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The sources of jurisdiction of the International Military Tribunal

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THE SOURCES OF JURISDICTION OF THE INTERNATIONAL MILITARY TRIBUNAL

by

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CHAPTER I

BIRTH OF AN INTERNATIONAL MILITARY TRIBUNAL

As a direct result of man's attempt to govern himself in the international community, and his determination to punish those who offended international legal and ethical standards, an instrument was created, in the year 1945, so controversial in nature as to become a major concern of international jurists. This instrument was the Nuremberg Tribunal constituted for the express purpose of prosecuting European Axis major war criminals whose crimes had no particular geographical location. The purpose of this study is to examine the legal foundations of the jurisdiction of the Tribunal.

History reveals the existence of a body of laws, born out of custom and convention, owing their existence and growth to a desire to ameliorate conditions in the conduct of warfare. Establishment of violations of these laws has ancient precedent, and war crimes trials have been conducted in previous centuries. But these may not be relied upon as setting exact precedents for the Nuremberg Court, for they were not war crimes trials in the international sense embraced by the Tribunal at Nuremberg. The trial of Sir Peter of Hagenback in 1474
appears to be the first war crime trial on an international level. During the proceedings, Sir Peter, governor of Breisach under Charles of Burgundy, was charged with having trespassed all bounds of decency and humanity in his treatment of the people under his rule. An alliance of independent cities and states captured Peter of Hagenbach and brought him before a tribunal consisting of judges from the various states and cities forming the alliance. He was convicted and sentenced to death for having disregarded the laws of God and man. This trial was carried on in accordance with judicial standards and may be considered as a forerunner of the Nuremberg trial.

The termination of World War I witnessed a formal attempt to create an international war crimes tribunal to punish enemy persons accused of having committed acts in violation of the laws and customs of warfare. An Allied commission was formed to inquire into and report upon violations of international law chargeable to Germany and her allies. It came to naught. As the American Professor Glueck remarks, "... the malefactors not only went unwhipped of justice but were vociferously championed by strong elements of

Georg Schwarzenberger, International Law, 308 (2nd Ed. 1950).
English and American public opinion. Notwithstanding the fact that most of the accused went unpunished, it is imperative that the Commission's deliberations and recommendations be examined as a point of departure for similar developments after the Second World War.

The Preliminary Peace Conference at the plenary session of January 25, 1919, decided to create a commission to inquire into the responsibilities for the war. The Commission comprised fifteen members, two to be named by each of the Great Powers (United States, Great Britain, France, Italy and Japan), and five to be elected from among the Powers with special interests. The Commission was to inquire into and report upon the following points:

1. The responsibility of the authors of the war.

2. The facts as to breaches of the laws and customs of war committed by the forces of the German Empire, and their Allies, on land, on sea, and in the air during the present war.

3. The degree of responsibility for those offences attaching to particular members of the enemy forces, including members of the General Staff, and other individuals, however, highly placed.

Sheldon Glueck, War Criminals, 123 (1944).
4. The constitution and procedure of a tribunal appropriate for the trial of these offences.

5. Any other matters cognate or ancillary to the above which may arise in the course of the inquiry, and which the Commission finds it useful and relevant to take into consideration.

The Commission presented its carefully prepared opinions to the Preliminary Peace Conference. On the question of the German responsibility for the war, the Commission considered these acts to be of such gravity that they should be formally condemned by the Conference; however, the acts which brought about the war should not be charged against their authors or subjected to a Tribunal.

Regarding breaches of the laws and customs of war and of humanity, the Commission members recognised that international law permits a belligerent to prosecute those accused of committing offences against the laws and customs of war, once the accused are within its power, and it may for that purpose set up its own courts and procedure. However, four categories of

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3 "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties," 14 American Journal of International Law 95 (1920), hereafter cited A.J.I.L.

4 Ibid., 120.

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charges seemed to the members to demand proceedings in an international tribunal.

(a) Against persons belonging to enemy countries who have committed outrages against a number of civilians and soldiers of several Allied nations, such as outrages committed in prison camps where prisoners of war of several nations were congregated or the crime of forced labor in mines where prisoners of more than one nationality were forced to work;

(b) Against persons of authority, belonging to enemy countries, whose orders were executed not only in one area or on one battle front, but whose orders affected the conduct of operations against several of the Allied Armies;

(c) Against all authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of states who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war;

(d) Against such other persons belonging to enemy countries as, having regard to the character of the offence or the law of any belligerent country, it may be considered advisable not to proceed before a court other than the high tribunal hereafter referred to.

The Commission proposed that the United States, Great Britain, France, Italy and Japan each choose three

5 Ibid., 120-421.
members to sit on this High Tribunal, and that Belgium, Poland, Czechoslovakia, Greece, Roumania, Serbia and Portugal each select one member for the Tribunal. The law to be applied by this Tribunal was to embrace principles of international law founded on the laws of humanity and established usages of civilized nations. If an accused person was found guilty by the Tribunal, the High Tribunal was to have the power to sentence him to such punishment as might be imposed for such an offence by any court in any country represented on the Tribunal or in the country of the convicted person.

Significantly the Commission believed that those responsible for violating the peace, however grave their acts, should not be subjected to a tribunal because:

... by reason of the purely optional character of the institutions at The Hague for the maintenance of peace ... a war of aggression may not be considered as an act directly contrary to positive law, or one which can be successfully brought before a tribunal such as the Commission is authorised to consider under its terms of reference. Further, any inquiry into the authorship of the war must, to be exhaustive, extend over events that have happened during many years in different European countries, and must raise many difficult and complex problems which might be more fitly investigated by historians and statesmen than by a tribunal appropriate to the trial of offenders against the laws and customs of war.7

6Ibid., 122.
7Ibid., 118-119.
Thus, according to the Commission, the authors of the war, notably the ex-Kaiser, should not be brought before a tribunal. However, the Commission, debating the charge of violations of the laws of war, was of the opinion that an international tribunal could try such offenders, regardless of their position in the German government.

These recommendations of the Commission were not adopted. The American members of the Commission refused assent to the creation of an international criminal court for the trial of individuals, on the ground that precedent was lacking in the practice of nations. They believed "... that an act could not be a crime in the legal sense of the word, unless it were made so by law, and that the commission of an act declared to be crime by law could not be punished unless the law prescribed the penalty to be inflicted." The American members declared that they knew of no international statute or convention making a violation of the laws and customs of war an international crime, establishing a punishment for it or stating the court which had jurisdiction over the offense. The Americans "felt that the difficulty ... was not insurmountable, inasmuch as the various states have declared certain acts violating the laws and customs

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Ibid., 145.
of war to be crimes, affixing punishment for their commission, and providing military courts or commissions within the respective states possessing jurisdiction over such offence." Further, the United States members opposed the doctrine of negative criminality which placed a criminal charge against individuals who failed to prevent violations of the laws of war.

The Japanese delegates to the Commission raised the same basic question whether the law of nations recognized a penal law applicable to those who are guilty. It also seemed vital to them to "... consider the consequences which would be created in the history of international law by the prosecution for breaches of the laws and customs of war of enemy heads of states before a tribunal constituted by the opposite party."

Thus the Allies, instead of accepting in full the recommendations of the Commission, inserted in the Treaty of Versailles certain "punitive Articles." By Article 226 the German government recognized the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. By the same Article, the German government was to hand over to one or

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9 Ibid., 147.
10 Ibid., 152.
all of the Allied and Associated Powers all persons so accused, specified by name and rank, office or employment which they held under German authorities. The guilty were to be sentenced to punishments prescribed by law. Article 229 provided for the trial of the accused in military tribunals of the power against whose nationals the alleged crimes were committed. By Article 230 the German government undertook to furnish all documents and information which might be considered necessary for such proceedings.

Pursuant to Article 228, lists of accused persons were compiled by the principal Allied nations and presented to the German government on February 3, 1920. Upon receipt of more than nine hundred names, the German government, though solemnly bound to respect the Peace Treaty, refused to surrender its war criminals. Approximately two weeks before presentation of the list of accused to Germany, the German government had proposed a compromise by which Germany would assume responsibility to prosecute the war criminals. The Allies, sensing the growing opposition to trials of German war criminals in Allied military courts, finally accepted the German suggestion, with the reservation that, if they were not satisfied with the conduct of the German court prosecuting the war criminals, the Allies would again exercise the
right to try the accused in their own military tribunals.

In the place of the original list containing the nine hundred names presented to Germany, February 3, 1920, the Allies substituted an abridged list to the German Supreme Court at Leipzig containing only forty-five names of accused. Glueck notes:

But having so easily obtained a major concession from the Allies, the Germans were not ready for trial even after receiving this abridged list. They informed the Allies that difficulties were being experienced in obtaining evidence against the accused, because much of the necessary proof was in possession of the Allied Governments. The Allies then arranged to assemble statements of the proof against persons on the abridged list and transmit them to the public prosecutor in Leipzig. They prepared the evidence with commendable care. Preliminary examinations were made in France and Belgium; depositions were taken in London; witnesses were collected from across the seas and brought to Leipzig.

From the very beginning, however, the Leipzig Tribunal brazenly flouted the seriousness of the task. Only twelve of the forty-five persons accused of war crimes were actually tried by the Leipzig Court and but six were convicted; their sentences ranged from six months to four years imprisonment. The Allies were distressed, and the French and Belgians particularly were indignant over the Leipzig proceedings. A Commission of Allied

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Jurists was set up in 1922, to inquire into the conduct of the Leipzig trials. In general, the Committee was dissatisfied with the proceedings of that Court. The members of the Committee concluded that it was useless to allow the German court to continue. As a result, they recommended to the Supreme Council of the Allied and Associated Powers that no new cases be sent to Leipzig and that the German government be compelled to turn over accused persons for prosecution by the Allies in pursuance of Article 228. "This," according to Glueck, "only resulted in great indignation in Germany . . . . Chauvinistic groups organized truculent protest meetings throughout Germany, at which high-ranking officers reminded the world that 250,000 national soldiers and the police of the Reichswehr are in alliance to prevent the handing over of Germans to the justice of the Entente." 12

In view of the half-hearted attempts at justice by the Court and the apathy evident in some Allied circles, notably American and British, the German republic was able to effect an almost total acquittal for their war criminals. But despite dissatisfaction and the failure to establish strong precedents, there can be little doubt that the intentions and opinions of the Allied

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12 Ibid., 32.
Commission created a pattern which became a cornerstone in the structure of the more recent tribunal.

