Aus:

Henry J. Steiner/ Philip Alston: International Human Rights in Context. Law, Politics, Morals. Text and Materials. Oxford: Clarendon Press 1996, 99-113.

ADDITIONAL READING

Nathaniel Berman. *'But the Alternative is Despair': European Nationalism and the Modernist Renewal of International Law*, 106 Harv. L. Rev. 1792 (1993); Danilo Türk, *Minority Issues in the UN: Norms and Institutions*, in Henry Steiner (ed.), *Ethnic Conflict and the UN Human Rights System* (forthcoming 1995).

COMMENT ON THE NUREMBERG TRIALS

The trial at Nuremberg in 1945-46 *of* major war criminals among the Axis powers, dominantly Nazi party leaders and military officials, gave the nascent human rights movement a powerful impulse. The UN Charter that became effective in 1945 included a few broad human rights provisions. But they were more programmatic than operational, more a program to be realized by states over time than legal rules to be applied immediately to states. Nuremberg, on the other hand, was concrete and applied: prosecutions, convictions, punishment. The prosecution and the Judgment of the International Military Tribunal were based on concepts and norms, some *of* which had deep roots in international law and some of which represented a significant development of that law that underlay the later formulation of major human rights norms.

The striking aspect of Nuremberg was that the trial and Judgment applied international law doctrines and concepts to impose criminal punishment on individuals for their commission *of* any of the three types of crimes under international law that are described below. The notion of crimes against the law of nations for which violators bore an individual criminal responsibility was itself an older one, but it had operated in a restricted field. As customary international law developed from the time of Grotius, certain conduct came to be considered a violation of the law of nations - in effect, a universal crime. Piracy on the high seas was long the classic example of this limited category of crimes. Given the common interest of all nations in protecting navigation against interference on the high seas outside the territory of any state, it was considered appropriate for the state apprehending a pirate to prosecute in its own courts. Since there was no international criminal tribunal, prosecution in a state court was the only means *of* judicial enforcement. To the extent that the state courts sought to apply the customary international law defining the crime of piracy, either directly or as it had become absorbed into national legislation, the choice of forum became less significant, for state courts everywhere, at least in theory, were applying the same law.

One specialized field, the humanitarian laws of war, had long included rules regulating the conduct of war, the so-called *jus in bello.* This body *of* law imposed sanctions against combatants who committed serious violations of the restrictive rules. Such application of the laws *of* war, and its foundation in customary norms and in

treaties, figure in the Judgment below. But the concept *of* individual criminal responsibility was not systematically developed. It achieved

a new prominence and a clearer definition after the Nuremberg Judgment, and the treaties and protocols noted at p. *69 supra.* Gradually other types of conduct have been added to this small list of crimes under international law-for example, slave trading prior to Nuremberg and genocide thereafter.

As World War Il came to an end, the Allied powers held several conferences to determine what policies they should follow towards the Germans responsible for the war and the massive, systematic barbarity and destruction of the period. These conferences culminated in the (U.S., U.S.S.R., Britain, France) London Agreement of August 8, 1945, 59 Stat. 1544, E.A.S. No. 472, in which the parties determined to constitute 'an International Military Tribunal for the trial of war criminals.' The Charter annexed to the Agreement provided for the composition and basic procedures of the Tribunal and stated in its three critical articles:

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 participa tion in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, illtreatment or deportation to slave labor or for any other pur pose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan 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 determines that justice so requires.

Note the innovative character of these provisions. The Tribunal of four judges (one from each of the major Allied Powers) was international in formation and composition and, although restricted to the four victorious powers creating The Tribunal, was radically different from the national military courts before which the laws of war had to that time generally been enforced. At the core of the Charter lay the concept of international crimes for which there would be `individual responsibility,' a sharp departure from the thenexisting customary law or conventions which gave prominence to the duties of (and sometimes to sanctions against) nations. Moreover, in defining crimes within the Tribunal's jurisdiction, the Charter went beyond the traditional `war crimes' (paragraph (b) of Article 6) in two ways.

