United Nations | *Nations Unies*

ECONOMIC AND SOCIAL COUNCIL | **CONSEIL ECONOMIQUE ET SOCIAL**

RESTRICTED

E/CN.4/W.19
15 May 1948

ORIGINAL: ENGLISH

INFORMATION CONCERNING HUMAN RIGHTS ARISING FROM TRIALS OF WAR CRIMINALS

REPORT

Prepared by the

UNITED NATIONS WAR CRIMES COMMISSION

In Accordance with the Request Received from the United Nations

/PREFACE

PREFACE

The Economic and Social Council of the United Nations adopted on 21 July 1946, a Resolution proposed by the Commission on Human Rights. In paragraph 4 of this Resolution, under the heading "Documentation", the Secretary-General of the United Nations was requested to make arrangements for "the collection and publication of information concerning human rights arising from trials of war criminals, quislings and traitors, and in particular from the Nürnberg and Tokyo Trials".

In a letter from the Director of the Division of Human Rights, United Nations, dated 15 May 1947, the Chairman of the United Nations War Crimes Commission was informed:

(a) That in the opinion of the Secretariat of the United Nations, the United Nations War Crimes Commission was in a better position than the United Nations Secretariat to undertake the work connected with the collection and publication of information concerning human rights arising from trials of war criminals, quislings and traitors;

(b) That the Secretariat of the United Nations would, therefore, be pleased if the United Nations War Crimes Commission could undertake the work for which the Secretary-General of the United Nations had been requested to make arrangements.

At its meeting held on 21 May 1947, the United Nations War Crimes Commission decided to accept responsibility for the work as requested as far as information arising from trials of war criminals was concerned. It reserved its view as to whether the collection of information arising from trials of quislings and traitors would also be practicable.

The whole question was then referred by the United Nations War Crimes Commission to its Legal Committee of which Sir Robert Craigie is Chairman, which thereafter made the necessary recommendations to the Commission and organized and supervised the execution of this work until its completion.

In response to a letter from the Director of the Human Rights Division, dated 29 May 1947, the United Nations War Crimes Commission furnished to the United Nations Secretariat on 27 August 1947, a Progress Report giving an account of the preparatory work to be undertaken and a tentative outline of the final Report on the subject. It also submitted a number of preparatory papers.

When undertaking to prepare this Report, the United Nations War Crimes Commission was fully aware of the wide scope of the undertaking; from the outset it was realized that to present a full and complete

Report many months of intensive research would be necessary for the classification of sources and the selection of information to be utilized.

The time made available for the completion of this work has proved to be running counter to these requirements. In his letter of 15 May 1947, referred to above, the Director of the Human Rights Division expressed the wish to have a substantial part of the Report by 25 August 1947, when it was originally intended to hold the Second Session of the Human Rights Commission. This meeting was postponed, and therefore in consequence of the postponement the Director of the Human Rights Division, in his letter dated 10 November 1947, requested that the final Report should be submitted not later than 1 December 1947.

These letters embodied a definite proposal and its acceptance by this Commission, subject to the limitation as to quislings and traitors, reference to which is made later. It may perhaps not be superfluous to interpose here a few words of explanation.

The information which this Commission was to collect and publish was to be that concerning human rights and was to be derived from the trials of war criminals. The abstract concept of war crimes has been recognized for some centuries but has come into prominence and practical importance mainly during and since the last great War, that of 1939 to 1945. War has been described as organized murder and desolation. But there was a question of great moment because of the rival contentions advanced on the two sides. One side, that of the Axis, asserted the absolute responsibility of belligerents, who, it was asserted, were under no obligation to respect human rights, but were entitled to trample them underfoot wherever the military forces found them inconvenient for the waging of war. This is the totalitarian war as envisaged by the Axis powers. This doctrine was repudiated as contrary not only to morality but to recognized international law which prescribed metes and bounds for the violation even in war of human rights. This latter doctrine involved also the further principle that there was individual responsibility for violations of human rights in war time, beyond the limits permitted by the law of war. The idea of individual responsibility, if it was to be conceived in terms of law, involved a legal system and procedure, in order to decide the question of individual criminality. The Allies had announced that war crimes were to be punished and at the close of the war organized a system of trials of alleged war criminals. Many hundreds of such trials have been held and judgments delivered. This is in substance a new form of information for the determination of the existence and nature of war crimes. It flowed directly from the ideas of individual penal

responsibility and of an international law of war crimes. That law had been almost entirely to be found in the great international treaties or conventions, such as the Hague and Geneva Conventions and the Pact of Paris. But the generality of the terms of these international enactments required definition and precision which could not be obtained by judicial decisions in trials as they arose. It is true that no particular decision is of coercive authority, but the accumulation of decisions goes to contribute a jurisprudence, even before their full scope and variety can be used to build up an international code. It was to collect and analyze and explain these decisions and elicit their full force and meaning that the United Nations put upon this Commission the task embodied in the letters just set out.

It follows that if the material information is incomplete, the work which this Commission has accomplished in the matter must be correspondingly incomplete. As will now appear, a great part of the information is indeed at present unavailable, and hence the Report itself is of necessity of a preliminary and exploratory character.

