the sense that he was aware of the wrongfulness of his commissions and omissions. From the point of view of the European concept of penal law, the fact that a person was not aware of doing wrong is certainly a point which the Tribunal must not overlook.'<sup>342</sup>

Jackson was, however, dismissive of the contention that at the time of commission the Defendants could feign ignorance of the criminal implications of their conduct:

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<sup>342</sup> Jahreiss: 17 IMT 460.

‘The fact is that when the law evolves by the case method, as did the Common law and as International law must do if it is to advance at all, it advances at the expense of those who wrongly guessed the law and learned too late their error. The law so far as international law can be decreed had been clearly pronounced when these acts took place.’<sup>343</sup>

Likewise adamant that the *ex post facto* principle was inapplicable in the context of international law, the Tribunal in *United States of America v Alstoetter et al.*<sup>344</sup> adopted a similar approach:

‘International law is not the product of Statute. It is sheer absurdity to suggest that the *ex post facto* rule should be applied to a Treaty, a custom, or a common law decision of an international tribunal or to the international acquiescence which follows the event. To have attempted to apply the *ex post facto* principle to judicial decisions of common international law would have been to strangle international law at birth.’

These views regarding the development of international law may well have possessed a degree of intrinsic validity. Law of any type would sacrifice utility and currency, if unable to keep pace with the demands of a changing world. However, the need for topicality could, in no sense, be equated with, or justify reliance upon *ex post facto* criminal ‘offences’. Rarely, if ever, should awareness of the law be deemed to reside in mere guesswork on the part of those likely to be affected by its dictates; the more so, when violation was ultimately adjudged to constitute a capital offence. Jackson’s insistence that international law had been ‘*clearly pronounced*’, before the Nazi atrocities occurred was, perhaps, disingenuous. *Had* this level of clarity been previously achieved, surely he would have grasped the opportunity to articulate both the exact mode of such declarations and their ensuing content. However, the Prosecution did endeavour to surmount the hurdle posed by lack of positive precedent in the ‘*Augustinian sense*’ of ‘*laws imposed by a sovereign*’.<sup>345</sup> From the Allied standpoint, international law was not a concept formed from a body of rules, in the strict sense, but rather a reflection of the will of ‘*the people of the world*’ in their desire to ‘*create an operative system of rules based upon the consent of nations to stabilize international relations*’.<sup>346</sup> This was amply evidenced by the series of agreements, declarations and Treaties, made in the aftermath of the First World War.<sup>347</sup>

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<sup>343</sup> Jackson: 2 IMT 147.

<sup>344</sup> [1948] 3 T.W.C. 1

<sup>345</sup> Shawcross: 3 IMT 103.

<sup>346</sup> Shawcross: 3 IMT 94.

<sup>347</sup> The cogency of this argument is explored below. The Treaties and other developments relied upon by the Prosecution and the Tribunal are detailed in the Table: Appendix 1.

In sharp contrast to this emphasis upon law as a process reflective of a gradual evolutionary process and concordant with the accepted values of civilised nations, Jahreiss instead interpreted law (in ‘the sense of *lex*’)<sup>348</sup> as being solely derived from the legislative process of the State rather than ‘*any deeply rooted rule of ethics and morality*’.<sup>349</sup> His stance upon this point, divorced from moral values or indeed custom, was rigidly positivistic.<sup>350</sup> In the absence of established precedent for the *actual offences* with which the Defendants were charged, in the Indictment, as opposed to the crime of *murder* of which they had *not* uniquely been accused, there was a manifest utilisation of *ex post facto* law. This was irremediable by reference to customary law or the accepted standards of civilised nations. A fundamental injustice was wrought by any attempt to criminalise or punish actions retrospectively; no avenue existed by which this could be rectified or validated, even where the ultimate aim was adjudged consonant with an objective notion of fairness.

Shawcross, however, affirmed the pre-existence of the ‘offence’ of waging aggressive war and dismissed, as mere linguistic usage, arguments arising from the ostensibly retrospective elements of paragraph (a):

‘In essence, law rendering recourse to aggressive war an international crime had been well-established when the Charter was adopted. It is only by way of corruption of language that it can be described as a retroactive law.’<sup>351</sup>

Shawcross was palpably grappling with the innovatory nature of the Charter in his comment that ‘*insofar as the Charter of this Tribunal introduces new law, its authors have established a precedent for the future*’.<sup>352</sup> Nonetheless, he remained resolute in the conviction that ‘*law, rendering recourse to aggressive war an international crime, had been well-established when the Charter was adopted*’.<sup>353</sup> On the one hand, his rhetoric contained an explicit concession that the Charter had no legal precursor, was the harbinger of novel provisions and would, therefore, set a standard for the future

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<sup>348</sup> Jahreiss: 17 IMT 481.

<sup>349</sup> Jahreiss: 17 IMT 481.

<sup>350</sup> It is interesting that Rudenko: 7 IMT 147, differentiated between national and international law, insofar as pertained to his definition of *lex*, ‘*Lex in its meaning in national law is an act of legislative power of the State, clothed in a proper form. In its meaning in international law, it is different. In the international field, there never existed, nor now exist, any legislative bodies which are competent to pass laws which are binding on individual states. In the international field, the basic source of law, and the only legislative act, is a treaty, an agreement between states.*

<sup>351</sup> Shawcross: 3 IMT 106.

<sup>352</sup> Shawcross: 3 IMT 106.

<sup>353</sup> Shawcross: 3 IMT 106.

regulation of humankind. This was directly juxtaposed with an insistence that aggressive war was not an innovatory concept because the criminal illegality of such conduct was recognised prior to the Charter. But how could the same legislative instrument be, at once, both innovatory and declaratory? Surely, the ‘offence’ encapsulated within Article 6 (a) was either one or the other. In the final analysis, however, Shawcross was content to rest his case upon the footing that aggressive war was already an ‘*international crime*’ prior to the inception of the Charter. If the Allies were to surmount criticism arising from their purported utilisation of *ex post facto* legislation, no other viable option was available.<sup>354</sup>

This intransigence in relation to the retrospective import of paragraph (a) was echoed by the Tribunal, in that the Members again exhibited an unshakeable resolve to repudiate Defence allegations that the Charter was an exercise in *retrospective* legislation. Both Prosecution<sup>355</sup> and IMT frequently alluded to the Charter provisions as the unchallengeable bedrock upon which the entire proceedings were founded. Earlier in the proceedings, the Members had asserted that they were under no obligation to undertake a review of Treaties, existing prior to the inception of the Charter. In their view, this obviated the need to analyse pre-existing law. This notwithstanding, they evidently felt constrained to explore the substantive issues which the parties had raised before the Tribunal:

‘The Charter makes the planning of a war of aggression or a war in violation of treaties a crime; and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement. But in view of the great importance

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<sup>354</sup> See also Rudenko: 19 IMT 575. In his closing argument, Rudenko made it clear that the absence of prior positive law was irrelevant to the legitimacy of the proceedings but that, in any event, the Charter did not make use of retrospective provisions: ‘From the legal point of view, sentence can be pronounced and carried out without requiring that the deeds which incriminate the defendants be foreseen by the criminal law at the date of their perpetration. Nevertheless, there is no doubt that the deeds of the defendants, at the time they were committed, were actual criminal acts from the standpoint of the then existing criminal law.’ Given that the use of retrospective law was still permissible in the Soviet Union at the time of the Nuremberg proceedings, the first element of this statement is perhaps unsurprising.

<sup>355</sup> Shawcross: 3 IMT 93, ‘It is not incumbent upon the prosecution to prove that wars of aggression and wars in violation of international treaties are or ought to be crimes. The Charter of this Tribunal has prescribed that they are crimes and that the Charter is the Statute and the law of this Court. This Charter merely declares and creates a jurisdiction in respect of what was already the law of nations’; also Rudenko: 7 IMT 148: ‘Being an integral part of this Agreement (London Agreement) the Charter is to be considered an unquestionable and sufficient legislative act defining the basis and the procedure for the trial and punishment of major war criminals. The Charter of this Tribunal is in force and in operation and all its provisions possess binding and absolute force’.

of the questions of law involved, the Tribunal has heard evidence from the prosecution and the defence and will express its view on the matter.’<sup>356</sup>

The Decision of the Members therefore indicated the following:

- (i) The Charter was deemed unassailable and immune to challenge.
- (ii) The Charter was not innovatory but *declaratory* of the previously established precepts of international law.
- (iii) The Defendants were individually responsible under international criminal law.
- (iv) The Defendants had been arraigned for the ‘offence’ *either* of waging wars of aggression *or* waging wars in violation of Treaties, agreements or assurances.
- (v) It was, therefore, sufficient to find the Defendants guilty of waging wars of aggression under the first limb of Article 6(a).
- (vi) Some or all those wars of aggression perpetrated by the Defendants were also coincidentally in violation of treaties, agreements or assurances under the second limb of Article 6(a). However, even in the absence of such a finding, the Defendants would still have been convicted on the basis that the wars were *intrinsically aggressive* under the first limb of paragraph (a).
- (vii) Thus, any discussion of the existence, interpretation and significance of prior Treaties agreements and assurances was ostensibly extraneous to the decision to convict the Defendants of the offence of ‘waging aggressive war’ *per se*.

Glueck posited that the Tribunal’s discussion of prior treaties and agreements was vital in serving to buttress the argument that precedent did exist for the offence of waging aggressive war.<sup>357</sup> The provisions of all or any prior Treaties may have failed to create a

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<sup>356</sup> Judgment: 22 IMT 461. Notably, the Members’ attempt to locate precedent for *crimes against peace*, and to seek to justify their decision, was the only real effort made throughout the Judgment to embark upon a degree of rationalisation for their stance. In this context, the ‘offence’ was not delimited, as was instanced with both *crimes against humanity* (Article 6 (c)) and with *organisational guilt* (Articles 9 and 10). Reflective of the importance the Allies attached to the criminalisation of ‘waging wars of aggression,’ the Members resoundingly pronounced, ‘to initiate a war of aggression is not only an international crime; it is the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole’: 22 IMT 427. Whether this sweeping assertion would have satisfied the *pre-war* victims of Nazi despotism, is another question.

<sup>357</sup> *Supra*: Glueck *The Nuremberg Trial and Aggressive War*, 44. The principal thesis advocated by Glueck is predicated upon the existence of customary law as forming adequate legal precedent both for

criminal offence for which a punitive sanction could be imposed upon individual perpetrators, rather than the State of which they were instruments. Precedent existed, however, for prosecution of such offenders within customary law, arising through the collective will and acquiescence of the ‘world community’ or in Glueck’s terminology, ‘*the family of nations*’.<sup>358</sup>

Regardless of the lack of pertinent *lex scripta*, the merest allusions in peripherally-related treaties served both to evidence and augment the growing international consensus in favour of the notion of the criminal illegality of aggressive war. This constituted the customary international law necessary to form an unimpeachable juridical basis for Article 6(a) of the Charter, in relation to the offence of waging wars of aggression. However, when assessing the role to be ascribed to customary law, Calvocoressi counselled a more cautionary approach:

‘It is well settled that International law as well as State law includes custom. The Charter of the IMT purported to reduce existing customs having the force of law to writing. Of course the framers of such an instrument may be wrong. It is always arguable that a particular custom was not sufficiently clear or well-established to have the force of law or that the custom has been misunderstood or inadequately expressed in the enactment. If and so far as an enactment errs in any such respect, then it is no longer declaring law but making it – and probably bad law at that.’<sup>359</sup>

What then was the significance and role of prior Treaties, agreements and assurances existing at the date of inception of the Nuremberg process? Viewed from a dual perspective, did they:

- (i) Comprise unequivocal authority for the ‘offence’ of waging aggressive war in the event of there being a proven violation of their provisions; and/or
- (ii) Utilise terminology or reflect a world view of international custom and practice, sufficiently persuasive as to create a body of *unwritten*

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the criminal offence of waging aggressive war and individual accountability for such offence. It should be noted however that he was engaged to act as a paid Consultant to the Prosecution.

<sup>358</sup> *Supra*: Glueck *War Criminals: their Prosecution and Punishment*, 104-105.

<sup>359</sup> *Supra*: Calvocoressi *Nuremberg*, 32.

but nevertheless binding code of behaviour, by which State and individual conduct was to be governed and regulated.<sup>360</sup>

Historically, the laws that regulated the conduct of war once a state of warfare existed<sup>361</sup> were distinguishable from the laws which governed the right to wage war.<sup>362</sup> It was the former concept which spawned *war crimes* per se and, in part, *crimes against humanity* comprised in Articles 6 (b) and (c) of the Charter, whereas the latter was to underpin the concept of *crimes against peace* embodied in Article 6 (a). The Roman and early Christian precepts of warfare crystallised in the ideology of St. Augustine in the fifth century. Warfare was deemed intrinsically evil unless fought for an objectively just cause and the principle gradually evolved whereby those subjected to a just offensive war had no right of reprisal or defence.<sup>363</sup> In the sixteenth Century, Franciscus Suarez<sup>364</sup> laid the initial foundations for the distinction between *positive* law by which ‘just war’ was rendered permissible and *natural* law, emanating from the rational nature of Man, under which the right of self-defence was deemed legitimate.

With the rise of the nation state towards the end of the 17<sup>th</sup> century and the accompanying emphasis upon the paramount nature of sovereignty, the significance of the concept of the ‘just war’ diminished as it became increasingly acceptable for state rulers to self-determine the circumstances in which war could be waged against another nation. There was a tacit recognition of the parity of sovereigns. This culminated in a philosophy within the arena of conflict that neither protagonist could be castigated for launching an offensive attack against the other. The dichotomy between just and unjust war declined to its nadir during the jingoistic nationalism of the late 19<sup>th</sup> century. Though the provisions of The Hague Conventions of 1899 and 1907 did endeavour to specify certain conditions to be fulfilled as essential pre-requisites to the waging of war,

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<sup>360</sup> See Appendix 1 for a survey of the relevant treaties and declarations upon which the Prosecution case was founded.

<sup>361</sup> *Supra*: Woetzel *The Nuremberg Trials in International Law*, 123 in which comparison is drawn between the ‘*ius in bello*,’ the law within warfare, as opposed to the ‘*ius ad bellum*,’ or the law governing the right to wage war.

<sup>362</sup> See *supra*: Woetzel *The Nuremberg Trials in International Law*, 122-123; the ‘*jus ad bellum*’ the corollary of which is the ‘*jus contra bellum*,’ respectively the right to wage war as opposed to the law against the initiation of war, which may be summarised as the just/unjust war dichotomy.

<sup>363</sup> Shawcross: 3 IMT 97, ‘The Covenant of the League of Nations, restored the position as it was at the dawn of international law, at the time when Grotius was laying down the foundations of the modern law of nations and established the distinction, a distinction accompanied by profound consequences in the sphere, for instance, of neutrality, between a just war and an unjust war’.

<sup>364</sup> Suarez, *De Bello*, s. 1, as quoted *supra*: Woetzel *The Nuremberg Trials in International Law*, 126.

they demonstrated a paucity of any real effort to ‘outlaw’ war effectively or, indeed, at all. In comparison, the Conventions contained an implicit recognition that States were entitled to resort to warfare without fear of legal redress. However, the notion that war was capable of being waged without fear of reproach was greeted with condemnation by the Prosecution:

‘It was under the law of all civilised peoples a crime for one man with his bare knuckles to assault another. How did it come about that multiplying this crime by a million and adding firearms to bare knuckles made it a legally innocent act? The doctrine was that one could not be regarded as criminal for committing the usual violent acts in the conduct of legitimate warfare. The age of imperialistic expansion during the eighteenth and nineteenth centuries added the foul doctrine, contrary to the teachings of early Christian and international law scholars such as Grotius that all wars are to be regarded as legitimate wars. The sum of these two doctrines was to give war-making a complete immunity from accountability to law.’<sup>365</sup>

This was an unequivocal denunciation of the purported pre-existing ‘acceptability’ of armed conflict. However, was it not also tantamount to an implicit admission that prior to the Charter, the concept of waging aggressive war had never before attained standing as a criminal ‘offence’?

Efforts had to be made to circumvent this obstacle. Focus was accordingly directed to such developments as had occurred during the period of twenty years elapsing between the end of the First World War and the conflagration of the Second World War. To this end, a series of Treaties, Conventions, proclamations and declarations, appeared incrementally to condemn the waging of aggressive war.<sup>366</sup> The Prosecution considered that these established a climate of public opinion, reflective of the will of the international community. This possessed sufficient force and momentum to enable a purposive approach to be afforded towards the interpretation and import of the most significant international treaty to be enacted during the internecine period, namely the Kellogg-Briand Pact 1928.<sup>367</sup> Such commonality of censure was purportedly relevant to the impact of the Treaty itself. It also evidenced the creation of a world view, though

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<sup>365</sup> Jackson: 2 IMT 145.

<sup>366</sup> The relevant provisions are mentioned in the Table: Appendix 1.

<sup>367</sup> The Kellogg-Briand Pact otherwise known as the Pact of Paris dated 27<sup>th</sup> August 1928 was signed by 63 nations, including all the major powers including Germany as the first named Contracting Party and the first signatory and was the main substantive provision upon which the prosecution rested its case during the Nuremberg Trials. It came into force on 24<sup>th</sup> July 1929. It is available online at: <http://www.yale.edu/lawweb/avalon/kbpact/kbmenu.htm>; Shawcross assessed the merits of the Pact: 3 IMT 98, ‘It was and has remained the most widely signed and ratified international instrument. It contained no provision for its termination and it was conceived as the cornerstone of any future international law worthy of the name.’ He also described the Pact as, ‘a source of hope and faith for mankind,’ signifying at 3 IMT 99 that, ‘the right of war was no longer the essence of sovereignty’.

one defied by the perpetrators of aggressive war, by which customary law had evolved to render the initiation of wars of aggression criminally illicit.<sup>368</sup>

The Preamble to the Kellogg-Briand Pact comprised a universal renunciation of war. Article I then contained a declaration that the parties condemned recourse to war. This reaffirmed the repudiation of war, as an instrument of national policy. Finally, Article II recorded that the sole mechanism available for dispute resolution, lay in pacific means. The emphasis of the Pact resided in peace, rather than war; this objective was to be achieved in a spirit of co-operation and multi-lateral goodwill. However, in categorising the import of the Pact as precatory, rather than mandatory, Morgan has since observed that the terms:

‘renounce and condemn are the language of theology, not of law. We all as good Christians condemn and renounce sin or we affect to do so but until sin is made punishable, by an Act of parliament or by the usage of belligerent courts, it is not a crime. Excommunication is not outlawry.’<sup>369</sup>

The Pact did not itself purport to have the status of a penal Statute in that it neither expressly rendered criminal any violation of its provisions, nor decreed any procedure for the imposition of individual punitive sanctions. Instead, the focus was directed towards the collective liability of the States who were parties to the Pact, rather than to the citizens of such nation:

‘All States parties to the Pact and not only the immediate victim of an illegal war are authorised to resort to war against a State which in violation of the pact has resorted to war. Reprisals and war as sanctions are directed against a State as such and not against the individuals forming its government. These sanctions constitute collective responsibility, not criminal responsibility of definite individuals performing the acts by which international law is violated.’<sup>370</sup>

In terms of enforceability, the Pact was content merely to specify a *quid pro quo* whereby any signatory power, which resorted to war in violation of its provisions, would be denied the benefits thereby afforded. Even were it conceded that the Pact established the illegality of aggressive war, vital lacunae emerged. These related both to the lack of effective criminalisation of acts perpetrated in breach of the Pact *and* individual responsibility for violation of its terms:

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<sup>368</sup> This concept of customary law as a precedent for the crime of aggressive war forms the basis for Glueck’s treatise: *supra*: Glueck *The Nuremberg Trial and Aggressive War*, 44.

<sup>369</sup> *Supra*: Morgan *The Great Assize*, 10.

<sup>370</sup> *Supra*: Kelsen ‘Will the Judgment in the Nuremberg Trial constitute a precedent in international law?’, 155.