First, the Charter included the war-related `crimes against peace'-so-called *jus ad bellum, in* contrast with the category of war crimes or *jus in bello.* International law had for a long time been innocent of such a concept. After a slow departure during the post-Reformation period from earlier distinctions of philosophers, theologians, and writers on international law between `just' and `unjust' wars, the European nations moved towards a conception of war as an instrument of national policy, much like any other, to be legally regulated only as to the manner of its conduct. The Covenant of the League of Nations did not frontally challenge this principle, although it attempted to control aggression through collective decisions of the League. The interwar period witnessed some fortification of the principles later articulated in the Nuremberg Charter, primarily through the Kellogg-Briand pact of 1927 referred to in the Judgment. Today the United Nations Charter requires members (Article 2(4)) to `refrain in their international relations from the threat or use of force' against other states, while providing (Article 51) that nothing shall impair `the inherent right of individual or collective self-defense if an armed attack occurs against a Member . . .' When viewed in conjunction with the Nuremberg Charter, those provisions suggest the contemporary effort to distinguish not between `just' and `unjust' wars but between 'self-defense' and 'aggression' - the word used in defining `crimes against peace' in Article 6(a) of that Charter.

Second, Article 6(c) represented an important innovation. There were few precedents for use of the phrase `crimes against humanity' as part of a description of international law, and its content was correspondingly indeterminate. On its face, paragraph (c) might have been read to include the entire program of the Nazi gov-

ernment to exterminate Jews and other civilian groups, in and outside Germany, whether `before or during the war,' and thus to include the planning for and early persecution of Jews and other groups preceding the Holocaust as well as the Holocaust itself. Moreover, that paragraph included the persecution or annihilation by Germany of Jews who were German nationals as well as those who were aliens. The advance on the international law of state responsibility to aliens as described in the materials on the *Chattin* case, p. 75, *supra is* evident. Note how the Judgment of the Tribunal interpreted paragraph (c) with respect to these observations.

In other respects as well, the concept of `crimes against humanity,' even in this early formulation, differed from earlier international law. War crimes were directed to combatants; crimes against humanity could be committed by civilians as well. War crimes could cover discrete as well as systematic action by a combatant - an isolated murder of a civilian by a combatant as well a systematic policy of wanton desruction of towns. Crimes against humanity were directed primarily to planned conduct, to systematic conduct, to massive destruction.

In defining the charges against the major Nazi leaders tried at Nuremberg and its successor tribunals, the Allied powers took care to exclude those types of conduct which had not been understood to violate existing custom or conventions and in which they themselves had engaged - for example, the massive bombing of cities with predictably high tolls of civilians.

JUDGMENT OF NUREMBERG TRIBUNAL

International Military Tribunal (Nuremberg), 1946.
41 Am. J. Int. h. 172 (1947).

The Law of the Charter

The jurisdiction of the Tribunal is defined in the [London] Agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal.

The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious Nations, but in the view of the Tribunal, as will be shown, it is the expression of international law

existing at the time of its creation; and to that extent is itself a contribution to international law.

. . . With regard to the constitution of the Court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law.

The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime; and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement. But in view of the great importance of the questions of law involved, the Tribunal has heard full argument from the Prosecution and the Defense, and will express its view on the matter.

It was urged on behalf of the defendants that a fundamental principle of all law - international and domestic - is that there can be no punishment of crime without a pre-existing law. *'Nullum crimen sine lege, nulla poena sine lege.'* It was submitted that *ex post facto* punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. . . .

This view is strongly reinforced by a consideration of the state of international law in 1939, so far as aggressive war is concerned. The General Treaty for the Renunciation of War of 27 August 1928, more generally known as the Pact of Paris or the Kellogg-Briand Pact, was binding on *63* nations, including Germany, Italy and Japan at the outbreak of war in 1939. . . .

. . . The nations who signed the Pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact. . . .

. . . The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of true, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as

offenses against the law of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention.... The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.

. . .

