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The Nuremberg Military Tribunals and the origins of International Criminal Law

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CHAPTER 5: Jurisdiction and Legal Character of the Tribunals

INTRODUCTION

This chapter explores the jurisdiction and legal character of the NMTs. Section 1 discusses the tribunals' subject-matter jurisdiction, with a particular emphasis on the ways in which Law No. 10 went beyond the substantive provisions of the London Charter. Section 2 examines the vexing issue of whether the tribunals were American courts, as the defendants insisted, or international courts, as the tribunals themselves insisted. It concludes that, in fact, they were neither – they were inter-allied special tribunals created by the Allied Control Council pursuant to its sovereign legislative authority in Germany. Section 3 explains why, even though they were not international courts, the tribunals nevertheless applied international law. Section 4 addresses the issue of whether the law applied by the tribunals violated the principle of non-retroactivity, particularly the provisions of Law No. 10 that went beyond the London Charter. Finally, Section 5 focuses on the personal jurisdiction of the tribunals, demonstrating that their ability to prosecute the defendants was based on an amalgam of passive-personality, protective, and universal jurisdiction.

I. SUBJECT-MATTER JURISDICTION

Ordinance No. 7 provided that the NMTs had the power "to try and punish persons charged with offenses recognized as crimes in Article II of Control Council Law No. 10." Article II recognized four crimes: crimes against peace, war crimes, crimes against humanity, and membership in a criminal organization. All four crimes were modeled on the parallel provisions of the London Charter, but all four differed from the Charter in important ways.

A. Crimes Against Peace

The London Charter's definition of crimes against peace differed from Law No. 10's definition in two respects. First, whereas the Charter's list of modes of participation in crimes against peace was exclusive, Law No. 10's list was illustrative – "including, but not limited to." Despite the broader language of Law No. 10, however, no tribunal ever suggested that other modes of participation were possible. Second, Law No. 10 criminalized "invasions" as well as aggressive wars. That extension of the Charter, which would play an important role in the tribunals' subsequent jurisprudence, reflected JCS 1023/10, which defined crimes against peace for purposes of apprehending suspected war criminals as "initiation of invasions of other countries and wars of aggression."[1]

B. War Crimes

There were two differences between the war-crimes provisions in the London Charter and Law No. 10, neither of which was ever discussed by the tribunals. First, Article II(1)(b) of Law No. 10 addressed the mistreatment of "civilian population *from*

[1] JCS 1023/10, para. 2(b).

occupied territory," while Article 6(b) of the Charter addressed the mistreatment of "civilian population *of or in* occupied territory." Second, whereas Article 6(b) referred to "violations of the laws or customs of war," Article II(1)(b) referred to "[a]trocities or offenses against persons or property constituting violations of the laws or customs of war."

C. Crimes Against Humanity

The most significant differences between the London Charter and Law No. 10 concerned crimes against humanity. First, Article II(1)(c) did not include Article 6(c)'s "before or during the war" language. Although that omission would seem to limit crimes against humanity to acts committed during the war, Article II(5) made clear that Law No. 10 also applied to pre-war acts by expressly providing that "[i]n any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect to the period from 30 January 1933 to 1 July 1945." Second, Article 6(c) did not contain a statute-of-limitations provision equivalent to Article II(5) of Law No. 10. Third, Article II(1)(c) eliminated Article 6(c)'s requirement that crimes against peace be committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal" – the so-called "nexus" requirement. As we will see in Chapter 10, the OCC relied heavily on those three differences when it argued – unsuccessfully – that Article II(1)(c) criminalized pre-war crimes against humanity that had no connection to either war crimes or crimes against peace.

D. Criminal Membership

Articles 9 and 10 of the London Charter permitted the IMT to declare that certain groups and organizations associated with the Nazis were "criminal organizations" and provided that a "competent national authority" could prosecute individual members of convicted groups and organizations for the crime of criminal membership. Article II(d) of Law No. 10 recognized "[m]embership in categories of a criminal group or organization declared criminal by the International Military Tribunal" as a criminal act, thereby creating the substantive offence that the drafters of the London Charter had anticipated.

E. Conspiracy

Although the IMT limited conspiracy to crimes against peace,[2] Article 6(c) of the London Charter provided that "[l]eaders, 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." Law No. 10 did not contain a similar provision; Article II(2)(d) limited criminal responsibility to individuals "connected with plans or enterprises" involving the commission of a war crime, crime against humanity, or crime against peace. By contrast, Article I of Ordinance No. 7 specifically authorized the NMT to prosecute any of the offenses in Article II of Law No. 10, "including conspiracies to commit any such crimes."

[2] IMT JUDGMENT, 44.

F. Modes of Participation

Other than providing that "participating in the formulation or execution of a common plan or conspiracy" was criminal, the London Charter was silent concerning the possible modes of participation in war crimes and crimes against humanity. By contrast, as discussed in Chapters 11 and 12, Article II(2) of Law No. 10 provided a comprehensive list of the ways in which an individual could be responsible for a crime.

II. THE CHARACTER OF THE TRIBUNALS

As noted earlier, Ordinance No. 7 relied on Law No. 10 to establish "Military Tribunals" for the prosecution of individuals charged with violating the substantive provisions of Law No. 10. That designation, however, raises an important – and complicated – question: what was the legal character of the NMTs? Were they international tribunals, like the IMT? American courts? Or were they something else entirely?

The tribunals themselves generally took the first position. In the *Justice* case, for example, Tribunal III held that "[t]he tribunals authorized by Ordinance No. 7 are dependent upon the substantive jurisdictional provisions of C. C. Law 10 and are thus based upon international authority and retain international characteristics."[3] Similarly, in *Ministries*, Tribunal IV held that "[t]his is not a tribunal of the United States of America, but is an International Military Tribunal, established and exercising jurisdiction pursuant to authority given for such establishment and jurisdiction by Control Council Law No. 10."[4]

NMT defendants and critics, by contrast, always claimed the tribunals were American courts. Von Knieriem insisted that it was "incontestable" that "[t]he Nuremberg Tribunals were not international but American tribunals."[5] And Bishop Wurm argued in a letter to Clay that "[t]he Nürnberg Military Tribunal is to-day, after the other victor nations have withdrawn, a purely American Tribunal which no longer possesses the prerequisites of a Military Tribunal."[6] Their position was by no means frivolous: at various times both the tribunals and the prosecution made statements implying that the tribunals were American, not international. In *Farben*, Judge Curtis Shake observed from the bench that "this Tribunal is an American Court constituted under American Law."[7] And in his opening statement in the *Justice* case, Telford Taylor told Tribunal III that "[a]lthough this Tribunal is internationally constituted, it is an American court. The obligations which derive from these proceedings are, therefore, particularly binding on the United States."[8]

A. What Makes a Tribunal International?

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[3] Justice, III TWC 958.
[4] Ministries, Order, 29 Dec. 1947, XV TWC 325.
[5] VON KNIERIEM, 100.
[6] Letter from Wurm to Clay, 20 May 1948, in WURM MEMORANDUM, 25.
[7] Quoted in VON KNIERIEM, 97.
[8] Quoted in id.

To determine the legal character of the NMTs, we must first identify what distinguishes an international tribunal from a domestic court. Perhaps surprisingly, that issue has been largely ignored by scholars. The primary exception is Robert Woetzel's 1962 book *The Nuremberg Trials in International Law*,[9] which dedicated an entire chapter to explaining why the IMT qualified as a genuinely international tribunal – a conclusion that most scholars, though certainly not all, accept.[10] If Woetzel's explanation of the IMT's legal character is correct, it is not possible to maintain that the NMTs were international tribunals.

Woetzel discussed four possible theories of what makes a court international. The first is that "a court can be regarded as international if it applies international law." Woetzel rightly dismissed that theory as "spurious," pointing out that "many national, civil, and military tribunals apply international law in certain cases and judge international crimes."[11] The second is that "an international court is one that is based on powers of occupation under international law." That theory is flawed, according to Woetzel, because the rules of belligerent occupation impose significant limitations on the occupier,[12] such as the obligation to respect the occupied state's laws "unless absolutely prevented."[13]

The third theory is that "a tribunal can be regarded as international if its basis is a treaty or an international agreement, instead of it being the organ of a single state." Woetzel took this theory more seriously, because it indicated that the IMT was international. He pointed out, though, that a tribunal created pursuant to a multi-state agreement would be international only in the literal sense, because "a tribunal set up under such an agreement would only be entitled to the combined powers of jurisdiction of the contracting parties, but no more." Differently put, that tribunal would "be indisputably international only in so far as the contracting members are affected by it, within their respective spheres of jurisdiction." Viewed in this light, the IMT would have qualified as international with regard to the Allies, but would not have been international with regard to Germany, which never signed the London Charter or consented to the IMT's jurisdiction over Germans.[14]

The final theory is the one that Woetzel ultimately endorsed: namely, that a tribunal is international if it is "instituted by one or a group of nations with the consent and approval of the international community."[15] That approval, according to Woetzel, cannot simply be assumed by the nations that create a tribunal; the international community must offer its "clear endorsement" of the tribunal's internationality in one of two ways. The best endorsement would be by an organization empowered to speak

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[9] ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW (1962).
[10] Georg Schwarzenberger, for example, considered the IMT to be a "municipal tribunal of extraordinary jurisdiction which the four Contracting Powers share in common." Georg Schwarzenberger, *The Judgment of Nuremberg*, in METTRAUX, 171.
[11] WOETZEL, 42.
[12] Id.
[13] Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex, 18 Oct. 1907, art. 43 ("Hague Convention 1907").
[14] WOETZEL, 42-43. The issue of the Allies consenting on behalf of Germany is discussed in the personal jurisdiction section below.
[15] Id. at 49.