‘That Pact too failed to make violations of its terms an international crime punishable either by national courts or some international tribunal. The legal basis for prosecution for violations of the Pact of Paris (the Kellogg-Briand Pact) may be open to question, though the moral grounds are crystal clear.’<sup>371</sup>

Despite these difficulties, De Menthon adopted an argument congruent with the non-impeachability of the Kellogg-Briand Pact as a binding precedent for the criminally illicit nature of wars of aggression. From this, it followed that all acts perpetrated within the ambit of aggressive war were in violation of criminal law. This deprived perpetrators of the defence of ‘justification’ to offences such as murder and arson, committed during a state of ongoing warfare. However, even if this *were* a natural consequence flowing from the inherent illegality of aggressive war, this analysis proffered no more satisfactory insight into the import of the Kellogg- Briand Pact. It was simply assumed, without more, that aggressive war did attract the full force of the criminal law. Because wars of aggression were punishable by criminal sanctions, then so were transgressions committed within them:

‘Acts committed in the execution of a war are assaults on persons and goods which are themselves prohibited but are sanctioned in all legislations. The state of war could make them legitimate only if the war itself was legitimate. Inasmuch as this is no longer the case, since the Kellogg-Briand Pact, these acts become purely and simply common law crimes. As Mr Justice Jackson has already argued before you with irrefutable logic, any recourse to war is a recourse to means which are in themselves criminal. A war perpetrated in violation of international law no longer possesses the juridical character of a war. It is truly an act of gangsterism, a systematically criminal undertaking.’<sup>372</sup>

Though this rationale might have been cogent had the sole point in issue been the criminal nature of acts committed during war, it was not. The crucial issue here was the criminal illegality of aggressive war itself, but was this ‘offence’ unequivocally underpinned by the Kellogg-Briand Pact? De Menthon’s attempt to dispose of the thorny problem of retrospectivity, therefore, appeared to founder upon the rock of an elliptical analysis:

- (i) The Kellogg-Briand Pact decreed aggressive war criminally illegal

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<sup>371</sup> *Supra*: Glueck *War Criminals: their Prosecution and Punishment*, 38.

<sup>372</sup> De Menthon: 5 IMT 387, endorsing Jackson 2 IMT 146, ‘Any resort to war is a resort to means that are inherently criminal. The very minimum legal consequence of the treaties making aggressive wars illegal is to strip those who incite or wage them of every defence the law ever gave and to leave war-makers subject to judgment by the usually accepted principles of the law of crimes.’ Jackson did deal with the possible innovatory nature of Article 6 (a) 2 IMT 147, ‘But if it be thought that the Charter, whose declarations bind us all, does contain new law, I still do not shrink from demanding its strict application by the Tribunal’.

- (ii) All acts associated with or committed during wars of aggression were similarly contrary to the criminal law
- (iii) The defence of 'justification' did not avail the perpetrators of such acts; they were relegated to the status of common criminals:

This entire argument, however, hinged upon the cogency of its initial premise. If the Kellogg-Briand Pact ordained that punitive sanctions for the waging of aggressive war could properly be imposed upon individuals, then the case against the Defendants pursuant to Article 6 (a) was proven. But as a comprehensive legislative instrument, the Kellogg-Briand Pact was transparently deficient.<sup>373</sup> Had it not been so, further debate as to the legal legitimacy of *crimes against peace* would have been otiose. Yet, the Allies, and indeed the tribunal, found the need to cast their nets more widely to locate a plausible foundation for paragraph (a).

This was to bring into stark relief the imperative of relevant customary law, emergent from the various Treaties and declarations made in the aftermath of the First World War:

- (i) To create the offence of and criminally stigmatise the waging of aggressive war *per se* under the first limb of Article 6 (a) of the Charter
- (ii) To criminalise violations of the Kellogg-Briand Pact and other Treaties, agreements or assurances under the second limb of Article 6 (a)
- (iii) In either or both of the above scenarios to ascribe commensurate criminal responsibility to the individual citizens of those States which had initiated such wars of aggression.

The Members proved themselves aware of the importance of customary law in addressing the imputation that the Charter constituted *ex post facto* legislation:

'All these expressions of opinion and others that could be cited reinforce the construction which the Tribunal placed upon the Pact of Paris that resort to a war of aggression is not merely illegal

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<sup>373</sup> As Finch points out, it should not have been difficult to insert provisions in the Kellogg-Briand Pact as would have rendered its meaning totally unambiguous. This occurred as long ago in the US Neutrality Law, 1794 where the Act defined the offence, conferred upon courts of the US the jurisdiction to try and punish offenders and prescribed the penalties for those convicted: *supra*: Finch 'The Nuremberg Trials and International Law', 20, 37.

but is criminal. The prohibition of aggressive war demanded by the conscience of the world finds its expression in the series of Pacts and Treaties to which the tribunal has just referred.’<sup>374</sup>

A series of developments at international level had unquestionably occurred between 1919 and 1939, supportive of the Tribunal’s assessment of the legal foundation for *crimes against peace*.<sup>375</sup> It was, nonetheless, arguable that none of these furnished an unequivocal basis for the assertion that *waging aggressive war* had attained the status of a criminal offence, punishable by death.<sup>376</sup> Further, the choice of language pervading the Members’ evaluation was, perhaps, also indicative of a covert awareness that the legal position was less clear-cut, than was desirable. This was amply demonstrated by their repeated linguistic usage of the term, ‘*expression*’, coupled with the reference to ‘*the conscience of the world*’.<sup>377</sup> For neither term appeared to convey any real depth of conviction, as to the existence of unassailable precedent for the ‘offence’ of *crimes against peace*.

Whatever the standing of the Kellogg-Briand Pact the task fell to Jahreiss,<sup>378</sup> on behalf of the Defence, to confront the putative precedent it represented:

- (i) International treaties had rendered aggressive warfare potentially illegal but never criminal.
- (ii) Such treaties had determined that every State had a right of self-determination arising from its own sovereignty. This had been affirmed rather than displaced by the Pact, in its recognition that warfare was not illegal if waged pursuant to the right of self-defence explicitly preserved by the Treaty.<sup>379</sup>

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<sup>374</sup> Judgment: 22 IMT 466.

<sup>375</sup> The Hague Conventions, 1899 and 1907, did regulate the conduct of protagonists within war, but the role of the Conventions, in terms of acting as a deterrent to aggressive war, had proved minimal, in light of the First World War, 1914-18.

<sup>376</sup> *Supra*: Finch ‘The Nuremberg Trials and International, 20, 26: ‘Un-ratified protocols cannot be cited to show acceptance of their provisions and resolutions of international conferences have no binding effect unless and until they are sanctioned by subsequent national or international action. Treaties of non-aggression that are flagrantly disobeyed when it becomes expedient to do so, cannot be relied upon as evidence to prove the evolution of an international custom outlawing aggression’.

<sup>377</sup> Judgment: 22 IMT 466.

<sup>378</sup> Jahreiss: 17 IMT 472-478.

<sup>379</sup> On 25th June 1928, Kellogg, the US Secretary of State declared to nine of the nations participating in the negotiations preceding the Pact, ‘The right of self-defence is inherent in every sovereign State and is implicit in every treaty. Every nation is competent to decide whether circumstances require recourse to war in self-defence’.

(iii) The entire system of prohibition of warfare had collapsed in the chaos which ensued between the two World Wars. This was evidenced by the declared neutrality of various nations, a situation which reflected the failure of the League of Nations<sup>380</sup> to create a world order where peace reigned supreme. It was emphasized that during the 1930s, there was no longer any effective collective 'security' as was manifest in the readiness of numerous States to conclude Treaties in the hope of guaranteeing peace between themselves. If the Kellogg-Briand Pact had been considered by such States as a binding enforceable document with recognised sanctions arising from violation of any of its provisions, there would have been no necessity to enact further treaties to regulate their conduct. In a similar vein, the policy of appeasement adopted by England and France which reached its high watermark in the Munich Pact with Hitler on 29<sup>th</sup> September 1938,<sup>381</sup> could likewise be interpreted as a negation of the spirit in which the 1928 Pact and other pertinent treaties had been made. In addition, the conduct of the Allies had lulled the Nazis into the erroneous belief that there existed no category of conduct on their part which would not ultimately be ratified or waived by the international community. The Members clearly felt a need to dispense with this argument. Indeed, on this point, they made specific reference to the declarations of war by Britain and France, in response to the German invasion of Poland. However, it was impossible to raise any credible rebuttal to Jahreiss' assertions, insofar as pertained to the conciliatory stance of the Allied nations during the pre-war period:

'It is interesting to note in this connection that one of the arguments frequently presented by the Defence in the present case, is that the defendants were influenced to think that their conduct was not in breach of international law by the acquiescence of other powers.'<sup>382</sup>

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<sup>380</sup> The League of Nations had been established by the Covenant of the League of Nations which formed part of the 1919 Treaty of Versailles.

<sup>381</sup> Czechoslovakia was required to acquiesce in the cession of the Sudetenland to Germany, which act was consummated by German annexation on 1<sup>st</sup> October 1938. *Supra*: Finch 'The Nuremberg Trials and International Law', 20, 27: 'If the aggression against Czechoslovakia was an international criminal act, then all the participants in the Munich Agreement were equally guilty'.

<sup>382</sup> Judgment: 22 IMT 440. The Tribunal sought to dispel the Defence allegations of acquiescence, by alluding to the eventual declarations of war by Britain and France in 1939. However, this did not deal satisfactorily with the Allies' failure to respond effectively to the military threat, which Germany had manifestly posed at a far earlier stage.

- (iv) The treaties had forfeited any credibility due to pejorative analysis by learned jurists.
- (v) Germany could not be subjected to criminal proceedings, since no meaningful punitive sanction could be exacted against a State.<sup>383</sup>
- (vi) Individuals belonging to the State could not be deemed criminally responsible. Although the State was unable to be punished for a breach of the criminal law, the transgression of waging aggressive war had nonetheless been committed by individuals, not on their own behalf but as instruments of the State. Furthermore, there was no provision made either in the 1928 Pact or any other Treaty, whereby individual responsibility could be assigned to the alleged malfesants.<sup>384</sup>

Shawcross dismissed Jahreiss' submissions as '*a political appeal to some outside audience which may be more easily impressed by the complaint that the accused are being made the object of post factum legislation*'.<sup>385</sup> The role of the Kellogg-Briand Pact, in rendering illegal the waging of aggressive war, was paramount. The Defence contention that the provisions of the Treaty were unenforceable, due to the alleged collapse of the system of collective security, was unsustainable. The causative factor underlying the disarray of international relations, resided in the expansionist policy promulgated by Germany herself.<sup>386</sup> It was entirely fallacious to posit that the right of self-defence contained in the Pact, supposedly undermined the entire purport and

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<sup>383</sup> Jackson: 2 IMT 153-4 posited that the only criminal sanction which could be employed against the State was *coercion in the form of a declaration of war* which would effectively undermine the entire purpose of any Treaty obligations. He therefore argued that the only effective criminal action was against the individuals who perpetrated the war of aggression. In contrast, Glueck, refers to Article 16 of the Covenant of the League of Nations, which enables the imposition of economic sanctions, against the offending nation. He also adverts to publication of the facts with a view to influencing public opinion against the belligerent State, protests and demand for punishment of individual offenders, reprisals and post-war recompense. He nevertheless concludes that the entirety of these actions proved ineffectual, in preserving world peace after the First World War: *supra*: Glueck *The Nuremberg Trial and Aggressive War*, 22. Shawcross: 3 IMT 104 emphasized that a State was capable of the commission of a tort, that is, a civil wrongdoing. He also indicated that the US had, in 1935, been required to pay penal damages for an affront to Canadian sovereignty. This, in his view, could be extended to criminal liability. The doctrine of state sovereignty should not be allowed to pose an obstacle to this objective.

<sup>384</sup> De Menthon: 5 IMT 387. The arguments made by Jahreiss in relation to points (v) and (iv) had been cursorily and pre-emptively dismissed by De Menthon in his opening address to the IMT, 'A war perpetrated in violation of international law no longer possesses the juridical character of a war. It is truly an act of gangsterism. Inasmuch as they could not legally have resorted to force, those who dictated it and who were the very organs of the state bound by Treaties must be considered as the very source of the numerous assaults upon life and property that are punishable by all penal law'.

<sup>385</sup> Shawcross: 19 IMT 459.

<sup>386</sup> Jackson: 19 IMT 424: 'These men are in the position of the fictional boy who murdered his father and mother and then pleaded for leniency because he was an orphan'.

enforceability of the Treaty. Were the Tribunal to afford credence to this approach, this would effectively reduce ‘*a solemn treaty subscribed to by more than sixty nations to a scrap of paper devoid of meaning. Every prohibition of limitation of the right of war would be a nullity if it expressly provides for the right of self-defence*’.<sup>387</sup>

Shawcross was insistent that neither barrier nor legal impediment existed to the legal coercion of nations. States *were* criminally accountable. The previous absence of a competent judicial jurisdiction capable of imposing an appropriate criminal sanction was, in his view, inconsequential. This was comparable to any other procedural lacuna. Indeed, ‘*the first man tried for murder may have complained that no court had tried such a case before*’.<sup>388</sup> However, this effectively reduced to the point of absurdity the rationale underlying the pertinent issues.<sup>389</sup>

The Allies proceeded upon the questionable premise that the provisions of the Kellogg-Briand Pact, as purposively interpreted by the development of pertinent customary law, rendered the waging of aggressive war not only criminally illegal but also commensurately punishable under *international* law. Hence, neither Shawcross nor the other members of the Prosecution team were prepared to entertain any suggestion that Article 6(a) typified *ex post facto* legislation. The validity of their stance rested upon the twin premise that:

- (i) The will of the international community had provided overwhelming support for the criminalisation of aggressive war
  
- (ii) A new body of law had been effectively established upon the basis of custom and practice, over the brief period of just eighteen years, which had elapsed between the Treaty of Versailles in 1919 and the date of commission of the Defendants’ alleged transgressions. On this point, some of their convictions were partially founded on acts,

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<sup>387</sup> Shawcross: 19 IMT 462. It is significant that Shawcross also alluded to ‘guilt according to natural justice which demands that crimes shall not go unpunished’.

<sup>388</sup> Shawcross: 19 IMT 457.

<sup>389</sup> Ironically, Shawcross: 3 IMT 104, condemned the Defence stance upon the import of the pre-war denunciation of aggressive war and the effect of the Kellogg-Briand Pact in similar terms, ‘Will it be seriously said by these defendants that such a war is only an offence, only an illegality, only a matter of condemnation perhaps sounding in damages, but not a crime justiciable by any tribunal? No law worthy of the name can allow itself to be reduced to an absurdity in that way and certainly the great powers responsible for the Charter are not prepared to admit it’.

perpetrated as early as 1937, when the conspiracy to wage aggressive war under Count One of the Indictment was accepted to have arisen.<sup>390</sup>

However, was it feasible in this manner to establish a wholly innovatory body of law? On the one hand, the relevant events had occurred over the merest scintilla of time when scrutinised against the totality of juristic evolution. On the other, the overriding importance of rendering criminally illegal the act of aggressive war was such that the brief time-frame was possibly inconsequential. Invocation of custom and practice doubtless possessed more than a merely superficial appeal, but was such pragmatic manipulation ultimately justified? Although it was possible to extrapolate evidence to suggest that the international community was supportive of the criminalisation of wars of aggression, some of that momentum seemed to reside in the developments between 1919 and 1928, when the Kellogg-Briand Pact was made.<sup>391</sup> Clearly, the architects of the Pact, together with its signatories, were aware both of the political posturing in the aftermath of the First World War and the framing of the various Treaties, both of a ratified and inchoate nature, which had transpired during the years preceding the Pact.

It is, perhaps, feasible to argue that the ‘world community’ was receptive both to the formalisation of Treaty obligations predicated upon the criminal illegalisation of aggressive war and individual responsibility for any such transgressions. But if it *was* the intention of the 1928 Pact to encapsulate that international will in legislative form, this still does not surmount the oblique manner in which the Treaty was drafted. There was no specific mention of the illegality of aggressive war, far less the criminalisation of any acts which the Pact supposedly proscribed. Furthermore, no attempt was made to create individual accountability for breach of its provisions. Subsequent efforts to interpret the Pact more expansively on the basis of a body of customary law and practice were, thus, not readily sustainable. Nor were attempts to rely upon unwritten law to establish the general criminality of aggressive war outside the ambit of treaty obligations. In the sphere of *crimes against peace*, the contrived symbiosis between

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<sup>390</sup> See *supra*: Tusa *The Nuremberg Trial*, 181-182; the Hossbach Memorandum is available online at: <http://www.yale.edu/lawweb/avalon/imt/document/hossbach.htm> Interestingly, the prosecution case in relation to the conspiracy to wage aggressive war was presented on the basis of events occurring from the 1920s onwards, the window of opportunity for the establishment of customary law to furnish acceptable precedent for the criminal offences with which the Defendants were charged becoming ever smaller.

<sup>391</sup> Appendix 1: a survey in tabular form of the pre-war Conventions and declarations which purportedly furnished substantive precedent for the ‘offence’ of waging aggressive war in violation of ‘international treaties, agreements and assurances’. Alternatively, those pre-war developments constituted the necessary customary law on which to found the ‘offence’ of waging wars of aggression *per se*.

Treaty-based law and custom only served to create a mutual dependency, from which neither emerged unscathed and the fusion of which was scarcely more compelling than its constituent elements.

The Members were, perhaps, aware of the fragility of customary and, indeed, Treaty-based law as a sound legal foundation for paragraph (a). They accordingly concluded that law was derivable, not merely from these objectively determinable sources. An equally valid source of law lay in a nebulous process of cultural evolution, recognised and '*demanding by the conscience of the world*'.<sup>392</sup> Strongly reminiscent of a *natural law* position, this type of stance might well have proved anathema to positivists, such as Jahreiss. However, the Members were, on this point, to find oblique support from an unlikely source. Surprisingly, perhaps, Defence Counsel Merkl, on behalf of the Gestapo, appeared to concede the possibility and, indeed, invited the inclusion of unwritten law whenever expedient:

'Where the written law is not adequate, as when a state of emergency exists, sensible and practical considerations must fill the gaps.'<sup>393</sup>

Merkl also ironically adverted to the importance '*of natural law and the general laws of all peoples*'.<sup>394</sup> This was not, however, a rationale universally embraced by the Defendants. Had it been so, the Defence would doubtless have found themselves hard pressed to refute the following proposition: no legal system within a civilised society can aspire to the highest standards of 'justice,' unless prepared to admit laws, derived from the *natural law* tradition, as well as those drawn from *positive* and *customary* sources. Throughout the Trial, the Prosecution constantly made reference to '*traditions of fairness and justice which have been internationally accepted*'.<sup>395</sup> It was difficult to interpret this as customary law. Had it been so, the Allies would surely have alluded to it as such, in clear and unambiguous language. They may have chiefly avoided any explicit reliance upon *natural law* and ostensibly eschewed *natural law* as a source of law, from which they had drawn their inspiration for the more innovatory provisions of the Charter. Yet, how else were 'traditions of fairness and justice' to be understood? The concept of 'fairness' was ideologically grounded in morality and ethical rectitude; it

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<sup>392</sup> Judgment: 22 IMT 466.

<sup>393</sup> Dr Rudolf Merkl for the Gestapo: 21 IMT 537.

<sup>394</sup> Merkl: 21 IMT 543.

<sup>395</sup> Jackson's *Report to the President on Atrocities and War Crimes; 7<sup>th</sup> June 1945*: available online at <<<http://www.yale.edu/lawweb/avalon/imt/jack01.htm>>>

was not necessarily synonymous with the punitive ethos of the criminal law, nor could it be directly equated with any of the historical catalysts for the progressive development of international law.<sup>396</sup>

According to the Tribunal, international law owed its development to a trinity of legal principles, founded upon Treaty obligations (positive law); the customs and practices of States attracting universal recognition (customary law); and the general principles of justice applied by jurists and practiced by military courts (possibly an allusion to natural law).<sup>397</sup> Taken together, these constituted the platform from which the Members sought to surmount potential difficulties, associated with exclusive reliance upon a system of law derived entirely from legislative provisions. On this view, international law would be stultified if constrained by a legal system prepared only to accept legislation as a proper basis of regulation.<sup>398</sup> Conversely, the Tribunal chiefly tended to adjudge the Charter incapable of impeachment. It possessed unassailable status. Accordingly, the above ambivalence about the adequacy of positive legislative norms was less than consistent.