All these expressions of opinion, and others that could be cited, so solemnly made, reinforce the construction which the Tribunal placed upon the Pact of Paris, that resort to a war of aggression is not merely illegal, but is criminal. The prohibition of aggressive war demanded by the conscience of the world, finds its expression in the series of pacts and treaties to which the Tribunal has just referred.

. . .

. . . That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized.... Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

. . .

. . . The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares:

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.

On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.

It was also submitted on behalf of most of these defendants that in doing what they did they were acting under the orders of Hitler, and therefore cannot be held responsible for the acts committed by them in carrying out these orders. The Charter specifically provides in 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.

The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized 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.

. . .

War Crimes and Crimes against Humanity

. . . War Crimes were committed on a vast scale, never before seen in the history of war. They were perpetrated in all the countries occupied by Germany, and on the High Seas, and were attended by every conceivable circumstance of cruelty and horror. There can be no doubt that the majority of them arose from the Nazi conception of `total war,' with which the aggressive wars were waged. For in this conception of

`total war,' the moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity. Everything is made subordinate to the overmastering dictates of war. Rules, regulations, assurances, and treaties all alike are of no moment; and so, freed from the restraining influence of international law, the aggressive war is conducted by the Nazi leaders in the most barbaric way. Accordingly, War Crimes were committed when and wherever the Führer and his close associates thought them to be advantageous. They were for the most part the result of cold and criminal calculation.

. . .

. . . Prisoners of war were ill-treated and tortured and murdered, not only in defiance of the well-established rules of international law, but. in complete disregard of the elementary dictates of humanity. Civilian populations in occupied territories suffered the same fate. Whole populations were deported to Germany for the purposes of slave labor upon defense works, armament production, and similar tasks connected with the war effort. Hostages were taken in very large numbers from the civilian populations in all the occupied countries, and were shot as suited the German purposes. Public and private property was systematically plundered and pillaged in order to enlarge the

resources of Germany at the expense of the rest of Europe. Cities and towns and villages were wantonly destroyed without military justification or necessity.

. . .

Murder and Ill-treatment of Civilian Population

Article *6 (b)* of the Charter provides that `ill-treatment . . . of civilian population of or in occupied territory . . . killing of hostages . . . wanton destruction of cities, towns, or villages' shall be a war crime. In the main, these provisions are merely declaratory of the existing laws of war as expressed by the Hague Convention, Article 46. . . .

. . .

One of the most notorious means of terrorizing the people in occupied territories was the use of concentration camps ... [which] became places of organized and systematic murder, where millions of people were destroyed.

In the administration of the occupied territories the concentration camps were used to destroy all opposition groups. . . .

A certain number of the concentration camps were equipped with gas chambers for the wholesale destruction of the inmates, and with furnaces for the burning of the bodies. Some of them were in fact used for the extermination of Jews as part of the `final solution' of the Jewish problem. . . .

. . .

Slave Labor Policy

Article 6 (b) of the Charter provides that the `ill-treatment or deportation to slave labor or for any other purpose, of civilian population of or in occupied territory' shall be a War Crime. The laws relating to forced labor by the inhabitants of occupied territories are found in Article 52 of the Hague Convention. . . . The policy of the German occupation authorities was in flagrant violation of the terms of this convention. . . . [T]he German occupation authorities did succeed in forcing many of the inhabitants of the

occupied territories to work for the German war effort, and in deporting at least 5,000,000 persons to Germany to serve German industry and agriculture.

Persecution of the Jews

The persecution of the Jews at the hands of the Nazi Government has been proved in the greatest detail before the Tribunal. It is a record of consistent and systematic inhumanity on the greatest scale. Ohlendorf, Chief of Amt III in the RSHA from 1939 to 1943, and who was in command of one of the Einsatz groups in the campaign against the Soviet Union testified as to the methods employed in the extermination of the Jews. . . .

When the witness Bach Zelewski was asked how Ohlendorf could admit the murder of 90,000 people, he replied: 'I am of the opinion that when, for years, for decades, the doctrine is preached that the Slav race is an inferior race, and Jews not even human, then such an outcome is inevitable.'

. . .