on behalf of the international community, such as the United Nations.[16] Alternatively, if such an organization was "paralysed in its activity due to unforeseen circumstances or non-existent," the requisite endorsement could be given by a "combination of states that represent the 'quasi-totality of civilised nations'."[17]

Judged according to this theory, the IMT was clearly an international tribunal. Although the UN General Assembly had not yet met when the IMT trial began in November 1945, the 17 members of the United Nations War Crime Commission (UNWCC) represented "the quasi-totality of civilised nations" and 15 of the 17 members, along with six other nations, including the United Kingdom and the Soviet Union, adhered to the London Charter. Moreover, once the trial was concluded, the 51 members of the General Assembly specifically and unanimously recognized the internationality of the IMT in Resolution 95(1). Those actions, according to Woetzel, indicate "that the IMT clearly had the sanction of the international community and can be considered an international court."[18]

B. Were the NMTs International Tribunals?

If the defining feature of an international tribunal is that it is created with the consent and approval of the international community, the NMTs cannot be considered international. The tribunals generally applied the substantive law of the London Charter, but the tribunals were authorized not by the Charter but by Law No. 10.[19] That was a critical difference: although the Charter clearly enjoyed the consent and approval of the international community, Law No. 10 "was a multi-national agreement that was never directly confirmed by the United Nations or any other international body, nor were the conclusions of the twelve subsequent Nuremberg trials endorsed by the quasi-totality of states acting through an international organisation."[20]

Indeed, the argument used by the tribunals themselves to justify their internationality – that they were "dependent upon the substantive jurisdictional provisions" of Law No. 10 (*Justice*) or were "established by the International Control Council, the high legislative branch of the four Allied Powers" (*Flick*) – leads to absurd results. Law No. 10 did not simply authorize the Allies to create zonal courts; it also authorized the German government, with the consent of the occupying authorities, to create German courts with jurisdiction over "crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons."[21] As Freyhofer points out, Law No. 10 "became part of the German legal system and led to the indictment and conviction of many more perpetrators in later years."[22] The tribunals' view of internationality would thus lead to the conclusion

[16] Id. at 52.
[17] Id. at 53.
[18] Id. at 56-57.
[19] Article I of Law No. 10, in fact, specifically provided that "[a]dherence to the provisions of the London Agreement by any of the United Nations… shall not entitle such Nations to participate or interfere in the operation of this Law within the Control Council area of authority in Germany."
[20] WOETZEL, 243 n. 49.
[21] Law No. 10, art. III(d).
[22] FREYHOFER, 89.

that all of the German courts created pursuant to Law No. 10 were also international tribunals, which cannot be correct.

C. Were the NMTs American Courts or Tribunals?

The tribunals' failure to qualify as international does not mean, however, that they were American. The tribunals were clearly not Article III courts, because only Congress has the authority to "ordain and establish" inferior federal courts[23] and the tribunals were created not by Congress but by General Clay in his dual role as Military Governor and Commander of the American Zone.[24] For similar reasons, they also cannot be considered "tribunals of the United States" whose decisions were reviewable by federal courts. The United States Court of Appeals for the D.C. Circuit specifically rejected that argument in *Flick v. Johnson*. Its reasoning is worth quoting at length:

> [Military Tribunal IV's] power and jurisdiction arose out of the joint sovereignty of the Four victorious Powers. The exercise of their supreme authority became vested in the Control Council. That body enacted Law No. 10, for the prosecution of war crimes…. Pursuant to that power, and agreeably to rules duly promulgated by Ordinance No. 7, the Zone Commander constituted Military Tribunal IV, under whose judgment Flick is now confined. Thus the power and jurisdiction of that Tribunal stemmed directly from the Control Council, the supreme governing body of Germany, exercising its authority in behalf of the Four Allied Powers…. Accordingly, we are led to the final conclusion that the tribunal which tried and sentenced Flick was not a tribunal of the United States. [25]

Although scholars at the time questioned the fairness of the D.C. Circuit's decision, they did not question whether it was legally correct.[26] Indeed, *Flick* was consistent with *Hirota v. MacArthur*, in which the Supreme Court had held that the IMTFE was not an American tribunal because it had been created "by General MacArthur as the agent of the Allied Powers."[27] The tribunals might not have qualified as international courts, but there is no doubt General Clay created them in his capacity as an agent of the Control Council.

D. The NMTs as Inter-Allied Special Tribunals

This analysis, of course, raises an important question: if the NMTs were neither international tribunals nor American courts, what were they? The best answer is that they were inter-Allied special tribunals created pursuant to Law No. 10, a multilateral

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[23] U.S. Constitution, art. III, sec. 1.
[24] Ordinance No. 7, art. II(a).
[25] Flick v. Johnson, 174 F.2d 983, 986 (D.C. Dir. 1949). Tribunal IV had specifically held in *Flick* that "[t]he Tribunal is not a court of the United States as that term is used in the Constitution of the United States."
[26] *Review of International Criminal Convictions*, 59 YALE L. J. 997, 1004-05 (1950).
[27] 338 U.S. 197, 198 (1948).

agreement enacted by the Allied Control Council as the supreme authority in Germany. That description of the NMTs relies upon three interrelated propositions: (1) by virtue of debellatio, the Allies possessed absolute sovereignty over Germany; (2) the Allies jointly exercised their sovereignty as a condominium via the Control Council; and (3) the Control Council had the right to authorize the creation of inter-Allied special tribunals through Law No. 10, because the Allies had the right to do collectively what each could have done singly.

1. Debellatio

The Allied Control Council enacted Law No. 10 to establish "a uniform legal basis in Germany for the prosecution of war criminals." As its number indicates, Law No. 10 was one of many fundamental changes the Control Council imposed on Germany in the aftermath of the war, many of which directly affected Germany's judicial system. Law No. 1 repealed discriminatory Nazi laws. Law No. 4 reorganized Germany's court system and precluded German courts from prosecuting Nazi crimes. And Law No. 11 repealed various provisions of the German Penal Code, including the crime of treason.

The Control Council's authority to enact Law No. 10 was first referenced in Judge Musmanno's concurring opinion in *Milch*. According to Musmanno, because Germany lacked a government of its own following surrender, "the very circumstances of Germany's present political situation not only justifies but demands that the Control Council establish government in its three fundamental phases; namely, the judiciary, the executive, and the legislative."[28] A divided Tribunal III then specifically held in the *Justice* case that the dissolution of the German government and the High Command's unconditional surrender authorized Law No. 10:

> The unconditional surrender of Germany took place on 8 May 1945. The surrender was preceded by the complete disintegration of the central government and was followed by the complete occupation of all of Germany. There were no opposing German forces in the field; the officials who during the war had exercised the powers of the Reich Government were either dead, in prison, or in hiding…. It is this fact of the complete disintegration of the government in Germany, followed by unconditional surrender and by occupation of the territory, which explains and justifies the assumption and exercise of supreme governmental power by the Allies.[29]

Scholars use the term "debellatio" to refer to a situation in which victorious powers are entitled to assume absolute sovereignty over a state because its government, as a result of total military defeat, has ceased to exist.[30] As we will see below, the Allies relied on debellatio to avoid being bound by the rules of belligerent occupation, which would have likely prevented the Control Council from enacting Law No. 10.

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[28] Milch, Musmanno Concurrence, II TWC 848.
[29] Justice, III TWC 959-60.
[30] EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 92 (2004).

The question, then, is whether the Allies were, in fact, entitled to invoke the doctrine in the context of Germany's unconditional surrender.

Benvenisti, perhaps the leading contemporary scholar of the law of occupation, has convincingly argued that debellatio "has no place in contemporary international law," because it is based on "an archaic conception that assimilated state into government" and was implicitly rejected by the 1949 Geneva Conventions, whose limits on belligerent occupation make no exception for situations involving unconditional surrender.[31] He acknowledges, however, that the doctrine applied in the post-war era and that "it was generally accepted that the conditions for debellatio had been met with respect to Germany and hence the four occupying powers had acquired sovereign title over it."[32]

Benvenisti's conclusion appears sound. The majority in the *Justice* case itself referenced two scholars, Hans Kelsen and Alwyn Freeman, in defense of its conclusion that debellatio justified the Control Council's absolute sovereignty over Germany. Kelsen cited the High Command's unconditional surrender in the Berlin Declaration as evidence "that a so-called debellatio of Germany has taken place, which is the essential condition of 'assuming supreme authority with respect to Germany including all the powers possessed by the German Government'."[33] Similarly, Freeman argued that "a distinction is clearly warranted between measures taken by the Allies prior to the destruction of the German government and those taken thereafter," because in the latter period the German government's absence meant that the Allies were "entitled to exercise all the attributes of sovereignty over the area."[34] Many other scholars writing in the aftermath of the war agreed, including John H.E. Fried, who had served as the legal adviser to the NMT defendants; Quincy Wright, who had been Jackson's legal adviser at the IMT, and Georg Schwarzenberger.[35]

The idea that debellatio justified the Control Council's absolute sovereignty over Germany, however, was not universally accepted. Most notably, Judge Blair dissented from the majority's invocation of debellatio in the *Justice* case, insisting that "there is no rule which would, because of the unconditional surrender of the German armed forces, transfer the sovereignty of Germany to the Allied occupants, or to either of them, in their respective zones of occupation."[36] Indeed, in his view, the Allies had made "no act or declaration… either before or since their occupation of Germany under the terms of the unconditional surrender, which could possibly be