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<sup>396</sup> Interestingly, De Ribes (Chief Prosecutor for France at the conclusion of the Trial): 19 IMT 536, rested his case on the basis that the defendants had *either* violated the internal laws of the countries whose nationals had been affected by the Defendants' acts, *or* common international law which he deemed 'the root of international custom.' The prevailing view was that pre-established custom eventually led to the evolution of positive legal provisions to reflect the customary position. Instead, De Ribes seemed to treat law as the precursor to custom, at least in the international context.

<sup>397</sup> Judgment: 22 IMT 464.

<sup>398</sup> Judgment: 22 IMT 464.

## Summary and evaluation of Article 6 (a)

Though the *ex post facto* composition of Article 6(a) rendered its provisions vulnerable to criticism, the Tribunal had no truck with any suggestion that the integrity of the proceedings had been in any way tainted or compromised. In the Members' view, the Charter was immune from challenge. From a rigorously positivistic stance, no additional justification was required. Even were any relevant arguments to be further developed, the Kellogg-Briand Pact constituted irrefutable precedent for paragraph (a). It served as the prior Treaty of which the defendants were in violation. It also formed part of a complex mosaic of pre-war agreements, assurances and declarations which cumulatively formed the requisite customary law to support the 'offence' of waging aggressive war *per se*. Precedent, therefore, unquestionably existed for both limbs of paragraph (a). From the Members' perspective, no substantive impediment existed in citing the Pact as irrefutable precedent for the 'offence' of *crimes against peace*:

'In interpreting the words of the Pact, it must be remembered that international law is not the product of international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law and not with administrative matters of procedure.'<sup>399</sup>

In the last resort and were such conventional and customary law to be rejected, recourse was possible to the 'general principles of justice accepted by civilised nations'. The Members recognised this *natural law* type of approach as entirely valid. Aggressive war was a threat to the stability of the world and would not be countenanced. It was intrinsically heinous and was subject to sanction according to transcendent principles which had been transformed by the Charter into substantive law. The Charter was not innovatory but declaratory of existing law. It ratified the consensus of every moral and humane society. The Defendants were arraigned for 'offences' which were pre-existing at the date of commission and any attempt to gainsay the legal legitimacy of paragraph (a) was pervaded by cynicism, moral ambivalence and linguistic corruption.

In contrast, even if an overarching *natural law* were conceded to exist, any countervailing position to that adopted by the Prosecution and the IMT, would insist that the waging of aggressive war *per se* was not an established 'offence' prior to the Charter. The issues underlying the instigation of such conflict would be far too

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<sup>399</sup> Judgment: 22 IMT 463.

complex to be susceptible to the vagaries of an unwritten and, therefore, uncertain ethical code of rectitude. The factors which one State regarded as adequate justification for war would evoke a diametrically opposite reaction from the potential opponent. States and the human functionaries, through whom their political ambitions and aspirations were fulfilled, had to know the parameters within which they could legally act. Their actions were accordingly circumscribed only by readily ascertainable positive law. There was insufficient basis upon which to conclude that aggressive war had been criminalised by customary law. Wars of aggression were not illegal in 1919 and the period of time which had elapsed until the onset of the Second World War was inadequate, without more, to convert the gradual momentum in favour of the denunciation of aggressive war into a criminal offence:

‘It is legally untenable to accept draft treaties, protocols, recommendations and resolutions which never became legally binding and which were continuously violated as evidence that the Pact of Paris is declaratory of an already existing principle of international law according to which resort to a war of aggression is not merely illegal but criminal.’<sup>400</sup>

The Kellogg-Briand Pact, in itself, was equally unpersuasive. It did not purport to be a penal Statute but merely contained a general condemnation of aggressive war. Once Germany’s pre-war escalation towards re-armament was observed and her expansionist policies detected, there was ample opportunity to address any deficit in international law. Enactment of unambiguous legislation criminalising the waging of aggressive war and imposing appropriate punitive sanctions against individuals, in the event of any breach of its terms, would have placed the matter beyond question. By the outbreak of War in 1939, the Nazis’ decision to initiate wars of aggression would then have constituted a criminal offence attracting the full force of international law. However, the provisions of the Kellogg-Briand Pact had not been revisited in any manner suggestive, or in reinforcement, of its supposed mandatory import. Furthermore, none of the various declarations of war by the Allies from 1939 onwards, made mention of any prior violation of the Pact by Germany.

Analysis of paragraph (a) therefore indicates the following:

- (i) The two limbs of *crimes against peace* were treated as co-equal.

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<sup>400</sup> *Supra*: Schick ‘The Nuremberg Trial and The International Law Of the Future’, 770, 784

- (ii) The ‘offence’ of waging wars of aggression *in violation of prior Treaties, agreements and assurances* necessarily hinged upon the pre-existence of the requisite substantive precedent. However, the doctrinal evidence, in the form, *inter alia*, of the Kellogg-Briand Pact was unconvincing. In consequence, strict compliance with the rubric of the stipulated ‘offence,’ yielded the conclusion that the second limb of paragraph (a), was manifestly reliant upon *ex post facto* law.
- (iii) Customary law could, perhaps, have potentially salvaged the ‘offence’ prescribed under the second limb of paragraph (a), had it been capable of validly enabling a purposive interpretation to be applied to conventional precedent. However, scrutiny of the historical basis for any purported evolution of such customary law was less than compelling. Further, even had the requisite customary law developed, the Prosecution would have needed to establish that this had properly impinged upon the literal parsing of any such prior Treaties, agreements and assurances, so as to render them capable of interpretation, in a manner which the original draftsmen and signatories had ostensibly never contemplated.
- (iv) The ‘offence’ mentioned in the first limb of paragraph (a), namely, waging wars of aggression *per se*, never purported to be wholly dependent upon conventional precedent. In this respect, it differed materially from the ‘offence’ prescribed under the second limb of paragraph (a). Precedent for the ‘offence’ could instead, perhaps, have been legitimately located in customary law. However, as indicated at (iii) above, the argument in favour of the *development* of customary law between 1919 and 1937/9 - as an unimpeachable basis for the ‘offence’ of waging aggressive war - was unpersuasive.
- (v) It follows from the above, that neither of the ‘offences’ specified in paragraph (a), were adequately supported by conventional *or* customary precedent. Leaving aside the unassailability of the Charter, the concept of *crimes against peace* appeared, therefore, to represent a manifest utilisation of retrospective law. Both of the ‘offences’ specified in paragraph (a) were arguably retrospective, though not for identical reasons.
- (vi) In the absence of substantive precedent, both ‘offences’ were innovatory in *international* law.

- (vii) Nor had either ‘offence’ attained prior recognition within *German municipal law*.
- (viii) The Charter was ever-present as an avenue of last resort. However, it was possible to regard the Tribunal’s emphasis upon the inviolability of the Charter, as mere judicial endorsement of the Allies’ legislative *fiat*.
- (ix) The place of commission or the *lex loci* was difficult to particularise. The specific location of the wars of aggression allegedly waged by the Nazis clearly varied in accordance with the precise zone of conflict. Nonetheless, if the initial decision to commence such warfare was made in Germany, the *territoriality principle* was infringed. In any event, this may have been of little significance given that arguably, none of the theatres of war within Europe or elsewhere, had themselves recognised the criminal illegality of *waging wars of aggression*. Thus, irrespective of the place of commission, the acts perpetrated by the Defendants had not previously been designated as criminally illegal.
- (x) The attribution to the Defendants of *individual responsibility*, for the commission of *crimes against peace*, raised a further significant issue as to retrospectivity.<sup>401</sup>
- (xi) The only residual prospect of redeeming the legal legitimacy of the ‘offences’ charged under Count Two of the Indictment, seemingly resided in a ‘natural law’ type of approach decried by those of a more positivist inclination.<sup>402</sup>

The Allies needed to prove that they were equal to the task of establishing the existence of appropriate precedent to underpin their concept of *crimes against peace*. Otherwise, Article 6 (a) could never wholly emerge from the chrysalis of retrospectivity in which it was shrouded.<sup>403</sup> The submissions tendered to the Tribunal arguably did nothing to dispel this imputation. Further, in seeking to address the putatively retrospective import

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<sup>401</sup> See *infra* on individual responsibility.

<sup>402</sup> See Chapter 5 for a discussion of natural law from a Schmittian perspective.

<sup>403</sup> *Supra*: Schick ‘The Nuremberg Trial and The International Law of the Future’, 770, 782: ‘International law in existence at the time the Nuremberg defendants committed the incriminated offences knew of no obligation forbidding nationals of a sovereign state to plan or perform acts which, viewed retrospectively by the victor, may be considered as having led to an illegal war’.

of paragraph (a), the rationale employed by the Members was, ultimately, no more persuasive.<sup>404</sup>

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<sup>404</sup> For the current approach, see *supra*: Gallant *The Principle of Legality in International and Comparative Law*, 367: ‘If an act was not a crime in customary international law and was not a crime under the general principles of law when committed, international human rights permits its prosecution in a national or international tribunal as an international crime only if it was a crime under applicable national law or applicable conventional international law at the time of its commission’.

## **6. Individual responsibility.**

The substantive nature of the ‘offences’ charged under Count Two of the Indictment did not constitute the *only* obstacle confronting the Prosecution. The other potential impediment to the legal validity of Article 6 arose in relation to the issue of the Defendants’ *individual criminal responsibility* for the ‘offences’ with which they were indicted. This manifested itself most notably in the context of the paragraph (a) concept of *crimes against peace*. However, with the possible exception of conventional *war crimes*, repercussions emanating from the importation of individual responsibility emerged across the range of ‘offences’ comprised within Article 6.

## **6. Individual responsibility in the context of waging wars of aggression:**

### **Article 6 (a)**

The Defendants, in the last resort, sought to exculpate themselves on the basis that they ought not to be fixed with individual responsibility. In furtherance of this design, they asserted that no avenue existed under pre-existing international law by which the Allies could ascribe criminal accountability to them. Liability rested with the State, not with the individual perpetrator.<sup>405</sup> On this view, the only recourse open to the Prosecution resided in the *ex post facto* provisions of the Charter:<sup>406</sup>

### **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:<sup>407</sup>

(a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing (\*Counts 2 and 1 of the Indictment).

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<sup>405</sup> This argument was cursorily rejected by Shawcross: 3 IMT 105, ‘The state is not an abstract entity. Its rights and duties are the rights and duties of men. Its actions are the actions of men. It is a salutary legal rule that persons, who in violation of the law, plunge their own and other countries into an aggressive war, do so with a halter around their necks.’ This does of course require that there **is** a pre-existing law of which the alleged perpetrator is in violation.

<sup>406</sup> They would doubtless also have relied upon the ‘acts of state’ doctrine and the defence of ‘superior orders’ had these not been precluded by Articles 7 and 8 of the Charter. They were thus compelled to argue that there was no individual liability for the offence of waging aggressive war in the event that such offence was found by the IMT validly to exist. In this regard, they again sought to avail themselves of the *nulla poena sine lege* argument.

<sup>407</sup> This clause importing individual responsibility to the Defendants was equally applicable to the other ‘offences’ comprised within Article 6, namely, *conspiracy*, *war crimes* and *crimes against humanity*.

The Defence maintained that international law was generally binding upon *States*, as opposed to national law which regulated the conduct of *individuals*. The Defendants were, therefore, subject to the strictures of international law, only where prior to the date of commission of the acts charged against them such provisions had been specifically incorporated into their municipal law. This point was, however, met by a contention by the Prosecution that Article 4 of the August 1919 Reich Constitution had effected a vital transposition from the international to the domestic arena:

‘The generally accepted rules of international law are to be considered as binding integral parts of the law of the German Reich.’<sup>408</sup>

The validity of this argument, nonetheless, presupposed that throughout the entirety of the material period the offence of waging aggressive war was an unassailable precept of international law, capable of legitimate incorporation into the national law of Germany. Furthermore, were it a pre-requisite of the enforceability of international law that it had firstly to be transposed into national law to render it binding upon individuals of the State, it followed that in its absence the provisions of international law would not directly impact upon individuals:

‘International law is not law at all except insofar as it is adopted by the courts of each individual country and there is no compulsion upon them so to adopt it. Except for that small portion of international law which has been expressly adopted by the courts of each nation, International Law is nothing more than international etiquette. A nation which does not conform to it may be cut by the nations which do so as an outsider. But to stigmatise the outsider as an outlaw is meaningless and futile.’<sup>409</sup>

Hans Kelsen, conversely, suggested that the inherent supremacy of international law would always invalidate any provisions of national law that conflicted with it:

‘Individuals are obliged by international law to abstain from a delict determined by international law even if their national law also requires the same conduct.’<sup>410</sup>

It was, therefore, of no consequence that the provisions of international law had not been validly transposed into the constitution of National Socialist Germany. The amendments made by the Nazis to the Weimar Constitution, with the ostensible safeguards afforded to the Defendants, provided no protection against the higher

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<sup>408</sup> Article 4, which remained valid under the Nazi regime, as referred to in the opening address of Jackson as 2050 PS: 2 IMT 146, ‘Indeed by their own law – had they heeded any law- these principles were binding on these defendants’.

<sup>409</sup> *Supra*: Morgan *The Great Assize*, 37.

<sup>410</sup> *Supra*: Kelsen *Peace through Law*, 80.

authority represented by international law. In a similar vein, piracy was historically punishable as a violation of the ‘law of nations’,<sup>411</sup> even where such offence had never been accorded criminal status within the municipal law of the apprehending State.<sup>412</sup>

‘On the one hand, no prior legislative act making a piratical act a crime was necessary to the criminalisation of piracy: on the other hand no prior enactment of municipal law was necessary to make the act also a local crime. Yet individuals are prosecuted as criminals.’<sup>413</sup>

In the circumstances, therefore, it was scarcely co-incidental that, in an effort to justify his assertion that the Defendants be fixed with individual criminal responsibility, Jackson adverted on numerous occasions both to piracy and brigandage:

‘Doubtless what appeals to men of goodwill and common sense as the crime which comprehends all lesser crimes is the crime of making unjustifiable war. Such acts would unquestionably be criminal except that international law throws a mantle of protection around acts which would otherwise be crimes when committed in pursuit of legitimate warfare. In this they are distinguished from the same acts in the pursuit of piracy or brigandage which have been considered punishable wherever and by whomever the guilty are caught.’<sup>414</sup>

Advocates of the proposition that individuals might properly be held responsible under international law have since sought to extract support from the respective decisions of the German and US Supreme Courts in the cases of *LLandoverly Castle*<sup>415</sup> and *Ex Parte Quirin*.<sup>416</sup> In *LLandoverly Castle*, the court was concerned with the culpability of a

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<sup>411</sup> *Supra*: Kelsen *Peace through Law*, 75: ‘There are norms of 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. Such a norm of general international law is the rule forbidding piracy. International law does not authorise the States to resort to reprisals or war against the State whose subject or vessel has committed acts of piracy. It authorises the States to execute sanctions only against the individuals who committed acts of piracy.’ Kelsen also refers to breach of blockade and carriage of contraband as falling within the same category as piracy.

<sup>412</sup> *Supra*: Morgan *The Great Assize*, 36: ‘There is no such thing in law as an international crime with the single exception of piracy *jure gentium* which is indeed the sort of exception which proves the rule, for it is a bequest of our old admiralty jurisdiction fortified by a Statute of Henry VIII and absorbed into our common law. Without such absorption, our courts would have known nothing of it’.

<sup>413</sup> *Supra*: Glueck *The Nuremberg Trial and Aggressive War*, 61.

<sup>414</sup> Jackson’s *Report to the President on Atrocities and War Crimes*; 7<sup>th</sup> June 1945: available online at <<<http://www.yale.edu/lawweb/avalon/imt/jack01.htm>>> Jackson’s emphasis upon the law of piracy, was echoed by Shawcross: 3 IMT 106, ‘Nor is the principle of individual responsibility for offences against the law of nations altogether new. It has been applied not only to pirates. The entire law relating to war crimes, as distinct from the crime of war, is based upon the principle of individual responsibility.’ *Supra*: Glueck *War Criminals: their Prosecution and Punishment*, 100, ‘In the absence of a world authority and an international criminal tribunal, the prosecution must perforce be conducted in the courts of the State which has seized the pirate but the violation of the law involved is one which concerns the entire community of nations and the prosecuting State is in effect acting as agent of all civilised states in vindicating the law common to them all’.

<sup>415</sup> *LLandoverly Castle* H.M.S.O. Cmd.450.

<sup>416</sup> *Ex parte Quirin v Cox* 317 U.S.1.

German Naval officer, Patzig, for his alleged role in ordering the torpedoing of a British hospital ship and the machine-gunning of survivors in a lifeboat. It was held that:

‘Any violation of the law of nations is a punishable offence. The fact that his deed is a violation of international law must be well-known to the wrongdoer. The rule of international law which is here involved is simple and is universally known.’

However, his guilt was predicated upon the basis that the offence for which he was convicted fell within the ambit of a ‘conventional’ war crime, recognised by international law. It was therefore an offence of a type *universally known* and not one *never previously articulated*. Whilst appearing at first sight, therefore, to constitute persuasive authority for the imposition of individual responsibility, its ambit was necessarily confined to generally recognised ‘offences’. *Llandovery Castle* never purported to have ubiquitous application. It was this feature which, in the context of paragraph (a), enabled the Defendants to distinguish the principle enunciated in *Llandovery Castle* from the legitimate attribution of individual responsibility for the commission of *crimes against peace*.

Similarly, application of the principle established in *Ex Parte Quirin* proved less than convincing. It fell to the Court to determine the disposition of alleged saboteurs, charged with offences of espionage and sabotage, after landing covertly in the United States during the War. Although the IMT attached considerable weight to *dicta* of Chief Justice Stone,<sup>417</sup> the Members’ interpretation of *Quirin* was not immune to criticism. Firstly, Stone CJ referred to a ‘*law of nations which prescribed for the conduct of war*’. Arguably, therefore, he was seeking to reaffirm a principle applicable to acts within a state of *ongoing warfare* rather than the *initiation* of war itself:

‘Ex parte *Quirin* was concerned with the conduct of war and not at all with the character, aggressive or otherwise, of a war nor with its origins.’<sup>418</sup>

Secondly, all offences pertaining to war had been previously incorporated into US law. It thus appeared that the Defendants, as individuals, were dealt with under the

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<sup>417</sup> ‘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’.

<sup>418</sup> *Supra*: Morgan *The Great Assize*, 36.

provisions of American military law rather than international law.<sup>419</sup> There was, therefore, no imposition of responsibility upon individual perpetrators by the direct implementation of international law. Accountability arose only because the relevant provisions of international law had been previously transposed into the municipal law of the prosecuting State. Ostensibly vindicated, however, by the decision of the US Supreme Court in *Quirin*, the IMT was content without further analysis to conclude that *individuals* were punishable for the commission of *crimes against peace*.<sup>420</sup>

Additionally, the Prosecutors submitted that despite the absence of specific procedures in The Hague Convention 1907 for the disposition of individuals who contravened its stipulations, a practice had nonetheless developed whereby perpetrators of *war crimes* were routinely subjected to the sanction of trial and punishment. Indeed, this was evidenced by the decision of the German Supreme Court in *LLandoverly Castle*. By analogy, therefore, the Members accepted that perpetrators of *aggressive war* could similarly be tried before an appropriately convened Tribunal:

‘The Hague Convention nowhere designates such practices (*offences against the laws of war*) as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, those who wage aggressive war, are doing that which is equally illegal and of much greater moment than a breach of one of the rules of the Hague Convention.’<sup>421</sup>

However, this comparison lacked cogency. Firstly, the Tribunal’s dismissive treatment of the binding provisions of an internationally ratified Treaty was startling in the extreme. The Members’ cursory relegation of the gravity of *war crimes per se* to the arguably novel ‘offence’ of *crimes against peace* was morally, if not legally unsustainable. Secondly, whilst The Hague Convention had been expressly and

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<sup>419</sup> *Supra*: Woetzel *The Nuremberg Trials in International Law*, 103 quoting the views of A. Knierim: *Nurnberg-Rechtliche und menschliche Probleme* (Stuttgart, 1953), 62. *Supra*: Glueck *War Criminals: their Prosecution and Punishment*, 103 disputes this analysis stating that, ‘fundamentally, it cannot be said that the laws and customs of warfare as part of the law of nations are not applicable directly to individuals in the absence of their prior statutory conversion into crimes against the United States.’ However, in so doing, he disregards the exact nature of the laws in question by failing to draw a distinction between the *ius in bello* and the *ius ad bellum*.