The interim period between two major world conflicts in this century might perhaps have given birth to a body, such as an international tribunal, powerful enough to cope with future war criminals and war crimes trials. But this did not occur. True enough, a World Court existed, but it lacked jurisdiction to try criminal charges or to punish individual offenders. Moreover, no international code of criminal law was created during this period. Neither the Geneva Protocol of 1924 nor the Paris Pact of 1928, though designed to promote international conciliation, developed a code of international criminal law or an international tribunal. Thus, as another war approached, the world still lacked some supra-national organ established for the punishment of persons violating principles in the law of nations. However, the incredible mass atrocities, havoc and destruction, and treaty violations which accompanied the more recent European holocaust aroused a great demand for punishment of those responsible for it. Many official protests were issued by the nations occupied by Germany for crimes committed by Germans on their soil. Crimes

committed by the Germans in Poland and Czechoslovakia were condemned by the British, French, Polish and Czechoslovak governments in 1940. As General Taylor, Chief of Counsel for Prosecution in the Nuremberg Tribunal, notes, "President Franklin D. Roosevelt publicly condemned the German practice of executing scores of innocent hostages in October 1941, and the British Government indorsed President Roosevelt's views in a declaration by Mr. Churchill." But it was not until 1942 that a systematic program was developed to handle the problem of enemy war criminals. A London conference of representatives from nine European countries culminated in the

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15 Belgium, Czechoslovakia, Free French National Committee, Greece, Norway, Poland, Yugoslavia, Luxembourg, and The Netherlands.

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St. James Declaration of January 13, 1942. It is worth

The text, as reported in The New York Times, p. 6, col. 1, Jan. 14, 1942:

Whereas Germany since the beginning of the present conflict, which arose out of her policy of aggression, has instituted in occupied countries a regime of terror characterized in particular by imprisonments, mass expulsions, execution of hostages, and massacres . . .

... And whereas, international solidarity is necessary in order to avoid repression of these acts of violence simply by acts of vengeance on the part of the general public and in order to satisfy the sense of justice of the civilized world;

Recalling that international law and, in particular, The Hague in 1907 regarding laws and customs of land warfare do not permit belligerents in occupied countries to perpetrate acts of violence against civilians, to bring into disrepute laws in force or to overthrow national institutions;

The undersigned representatives of the Government of Belgium, the Government of Czecho-Slovakia, the Free French National Committee, the Government of Greece, the Government of Norway, the Government of Poland, the Government of Luxemburg, the Government of the Netherlands, and the Government of Yugoslavia:

1. Affirm that acts of violence thus perpetrated against civilian populations are at variance with accepted ideas concerning acts of war and political offenses as these are understood by civilized nations;

2. Take note of the declaration made in this respect on October 25, 1941, by the President of the United States of America and the British Prime Minister;

3. Place among their principal war aims punishment through the channel of organized justice of those guilty and responsible for these crimes whether they have ordered them, perpetrated them or in any way participated in them;
notice that the signatories were governments in exile; none of the major states were parties. This document was a declaration of intention to punish those guilty of war crimes, at the termination of hostilities. The Declaration, made public to the world, provoked an enormous amount of criticism. While some believed that summary punishment of the guilty would be the safest and quickest method of attaining the goal, others saw in the trials Allied desires for vengeance and fearful consequences in future history.

One of the principal aims of Allied statesmen was to try the offenders through the channels of organised justice, with the view that all the nations and their leaders would not soon forget these documented proceedings.

4. Determine in the spirit of international solidarity to see to it that those guilty and responsible, whatever their nationality, are sought for, handed over to justice and judged; that sentences pronounced are carried out.

Moreover, there is little doubt that this talk of punishment was planned by the Allies in order to encourage resistance to the Germans and to demoralise them. It might be added however, that the German leaders, sensing forthcoming punishment, appear to have spurred German resistance to the bitter end.

As months passed, the determination of the Allies to punish criminals of the European Axis increased. On many occasions, Allied statesmen issued warning that wrongs done would not go unpunished. Early in 1942, the American Secretary of State declared:

We are confident that before the end of another year the instigators of this war will have been given to understand how seriously they have underestimated the determination and the ability for effective action of the peace-loving nations and will have learned that in an aroused world aggressors can no longer escape the consequences of acts resulting in human suffering and destruction.\footnote{16}

In May, 1942, the United States Assistant Secretary of State, Mr. Berle, announced:

\footnote{16} \textit{Department of State Bulletin 1761, Congratulations to the Soviet Union on Successful Resistance to Nazi Aggression}, 562 (June 27, 1942).
The individual Gestapo agents, Black-Troopers, and others guilty of cruelty, robbery and oppression of civilians must be held to account. The names of many of these are already known to the United Nations. They will learn that none can break the laws of civilization with impunity.19

On October 7, 1942, the President of the United States made his views public to the world:

On August 21 I said that this government was constantly receiving information concerning the barbaric crimes being committed by the enemy against civilian populations in occupied countries, particularly on the continent of Europe. I said it was the purpose of this government, as I knew it to be the purpose of the other United Nations, to see that when victory is won the perpetrators of these crimes shall answer for them before courts of law. I now declare it to be the intention of this government that the successful close of the war shall include provisions for the surrender to the United Nations of war criminals. It is our intention that just and sure punishment shall be meted out to the ring-leaders responsible for the organized murder of thousands of innocent persons and the commission of atrocities which have violated every tenet of Christian faith.20

A few days later the United States and British governments announced their desire to join with other

19 Dept. of State Bull. 1742, Commemoration of Second Anniversary of Invasion of Netherlands, Belgium and Luxembourg, 437 (May 16, 1942).

20 Dept. of State Bull. 1824, United Nations Commission to Investigate War Crimes, 797 (October 10, 1942).
Allied nations to establish a "United Nations Commission for the Investigation of War Crimes." Seventeen nations joined in creating the Commission which met for the first time in October 1943. Russia desired to participate, and urged that her sixteen Soviet Republics be represented independently. This demand was opposed by the United States and Great Britain, and as a result the Soviet Union refused to participate. The Commission for the Investigation of War Crimes gathered and indexed charges submitted by member nations, and assembled lists of war crime suspects, but did not make investigations or prepare prosecutions.

These Allied warnings and preparations of punishment did not deter the Nazis, who continued their barbarous experiments at Dachau and Buchenwald. Other Lidices sprang up in various German occupied areas, notably the Greek village of Distomo, and the unwarranted shooting of hostages, prisoners of war and civilians was not halted.

21 Australia, Belgium, Canada, China, Czechoslovakia, France, Greece, India, Luxembourg, the Netherlands, New Zealand, Norway, Poland, South Africa, the United Kingdom, the United States, and Yugoslavia.
Allied determination to punish the enemy grew in strength with the Moscow Conference. In a "Declaration on German Atrocities," of October 30, 1943, the United Kingdom, the United States, and the Soviet Union jointly declared:

At the time of the granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein. . . . The above declaration is without prejudice to the case of the major criminals, whose offences have no particular geographical localisation and who will be punished by the joint decision of the Governments of the Allies. 22

A further and decisive step in the formulation of an international tribunal was taken only after victory in Europe. Pursuant to the Moscow Declaration, the United Kingdom, the United States, the French Republic, and the Soviet Union met at London, August 8, 1945, and signed an agreement of the establishment of an

international military tribunal. The London Agreement crystallized the purpose of the signatory nations:

Article 1

There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.

Article 2

The constitution, jurisdiction and functions of the International Military Tribunal shall be those set out in the Charter annexed to this Agreement, which Charter shall form an integral part of this Agreement.

Article 3

Each of the signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The signatories shall also use their best endeavours to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the signatories.

Article 4

Nothing in this Agreement shall prejudice the provisions established by the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes.
Article 5

Any Government of the United Nations may adhere to this Agreement by notice given through the diplomatic channel to the Government of the United Kingdom, who shall inform the other signatory and adhering Governments of each such adherence.

Article 6

Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any Allied territory or in Germany for the trial of war criminals.

