In The Name Of Peace: Unpacking the Contention Around ‘Crimes against Peace

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Abstract

The Tokyo Trials were a 2 year long international military tribunal following WWII that tried 28 Japanese officals and public figures for war crimes, crimes against humanity, and notably the newly invented and ambiguously defined *crimes against peace.* My research endeavoured to analyze to what extent these crimes against peace were a valid international legal statute, moreover understanding how they came to be, to better explain the discontent with them then at the time, and the way their legacy prevails to this day. New research into the emergence of crimes against peace remains necessary as they begin to be reevaluated as a product of cultural differences and bias leading to questions of how the trial might be a "victor's justice" enacted. This paper utilized an extensive analysis of primary source documentation of treaties, agreements, and diplomatic papers to evaluate the historical progression of international law as it relates to Crimes against Peace and historically situate the arguments troubling its existence. This paper found that there was largely no statutory precedence to the concept of Crimes Against Peace prior to its usage after WWII leading to dissneters to deem it an *ex post facto* law in violation of the legal maxim *nullum crimen sine lege, nulla poena sine lege.* This argument remains interesting in the way it exposes how international law is largely the result of a customary law, and the vague treaty agreements signed between nations which proves problematic when attempting to create a defined international criminal justice system. Future research should be conducted into how convention is turned into statute in the arena of international criminal law, and the question of *who's* convention is to be utilized.

I. INTRODUCTION

On July 26, 1945 during the historic Potsdam Conference of the the big three (Winston Churchill, Harry Truman, and Joseph Stalin) the governments of the United States, the Republic of China, and Great Britain issued the Proclamation Defining Terms for Japanese Surrender, known also as the Potsdam Declaration.[1] Promising the "complete destruction of the Japanese armed forces and…the utter devastation of the Japanese homeland" if resistance continued, the declaration layed out the terms for Japanese surrender, including the allied occupation of Japanese territory until the dismantlement of Japan's war-making power, and the elimination of the "authority and influence" of those that brought Japan down the path of conquest with "stern justice" for all war criminals.[2] It concludes by demanding the unconditional surrender of Japanese military forces. The Japanese initially rejected the declaration on July 28th.[3] However, following the U.S dropping of atomic bombs on Aug. 6th and 9th, and the Soviet entry into the war on Aug. 8th, the Japanese, through Swiss channels, replied that they would accept the terms pending assurance that the Emperor would retain his seat. The Americans acquiesced, and on Aug. 14th the Japanese officially accepted the Potsdam Declaration.[4]

A key facet of the Potsdam Declaration was the promise of justice to be brought against Japanese war criminals. Following the Moscow Conference in December of 1945, which agreed that the Supreme commander for the Allied Powers would issue all orders for the implementation

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[1] The Soviet Union did not initially sign on because they were not yet at war with the Japanese given an existing 1941 neutrality pact

[2] (1945). *Axis in Defeat: A Collection of Documents on American Policy toward Germany and Japan*. Washington, Dept. of State. pp.27

[3] Foreign Relations of the United States: Diplomatic Papers, THe Conference of Berlin (The Potsdam Conference), 1945, Volume II. Document 1258

[4] (1945). *Axis in Defeat: A Collection of Documents on American Policy toward Germany and Japan*. Washington, Dept. of State. pp.31

of the Japanese terms of surrender, Douglas Macarthur established the International Military Tribunal for the Far East on the 19th of January, 1946.[5] In its Charter, it outlines the provisions for the numbers of judges and the rights of defendants to representation and due process. In Article 5 of the Charter, in great similarity to the Nuremberg Tribunal, it details three offenses with which defendants can be charged: Crimes against Peace, Conventional War Crimes, and Crimes Against Humanity.

In the indictment, read in court over a period of two days, 55 counts spanning three types of offenses were enumerated against the 28 defendants. The prosecution lodged 36 counts of crimes against peace, 5 of which for participation in the formulation of a common plan or conspiracy, 11 for planning and preparing a war of aggression, 9 for initiating a war of aggression, and 9 for waging a war of aggression. An additional 15 counts of the murder of both civilian and military peoples were listed, along with three counts of Conventional War Crimes and Crimes Against Humanity. At its earliest stretching back to 1928 the charges of which top officials were indicted of, put on trial the actions they took against nations, localities and their peoples. However, beginning before the tribunal and subsequently drawn out through various later debates in the U.N and in scholarly literature, there has emerged great contention over the jurisdiction of the tribunal in direct relation to the invocation of crimes against peace.