<sup>420</sup> Dinstein supports the view that, ‘the criminality of war of aggression means the accountability of human beings, and not merely of abstract entities’: Yoram Dinstein *War and Aggression*, 3<sup>rd</sup> Edition Cambridge: Cambridge University Press, 2001), 76.

<sup>421</sup> Judgment: 22 IMT 463. The Nazis were condemned for their utilisation of the principle of analogy and yet the prosecution sought to support the principle of individual responsibility for criminal breaches of international law by reference to the manner in which violators of the Hague Convention were treated. This argument was accepted and endorsed by the IMT Members.

effectively transposed into the municipal law of the participating States, including that of Germany, a similar claim could not be advanced on behalf of the Kellogg-Briand Pact:

‘The Tribunal neglected to mention that in the case of the Hague Rules, each State had added the provisions in question to its own legal code, while no such development had occurred for the Kellogg-Briand Pact.’<sup>422</sup>

The presumed analogy between the two legislative provisions was also perhaps open to question on the basis that:

‘The differences between the Hague Convention on the rules of warfare and the Kellogg-Briand Pact is that the former can be violated by acts of State as well as by acts of private persons whereas the latter can be violated only by acts of State. The Kellogg-Briand Pact does not - as does the Hague Convention - forbid actions of private persons. In establishing individual criminal responsibility, the London Agreement created law not yet established by the Kellogg-Briand Pact or valid as a rule of general international law.’<sup>423</sup>

The Members were, nonetheless, unprepared to be swayed by the lack of provision in the Kellogg-Briand Pact, either for specific judicial procedures or punitive criminal sanctions against individual violators.<sup>424</sup> Implicit in their decision was acquiescence in the asserted correlation between the historical application of The Hague Convention and the Allies’ present putative instrumentalisation of the Kellogg-Briand Pact.<sup>425</sup>

Ultimately, however, the rationale employed to justify the imposition of individual responsibility for the commission of *crimes against peace* lacked plausibility. Such

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<sup>422</sup> *Supra*: Smith *Reaching Judgment at Nuremberg*, 156; see also *supra*: Morgan *The Great Assize*, 37, ‘Even the Hague Conventions, it has been authoritatively held cannot, although ratified by our own government, alter the law of this country in the absence of an Act of Parliament to that effect’ (*Porter v Freudenberg* (1915) 84 L.J.K.B. 1001).

<sup>423</sup> *Supra*: Kelsen ‘Will the Judgment in the Nuremberg Trial constitute a precedent in international law?’, 161.

<sup>424</sup> *Supra*: Hans Kelsen ‘The Rule against Ex Post Facto Laws and the Prosecution of Axis War Criminals’, 46, ‘At the time the Briand-Kellogg Pact (sic) and certain non-aggression pacts were violated by the Axis Powers, the conviction that an aggressive war is a crime was so generally recognised by the public opinion of the world that subsequent international agreements providing individual punishment for these violations of international law were certainly not unforeseeable and this all the more as the Treaty of Versailles had already established a precedent by authorising an international court to punish William the Second ‘for a supreme offence against international morality and the sanctity of treaties’

<sup>425</sup> However, Finch insists that within the Kellogg-Briand Pact, ‘personal criminal responsibility was not stipulated nor even impliedly suggested.’ *supra*: Finch ‘The Nuremberg Trials and International Law’, 20, 30. *Ibid*: 33: ‘it requires an attenuated legal conceptualism to deduce *dehors* the written instrument (*Kellogg-Briand Pact*) personal criminal liability for non-observance of the pact never before conceived of in international law as attaching to violations of Treaties regulating state conduct’; see also *supra*: Birkett ‘International Theories Evolved at Nuremberg’, 317-325 in which Birkett, somewhat spuriously, supports the analogy between the prior deployment of The Hague Convention and its extended application to the Kellogg-Briand Pact.

legal authorities as did exist were distinguishable from the facts before the Tribunal. The submissions advanced to the IMT, thus, appeared open to challenge. Expedient though the notion of personal accountability may have been in the context of the Nuremberg process, the concept was innovatory and, by implication, retrospective. On this point, Shawcross was driven to concede that individual responsibility in the arena of *crimes against peace*, in contradistinction to *war crimes*, was indeed innovatory. This imposition of individual accountability was, nevertheless, capable of vindication in the interests of the preservation of world peace:

‘The entire law relating to war crimes, as distinct from the crime of war, is based upon the principle of individual responsibility. The future of international law, and indeed, of the world itself, depends on its application in a much wider sphere, in particular that of safeguarding the peace of the world. There must be acknowledged fundamental human duties as in the Charter of this Tribunal, and of these none is more vital, none is more fundamental, than the duty not to vex the peace of nations. If this be an innovation, it is an innovation which we are prepared to defend and justify.’<sup>426</sup>

The Defendants could scarcely, therefore, have been contemporaneously aware that they would ever be deemed individually accountable for undertaking acts of warfare, which would *later* be labelled contrary to international criminal law. *Had* the Kellogg-Briand Pact stipulated that nationals of a State which waged war upon another State would be criminally liable for breach of its provisions, the Defendants’ complaint might have been less well founded. Likewise, if customary law had already ascribed personal accountability to the perpetrators of *crimes against peace*, any contention by the Defence, in relation to the retrospective import of Article 6(a), would have been less than convincing. However, no such unambiguous development of customary legal norms had occurred. It followed that individual responsibility for an ‘offence’ that fundamentally constituted a breach of the peace between nations had, at no time, been established beyond doubt.<sup>427</sup>

In practical terms, the Members’ decision upon the inviolability of the Charter consigned to failure any argument concerning the legal legitimacy of Article 6 (a). Yet, in the context of *crimes against peace*, exposure of the lack of substantive precedent for

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<sup>426</sup> Shawcross: 3 IMT 106.

<sup>427</sup> When commenting upon the declared neutrality of the U.S. and with considerable irony, Finch comments that, ‘to maintain retroactively that these invasions (of Poland and other European nations by Germany) were international criminal acts involving personal responsibility is to suggest that the United States officially compounded international crime with international criminals’: *supra*: Finch ‘The Nuremberg Trials and International Law’, 20, 28.

the concept of individual criminal responsibility once again highlighted the fragile foundations upon which the Charter was constructed. Andre Gros, assistant to the French representative at Nuremberg, even conceded during pre-trial negotiations with the other Allied powers that importation of individual responsibility for waging aggressive war (and conspiracy to do so) epitomised *ex post facto* legislation. It was tantamount to invention of a new sanction where none had previously existed. Morally and politically desirable though it was, it lacked the status of international law.<sup>428</sup> In the absence of precedent in conventional or customary law, how then were the Allies to persuade their audience that certain elements of the proceedings were not beset by retrospectivity?

Ultimately, perhaps, the only response which the Prosecution could have proffered with any degree of candour resided in the underlying factors by which the Allies were primarily motivated. Although they would have been scarcely likely to concede the point, pragmatic utility seemingly transcended the need for legal precision. Allied strategy was defined by a need to compel the Defendants to atone for their transgressions; to leave no residual doubt in the minds of future perpetrators as to the fate which would inevitably await them, were they to fail to heed the punishment meted out at Nuremberg:

‘The increasing complexities of modern warfare, in particular having regard to the potentialities of scientific weapons of destruction, may call for far-reaching extensions of individual responsibility directly pronounced by international law.’<sup>429</sup>

Though the Nazis had to pay the price for what the victorious nations deemed an appalling and unnecessary waste of human life, the commensurate toll exacted against any objective ideal of ‘justice’, was far less easy to evaluate.

Not least due to the intrinsic nature of the ‘offences’ charged against the Defendants under Count Two of the Indictment, the issue of individual responsibility was to prove most problematical in the arena of *crimes against peace*. The reason was not difficult to discern. Traditionally, the decision to wage war was attributed not to any official or functionary of government but to the State itself. Wars occurred between nations and

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<sup>428</sup> Comments of Gros, 19<sup>th</sup> July 1945, 23<sup>rd</sup> July 1945 and 25<sup>th</sup> July 1945 in Jackson’s *Report to the President on Atrocities and War Crimes*, 7<sup>th</sup> June 1945.

<sup>429</sup> Lassa Oppenheim *International Law 6<sup>th</sup> Edition* (London: Longmans, Green and Co, 1947), 310.

not citizens of those States. Declarations of war were historically couched in the stentorian language of inter-State diplomacy, with the clear intention of signifying a condition of belligerency between the protagonist nations. The idea that responsibility for recourse to war could suddenly be imported to individuals seemed revolutionary indeed; the more so, when an additional dimension of criminal illegality was superimposed. Sheathed within a cocoon of sovereign immunity, States waged war, not their nationals. Furthermore, even in circumstances where individual responsibility was proven to exist for any given ‘offence’, an alleged perpetrator in the pre-Nuremberg era was able to rely, by way of defence, upon the doctrine of ‘acts of state’.<sup>430</sup> However, it was fundamental to the debate that, had not Article 6 purported to ascribe *individual responsibility* to the Nazis, the Defendants (not being *Heads of State*) would *never* have had cause to resort to *any* defence, whether or not abrogated by the Charter. Simply couched, any defence would have been superfluous in the absence of primary liability for the designated ‘offence’. To the extent, therefore, that criminal responsibility for violation of international law was presumptively foisted upon individual citizens the pivotal issue was distilled into the legal legitimacy of the opening segment of Article 6.

Given that prior precedent for the imposition of individual responsibility was not particularly compelling, it was arguable not only that substantive ‘offences’ of *crimes against peace* were retrospective but also that attribution of personal accountability was susceptible to a similar conclusion. In essence, the ‘offences’ contained within Article 6 (a) would have been vulnerable to a charge of retrospectivity, even had the Defendant before the Tribunal been the State of Germany. *A fortiori*, therefore, where the target of the criminal prosecution were individuals against whom, in the context of paragraph (a) and in the absence of the Charter, no proceedings would arguably have been feasible. This constituted utilisation of *ex post facto* law with a vengeance. Any retrospective ramifications of the ‘offences’ encompassed within paragraph (a) were unquestionably exacerbated by the putative *transposition* of criminal liability from one potential Defendant to another.

The criticism directed against personal criminal accountability in the context of paragraph (a) was *prima facie* applicable with equal force both to Article 6 (b) and (c) and also to the ‘offence’ of *conspiracy* under the unlettered portion of Article 6. What

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<sup>430</sup> The ‘acts of state’ doctrine is discussed earlier in this Chapter.

then were the retrospective ramifications, if any, of attribution of individual responsibility to the Defendants for commission of those remaining ‘offences’?

**(ii) Individual responsibility in the context of war crimes: Article 6 (b)**

As noted earlier, retrospective connotations relating to the issue of individual responsibility, appeared not to exist in the sphere of conventional *war crimes*.<sup>431</sup> The Prosecutors were able to advert to substantive precedent in the form of The Hague and Geneva Conventions, themselves both founded upon established customary law. Reinforced by the incorporation of the provisions of those Treaties into the municipal law of Germany, this was further endorsed by the decision of the German Supreme Court in *LLandoverly Castle*. If the retrospective ramifications of individual responsibility referable to *crimes against peace* were located at one end of the spectrum, then the comparable situation in relation to *war crimes* was, therefore, to be found in a diametrically opposite position.

Given the substantive basis for this legitimate, though limited, imposition of individual responsibility upon the Defendants, did any conceptual link exist between *war crimes* and *crimes against humanity*, so as to negate any potential retrospective imputations in the context of the ‘offences’ encompassed within paragraph (c)?

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<sup>431</sup> Individual responsibility in the context of war crimes is mentioned also during the discussion of the retrospective implications, if any, of war crimes in the old sense.

**(iii) Individual responsibility in the context of crimes against humanity: Article 6(c)**

The substantive nature of the acts of atrocity encompassed within the first limb of paragraph (c) bore more than a passing resemblance to the commission of conventional *war crimes*. By analogy, therefore, it was perhaps arguable that the principle enunciated in *LLandoverly Castle* was legitimately applicable. Had such *crimes against humanity* satisfied the criteria of being *universally known* and *previously articulated*, such a contention was perhaps cogent. Within such narrow parameters, the imposition of individual responsibility could not then have been branded retrospective:

‘The entire law of war is based upon the assumption that its commands are binding not only upon States but also upon their nationals. To that extent, no innovation was implied in the Charter inasmuch as it decreed individual responsibility for war crimes proper and for what it described as crimes against humanity.’<sup>432</sup>

However, it was not possible to be similarly sanguine in relation to the balance of the ‘offences’ contained within paragraph (c), especially when conflated with the manifold innovatory concepts introduced by that segment of the Charter. Numerous facets of the concept of *crimes against humanity* appeared to utilise *ex post facto* law. To that extent, the ‘offences’ lacked precedent within international law. They could hardly, therefore, have been constitutionally transposed into the municipal law of Germany. Given the inherently retrospective nature of those ‘offences’, any assertion that the perpetrators could be *individually* fixed with criminal liability remained questionable.

A further issue, additionally, arose in that persecution within the second limb of paragraph (c), together with atrocities committed on a premeditated basis, were perhaps reflective of a *State-decreed* policy of repression and extermination.<sup>433</sup> The Defendants did not, therefore, act on a disparate *ad hoc* basis but in pursuance of State ordination:<sup>434</sup>

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<sup>432</sup> *Supra*: Oppenheim *International Law*, 310.

<sup>433</sup> This was certainly the stance adopted by Charles Dubost (Deputy Chief Prosecutor for France) in his final address to the Tribunal: 19 IMT 548: ‘All the crimes of the defendants lie in their political life. They are elements of a criminal State policy. To consider the defendants as offenders against the common law, to forget that they have acted on behalf of the German State and on account of that State to apply the same standards to them as that applied to hooligans or murderers would narrow the scope of the trial and misrepresent the character of their crimes. The crimes ordinarily tried by the courts of our countries show the criminal as opposed to the social order.’ At 19 IMT 550, he emphasized that, ‘this is the crime of the German Reich’.

<sup>434</sup> Interestingly, the Tribunal in *United States of America v Alstoetter et al.* (‘The Justice case’) [1948] 3 T.W.C. 1 referred to the provisions of Control Council Law No. 10, (repeating Article 6(c) of the

‘The entity (*formed from all the constituents of the totalitarian State*) was the Government of the Reich, this was the State-party or Party-State; an entity perhaps but a conscious and criminal entity which decreed the murder of millions of human beings in order to enlarge the Reich beyond all limits.’<sup>435</sup>

‘Genocide, murder, or any other crime becomes anonymous when it is committed by the State.’<sup>436</sup>

Whilst, therefore, the transgressions were committed by individuals, the Nazis would have doubtless contended that *criminal* liability had been improperly attributed to them. If any prosecution for the commission of ‘crimes against humanity’ was remotely sustainable, the accused should, in their view, properly have been the State of Germany, not her individual functionaries. The importation of individual responsibility under paragraph (c) was, accordingly, beset by imputations of retrospectivity.

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Charter). It indicated that ‘the provision is directed against offences and inhumane acts and persecution of the government. It is not the isolated crime by a private individual which is condemned’.

<sup>435</sup> Dubost: 19 IMT 547.

<sup>436</sup> Dubost: 19 IMT 564.

#### **(iv) Individual responsibility in the context of conspiracy: Article 6 and Count One of the Indictment**

Likewise, Article 6 sought to fix the Defendants with individual responsibility for the ‘offence’ of *conspiracy*. However, this segment of the Charter was also susceptible to criticism arising from possible incursions into the *nullum crimen, nulla poena* doctrine. Denigration of the substantive offence of conspiracy could, perhaps, have been directed with equal vehemence towards the interwoven issue of *individual responsibility*:

‘The Counts of ‘conspiracy’ of ‘aggressive war’ and ‘crimes against humanity’ had better never been framed at all. They were indeed as gratuitous as they were unprecedented for in the case of all but two of the Defendants who were convicted those Defendants were also convicted on what I have called the one invulnerable count of ‘war crimes.’<sup>437</sup>

As mentioned previously, the Members had significantly delimited the extent of the conspiracy charge. This decision diminished the force of the criticism directed against a concept which, in the specific form charged, was not recognised by continental legal systems and which was without precedent in the annals of international law. Yet, even in its truncated form, referable only to the commission of *crimes against peace*, the ‘offence’ appeared unsupported by substantive precedent. Therefore, although the charge of *conspiracy* was necessarily directed against the individual Nazis who had allegedly formed the requisite plans to wage aggressive war, the ‘offence’ had never been previously transposed into German domestic law. Indeed, in the absence of any substantive precedent, either in international or German municipal law, prior to the inception of the Nuremberg process for the concept of *conspiracy* as an ‘offence’, by what means could individual responsibility possibly have been ascribed to the Defendants at the date(s) when their Plans were supposedly formulated? If the ‘offence’ of *conspiracy* was innovatory, then so also was individual responsibility for the commission of such ‘offence’. The principles respectively enunciated in *Llandovery Castle* and *Ex Parte Quirin* were unpersuasive, the one hinging upon the pre-existence of *a universally known offence* whilst the other arguably related only to acts committed within, rather than as a prelude to, warfare. *Conspiracy* failed to fulfil either of the

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<sup>437</sup> *Supra*: Morgan *The Great Assize*, 40; there were actually *three* Defendants who were convicted under some Counts but not under Count Three, these being Hess who was indicted under all four Counts but convicted only under Counts One and Two, Schirach indicted under Counts One and Four but convicted under Count Four only and Streicher who was similarly indicted and convicted. Fritzsche was indicted under Counts One, Three and Four but acquitted of all charges whilst Schacht and Von Papen were also acquitted generally but never indicted under Count Three.

requisite criteria for the legitimate imposition of individual responsibility for an 'offence' newly created within international law. The issue of retrospectivity was, therefore, again exposed.

**(v) Individual responsibility: a summary of retrospective aspects.**

- (i) Certain of the 'offences' charged against the Defendants were pre-existing under international law. This category embraced conventional *war crimes per se* and possibly *crimes against humanity*, to the extent only that they were directly analogous to war crimes. Conduct of a type universally recognised as an 'offence' attracting the full force of criminal law and for which individuals could properly be deemed responsible, fell within the principle enunciated in *Llandovery Castle*. However, such acts were arguably only embraced within this principle where they were committed within ongoing warfare, as exemplified by *Quirin*.
- (ii) By analogy to piracy and brigandage and even in the absence of any specific transposition into German municipal law, the 'offences' were arguably, without more, binding upon individual perpetrators.
- (iii) Pre-existing 'offences' codified, for example, in The Hague Convention had, in any event, been transposed into the municipal law of Germany and were thus acts for which the Defendants could be deemed individually responsible.
- (iv) Insofar as pertained to the issue of individual responsibility, 'offences' which fell within the above parameters escaped retrospective ramifications.
- (v) Where the 'offences' charged under Article 6 of the Charter were unsupported by prior substantive precedent, it followed that, from a positivist perspective, they had not previously been recognised under international law. Hence, there was no doctrinal basis upon which individual responsibility could be satisfactorily established. The only possible avenue, by which an imputation of retrospectivity could have been evaded, was by reliance upon the intrinsically heinous nature of the 'offence' in issue. The 'piracy' analogy would then arguably have been relevant. Although this could have mitigated the retrospective implications in connection with certain aspects of *crimes against humanity* it was, however, less compelling in the context of *crimes against peace* and *conspiracy*.
- (vi) Where the 'offence' was intrinsically innovatory, no opportunity had ever arisen for any constitutional transposition into German domestic law. If individual responsibility for specific 'offences' had not acquired prior recognition within the municipal law of the Defendants' own State, then

issues of *locational* and *jurisdictional* retrospectivity,<sup>438</sup> therefore, emerged. *Locational* when the ‘offences’ were committed in Germany, in the absence of any prior recognition of the concept of individual responsibility for the specific ‘offences’ with which the defendants were arraigned;<sup>439</sup> *jurisdictional*, where individual responsibility was, for example, imported to the Defendants, for commission of ‘offences’ perpetrated upon German soil against other German nationals.