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[31] Id. at 94-95.
[32] Id. at 93.
[33] Hans Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 AM. J. INT'L L. 518, 520 (1945).
[34] Alwyn V. Freeman, *War Crimes by Enemy Nationals Administering Justice in Occupied Territory*, 41 AM. J. INT'L L. 579, 605 (1947).
[35] John H. E. Fried, *Transfer of Civilian Manpower From Occupied Territory*, 40 AM. J. INT'L L. 303, 327-28; Quincy Wright, *The Law of the Nuremberg Trial*, in METTRAUX, 331-32; Schwarzenberger, in METTRAUX, 174.
[36] Justice, Blair Separate Opinion, III TWC 1180-81. Note that Judge Blair concurred in the final judgment; he dissented on specific points of law in his separate opinion.

construed as showing that they intend by the subjugation and occupation of Germany to transfer her sovereignty to themselves."[37]

Judge Blair's rejection of debellatio focused on Rule 275 of the U.S. Army's Rules of Land Warfare, which provided that a military occupation did not result in a transfer of sovereignty to the U.S. unless it involved "subjugation or conquest." Implicit in his argument is the idea the Berlin Declaration did not result in "subjugation or conquest" because it specifically provided that the Allies' assumption of sovereign authority did not "affect the annexation of Germany."[38] Other scholars – mostly German – who rejected debellatio made that argument explicitly. Kurt von Laun, for example, argued that the absence of annexation meant that Germany continued to exist even after its complete military defeat, because "the opinion that Germany has ceased to exist as a state can only be based on the assumption that she has been annexed. From the point of view of law, not military conquest but the declaration of the annexation is decisive."[39]

Scholars who based the Control Council's authority on debellatio were aware of the annexation issue, but uniformly rejected the idea that the transfer of sovereignty to the Allies required annexation. Wright, for example, argued 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."[40] Kelsen's position was similar – and he noted that, because Germany had ceased to exist as a state, rejecting debellatio would mean that no state was in control of Germany's territory.[41] Their position is clearly the superior one: the law of occupation is designed to ensure that occupation is temporary, a goal that would be undermined by requiring annexation as a condition precedent to a victorious power assuming sovereignty over a state whose government has ceased to exist.[42]

2. Condominium

In most situations involving debellatio, sovereignty over a defeated state that has ceased to exist transfers to a single power. That was obviously not the case in Germany: the Berlin Declaration provided that the four Allies jointly 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." Most scholars referred to this joint assumption of sovereignty as a "condominium." Kelsen, for example, wrote that "[t]he sovereignty under which the German territory, together with its population has been placed is the joined sovereignty of the occupant powers. If two or more states exercise jointly their sovereignty over a certain territory, we speak of a condominium."[43]

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[37] Id. at 1182.
[38] Allied Declaration Regarding the Defeat of Germany, 5 June 1945, Preamble.
[39] Kurt von Laun, *The Legal Status of Germany*, 45 AM. J. INT'L L. 267, 270 (1951); see also WOETZEL, 80.
[40] Wright, *Law of the Nuremberg Trial*, in METTRAUX, 332.
[41] Kelsen, *Legal Status*, 521.
[42] BENVENISTI, 5.
[43] Kelsen, *Legal Status*, 524.

Scholars who rejected the existence of debellatio also rejected the idea that the Allies possessed sovereignty over Germany as a condominium. Von Laun claimed that "[i]f Germany has not been annexed, she cannot have been a condominium."[44] And Woetzel claimed that "it would be wrong… to speak of a condominium of the Allied Powers, since this would mean annexation which the Allies had specifically ruled out."[45] Once again, however, defenders of debellatio insisted that the greater power to annex included the lesser power to assume sovereignty temporarily through a condominium. Kelsen, Wright, Schwarzenberger, and Max Rheinstein all took that position,[46] although the latter preferred to describe the Allies' joint sovereignty as a "co-imperium," which he believed reflected the absence of annexation. Rheinstein cited Anglo-Egyptian Sudan and the New Hebrides as historical precedent for the Allied condominium/co-imperium.[47]

3. Inter-Allied Special Tribunals

As is well known, the IMT justified its creation by pointing out that "[t]he making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered… In doing so, they have done together what one any of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law."[48] That is a questionable justification, for two reasons. First, it cannot explain why the IMT was an international tribunal, because the Control Council did not have the unilateral authority to create such a tribunal in its capacity as the *de facto* government of Germany. Second, as Leo Gross has pointed out, the IMT was not actually created by the Control Council – it was created by an executive agreement between the Allies, despite U.S. suggestions that the former was the preferable method.[49]

By contrast, the "sovereign legislative power" rationale works quite well for the NMTs, which cannot qualify as international tribunals and were created pursuant to an enactment of the Control Council – Law No. 10. Indeed, the tribunals specifically relied on that rationale to justify their authority. In the *Justice* case, Tribunal III emphasized the Control Council's status as the *de facto* government of Germany: "by virtue of the situation at the time of unconditional surrender, the Allied Powers were provisionally in the exercise of supreme authority, valid and effective until such time as, by treaty or otherwise, Germany shall be permitted to exercise the full powers of sovereignty. We hold that the legal right of the four Powers to enact C. C. Law 10 is established."[50] And in *Einsatzgruppen*, Tribunal II justified the creation of the NMT by invoking the pooled jurisdiction of the Allies: "[t]here is no authority which denies

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[44] Von Laun, 270.
[45] WOETZEL, 81.
[46] Kelsen, *Legal Status*, 524; Wright, *Law of the Nuremberg Trial*, in METTRAUX, 331; Schwarzenberger, in METTRAUX, 174; Max Rheinstein, *The Legal Status of Occupied Germany*, 47 MICH. L. REV. 23, 37 (1948).
[47] Rheinstein, 37.
[48] IMT JUDGMENT, 38.
[49] LEO GROSS, SELECTED ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION 158-59 (1993).
[50] Justice, III TWC 963.

any belligerent nation jurisdiction over individuals in its actual custody charged with violation of international law. And if a single nation may legally take jurisdiction in such instances, with what more reason may a number of nations agree, in the interest of justice, to try alleged violations of the international code of war?"[51] Even Judge Blair, otherwise critical of the majority's analysis in the *Justice* case, accepted that, because a state of war officially still existed, "the Allied Powers, or either of them, have the right to try and punish individual defendants in this case."[52]

Scholarly opinion at the time supported the idea that the NMTs were inter-Allied special tribunals. Kelsen, for example, argued that "[t]he Control Council established by the Declaration of Berlin in its capacity as the main agency of the condominium over the former German territory is the proper authority to prosecute the German war criminals." Indeed, he even claimed that because international law obligated states to punish war crimes committed by their nationals, the Control Council's authorization of military tribunals "fulfill[ed] an obligation imposed on it in its capacity as successor of the German government."[53] Many other scholars agreed, including Wright; Schwarzenberger; Sheldon Glueck, a professor at Harvard Law School; and Willard B. Cowles, who had served in the Judge Advocate General's office during the war.[54] Cowles additionally noted that an inter-allied special tribunal like the NMTs was not unprecedented, because such a tribunal was used at Archangel in the aftermath of World War I.[55]

4.Why Not German Courts?

It is also possible, of course, to view the NMTs as German courts instead of as inter-Allied special tribunals. The argument is essentially the same: the Allies were the supreme legislative authority in Germany as a result of debellatio; the Allies exercised that authority as a condominium via the Control Council; the Control Council used its authority to create German courts to prosecute war criminals. There is nothing inherently wrong with that view, as long as we recognize that those courts applied international law, not the law of occupation or German law – issues addressed in the next section. Nevertheless, "inter-Allied special tribunal" is still the more accurate description. First, it is clear that the Control Council itself did not believe that the tribunals authorized by Article III(1)(d) of Law No. 10 were German courts, because that provision specifically distinguished between Allied "tribunals," which had jurisdiction over all of the crimes in Article II, and "German courts," which had to be authorized by the occupying powers and could only prosecute acts committed by Germans against other Germans. Second, Article III(2) specifically authorized each Ally to determine the "rules and procedure" of the tribunals it created pursuant to Law No. 10, thus leaving open the possibility that those tribunals would prosecute the

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[51] Einsatzgruppen, IV TWC 460.
[52] Justice, BSO, III TWC 1194.
[53] Kelsen, *Legal Status*, 524-25.
[54] Wright, *Law of the Nuremberg Trial*, in METTRAUX, 330-31; Schwarzenberger, in METTRAUX, 174; Sheldon Glueck, *By What Tribunal Shall War Offenders Be Tried?*, 56 HARV. L. REV. 1059, 1083 (1943); Willard B. Cowles, *Trials of War Criminals (Non-Nuremberg)*, 42 AM. J. INT'L L. 299, 318 (1948).
[55] Cowles, *Trials of War Criminals*, 318.

same substantive crimes via very different procedures. Indeed, that is exactly what happened, as illustrated by the fact that the NMTs did not provide defendants with any kind of appellate review, while the tribunal France created to prosecute Hermann Roechling and his four co-defendants permitted the defendants to appeal their convictions to the Superior Military Government Court.[56] The "German court" interpretation, therefore, means that the Control Council deliberately authorized the creation of German courts with the same subject-matter jurisdiction but very different procedural regimes. That seems like a strained interpretation of the Control Council's intentions, particularly in light of the distinction it drew in Article III(1)(d) between Allied tribunals and German courts.