On May 13th. 1946 Dr Kiyose, a lead defense attorney at the Tokyo Tribunal, filed a motion challenging the jurisdiction of the court citing a lack of authority to prosecute crimes against peace. Dr Kiyose recalls the Potsdam Declaration noting that while it promised "stern justice" against war criminals, the Japanese government accepted it "on the understanding that the punishment of war criminals will take place in accordance with the commonly accepted

[5] International Military Tribunal for the Far East. The Tokyo War Crimes Trial. Edited by R. John. Pritchard, Sonia M. Zaide, and Donald Cameron. Watt. New York: Garland Pub., 1981. Vol.1

understanding of that term throughout the world". [6] He further argued that "we in Japan have at no time ever imagined that the interpretation of the war criminals mentioned in that Declaration should extend to 'Crimes against Peace'".[7] Indeed, at that time crimes against peace, and the derivative, wars of aggression, had never been succinctly and explicitly codified into anything resembling international law, least of all anything that specified individual responsibility. This remained true even in spite of the topic's preeminence in global peace discussions of the 1920s and 30s. However perhaps even more indicative of the disputation of crimes against peace was the lack of any precise definition preceding and even following the Tokyo Tribunal. Defining aggression would prove to be an endlessly difficult task. As Special Rapporteur Ricardo J. Alfaro of the International Law Commision wrote in 1951 "the efforts to achieve [a definition of crimes against peace] have concentrated on the idea of an enumeration of the different acts constituting aggression". As "all persons familiar with drafting legislative or contractual texts know very well…enumerations of prohibited or punishable acts are always likely to be incomplete, and hence to leave loopholes through which transgressors may find escape".[8] As such definitions of aggression remained purposefully vague and the law, if any, remained unclear. . A proper inquiry into how they came to be is required to better understand how the manner of their creation still influences international law today.

II. METHODOLOGY

This paper primarily functions as an in-depth historical analysis of the progression of international treaties and laws in an attempt to trace the evolution in global thought regarding the concept of aggression. As such the majority of the sources utilized will be drawn from primary

[6] Ibid, pg. 125
[7] Ibid, pg. 128
[8] J. Alfaro, Ricardo. "'Question of Defining Aggression' (A/CN.4/L.8)." International Law Commission , 1951. https://legal.un.org/ilc/documentation/english/a_cn4_l8.pdf.

source material that are namely American or British governmental records of treaties signed, or agreements made. Many of these sources contain notes of discussions or draft copies during preliminary meetings between countries that have proved useful in ascertaining the values and priorities of various different parties. This paper also used with great appreciation the complete trial proceedings of the Tokyo Tribunal which for the first time ever was compiled and edited by John R. Pritchard, Ziade M. Sonia, and Cameron Donald. This collection was innumerably helpful in understanding the Tokyo Tribunal, and the manners in which it invocated Crimes against Peace . It is important to acknowledge that while we are attempting to portray advancements in *international* law, this paper relies on western understandings of law and predominantly western sources for the treaties and agreements referenced with some limited Japanese perspectives included as well. Indeed this is reflective of one of the main points of this paper which challenges the concept of crimes against peace as a wholly 'international' criminal category. Furthermore it is important to recognize the limitations of any historical analysis insofar that anytime you choose to include one fact you are implicitly choosing not to include another. However the sources utilized have been chosen mindfully to illustrate a wide spanning picture of the historical continuity and change over time.

III. A BRIEF HISTORY OF THE CONCEPT OF AGGRESSION

The first modern instance of a war crimes trial resembling that of Nuremberg or Tokyo can be traced to the end of WWI and the Treaty of Versailles. Among the questions of debate in the initial Paris Peace Conference sessions was whether or not Kaiser Wilhelm II should stand trial for the war, and more broadly if the Germans had transgressed international law. Subsequently if so, how might a tribunal be constructed to try those offenses. On January 25th,

1919 these questions were delegated to the “Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties" consisting of 15 judges from: the United States, Britain, France, Italy, Japan, Belgium, Greece, Poland, Romania, and Serbia. In the majority report they enumerated a plethora of violations of “the laws and customs of war” and, seminally, declared that “there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of Heads of States”.[9] For the first time individual responsibility for a crime of war was articulated. In dissenting reports however the United States disputed charging individuals with these crimes in so far “as it subjects to criminal, and, therefore, to legal prosecution, persons accused of offenses against ' the laws of humanity’...to a degree of responsibility hitherto unknown to municipal or international law, [and] for which no precedents are to be found”.[10] In essence the prospect of these tribunals was a practice of retroactive justice, *ex post facto,* which is inherently counter to provisions in the U.S Constitution. The irony of this is that following WWII it would be them, along with other allies, accused of creating retroactive justice. Another dissenting opinion was raised by The Japanese in unknowing anticipation of the issues of the Tokyo Tribunal two decades later. They expressed concern over indicting highly ranked officials by a tribunal made up of the belligerent nations given the potentiality for a biased victor's justice.[11]