- (vii) In the context of *crimes against peace* and possibly also State-ordained *crimes against humanity* against entire races of peoples, the Defendant perhaps ought properly to have been the State, rather than its individual citizens. Where criminal liability was thus arbitrarily transposed from the State to the individual perpetrator, the retrospective connotations of the concept of individual responsibility were thereby compounded. Not only was the attribution of individual responsibility substantively retrospective; so also was the putative transfer of liability to individual Defendants for ‘offences’, more readily definable as State-decreed transgressions.

In the final analysis, international law historically governed the inter-relationship between sovereign States. On this premise, individuals were not bound by the dictates of international law. This classical theory of international law was highlighted in *Ex Parte Pinochet Ugarte*:<sup>440</sup>

‘This taught that states were the only actors on the international plane; the rights of individuals were not the subject of international law.’<sup>441</sup>

‘Apart from the law of piracy, the concept of personal liability under international law for international crimes is of comparatively modern growth. The traditional subjects of international law are states, not human beings. But consequent upon the war crimes trials after the 1939-1945 World War, the international community came to recognise that there could be criminal liability under international law for a class of crimes such as war crimes and crimes against humanity.’<sup>442</sup>

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<sup>438</sup> A further discussion of these terms appears at the end of this Chapter.

<sup>439</sup> The issue of *locational* retrospectivity in the context of individual responsibility was equally applicable to a situation where the Charter sought to ascribe personal accountability to the Defendants for ‘offences’ committed on *non-German* soil, for which individual responsibility had never been previously established under the relevant *lex loci*.

<sup>440</sup> *Regina v Bow Street Metropolitan Magistrate Ex Parte Pinochet Ugarte* [2000] 1 AC 147.

<sup>441</sup> *Ibid: per* Lord Millett.

<sup>442</sup> *Ibid: per* Lord Browne-Wilkinson.

The onus for any contrary assertion, therefore, surely rested with those who sought to ascribe personal accountability to the Defendants. Responsibility could be legitimately thrust upon such individuals, when ordained in Treaty obligations that were extant at the date of commission of the alleged ‘offence’. Even then, individuals would be deemed responsible for violation of such Treaties, only where the relevant provisions had been previously incorporated into the municipal law of the relevant State. Customary law also, perhaps, availed where the ‘offence’ was both of an intrinsically heinous nature *and* the act in issue had been established as criminally illegal prior to the date of commission of the alleged ‘offence’. Recourse could also possibly be made to principles germane to any comparable ‘offences’, for which personal accountability had been established. When seeking on the basis of analogy, however, to attribute individual responsibility for ‘offences’, innovatory in concept, application, or both, extreme caution had to be exercised.

This contentious issue of *individual responsibility* was to permeate the Nuremberg process, as did the central debate arising from the intrinsic nature of the ‘offences’ comprised within Article 6. In differing degrees, all were arguably imbued with variant shades of retrospectivity.<sup>443</sup> Discussed below are the unifying and divergent strands of the Allies’ reliance upon these ostensibly *ex post facto* elements of the Charter.

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<sup>443</sup> This is considered further towards the closing stages of this Chapter.

## 7. Articles 9 and 10: Organisational guilt

In the context of the substantive ‘offences’ comprised within the Charter, Article 6 was not the only problematical area. From the outset of the judicial process, the Allies had ruminated upon the practical devices available to dispose of vast swathes of former Nazis. On the scale envisaged, it was hardly feasible to establish *actus reus* and *mens rea* afresh at every future trial of each alleged ‘offender’. The Allies, therefore, conceived the notion of *organisational guilt* to address these inevitable logistical difficulties.<sup>444</sup> Opaquely expressed and plagued by retrospective implications, the salient provisions were located within Articles 9 and 10 of the Charter:

### Article 9

At the trial of any individual member of any group or organisation the tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organisation of which the individual member was a criminal organisation.

### Article 10

In cases where a group or organisation is declared criminal by the tribunal, the competent national authority of any signatory shall have the right to bring an individual to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned.

The indicted Groups included the Gestapo/SD, the SS, and the Leadership Corps of the Nazi Party, the General Staff and High Command of the Armed Services, the SA and the Reich Cabinet.<sup>445</sup> Findings of guilt were made against the former three accused organisations, whilst the remainder were exonerated. The Members held that the General Staff did not constitute a group within the definition stipulated in the Indictment. Further, the SA was found to have effectively ceased to function as a group after the Roehm purge of its leaders in 1934, whilst the Reich Cabinet had never ‘acted as a group’ after 1937. In any event, none of Hitler’s plans for the waging of aggressive war were proven to have occurred in the presence of the Cabinet.<sup>446</sup>

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<sup>444</sup> See *supra*: Doman ‘Political consequences of the Nuremberg Trial’, 81-90, for a sympathetic analysis of the notion of collective criminality.

<sup>445</sup> Articles 9 and 10 have been criticised also on the grounds that any potential Defendants tried by the Allied occupation Courts or any other Forum would effectively be criminalised for membership of organisations which had already been dissolved and which were therefore non-existent at the date of the Nuremberg Judgment.

<sup>446</sup> Judgment: 22 IMT 519.

Essentially, however, the notion of *organisational guilt* lacked legal foundation within international law. Compelling substantive precedent existed neither in relation to its conceptual basis nor the procedural elements upon which the ‘offence’ was predicated.<sup>447</sup> Nonetheless, the Prosecutors grasped elusively for an adequate doctrinal basis for the progeny they had conceived. To that end, the Tribunal was invited to accept that appropriate precedent was discoverable in various prior enactments, including the US Smith Act 1940, the British Seditious Acts 1817 and 1846, the British Public Order Act 1936 and the German Criminal Code 1871.<sup>448</sup> However, criminal illegality there was attributed to individuals on the basis of *membership* of certain undesirable groups, not by the designation as ‘illegal’ of the organisations themselves. In the context of the Charter, individual culpability was to be spelled out of the adjudged criminal nature of each Group as a discrete entity. To fortify the asserted validity of Article 9, the Prosecution also tentatively invoked customary law. On this point, Rudenko adverted to the fact that ‘*in Russia and other lands, membership in an organisation which has criminal aims makes an individual liable*’.<sup>449</sup>

The dearth of convincing legal foundation for Articles 9 and 10 impelled the Tribunal to seek recourse in the intrinsic validity of the Charter. No additional authority was deemed necessary. However, notwithstanding the professed unassailability of the Charter, the Members expressed considerable concern in relation to the entire *organisational guilt* issue. Pursuant to Law Number 10 of the Control Council of Germany, potential defendants were susceptible to capital punishment.<sup>450</sup> No further opportunity would be afforded them to make submissions upon the criminality of the

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<sup>447</sup> *Supra*: Schick ‘The Nuremberg Trial and the International Law of the Future’, 770, 787: ‘If consistently applied, this legal innovation would have permitted the trial and punishment of large population segments of any defeated nation. No doubt exists that the prevailing rules of international law did not confer upon the IMT such a vast jurisdiction’.

<sup>448</sup> Other precedent was supposedly found in the British India Act No. 30, enacted on 14<sup>th</sup> November 1836, section 1 of which provided: ‘It is hereby enacted that whoever shall be proved to have belonged either before or after the passing of this Act to any gang of thugs either within or without the territories of the East India Company shall be punished with imprisonment for life with hard labour.’

<sup>449</sup> Rudenko: 7 IMT 165. According to Jackson, ‘Soviet Russia punishes as a crime the formation of and membership in a criminal gang. Criminologists of the USSR call this crime the “crime of banditry,” a term appropriate to the German organisations’: *supra*: Robert H. Jackson *The Nuremberg Case*, 105.

<sup>450</sup> Law No. 10 regulated the organisation of prosecutions in the four zones of occupation designated to each of the Allied powers. It allowed occupation Courts to deploy a range of sentences including execution on simple proof that membership of a criminal organisation had been established. The US had enacted a denazification zone in their area which prescribed reduced penalties on proof of membership. The IMT ordained that Law No 10 be harmonised with the US provisions to mitigate the harshness of the sentence and decreed that no person be prosecuted under both regimes for the same offence thereby avoiding double jeopardy.

organisation of which they were alleged to have been members. Procedures did exist whereby, prior to the commencement of the Nuremberg Trial, notices were dispatched to categories of persons who were likely to be affected by Articles 9 and 10. However, in the chaos following the end of hostilities, it was never realistically envisaged that any interested parties would have the requisite knowledge or capacity either to attend the proceedings or avail themselves of legal representation.<sup>451</sup>

The procedural mechanisms integral to the application of the concept of *organisational guilt* were to evoke considerable consternation amongst the Members. Prior to delivery of Judgment, the Members wrestled at length with the prospective ramifications upon those whom, as a consequence of the Tribunal's decision, would be subsequently subject to the undiluted impact of the criminal law:

'This is a far-reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice. The Tribunal should make such declaration of criminality so far as possible in a manner to ensure that innocent persons will not be punished.'<sup>452</sup>

The Members were insistent that a solution be engineered. To that end, and despite their earlier emasculation of the *conspiracy* charge, they seized upon constituent elements of the 'offence' of conspiracy to address the issues posed by *organisational guilt*.<sup>453</sup> Ultimately, the US Alternate, Judge Parker, formulated a proposal whereby complicity in any of the convicted organisations would be deemed *analogous* to conspiracy. Membership alone would be inadequate to found liability. Guilt would instead rest on the notion of *co-operation for criminal purposes*, implicit within which were the dual

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<sup>451</sup> Jackson reported that 'the Tribunal sent out 200,000 printed notices of the fight to appear before it and defend. They were sent to allied prisoner of war and detention camps. The notice was published in all German-language papers and was repeatedly broadcast over the radio. The 45,000 persons who responded with applications to be heard came principally from about 15 prisoner of war camps and internment camps in British or US control': *supra*: Jackson *The Nuremberg Case*, 115. Notably however, he concludes that, 'examination of the applications made to the Tribunal indicates that most members do not profess to have evidence on the general issue triable here. They assent that the writer has neither committed, witnessed, nor known of the crimes charged against the organisation. On a proper definition of the issues, such an application is insufficient on its face': *ibid*: 116.

<sup>452</sup> Judgment: 22 IMT 500.

<sup>453</sup> Jackson did not share the reservations of the IMT in relation to organisational guilt. He claimed that 'as to trials of individual members, the Charter denies only one of the possible defences of an accused: he may not re-litigate the question whether the organisation itself was a criminal one. Nothing precludes him from denying that his participation was voluntary and proving he acted under duress. The membership which the Charter and the Control Council make criminal implies a genuine membership involving the volition of the member:' *supra*: Jackson *The Nuremberg Case*, 102. This sanguine view was not favoured by the Tribunal and hence the strenuous efforts made by the Members to mitigate the severity of Articles 9 and 10 which they otherwise perceived to exist.

requisites of *knowledge* of the criminal purposes of the Group and *voluntary* involvement with the organisation.<sup>454</sup> This excluded any persons acting either in ignorance of the Group ethos and activities *and/or* under duress. The burden of proof for satisfying these twin criteria was firmly vested in the Prosecution, such that the practical likelihood of future criminal trials arising from membership in the convicted organisations diminished, almost to vanishing point. Evidential problems inherent in establishing that the accused had neither been conscripted into the relevant Group, nor possessed the necessary awareness of the Organisation's criminal objectives, effectively rendered impracticable any further judicial process. The IMT thus determined that '*membership alone was not enough to come within the scope of these declarations*':<sup>455</sup>

'Given this situation, it is difficult to fault the general organisational opinion that the Court wrote or the specific organisational findings. As was revealed on the conspiracy issue, the court performed most effectively when coping with complex and practical problems. When it entered the realm of abstract legal theory as it did on the general question of the criminality of aggressive war, the results were disappointing.'<sup>456</sup>

The Members further circumscribed the extent of Articles 9 and 10 by stipulating that no individual was to be held liable in respect of *pre-war membership*. The defining date stipulated for this purpose was 1<sup>st</sup> September 1939:

'Only a handful of individuals were convicted solely on the ground of criminal organisation membership in the twelve subsequent trials (at Nuremberg ) and even the denazification proceedings merely made a perfunctory pass at group prosecution. This limiting and mitigating influence of the Nuremberg bench was largely the result of the judges' desire to perform like a real court.'<sup>457</sup>

By this delimitation of organisational criminality,<sup>458</sup> the Tribunal contrived to ensure that no injustice would flow from the usage of *ex post facto* legislation. The Members decreed that the doctrine could be legitimately circumvented, only when no

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<sup>454</sup> The Russian Member Nikitchenko dissented from the decision to exonerate the SA, Reich Cabinet and General Staff and objected to the curtailment of the scope of organisational criminality.

<sup>455</sup> Judgment: 22 IMT 500.

<sup>456</sup> *Supra*: Smith *Reaching Judgment at Nuremberg*, 170.

<sup>457</sup> *Ibid*: 304.

<sup>458</sup> By this departure from the provisions of the Charter, it is arguable that the Tribunal's decision in this regard did, *prima facie*, have the force of binding judicial precedent in establishing a new rule of law, although this contention is simultaneously undermined by the *ad hoc* nature of the IMT. Likewise, it betrays an inconsistency in the rationale of the Tribunal, in terms of the professed inviolability of the Charter: 'it would appear that this dictum (*the delimitation of Articles 9 and 10*) implies a rejection of the principles incorporated in the Charter, principles which had been proclaimed to be declaratory of international law': *supra*: Schick 'The Nuremberg Trial and The International Law Of the Future', 770, 788.

consequential inequity *would* ensue.<sup>459</sup> This reinforced their earlier assertion that the maxim, ‘*nullum crimen et nulla poena sine lege*’ was predicated upon standards of fairness and justice.<sup>460</sup> By inference, this served to preclude the utilisation of retrospective criminal law whenever *injustice* would be propagated.<sup>461</sup>

Nonetheless, this did not mask the innovatory aspects of Articles 9 and 10:

- (i) The indicted organisations had ceased to exist at the date of the Nuremberg proceedings. Nonetheless, with the objective of criminalising the entire membership, the Charter had magically authorised the revival of six Groups whom the Allies wished to condemn.<sup>462</sup> This was akin to raising an individual defendant from the grave and trying his spirit. Application of the criminal law in such circumstances had no precedent in international law. Justification for the imposition of punitive sanctions against a wrongdoer was usually deemed to lie in punishment *per se* of the perpetrator, combined with the deterrent effect upon other potential offenders and the protection of the public interest. Where the defendant predeceased his intended criminal

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<sup>459</sup> Judgment: 22 IMT 462.

<sup>460</sup> Judgment: 22 IMT 462.

<sup>461</sup> Interestingly, the French version of the Judgment does not even allude to ‘justice’, the English translation of this being: ‘*Nullum crimen sine lege* does not limit the sovereignty of states; it only formulates a rule that is generally followed’. This stance was adopted and extended still further by the Dutch member of the Tokyo War crimes Tribunal, Bernard Roling, who rejected the view that the embargo on the use of ex post facto law was a principle of justice on the grounds that if that had been the case, many aspects of the Charter would have been susceptible to exclusion on the grounds of retroactivity. This was because it was the first duty of the Tribunal to mete out justice and if the principle of legality was founded on this selfsame precept, then the Tribunal could not possibly have countenanced the retrospective deployment of criminal sanctions. Roling, therefore, considered that the maxim, ‘*nullum crimen*’ was instead merely a rule of policy, valid only if expressly adopted and capable of being disregarded at the will of the Tribunal. The discrepancy between the English language and French language versions of the Tribunal is possibly attributable to the somewhat vague treatment of the maxim by the IMT at Nuremberg. On the above, see *supra*: Gallant *The Principle of Legality in International and Comparative Law*, 2-3.

<sup>462</sup> In his compilation of speeches in relation to the trial process, Jackson sought to draw a distinction between a *trial* of the organisations (which he stated was impossible because the Charter only conferred the right to try individuals) and a mere *declaration* that the organisations were criminal: *supra*: Jackson *The Nuremberg Case*, 101. This, in his view dispensed with the need for the entities to be served with process (this was highly convenient to the Allies since it would hardly have been possible to effect service upon a defunct group). Jackson also stressed that the Charter did not empower the IMT to impose sentence upon the organisations as entities, nor to convict any person because of membership. However, this was a distinction (between trial and declaration) without a difference. The fact remained that members of a Group declared criminally illegal by the Tribunal were thereafter susceptible to trial and punishment, just as effectively as had the Group been convicted by the IMT. Jackson sought to palliate the harshness of Articles 9 and 10 by observing that the competent national authorities ‘*shall have the right to bring individuals for trial for membership therein.*’ The Charter ‘does not *require* subsequent proceedings against anyone’.

trial, he was thereby placed beyond either punishment or risk of endangerment to innocent bystanders. Yet, the six organisations subjected to trial had been disbanded in the immediate aftermath of the War. Indicted pursuant to the authority conferred upon the IMT by Article 9, they were, by then, not only elusive but non-existent.

- (ii) Article 10 enabled the Tribunal to brand as criminal an entire group or organisation. Implicit within this provision was the pre-existence of such organisation as a separate and distinct legal entity. However, the Prosecution was unable to adduce supportive precedent for the contention that individuals, grouped together under a collective name or ethos, were suddenly transformed into a quasi-corporate body. The feasibility of this transition was simply assumed.
- (iii) With the exception of the need for a single representative defendant present during the Trial, declarations of criminalisation against specified organisations could be, and were made in the absence of other individuals formerly comprising their membership; namely those same individuals who would subsequently face prosecution and execution on proof of *mere membership*. The procedural mechanisms underpinning the ‘offence’ of *organisational guilt* were without precedent in international law
- (iv) Articles 9 and 10 provided that, in future criminal proceedings, the accused would be debarred from challenging prior findings of guilt against organisations, of which they had purportedly been associated. They would be effectively estopped from raising issues pivotal to their ultimate judicial disposition. Once mere membership was established, they would be potentially subject to the death penalty. No mechanism existed by which they could adduce evidence as to their motivation for joining the relevant organisation. It was irrelevant whether they had been conscripted or the extent to which they had been subjected to prior political indoctrination. Procedurally without precedent in international law, the potential consequences of Article 10 were, in practice, instrumental in informing the Members’ decision to import additional criteria, as essential pre-requisites to the subsequent conviction of any individual member.
- (v) The *concept* of organisational guilt was in itself novel. It was previously a recognised ‘offence’ in some jurisdictions to participate as a member in

specified organisations. However, never before had it been established that adjudication of guilt against a specified organisation would render its individual members similarly culpable.

- (vi) Implicit within Article 10 of the Charter was the irrelevance of *mens rea* for the attribution of individual liability; this effectively connoted imposition of strict liability for a *capital* criminal ‘offence’. Guilt without intent, in such circumstances, was draconian in the extreme and without precedent in international law.<sup>463</sup> It also seemingly contravened the ‘standards of justice recognised by civilised nations’, if indeed this concept, so favoured by the Allies, were conceded to exist. On this point, therefore, the Prosecution was effectively a victim of its own rhetoric. Ironically, however, the regime prevailing within National Socialist Germany during the period when the indicted organisations existed, embraced the imposition of punishment without trial; of executive interference in the judicial process; of arbitrary use of the death penalty. In service of their nefarious ends, the Nazis had also harnessed the twin concepts of guilt by analogy and retrospective punishment for offences never previously accorded criminal status.<sup>464</sup> More than a vestige of hypocrisy, therefore, pervaded any contention that the Defendants were contemporaneously unable to envision similarly obscene perversions of the Rule of Law. However, this hardly served as vindication of the provisions of the Charter. Duplication of arbitrary and capricious means arguably exacerbated, rather than excused the invidious nature of any devices sanitised beneath a facade of purported ‘legality’.
- (vii) The Members mitigated the severity of *organisational guilt* by introducing the dual pre-requisites of knowledge and voluntary involvement. The *ex post facto* implications of Articles 9 and 10 were thus curtailed. Yet, in the absence of this intervention, the Allies would have entertained no compunction in utilising provisions, arguably abounding in retrospective

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<sup>463</sup> This argument was strenuously countered by Jackson, ‘some concern has been expressed as to the number of persons who might be affected by the declarations of criminality we have asked. Some people seem more susceptible to the shock of a million punishments than to the shock of five (sic) million murders. At most the number of punishments will never catch up with the number of crimes’: *supra*: Jackson *The Nuremberg Case*, 117.