Article 7

This Agreement shall come into force on the day of signature and shall remain in force for the period of one year and shall continue thereafter, subject to the right of any signatory to give, through the diplomatic channel, one month's notice of intention to terminate it. Such termination shall not prejudice any proceedings already taken or any findings already made in pursuance to this Agreement. 23

The constitution, jurisdiction and functions of the International Military Tribunal are found in the Charter drawn up expressly for the Tribunal and appended

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to the London Agreement. According to the Charter, the International Military Tribunal would have the power to try and punish major war criminals of the European Axis. The Charter specified that each of the four original signatories would designate a member and an alternate to the Tribunal. The members of the Tribunal, before the beginning of trial, were to agree among themselves upon the selection of a President from their number. Regarding jurisdiction, signatories declared in Charter Article 3, that "Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel." The Tribunal was not to concern itself with all individuals who had committed barbarities, no matter how grave or repulsive, nor with traitors, such as Laval, Quisling, or Lord "Haw Haw," nor with individuals committing crimes in localised areas of a country formerly occupied by Germany, for such persons would come under the jurisdiction of the national courts where the acts were perpetrated. The Tribunal would prosecute only major war criminals of the European Axis, whose offences, as stated at Moscow, "have no particular

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24 International Conference on Military Trials, 422.
geographical location," and whose crimes were part of the Nazi master plan of aggression. As Justice Jackson, Chief Counsel for Prosecution on behalf of the United States, declared:

Our case against the major defendants is concerned with the Nazi master plan, not with individual barbarities and perversions which occurred independently of any central plan. The groundwork of our case must be factually authentic and constitute a well documented history of what we are convinced was a grand, concerted pattern to commit the aggressions and barbarities which have shocked the world. 25

The Nuremberg Court was invested with power to try and punish individuals guilty of having committed the following crimes:

Crimes Against the Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participating in a common plan or conspiracy for the accomplishment of any of the foregoing;

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 labor 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;

Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against

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. 26

With regard to the official position of the defendants, whether Heads of State or responsible officials in the German government, the Tribunal was not to consider them as outside its jurisdiction, nor was their position to be considered as mitigating the punishment they were to receive. Neither could the Tribunal free from punishment those defendants who acted pursuant to superior orders, though this might be considered in mitigation of punishment. This was demonstrated in practice during the Nuremberg proceedings when the Tribunal stated that "The principle of international law, which under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings." Again in the view of the Court, "That a soldier

26 International Conference on Military Trials, 423.
was ordered to kill or torture in violation of the international law of war has never been recognised as a defense to such acts of brutality, though as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible. 28 The determination of criminality on the part of some group or organisation, such as the Gestapo, also came within the realm of the Tribunal.

An examination of the Charter, concerning fair trial for the defendants, reveals the workable and sensible procedure to be used by the Tribunal. The Four member nations each had relatively distinct and highly developed judicial traditions. For instance, criminal procedure in both the United States and Great Britain allows a defendant to testify subject to cross examination. This method is quite unknown in the French and Russian systems. However, the stipulation that a defendant may give statements to a tribunal without taking an oath or subjecting himself to a cross-examination is employed by continental courts but is wholly alien to Anglo-American practice. Further, unlike Anglo-American

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28 Opinion and Judgment, 53-54.
judicial practice, Soviet practice relies on the
diligence of the court rather than the efforts of
counsel to develop the facts in a case. Sensing the
need to resolve these differences, the Four Allies, after
much discussion were able to achieve an amalgamation of
the divergent practices. Article 24 of the Charter re-
conciled these divergent legal philosophies of the
member nations in a workable procedure which sought to
preserve the elements of reasonableness and fairness:

Article 24. The proceedings at the Trial
shall take the following course:

. . . . (g) The Prosecution and the Defense
shall interrogate and may cross-examine any
witness and any defendant who gives testimony.

. . . . (j) Each defendant may make a state-
ment to the Tribunal. 30

Article 16 of the Charter contained certain safeguards
of fairness in the hearings:

Article 16. In order to ensure fair trial
for the Defendants, the following procedure
shall be followed:

29 Taylor, op. cit., 258-259.
30 International Conference on Military Trials, 427-
428.
(a) The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at a reasonable time before the Trial.

(b) During any preliminary examination or trial of a Defendant he shall have the right to give any explanation relevant to the charges made against him.

(c) A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands.

(d) A defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of Counsel.

(e) A defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution.

Articles 18 through 21 of the Charter for the International military Tribunal stipulated that the Tribunal

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31 Ibid., 426.
32 Ibid., 426.
was not to be bound by technical rules of evidence.

In passing sentence, the Tribunal was to state reasons why it had found a defendant guilty or not

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Ibid., 427:

Article 18. The Tribunal shall

(a) confine the trial strictly to an expeditious hearing of the issues raised by the charges,

(b) take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever,

(c) deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any defendant or his counsel from some or all further proceedings, but without prejudice to the determination of the charges.

Article 19. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.

Article 20. The Tribunal may require to be informed of the nature of any evidence before it is offered so that it may rule upon the relevance thereof.

Article 21. The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof. It shall also take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various allied for the investigation of war crimes, and the records and findings of military or other Tribunals of any of the United Nations.
guilty. Each judgment would be final and not subject to review. On conviction, imposition upon a defendant of the death penalty or any other punishment was in the hands of the Court. Sentences were to be carried out in accordance with the orders of the Control Council for Germany, which had the power to reduce or otherwise alter the sentences, but not to increase their severity. If after the conviction of a defendant, the Control Council should find new evidence upon which a fresh charge could be lodged against him, the Council was to report the matter to the Prosecution.

Thus, the Allies surmounted most vexing problems to create an international legal tribunal for the trial of major war criminals. The trial opened on November 20, 1945, and was faced with the prosecution of twenty-two defendants and six organizations. A day later, November 21, 1945, Justice Jackson arose to present the opening statement in the case on behalf of the United States government. The American Justice conceded that the Tribunal, while novel and experimental, was not the product of abstract theorising. It was rather the result of a practical effort by four powerful nations and numerous lesser powers to utilize international law in cases where it had been violated. The significance of the Tribunal, for the United States representative,
was that it would bring to justice those living symbols of terrorism, racial hatreds, violence, and of arrogance and cruelty. To have faltered in creating such a court would have meant that civilization was compromising with those evil persons who renew their strength on the apathy and timidity of others.

Unfortunately, stated Jackson the nature of these crimes is such that both prosecution and judgment must be made by victor nations over vanquished foes. The world-wide scope of the aggressions carried out by these men has left but few real neutrals. 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. The former high station of these defendants, the notoriety of their acts, and the adaptability of their conduct to provoke retaliation make it hard to distinguish between the demand for a just and measured retribution, and the unthinking cry for vengeance which arises from the anguish of war. . . . We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. 33

Sir Hartley Shawcross, United Kingdom prosecutor on the Nuremberg Tribunal saw the possibility of summary punishment for the defendants, but only a tribunal could adjudge the guilt of those accused, according

33 Robert H. Jackson, The Case Against the Nazi War Criminals, 7 (1946).
to law as well as on moral or ethical bases. While natural justice demanded that the perpetrators of war crimes be punished, it also demanded that no person be punished unless a careful examination of the facts demonstrated that he shared the guilt for what has been done. The British representative declared:

... the effects of this trial will reach out far beyond the punishment of a score or so of guilty men. Issues are at stake far greater than their fate, although upon their fate those issues, in some measure depend. In the pages of history it will count for nothing whether this trial lasted for two months or for ten. But it will count for much that by just and patient examination the truth has been established about deeds so terrible that their mark may never be erased, and it will count for much that law and justice have been vindicated in the end. 34

In his closing argument, Deputy Chief Prosecutor Dubost, for the French Republic, pointed out that the Court received facts which were submitted with the strictest objectivity, allowing no room for passion. Further, the Tribunal had excluded from debate anything that, in its view, appeared insufficiently demonstrated, anything that might have been motivated by reason of vengeance. For the French prosecution, the important

34 United States Chief of Counsel for the Prosecution of Axis Criminality, 1 Nazi Conspiracy and Aggression, (Supp A) 62 (1946), hereafter cited Nazi Conspiracy.
element of the Nuremberg Trial was that of historical truth. Future historians would have a documented record of the political, diplomatic, and military events during a most unfortunate period in history, and of the way in which Allied nations punished the men who were guilty of many acts contrary to legal and moral codes.

Lt. General Rudenko, representing the Soviet Union as prosecutor remarked in his closing argument:

For the first time in the history of mankind, criminals against humanity are being held responsible for their crimes before an International Criminal Tribunal. . . . The present trial is being conducted in such a manner that the defendants who are accused of the most heinous crimes, are given all the possibilities for a defense, all the necessary legal guarantees. In their own country, the defendants who stood at the head to the Government, destroyed all legal forms of justice. . . . They themselves are being tried by the International Court in accordance with all legal guarantees and they are assured of all their defense rights. 36

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35 Nazi Conspiracy, 159.
36 Nazi Conspiracy, 199, 200.
CHAPTER II

STATUS OF GERMANY AT THE TERMINATION OF WORLD WAR II

Before we can discuss the sources of jurisdiction of the International Military Tribunal, our attention should be directed toward a problem of paramount importance: the status of Germany at the end of World War II. The question, "who possessed sovereignty?" must be resolved since it is closely connected with bases of jurisdiction of the Tribunal. It is relevant because Germany did not consent to the establishment of a court for the trial of her subjects and thus a fundamental problem of international law, that of the necessity of consent, is raised.

On April 29, 1945, Lieutenant-General W. D. Morgan, Chief of Staff of Allied Force Headquarters, received the signature of two German plenipotentiaries, providing for cessation of hostilities and unconditional surrender of Nazi forces to the allied forces in Italy to be effective May 2, 1945. The instrument of surrender stipulated that "It is independent of, without prejudice to, and will be superseded by, any general instrument of surrender imposed by or on behalf of the United Nations and applicable to Germany and the German armed forces as..."
On May 8 and 9, respectively, German representatives, for the balance of the German forces, signed further unconditional surrender documents at Rheims and Berlin. Complete cessation of hostilities had now been achieved. It is important to note that these last two documents of surrender had, like the first, stipulated that a general instrument of surrender imposed by or on behalf of the United Nations would follow and supersede them.

Twenty seven days later these initial instruments of surrender were supplanted by the promulgation of the Declaration of Berlin, June 5, 1945. According to this document the victorious powers assumed supreme authority over the German territory:

The German armed forces on land, at sea and in the air have been completely defeated and have surrendered unconditionally. . . . There is no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers . . . . The Government of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany,

including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not affect the annexation of Germany.2

This Declaration created unique and unprecedented situation in Germany, and many theories have since arisen as to the legal status of that country. Occupied Germany truly presents a legal dilemma, since it was conquered and its government was destroyed, but it was not annexed. To find an acceptable legal approach to the status of Germany an inquiry must be made into the several divergent theories dealing with the matter.