In the first place the stage reached in the conduct of war crime trials renders any final analysis impossible for the present. Many important trials have not been completed and some have not even begun. Amongst those still in progress is the trial of the Japanese major war criminals before the International Military Tribunal at Tokyo. There are also in progress some ten very important trials held by United States Military Tribunals at Nürnberg; these are known as "Second Nürnberg Trials", or "subsequent proceedings", to indicate that they are a sequence to the trial of German major war criminals, completed by the International Military Tribunal at Nürnberg in October 1946. They concern high-ranking Nazi Party members, officials and other adherents of the Nazi regime, besides those tried by the International Military Tribunal. Up to date, only three of them have been completed, namely the trial of twenty-three doctors and scientists who carried out criminal experiments on victims of many nationalities (Case No. 1); the trial of ex-Air Marshal Milch for criminal medical experiments and for enslavement, torture and other atrocities (Case No. 2); and the trial of officials of the ex-Ministry of Justice, who were prosecuted for committing crimes through legislative enactments (Case No. 3). The following trials are still in progress: the trial of the leading officials in charge of concentration camps (Case No. 4); the trial of officials in charge of foreign workers brought to Germany for slave labour (Case No. 5); the trial of industrialists who directed the world-wide operations of the great chemical organization, "I. G. Farben-industrie", prosecuted for crimes against peace, war crimes and

crimes against humanity (Case No. 6); the trial of officers responsible for the systematic killing of hostages (Case No. 7); the trial of officers guilty of carrying out mass murders through special units called "Einsatzgruppen" (Case No. 9); the trial of industrialists from the armament firm "Krupp", which is similar in scope to that of the "I. G. Farbenindustrie" (Case No. 10); and the trial of officials from the ex-Ministry for Foreign Affairs (Case No. 11).

Other courts are also still engaged in the process of conducting trials, many of which may prove to be of the utmost importance for questions connected with human rights. Such is, in particular, the case with Allied Military Courts in Germany and with German national courts operating under Allied supervision, whose competence it is to hear cases concerning, inter alia, crimes against humanity, including those committed against German citizens and stateless persons. Many very important trials are being held in certain Allied countries, e.g., Denmark, France, Norway, Poland. In the Far East hundreds of important trials have been and are being conducted. Finally, the courts of certain countries, such as those of the Netherlands and of Belgium, are only on the point of commencing their war crimes trials which should bring to light information of great value.

The United Nations War Crimes Commission was, thus, limited as to its sources of information which, although concerning a wide field, were far from representing a complete survey of all the trials which should be included in a comprehensive Report.

The Report submitted is also incomplete in another respect. It has not been possible in the time appointed to make a thorough study even of such transcripts of completed trials as are available to the Commission. Over a thousand individual trials have been taken into consideration and have been studied as far as this was possible in the period of less than five months; the material which would properly require to be examined included tens of thousands of pages of transcript relating to important trials, such as the Nürnberg Trial. The time factor has thus made it imperative to proceed with the work by deliberatly discarding for the time being a series of subjects, or sources of information, and by concentrating on the more important and illustrative topics.

The information furnished in the Report is divided into two main parts. The first deals with the question of human rights as they were violated or protected under the rules of warfare, i.e., under the laws and customs of war. In this part humar rights are considered as arising from the relationship between subjects of belligerent Powers, that is to say between members of the armed forces, prisoners of war and civilians,

/including

including the inhabitants of occupied territories, of two countries which are in a state of war. In the second part human rights are considered in reference to the relationship between the State and persons under its own jurisdiction. In this part the question is envisaged beyond the strict period of a time of war; the report deals with violations of human rights committed before the war in connection with the planning and preparation of a war of aggression and, on the other hand, with the more general problem of violations committed in time of peace, irrespective of the preparation or the launching of a war of aggression. Of the various problems arising from a study of this subject, one has been treated more extensively, namely, how far the jurisdiction of the International Military Tribunal at Nürnberg and of the municipal courts established in Germany covers encroachments by the legislature or executive of Nazi Germany upon the fundamental rights and freedoms of its citizens.

The information furnished in the first part is grouped into three main chapters, arranged according to the sources of information. One deals with information concerning selected subjects arising from the Nürnberg Trial, excluding offences against Germans and stateless persons which have been considered in the second part of the Report. The second chapter deals with information arising from the Tokyo Trial; and the third with information arising from other trials. Reasons for the inclusion of the Tokyo Trial, although it is not completed, are given in the appropriate places of the Report. In every chapter the information has been gathered according to the subject matter covered and in this respect there is a similarity of presentation in the main sections of each chapter. There is, however, a difference to be noted in respect of Chapter III. In this chapter, which, as stated, deals with trials other than those conducted by the International Military Tribunals at Nürnberg and Tokyo, an attempt has been made to cover a wider field than in those dealing with the Nürnberg and Tokyo trials, and to make as full a use as possible of the verbatim records of the trials concerned. Because of the fact that more than a thousand trials have been involved, however, here too a thorough analysis of all subjects covered has not proved possible.