<sup>464</sup> Reichgesetzblatt 1935, 839.

elements. The ultimate lack of fulfilment of their original objective in relation to organisational guilt owed nothing to any obligation, on their part, to conform either to prior substantive precedent or any sense of moral rectitude. Due only to the Members' intolerance of the injustice which would surely have ensued had the 'offence' of *organisational guilt* remained unmodified, were the *ex post facto* aspects of Articles 9 and 10 partially unrealised.

In its ultimate metamorphosis, the concept of *organisational guilt* was stripped of the menace which the Defendants had possibly conjectured at the outset of the proceedings. However, this could scarcely expunge the memory of the Allies' pragmatic readiness to have resort to every utilitarian device at their disposal. To this end, they had designed Articles 9 and 10 of the Charter to secure the maximum number of future convictions with optimal despatch. Seemingly geared towards efficacy rather than conformity with substantive legal precedent, *organisational guilt* was again born of a prosecution strategy, ostensibly dependent upon *ex post facto* utilisation of the criminal law.

## 8. The aftermath of the Trial

Scarcely had the dust settled on the Proceedings, when the impact of the Tribunal's Judgment<sup>465</sup> upon the prospective evolution of international law started to exercise the minds of those responsible for the crystallisation of the Nuremberg principles.<sup>466</sup> It remains an issue of debate whether developments subsequent to the Trial derive from the *legislative* instrument constituted by the Charter or the *Judgment* itself. This latter possibility Kelsen, for example, discounts on the basis that the general findings of the Tribunal failed to establish a new Rule of Law.<sup>467</sup> Rather they were entirely parasitic in concept and application upon the Charter that gave it birth.

In any event, on 11<sup>th</sup> December 1946, the United Nations General Assembly adopted Resolution 95 (1) entitled, 'Affirmation of the Principles of International Law Recognised by the Charter of The Nuremberg Tribunal.'<sup>468</sup> Such terminology was clearly designed to endorse the intrinsic legality of the Charter, whilst the contents of the Resolution affirmed the points of law enunciated during the Trial:<sup>469</sup>

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<sup>465</sup> The Judgment was delivered on 30<sup>th</sup> September and 1<sup>st</sup> October 1946.

<sup>466</sup> The ensuing twelve Nuremberg Tribunals essentially confirmed the principles and doctrine established at the Trial of the Major War Criminals. War Crimes Trials also occurred in Tokyo for which 28 Defendants were indicted, 2 dying during the trial and 1 being unable to plead. 23 Defendants were convicted of conspiring to wage aggressive war and 12 were convicted of offences arising from violations of the laws regulating the actual conduct of war. The Tribunal at Tokyo held that the maxim *nullum crimen sine lege* was a principle of justice and could thus be disregarded where the outcome of the trial was objectively equitable. Justice Pal in his dissenting opinion commented that the crime of waging aggressive war did indeed constitute *ex post facto* legislation whilst Justice Roling stated that crimes against peace had no real place within the legal realm but were more properly punishable on the grounds of political expediency with the objective of preserving world peace: *Judgment of the International Military Tribunal for the Far East November* (1948).

<sup>467</sup> *Supra*: Kelsen 'Will the Judgment in the Nuremberg Trial constitute a precedent in international law?', 153-154. He does, however, draw a distinction between the *general* findings of the IMT which he argues were entirely derived from the Charter as opposed to the decision in relation to *organisational guilt* which *prima facie* were capable of constituting valid judicial precedent on the basis that there was some degree of originality on the part of the Tribunal. Kelsen also highlights the point that the Charter possessed legislative force only in so far as related to the founding of the International Military Tribunal on an 'ad hoc' basis. Article 7 of the London Agreement to which the Charter was appended ordained that the Agreement would remain in force for the period of one year and should continue thereafter subject to the right of any of the signatories to terminate it by giving one month's notice.

<sup>468</sup> G.A.Res, 95 1<sup>st</sup> Session 1144; U.N. Doc. A/236 (1946).

<sup>469</sup> Malcolm Shaw *International Law 5<sup>th</sup> Edition* (Cambridge: Cambridge University Press, 2003), 235, 'The provisions of the Nuremberg Charter can now be regarded as part of international law'. The concept of the illegality of aggressive war was accepted by the United Nations Charter, Article 2 (4) of which decreed that all member states must refrain from the threat or use of force against the territorial integrity or political independence of any state. Force was however considered legitimate if exercised in self-defence.

‘Although there may be legitimate doubts as to the legality of the Nuremberg Charter, in my judgment, those doubts were stilled by the Affirmation of the Principles of International Law *Recognised* by the Charter of The Nuremberg Tribunal. That affirmed the principles of international law recognised by the Charter and the judgment of the Tribunal and directed the committee on the codification of international law to treat as a matter of primary importance plans for the formulation of the principles recognised in the Charter.’<sup>470</sup>

The Assembly also declared that under international law, *genocide* was an offence bearing individual responsibility. In June 1947, the Assembly Committee on the Progressive Development of International Law and its Codification published its Report, containing a recommendation that the International Law Commission prepare a Code to incorporate the Nuremberg principles. Accepted by the United Nations General Assembly by Resolution 177(ii) in November 1947, the UN ultimately adopted the following text on 12<sup>th</sup> December 1950.<sup>471</sup>

#### Principle 1

Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

#### Principle 2

The fact that internal law does not impose a penalty for an act which is an international crime does not relieve the person who committed the act from responsibility under international law.

#### Principle 3

The fact that a person who committed an act which constitutes a crime under international law acted as *Head of State* or responsible government official *does not relieve him from responsibility* under international law.

#### Principle 4

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law *provided a moral choice was in fact possible to him*.

#### Principle 5

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

#### Principle 6

The crimes hereinafter set out are punishable as crimes under international law:

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<sup>470</sup> *Regina v Bow Street Metropolitan Magistrate Ex Parte Pinochet Ugarte* [2000] 1 AC 147 *per* Lord Browne Wilkinson.

<sup>471</sup> International Law Commission available online at: <<http://www.un.org/law/ilc/texts/nurnberg.htm>>

(a) Crimes against peace:

- (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
- (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

(b) War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment 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, of 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:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on *in execution of or in connection with any crime against peace or any war crime*

Principle 7

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

On 10<sup>th</sup> December 1948, the UN General Assembly approved the Universal Declaration of Human Rights.<sup>472</sup> This incorporated the various liberties and rights violated by the Nazis convicted at Nuremberg. On the preceding day, the Assembly had also sanctioned the Convention on the Prevention and Punishment of the Crime of Genocide. This measure codified and extended the notion of *crimes against humanity* that the Defence at Nuremberg had condemned as innovatory just three years earlier.<sup>473</sup> On 5<sup>th</sup> December 1954, the General Assembly of the UN, at its sixth session, debated the text of a draft Code of Offences against the Peace and Security of Mankind.<sup>474</sup> This sought to recognise the offences that had formed the core of the Charter and to criminalise many acts which were not thus designated under the Nuremberg principles. The provisions of Articles 7 and 8 of the Charter were respectively preserved by Articles 3 and 4<sup>475</sup> of the 1954 Code of Offences and the concept of conspiracy was restated in Article 2 (13).

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<sup>472</sup> Doc. A/810 (Third Session of the General Assembly)

<sup>473</sup> Resolution 260 III

<sup>474</sup> International Law Commission: available online at: < <http://www.un.org/law/ilc/texts/offences.htm>>

<sup>475</sup> By way of qualification however, Article 4 did also provide that obedience to a superior order would not relieve the perpetrator of responsibility if in the circumstances it was possible for him not to comply with the order, thereby ratifying the Judgment of the IMT insofar as the issue of 'choice' was concerned. This corresponded with the provisions of Principle 4 of the Resolution adopted by the UN in 1950 as previously mentioned.

Underpinned by the stipulation that the offences defined in the Code ‘*are crimes under international law for which the responsible individuals shall be punished*’, the Code obviated the potential difficulties of interpretation or application of the type which had trailed in the wake of the Kellogg-Briand Pact.

A further Draft Code of Crimes against the Peace and Security of Mankind was submitted to the forty-eighth session of the United Nations in 1996.<sup>476</sup> Article 2 ordained that the ‘offences’ enumerated within the Code were crimes under international law, punishable irrespective of the national law of the alleged perpetrator.<sup>477</sup> The laws of municipal regimes were thus explicitly subordinated to the provisions of international law.<sup>478</sup>

In light of the controversy arising during the Nuremberg Trial in relation to the legal legitimacy of the Charter and the purported violation of the maxim ‘*nullum crimen sine lege, nulla poena sine lege*’, Article 13 (1) of the 1996 Code is, perhaps, deserving of particular mention.<sup>479</sup> Standing as a tangible reflection of the unequivocal will of the international community, this provision endorsed in legislative form the validity and universal application of the *nullum crimen* principle:

‘No one shall be convicted under the present Code for acts committed before its entry into force.’<sup>480</sup>

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<sup>476</sup> International Law Commission: available online at: <http://www.un.org/law/ilc/texts/dcode.htm>

<sup>477</sup> Crimes of aggression, the crime of genocide, war crimes and crimes against humanity, the principles of conspiracy and individual responsibility were again afforded full recognition. It was also ordained that the fact that an individual may be deemed responsible for the crimes in question would not affect the issue of state responsibility.

<sup>478</sup> Article 5 of the 1996 Code provides that the obedience to superior orders does not relieve the perpetrator of criminal responsibility but may be considered in mitigation of punishment whilst Article 7 provides that the doctrine of ‘acts of state’ neither relieves the perpetrator of criminal responsibility nor mitigates punishment. There is no mention in Article 5 as to any modification of the situation where the perpetrator did not have a choice whether or not to obey the order unlike the provisions of Principle 4 of the 1950 Principles which refer to a ‘moral choice’ and Article 4 of the 1954 Code in which it is implicit that the perpetrator may be relieved of criminal responsibility where it was not possible for him to disobey the order which he followed. Article 5 of the 1996 Code thus represents a reversion to the provisions of Article 8 of the Charter annexed to the London Agreement 1945.

<sup>479</sup> Article 13 (1) of the 1996 Code echoed the provisions of Article 11 (2) of the Universal Declaration of Human Rights 1948: Article 11 (2) of the Universal Declaration of Human Rights 1948: ‘No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence under national or international law at a time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.’

<sup>480</sup> Commentary of the International Law Commission upon Article 13 (1), ‘The fundamental purpose of criminal law is to prohibit to punish and to deter conduct which is considered to be of a sufficiently serious nature to justify the characterization of an act or omission as a crime. This law provides a standard

This trend towards repudiation of retrospective criminal law in the international arena was cemented by Articles 22 to 24 of the Rome Statute for the International Criminal Court.<sup>481</sup> This became operative on 1<sup>st</sup> July 2002, since when it has been unequivocal that guilt by analogy is impermissible and that any doubt must be resolved in favour of the alleged offender. Further, no person shall be criminally responsible for conduct that was not a 'crime' within the jurisdiction of the Court *at the date* when perpetrated. Similarly, punishment may only be dispensed in accordance within the strictures of the Statute.

The process instigated at Nuremberg, as reinforced by the subsequent gradual progression in the development of international law, suggests that:

- (i) The Charter sought to introduce various novel 'offences'.
- (ii) The Charter nullified previously established 'defences'.
- (iii) On the international stage, the substantive 'offences' incorporated in the Charter attracted widespread approbation, as did the nullification of the defences of 'acts of state' and 'superior orders'.

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of conduct to guide the subsequent behaviour of individuals. It would clearly be unreasonable to determine the lawfulness of the conduct of an individual based on a standard that was not in existence at the time the individual decided to pursue a particular course of action or to refrain from taking any action. The prosecution and punishment of an individual for an act or omission that was not prohibited when the individual decided to act or to refrain from acting would be manifestly unjust. The prohibition of the retroactive application of criminal law is reflected in the principle *nullum crimen sine lege*. This principle has been embodied in a number of international instruments, such as the Universal Declaration of Human Rights (article 11 (2)), the International Covenant on Civil and Political Rights (article 15 (1)), the European Convention on Human Rights (article 7 (1)), the American Convention on Human Rights (article 9) and the African Charter on Human and Peoples' Rights (article 7 (2)). The principle of the non-retroactivity of criminal law is recognized with respect to the present Code in article 13. This principle would be violated if the Code were to be applied to crimes committed before its entry into force. Paragraph 1 is intended to avoid any violation of the principle by limiting the application of the Code to acts committed after its entry into force. It would therefore not be permissible to try and possibly convict an individual for a crime "under the present Code" as a consequence of an act committed "before its entry into force." However, it is noteworthy that in *SW and CR v United Kingdom* [1995] 21 EHRR 363, the European Court, in interpreting Article 7 of the European Convention of Human Rights, held that: 'Article 7 (1) excludes that any acts not previously punishable should be held by the courts to entail criminal liability or that existing offences should be extended to cover facts which previously did not clearly constitute a criminal offence. It is however compatible with the requirements of Article 7 (1) for the existing elements of an offence to be clarified or adapted to new circumstances or developments in society in so far as this can reasonably be brought within the original concept of the offence. The constituent elements of the offence may not, however, be essentially changed to the detriment of the accused and any progressive development by way of interpretation must be reasonably foreseeable to him with the assistance of appropriate legal advice, if necessary'; [1995] 21 EHRR 363, 390.

<sup>481</sup>This is available online: [http://www.icccpi.int/library/about/officialjournal/Rome\\_Statute\\_English.pdf](http://www.icccpi.int/library/about/officialjournal/Rome_Statute_English.pdf).

- (iv) In contrast, imposition of *ex post facto* punishment was viewed with opprobrium. Indeed, as early as 1948, such disapproval was enshrined within Article 11 (2) of the Universal Declaration of Human Rights:

‘No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence under national or international law at a time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.’

- (v) The attitude of the international community since the end of the Second World War evidenced some lack of consistency in approach. On the one hand, a pragmatic willingness to exploit the impetus generated by the Trial; on the other, a rekindled desire to reaffirm the unacceptability of retrospectively applied criminal law. Substantive ‘offences’, owing their provenance to the Nuremberg Charter, were embraced. By implication, therefore, so was the utilisation of the *ex post facto* provisions arguably intrinsic to the provisions of the Charter. Yet, in contrast, only two years following the conclusion of the Trial, Article 11 (2) of the Universal Declaration of Human Rights explicitly rejected the use of *post factum* penal provisions. The constituent members of the United Nations either failed to detect the inherent irony in their position or, perhaps, felt that, in the interests of ‘justice’ the risk of exposure was a price that they were minded to pay.<sup>483</sup>

Utilised in arenas as diverse as Yugoslavia<sup>484</sup> and Rwanda,<sup>485</sup> the post-war codification of international law in the sphere of *war crimes, crimes against humanity and the waging of aggressive war*, has been such that the spectre of the retroactive application of *international* criminal law may never again arise to trouble

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<sup>483</sup> On this point see *supra*: Gallant *The Principle of Legality in International and Comparative Law*, 355: ‘Any failure to enforce the core principles of legality at Nuremberg, Tokyo and other post-World War II tribunals (as by the arguably retroactive creation of crimes against humanity) has been decisively rejected by state and international organisation practice and *opinio juris* since then. However, the substantive criminal law made in those tribunals, particularly the law of crimes against humanity, has been accepted as legitimate for use in the process of creating international criminal law’.

<sup>484</sup> The UN Security Council adopted Resolution 808 (1993) providing for the establishment of an International Tribunal to prosecute those responsible for violating international humanitarian law in Yugoslavia since 1991. An International Tribunal was subsequently established.

<sup>485</sup> The UN Security Council adopted Resolution 955 (1994) to establish an International Tribunal to prosecute those responsible for humanitarian atrocities, committed in Rwanda and neighbouring territories between 1<sup>st</sup> January 1994 and 31<sup>st</sup> December 1994. An International Tribunal was subsequently established.

the minds of legal theorists. Arguably, without the catalyst afforded by the Nuremberg Trials no mechanism would have existed by which international law would have evolved to meet the exigencies of legal issues inherent in human catastrophes, such as 'ethnic cleansing'. In contrast, it is also feasible that in the absence of the 'Nazi War Crimes Trials', there would still have arisen subsequent occasions in which the architects of international law would have been prevailed upon to address lacunae within the legal code. Presumably, therefore, legislative provisions would, in any event, have been eventually enacted to exact justice against those responsible for the commission of humanitarian atrocities.

However, what is less clear is the extent to which, in the absence of the Holocaust, the international community would have been prepared to resort to the introduction of *ex post facto* legislation. The enormity of the carnage perpetrated by the Nazis arguably impelled the Allies to act in a precipitate manner. This was manifested, not specifically in relation to their adoption *per se* of a process of judicial disposition but rather by the zeal with which they were to embrace and implement retrospective legislation. Had international law not suddenly been galvanised by the backwash of the Second World War, the development of appropriate devices to regulate human behaviour both on the world stage and in the domestic arena, could perhaps have proceeded in a more measured fashion. Innovatory legislative provisions, incorporating elements of retribution and dissuasion, would have aspired to curb abominations only with *prospective* effect. Their purport would have been confined to violations occurring later in time. On this premise, it would have proved a simple task to dispel imputations in relation to the utilisation of *ex post facto* law.

## 9. The dilemmas posed by the Nuremberg proceedings

The principles, enunciated at Nuremberg, have found vindication in the growth and development of international law since 1945.<sup>486</sup> Nonetheless, there remains a host of unanswered questions which strike at the very heart of the objective ideals of law and justice:

- On the basis that the Nazis were responsible for the perpetration of genocide and atrocities on a scale which the world had never previously witnessed and for which international law was then ill-equipped to deal, were the Allies justified in formulating a partially innovatory code of offences? Was it, thereby, acceptable to indict and convict the Defendants, in the interests of producing an incontrovertible and enduring memorial to their victims, whom they had exterminated, massacred and tortured without clemency?
- The Nazis were vilified both for their repeal of the Weimar prohibition against *retrospectivity* and their adherence to a regime wherein the Rule of Law was obliterated. Scrutiny of pre-established substantive precedent appears to yield the conclusion that the Charter did indeed constitute *ex post facto* legislation. On such premise, were not the Allies at Nuremberg culpable of a similar exploitation of law to facilitate their preconceived objective of securing the convictions of the Defendants with the minimum degree of risk? This encapsulates the raw dilemma between a perceived need to attain pre-ordained *objectives*, regardless of the validity of the process *and* the legitimacy of the *methods* utilised to achieve those aims.
- Though the legal impregnability of the proceedings provided the Allies' unifying theme, examination of the respective stances adopted by the Prosecutors yielded some degree of diversity in their individual approaches:

- (i) The Charter was binding and unassailable.<sup>487</sup>

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<sup>486</sup> In 1994, a draft Statute for an International Criminal Court was accepted by the International Law Commission: Report of the ILC on the Work of its 46<sup>th</sup> Session, A/49/10. The Statute establishing the International Criminal Court came into force on 1<sup>st</sup> July 2002, its jurisdiction being confined to 'the most serious crimes of concern to the international community as a whole' namely genocide, crimes against humanity, war crimes and aggression with individual responsibility being imposed for transgressions of the provisions of the Statute.

<sup>487</sup> Rudenko: 7 IMT 147, 'the Charter of the Tribunal is in force and in operation and all its provisions possess absolute and binding force'.