Belligerent Occupation

The long-recognised status of belligerent occupation must be clearly distinguished from whatever form of occupation existed in German territory after World War II. Article 43 of The Regulations Respecting the Laws and Customs of War on Land annexed to the Hague Con-

2 "Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany," 39 A.J.I.L. (Supp) 171-172 (1945) emphasis added.
vention of 1907 declared:

The authority of the legitimate power having passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.3

By belligerent occupation the legitimate government is made incapable of exercising its authority and the authority of the occupant power is substituted only for the period of occupation. But the occupant power cannot assume sovereignty over the occupied territory. It must, as expressly stated in Article 43, respect the laws in force in the country at time of occupation, unless absolutely prevented. Further, it must at some time conclude a treaty of peace with the government of the occupied territory under its domination. The international jurist, Hans Kelsen, declares that belligerent occupation "presupposes that a state of war still exists in the relationship between the occupant state and the state whose territory is under belligerent occupation."

This condition implies the continued existence of the state whose territory is occupied and, consequently, the continued existence of its government recognized as the legitimate bearer of the sovereignty of the occupied state. This is the reason why it is generally assumed that belligerent occupation does not confer upon the occupant power sovereignty over the occupied territory.4

If the state exercising belligerent occupation should expel the legitimate government or the head of state, some form of government must be allowed to continue and be recognized as the legal one. Further, the occupant has no right to divide the country for political purposes. For instance, the division of Belgium by Germany into French and Flemish zones during World War I, and the encouragement of Flemish nationalism has been considered to be a violation of international law. The conquering power has no legal justification in setting up part of the occupied territory as an independent state. Prior to the First World War, George Grafton Wilson stressed the point that:

5 Ibid., 518.
Military occupation (occurratio bellica), by the usage of nations and the laws of war, differs from, and falls short of, the right of complete conquest (dolellatio, ultima victoria). Military occupation is an incident of war, and as such is not political in its effects. It does not transfer sovereignty, but gives to the invading force the right to exercise control for the period of occupation.

Discussing further the rights and limitations of belligerent occupation, Wilson stated:

Military occupation in the strict sense is a term applicable only in time of war, and is the effective holding by force of an enemy territory. This would cease in fact when the force is withdrawn, and would cease from a legal point of view when by treaty of peace the war is at an end.

According to Hershey, writing during the First World War:

Belligerent or military occupation should also be distinguished from conquest. The rights of a military occupant, however absolute, are in no wise those of a sovereign. They are merely provisional and are based upon military necessity. The occupant may not exact an oath of allegiance and his status is not even that of a temporary or substituted sovereign.

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7 Ibid., 341.
Occupatio bellica, being of an essentially provisional character, does not serve to transfer sovereignty over the occupied territory, notwithstanding the fact that the de jure sovereign, during the period of occupancy, is deprived of power to exercise its rights as such.

Belligerent occupation, being provisional in character, is essentially precarious since it is subject to the vicissitudes of war. It presupposes that war goes on in a factual sense; that the occupied state can still offer some resistance; and that continuance of resistance may result in changing the general situation. After World War II, it was evident that belligerent occupation in the traditional sense could not cover the case of Germany. Thus, the American jurist Kunz writes: "However, after the total defeat of Nazi Germany, the situation was essentially different since the occupation had become firmly established; any resistance, any factual continuation of hostilities, any possibility that the occupant might be driven out... all these were out of the question." The law of belligerent

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9 Charles Hyde, 3 International Law, 1878 (3rd Ed. 1947).

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occupation is still a valid concept for Kunz, but he, as do many others, denies that it was applicable to Germany after her unconditional surrender in 1945. "Any attempt to construe the present status of occupied Germany as simple belligerent occupation must necessarily fail in view of the unsurmountable legal obstacle constituted by Article 43 of the Hague rules." The American lawyer Friedman, analysing the legal status of Germany, admits that revolutionary changes in the social structure of states and in the methods of modern warfare have made the majority of the rules of warfare obsolete. "But even the most elastic interpretation could not bring the wholesale abolition of laws, the de-Nazification procedure, the arrest of thousands of individuals, the introduction of sweeping social reforms, the expropriations of industries, and above all the sweeping changes in the territorial and constitutional structure of Germany within the rights of belligerent

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12 Kunz, loc. cit., 538.
occupation." Alwyn Freeman, former Assistant to the Legal Adviser of the United States Department of State, examining the legal character of belligerent occupation, concludes:

... the Hague Regulations... are inapplicable to the situation now prevailing in Germany. Disappearance of the German State as a belligerent entity, necessarily implied in the Declaration of Berlin of June 5, 1945, signifies that a true state of war - hence belligerent occupation - no longer exists within the meaning of international law. The occupying authorities are exercising and are entitled to exercise all the attributes of sovereignty over the area. 14

From the foregoing discussion of belligerent occupation, one fact seems evident: in Germany, after the unconditional surrender of her armed forces, the essential conditions of occupatio bellica in the traditional sense were lacking. In the three documents of military surrender signed by German military leaders there appeared the stipulation, "It is independent of, without prejudice to, and will be superseded by, any general instrument of surrender.

imposed by or on behalf of the United Nations and applicable to Germany and the German armed forces as a whole." The June 5, 1945 Declaration, in which the Allies assumed supreme authority over the German territory, is the "general instrument of surrender" alluded to in the three military surrender documents. Since the essential conditions of belligerent occupation were lacking at the end of the war, it is obvious that the theory occupatio bellica in regard to Germany is untenable and thus, must be discarded.

Fiduciary Occupation

The Swiss writer G. Sauser-Hall, with recent support by an American jurist, Max Rheinstein, has proposed another theory, that of fiduciary occupation, to describe the status of Germany. The concept pictures the occupant as holding the territory in some form of trust, for the benefit of the occupied territory. Rheinstein, discussing fiduciary occupation, declares:

Having assumed supreme authority with respect to Germany, a country having no government able to speak for herself and her people, the occupant are finding themselves in a fiduciary position. The fiduciary position of the occupant implies, among others, a duty to preserve the capital assets of the German economy, to restore the productive capacity of the country, to provide for an efficient and clean administrative machinery, to preserve Germany's cultural identity, to reintegrate the German people into the economic and cultural world community, and to prevent disease and starvation.

It would seem that a territory under fiduciary occupation is thus in some way similar to a colony. But Allied pronouncements during and immediately after the war suggest that in reality the victors were concerned with safeguarding their own interests. As Kuns points out:

... prior to 1945 ideas were advocated, studies and preparations made, tending toward the destruction of Germany by way of dismemberment and not merely toward the disruption of the Nationalist Socialist regime in Germany. ... Summer Welles ... proposed a partition plan. The United States Secretary of the Treasury proposed his Morgenthau Plan, ... that coupled the dismemberment of Germany with the proposal of her complete deindustrialization and pasturalization, by making the Ruhr a pasture for goats. Dismemberment proposals and the Morgenthau Plan, to a certain extent, were favored by President Roosevelt who proposed at the Teheran Conference the partition of Germany into five autonomous states. ... Churchill advocated joining Bavaria with Austria. An intergovernmental

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Commission for the Dismemberment of Germany was set up. 17

True, in the face of much opposition, these plans and ideas were modified or dismissed, but as Kunz has noted, "reminiscences of it remain even in the events and the documents of 1945." These words in the Potsdam Declaration are pertinent:

Germany and the German people have begun to atone for the terrible crimes committed under the leadership of those whom in the hour of their success, they openly approved and blindly obeyed. In accordance with the Crimea decision that Germany be compelled to compensate to the greatest possible extent for the loss and suffering that she has caused to the United Nations and for which German people cannot escape responsibility, the following agreement on reparations was reached. . . 19

Reparation duties were imposed on the German people; Poland received German territory; France detached the Saar from Germany; and Germany was split up into four zones of occupation, each under a different Power with distinct political aims.

Therefore, there can be little doubt that in 1945, Germany was to be punished, that reconstruction of her economy was not a paramount consideration, and that the

17 Kunz, loc. cit., 546-547.
18 Ibid., 547.
division of Germany into four zones of occupation made it untenable to regard that occupation as fiduciary in the face of Allied directives, attitudes and events prior to Germany's defeat and in the years 1945-1946.

Occupation of Intervention

Still another theory on the legal status of Germany proposed by Georg A. Zinn and embraced by Adolf Arndt is that of occupation of intervention. This form of occupation can be imposed upon a state when it violates well established principles of the law of nations. The government of Nazi Germany, according to this view, had been illegal from its inception to its destruction in 1945. Arndt states that "Hitler usurped power in Germany through violence and fraud and . . . his power was always illegal and illegitimate. Consequently, there was never de jure a National Socialist state or Third Reich, but only a National Socialist tyranny in the German state. . . . Hitler came into power through terror and remained in power through terror." Proponents of the doctrine of occupation of intervention are of the opinion that the last war was an international civil war fought for the rights and privileges of men. Following

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this line of thought, the Allied nations intervened, or went to war with an illegal government; and upon the latter's defeat, the victorious powers occupied the territory by right of intervention. Somewhat similar to the position taken by fiduciary occupation, occupation of intervention implies that the Allies occupied Germany for the benefit of the country. As trustees of the territory and its inhabitants it is their task to reconstruct the political life in that area and to return the people to a more democratic way of life.