The information furnished in the second part of the Report is arranged in its entirety according to subject matter, and not according to sources. This was necessary because, for every subject under review in the main chapter (Chapter I), there are several sources of information to be considered simultaneously.

Both parts are preceded by a Historical Survey of the problem of violations of human rights as it arises within the sphere of international

law dealing with war crimes. Time has not permitted the elaboration of all the stages of this historical aspect, so that the section dealing with the period 1939-1945 has been compressed and limited to an essential outline only.

The request received from the United Nations Secretariat included, in accordance with the above-mentioned Resolution of the Economic and Social Council, the collection of information arising from the trials of quislings and traitors. When considering the possibility of performing this task, the United Nations War Crimes Commission came to the conclusion that, in addition to the time factor, it would not be feasible, for the following reasons. Firstly, it was not within the terms of reference of the Commission to deal with acts of treason and consequently with trials of traitors and quislings. The Commission was competent to deal with such cases only inasmuch as a traitor or quisling had, at the same time and incidental to his treasonable activities committed war crimes or crimes against humanity. An examination of the files of the Commission indicates that such cases are comparatively few. The second reason follows from the first. The Commission did not possess the sources of information concerning trials of quislings and traitors and was therefore unable, in the time available, to present information regarding them.

Nevertheless, the Commission fully realize the importance of such information for the purposes which the United Nations have in view and appreciate that a Report based solely on war crime trials would not give a comprehensive picture. It was thought that trials of Germans accused of offences against Germans and stateless persons would furnish information similar to that which can be found in trials of quislings and traitors charged with offences against their fellow-citizens. The transcripts of the former are more readily accessible to the Commission than those of the latter. The second part of the Report deals, therefore, mainly with trials of Germans accused of offences against their co-nationals and is based, first, on the information arising from the relevant parts of the Nürnberg trial, and secondly on the information which can be found in trials conducted by the municipal courts in Germany. To indicate the value of a comparative study of trials of quislings held in Allied countries, a brief account of one such trial has been given - that of Pierre Laval.

The information embodied in this Report has been collected with the full realization that it was not an end in itself but rather designed to serve the specific purpose of contributing to the task of the Commission on Human Rights, in preparing an international bill of rights, or international declarations or conventions on civil liberties.

/In view of

In view of this, the following documents submitted to the Drafting Committee of the Commission on Human Rights were taken into consideration as a guide for the preparation of the Report:

(a) The draft Declaration concerning Fundamental Human Rights submitted by the Panamanian delegation to the San Francisco Conference;

(b) The United Kingdom draft of an International Bill of Human Rights;

(c) The Draft Outline of an International Bill of Rights prepared by the Secretariat of the United Nations.

It must, however, be observed that it was neither possible nor necessary for this Report to deal with all the rights enumerated in these documents. Nor was it possible, in view of the preliminary nature of the Report, to establish a detailed catalogue of all the human rights involved in the crimes under review and to draw definitive and express conclusions on this subject. The rights involved have been referred to in a more general way, and only such conclusions reached as appeared possible and advisable at the present stage of the inquiry.

In connection with the preceding observation there are one or two general conclusions which can be made on the Report as a whole and to which particular attention should be drawn. In the first place it would appear that a resumption of the research initiated by the United Nations War Crimes Commission would ultimately result in the collection and publication of a comprehensive body of information on a subject hitherto virtually untouched. The second conclusion is that the information collected would serve more than one purpose of importance. It would, in the first place, contribute to a further improvement in the legal protection of human rights by international agreement. It should, in addition, be invaluable to the purpose of developing and codifying international law, either within the more narrow sphere of the laws and customs of war, or within the wider field of an international law progressing on lines which would tend to eliminate gradually the traditional division between war and peace, and thus establish a universal system outlawing war in all its manifestations. Finally, the information thus collected should serve the more particular purposes of historians, sociologists, economists, scientists, psychologists, and other specialists.

Only after such full investigation would it be possible to present a complete survey with all the details required to deal simultaneously with each particular sphere of inquiry. Such a document would, in particular, provide a definite answer to questions which it has not been

possible to solve in their entirety in this Report, namely:

(a) Were there cases where the existing provisions of International Law did not furnish sufficient basis for imposing a just penalty for activities violating human rights?

(b) Were there cases showing that more elaborate provisions of international law could have prevented violations of human rights?

(c) Do war crime trials held so far warrant the conclusion that international law as applied by the courts is being sufficiently developed by this method as to extent the protection of minimum standards of human rights to human beings everywhere and not only to those of specific groups, such as, for instance, "allied" nationals and "allied" interests during the late war?

These and many more questions should, it is suggested, be answered if the collection of information arising from war crime trials is to be fully utilized by the United Nations. They can be fully answered only if the present work is elaborated in the future so as to embrace the trials still in progress and to complete the research as undertaken of those trials reviewed in this Report.

The United Nations War Crimes Commission ventures, in conclusion, to observe that a great opportunity of illuminating a most vital problem of world affairs would be lost if the central topic of this Report were not made the subject of more detailed, complete and elaborate exploration in the future.