- (ii) The Charter merely addressed imperfections in the international penal machinery under which there had previously been no court competent to pronounce judgment for breaches of the criminal law.<sup>488</sup>

‘Rejecting the classical legal positivist’s characterisation of law in terms of the power to impose sanctions and interpreting the pre-existing norms as legal obligations, the prosecution granted only that the Charter may be in breach of the *nulla poena* rule. And, as it happened, this was an innocuous concession, for the prosecution (and the Tribunal) refused on both moral and international legal grounds to recognise the *nulla poena* rule. More generally, what for the prosecution was merely the addition of sanctions to pre-existing law was for the positivist minded defence counsel the enactment of new law. And what would have been for the prosecution merely a violation of the *nulla poena* rule (had the prosecution been minded to accept such a rule) was for the positivist-minded defence counsel a violation of the *nullum crimen* rule.’<sup>489</sup>

- (iii) The Defendants were forewarned throughout the War of the potential implications of their transgressions despite which there was no amelioration of their misdeeds. They were accordingly unable to assert that they were ignorant either of the ‘criminal’ nature of their actions or the likelihood of appropriate punitive sanctions being exacted.<sup>490</sup> Some two years later, the Tribunal in *United States of America v Alstoetter et al.*<sup>491</sup> similarly emphasized the purported significance of the warnings accorded to the Nazis. It was deemed crucial that ‘*notice of intent to punish had been repeatedly given by the only means possible in international affairs, namely, the solemn warning of the governments of the States at war with Germany*’.<sup>492</sup>
- (iv) The Charter was not innovatory but declaratory of pre-existing international law discoverable both in positive legal provisions and law based upon custom and practice.<sup>493</sup>

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<sup>488</sup> Shawcross: 3 IMT 106.

<sup>489</sup> *Supra*: Paulson ‘Classical Legal Positivism at Nuremberg’, 132-158, 155.

<sup>490</sup> De Menthon: 5 IMT 414. However, even if this were a valid argument for example in relation to war crimes and perhaps also to crimes against humanity, those warnings neither related to crimes against peace nor to conspiracy to wage wars of aggression.

<sup>491</sup> ‘The Justice Case’ [1948] 3 T.W.C. 1.

<sup>492</sup> ‘The Justice Case’ [1948] 3 T.W.C. 1.

<sup>493</sup> De Menthon: 5 IMT 388; Shawcross: 3 IMT 93, ‘for, just as in the experience of our country, some old English statutes were merely declaratory of the common law, so today, this Statute merely declares and creates a jurisdiction in respect of what was already the law of nations.’ Rudenko: 19 IMT 575. ‘The principles of criminal law contained in the Charter are the expression of the principles contained in a number of international agreements and in the criminal law of all civilised countries’.

- (v) Even in the absence of any such codified or customary law, the process was sustainable on the basis that the Defendants had ‘*offended the conscience of our people*’,<sup>494</sup> was ‘*an international crime before the conscience of humanity*’,<sup>495</sup> or violated ‘*traditions of fairness*’,<sup>496</sup> and ‘*the moral sense of mankind*’.<sup>497</sup> On this view, the validity of the Charter was unable to be impugned since it was suffused with a transcendent moral imperative, by which the entire process was readily capable of vindication.<sup>498</sup>

This baton of ethical rectitude was also grasped by the Tribunal in *United States of America v Alstoetter et al.*<sup>499</sup> It was there adjudged that no infringement of the desired standards of justice would be perpetrated, provided that proof was available ‘*that the accused knew or should have known that he was guilty of participation in a nationally organised system of injustice and persecution shocking to the moral sense of mankind*’.<sup>500</sup>

- (vi) On the rare occasions where the issue of retrospective criminalisation was squarely confronted, it was variously dismissed on grounds including:
- (a) ‘*We proclaim it (namely the rejection of the argument that the Defendants were being tried pursuant to ex post facto legislation) to be most fully consistent with that higher justice which in the practice of civilised states has set a limit on the retrospective operation of*

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<sup>494</sup> Jackson’s *Report to the President on Atrocities and War Crimes*, 7<sup>th</sup> June 1945: available online at <<<http://www.yale.edu/lawweb/avalon/imt/jack01.htm>>>

<sup>495</sup> De Menthon: 5 IMT 588.

<sup>496</sup> Jackson’s *Report to the President on Atrocities and War Crimes*, 7<sup>th</sup> June 1945: available online at <<<http://www.yale.edu/lawweb/avalon/imt/jack01.htm>>>

<sup>497</sup> Jackson: 2 IMT 155, ‘The refuge of the defendants can be only their hope that international law will lag so far behind the moral sense of mankind that conduct which is crime in the moral sense must be regarded as innocent in law’.

<sup>498</sup> See *supra*: Biddiss ‘The Nuremberg Trial: Two Exercises in Judgment’, *Journal of Contemporary History*, Vol.16, No.3, (July, 1981), 597-615, 611: ‘But deeper still, animating the court’s aspirations to avert further catastrophe, lay the natural law sentiments which Lawrence allows us to glimpse in sentiments such as this: “Just as International Law should have supremacy over national law, so the law of God, the law of right and wrong, or of conscience, or whatever, you choose to call it, should have supremacy over both”.’

<sup>499</sup> ‘The Justice Case’ [1948] 3 T.W.C. 1

<sup>500</sup> ‘The Justice Case’ [1948] 3 T.W.C. 1.

laws'.<sup>501</sup> In essence, the maxim *nullum crimen, nulla poena sine lege* is predicated upon the moral imperative of 'justice'; the doctrine may therefore be set aside in the furtherance of the greater good of mankind:

'Morality and justice have slowly but surely taken shape and been incorporated in the international customs of civilised nations.'<sup>502</sup>

In short, it would have constituted a monumental injustice had we not conceived and implemented this prosecution.<sup>503</sup> This, by far, outweighs any possible repercussions that emanate from lack of adherence to any purported embargo upon the deployment of retrospective criminal legislation. It may be the case that the maxim: '*nullum crimen*' is acknowledged throughout the civilised world as a principle of justice but what we are seeking to achieve before this Tribunal takes precedence over any other consideration, whether moral or legalistic in foundation

- (b) '*International law grows as did the common law through decisions reached from time to time in adapting settled principles to meet novel situations. Hence, I am not disturbed by the lack of precedent for the inquiry we propose to conduct.*'<sup>504</sup> It is irrelevant that we have not endeavoured to elucidate the term '*settled principles*'. It is the very fact that those principles are firmly established that renders superfluous any additional explanation.<sup>505</sup>
- (c) As a consequence of their own reliance upon retrospective legislation, the Defendants cannot be heard to complain if the Charter evinces similar deficiencies. No situation will be countenanced in which they seek to avail themselves of the same type of legal safeguards which in facilitation of their own regime of oppression

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<sup>501</sup> Shawcross: 3 IMT 106.

<sup>502</sup> Champetier de Ribes (Chief Prosecutor for France at the conclusion of the Trial): 19 IMT 534

<sup>503</sup> This was a common thread running through Jackson's approach to the proceedings.

<sup>504</sup> Jackson's *Report to the President on Atrocities and War Crimes*; 7<sup>th</sup> June 1945: available online at <<<http://www.yale.edu/lawweb/avalon/imt/jack01.htm>>> Jackson 2 IMT 147.

<sup>505</sup> In Jackson's rhetoric, there is clear evidence of conflation of two different issues, that is, precedent as to fact and precedent as to law.

and subjugation they blatantly and persistently flouted.<sup>506</sup> This type of argument is perfectly legitimate and we entertain no qualms in deploying the evidential device of *estoppel* to silence the Defence. Indeed, it would be a gross inequity to adopt any alternative path.

- (d) The accepted criminal illegality of atrocities within a state of ongoing warfare suffices by analogy or implication to criminalise the act of waging aggressive war. As the crime which includes all others,<sup>507</sup> the ‘offence’ of waging wars of aggression is, therefore, soundly established in international law and is not tinged by any retrospective connotation.<sup>508</sup>
- (e) The Defendants’ obsession with the purported retroactivity of the Charter is merely ‘*a political appeal to some outside audience which may be more easily impressed by the complaint that the accused are being made the object of post factum legislation*’.<sup>509</sup> In their desperate efforts to absolve themselves of guilt, they are prepared to resort to any depths of cynicism and insincerity to court public sympathy for their manner of disposition before this Tribunal. There is, however, no legal foundation underpinning the Defendants’ protestations of ‘injustice’. Protestations of the type propounded by Von Ribbentrop only days before his death that ‘*the convictions were based on a statute that had been enacted ex post facto; this violated another fundamental legal principle: no punishment without a law*’<sup>510</sup> are patently flawed.

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<sup>506</sup> Jackson: 2 IMT 144. German Constitution 1919 Article 2, as amended: Reichgesetzblatt 1935, p. 839. The original Article 2 stipulated that, ‘For no act may be punished unless such punishment is prescribed by Statute before the crime was committed.’ This unequivocally precluded the use of ex post facto criminal law. Significantly, Proclamation Number 3 of the Control Council of Germany 1945 abolished the doctrines of analogy and retroactivity.

<sup>507</sup> ‘To initiate a war of aggression is not only an international crime; it is the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole’: 22 IMT 427.

<sup>508</sup> De Menthon: 5 IMT 388.

<sup>509</sup> Shawcross: 19 IMT 459.

<sup>510</sup> *Supra*: Owen Nuremberg: *Evil on Trial*, 330 where Owen quotes from brief notes made by the convicted Joachim von Ribbentrop, about the court and the death sentence passed on him. Ribbentrop also highlighted that ‘only the victorious Powers were represented on the Court, which was interested in securing convictions. They were judges in their own cause, which conflicts with the very conception of law....The defence had no fair chance to defend German foreign policy. Our prepared application for the admission of evidence was not allowed’. With considerable prescience, Ribbentrop also observed: ‘Every German who is convicted as a result of political justice is an obstacle to the reconciliation which is so

- (f) In the context of the ‘offence’ of waging aggressive war, *‘it is only by way of corruption of language that it can be described as a retroactive law’*.<sup>511</sup> Linguistic niceties do not invalidate an ‘offence,’ the legitimacy of which is manifestly acknowledged by the international community. The Defendants’ own perception of the concept is immaterial. It is clearly in their interests to explore any avenue at their disposal to evade liability. However, we will not be deflected nor allow the proceedings to be undermined, by spurious semantic distinctions. To the extent that any assertions by the Defence are founded upon words, rather than substance, they are wholly unsustainable.
- (g) *‘But let it be plainly said now that the Defendants are charged only as common murderers. That charge alone merits the imposition of the supreme penalty and the joinder in the Indictment of this crime against peace can add nothing to the penalty which may be imposed on these individuals.’*<sup>512</sup> We are prepared to adopt a broad view of the range of ‘offences’ enshrined in the Charter and are untroubled by any insinuation that our stance may be adjudged utilitarian.
- (vii) If the attainment of justice is an integral function of law, were the strategies utilised by the prosecution consonant with that aim and to what extent was that ideal realised by reliance upon ‘morality’, the ‘*instincts of our people*’ and the punishment of such ‘*acts which have been regarded as criminal since the time of Cain*’,<sup>513</sup> or as ‘*deeds which civilised humanity had long ago recognised as criminal*’?<sup>514</sup>
- (viii) Did it indeed suffice that the Defendants were deemed guilty ‘*according to natural justice which demands that crimes shall not go unpunished*’?<sup>515</sup> In short, was a ‘natural law’ approach adequate to salvage both the validity of the Charter and the Trial which ensued?

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urgently needed between the German and Western nations. The Soviets will reap the benefit for, not without reason, these trials are regarded as an American business’.

<sup>511</sup> Shawcross: 3 IMT 106.

<sup>512</sup> Shawcross: 19 IMT 448.

<sup>513</sup> Jackson’s *Report to the President on Atrocities and War Crimes; 7<sup>th</sup> June 1945*: available online at <<<http://www.yale.edu/lawweb/avalon/imt/jack01.htm>>>

<sup>514</sup> Rudenko: 19 IMT 575; the natural law perspective is discussed further *infra*: Chapter 5.

<sup>515</sup> Shawcross: 19 IMT 462.

- Is the maxim *nullum crimen sine lege, nulla poena sine lege* an inviolable principle of law, applicable irrespective of the ultimate outcome, or a doctrine predicated upon fairness which may be disregarded whenever the interests of justice demand its exclusion? By whose standards is ‘justice’ then to be defined?<sup>516</sup>
- Is it ever feasible to uphold the Rule of Law whilst simultaneously violating its ideals and do pragmatic considerations in terms of the desired aims serve to justify the means by which those goals are accomplished? In such event and if the ultimate objective to be attained is afforded pre-eminence over established principles of law, is this not tantamount to a state of normative confusion beset by the vicissitudes of lack of certainty and fidelity in the law-making process?
  - (i) In this context, the defences of ‘acts of State’ and ‘superior orders’ were, at least, partially recognised by substantive precedent, pre-existing at the date of commission of the ‘offences’ with which the Defendants were subsequently charged. However, these were retrospectively precluded by Articles 7 and 8 of the Charter.
  - (ii) In the event that the Defendants had been subjected to trial, *prior* to the implementation of the Charter, application of the *universal knowledge* test enunciated in *LLandoverly Castle*, may possibly have afforded a viable defence, based upon deference to ‘superior orders’.<sup>517</sup> On a different view however, it is feasible that, had the Court before which

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<sup>516</sup> The proposition, whereby the *nullum crimen* maxim was deemed to be founded upon the interests of ‘justice’ was favoured by the Members. However, the IMT repeatedly asserted that the Charter was declaratory, or at least an expression of pre-existing international law. The Charter was thus not innovatory and accordingly was not open to a charge of retrospectivity: 22 IMT 462. As such, and given this professed inviolability of the Charter, it was not necessary for the Members to express any view upon the status of the purported embargo on the use of retrospectively enforced criminal law. Despite this, they nevertheless elected to do so. Such comments were therefore outside of or *obiter* to the strict remit of the Judgment. The relativity of the injustice/justice, potentially caused by adherence/ouster of the doctrine, is explored by Hans Kelsen in ‘The Rule against Ex Post Facto Laws and the Prosecution of Axis War Criminals’ *Judge Advocate General*, Vol. 2, (Fall-Winter, 1945), 46, ‘In all cases where the rule against *ex post facto* laws comes into consideration in the prosecution of war criminals, we must bear in mind that this rule is frequently in competition with another principle of justice so that the one must be restricted by the other. There can be little doubt that according to the public opinion of the civilised world, it is more important to bring the war criminals to justice than to respect, in their trials, the rule against *ex post facto* law which has merely a relative value and consequently was never unrestrictedly recognised.’

<sup>517</sup> *LLandoverly Castle* (1921) H.M.S.O. Cmd. 450 which seemed to import an element of subjectivity in indicating that the defence of superior orders was unavailable where the order was ‘known universally to everyone including the accused to be without doubt whatever against the law’. In contrast it is implicit in the ‘manifest illegality’ test that such illegality should be objectively determined.

they were arraigned adjudged those orders to be *manifestly or palpably unlawful*, such defence would have foundered.

- (iii) Had it not been nullified by the Charter, the defence of ‘acts of State’ would have arguably served to exculpate the Defendants. It is reasonable to presume that at the date of perpetration of their transgressions, they believed that their role as instruments of the State conferred upon them absolute and automatic immunity from prosecution.
  - (iv) Had the defences of ‘superior orders’ and ‘acts of State’ been extant during the Trial, the Tribunal may have had no option but to acquit the Defendants. In upholding the ‘letter of the law’, the perpetrators of some of the most heinous acts ever witnessed by humanity would have walked away from the proceedings as free men.<sup>518</sup> Placed once again beneath the glaring spotlight of public scrutiny, this crucial value-judgment between two seemingly irreconcilable and competing interests: on the one hand, the ramifications inexorably flowing from ouster of the *nulla poena* doctrine; on the other, the potential ‘injustice’ emanating from strict adherence to it.
  - (v) The retrospective invalidation of previously accepted defences may be perceived as amoral. However, is there a greater immorality in permitting the commission of atrocities to go unpunished? At the very core of the Nuremberg process, a dilemma of momentous import. The means and ends dichotomy starkly exposed; the intrinsic conflict between the legitimacy of the methods employed, versus the supremacy of the ultimate outcome. In the specific context of the nullification of pre-existing defences, the pre-eminence afforded to this pragmatic stance amply epitomises the tenor of the Allies’ overall approach to the entire proceedings.
- Is the law a malleable instrument embracing both positive provisions and ethical principles drawn from standards of just conduct generally accepted in all

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<sup>518</sup> Jackson: 2 IMT 150, ‘The Charter recognises that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of state. These twin principles working together have heretofore resulted in immunity for practically everyone concerned in the really great crimes against peace and mankind. It (*modern civilisation*) cannot tolerate so vast an area of legal irresponsibility’.

civilised countries?<sup>519</sup> If so, is it viable to entrust any Tribunal with responsibility for the arbitration of such extraneous factors which are deemed of sufficient import to warrant impingement upon positive legal provisions? In the event of a conflict between codified/customary law and law derived from the more nebulous concept of morality emanating from traditions of fairness and the conscience of mankind, how is the pre-eminent precept determinable? By the inevitable uncertainty thereby engendered, is the ideal of justice subverted and is the effort to imbue the legal system with an overarching code of moral rectitude at best futile or at worst insidious?<sup>520</sup>

- If, indeed, it may be fairly concluded that the Charter was a flagrant example of *ex post facto* law-making, is that the limit of proper inquiry? Does it suffice to categorise each and every aspect of post factum utilisation of the criminal law within the amorphous concept of retrospectivity? At first blush, generalisation of this type might be deemed adequate, even desirable. Yet, whilst all-embracing legal definitions are on occasions capable of capturing the essence of the subject under scrutiny, they may equally be responsible for concealing any underlying subtleties beneath a veil of linguistic inexactitude. To a limited degree, summation of the Nuremberg process, as an exercise in *retrospectivity*, might succeed in embodying the inherent legalistic imperfections within the proceedings. In contrast, however, it may perhaps be fairly stated that the deficiency, if any, lies not in the verity *per se* of the term but rather, in its tendency to obscure the quintessential composition of *ex post facto* law-making. The retrospective imposition of punitive sanctions is, figuratively, the very antithesis of light. Yet, just as the radiance of white light owes its brilliance to the hidden beauty of its iridescent parts, the notion of retrospectivity, as a term of art, comprises a miscellany of interwoven components: the refulgence of the one revealed by a prism of glass, the murkiness of the other unveiled through the ‘prism’ of time.

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<sup>519</sup> 3 IMT 106; 5 IMT 370.

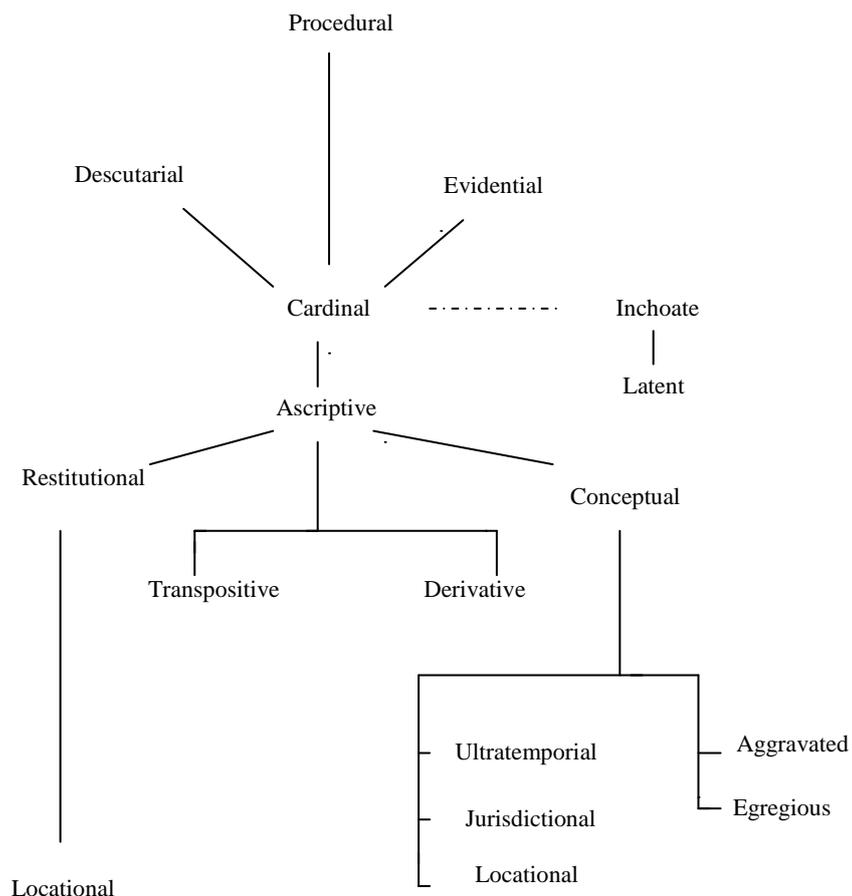
<sup>520</sup> See Telford Taylor ‘The Nuremberg War Crimes Trials: An Appraisal’, *Proceedings of the Academy of Political Science*, Vol.23, No.3, (May, 1949), 19-34, 34: ‘International law and government are in infancy, in the womb. Here is a series of great cases which have added enormously to the body and the living reality of international penal law. Here, the whole world has been able to see the international judicial process in action’. Taylor expressed the view that the Trial will be viewed more sympathetically with the benefit of hindsight than it was greeted at the time.