It appears, however, that the concept of occupation of intervention is an *ad hoc* solution with little basis in general international law. Lauterpacht-Oppenheim defines intervention thus:

> dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual conditions of things. Such intervention can take place by right or without (a) right, but it always concerns the external independence of the territorial or personal supremacy of the State concerned, and the whole matter is therefore of great importance for the international position of States. That intervention is, as a rule, forbidden by the Law of Nations which protects the international personality of the States, there is no doubt. 21

It may be conceded that while some of Hitler's methods and motives were repulsive to the nations of the world, he was careful in the year 1933 to avoid unconstitutional

measures in his rise to power. He became the leader by virtue of a constitutional election. Naturally, his popularity was not overwhelming among all the Germans at first, but there seems to be little doubt that in the years following 1933 the majority of Germans, after witnessing Germany's benefits under Nazi domination, supported Hitler voluntarily. Moreover, the principal nations continued to recognize Hitler and his government as sovereign de jure, indicating little or no conviction that Hitler and his government were illegal. Therefore, occupation of intervention does not seem plausible when applied to the status of Germany after World War II. Kuns observes that "the literature has produced many ad hoc solutions, such as an occupation of intervention ... But these ad hoc solutions are legally untenable, because they have no basis in general international law. Intervention without a particular legal title is unlawful under general international law."22

Dual Sovereignty

A German, Professor Verdross, offers still another theory as to the legal position of occupied Germany in which he reasons that the Four Powers exercise supreme authority in the higher organs of German political

22 Kunz, loc. cit., 539-540.
machinery but that German state power has continued to exist in the lower organs. But legal sovereignty has commonly been regarded as indivisible, and it seems anomalous that sovereignty could exist in the lower organs in the hands of one sovereign, and at the same time, exist in the higher organs in the hands of another sovereign. This theoretical difficulty is obviated by specific terms of the Declaration of Berlin. No German sovereignty has existed in the lower organs since, by that Declaration, the Allies assumed "supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority." Professor Verdross appears to have made a distinction between territorial sovereignty and mere territorial supremacy, that is, between sovereignty and mere exercise of sovereignty. The Allies, for Verdross, only exercise sovereignty. This view of occupied Germany, while theoretically tenable, seems unsupportable in the face of the Declaration of Berlin:

23 Ibid., 559 reporting correspondence with Verdross.
The Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics, and the Provisional Government of the French Republic, will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory.  

If the Allies merely exercised sovereignty, but were not the actual territorial sovereigns, then how are we to explain the situation in which the Allies decide the disposition of territory? Kuns agrees that the distinction made by Verdross between mere exercise of sovereignty and actual territorial sovereignty, "is certainly a correct one."

He who, as in the case of cession for administration, has only territorial supremacy is not the sovereign. He has only . . . all the rights as if he were sovereign, but not of the sovereign; the right of sovereignty . . . can be in another state. Only the sovereign has the jus disponendi over the territory, not he who has mere territorial supremacy.  

But this was not the case in Germany. The Declaration of Berlin, expressly stated that the Allies, "will hereafter determine the boundaries of Germany." Therefore, Professor Verdross' theory seems not only unconvincing, but erroneous.

25 Ibid., 172.
26 Kuns, loc. cit., 558-559.


Title by Conquest

Of the four theories thus far examined none appear to be tenable. To reiterate, Germany's situation at the end of the war was unique and unprecedented. The country was conquered but not annexed; and political and legal ambiguities crept into the various declarations and actions of the victors as disunity developed between the Three Western powers and the Soviet Union. Nevertheless, since it is essential to find some legally acceptable theory of the status of Germany, a fifth theory, known as title by conquest, will be discussed as the most promising concept.

Hans Kelsen has proposed a title by conquest doctrine for the status of Germany, maintaining that Germany ceased to exist as a sovereign state, and that her sovereignty was assumed and exercised by the victorious Four Powers. According to Kelsen, "The existence of an independent government is an essential element of a state in the eyes of international law. . . . By abolishing the last Government of Germany the victorious powers have destroyed the existence of Germany as a sovereign state. Since her unconditional surrender, at least since the abolition of the Dönitz Government, Germany has ceased to

28 Kuns, loc. cit., 545.
exist as a state, the status of war has been terminated, because such a status can exist only between belligerent states. .

Lauterpacht-Oppenheim, on the question of government independence concurs with Kelsen, stating that, "A state is in existence when a people is settled in a country under its own sovereign Government." Kelsen's thesis, then, is that Germany was conquered and debellatio resulted opening the way for sovereignty in a condominium of the victors over that territory. In international law a condominium is recognized as the joint exercise of sovereignty over some territory by two or more states. Green Hackworth, legal adviser to the State Department and American representative to the International Court of Justice, states:

The conjoint exercise of sovereignty over a region by two or more states is denominated condominium. The joint action of Great Britain and Egypt in the Sudan and that of Great Britain and France in the New Hebrides have been referred to by writers as examples of condominium. 32

Lauterpacht-Oppenheim regard condominium as the foremost

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29 Kelsen, loc. cit., 518, 526
30 Lauterpacht-Oppenheim, op. cit., 114.
31 Schwarzenberger, op. cit., (Glossary XXXIX).
32 Green Hackworth, 1 Digest of International Law, 56-57 (1940).
and perhaps sole exception to the general maxim of the
indivisibility of a single sovereignty over the same
territory. "In this case a piece of territory consist­
ing of land or water is under the joint tenancy of two
or more states, these several states exercising sovereignty
conjointly over it, and over the individuals living thereon."

Thus Schleswig-Holstein and Lauenburg from
1864 till 1866 were under the condominium of
Austria and Prussia... and since 1939 the
Islands of Canton and Endenburg... have
been under the joint control of Great Britain
and the United States... When on June 5,
1945, Great Britain, the United States,
Russia and France, in a Declaration regarding
the defeat of Germany, assumed supreme authority
over that country, they provided an example of
joint exercise of sovereignty. 33

The ideas of Kelsen have gained wide support,
including some Germans, especially a minority of
experts preparing the Bonn constitution and concurring
with Kelsen's views that Germany as a sovereign state
had ceased to exist. 34

33 Lauterpacht-Oppenheim, op. cit., 409, 411.
34 Kuns, loc. cit., 542, 543.
A curiously interesting case connected indirectly with the status of Germany was noted recently in the Michigan Law Review. An American citizen living in Germany voted for the election of local officials in the American Zone of Occupation. For this act, the American citizen was issued a certificate of loss of nationality for having violated the Nationality Act of 1940 restricting Americans from voting in political elections in a foreign state. A federal District Court in Texas held that the petitioner had not lost her citizenship since the election was held in territory then ruled and governed by the United States and was held by permission and under the direction and by the authority of the United States, and was not an election in a foreign state within the meaning of the Nationality Act of 1940.

Before we evaluate the theory of title by conquest, attention must be given to the closely related meaning of debellatio in international law. There is a deep divergency in the literature regarding the legal connotation of debellatio. Modern Continental writers on

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the subject emphasize factual considerations in use of the term. That is, if the enemy forces have been annihilated in fact, if occupation of the enemy state is total, if the government is destroyed, then the enemy state has ceased to exist as a sovereign state. Thus debellatio, for Continental writers, is identical with conquest. Annexation is not legally necessary in order to make debellatio complete. The second school of thought on the other hand, claims that debellatio consists of conquest plus subjugation and that subjugation can only be effected through annexation. Lauterpacht-Oppenheim, representative of the Anglo-American school, denies that conquest alone is able to bring about subjugation and thus debellatio. "Conquest is only a mode of acquisition if the conqueror, after having firmly established the conquest, formally annexes the territory. Such annexation makes the enemy State cease to exist, and thereby brings the war to an end. . . it is conquest followed by subjugation, and not conquest alone, which gives a title, and is a mode of acquiring territory." Westlake declared: "The extinction of a state by conquest will take place when the conquering

36 Kuns, loc. cit., 552.
37 Lauterpacht-Oppenheim, op. cit., 518.
power has declared its will to annex it and has established its authority throughout the territory... ."  
Fenwick concurs, declaring that conquest is usually described as subjugation, but that this should only occur when conquest is followed by formal annexation of the defeated territory. The sovereignty and international personality of the state is destroyed when there is conquest plus subjugation; subjugation, of course, entailing formal annexation.

Some additional minor points must be examined. The question might be raised: is debellatio accepted as legal in the law of nations? At first glance the answer would have to be in the negative, for much opposition to the doctrine has arisen. Further, it is not denied that tendencies have appeared in this century which have endeavored to place limitations on title by conquest. These tendencies found expression in numerous Pan-American declarations. But these tendencies, however admirable, are not yet a new rule of general international law.

38 John Westlake, *International Law*, 64 (1904).
40 Kunz, *loc. cit.*, 551.
Hyde concedes that while it would be commendable if the nations of the world would outlaw this title by conquest, he is forced to admit, as do others, that no rule has yet been accepted which legally abolishes conquest as a mode of acquisition of territory. As Sir John Fisher-Williams stated:

Conquest is often, though not always, a moral wrong. But it is not illegal and it produces legal results. We shall not advance the cause of peace and international order by seeking to deny that war produces results - such as the acquisition of territory - which it does in fact produce. If we want to stop the forcible acquisition of territory, we must stop private war. 42

Title by conquest, though common in the day of Grotius, had almost disappeared by the end of the nineteenth century. But there is no evidence that it had been outlawed by the international community, and it did reappear in the twentieth century, as evidenced by the conquest of the Boer Republics in 1900 by Great Britain, and the conquest of Ethiopia by Italy in 1937. Doubtless, the

world would benefit by its outlawry, but this has not yet been achieved. General international law knows of no rule yet which places restrictions on title by conquest, and it appears sound to say that title by conquest is still legally valid.

