Annex B

OXFORD

INTERNATIONAL CRIMINAL LAW

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INTERNATIONAL CRIMINAL LAW

A CRITICAL INTRODUCTION

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'CUSTOM' AND OTHER SOURCES OF SUBSTANTIVE INTERNATIONAL CRIMINAL LAW

SUMMARY

3.1 INTRODUCTION

One of the most important areas of controversy and confusion in the practice of the ad hoc tribunals has been their choice and use of sources, to define, among other things, elements of crimes and forms of personal criminal liability. This chapter reviews the various sources of law utilized by the tribunals and the methods employed to interpret them.[1] One should be aware that the law of evidence and procedure is much more flexible than substantive law, since there is no requirement that the former law is fixed and known at the time of the commission of the offence. Procedural innovations, of which there have been many at the tribunals, must conform with the principle of fairness, but the issues they raise are generally not entangled with those examined in this chapter.[2]

[1] For a history of the sources of the law of armed conflict up until 1949, see Green, *Contemporary Law of Armed Conflict*, pp. 20–53.

[2] See Part III of this book for a discussion of the development of the law of procedure and evidence at the tribunals.

Traditionally, the sources of international law are taken to be those listed in Article 38 of the 1945 Statute of the International Court of Justice, and in theory this is true of the sources of substantive international criminal law as well:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

How does one get from this to *criminal law* with its myriad elements; that is, to a workable criminal law which oils the gears of a busy criminal court and has the more than occasional effect of incarcerating individuals for years? Compared with state jurisdictions, where the whole of the criminal law is found in Acts of Parliament and in judicial decisions that have interpreted and applied the legislature's provisions, the ad hoc tribunals, and in particular the ICTY and ICTR, have lived the life of hunter-gatherers in a legal wilderness. They have had to track down and synthesize for themselves the law to apply to the facts.

3.2 THE UNCERTAIN INSISTENCE ON CUSTOMARY INTERNATIONAL LAW

It is the very ad-hocness of international criminal tribunals (the fact that they post-date the alleged crimes) that places them at a disadvantage in relation to sources of law. The Nuremberg Tribunal suffered from the problem of having to pass judgment as an *ex post facto* court. The same is true of the latter-day tribunals. Their 'statutes' are retrospective and are not themselves *law*; they are, rather, pointers to a law existing in some form in the rarefied sphere of international law at the time of the alleged offences.

The Nuremberg judges would have quibbled over this last claim, yet in the final analysis they too viewed the International Military Tribunal's charter negatively, as a limitation on jurisdiction, not as the law itself. For the latter they were obliged to look elsewhere. This is clear from the IMT judgment, where the court undertakes to excavate the foundations of its charter, revealing first a layer of treaties, and beneath that a layer of general legal principles.

The IMT's approach must be reviewed in some detail, since it is a model that contemporary tribunals have aspired to follow. The tribunal at Nuremberg began from

the following position:

> The jurisdiction of the Tribunal is defined in the Agreement[3] and Charter,[4] and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal.[5]

Despite this remark, the tribunal was to concede that if the charter was law, it was law derived from other sources:

> The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation.[6]

There was no reasonable alternative to this concession. The German defendants possessed a powerful argument:

> It was urged on behalf of the defendants that a fundamental principle of all law — international and domestic — is that there can be no punishment of crime without a pre-existing law. 'Nullum crimen sine lege. Nulla poena sine lege.' It was submitted that ex post facto punishment is abhorrent to the law of all civilized nations.[7]

The international tribunal agreed with this position. It was not possible, therefore, to take the charter at face value. Not only was it not statutory law, it did not even *evidence* law. The law was evidenced, rather, by treaties.

The IMT indictment listed several international treaties which Germany allegedly had violated, among them the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes, the 1919 Treaty of Versailles, and the 1928 Kellogg–Briand Pact. Numerous bilateral treaties, conventions, and pacts which Germany had entered into with other countries, providing for arbitration, reconciliation, and non-aggression, had also been cast aside by Germany, according to the indictment.[8]

What was the relationship of the 'law of the charter' to these treaties? Was it the charter's role to bring to the fore, and consolidate, treaty-law prohibitions pre-dating the alleged offences? Was it the IMT's role to punish violations of these treaties per se? Or did the charter stand for a different kind of law and the IMT for a different kind of adjudication? The Nuremberg judges wrote:

> The nations who signed the [Kellogg–Briand] pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the pact, any nation resorting to war as an instrument of national policy breaks the pact.[9]

So far, this is only about the Pact, but then:

> In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.[10]

[3] London Agreement, 8 August 1945 (1951) *UNTS* 280. [4] (1951) *UNTS* 284.
[5] 22 IMT Judgment 461. [6] Ibid. [7] Ibid., at. 461–2.
[8] 1 IMT Judgment 84–92 (Appendix C of indictment). [9] 22 IMT Judgment 463. [10] Ibid.