The Report has been prepared by members of the Legal Staff of the Commission, whose names appear in the table of contents under the appropriate headings.

/TABLE OF CONTENTS

TABLE OF CONTENTS

/II. Jurisdiction over

/Conclusion as to

HISTORICAL SURVEY
OF THE PROBLEM OF VIOLATIONS OF HUMAN RIGHTS

(War Crimes and Crimes against Humanity)

The specific rules of Article 6 and Article 5 of the Charters of the International Military Tribunals at Nürnberg and Tokyo respectively, and Article II of the Control Council (for Germany) Law No. 10*, on the basis of which these Tribunals and other Courts had to determine the guilt or innocence of the war criminals, i.e. their responsibility for violations of the fundamental rights of nations as well as for violations of fundamental human rights of peoples and of individual persons, comprise three types of crimes: (a) crimes against peace, (b) war crimes, and (c) crimes against humanity.

It is the rules relating to the latter two categories of crimes which are of particular interest to, and have a bearing on, the question of the protection of human rights. By their very nature these rules either constitute evidence of an already existing system or contain the nucleus of a system of provisions which, if properly developed, would lead to the better protection of fundamental human rights and minimum human standards in time of war and in peace, including the protection of populations against the abuse of sovereignty by their own authorities. Such protection would be afforded irrespective of whether or not the abuse of sovereignty and inhumane acts are committed in violation of the domestic law of the country where they were perpetrated. It is especially this definition of the general character of the concept of crimes against humanity, irrespective of time and place and national sovereignty, which makes these rules so relevant for the promotion and encouragement of respect for human rights and for fundamental freedoms without distinction as to race, sex, language or religion

---

* See:

1. The Agreement of 8th August, 1945, for the Prosecution and Punishment of the Major War Criminals of the European Axis, together with the Charter.
2. The Charter of the International Military Tribunal for the Far East, of 1946.
3. The Control Council Law No. 10 (Punishment of Persons Guilty of War Crimes, Crimes against Peace and Crimes against Humanity), 1946.

/As will

As will be shown later in greater detail, the terms "war crimes" and "crimes against humanity" as defined in these documents, and the concepts which they represent are overlapping, juxtaposed and inter-related in the sense that while all acts enumerated under the heading "war crimes" are also and simultaneously crimes against humanity, the converse is not equally true; there are many acts coming under the notion of crimes against humanity which are also and simultaneously war crimes, particularly when such acts are committed on enemy occupied territory or against allied nationals; but there are also acts qualified as crimes against humanity which cannot be brought within the category of violations of the laws and customs of war, i.e. those crimes against humanity which were committed either at a time when there was no state of war, or against citizens of neutral states, or against enemy nationals, or on enemy territory.

It may, however, be said that every, or nearly every act, coming under the terms "war crimes" and "crimes against humanity" violates the corresponding human right. It may be added that crimes against peace, namely, planning, preparation, initiation and waging of a war of aggression, which were declared by the Nürnberg Tribunal as the supreme international crime, constitute also, in a general non-technical sense, a crime against humanity, as, in certain circumstances, they involve violations of human rights.

The terms, "crimes against peace", "war crimes", and "crimes against humanity", used in the document mentioned above as technical terms, do not represent conceptions and ideas entirely novel and without precedent. All of them have some history behind them and, insofar as the question of the protection of human rights is concerned, they are an expression of the common "desire to serve the interest of humanity and the ever progressive needs of civilization". This quotation taken from paragraph 2 of the Preamble of the Fourth Hague Convention of 1907 concerning the Laws and Customs of War on Land, brings us to the essential part of this Survey, the purpose of which is to outline the historical events preceding the Charters, as well as the more important stages of the development of the relevant notions strictly connected with the protection of human rights.

/I. THE HAGUE

I. THE HAGUE CONVENTIONS OF 1907

In the centuries-long chain of developments and progress which tended to modify gradually the unsparing cruelty of war practices and which aimed, through custom and treaties, at transforming the usages in war into legal rules of warfare in order to make wars more humane, the Second Peace Conference held at the Hague in 1907 marks the turning point. This Conference, which had been convened for the purpose of "giving a fresh development to the humanitarian principles"*, drew up a number of Conventions which represent the most important step in "evolving a lofty conception of the common welfare of humanity".**

One of the principles which underline all these enactments is the principle of humanity. Its aim is to establish, as firmly as possible, that all such kinds and degrees of violence as are not necessary for overpowering of the opponent should not be permitted to a belligerent, and that, in contradistinction to the savage cruelty of former times, fairness of conduct and respect for human rights should be observed in the realization of the purpose of war.

Thus the fourth of the Hague Conventions of 1907, the one concerning the Laws and Customs of War on Land, recalls in the Preamble that the Contracting Parties "inspired by the desire to diminish the evils of war, so far as military requirements permit", thought it important "to revise

---

* See the Preamble to the Final Act of the Second Peace Conference, The Hague, 1907.