To return now to the matter of the two schools of doctrine on debellatio: we have seen how the Anglo-American school insists that title by conquest is only achieved when the conquering power has effectively occupied the enemy's territory and then formally annexed it. Yet, regarding Germany, the Allies in the June 5, 1945 Declaration explicitly declared that it was not their intention to annex the German territory. If we then follow Anglo-American doctrine, the Allies are not sovereign occupants, for Germany, although conquered, was certainly not annexed. The Anglo-American interpretation may be too rigidly conceptual. It seems that if a state is in a position to annex an enemy's territory, it coincidentally has the right to impose less harsh methods. That is, the conqueror could hold the territory on a temporary basis. "Under international law," according to Wright, "a state may acquire sovereignty of territory by declaration of annexation after subjugation of the territory." However, this American writer goes on to say that, "... it appears that if a state or
states are in a position to annex a territory they have the right to declare the lesser policy of exercising sovereignty temporarily for specified purposes with the intention of eventually transferring the sovereignty to someone else."

Kuns concurs:

While the situation... could be construed as healed by the principle of effectivity that is a norm of positive general international law, it is not necessary to resort to this construction. The legal basis of the present occupation is conquest; the conqueror has a right to annex the conquered state, but can also take other measures. He can, particularly, intend to preserve the sovereignty of the conquered state. That was the declared intention of the conquerors of Germany. 44

The literature on methods of acquiring territorial sovereignty usually recognizes five modes to attain such ends. The British writer, Mann, though not repudiating the general view that conquest followed by annexation is the usual procedure, suggests that this is not the only possibility. "It must be admitted that there is no a priori reason why the categories of methods of acquiring territorial sovereignty should be considered closed. International law is not so

43 "right, loc. cit., 50.
44 Kunz, loc. cit., 564.
rigid as to exclude new developments. It may well be, therefore, that there exists a sixth method of acquiring territorial sovereignty. . . ." In the words of Kelsen:

The existence of a state is destroyed by its adversary when the latter has not only annihilated the armed forces but also abolished the government of the former. The establishment of territorial sovereignty does not depend on the new sovereign's intention to hold the territory for good. . . . If there is a difference at all between formal annexation and placing the territory under the conqueror's sovereignty without the latter's intention to hold it permanently, it is rather a political than legal one. 47

Schwarzenberger points out that the Allies at the end of World War II could have done any one of three things. They could have annexed all or some of the German territory; they could regard the German territory as res nullius; or they could have established the German territory as a new international person, over which they might exercise a condominium and ultimately return the territory to the sovereignty of the German people. Of the three choices, Schwarzenberger

47 Kelsen, loc. cit., 521.
continues, the allies adopted the lost and established a condominium over Germany. Even Lauterpacht-Oppenheim, while strictly maintaining that title by conquest is acquired after the conquered territory is formally annexed, makes the concession that conquered territory, though not annexed, continues to be in possession and under the sway of the conqueror. A German philosopher, Jurgen von Kempski, takes a slightly different view from both schools, regarding subjugation as a much broader concept than that proposed by Lauterpacht-Oppenheim and the Anglo-American school on debellatio. "Every annexation," states Kempski, "is indeed a subjugation but a subjugation does not have to be an annexation." Von Kempski's view is close to that of the Continental school; while this school accepts title by simple conquest, von Kempski, admitting title by subjugation, is still less rigid in his conception. The British writer Jennings asserts:

48 Schwarzenberger, 1 \textit{International Law}, 142 (2nd Ed. 1950).
49 Lauterpacht-Oppenheim, 1 \textit{International Law} 519 (7th Ed. 1948).
Germany was so completely at the disposal of the Allies as to justify them in law in annexing the German state; it would seem to follow that they are by the same token entitled to assume the rights of supreme authority unaccompanied by annexation. 51

Returning to the question which of the two doctrines of debellatio seems the most plausible, it is obvious that the traditional Anglo-American view is too rigid to accommodate the facts in Germany. The Allies were certainly legally entitled to annex Germany, but this was not their desire. Moreover, it is not very convincing to say that their failure to annex invalidates the claim that they are sovereigns in Germany. Surely, they were entitled to take whatever measures they wished once Germany was totally defeated. Moreover, the traditional Anglo-American position is attacked by foremost Anglo-American writers on international law. The Continental doctrine, in general, more closely covers the facts in Germany. For this school, an enemy state is totally defeated and conquered and the conqueror, as the sovereign over the territory, pursues whatever measures he deems fit. Further, the Continental school appears more humanitarian in that it does not require that annexation must follow. Thus the Continental school most nearly accommodates the unprecedented situation.

in Germany in 1945 to the more orthodox legal channels of international law.

Still another group of writers concur in the thesis that Germany has ceased to exist, but do not touch upon the divergent view on debellatio. These writers assume that Germany has ceased to exist, simply by virtue of her unconditional surrender and the Berlin Declaration. Finch states:

With the unconditional surrender of Germany, its government went out of existence as a sovereign state and its sovereignty is now held in trust by the condominium of the occupying powers. 52

The American jurist Karl Loewenstein has written:

By the Four Power Statement of June 5, 1945, the Inter-Allied Control Authority, Control Council, was established in Berlin as the supreme authority for occupied Germany in lieu of the non-existing central German government. 53

Rheinstein agrees with Finch and Loewenstein:


He who has assumed all the powers of the German government is the German government. Hence, there exists a German government and this government rests with the four occupying Powers. 54

To recapitulate, five different theories on the status of Germany have been examined: belligerent occupation; fiduciary occupation; occupation of intervention; dual sovereignty; and title by conquest, or debellatio. Of the five, the last, title by conquest as understood by the Continental writers, appears to be the most tenable.

It has been necessary here to establish Germany's status at the end of World War II for two reasons. First, the very fact that the Allies became sovereign on German territory may be found to affect the basis of jurisdiction of the Tribunal. Second, in view of Allied sovereignty in Germany, consent from Germany was not an indispensable condition for legal validity in the trial of her war criminals.

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54 Sheinstein, loc. cit., 23.
CHAPTER III

INTERPRETATION OF THE JURISDICTION
OF THE INTERNATIONAL MILITARY
TRIBUNAL

Critics of the Nuremberg Trial, with firm and perhaps sincere conviction, challenged the right of victorious nations to prosecute and convict individuals who were members of a vanquished state without the consent of that state. The challenge was based on the well established rule of general international law denying a state jurisdiction over acts of another state and its nationals without consent of that state. Quincy Wright notes that "Sovereign states... cannot be subjected to foreign jurisdiction without their consent." Kelsen declares:

The principle that no state has jurisdiction over acts of another state applies also to the jurisdiction of a tribunal established by an international agreement with respect to acts of a state not a contracting party to the agreement. 2


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"The jurisdiction of international courts and tribunals," according to Schwarzenberger, "depends on the consent of the parties concerned." A number of other writers concur in this view.

The Allies, at the termination of World War I, observed the rule that a state has jurisdiction over acts of another state only with the latter's consent. Certain Articles, (228, 229 and 230) were inserted in the Treaty of Versailles and came to be regarded as the punitive Articles. The Versailles Treaty, establishing criminal responsibility of the German Emperor and others for violations of international law committed in their capacity as agents of the German Reich, was ratified by Germany. It is evident however, that the situation at the end of World War II was essentially different. As we have seen, there is a tenable argument to be made that, in the sense of international law, Germany had ceased to exist.

The four Powers exercising condominium over Germany thus could have created a municipal court competent to try German major war criminals. But this procedure was not followed. Instead, these Powers met at London

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August 8, 1945 and signed an agreement for the establishment of an international military tribunal for the trial of all European Axis major war criminals. It must be emphasized, nevertheless, that Allied sovereignty in Germany was important, for if Germany had not ceased to exist, then the signatories to the Agreement needed her consent.

It may be tenable to assume that the London Agreement was the international basis for the Tribunal for various reasons. First, the Tribunal was the offspring of an international treaty and derived its creation and jurisdiction from such a treaty in the same manner as any other international court, commission or board. Second, the adherence of nineteen other members of the United Nations to the principles of the Agreement lent some persuasiveness to the contention that the Tribunal was international. Third, though it is conceded that the Agreement created an agency for the application of traditional international law when the Tribunal was empowered to try traditional war crimes, it went beyond this and established conventional law by commissioning the Tribunal to try individuals on charges of crimes against humanity.

It may also be tenable to say that the London
Agreement, though formally establishing an international tribunal, was in substance actually creating a joint-national tribunal. No doubt exists that such a tribunal would have had jurisdiction to try individuals for traditional war crimes by resorting to principles of general international law. By analogy, the judicial organs of any nation may punish pirates for having committed acts in violation of the laws of nations. But the Nuremberg Tribunal did not stay within the scope of traditional war crimes, for it prosecuted and punished also those persons guilty of having committed crimes

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Kelsen, op. cit., 124-125; But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or its own ships, and to crimes by its own nationals wherever committed, it is also recognized as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. In Re Piracy Jure Gentium, Great Britain; Judicial Committee of the Privy Council, (1934), reprinted in Brings, The Law of Nations, 361, 363 (1938).
against humanity, as defined in the Charter annexed to the Agreement. If it is maintained that it was a joint-national tribunal a difficulty arises, because it would then appear to be a national tribunal applying ad hoc treaty law and an ad hoc tribunal applying ad hoc law. Schwarzenberger makes this point, that "the status of the Tribunal within the judicial hierarchy of municipal courts and tribunals of the states which shared it was that of a military ad hoc tribunal." However, if the words of the international Military Tribunal summoning allied sovereignty for support in its resort to municipal law are accepted at face value, the ad hoc objection may perhaps be circumvented. The Tribunal declared that "The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered."  