III. WHAT KIND OF LAW DID THE NMTS APPLY?

Properly understood, in short, the NMTs were inter-Allied special tribunals created by the Allied Control Council as the sovereign legislative authority in Germany. But what kind of law did they apply? NMT defendants and critics argued at various times that the tribunals applied the law of occupation, American law, or German law. The tribunals themselves, by contrast, uniformly concluded that they applied international law. This section explains why the tribunals were correct.

A. The Law of Occupation

NMT defendants and critics often claimed that the tribunals applied the law of occupation, by which they meant that the Hague Regulations concerning belligerent occupation limited the Control Council's legislative authority over Germany. Von Knieriem, for example, argued that Law No. 10 was "a uniform law established by the occupying powers for the whole of Germany, that is to say, that it is occupation law."[57] Von Laun agreed, adding that the applicability of the Hague Regulations was not affected by "the type of occupation, by conditions in Germany, or by the questions whether a state of war exists or whether hostilities continue." In his view, the Hague Regulations would have ceased to apply only if the Allies evacuated Germany or formally annexed it.[58] The defendants in *Ministries* made a similar argument.[59]

It is not difficult to understand why the defendants and critics argued that the tribunals applied occupation law. Article 43 of the Hague Regulations provides that "[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Although there is a non-frivolous argument that the Control Council's radical restructuring of the German judicial system could have been justified by Article 43's "absolutely prevented" exception,[60] most scholars believe that – as Woetzel put it – "it is doubtful that [such] summary action could have been

[56] XV TWC 1143.
[57] VON KNIERIEM, 25.
[58] Von Laun, 274-75.
[59] Ministries, XIV TWC 690.
[60] BENVENISTI, 91 n. 135 (collecting cites).

justified according to international law."[61] Indeed, the *Justice* tribunal cited an article by George Zinn, the Minister of Justice in Hessen, in which Zinn claimed that if the Allies were belligerently occupying Germany, "then all legal and constitutional changes brought about since 7 May 1945 would cease to be valid once the Allied troops were withdrawn and all Nazi laws would again and automatically become the law of Germany." The Tribunal described that outcome as "a consummation devoutly to be avoided."[62]

The tribunals, however, uniformly rejected the Hague Regulations argument. Their rationale was familiar: debellatio. According to the *Ministries* tribunal, the High Command's unconditional surrender meant that the Allies were not belligerently occupying Germany and thus Article 43 did not apply to the actions of the Control Council:

> There is a great difference between the rights and powers of the Allied governments in the Reich today, and the rights and powers of the Reich in the territories that it belligerently occupied, following its invasions and through the war years. The Allied occupation of Germany following her unconditional surrender and the disbanding of her armies, and the subsequent Allied exaction of reparations to restore and rehabilitate in a measure the territories devastated and despoiled by Germany do not make a situation falling within the contemplation of the provisions of the Hague Convention applicable to belligerent occupancy.[63]

The *Justice* tribunal agreed, pointing out that the fact of debellatio "distinguishes the present occupation of Germany from the type of occupation which occurs when, in the course of actual warfare, an invading army enters and occupies the territory of another state, whose government is still in existence and is in receipt of international recognition, and whose armies, with those of its allies, are still in the field." In its view, the Hague Regulations applied only to the latter *occupation bellica*.[64]

The *Justice* tribunal claimed that its interpretation of the Control Council's authority was "supported by modern scholars of high standing in the field of international law," and indeed it was. The Tribunal itself cited Freeman, Fried, Kelsen, and Lord Wright, the head of the UNWCC.[65] Other scholars who believed that debellatio ended the Allies' belligerent occupation of Germany included Friedmann and Schwarzenberger.[66] British courts had also reached the same conclusion by the time

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[61] WOETZEL, 85.
[62] Justice, III TWC 962.
[63] Ministries, XIV TWC 690.
[64] Justice, III TWC 960.
[65] See the citations in id. at 961-62.
[66] W. Friedmann, *The Legal and Constitutional Position of Germany Under Allied Military Government*, 3 RES JUDICATAE 133, 136 (1947).; Schwarzenberger, in METTRAUX, 174.

the Tribunal released its judgment[67] – and French, Dutch, and even German courts would agree later.[68]

Finally, although the tribunals' reliance on debellatio appears sound, it is worth noting that Judge Blair believed that they should have avoided determining whether the Control Council was bound by the Hague Regulations. In his view, that issue was irrelevant to the tribunals' authority to apply the substantive provisions of Law No. 10, because "[n]o authority or jurisdiction to determine the question of the present status of belligerency of the occupation of Germany has been given" to the tribunals. In other words, the tribunals were required to apply Law No. 10 as written; they had no right to question the legitimacy of the law itself.[69]

B. American Law

In addition to arguing that the tribunals were American courts, NMT defendants and critics also claimed that the tribunals applied American criminal law and were thus bound by the U.S. Constitution. Von Knieriem, for example, argued that "[i]f… the Nuremberg Tribunals were American courts" – as he believed they were – "they could not apply any legal rules other than those which American legislation allowed them to apply."[70] The tribunals, however, were no less hostile to the idea that they applied American law and were bound by the U.S. Constitution than they were to the idea that they were American courts. The *Flick* tribunal, for example, stated unequivocally that "[t]he Tribunal administers international law. It is not bound by the general statutes of the United States or even by those parts of its Constitution which relate to courts of the United States.[71] The *Krupp* tribunal reached the same conclusion, pointing out that the tribunals recognized "certain safeguards for persons charged with crimes" as binding "not… because of their inclusion in the Constitution and statutes of the United States, but because they are understood as principles of a fair trial."[72] Similar statements can be found in both *Ministries* and the *Justice* case.[73]

This position is clearly correct. If the tribunals did not qualify as American courts, it is difficult to see how they could have applied American law. Moreover – and even more important in this context – the tribunals were created pursuant to Law No. 10, which was enacted by the Control Council, a condominium of the four Allies that possessed supreme legislative authority over Germany. As Tribunal III pointed out in the *Justice* case, given the quadripartite foundation of Law No. 10, "it follows of necessity that there is no national constitution of anyone state which could be invoked to invalidate the substantive provisions of such international legislation."[74] Indeed,

[67] See, e.g., Grahame v. Director of Prosecutions, [1947] AD Case No. 103.
[68] France: In re Bauerle, [1949] AD Case No. 93; Netherlands: In re Flesche, [1949] AD Case No. 87; Germany: Recidivist (American Military Tribunal) Case, 1951 ILR 617.
[69] Justice, Blair Separate Opinion, III TWC 1178.
[70] VON KNIERIEM, 87.
[71] Flick, VI TWC 1188.
[72] Krupp, IX TWC 1331.
[73] Ministries, Order, 29 Dec 1947, XV TWC 325; Justice, III TWC 984.
[74] Justice, III TWC 965.

the Control Council enacted Law No. 10 precisely "to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders."[75]

C. German Law

Finally, a number of NMT defendants claimed that the tribunals applied German law. That was the defendants' argument, for example, in the *Justice* case. Their motivation was obvious: if the tribunals applied German law – which was certainly plausible, given that the Control Council was acting as the *de facto* German government – they could not be convicted for actions that were legal under German law at the time they were committed.[76]

Interestingly, both the OCC and various American war-crimes officials also occasionally claimed that the tribunals applied German law. Their motivation, however, was quite different: they believed that if the tribunals applied German law, they would be able to prosecute crimes contained in Law No. 10 that were not necessarily criminal under international law, particularly crimes against humanity committed against German Jews that were not connected to the the Nazis' wars of aggression. In early 1947, for example, Taylor asked Damon Gunn, an official in the Theater Judge Advocate's Office, whether such crimes violated international law and were thus punishable under the London Charter. Gunn replied that "the answer is in the negative, if considered as stated, under International Law," but insisted that "this appears to be immaterial because these persons can be punished by these Courts, under provisions of Control Council Law No.10 which is the German Law."[77] Taylor later made precisely that argument in *Flick*.[78]

Both the defendants and the Americans would ultimately be disappointed, because the tribunals unequivocally rejected the idea that they applied German law. As Tribunal III said in the *Justice* case:

> The Nuernberg Tribunals are not German courts. They are not enforcing German law. The charges are not based on violation by the defendants of German law. On the contrary, the jurisdiction of this Tribunal rests on international authority. It enforces the law as declared by the IMT Charter and C. C. Law 10, and within the limitations on the power conferred, it enforces international law as superior in authority to any German statute or decree.[79]

This argument is sound. There is no question that the Control Council often used its supreme legislative authority in Germany to create German law; Law No. 11, which rewrote the German Penal Code, is an example. But Law No. 10 was not intended to create German law – it was designed to apply the international law of the London Charter to German war criminals via the procedural mechanism of zonal trials. Law No. 10, in other words, was the law *in* Germany, but it was not the law *of* Germany.

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[75] Law No. 10, Preamble.
[76] WOETZEL, 60.
[77] Memo from Gunn to Assistant Secretary of War, 7 Mar. 1947, NA-153-1018-8, at 1.
[78] IX Law Reports of Trials of War Criminals 45 n. 1 (1949) (hereafter "LRTWC").
[79] Justice, III TWC 984.

D. International Law

The tribunals' insistence that they did not apply either American or German law was based on the same idea: that they were international courts that applied international law. We have already seen that the first assumption is untenable. But what about the second? Could the tribunals have applied international law if they were inter-Allied special tribunals, not international courts?