Following from this report the ratified Versaille Treaty included *Part VII: Penalties* which outlined the creation of military tribunals for, “Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers” (Article 229) as well as a special military

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[9] Paris Peace Conference. *Violation of the Laws and Customs of War: Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919.* (Oxford: For the Endowment, at the Clarendon Press, 1919.) pg. 19
[10] Ibid, pg. 63
[11] Ibid, pg. 80

tribunal for the Kaiser, "for a supreme offense against international morality and the sanctity of treaties" (Article 227).[12] Of most pertinence to the concept of aggression however however is Article 231 which states:

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

As Kirsten Sellars wrote in her book *Crimes against Peace' and International Law* "The use of the word 'aggression' introduced a new perspective on warfare. It signaled that a nation was not being punished for losing a war, as had traditionally been the case, but for starting one".[13] Ultimately however nothing ever came of the proposed military tribunals. The Netherlands refused to give up the Kaiser and he nor any others were ever placed on trial. However, the concept of aggression was left to be further explored in the establishment of the League of Nations and ensuing treaties of the 1920s.

Article 10 of the Covenant of The League of Nations mentions aggression numerous times, and is characterized within the context of preserving the status quo of international affairs and existing world borders. It declared that member nations "undertake to respect and preserve as against external aggression, the territorial integrity and existing political independence of all Members of the League".[14] This understanding of aggression would be later expanded upon in proposed definitions notably by Maxim Litvinov in 1933. In ensuing Articles 12-16 a process for dealing with disputes between Members of the League is laid out either through arbitration,

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[12] Treaty of Peace between the Allied and Associated Powers and Germany, and Other Treaty Engagements, Signed at Versailles, June 28th, 1919. London, H.M. Stationery Off. pg. 97-98

[13] Sellars, Kirsten. *"Crimes against Peace" and International Law.* Cambridge: Cambridge University Press, 2013. https://doi.org/10.1017/CBO9781139236980. pg.8

[14] League of Nations. *The Covenant of the League of Nations.* New York: League of Nations Non-Partisan Association, 1923.

judicial settlement (through a Permanent Court of International Justice established in Article 14), or via a settlement through The Council. Nevertheless the concept of aggression in Article 10, was notably far from the criminalization of it that was seen at the Nuremberg and Tokyo Tribunals following WWII. Ensuing treaties through the League of Nations, however, would attempt to make that leap. In 1923, in an effort to make pushes for disarmament more palatable, the draft Treaty For Mutual Guarantee (known also as the draft Treaty for Mutual Assistance) was introduced and in its first article declared that "aggressive war is an international crime". It did not define a war of aggression but rather based it on whether or not the war was condoned through the procedures of the League of Nations (unanimous recommendation of the Council, verdict of the Permanent Court of International Justice, or arbitration).[15] If an action by one state against another was considered aggression, then within four days the League Council would decide what form of assistance direct treaty signatories would need to take. This treaty however failed to be ratified in part because of British skepticism that it would unnecessarily entangle them due to the ambiguity of what defines "a war of aggression". In 1924 a new treaty envisioned by French Prime Minister Édouard Herriot called the Protocol for the Pacific Settlement of International Disputes or the "Geneva Protocol" emerged. It too tried to promote disarmament through assurances of security, and in its preamble stated that "A war of aggression constitutes a violation of this solidarity and is an international crime."[16] In total 19 nations signed the protocol, though again it failed to ratify and did not enter force.

In 1928, separate from the League, emerged the Treaty for the Renunciation of War known also as the Kellogg-Briand Pact. It began when French Foreign Minister Aristide Briand, understanding their wary place in geopolitics, and wanting assurances of U.S goodwill,

[15]"The Draft Treaty of Mutual Assistance." *Journal of the British Institute of International Affairs* 3, no. 2 (1924): 45–82. https://doi.org/10.2307/3014661.
[16] League of Nations. Assembly (5th : 1924). *Protocol for the Pacific Settlement of International Disputes*. Pamphlet (Foreign Policy Association) ; No. 30. New York : Foreign Policy Association, , 1925.

suggested a pact with the United States repudiating war between their two countries and honoring their friendship. U.S Secretary of State Frank Kellog responded with the caveat that in the effort to " make a more signal contribution to world peace" create rather a multilateral treaty "open to signature by all Nations."[17] Not coincidentally this would prevent a solely bilateral treaty ensuring that it was not interpreted as an alliance between the two countries that might entangle the U.S should France ever come under attack. The French agreed and after a series of notes shared between the two governments, the following treaty was established.