** Other general treaties concluded between the majority of States, which constitute the most important developments of the laws of war prior to 1907, are the following:

(a) The Declaration of Paris of April 16th, 1856, respecting warfare on sea, which abolished privateering, recognized the principles that the neutral flag protects non-contraband enemy goods, and that non-contraband neutral goods under an enemy flag cannot be seized.

(b) The Geneva Convention of August 22nd, 1864, for the amelioration of the conditions of wounded soldiers in armies in the field, followed by a Convention signed in Geneva on July 6th 1906.

(c) The Declaration of St. Petersburg of December 11th, 1868, respecting the prohibition of the use in war of projectiles under 400 grammes (14 ounces) which are either explosive or charged with inflammable substances.

(d) The Convention enacting regulations respecting the Laws of War on Land agreed upon at the First Peace Conference of 1889, which represented the first international endeavour to codify the laws of war. This Convention was revised in 1907 and its place is now taken by Convention IV of the Second Peace Conference.

/the general

the general laws and customs of war, with the view on the one hand of defining them with greater precision, and, on the other hand, of confining them within limits intended to mitigate their severity as far as possible". According to the views of the Signatory States, these provisions were intended to serve as a general rule of conduct for belligerents not only in their mutual relations but also in their relations with the civilian population. Accordingly, in the eighth paragraph of the Preamble the Contracting Parties expressly declared that "the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience".

However, all such references to "humanity", "interests of humanity" and "laws of humanity", as appear in this Convention and in the other documents and enactments of that period, are used in a non-technical sense and certainly not with the intention of indicating a set of norms different from the "laws and customs of war", the violations of which constitute war crimes within the meaning of the documents of 1945 and 1946 enumerated at the outset. The Fourth Hague Convention is an instrument dealing per definitionem with war crimes in the technical and narrower sense, and the "interests of humanity" are conceived in it only as the object which the laws and customs of war are intended to serve, and the "laws of humanity" only as one of the sources of the law of nations.*

Among the other Hague Conventions of 1907 which are of relevance to the protection of human rights and the provisions of which are of the same nature as those of the Fourth Convention, the following may be mentioned:

Third Convention relative to the Opening of Hostilities.

Fifth Convention respecting the Rights and Duties of Neutral Powers and Persons in case of War on Land.

Sixth Convention relative to the Status of Enemy Merchant-Ships on the Outbreak of Hostilities.

Seventh Convention relative to the Conversion of Merchant-Ships into War-Ships.

Eighth Convention relative to the Laying of Automatic Submarine Contact Mines.

Ninth Convention respecting Bombardment by Naval Forces in Time of War.

* See E. Schwelb's article on "Crimes against Humanity", written for the British Year Book of International Law, 1947.

Tenth Convention for the Adaptation to Naval War of the Principles of the Geneva Convention.

Eleventh Convention relative to certain Restrictions with regard to the Exercise of the Right of Caputre in Naval Wars.

Thirteenth Convention concerning the Rights and Duties of Neutral Powers in Naval Wars.

Fourteenth Convention Prohibiting the Discharge of Projectiles and Explosives from Balloons.*

In connection with the Eighth of the above Conventions it may be worth while to recall the declaration of Baron Marschall von Bieberstein, First Delegate Plenipotentiary of Germany. Speaking at the Hague Conference of 1907 with regard to submarine mines, he used the following words:

> "Military operations are not governed solely by stipulations of international law. There are other factors. Conscience, good sense, and the sense of duty imposed by the principles of humanity will be the surest guides for the conduct of sailors, and will constitute the most effective guarantee against abuses. The officers of the German Navy, I loudly proclaim it, will always fulfill in the strictest fashion the duties which emanate from the unwritten law of humanity and civilization."**

As to the binding force of all these conventions and enactments, it is sufficient to say quite generally that, according to the principles of International Law, all the rules of warfare that by custom or treaty evolved into laws of war are binding upon belligerents under all circumstances and conditions, and in principle cannot be overruled even by necessity. They do not lose their binding force even if their breach would effect an escape from extreme danger or the realization of the purpose of war. These guiding principles find their expression in Article 22 of the Hague Regulations which stipulates distinctly that the right of belligerents to adopt means of injuring the enemy is not unlimited.

The effectiveness of some of the Hague Conventions concluded before the First World War was considerably impaired by the incorporation of a so-called "general participation clause" providing that the Convention shall be binding only if all belligerents are parties to it. On the other hand some of the later Conventions expressly reject the general

---

* See the Final Act of the Second Peace Conference, The Hague, 1907, and Conventions and Declarations Annexed thereto.