At first glance, the answer to that question seems obvious. National courts prosecuted violations of international law long before the NMTs – particularly violations of the laws of war – so there is no reason that the tribunals, which were based on the pooled jurisdiction of the individual Allies, could not have prosecuted violations of international law. That answer, however, assumes that the substantive law the tribunals applied – Article II of Law No. 10 – genuinely qualified as international. To paraphrase Woetzel's question about the IMT, were the crimes listed in Law No. 10 "really international crimes based on international law"?[80]

Without exception, the tribunals insisted that they were. First, they argued that the crimes in Law No. 10 were international crimes because they were based on the London Charter, which the international community had ratified as international law. Second, they claimed that regardless of the international community's ratification of the London Charter, the crimes in Law No. 10 reflected pre-existing rules of international law.

1. International Ratification

Two tribunals relied on the international community's ratification of the London Charter to justify the internationality of Law No. 10. In *Einsatzgruppen*, Tribunal II held that Law No. 10's crimes against humanity provision qualified as international law because it was based on Article 6(c) of the London Charter and 19 states had adhered to the Charter "[f]ollowing the London Agreement of 8 August 1945 between the four Allied powers."[81] Tribunal III reached a similar conclusion in the *Justice* case, adding that Law No. 10's incorporation of the London Charter guaranteed its internationality not only because "23 states, including all of the great powers" adhered to the Charter, but also because "the IMT Charter must be deemed declaratory of the principles of international law in view of its recognition as such by the General Assembly of the United Nations."[82]

This explanation of Law No. 10's internationality depends, of course, on the idea that the London Charter actually qualified as international law. Most scholars, both past and present, have relied on the adherence rationale, arguing that the Charter declared international law because it was enacted by the Allies on behalf of the international community. Quincy Wright, for example, took the position that "[w]hile such an assumption of competence would theoretically be a novelty in international law, it would accord with the practice established during the nineteenth century under which leading powers exercised a predominant influence in initiating new rules of

[80] WOETZEL, 241.
[81] Einsatzgruppen, IV TWC 498.
[82] Justice, III TWC 698.

international law."[83] Lord Wright argued that the Charter "should be regarded as a declaration of international law because, though it was an agreement to which the original parties were only the four Great Powers, it was acceded to by practically all the Allies."[84] Schwelb and Schwarzenberger took similar positions,[85] as have Woetzel and Bassiouni more recently.[86]

Woetzel also endorsed the idea that the UN's subsequent ratification of the London Charter and the IMT judgment meant that the Charter declared international law. In his view, General Assembly Resolution 95(1) is "of special importance" to the internationality of the Charter, because the IMT, unlike the Permanent Court of International Justice, did not directly apply general international law but was bound by the terms of the Charter. Resolution 95(1) thus provides "further tangible evidence for assuming that the principles of the Charter… were valid principles of international law," not simply special occupation law enacted by the Allies as the supreme legislative authority in Germany.[87]

2. Pre-Existing International Law

Most of the tribunals, by contrast, claimed that they applied international law not because the London Charter had been approved by the international community, but because Law No. 10 reflected pre-existing rules of international law, both customary and conventional. In the *Hostage* case, for example, Tribunal V held that "[t]he crimes defined in Control Council Law No. 10… were crimes under pre-existing rules of international law," because "the practices and usages of war which gradually ripened into recognized customs with which belligerents were bound to comply recognized the crimes specified herein as crimes subject to punishment."[88] Similarly, in *High Command*, Tribunal V claimed – quoting the IMT – that "[t]he Charter, supplemented by Control Council Law No. 10, is not an arbitrary exercise of power, but… is the expression of international law existing at the time of its creation."[89] Statements to the same effect can also be found in *Flick* and *Krupp*.[90]

The two tribunals that relied on the ratification rationale, it is worth noting, also relied on the pre-existing law rationale – likely because of the retroactivity problems inherent in the former, which are discussed in the next section. In the *Justice* case, Tribunal III claimed that, with a few exceptions, Law No. 10 was not "original substantive legislation," but simply provided "procedural means previously lacking for the enforcement within Germany of certain rules of international law which exist throughout the civilized world independently of any new substantive legislation."[91]

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[83] Wright, *Law of the Nuremberg Trial*, in METTRAUX, 333.
[84] Lord Wright, *The Killing of Hostages as a War Crime*, 25 BRIT. Y.B. INT'L L. 296, 304 (1948).
[85] Egon Schwelb, *Crimes Against Humanity*, in METTRAUX, 152-53; Schwarzenberger, in METTRAUX, 174.
[86] WOETZEL, 54; M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 83 (2d rev. ed. 1999).
[87] WOETZEL, 57.
[88] Hostage, XI TWC 1239.
[89] High Command, XI TWC 476.
[90] Flick, VI TWC 1189; Krupp, IX TWC 1331.
[91] Justice, III TWC 966.

More succinctly, the *Einsatzgruppen* tribunal held that "while the Tribunal derives its existence" from the London Charter, "its jurisdiction over the subject matter results from international law valid long prior to World War II."[92]

IV. RETROACTIVITY

The ratification and CIL rationales each raise important questions about whether Law No. 10 violated the principle of non-retroactivity. The ratification rationale is obviously difficult to reconcile with that principle: the crimes that the IMT and NMTs prosecuted were committed long before the Charter was drafted, much less adhered to or retrospectively approved. The CIL rationale does not have the same weakness, but it nevertheless depends on the empirical claim – contested by both NMT defendants and critics – that the crimes in Article II of Law No. 10 were, in fact, criminal under international law prior to WW II.

A. Does the Principle of Non-Retroactivity Apply?

Both rationales, of course, presume that the tribunals could not prosecute acts that were not criminal under international law at the time they were committed. The IMT had wavered on that issue. At one point in the judgment, the Tribunal said that "[t]he law of the Charter is decisive, and binding,"[93] implying that it had no authority to question the customary status of the crimes in the Charter. But it still entertained the defendants' *ex post facto* challenge, treating the principle of non-retroactivity as a "principle of justice" that was satisfied as long as each of the defendants knew that his actions were wrong at the time he engaged in them.[94]

Tribunal III exhibited similar ambivalence in the *Justice* case. In response to defense claims that the crimes in Law No. 10 violated the principle of non-retroactivity, it insisted that it had no authority to question whether those crimes reflected pre-existing rules of international law. According to the Tribunal, because Law No. 10 was "the legislative product of the only body in existence having and exercising general lawmaking power throughout the Reich," it could not "go behind the statute" and "declare invalid the act to which it owes its existence."[95] It then immediately stated, however, that although it was entitled to treat Law No. 10 as "a binding rule regardless of the righteousness of its provisions," the better course was to determine whether the law was consistent with the principle of non-retroactivity.[96]

Like the IMT, the *Justice* tribunal considered non-retroactivity to be a "principle of justice and fair play," not a limit on the Control Council's sovereignty.[97] But it did not adopt the IMT's view that the principle required no more than generalized knowledge of wrongfulness. On the contrary, it made the IMT test both easier and

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[92] Einsatzgruppen, IV TWC 154.
[93] IMT JUDGMENT, 38.
[94] Id. at 39. A number of scholars supported that interpretation of non-retroactivity, most notably Kelsen and Stefan Glaser. Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, in METTRAUX, 283; Stefan Glaser, *The Charter of the Nuremberg Tribunal and New Principles of International Law*, in METTRAUX, 64.
[95] Justice, III TWC 964-65.
[96] Id. at 963.
[97] Id. at 977.

more difficult to satisfy. It made it easier to satisfy by holding that the principle of non-retroactivity was satisfied as long as the defendant "knew or should have known" that his actions were wrongful – a negligence standard instead of a knowledge standard. And it made it more difficult to satisfy by holding that the defendant must have known or had reason to know both that his actions were wrongful ("shocking to the moral sense of mankind") and that "he would be subject to punishment if caught."[98]

The *Justice* tribunal was the only tribunal that considered the principle of non-retroactivity to be a principle of justice instead of a limit on sovereignty. All of the other tribunals that considered the issue concluded that the principle prohibited them from punishing defendants for acts that were not criminal under international law at the time they were committed – a significant development in international criminal law. The *Farben* tribunal, for example, held that Law No. 10 "cannot be made the basis of a determination of guilt for acts or conduct that would not have been criminal under the law as it existed at the time of the rendition of the judgment by the IMT."[99] Similarly, in the *Hostage* case, Tribunal V described "[t]he rule that one may not be charged with crime for committing an act which was not a crime at the time of its commission" as a "fundamental right" and held that the right prohibited "retroactive pronouncements."[100] The *Flick* and *Krupp* tribunals reached the same conclusion.[101]

B. Did Law No. 10 Violate the Principle of Non-Retroactivity?

Although the tribunals occasionally rejected specific charges against defendants on the ground that they exceeded pre-existing rules of international law, they consistently rejected claims that the substantive provisions of Law No. 10 violated the principle of non-retroactivity. Some of the tribunals made sweeping claims to that effect. In *Flick*, for example, Tribunal IV simply claimed that "[t]he Tribunal is giving no ex post facto application to Control Council Law No. 10. It is administering that law as a statement of international law which previously was at least partly uncodified… No act is adjudged criminal by the Tribunal which was not criminal under international law as it existed when the act was committed."[102] Other tribunals, by contrast, addressed the retroactivity of crimes against peace, war crimes, and crimes against humanity individually.