To give additional strength to the contention that

6 Schwarzenberger, 1 international Law, 314 (2nd Ed. 1949).

7 Opinion and Judgment, 43.
the Powers intended to create merely a joint-national tribunal, Article I of the London Agreement may be quoted:

There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities. 8

From this Article one might argue that if the Tribunal was international, with the power to try all Axis major criminals there was no need to consult the Control Council for Germany on the establishment of an international court. Further, in Article 29 of the Charter annexed to the Agreement there is the provision that the sentences to be imposed upon those found guilty should be carried out in accordance with the orders of the Control Council for Germany; and the power to reduce or alter the sentences is, according to this Article, within the domain of the Control Council. Moreover, on December 20, 1945, Control Council Law No. 10 was enacted. This Law, enacted more than a month after the Tribunal commenced its work, declared that:

8 Robert H. Jackson, The Case Against the Nazi War Criminals, 96 (1946).
In order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal, the Control Council enacts as follows.

The Moscow Declaration of 30 October 1943, and the London Agreement of 8 October 1945 "Concerning the Prosecution and Punishment of Major War Criminals of the European Axis" are made integral parts of this law.

Thus Law 10 besides creating a uniform legal basis for the prosecution of war criminals other than those to be dealt with by the International Military Tribunal, declared that it give effect, though belatedly, to the London Agreement and Charter and made both of them integral parts of the Law. It has been argued that Law 10, by using the words "to give effect," and "are made integral parts of this Law," sought to give legislative authority to the London Agreement. Franz Schick, Professor of Political Science at the University of Utah has stated:

It is, therefore, Control Council Law No. 10, and not the London Agreement, which must be considered the legal basis for the Nuremberg trial. No doubt exists that the Control Council at Berlin was competent to proclaim such a law since the Allied Powers, on the basis of the Potsdam Declaration, had assumed supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority, and since, according to a declaration issued on the same day, this supreme authority over Germany was to be exercised, on instructions from their Governments, by the Soviet, British, United States, and French Commanders-in-Chief, each in his own zone of occupation, and also jointly, in matters affecting Germany as a whole. ... Control Council Law No. 10, succeeded belatedly in establishing the legal basis for the prosecution of German major war criminals. ... 10

From this it might be implied that the jurisdiction of the International Military Tribunal had been delegated to it by the Control Council as the body exercising supreme authority in Germany. Thus it would follow that in substance the Nuremberg Tribunal was of a joint-national character.

But the assumption that Control Council Law 10 gave a legal basis to the Tribunal must be dismissed. The Charter for the Nuremberg Tribunal annexed to the London Agreement provided for the trial of all major war criminals of the European Axis. Here lies the

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inconsistency. How could the Tribunal, if it received its powers from Control Council Law No. 10, exercise authority broader than that of the Control Council for Germany by stating that it would prosecute all major European Axis war criminals, while the Control Council had legislative power only over the German territory?

There is no doubt that statements in the Tribunal's Judgment, in Article 1 of the London Agreement and in Article 29 of the Charter contained ambiguities. Perhaps the chief reason for this was that the four sovereign nations in Germany and signatories to the Agreement were somewhat uncertain in when creating such a novel experiment as the Tribunal, and that this confusion led to ambiguity of official language. Or it might be argued that the four Powers were not satisfied that the London Agreement by itself could vest jurisdiction in the International Military Tribunal, and sought a firmer basis, notably, Allied supreme authority in Germany.

However, Schwarzenberger presents a seemingly formidable argument that the Tribunal had a dual source of jurisdiction and was joint-national in substance. In the view of this jurist, the duality of jurisdiction rests upon the London Agreement and Allied
sovereignty in Germany:

The international basis of the Nuremberg Tribunal was provided by the Agreement of August 8, 1945,... There was, however, another source of the Tribunal's jurisdiction: the exercise by the occupying Powers of condominium over Germany. 11

It may be argued against Schwarzenberger's contention that the Charter of the International Military Tribunal stipulated that all major war criminals of the European Axis, not merely Germany, would be tried. It is conceded that in practice only Germans were prosecuted and punished by the Nuremberg Tribunal, but it was the declared intention of the Signatories to try all European Axis criminals. If the Allies had specifically stated that they would bring only German major war criminals before the International Military Tribunal, then it would be reasonable to say that the Tribunal had a dual source of jurisdiction; in fact, the London Agreement would not even have been necessary.

The Control Council for Germany exercising condominium over the territory could legally have established a court for the prosecution of the alleged German criminals.

On the matter of the joint-national character of the Tribunal Schwarzenberger states:

11 Schwarzenberger, I International Law, 314 (2nd Ed. 1950).
... the Nuremberg Tribunal may claim to be international in the formal sense of the word. ... It derives its existence and jurisdiction from an international treaty. ... It appears, however, to have been the intention of the parties to establish in substance joint military tribunals under municipal law rather than a truly international tribunal. 12

He supports this view by reference to two facts. First, a declaration by the Tribunal states that the Signatory Powers created the Tribunal and, "In doing so they have done together what any of them might have done singly." 13 Secondly, Justice Jackson stated that "One of the reasons this Tribunal was constituted as a military tribunal instead of an ordinary court of law was to avoid the precedent-creating effect of what is done here on our own law and the precedent control which would exist if this were an ordinary judicial body."

In making the first point that the Tribunal was a joint national tribunal in substance, Schwarzenberger overlooks an important matter. It is conceded that a single nation has the power to try enemy war criminals who have committed crimes against this nation once they

12 Ibid., 311.
13 Opinion and Judgment, 48.
14 Schwarzenberger, op. cit., 313, quoting Justice Jackson.
are within its power. However, a single nation could not try individuals for having committed crimes against other states. Yet, this is exactly what the Nuremberg Tribunal was doing. Great Britain, France, Russia and the United States were prosecuting enemy war criminals who not only committed crimes against them but against many other nations.

On the second point Schwarzenberger, analysing Jackson's statement that the Tribunal "was constituted as a military tribunal. . . to avoid the precedent-creating effect. . ." concludes that the Tribunal was a joint-national tribunal for if it had been truly international, it did not require the title of military, since international tribunals do not create precedents. It does not follow, however, that making the Tribunal military made it joint-national. War criminals are usually tried before military courts. It seems quite as reasonable to argue that Jackson's words were merely precautionary against setting precedents, as it is to argue Schwarzenberger's view, that imposing the title of military upon the tribunal made it joint-national in substance. Schwarzenberger, perhaps unintentionally,

15 Piracy is an exception. Kelsen, op. cit., 124-125.
16 Schwarzenberger, op. cit., 312, quoting Justice Jackson.
supported the contention that calling the Nuremberg Tribunal military does not necessarily make it joint-national when he stated that "Under international customary law persons accused of war crimes are entitled to trial by a military court of the enemy. To this extent the Charter of the Nuremberg Tribunal is merely declaratory of international customary law. By appointing a Major-General Jurisprudence as a member of the Tribunal and a Lieutenant-Colonel as his alternate, the Soviet Union emphasised the traditional character of such proceedings." It is not denied that here Schwarzenberger is speaking of national or joint-national tribunals, but it must be remembered that the International Tribunal at Nuremberg was also trying enemy war criminals and therefore, was justified in having the title of military.

Before conclusions can be reached as to the source of jurisdiction of the Tribunal and its character, a further argument must be presented. Counsel for defense of the twenty-four accused criminals challenged the jurisdiction of the Tribunal on the grounds that the

the Tribunal was made up of members of the victorious Powers and that neither Germany nor neutral states were represented. We might dismiss this view on the ground of the stipulation in Article 3 of the Charter that "Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel." However it seems proper to point out that much could be said in support of the view that neutrals should have been represented on the Tribunal. But this was not legally necessary and the Defense had little basis for its challenge on this point. Moreover, there were few neutrals at the termination of World War II. On the matter of Germans being represented, this too was not legally necessary. Germany had ceased to exist. It is conceded, however, that it might have been more satisfactory as far as German sentiment was concerned if one of their compatriots were present, but the fact that this was not the case does not detract anything from the jurisdiction of the Court. As Schwarzenberger stated:

18 Nazi Conspiracy, (Supp 3) 1, 3.
19 International Conference on Military Trials, 422.
the provision in the Charter that neither the Tribunal nor its members can be challenged is compatible with the minimum standards which, under international customary law, persons accused of war crimes ... may expect to be observed towards them. Nor have persons accused of war crimes any claim to be judged by nationals of neutral countries or to have one of their co-nationals on the bench. ... 20

Some of the problems need restatement. To say that the intention of the Allies was to create in substance a joint-national tribunal seems plausible for much of the afore-mentioned points in favor of such a view. However, it is more tenable to say that the Nuremberg Court derived its jurisdiction from the London Agreement and that the Tribunal was one of truly international character. The reasons for this contention have already been given. Further support can be drawn from the ease with which the Signatories amalgamated rules of evidence and procedure. If the Tribunal was contemplated as a joint-national court, there would have been less readiness to abandon particular national principles of evidence and procedure. As Wright notes, "... it has never been contended that those rules of evidence are required by international law." Moreover, crimes purported against

20 Schwarzenberger, op. cit., 312.
international law are violations of basic interests protected by the law of nations. Thus, according to Wright, they "may not be adequately punished by the exercise of the normal criminal jurisdiction of any state... International law has recognized the competence of states to establish international tribunals for the trial of grave offenses not dealt with by national tribunals such as terrorism and Aggression."  