** Quoted in the Reports of the Commission of Responsibilities of 1919, referred to in full in the subsequent sections.

participation clause or include it in a different and modified form.*

Thus, as regards the latter practice, the Signatories of the Protocol of 1925 concerning the use of poisonous gases in war included a reservation to the effect that the instrument shall cease to be binding towards any belligerent Power whose armed forces, "or the armed forces of whose Allies", fail to respect the prohibitions laid down in the Protocol. As Oppenheim says in this connection, "the effect might be that in a war in which a considerable number of belligerents are involved, the action of one State, however small, in a distant region of war, might become the starting point for a general abandonment of the restraints of the Convention. As between opposing belligerents actually in contact with one another some form of 'participation' clause is clearly necessary. But the requirements of reciprocity and of effectiveness of treaties are not irreconcilable, and progress can undoubtedly be achieved by a less rigid and exacting formulation of the clause than has been the case hitherto."**

Among other factors which are, or had until recently been, limiting the effectiveness of the rules of war may be mentioned: (a) the institution of reprisals which, though designed to ensure the observance of rules of war, have systematically been used as a convenient cloak for disregarding the laws of war; and (b) the question of the plea of superior orders. These very important questions meriting serious attention by all Governments, will form the subject of separate Sections of this Report.

Before leaving the subject of the development of the laws of war through international conventions, the following may be mentioned from among the more important instruments concluded in the period between the two World Wars:

(a) The Protocol of 1925 concerning the use in war of asphyxiating, poisonous, and other gases, signed at a special Conference convened by the Council of the League of Nations.

(b) The Geneva Conventions of 1929 concerning the treatment of sick and wounded, and of prisoners of war.

(c) The London Protocol of 1936 relating to the use of submarines against merchant vessels.

---

* See the Geneva Conventions of 1929 and the Protocol of 1925.

** L. Oppenheim, International Law, Vol. II, Sixth Edition, page 186.

II. DEVELOPMENTS DURING THE FIRST WORLD WAR

1. The Massacres of the Armenians in Turkey

In connection with the massacres of the Armenian population which occurred at the beginning of the First World War in Turkey, the Governments of France, Great Britain and Russia made a declaration, on 28 May 1915, denouncing them as "crimes against humanity and civilization" for which all the members of the Turkish Government would be held responsible, together with its agents implicated in the massacres. The relevant part of this declaration reads as follows:

> "En présence de ces nouveaux crimes de la Turquie contre l'humanité et la civilisation, les Gouvernements alliés font savoir publiquement à la Sublime Porte qu'ils tiendront personnellement responsables desdits crimes tous les membres du Gouvernement ottoman ainsi que ceux de ces agents qui se trouveraient impliqués dans de pareils massacres."*

As will be shown later in more detail, the warning given to the Turkish Government on this occasion by the Governments of the Triple Entente dealt precisely with one of the types of acts which the modern term "crimes against humanity" is intended to cover, namely, inhumane acts committed by a government against its own subjects.

2. The 1919 Commission of Responsibilities

In January 1919, the Preliminary Peace Conference of Paris decided to create a Commission composed of fifteen members for the purpose of "enquiring into the responsibilities relating to the war". The Commission was charged, inter alia, with enquiring into and reporting upon "the facts as to breaches of the laws and customs of war committed by the forces of the German Empire and their Allies, on land, on sea, and in the air", during the 1914-1919 war.**

In its Report of 29th March, 1919,*** the Commission stated that the large number of documents it had considered supplied abundant evidence of outrages of every description committed on land, at sea, and in the air, against the laws and customs of war and of the laws of humanity, and that in spite of explicit regulations, established customs and the clear

---

* The full text of the declaration is quoted in the Armenian Memorandum presented by the Greek delegation to the Commission of Responsibilities, Conference of Paris, 1919.

** Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of the American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32.

*** Op. cit., Chapter II.

dictates of humanity, Germany and her allies have piled outrage upon outrage.

In particular, the Commission established the fact that multiple violations of the rights of combatants, of the rights of civilians, and of the rights of both had been committed which were the outcome of the "most cruel practices which primitive barbarism, aided by all the resources of modern science, could devise for the execution of a system of terrorism carefully planned and carried out to the end. Not even prisoners, or wounded, or women, or children have been respected by belligerents who deliberately sought to strike terror into every heart for the purpose of repressing all resistance. Murders and massacres, tortures, shields formed of living human beings, collective penalties, the arrest and execution of hostages, the requisitioning of services for military purposes, the arbitrary destruction of public and private property, the aerial bombardment of open towns without there being any regular siege, the destruction of merchant ships without previous visit and without any precautions for the safety of passengers and crew, the massacre of prisoners, attacks on hospital ships, the poisoning of springs and of wells, outrages and profanations without regard for religion or the honour of individuals" constitute the most striking examples of such violations.

As a basis for future collection and classification of information concerning the charges as to breaches of the laws and customs of war, the Commission arrived at the following formal list of crimes or groups of crimes:

1. Murders and massacres; systematic terrorism.
2. Putting hostages to death.
3. Torture of civilians.
4. Deliberate starvation of civilians.
5. Rape.
6. Abduction of girls and women for the purpose of enforced prostitution.
7. Deportation of civilians.
8. Internment of civilians under inhuman conditions.
9. Forced labour of civilians in connection with the military operations of the enemy.
10. Usurpation of sovereignty during military occupation.
11. Compulsory enlistment of soldiers among the inhabitants of occupied territory.
12. Attempts to denationalize the inhabitants of occupied territory.
13. Pillage.
14. Confiscation of property.
15. Exaction of illegitimate or of exorbitant contributions and requisitions.
16. Debasement of currency, and issue of spurious currency.
17. Imposition of collective penalties.
18. Wanton devastation and destruction of property.
19. Deliberate bombardment of undefended places.
20. Wanton destruction of religious, charitable, educational and historic buildings and monuments.