1. War Crimes

The tribunals had little trouble concluding that international law criminalized the war crimes in Law No. 10 prior to World War II. Article II(1)(b) essentially replicated Article 6(b) of the London Charter, and the IMT had held that the Charter's crimes "were already recognized" via the Hague Convention IV of 1907 and the Geneva Convention of 1929, both of which had achieved customary status.[103] The tribunals followed the IMT. In *Einsatzgruppen*, for example, Tribunal II held that the war

[98] Id. at 978.
[99] Farben, VIII TWC 1098.
[100] Hostage, XI TWC 1241.
[101] Flick, VI TWC 1189; Krupp, IX TWC 1331.
[102] Flick, VI TWC 1189.
[103] IMT JUDGMENT, 64-65.

crimes in Law No. 10 "have been international law for decades if not centuries."[104] The *Hostage* and *High Command* tribunals reached similar conclusions.[105]

2. Crimes Against Peace

Two tribunals held that Law No. 10's definition of crimes against peace was consistent with international law. In *High Command*, Tribunal V examined two questions: whether aggressive war was criminal, and who could be convicted of participating in a crime against peace. Its affirmative answer to the first question was relatively cursory: echoing the IMT,[106] the Tribunal simply pointed out that the Kellogg-Briand Pact, which had "renounced war as an instrument of national policy," had been signed (at the time) by Germany and 62 other states.[107] Its analysis of the second question – which the IMT had not addressed – was more searching, but strangely devoid of any reference to history. The Tribunal simply held that international law limited criminal responsibility for aggressive war to "policy makers" who had the power "to shape or influence" the plans for war; it refused to find "that, at the present stage of development, international law declares as criminals those below that level who, in the execution of this war policy, act as the instruments of the policy makers."[108]

Tribunal IV went even further in *Ministries*. With regard to individual criminal responsibility, it rejected as "fallacious" the defendants' claim that "heads of states and officials thereof cannot be held personally responsible for initiating or waging aggressive wars and invasions because no penalty had been previously prescribed for such acts." It provided two examples of such penalties: Frederick the Great being summoned to Regensburg to explain, under threat of exile, why he had invaded Saxony; and Napoleon's banishment to St. Helena for sailing from Elba to try to regain his crown. It also made clear, however, that that it would have had "no hesitation" in upholding individual responsibility for participating in aggressive war "even if history furnished no examples" of it.[109]

The most important difference between *Ministries* and *High Command* centered on the criminality of invasions, which Law No. 10 criminalized but the London Charter did not. Although the *Ministries* tribunal also relied on the Kellogg-Briand Pact, it specifically held that international law condemned *both* invasions and aggressive wars: "[t]he initiation of wars and invasions with their attendant horror and suffering has for centuries been universally recognized by all civilized nations as wrong, to be resorted to only as a last resort to remedy wrongs already or imminently to be inflicted."[110] From a retroactivity standpoint, that was a critical conclusion. The *Ministries* tribunal ultimately convicted two defendants – Wilhelm Keppler and Hans

[104] Einsatzgruppen, IV TWC 458.
[105] Hostage, XI TWC 1240; High Command, XI TWC 534.
[106] IMT JUDGMENT, 39.
[107] High Command, XI TWC 490.
[108] Id. at 489.
[109] Ministries, XIV TWC 321.
[110] Id. at 319.

Lammers – for participating in the invasions of Austria and Czechoslovakia,[111] which the IMT had held were aggressive acts but not aggressive wars. Their convictions would thus have violated the principle of non-retroactivity had the Tribunal not held that customary international law was broader than the law of the London Charter.

Judge Powers, it is important to note, angrily rejected the Tribunal's insistence that invasions were criminal under customary international law:

> [N]either in the Kellogg-Briand Pact, nor any other treaty, so far as I am aware, is there any treaty or agreement affecting the countries here involved with reference to mere invasions – at least not invasions accomplished under the circumstances under which Austria and Czechoslovakia were invaded. The thing which is prohibited by all of these treaties is war. If we start with the premise that what was intended was to describe crimes which were already crimes under international law, we will have to exclude invasions, because there was no possible basis for claiming that a mere invasion was contrary to international law, prior to the enactment of Law 10.[112]

Judge Powers would seem to have the better of the argument. As Law No. 10 recognized, invasions and wars of aggression are different acts: unlike a war of aggression, which involves actual violence, an invasion is "the implementation of the national policy of the invading state by force even though the invaded state, due to fear or a sense of the futility of resistance in the face of superior force, adopts a policy of nonresistance."[113] Numerous scholars have rejected the IMT's conclusion that aggressive wars were criminal under international law prior to World War II,[114] but at least the IMT could point to the Kellogg-Briand Pact. The majority in *Ministries* could not even rely on the Pact to justify the criminality of invasions, because – as Judge Powers pointed out – it was silent concerning them.

3. Crimes Against Humanity

The IMT divided crimes against humanity into two categories: "war crimes… committed on a vast scale" during the war in occupied territory; and "inhumane acts" that took place either before the war or during the war outside of occupied territory, but were committed "in execution of, or in connection with, any crime within the jurisdiction of the Tribunal."[115] The IMT never specifically discussed the customary status of either category, which no doubt explains why so many scholars claim that crimes against humanity represented a new kind of international crime.[116]

Both categories, however, are at least arguably defensible. When committed in occupied territory, crimes against humanity in the first category were simply

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[111] Keppler was convicted of participating in the invasions of both Austria and Czechoslovakia. Lammers was convicted of participating in the invasion of Czechoslovakia.
[112] Ministries, Powers Dissent, XIV TWC 881.
[113] High Command, XI TWC 485.
[114] See, e.g., Schick, 770.
[115] IMT JUDGMENT, 65.
[116] See, e.g., Kranzbuehler, 343.

aggravated versions of war crimes and thus posed no retroactivity problems. The more difficult situation involved the second category: acts that did not qualify as war crimes either for geographic or for temporal reasons. The IMT's decision to criminalize such acts no doubt represented "a progressive historical development" in the evolution of crimes against humanity.[117] But that does not mean that the IMT thereby violated the principle of non-retroactivity. As Bassiouni has pointed out, the IMT's recognition of the second category of crimes against humanity did not criminalize any underlying acts that were not previously criminal; all of those acts would have qualified as war crimes had they been committed during the war in occupied territory. Indeed, such crimes against humanity were "based on the same moral and legal principles" as traditional war crimes – the "laws of humanity" mentioned in the Preambles to the Hague Conventions of 1899 and 1907 that had long existed and that had always underpinned the "norms and rules of the humanization and regulation of armed conflict."[118] Bassiouni thus rightly argues that it would have "empt[ied] international law of its value content" to insist that the principle of non-retroactivity prohibited the IMT from punishing crimes against humanity that fell into the second category: because such crimes had to have been committed "in execution of, or in connection with, the war" – the nexus requirement – their commission no less transgressed the values underlying the Hague Regulations than the commission of traditional war crimes.[119] Indeed, the *Ministries* tribunal specifically relied upon the freedom of religion protected by the Hague Regulations to justify its conclusion that the Nazis' systematic "persecution of churches and clergy" during the war in Germany (and in other Axis countries) was a crime against humanity.[120]

That rationale not only justifies the IMT's second category of crimes against humanity, it also explains why the IMT felt that the nexus requirement was so important. As Bassiouni notes, "[t]he result of limiting the scope of Article 6(c) was the exclusion of all Nazi crimes against the Jews before 1939. But that trade-off was intended to strengthen the validity of the crime in light of the requirements of the 'principles of legality'."[121] More specifically, although inhumane acts unconnected to the war were undoubtedly reprehensible no matter where or when they were committed, they only transgressed the "moral and legal principles" underlying traditional war crimes, thus justifying their punishment, if the nexus was satisfied.

Law No. 10 complicated the tribunals' analysis of crimes against humanity, because it eliminated the nexus requirement. Three tribunals considered the customary status of atrocities and persecutions committed prior to the war that did not satify the requirement: *Ministries*, *Justice*, and *Einsatzgruppen*. In *Ministries*, Tribunal IV read the nexus requirement into Law No. 10 on the ground that it was required by customary international law[122]: "the crimes here defined as crimes against humanity

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[117] BASSIOUNI, 70.
[118] Id. at 77.
[119] Id. at 75.
[120] Ministries, XIV TWC 522.
[121] BASSIOUNI, 29.
[122] As discussed in Chapter 10, the *Flick* tribunal also held that the nexus was required. It did so, however, by analyzing the relationship between Law No. 10 and the London Charter, not by examining customary international law.

and as perpetrated against German nationals were not, when committed, crimes against international law, there being no claim that such crimes were perpetrated in connection with crimes against peace or war crimes." To hold otherwise, the Tribunal insisted, "would be to disregard the well-established principle of justice that no act is to be declared a crime which was not a crime under law existing at the time when the act was committed."[123]

By contrast, the *Einsatzgruppen* and *Justice* tribunals held that international law prohibited pre-war crimes against humanity that did not satisfy the nexus requirement. In *Einsatzgruppen*, Tribunal II acknowledged that Law No. 10's elimination of the nexus requirement was "an innovation in the empire of law," but denied that the innovation violated the principle of non-retroactivity. On the contrary, the Tribunal insisted – echoing but expanding the IMT's emphasis on the mass nature of crimes against humanity – that crimes against humanity were simply "wholesale and systematic" versions of acts that were "long known and understood" as criminal "under the general principles of criminal law." Law No. 10 thus did not create new law by criminalizing even peacetime crimes against humanity; it simply provided a forum in which to prosecute such violations of "the common heritage of civilized peoples."[124]

Tribunal III's rejection of the nexus requirement in the *Justice* case also emphasized the scale of crimes against humanity. The tribunal acknowledged that Law No. 10 only criminalized "the type of criminal activity which prior to 1939 was and still is a matter of international concern." But it rejected the argument, made by the defendants, that "violations of the laws and customs of war [were] the only offenses recognized by common international law." In its view, regardless of whether the Nazis' pre-war acts constituted "technical violations of laws and customs of war," they were "acts of such scope and malevolence, and they so clearly imperiled the peace of the world, that they must be deemed to have become violations of international law."[125] Genocide was a "prime illustration": as evidenced by the General Assembly's recent resolution, genocide had been "recognized as a violation of common international law" on account of "its magnitude and its international repercussions."[126]