> Article I. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.
>
> Article II. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.[18]

An initial 15 nations signed it with the number of signatories eventually growing to 47: included among those were both the governments of Germany and Japan. In most respects however despite "condemn[ing] recourse to war" the pact lacked metaphorical teeth. Unlike as would later be opined in Nuremberg or Tokyo, the pact made no declaration that war was illegal and further, the wording "all disputes…shall never be sought except by pacific means" left a level of leniency, alluding to the fact that war might still be an option so long as peaceful means were first tried. Additionally it did not bind its members to if the terms were broken as prior treaties had. As such when the Japanese invaded Manchuria in 1931, in clear violation of the pact no actions were taken against them from either the League of Nations or the United States. Similar

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[17] *Treaty for the Renunciation of War; Text of the Treaty, Notes Exchanged, Instruments of Ratification and of Adherence and Other Papers*. Washington, U.S. Govt. Printing Off. pg. 11-12

[18] Ibid, pg. 4

unacted upon violations would be later committed by Germany, Austria and Italy, in the leadup to WWII.

The final development prior to WWII in our understanding of aggression came in 1933 during the Conference for the Reduction and Limitation of Armaments, before the Committee on Security Questions. There Maxim Litvinov, the Soviet Foreign Minister, developed a formative definition of aggression that was the subject of Committee Chairman Nicolas Politis's report.

> The aggressor in an international conflict shall be considered that State which is the first to take any of the following actions:
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> a) Declaration of war against another State;
>
> b) The invasion by its armed forces of the territory of another State without declaration of war;
>
> c) Bombarding the territory of another State by its land, naval or air forces or knowingly attacking the naval or air forces of another State;
>
> d) The landing in, or introduction within the frontiers of, another State of land, naval or air forces without the permission of the Government of such a State, or the infringement of the conditions of such permission, particularly as regards the duration of sojourn or extension of area;
>
> e) The establishment of a naval blockade of the coast or ports of another State.[19]

This was the first enumerative definition of aggression to come out of the numerous treaties and resolutions following WWI, and it gave much needed clarity to a concept that had previously been left deliberately vague. However, save for an agreement signed by the Soviet Union, Afghanistan, Estonia, Latvia, Persia, Poland, Romania, and Turkey, it wasn't adopted on a wide

[19] Conference for the Reduction and Limitation of Armaments (Series B, vol. 2); Minutes of the General Commission, 6 February 1933 ('Definition of "aggressor": draft definition', Conf.D./C.G.38.), 237–238.

scale. Nevertheless The Litvinov Definition would prove highly influential in laying the groundwork for future definitions. The American Attorney General, Robert Jackson, suggested a similar definition for aggression following WWII at the London Conference of 1945, and in 1974 UN General Assembly Resolution 3314 passed defining aggression along similar terms and which was in turn used at Kampala in 2010 to form what is now the final definition of aggression.

IV. CONSTRUCTING A CRIME

The specific term "Crime Against Peace" only began to be employed in official capacity near the end of WWII, when the establishment of the International Military Tribunal in Nuremberg was outlined at the London Conference of 1945. In the Charter for the International Military Tribunal, signed August 8th, Article 6 lists Crimes against Peace as one of three categories of crime within the jurisdiction of the Tribunal and is defined as:

> namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing [20]

It is this definition that would come to be exactly replicated in the Charter for the International Military Tribunal For the Far East signed one year later. Nevertheless (noting that this statement may yield some scholarly debate) the category of Crimes against Peace was not codified into an international penal law via Article 6. The Charter for the International Military Tribunal had been drafted after a conference only 4 countries (U.S, Soviet Union, U.K, and France) were privy to,

[20] United Nations. *Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics: for the Prosecution and Punishment of Major War Criminals of the European Axis, and Charter of the International Military Tribunal: London, 8th of August, 1945.*. London, H.M. Stationery off, 1946.

its purview was specific to Germany, and the tribunal was authorized to establish categories of crimes only insofar as they were the powers to whom Germany unconditionally surrendered. It is thus dubious if it reflected any sort of a solidly defined and globally accepted international law.This would change.