/21. Destruction

21. Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers and crew.
22. Destruction of fishing boats and of relief ships.
23. Deliberate bombardment of hospitals.
24. Attack on and destruction of hospital ships.
25. Breach of other rules relating to the Red Cross.
26. Use of deleterious and asphyxiating gases.
27. Use of explosive or expanding bullets, and other inhuman appliances.
28. Directions to give no quarter.
29. Ill-treatment of wounded and prisoners of war.
30. Employment of prisoners of war on unauthorized works.
31. Misuse of flags of truce.
32. Poisoning of wells.

It is sufficient to say here in this connection that almost all types of crimes which are included in this list or could be brought under the above heads either constitute per se or involve in given circumstances violations of inherent human rights.

The substantial number of examples (charges) of offences committed by the authorities and forces of the Central Empires and their Allies that had been collected by the Commission* can be divided into two categories. To the first category, comprising the overwhelming majority of charges, belong offences which were committed in violation of the laws and customs of war and can be classified as war crimes sensu stricto. The second category is composed of offences committed on the territory of Germany and her Allies against their own nationals. In particular, the Commission included among its findings information on various crimes violating the rights of civilians, such as those committed by Turkish and German authorities against Turkish subjects (i.e. the Armenians and the Greek speaking population of Turkey), or those committed by Austrian troops against the population of Gorizia, which at the material time (1915) was Austrian territory. It would appear that the latter set of offences were qualified by the Commission as crimes coming within the notion of violations of the laws of humanity. As has already been shown in paragraph (1) above, the massacres of the Armenian population in Turkey had been similarly denounced as "crimes against humanity and civilization".

The majority of the Commission came to the conclusion that the war of 1914-1919 "was carried on by the Central Empires together with their allies, Turkey and Bulgaria, by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary

---

* Reproduced in "La Documentation Internationale. La Paix de Versailles. Volume 3. Responsabilites des auteurs de la Guerre et Sanctions", Paris, 1930, Annex I to the Main Report.

/laws of humanity".

laws of humanity", and that "all persons belonging to enemy countries, however high their position may have been, without distinction of rank, including chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution".* Accordingly, the Commission recommended that in addition to the municipal courts, military or civil, which every belligerent has power, under International Law, to set up for the trial of such cases, an International Court ("High Tribunal") should be constituted for the trial of outrages falling under four special categories of charges of violations of the laws and customs of war and of the laws of humanity.**

The above conclusions and recommendations were the logical outcome of the opinion stated by the Commission to the effect that "having regard to the multiplicity of crimes committed by those Powers which a short time

---

* Op. cit., Chapter III.

** The four categories of charges are the following:

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

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

(c) Against all authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of States, who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war (it being understood that no such abstention should constitute a defence for the actual perpetrators);

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

(The American Representatives in the Commission submitted a number of reservations to the above recommendations).

before had on two occasions at the Hague protested their reverence for right, and their respect for the principles of humanity, the public conscience insists upon a sanction which will put clearly in the light that it is not permitted cynically to profess a disdain for the most sacred laws and the most formal undertakings".

From the foregoing, it appears that the two categories of offences with which the Commission of Fifteen concerned itself, namely, violations of the laws and customs of war, on the one hand, and offences against the laws of humanity, on the other, correspond generally speaking to "war crimes" and "crimes against humanity", as they are distinguished in the two Charters of 1945 and 1946 and in the Control Council Law No. 10. Thus, in 1919 we find for the first time the specific juxtaposition of these two types of offences.

It is, however, not known whether the 1919 Commission, in using the term "crimes against the laws of humanity", had in mind offences which were not covered by the other expression "violation of the laws and customs of war" nor whether the Commission considered that crimes against any civilian population fall within the former category. It is common knowledge that in the First World War the Central Powers resorted to the persecution of their own nationals on a considerable scale, though not on a scale comparable with what happened in Nazi dominated Europe between 1933 and 1945. As examples may be mentioned the persecution of political opposition groups and of the Slavonic and Romanic races in Austria and Hungary, and the crimes committed against racial minorities in Bulgaria and Turkey.

In the Memorandum of Reservations presented to the Commission,* the American members objected to the invocation of, and references to, the "laws and principles of humanity", included in the report, inter alia, on the ground that in contradistinction to the laws and customs of war, the laws and principles of humanity, are not "a standard certain" to be found in books of authority and in the practice of nations, but they "vary with the individual, which, if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law".

In particular, the American Representatives pointed out that "war was and is by its very nature inhuman, but acts consistent with the laws and

---

* "Memorandum of Reservations presented by the Representatives of the United States to the Report of the Commission of Responsibilities, April 4th, 1919", contained in Annex II to the Report of the Majority of the Commission of Responsibilities.