The *Justice* tribunal provided a number of historical examples in support of the idea that there had long been "an international interest and concern in relation to what was previously regarded as belonging exclusively to the domestic affairs of the individual state,"[127] such as President van Buren's intervention in Turkey in 1840 to protect Jews and France's use of force in 1861 to prevent religious atrocities in Lebanon. The Tribunal additionally cited the Commission on Responsibility of Authors of the War, which had concluded in the aftermath of World War I that "[a]ll persons belonging to enemy countries… who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution." And it pointed out –

[123] Ministries, Order & Memorandum of the Tribunal Dismissing Count Four, XIII TWC 116.
[124] Einsatzgruppen, IV TWC 458-59.
[125] Justice, III TWC 982.
[126] Id. at 983.
[127] Id. at 980, quoting Hyde.

with evident satisfaction – that Hitler himself had justified his invasion of Czechoslovakia on the ground that "[t]he alleged persecution of racial Germans by the government of that country was a matter of international concern warranting intervention by Germany."[128]

It is a difficult question whether the *Justice* tribunal was correct to claim that Law No. 10's extension of the London Charter was consistent with customary international law. Taylor believed that it was, rejecting claims that the extension violated the principle of non-retroactivity by insisting that the London Charter was not intended "to be a complete statement of the entire content of international penal law" and that, as a result, the NMTs were free to differ from the IMT concerning the reach of a particular international principle.[129] Bassiouni, by contrast, disagrees. In his opinion, Law No. 10's elimination of the London Charter's nexus requirement "overreaches" and "strains the principle of legality,"[130] ostensibly because pre-war crimes against humanity that were not connected to the war, although reprehensible, did not transgress the "moral and legal principles" underlying the Hague Regulations.

This debate, however, is merely academic. Although Law No. 10's criminalization of invasions led to actual convictions, no NMT defendant was ever convicted of a peacetime crime against humanity that was not connected to war crimes or crimes against peace as a result of Law No. 10's elimination of the nexus requirement.

4. Criminal Membership

Neither the IMT nor the NMTs ever considered whether membership in a criminal organization was a crime under international law prior to World War II. The IMT's silence was not problematic, because it convicted the organizations themselves, not individual members of those organizations. The NMTs, by contrast, convicted more than 70 individuals of the crime. Unless criminal membership was prohibited by either conventional or customary law, therefore, those convictions violated the principle of non-retroactivity.

Interestingly, not long after the NMT trials ended, one of the judges in the *Hostage* case, Edward Carter, revealed that it was no accident that the tribunals had not addressed the retroactivity issue. According to Carter, although the judges were skeptical that criminal membership was an international crime, they felt bound to honor its inclusion in Law No. 10.[131] Judge Carter himself was certainly dubious: in his view, "the IMT applied a retroactive pronouncement to this phase of the case," because "the holding that the Nazi party or the SS is a criminal organization and that membership in either was criminal [was] not based on any source of international law known to the writer, existing prior to the London Charter."[132]

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[128] Id. at 982.
[129] TAYLOR, FINAL REPORT, 9.
[130] BASSIOUNI, 34.
[131] Edward F. Carter, *The Nurnberg Trials: A Turning Point in the Enforcement of International Law*, 28 NEB. L. REV. 370, 374 (1949).
[132] Id. at 373-74.

The question was more complicated than Judge Carter acknowledged, however, because it was at least arguable that the crime of criminal membership was "a fundamental principle of criminal law accepted by nations generally," which qualified as international law according to his own tribunal.[133] Justice Jackson had mentioned a number of states that had criminalized criminal membership during the organizational phase of the IMT, a list that included all of the Allies[134] and could have been expanded to include Belgium and Switzerland.[135] He had also pointed out that the German Penal Code of 1891 had criminalized "participation in an organisation, the existence, constitution or purposes of which are to be kept secret from the Government," that in 1922 the German Parliament had criminalized membership in Nazi-like associations, and that German courts had declared the entire German Communist Party a criminal organization in 1927 and 1928.[136]

The customary status of criminal membership also drew some support from national laws criminalizing conspiracy. The IMT held that "[a] criminal organisation is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes."[137] That description was only partially accurate; as we will see in Chapter 12**,** criminal membership was actually a hybrid of conspiracy and common-plan liability. Nevertheless, the fact that conspiracy was an integral part of the common law and was far more widespread in civil-law systems than commonly acknowledged[138] – including in Germany[139] – indicates that the crime of criminal membership "cannot be regarded as entirely new law."[140]

V. PERSONAL JURISDICTION

The NMTs, in short, are best understood as inter-Allied special tribunals that applied international law. One question thus remains: did the tribunals have "the legal right to take jurisdiction over the German defendants and to hold them individually responsible for their crimes under international law"?[141]

Any attempt at an answer must begin with the fact that, unlike Japan, Germany never consented to Allied prosecution of German war criminals in its instrument of surrender.[142] As noted earlier, a tribunal based on an agreement between states is international only in the most literal sense, because it is entitled "to the combined powers of jurisdiction of the contracting parties, but no more." If that is correct, we cannot assume that the IMT and the NMTs had jurisdiction over the German war criminals simply by virtue of the Allies' decision to sign the Charter or enact Law No.

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133 Hostage, XI TWC 1235.
134 XIII LRTWC 46.
135 Glaser, in METTRAUX, 67.
136 XIII LRTWC 46.
137 IMT JUDGMENT, 67.
138 See, e.g., Wienczyslaw J. Wagner, *Conspiracy in Civil Law Countries*, 42 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 171, 175-77 (1951).
139 See, e.g., id. at 171-82.
140 WOETZEL, 209. The existence of conspiracy in Germany and in civilian systems generally is discussed in more detail in Chapter 12.
141 Id. at 241.
142 A.R. Carnegie, *Jurisdiction Over Violations of the Laws and Customs of War*, 39 BRIT. Y.B. INT'L L. 402, 416 (1963).

10. In each case, we would need to show that the individual Allies would have had jurisdiction over Germans had they created their own military tribunals.

That said, Woetzel argues that there are two situations in which a tribunal can exercise jurisdiction over nationals of a non-contracting state regardless of the contracting states' individual jurisdiction: where the tribunal qualifies as genuinely international, because it has the consent and approval of the international community; and where "exceptional circumstances" justify setting aside the general rule of consent.[143] The first exception would validate the IMT's jurisdiction over Germans, because the IMT qualified as a genuinely international tribunal. But it would not validate the NMTs' jurisdiction, because the international community never consented to or approved Law No. 10.

The second exception, by contrast, might justify the tribunals' jurisdiction. As discussed earlier, the dissolution of the German government and the High Command's unconditional surrender meant that the Allied Control Council was entitled to act as the supreme legislative authority in Germany. It is thus possible to argue that Law No. 10's assertion of jurisdiction over German war criminals was justified in one of two different ways: (1) Germany's consent to Law No. 10 was irrelevant, because Germany had ceased to exist as a state; or (2) as the *de facto* German government, the Control Council was entitled to consent to Law No. 10 on Germany's behalf. Kelsen endorsed the first argument[144]; Woetzel, the second.[145]

Only one tribunal specifically addressed its personal jurisdiction over German war criminals. In the *Justice* case, Tribunal III acknowledged that, as a general rule, no international authority could "establish judicial machinery for the punishment of those who have violated the rules of the common international law" if the criminals were nationals of "a state having a national government presently in the exercise of its sovereign powers." It pointed out, however, that the general rule did not prohibit the Control Council from enacting Law No. 10, because the German government had ceased to exist.[146]

Although plausible, both arguments seem designed less to announce a general rule of international law than to find a plausible *ex post* justification for the Allied war-crimes program. The second argument appears particularly unseemly: the idea of the Allies using their defeat of Germany to consent on Germany's behalf to their prosecution of German war criminals is more than a little redolent of victor's justice. It is thus reasonable to consider Woetzel's alternative basis of the NMTs' jurisdiction – the "combined powers of jurisdiction of the contracting parties" to Law No. 10. If each of the Allies could have individually prosecuted Germans for the crimes contained in Law No. 10, there is – as explained earlier – no reason they could not have prosecuted them together.

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143 WOETZEL, 86-87.
144 Kelsen, *Legal Status*, 525.
145 WOETZEL, 77-78.
146 Justice, III TWC 971.

That inquiry begins with the *Lotus* case, in which the Permanent Court of International Justice held that international law provides states "a wide measure of discretion" to extend their jurisdiction to acts committed outside of their territory.[147] By World War II, international law already recognized, to varying degrees, four bases of criminal jurisdiction other than territorial: active nationality, passive personality, protective, and universal.[148] Territorial and active nationality jurisdiction were not at issue in the NMT trials – although Carnegie noted in the early 1960s that it is possible to justify the Allies' jurisdiction on the ground that, regardless of the consent issue, the Control Council was entitled as the *de facto* government of Germany to exercise territorial jurisdiction over crimes committed in Germany and active nationality jurisdiction over crimes committed outside of it.[149] The three remaining bases, by contrast, all help explain the tribunals' right to prosecute German war criminals.