. . . The Nazi Party preached these doctrines throughout its history, *Der Stürmer* and other publications were allowed to disseminate hatred of the Jews, and in the speeches and public declarations of the Nazi leaders, the Jews were held up to public ridicule and contempt.

. . . By the autumn of 1938, the Nazi policy towards the Jews had reached the stage where it was directed towards the complete exclusion of Jews from German life. Pogroms were organized, which included the burning and demolishing of synagogues, the looting of Jewish businesses, and the arrest of prominent Jewish business men. . . .

It was contended for the Prosecution that certain aspects of this anti-Semitic policy were connected with the plans for aggressive war. The violent measures taken against the Jews in November 1938 were nominally in retaliation for the killing of an official of the German Embassy in Paris. But the decision to seize Austria and Czechoslovakia had been made a year before. The imposition of a fine of one billion marks was made, and the confiscation of the financial holdings of the Jews was decreed, at a time when German armament expenditure had put the German treasury in difficulties, and when the reduction of expenditure on armaments was being considered. . . .

It was further said that the connection of the anti-Semitic policy with aggressive war was not limited to economic matters. . . .

The Nazi persecution of Jews in Germany before the war, severe and repressive as it was, cannot compare, however, with the policy pursued during the war in the occupied territories. . . . In the summer of 1941, however, plans were made for the `final solution' of the Jewish question in Europe. This `final solution' meant the extermination of the Jews. . . .

The plan for exterminating the Jews was developed shortly after the attack on the Soviet Union. . . .

. . .

. . . Adolf Eichmann, who had been put in charge of this program by Hitler, has estimated that the policy pursued resulted in the killing of 6 million Jews, of which 4 million were killed in the extermination institutions.

The Law Relating to War Crimes and Crimes against Humanity

The Tribunal is of course bound by the Charter, in the definition which it gives both of War Crimes and Crimes against Humanity. With respect to War

Crimes, however, as has already been pointed out, the crimes defined by Article 6, Section (b), of the Charter were already recognized as War Crimes under international law. They were covered by Articles 46, 50, 52, and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46, and 51 of the Geneva Convention of 1929. That violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument.

But it is argued that the Hague Convention does not apply in this case, because of the `general participation' clause in Article 2 of the Hague Convention of 1907. That clause provided:

The provisions contained in the regulations (Rules of Land Warfare) referred to in Article 1 as well as in the present Convention do not apply except between contracting powers, and then only if all the belligerents are parties to the Convention.

Several of the belligerents in the recent war were not parties to this Convention.

In the opinion of the Tribunal it is not necessary to decide this question. The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the convention expressly stated that it was an attempt `to revise the general laws and customs of war,' which it thus recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (b) of the Charter.

. . .

With regard to Crimes against Humanity there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression, and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt. To constitute Crimes against Humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter, but from the beginning of the war in 1939 War Crimes were committed on a vast scale, which were also Crimes against Humanity; and insofar as the inhumane acts charged

in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity.

[The opinion considered individually each of the 22 defendants at this first trial of alleged war criminals. It found 19 of the defendants guilty of one or more counts of the indictment. It imposed 12 death sentences. Most convictions were for War Crimes and Crimes against Humanity, the majority of those convicted being found guilty of both crimes.]

NOTE

Note the following statement in Ian Brownlie, *Principles of Public International Law* (4th ed. 1990), at 562:

But whatever the state of the law in 1945, Article 6 of the Nuremberg Charter has since come to represent general international law. The Agreement to which the Charter was annexed was signed by the United States, United Kingdom, France, and USSR, and nineteen other state subsequently adhered to it. In a resolution adopted unanimously on 11 December 1946, the General Assembly affirmed `the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal'.

There has been considerable expansion in the definitions of two of the crimes defined in Article 6. The field of individual criminal responsibility for war crimes has been both expanded and clarified, through provisions of the Geneva Conventions of 1949 and later instruments. The concept of crimes against humanity has both expanded in coverage and shed some limitations placed on it by the Judgment of the Tribunal. Such developments are described in the materials dealing with the current International Criminal Tribunal for the Former Yugoslavia (and later, for Rwanda as well) in Chapter 15. The notion of `crimes against peace,' however, has fallen into relative disuse.