On Nov. 15th 1946, at the initiative of the American judge at the Nuremberg Tribunal, Francis Biddle, the American delegation to the United Nations submitted a proposal to "reaffirm the principles of international law" established in the Nuremberg Tribunal, and draw up principles of law emerging from there.[21] Following, On Dec. 11 1946 at its 55th plenary meeting, the General Assembly adopted resolution 95 which affirmed the concepts of international law recognized by the Charter of the Nuremberg Tribunal and set out for the Committee on the Codification of International Law to formulate legal ideas derived from the IMT Charter.[22] This resolution was noteworthy in that it affirmed, accepting, the categories of crimes established within the IMT Charter. As a result the International Law Commission's mandate to "formulate principles" was not intended to determine whether or not the IMT Charter reflected international law but merely enumerate its ideas . As a result, much of the ambiguity present in the IMT Charter (notably the lack of a definition for crimes against peace) remained, since adding a definition did not fit their directive.[23] The report was submitted to the General Assembly in 1950 and sent to member states for comment. The formalization of the Nuremberg Principles was important in contributing to their preeminence in international customary law; however still a penal law had not been created. In the end it would be almost a half century later when the 1998 Rome Statute of the International Criminal Court included the crime of aggression in

[21] (A/C.6/69, November 1946).
[22] "Resolutions Adopted on the Reports of the Sixth Committee," Resolutions and Decisions Adopted by the General Assembly 1, no. First Session - Second Part (1946): 175-195
[23] United Nations. *Yearbook of the International Law Commission 1950, Vol. II*. Yearbook of the International Law Commission. UN, 1950. https://doi.org/10.18356/cc800c08-en. pg. 194

Article 5.1 with the corresponding penalties of it established in Article 77. [24] Even then it would remain until the 2010 Kampala Conference for a specific definition of what comprises an "act of aggression", based on a non-binding proposal from 1974, to be agreed on.[25] The final definition is listed in Article 8 *bis* of the amended Rome Statute of the International Criminal Court:

> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
>
> (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
>
> (c) The blockade of the ports or coasts of a State by the armed forces of another State;
>
> (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
>
> (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
>
> (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

[24] Rome Statute of the International Criminal Court. The Hague, The Netherlands: International Criminal Court, 2021.
[25] Resolution 3314 (XXIX). Definition of Aggression. 1974

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein. [26]

V. DISCUSSION ON THE DISPUTE OVER CRIMES AGAINST PEACE

The primary objections to the utilization of "Crimes against Peace" in the war crimes trials following WWII, were made first by the Germans at Nuremberg. For all intent and purposes the protestations lodged by the Japanese, were merely mirrored reiterations of the plea of the Germans. The primary argument that the defendants at Nurmeberg expressed was that article 6 of the IMT Charter, (which lays out the category of crimes against peace), constituted an ex post facto law, violating the principle *nullum crimen sine lege, nulla poena sine lege.*[27] The court's response would lend insight into their interpretation of the constitutive properties of international law.

Firstly, the court reaffirmed that the law of the Charter was the exercise of the sovereign legislative power" by the countries Germany unconditionally surrendered to.[28] This unconditional surrender would grant the Allied powers great authority to enact their Tribunal with Germany, though as mentioned above would become contested in the case of Japan. The crux of the court's response however was that Germany had violated numerous treaties, which even if they did not explicitly criminalize wars of aggression , were representative of a body of international law that made wars of aggression a crime. Among other treaties, the judgment

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[26] Article 8 *bis* was inserted by resolution RC/Res.6 of 11 June 2010. See depositary notification C.N.651.2010.TREATIES-8 of 29 November 2010.
[27] *trans.* "No crime, no punishment without law"
[28] International Military Tribunal. Nazi Conspiracy and Aggression, Opinion and Judgment. Washington, U.S. Govt. Print. Off. pg. 48

names the Kellogg-Briand Pact, and argues that its disavowal of war as an instrument of national policy "necessarily involves the proposition that such a war is legal".[29] However, it was the point of view of the defendants that given the maxim *nullum crimen sine lege, nulla poena sine lege,* since the pact did not articulate a specific punishment for breaking its terms, their actions could not be tried as a crime. Nevertheless the court held that "The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice."[30] In this view they encapsulated one side of a core dilemma of international law: whether or not its basis is convention or penal standards – the difference between customary or statutory law. For the Nuremberg Tribunal the answer was in the favor of convention, and so too in Tokyo, as would be proven but a year later. Nonetheless, looking back from the perch of history it is clear these trials were a tipping point toward the later establishment of statutes of international criminal law, leaving the question: how was convention transformed into statute and perhaps more pointedly, *who's* conventions were transformed.

[29] Ibid, pg. 50
[30] Ibid, pg. 51