Notwithstanding the London Agreement as a source of jurisdiction for the Nuremberg Court, it seems that the Tribunal did go beyond this to invoke a second source of jurisdiction - general principles of international law - when it declared:

It was submitted that international law is concerned with the actions of Sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized... The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. 23

22 Opinion and Judgment, 48, 53.
23 Opinion and Judgment, 52, 53.
From this statement we see that the Tribunal was of the opinion that individuals and not abstract entities commit crimes which violate international norms, and when such persons are punished, then the law of nations is being enforced. Since a large amount of Justice Jackson's views were embodied in the Judgment by the Tribunal, one of his passages may be noted in which he speaks of internationally accepted standards of just conduct and seems to suggest emergent positive law:

Those acts which offended the conscience of our people were criminal by standards generally accepted in all civilized countries, and I believe that we may proceed to punish those responsible in full accord with both our own traditions of fairness and with standards of just conduct which have been internationally accepted. . . . In troubled times, progress toward an effective rule of law in the international community is slow indeed. Intertia rests more heavily upon the society of nations than upon any other society. How we stand at one of those rare moments when the thought and institutions and habits of the world have been shaken by the impact of world war on the lives of countless millions. Such occasions rarely come and quickly pass. We are put under a heavy responsibility to see that our behavior during this unsettled period will direct the world's thought toward a firmer enforcement of the laws of international conduct, so as to make war less attractive to those who have governments and destinies of peoples in their power. 24

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24 Opinion and Judgment, 52, 33.
Quite obviously and naturally the Allies were dedicated to the prosecution of those men who prior to and during the war had committed acts repulsive to mankind. But their punishments were to be applied through legal norms. For this reason the Tribunal wanted a sound legal basis for its jurisdiction. It is the contention of this study that the legal basis was to be found in an international treaty - the London Agreement. But it also appears that the Tribunal appealed to the body of general principles of international law as a more general basis of jurisdiction. "Thus," concedes Briggs, "... the resort to general principles of law is an accepted judicial procedure which... may, in effect, extend the scope or content of international law."

The Tribunal's reliance upon general principles of the law of nations as a second source of jurisdiction may have justification, for in the immediate circumstances it was difficult for the Tribunal to rest its basis entirely on strict legal maxims in view of the dynamic character of the society of nations. Jackson eloquently touched upon the central question when he said:

It is true, of course, that we have no judicial precedent for the Charter. But International Law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties and agreements between nations and of accepted custom. Yet every custom has its origin in some single act, and every agreement has to be initiated by the action of some state. Unless we are prepared to abandon every principle of growth for International Law, we cannot deny that our day has the right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law. International Law is not capable of development by the normal process of legislation for there is no continuing international legislative authority. Innovations and revisions in International Law are brought about by the action of governments designed to meet change in circumstances. 26

26 International Conference on Military Trials, 51-52.
I. Constitution of the International Military Tribunal.

Article 1. In pursuance of the Agreement signed on the 8th day of August 1945 by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal (hereinafter called "the Tribunal") for the just and prompt trial and punishment of the major war criminals of the European Axis.

Article 2. The Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the Signatories. The alternates shall, so far as they are able, be present at all sessions of the Tribunal. In case of illness of any member of the Tribunal or his incapacity for some other reason to fulfill his functions, his alternate shall take his place.

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 member 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.

Article 4.

(a) The presence of all four members of the Tri-
bunal or the alternate for any absent member shall be
necessary to constitute the quorum.

(b) The members of the Tribunal shall, before
any trial begins, agree among themselves upon the
selection from their number of a President, and the
President shall hold office during that trial, or as
may otherwise be agreed by a vote of not less than three
members. The principle of rotation of presidency for
successive trials is agreed. If, however, a session of
the Tribunal takes place on the territory of one of the
four Signatories, the representative of that Signatory
on the Tribunal shall preside.

(c) Save as aforesaid the Tribunal shall take
decisions by a majority vote and in case the votes
are evenly divided, the vote of the President shall be
decisive: provided always that convictions and
sentences shall only be imposed by affirmative votes of at least three members of the Tribunal.

Article 5. In case of need and depending on the number of the matters to be tried, other Tribunals may be set up; and the establishment, functions, and procedure of each Tribunal shall be identical, and shall be governed by this Charter.

II. Jurisdiction and General Principles

Article 6. The Tribunal established by the Agreement referred to in 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;

(b) \textit{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 labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) \textit{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 domestic law of the country where perpetrated.

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.

Article 7. The official position of defendants, whether as Heads of State or responsible officials in Government Departments, 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 or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determine that justice so requires.

Article 9. At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

After receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants
Article 10. In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

Article 11. Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.

Article 12. The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.
Article 13. The Tribunal shall draw up rules for its procedure. These rules shall not be inconsistent with the provisions of this Charter.

III. Committee for the Investigation and Prosecution of Major War Criminals

Article 14. Each Signatory shall appoint a Chief Prosecutor for the investigation of the charges against and the prosecution of major war criminals.

The Chief Prosecutors shall act as a committee for the following purposes:

(a) to agree upon a plan of the individual work of each of the Chief Prosecutors and his staff,

(b) to settle the final designation of major war criminals to be tried by the Tribunal,

(c) to approve the Indictment and the documents to be submitted therewith,

(d) to lodge the Indictment and the accompanying documents with the Tribunal,

(e) to draw up and recommend to the Tribunal for its approval draft rules of procedure, contemplated by Article 13 of this Charter. The Tribunal shall have power to accept, with or without amendments, or to reject, the rules so recommended.
The Committee shall act in all the above matters by a majority vote and shall appoint a Chairman as may be convenient and in accordance with the principle of rotation; provided that if there is an equal division of vote concerning the designation of a Defendant to be tried by the Tribunal, or the crimes with which he shall be charged, that proposal will be adopted which was made by the party which proposed that the particular Defendant be tried, or the particular charges be preferred against him.

Article 15. The Chief Prosecutors shall individually, and acting in collaboration with one another, also undertake the following duties:

(a) investigation, collection and production before or at the Trial of all necessary evidence,

(b) the preparation of the Indictment for approval by the Committee in accordance with paragraph (c) of Article 14 hereof,

(c) the preliminary examination of all necessary witnesses and of the Defendants,

(d) to act as prosecutor at the Trial,

(e) to appoint representatives to carry out such duties as may be assigned to them,
(f) to undertake such other matters as may appear necessary to them for the purposes of the preparation for and conduct of the Trial.

It is understood that no witness or Defendant detained by any Signatory shall be taken out of the possession of that Signatory without its assent.

IV. Fair Trial for Defendants

Article 16. In order to ensure fair trial for the Defendants, the following procedure shall be followed:

(a) The indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the indictment and of all the documents lodged with the indictment, translated into a language which he understands, shall be furnished to the Defendant at a reasonable time before the Trial.

(b) During any preliminary examination or trial of a Defendant he shall have the right to give any explanation relevant to the charges made against him.

(c) A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands.

(d) A defendant shall have the right to conduct his own defense before the Tribunal or to have the
assistance of Counsel.

(e) A defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution.

V. Powers of the Tribunal and Conduct of the Trial

Article 17. The Tribunal shall have the power

(a) to summon witnesses to the Trial and to require their attendance and testimony and to put questions to them,

(b) to interrogate any Defendant,

(c) to require the production of documents and other evidentiary material,

(d) to administer oaths to witnesses,

(e) to appoint officers for the carrying out of any task designated by the Tribunal including the power to have evidence taken on commission.

Article 18. The Tribunal shall

(a) confine the Trial strictly to an expeditious hearing of the issues raised by the charges.

(b) take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever.
(c) deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings, but without prejudice to the determination of the charges.

Article 19. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.

Article 20. The Tribunal may require to be informed of the nature of any evidence before it is offered so that it may rule upon the relevance thereof.

Article 21. The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof. It shall also take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various allied countries for the investigation of war crimes, and the records and findings of military or other Tribunals of any of the United Nations.
Article 22. The permanent seat of the Tribunal shall be in Berlin. The first meetings of the members of the Tribunal and of the Chief Prosecutors shall be held at Berlin in a place to be designated by the Control Council for Germany. The first trial shall be held at Nurnberg, and any subsequent trials shall be held at such places as the Tribunal may decide.

Article 23. One or more of the Chief Prosecutors may take part in the prosecution at each Trial. The function of any Chief Prosecutor may be discharged by him personally, or by any person or persons authorized by him.

The function of Counsel for a Defendant may be discharged at the Defendant's request by any Counsel professionally qualified to conduct cases before the Courts of his own country, or by any other person who may be specially authorized thereto by the Tribunal.

Article 24. The proceedings at the Trial shall take the following course:

(a) The Indictment shall be read in court.

(b) The Tribunal shall ask each Defendant whether he pleads "guilty" or "not guilty."

(c) The prosecution shall make an opening statement.
(d) The Tribunal shall ask the prosecution and the defense what evidence (if any) they wish to submit to the Tribunal, and the Tribunal shall rule upon the admissibility of any such evidence.

(e) The witnesses for the Prosecution shall be examined and after that the witnesses for the Defense. Thereafter such rebutting evidence as may be held by the Tribunal to be admissible shall be called by either the Prosecution or the Defense.

(f) The Tribunal may put any question to any witness and to any Defendant, at any time.

(g) The Prosecution and the Defense shall interrogate and may cross-examine any witnesses and any Defendant who gives testimony.

(h) The Defense shall address the court.

(i) The Prosecution shall address the court.

(j) Each Defendant may make a statement to the Tribunal.

(k) The Tribunal shall deliver judgment and pronounce sentence.

Article 25. All official documents shall be produced, and all court proceedings conducted, in English, French, and Russian, and in the language of the Defendant. So much of the record and of the proceedings may also be
translated into the language of any country in which the Tribunal is sitting, as the Tribunal considers desirable in the interests of justice and public opinion.

VI. Judgment and Sentence

Article 26. The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review.

Article 27. The Tribunal shall have the right to impose upon a Defendant on conviction, death or such other punishment as shall be determined by it to be just.

Article 28. In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany.

Article 29. In case of guilt, sentences shall be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof. If the Control Council
for Germany, after any Defendant has been convicted and sentenced, discovers fresh evidence which, in its opinion, would found a fresh charge against him, the Council shall report accordingly to the Committee established under Article 14 hereof, for such action as they may consider proper, having regard to the interests of justice.

VII. Expenses

Article 30. The expenses of the Tribunal and of the Trials, shall be charged by the Signatories against the funds allotted for maintenance of the Control Council for Germany.
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