A. War Crimes

Two tribunals specifically relied on passive-personality jurisdiction to justify their jurisdiction over Germans accused of war crimes. In the *Justice* case, Tribunal III held that, with regard to "war crimes in the narrow sense," it had "always been recognized that tribunals may be established and punishment imposed by the state into whose hands the perpetrators fall. These rules of international law were recognized as paramount, and jurisdiction to enforce them by the injured belligerent government, whether within the territorial boundaries of the state or in occupied territory, has been unquestioned."[150] Similarly, in *Einsatzgruppen*, Tribunal II affirmed that individuals who violated the laws of war "were subject to trial and prosecution by both the country whose subjects they were and by the country whose subjects they maltreated."[151] That position had been endorsed prior to the war by the UNWCC and by Hersh Lauterpacht.[152]

There is, of course, one problem with this argument: many of the crimes the NMTs prosecuted were not committed against American nationals. Insofar as the victims were nationals of another member of the Control Council, it can be persuasively argued that, by enacting Law No. 10, each member constructively consented to the others exercising passive-nationality jurisdiction on its behalf. Both the British[153] and the *Einsatzgruppen* tribunal made that argument explicitly.[154] A similar argument can also be made concerning the tribunals' jurisdiction over crimes whose victims were not nationals of a member of the Control Council. As the UNWCC pointed out, numerous Allies held trials for "offences committed against the nationals of another Ally or of persons treated as Allied nationals," including Britain, the United States, Australia, Norway, and China.[155] Those prosecutions can only be explained as

147 The Lotus Case, PCIJ Series A No. 10 (1927), at 19.
148 Harvard Research, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. SUPP. 439, 445 (1935).
149 Carnegie, 418.
150 Justice, III TWC 970.
151 Einsatzgruppen, IV TWC 496.
152 XV LRTWC 26; Hersh Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 BRIT. Y.B. INT'L L. 58, 63 (1944).
153 Carnegie, 420.
154 Einsatzgruppen, IV TWC 460.
155 XV LRTWC 43.

relying on transferred passive-personality jurisdiction or – even more dramatically – universal jurisdiction.

In the *Hostage* case, in fact, Tribunal V specifically relied on universal jurisdiction to justify its prosecution of war crimes:

> An international crime is such an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances. The inherent nature of a war crime is ordinarily itself sufficient justification for jurisdiction to attach in the courts of the belligerent into whose hands the alleged criminal has fallen…. Such crimes are punishable by the country where the crime was committed or by the belligerent into whose hands the criminals have fallen, the jurisdiction being concurrent.[156]

Although not uncontroversial,[157] there was significant support for the *Hostage* tribunal's position. The UNWCC endorsed universal jurisdiction over war crimes, as did Lord Wright in his forward to the Commission's Report.[158] Numerous other scholars, both German and non-German, agreed, including William Cowles, whose 1945 essay "Universality of Jurisdiction over War Crimes" was cited by the UNWCC; Hans-Heinrich Jescheck; and Sheldon Glueck.[159]

B. Crimes Against Peace

None of the tribunals specifically defended their ability to prosecute crimes against peace. That jurisdiction, however, can be justified on the basis of the protective principle, according to which "[a] State has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity, or political independence of that State."[160] The protective principle was recognized by international law long before World War II,[161] and numerous scholars writing during and after the war claimed that the principle permitted states to prosecute crimes against peace, including Quincy Wright, Alexander Sack, Lauterpacht, Carnegie, and Woetzel.[162]

It is clear that the states who were directly victimized by Nazi aggression would have had protective jurisdiction over the crimes against peace committed against them. The issue is whether the NMTs, as the agents of the Control Council, could prosecute

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156 Hostage, XI TWC 1241.
157 See, e.g., Carnegie, 421; VON KNIERIEM, 68.
158 XV LRTWC 26; Lord Wright, *Foreword*, XV LRTWC x.
159 Willard B. Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CAL. L. REV. 177, 218 (1945); *Hans-Heinrich Jescheck, Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht* 163 (1952); Glueck, 1087.
160 Harvard Research, 543.
161 Id.
162 Wright, *Law of the Nuremberg Trial*, in METTRAUX, 330; Alexander N. Sack, *War Criminals and the Defense of Act of State In International Law*, 5 LAW. GUILD REV. 288, 299 (1945); Lauterpacht, 63; Carnegie, 410; WOETZEL, 62.

those crimes on their behalf. The argument is easiest to make – analogizing to the British and *Einsatzgruppen* position mentioned above – regarding the Soviet Union, which was a signatory to Law No. 10. But there is no reason to assume that the "constructive consent" argument does not work for the other victimized states as well, given that most of them adhered to the London Charter, which provided for international prosecutions of those responsible for waging aggressive war against them, and that few if any of them could have prosecuted crimes against peace in their domestic courts.[163] Alternatively, it is reasonable to contend that the Nazis' desire to conquer all of Europe directly threatened each Ally, permitting them to assert protective jurisdiction over any of those acts of aggression; indeed, even a critic like von Knieriem acknowledged that because "an act directed against an ally may be considered a violation of a nation's own interests and may thus be subjected to the state's own criminal law under the principle of protection... every state which actively participated in the war against Germany could judge by its own law acts committed against itself as well as against its allies."[164]

C. Crimes Against Humanity

The NMT's jurisdiction over crimes against humanity is more problematic. The first category – mass war crimes in occupied territory – can be justified in the same way as "war crimes in the narrow sense," via passive-personality jurisdiction. That basis of jurisdiction, however, only justifies the second category – acts committed outside of occupied territory but in connection with the war – if we make the assumption that the Control Council, acting as the *de facto* government of Germany, consented to the NMTs' exercising passive-nationality jurisdiction over crimes against the Jews on Germany's behalf. But if we make that assumption, why not simply assume either that the Control Council consented to the NMTs' jurisdiction *in toto* on Germany's behalf or that, as Carnegie suggested, the Control Council was entitled to exercise territorial jurisdiction over the crimes against the Jews?

The protective principle, by contrast, provides a more satisfying justification for the NMTs' jurisdiction over the second category of crimes against humanity – a suggestion made by Quincy Wright before the war and by Carnegie after it.[165] Such crimes might not have directly threatened the security of the members of the Control Council, but there is no question that many of them *indirectly* threatened their security by materially increasing the Nazis' ability to wage aggressive wars. Tribunal IV made that point in *Ministries*, noting that although the Aryanization of Jewish agricultural property took place before the war, it was "of undoubted assistance in financing aggressive plans."[166] The same is true of the use of Jewish slave labor in Germany before the war.

That rationale would not justify, however, the NMT's jurisdiction over the third category – atrocities and persecutions committed prior to the war that did not satisfy the nexus requirement. There are only two possible bases for that jurisdiction: the

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[163] See generally XV LRTWC 28-48.
[164] VON KNIERIEM, 83.
[165] Wright, *Law of the Nuremberg Trial*, in METTRAUX, 331; Carnegie, 410.
[166] Ministries, XIV TWC 557.

debellatio rationale discussed above or universal jurisdiction. Kelsen explicitly embraced the former solution, arguing that the disappearance of the German government meant that the Control Council had the authority to prosecute Germans for any international crime, "even if the crime is not exactly a war crime in the usual sense of the term, such as certain atrocities, committed in no direct connection with the war, by the Nazis against their own fellow citizens."[167] Sack, by contrast, defended the latter solution, arguing in 1945 that universal jurisdiction existed for any crime that was "universally recognized to be wrong," that "seriously affect[ed] or concern[ed] the community of nations," and that could not "be left within the exclusive jurisdiction of the government which would ordinarily have jurisdiction."[168] That is precisely the definition of a crime against humanity adopted in *Einsatzgruppen*, which strongly suggests that Tribunal II believed that universal jurisdiction justified the prosecution of such crimes even in the absence of a connection to war.[169]

CONCLUSION

The NMTs viewed themselves as international tribunals. That characterization, however, is inaccurate: unlike the IMT, which qualified as international because the London Charter was approved by the international community, the NMTs were based on a multinational agreement, Law No. 10, that never received such approval. The tribunals are thus better understood as inter-Allied special tribunals created by the Control Council in its capacity as the *de facto* government of Germany. That distinction is anything but academic, because – as discussed in Chapter 16 – uncertainty about the legal character of the NMTs has directly affected the willingness of modern courts and tribunals to rely on the tribunals' judgments.

Although the tribunals were not international, they applied international law. They could not apply the law of occupation, because the High Command's unconditional surrender meant that the Allies were no longer belligerently occupying Germany. They could not apply American law, because the source of their authority was Law No. 10, enacted by the Control Council to create "a uniform legal basis in Germany for the prosecution of war criminals." And they could not apply German law, because Law No. 10 was based the London Charter, which had been transformed into international law by the international community and at least arguably reflected pre-war customary international law.

That said, Law No. 10 went beyond the London Charter in a number of respects, the most important of which were the criminalization of invasions and the elimination of the nexus requirement for crimes against humanity. Those extensions likely violated the principle of non-retroactivity, particularly given that – with the exception of the *Justice* tribunal – the NMTs viewed non-retroactivity as a limit on sovereignty, not as a principle of justice. That was a moot point regarding the nexus requirement, because no defendant was ever convicted of a crime against humanity that was not

[167] Kelsen, *Legal Status*, 525.
[168] Sack, 297.
[169] Einsatzgruppen, IV TWC 498. The *Hostage* tribunal also adopted that definition in its discussion of universal jurisdiction over war crimes. Hostage, XI TWC 1241.

connected to war crimes or crimes against peace. But it calls into question the *Ministries* tribunal's decision to convict two defendants of crimes against peace for their roles in the invasions of Austria and Czechoslovakia.