Compare with the Nuremberg Judgment the following provisions of the Convention on the Prevention and Punishment of the Crime of Genocide (116 parties as of September 1995) bearing on personal responsibility. The treaty parties 'confirm' in Art. 1 that genocide ‘is a crime under international law which they undertake to prevent and to punish.' Persons committing acts of genocide (as defined) ‘shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.' (Art. IV). The parties agree (Art. V) to enact the necessary legislation to give effect to the Convention and `to provide effective penalties for persons guilty of genocide.' Under Art. VI, persons charged with genocide are to be tried by a tribunal `of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those

Contracting Parties which shall have accepted its jurisdiction.' No international penal tribunal of general jurisdiction has been created.

VIEWS OF COMMENTATORS

There follow a number of authors' observations about the Judgment and the principles underlying the Nuremberg trials.

(1) In a review of a book by Sheldon Glueck entitled *The Nuremberg Trial and Aggressive War* (1946), the reviewer George Finch, 47 Am. J. Int. L. 334 (1947), makes the following arguments:

As the title indicates, this book deals with the charges at Nuremberg based upon the planning and waging of aggressive war. The author has written it because in his previous volume he expressed the view that he did not think such acts could be regarded as ‘international crimes.' He has now changed his mind and believes `that for the purpose of conceiving aggressive war to be an international crime, the Pact of Paris may, together with other treaties and resolutions, be regarded as evidence of a sufficiently developed custom to be accepted as international law' (pp. 4-5). . . .

The reviewer fully agrees with the author in regard to the place of custom in the development of international law. He regards as untenable, however, the argument not only of the author but of the prosecutors and judges at Nuremberg that custom can be judicially established by placing interpretations upon the words of treaties which are refuted by the acts of the signatories in practice, by citing unratified protocols or public and private resolutions of no legal effect, and by ignoring flagrant and repeated violations of non-aggression pacts by one of the prosecuting governments which, if properly weighed in the evidence, would nullify any judicial holding that a custom outlawing aggressive war had been accepted in international law. . . .

(2) In his article The *Nurnberg Trial, 33* Va. L. Rev. 679 (1947), at 694, Francis Biddle, the American judge on the Tribunal, commented on the definition of 'crimes against humanity' in Article 6(c) of the Charter:

. . .The authors of the Charter evidently realized that the crimes enumerated were essentially domestic and hardly subject to the incidence of international law, unless partaking of the nature of war crimes. Their purpose was evidently to reach the terrible persecution of the Jews and liberals within Germany before the war. But the Tribunal held that `revolting and horrible as many of these crimes were,' it had not been established that they were done ‘in execution of, or in connection with' any crime within its jurisdiction. After the beginning of the war, however, these inhumane acts were held to have been committed in execution of the war, and were therefore crimes against humanity.

Crimes against humanity constitute a somewhat nebulous conception, although the expression is not unknown to the language of international law. . . . With one possible exception . . . crimes against humanity were held [in the Judgment of the Tribunal] to have been committed only where the proof also fully established the commission of war crimes. Mr. Stimson suggested [that the Tribunal eliminate from its jurisdiction matters related to pre-war persecution in Germany], which involved ‘a reduction of the meaning of crimes against humanity to a point where they became practically synonymous with war crimes.' I agree. And I believe that this inelastic construction is justified by the language of the Charter and by the consideration that such a rigid interpretation is highly desirable in this stage of the development of international law.

(3) Professor Hans Kelsen, in Will *the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?, 1* Int. L. Q. 153 (1947) at 164, was critical of several aspects of the London Agreement and the Judgment. But with respect to the question of retroactivity of criminal punishment, he wrote:

The objection most frequently put forward - although not the weightiest one - is that the law applied by the judgment of Nuremberg is an ex post facto law. There can be little doubt that the London Agreement provides individual punishment for acts which, at the time they were performed were not punishable, either under international law or under any national law. . . . However, this rule [against retroactive legislation] is not valid at all within international law, and is valid within national law only with important exceptions. [Kelsen notes several exceptions, including the rule's irrelevance to 'customary law and to law created by a precedent, for such law is necessarily retroactive in respect to the first case to which it is applied. . . .']