## 10. Typography of retrospectivity

The conception of the Nuremberg Charter was, unquestionably, an act of considerable ingenuity. The victorious nations rallied an array of devices, firstly to render feasible the establishment of an appropriate international judicial forum and, secondly, to guarantee the Defendants' convictions with an optimal degree of assurance.<sup>521</sup> This process, however, entailed reliance upon a legislative instrument suffused with manifold *ex post facto* aspects.<sup>522</sup> From this, the following typography of retrospectivity gradually emerges as at Figure 1 below:

FIGURE 1

Strands of retrospectivity



<sup>521</sup> In this, the Allies were not wholly successful. Three of the Defendants were exonerated of all charges whilst others were acquitted of some of the 'offences' with which they had been indicted.

<sup>522</sup> The correlation between the typography of retrospectivity, and the 'offences' and other aspects of the Nuremberg War Crimes Trial, is summarised in tabular form: see Appendix 2.

- (i) *Cardinal* retrospectivity: the imposition of punitive sanctions for any act, never previously designated criminally illegal, under international law. This essentially embraced:
  - (a) Acts, previously established as criminal offences, within the *national* municipal law of *some* individual sovereign nations but never previously specified as transgressions, attracting punitive sanctions under the *international* law of nations; or
  - (b) Acts previously established as criminal offences, neither under the *national* legal jurisdiction of any individual sovereign state nor, by extension or otherwise, specified as transgressions, attracting punitive sanctions under the *international* law of nations.

Within the context of Nuremberg, the term thus encompassed the majority of the ‘offences’ comprised in Articles 6, 9 and 10 of the Charter. The sole exceptions were conventional *war crimes* under Article 6 (b) and possibly those ‘offences’ defined within Article 6 (c), wholly analogous, in every material respect, to *war crimes per se*. As previously indicated, this latter category comprised acts falling within the first limb of the paragraph (c) concept of *crimes against humanity*. More specifically, atrocities of this type were necessarily delimited to those committed during wartime against the civilian populations of occupied nations, under whose internal legal jurisdiction ‘offences’, within that precise definitional remit, previously existed.<sup>523</sup>

- (ii) *Restitutive* retrospectivity: a sub-strand of *cardinal* retrospectivity: the imposition of punitive sanctions for acts, such as murder, rape, kidnapping, criminal damage, assault, theft and arson, not designated as criminal ‘offences’, under the Defendants’ municipal or domestic law at the date of commission. Within a governmental regime conforming to an ideology of fundamental decency, those acts are

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<sup>523</sup> A detailed discussion of the interface between *war crimes* and *crimes against humanity* appears *supra* this Chapter.

always likely to carry illegal status under the criminal law. Only due to the vagaries of the prevailing political system - of which Nazi Germany was indicative - are they permitted to attain a dubious, though ephemeral legality.<sup>524</sup> It is this temporary arbitrary abnegation of the Rule of Law, which renders *retrospective* any subsequent attempt to punish acts, ostensibly 'legal' at the date of commission.

- (iii) *Conceptual* retrospectivity: a sub-strand of *cardinal retrospectivity*: the imposition of punitive sanctions, for 'offences' of an innovatory *conceptual* nature, not designated criminally illegal, under the Defendants' municipal or domestic law, at the date of commission. Within the specific context of the Nuremberg process, this encompassed any 'offences' of a novel nature contained in the Charter, which the Defendants could have contemporaneously perpetrated with impunity under the domestic law of Germany. Again, *war crimes* and perhaps wholly analogous acts were, on this point, the sole examples of non-retrospectivity.
- (iv) *Aggravated conceptual* retrospectivity: the retrospective imposition of punitive sanctions for acts, historically construed or applied within the Defendants' own legal system/tradition in a dissimilar manner to the 'offence(s)' subsequently alleged against them. The Count One Indictment for conspiracy aptly exemplified the utilisation of concepts, owing their provenance, not to the civil law system with which the Defendants were, or ought to have been familiar, but rather to the common law tradition, irrefutably alien to them.
- (v) *Egregious conceptual* retrospectivity: the retrospective imposition of punitive sanctions for acts, not only drawn from a legal tradition, foreign to the Defendants, but also representing a distortion or novel extension of that system. The Article 6 notion of a *common plan*, with its vague connotations of co-operation and forming one of the key strategies utilised by the Allies at Nuremberg, is amply illustrative of this type of retrospectivity.

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<sup>524</sup> Martin Horn: Defence Counsel for Ribbentrop: 17 IMT 602, referable to a situation 'where the cruelty of the act is so evident that there can be no doubt that it is deserving of punishment. This could hold good for acts which were not punished in Germany during the last years, solely in consequence of the abnormal amorality of the Hitler regime'.

- (vi) *Ultratemporal* retrospectivity:<sup>525</sup> the retrospective imposition of punitive sanctions for acts, falling outside the timescale prescribed by established precedent. For example, *war crimes* – for which substantive precedent existed prior to Nuremberg - had necessarily to be committed within the course of ongoing warfare; *crimes against humanity*, as defined in the Charter – for which substantive precedent was, on this point, arguably lacking - envisaged the attribution of criminal liability for acts perpetrated during *times of peace*.
- (vii) *Locational* retrospectivity: infringement of the *territoriality* principle by which the *lex loci*, the law of the place of commission was, and remains, generally conclusive in determining the feasibility of criminal proceedings. This is not co-extensive with either *restitutional* or *conceptual* retrospectivity; it is feasible for conduct, otherwise ‘legal’ under the *lex loci*, to be sufficiently heinous in nature, as to invoke *universal jurisdiction*, that is, by way of a previously recognised exception to the *territoriality* principle.<sup>526</sup> The municipal law of the *locus in quo* may, in these circumstances, fail to recognise the inherently abhorrent nature of the act and, in consequence, improperly disregard the probable invocation of *universal jurisdiction*. It follows that retrospective imposition of punitive sanctions for such acts, will not offend the *territoriality* principle.<sup>527</sup> As such, *locational* retrospectivity will not arise. However, should criminal proceedings be later instigated against the perpetrators of acts, deemed legal under the domestic law prevailing at the date of commission, this may, nonetheless, raise the spectre of either *restitutional* or *conceptual* retrospectivity.
- (viii) *Jurisdictional* retrospectivity: retrospective imposition of punitive sanctions, for acts not designated as criminally illegal, under the

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<sup>525</sup> A term derived from the Latin: *ultra* and *tempus*, literally beyond or outside the confines of the usual time constraints.

<sup>526</sup> This principle of *universal jurisdiction* would apply to any ‘offence’ for which such jurisdiction had been contemporaneously established, or which arguably so existed by analogy to another similar ‘offence’ (although utilisation of the device of analogy, if applied too broadly, may in itself infringe the doctrine of *nullum crimen, nulla poena sine lege*).

<sup>527</sup> This is founded upon the premise that individual States are bound by pre-existing precepts of international law, without the need for specific incorporation into the domestic law of each State.

Defendants' municipal law at the date of commission, where those acts involve transgressions committed by the Defendants against their fellow nationals. As also, on occasions, with *locational* retrospectivity, this potentially constitutes a manifest interference with the internal operation of sovereign States; the more so, indeed, with *jurisdictional* retrospectivity, where the protagonists, that is, both perpetrator and victim, are all nationals of the same State, which, at the date of commission, contemporaneously deemed the alleged conduct within the parameters of lawful behaviour.

- (ix) *Compound* retrospectivity: *ex post facto* imposition of punitive sanctions, for acts not designated as criminally illegal at the date of commission, and comprising at least two of the *conceptual* elements of retrospectivity, as defined within (iii), (iv), or (v) above.
- (x) *Descutarial* retrospectivity:<sup>528</sup> the *ex post facto* nullification of any defence, extant and legally recognised at the date of commission of acts, for which the perpetrators are later subjected to criminal prosecution. This arguably occurred at Nuremberg, in relation to the doctrines of *superior orders* and *acts of State*, both or either of which would have exculpated the Defendants, had it not been for the nullifying effects of Articles 7 and 8 of the Charter.
- (xi) *Ascriptive* retrospectivity: retrospective attribution to an *individual* of criminal responsibility for acts in respect of which personal accountability was not established at the date of commission of such acts. This was especially relevant at Nuremberg where, save in the context of *war crimes per se*, individuals had rarely, if ever, before been imputed with responsibility for violations of *international laws*.<sup>529</sup>

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<sup>528</sup> A term, derived from the Latin noun *scutum*: a shield and the preposition *de*: from. The Defendants were arguably deprived of the shield or defences which would have been available to them, in the absence of the Charter.

<sup>529</sup> See Shawcross: 3 IMT 105 where Shawcross asserts that the application of the criminal law to individuals rather than to states is preferable in that it avoids the stigmatisation of an entire state with the consequential attribution of collective guilt this engenders. This argument, however, appears to contradict the Allied strategy elsewhere in the proceedings, including the concept of organisational guilt in Articles 9 and 10 of the Charter.

- (xii) *Transpositive* retrospectivity: a sub-strand of *ascriptive* retrospectivity: retrospective attribution to an individual, of criminal responsibility for acts, in respect of which *both*:
- (a) Individual responsibility had not been established at the date of the alleged act; *and*
  - (b) By dint of the nature of the alleged ‘offence’, liability more properly rested with the State, rather than individual citizens of that State.

This was manifested at Nuremberg in connection with the ‘offences’ of *crimes against peace* and some aspects of *crimes against humanity*:

‘This (*crimes against humanity*) is the crime of the German Reich.’<sup>530</sup>

- (xiii) *Derivative* retrospectivity: a sub-strand of *ascriptive* retrospectivity: retrospective attribution to an individual of criminal responsibility for acts, in respect of which individual responsibility was not contemporaneously established and, where liability is imputed, on an *ex post facto* basis, to the individual, on the basis of a declaration of guilt against a *third party*. The ‘offence’ of *organisational guilt*, comprised within Articles 9 and 10 of the Charter exemplifies this concept.
- (xiv) *Procedural* retrospectivity: the retrospective implementation of any procedural methods or devices, not extant at the date of commission of the alleged ‘offences’. This encompasses a very broad spectrum of aspects, ranging from the *creation* of the judicial *forum*, to the detailed minutiae governing the newly-conceived trial process. Additionally, it was, at Nuremberg to extend beyond the Trial mechanism itself. For example, intrinsic elements of the substantive ‘offence’ of *organisational guilt*, within Articles 9 and 10 of the Charter appeared dependent upon wholly innovatory procedural elements.

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<sup>530</sup> Charles Dubost (Deputy Chief Prosecutor for France): 19 IMT 550.

- (xv) *Evidential* retrospectivity: the retrospective utilisation of evidential devices, designed to regulate the judicial process. This enabled the Tribunal, at Nuremberg, purportedly to exclude the defence of *tu quoque*.<sup>531</sup> As seen earlier, however, the Members nonetheless permitted the Prosecution to raise a quasi-estoppel against the Defendants, in relation, ironically, to the pivotal issue of retrospectivity. The Charter also introduced innovatory evidential elements, particularly in the context of *organisational guilt*.
- (xvi) *Inchoate* retrospectivity: where the legislative instrument – or other legal mandate – upon which the judicial process is founded, contains retrospective elements, whether explicit or implicit. Strict adherence to the provisions of such enactment, will necessarily invoke the utilisation of *ex post facto* law. However, the empanelled members of the judicial forum subsequently intervene to eradicate or circumscribe those retrospective aspects, in whole or part, such that in practice, they remain entirely or partially unfulfilled. This tendency was manifest in the Tribunal's interpretation of those

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<sup>531</sup> As indicated *supra*, the Charter was directed only at nationals of the Axis states, being Germany, Italy, Roumania, Bulgaria and Hungary. This effectively relieved the Allies of the need to proffer any explanation for their own wartime conduct, which on occasions, did not bear close scrutiny. A telling example was the Nazi-Soviet Aggression Pact, 23 August 1939, the secret additional Protocol to which was signed by Von Ribbentrop and Molotov, on behalf of Germany and Russia respectively: US Department of State Publication 6462, *Documents of German Foreign Policy 1918-45*, Series D (1937-45), Vol. 7, *The Last Days of Peace* (Washington DC: Printing Office, 1956), 245-6 [Doc.228]). This essentially provided for the partition of Poland and the Baltic States between the two subscribing nations. Ribbentrop attempted to found his defence upon the premise that if the defendants were guilty of the 'offences' comprised in the Indictments, then so were the Russians. Had the *tu quoque* type of defence been embraced by the Members, then the Defendants' position before the Tribunal would have been considerably enhanced. Controversy also reigned in relation to the Katyn Forest massacre, of thousands of Polish officers in 1940 at a time when Russian troops were still occupying the Smolensk region. On the insistence of the Soviet contingent, this atrocity was pleaded as a *war crime* in Count 2 of the Indictment. However, the Defendants maintained that the perpetrators were Russian, rather than German. The IMT rejected a submission by Rudenko that a 1944 Report prepared by a Soviet Special Commission and which exculpated the Russians of any responsibility for the Katyn massacre, was tantamount to an official governmental report, of which judicial notice should be taken under Article 21 of the Charter. However, no definitive findings as to culpability for this atrocity were ultimately made by the Members, each of the protagonists being respectively permitted to rely upon the oral evidence of just three witnesses, whose testimony was deemed inconclusive. For a full account of this aspect of the Trial, see Telford Taylor *The Anatomy of the Nuremberg Trials* (New York: Alfred A. Knopf, 1992), 466-472. Interestingly, Taylor explicitly rejects any suggestion that the accusation of each country by the other, constituted a *tu quoque* argument on the grounds that, 'in the Katyn case, the circumstances were such that only the Soviet Union or Germany could have perpetrated the atrocity. The only way either of them could vindicate its innocence was by proving that the other was guilty', *ibid*: 467.

portions of the Charter, referable to the ‘offences’ of *conspiracy*, *crimes against humanity*, and *organisational guilt*.

- (xvii) *Latent* retrospectivity: a sub-strand of *inchoate* retrospectivity. This arises where ostensibly supportive legislative precedent, in the form of Statute, Treaty or Convention, is cited upon the Indictment, or is implicit in the criminal charge(s) preferred against the defendant. On closer scrutiny, however, it transpires that the putative precedent fails to furnish any or adequate basis for the alleged ‘offence’. At Nuremberg, this emerged, both in connection with *crimes against peace*,<sup>532</sup> and to a far lesser degree, with *war crimes per se*.<sup>533</sup>
- (xviii) *Composite* retrospectivity: *ex post facto* imposition of punitive sanctions, for acts not designated as criminally illegal at the date of commission, and comprising at least two of *any* of the preceding elements of retrospectivity, other than two or more *conceptual* elements.

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<sup>532</sup> The purported precedent was constituted, *inter alia*, by the Kellogg-Briand Pact 1928. A full discussion of the content and interpretation of this Pact is contained *supra* this Chapter regarding waging aggressive war and, again, in Chapter 5.

<sup>533</sup> The purported precedent was constituted by The Hague Convention 1907 and The Geneva Convention 1929. This, strictly, only furnished the requisite substantive precedent for *war crimes* under Article 6 (b) of the Charter, where all the belligerent parties had been parties to the Conventions. This was not, in fact, the case.

## 11. Conclusion

From a positivist stance, these shades of retrospectivity, in varying degrees, tarnished the ‘offences’ for which the Defendants were indicted. None were wholly immune from the penumbral shadow thereby cast over the entire judicial process, as exemplified in the Table below.

<b>‘Offences’ for which the Defendants were indicted at Nuremberg</b>	<b>Retrospective elements of each ‘offence’</b>
Conspiracy	Cardinal; restitutorial (dependent upon whether any element of conspiracy, as charged in Count One, was identical to any abrogated pre-Nazi conspiracy laws within Germany); conceptual; aggravated; egregious; inchoate; locational; jurisdictional; ultratemporal; descutorial; ascriptive; procedural; evidential; compound; composite
Crimes against peace (waging aggressive war)	Cardinal; conceptual; locational; inchoate; latent; descutorial; ascriptive; transpositive; procedural; evidential; composite
War crimes	Restitutorial; inchoate; latent; descutorial; procedural; evidential; composite
Crimes against humanity	Cardinal; conceptual; restitutorial (to the extent that crimes against humanity were wholly analogous to war crimes); inchoate; locational (dependent upon the application of the principle of universal jurisdiction); jurisdictional; ultratemporal; descutorial; ascriptive; transpositive; procedural; evidential; composite
Organisational guilt	Cardinal; conceptual; aggravated; egregious; inchoate; locational; jurisdictional; ultratemporal; descutorial; ascriptive; transpositive; derivative; procedural; evidential; compound; composite

Unsurprisingly, the protagonists in the Trial adopted polarised stances, diametrically opposed in a rhetorical sense and, for the most part, also in substance. On the one hand, the Prosecution was dismissive of any imputation that the Trial was founded upon *ex post facto* provisions; on the other, the Defence strove, with scant success, to mount a challenge against the ubiquitous utilisation of retrospective criminal law. For their part the Members, in the main, ostensibly adhered to the letter of the Charter, though their observance was chequered by sundry instances where compliance was more apparent than real. This did, perhaps, temper the full extent of the Charter’s retrospective vigour.<sup>534</sup> Yet, just as history is indelibly seared by the enormity of the Nazi atrocities, it

<sup>534</sup> This delimitation of the scope of Article 6 of the Charter was particularly significant in the context of *conspiracy*, which in turn impinged upon the ambit of *crimes against humanity*. The Members adopted a similarly restrictive approach towards *organisational guilt* under Articles 9 and 10.

must also faithfully bear witness to the *means* by which retribution was exacted against those responsible for their commission. If the judicial process was flawed, is it then plausible to conclude that the interests of ‘justice’ were truly served? More specifically, did the Allies’ methodology in relation to *ex post facto* criminal laws replicate Nazi practices to a degree in which the Rule of Law was manipulated or endangered? The Defendants were castigated for their abnegation of the doctrine of ‘separation of powers’; the extent to which their regime thrived, albeit ephemerally upon the interference of the executive arm of government with legislative and judicial functions, accordingly deprived of any measure of independence. But was not the Charter itself the product of an underlying political agenda of “victors’ justice”, in which the Trial process could never be successfully detached from the slipstream of preconceived ambition on the part of the Allied nations?

The Nuremberg Trial was conducted on an international stage and the issue of retrospectivity played a ‘starring’ role. Those responsible for the drafting and implementation of the London Charter were presumably sincere in their motivation and convictions. Nonetheless, their rhetoric appeared, on occasions, tinged with artifice when striving to rationalise a legislative provision which, to an adherent of the maxim ‘*nullum crimen et nulla poena sine lege praevia*’, was manifestly unsustainable. The Members lauded the Charter as ‘*the expression of international law existing at the time of its creation and to that extent itself a contribution to international law*’.<sup>535</sup> However, it has befallen later generations to assess the verity and consequences of the Tribunal’s eulogising testimonial to its own progenitor; to explore and ultimately determine whether the labyrinthine complexities posed by the legitimacy of retroactive criminalisation are illuminated or obfuscated by the alternative jurisprudential approaches advocated by proponents of the positivist and natural law traditions. It is to these issues that the ensuing chapters turn.

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<sup>535</sup> Judgment: 22 IMT 461. The Members further stipulated that ‘the law of the Charter is decisive and binding upon the Tribunal’.