A retroactive law providing individual punishment for acts which were illegal though not criminal at the time they were committed, seems also to be an exception to the rule against ex post facto laws. The London Agreement is such a law. It is retroactive only in so far as it established individual criminal responsibility for acts which at the time they were committed constituted violations of existing international law, but for which this law has provided only collective responsibility. . . . Since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice.

(4) In his biography entitled *Harlan Fiske Stone: Pillar of the Law* (1956), Alpheus Thomas Mason discussed Chief Justice Stone's views about the involvement of Justices of the U.S. Supreme Court in extrajudïcial assignments and, in particular, Stone's views about President Truman's appointment of Justice Robert Jackson to be American Prosecutor at the trials. The following excerpts (at p. *715)* are all incorporations by Mason in his book of quotations of Chief Justice Stone's remarks.

Part B. Historical Development, Normative Framework 112

So far as the Nuremberg trial is an attempt to justify the application of the power of the victor to the vanquished because the vanquished made aggressive war, . . . I dislike extremely to see it dressed up with a false facade of legality. The best that can be said for it is that it is a political act of the victorious States which may be morally right . . . . It would not disturb me greatly . . . if that power were openly and frankly used to punish the German leaders for being a bad lot, but it disturbs me some to have it dressed up in the habiliments of the common law and the Constitutional safeguards to those charged with crime.

Jackson is away conducting his high-grade lynching party in Nuremberg . . . I don't mind what he does to the Nazis, but I hate to see the pretense that he is running a court and proceeding according to common law. This is a little too sanctimonious a fraud to meet my old-fashioned ideas.

(5) Professor Herbert Wechsler, *in The Issues of the Nuremberg Trial,* 62 Pol. Sci. Q. 11 (1947), at 23, observed:

. . . [M]ost of those who mount the attack [on the Judgment on contentions including *ex post facto* law] hasten to assure us that their plea is not one of immunity for the defendants; they argue only that they should have been disposed of politically, that is, dispatched out of hand. This is a curious position indeed. A punitive enterprise launched on the basis of general rules, administered in an adversary proceeding under a separation of prosecutive and adjudicative powers is, in the name of law and justice, asserted to be less desirable than an *ex parte* execution list or a drumhead court-martial constituted in the immediate aftermath of the war. . . . Those who choose to do so may view the Nuremberg proceeding as `political' rather than 'legal' - a program calling for the judicial application of principles of liability politically defined. They cannot view it as less civilized an institution than a program of organized violence against prisoners, whether directed from the respective capitals or by military commanders in the field.

QUESTIONS

1. Recall clause (c) of Article 38(1) of the Statute of the I.C.J., p. 27, *supra*. Could the Tribunal have relied on that clause to respond to charges of ex post facto application of Article 6(c) to individuals who were responsible for the murder of groups of Germans or aliens?

2. Do you agree with the Tribunal's restrictive. Consider the commentary of Francis Biddle.

3. How do you react to the criticism by Finch of the Tribunal's use of treaties in deciding whether customary international law included a given norm? Recall the comments about the growth of customary law by Schachter and Koskenniemi.

ADDITIONAL READING

In addition to the sources cited in the text, see three books of Telford Taylor: *Nuremberg Trials: War Crimes and International Law (1949); Nuremberg and Vietnam: An American Tragedy (1978);* and *The Anatomy of the Nuremberg Trials: A Personal Memoir (1992).* See also Memorandum Submitted by the Secretary-General, The Charter and Judgment of the Nürnberg Tribunal: History and Analysis, U.N. Doc. A/CN.4/5 *(1949);* and Egon Schwelb, *Crimes against Humanity, 2*3 Brit. Ybk. Int. L. 178 (19*46).*