/customs of

customs of war, although these acts are inhuman, are nevertheless not the object of punishment by a court of justice. A judicial tribunal only deals with existing law and only administers existing law, leaving to another forum infractions of the moral law and actions contrary to the laws and principles of humanity. A further objection lies in the fact that the laws and principles of humanity are not certain, varying with time, place, and circumstance, and accordingly, it may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity".

In connection with the work of the Commission of Fifteen it may also be of some interest to record the American observations on the principles which should be the standard of justice in measuring charges of inhuman or atrocious conduct during the prosecution of a war.*

These propositions were the following:

1. Slaying and maiming man in accordance with generally accepted rules of war are from their nature cruel and contrary to the modern conception of humanity.

2. The methods of destruction of life and property in conformity with the accepted rules of war are admitted by civilized nations to be justifiable and no charge of cruelty, inhumanity, or impropriety lies against a party employing such methods.

3. The principle underlying the accepted rules of war is the necessity of exercising physical force to protect national safety or to maintain national rights.

4. Reprehensible cruelty is a matter of degree which cannot be justly determined by a fixed line of distinction, but one which fluctuates in accordance with the facts in each case, but the manifest departure from accepted rules and customs of war imposes upon the one so departing the burden of justifying his conduct, as he is prima facie guilty of a criminal act.

5. The test of guilt in the perpetration of an act, which would be inhuman or otherwise reprehensible under normal conditions, is the necessity of that act to the protection of national safety or national rights measured chiefly by actual military advantage.

6. The assertion by the perpetrator of an act that it is necessary for military reasons does not exonerate him from guilt if the facts and circumstances present reasonably strong grounds for establishing the needlessness of the act or for believing that the assertion is not made in good faith.

7. While an act may be essentially reprehensible and the

---

* "Memorandum on the Principles which should Determine Inhuman and Improper Acts of War", contained in Annex II to the Report of Majority of the Commission of Responsibilities of 1919.

/perpetrator

perpetrator entirely unwarranted in assuming it to be necessary from a military point of view, he must not be condemned as wilfully violating the laws and customs of war or the principles of humanity unless it can be shown that the act was wanton and without reasonable excuse.

8. A wanton act which causes needless suffering (and this includes such causes of suffering as destruction of property, deprivation of necessaries of life, enforced labour, etc.), is cruel and criminal. The full measure of guilt attaches to a party who without adequate reasons perpetrates a needless act of cruelty. Such an act is a crime against civilization, which is without palliation.

9. It would appear, therefore, in determining the criminality of an act, that there should be considered the wantonness or malice of the perpetrator, the needlessness of the act from a military point of view, the perpetration of a justifiable act in a needlessly harsh or cruel manner, and the improper motive which inspired it.

3. The Peace Treaties of 1919-1923

In the subsequent Peace Treaties with Germany, Austria, Hungary and Bulgaria*, the view of the American members eventually prevailed, and the references to the "laws of humanity" do not appear in these treaties. All the relevant provisions in these treaties, with the exception of Article 227 of the Peace Treaty of Versailles, deal only with acts in violation of the laws and customs of war. Thus, for instance, in Article 228 of the Treaty of Versailles the German Government recognized the right of the Allied and Associated Powers to bring to justice persons accused of having committed acts in violation of the laws and customs of war, and it also subscribed to the obligation of handing over to these Powers all persons accused of having committed such acts.

As to the question of jurisdiction the treaty stipulated that persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power, while persons guilty of such acts against the nationals of more than one of these Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned (Article 229).

Article 227 of the Treaty of Versailles provided that the Allied and Associated Powers publicly arraign Wilhelm II of Hohenzollern, formerly the German Emperor, "for a supreme offence against international morality

---

* Peace Treaties of Versailles (Articles 227-230), Saint-Germain-en-Laye (Articles 173-176), Trianon (Articles 157-159), and Neuilly-sur-Seine (Articles 118-120).

/and the sanctity

and the sanctity of treaties". The special tribunal envisaged for the trial of Wilhelm II was to be guided "by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality".

It is to be pointed out that this arraignment of the Kaiser was not based on a charge of a violation of existing law; the ex-Kaiser was charged, according to what the authors of the treaty considered to be the then existing state of international law, with offences against moral, not legal provisions.

The provision of Article 227 which was the precursor of Article 6 (a) of the Nürnberg Charter and of Article 5 (a) of the Tokyo Charter respecting crimes against peace, with this important distinction, that the crimes against peace under these two Charters are not merely contraventions of a moral code, but violations of legal provisions, does not, of course, concern the present problem of "war crimes" and "crimes against humanity". However, in connection with Article 227 it may be recalled that during the Paris Peace Conference the Allied and Associated Powers had formally stated that in their view the war which began on 1 August 1914, was "the greatest crime against humanity and the freedom of peoples that any nation, calling itself civilized, has ever consciously committed".* Accordingly, Article 227 stipulated that a special Tribunal shall be constituted to try the German Emperor, composed of five judges, one appointed by each of the following Powers: United States, Great Britain, France, Italy and Japan. When the German Delegation contended, in connection with this and other stipulations referred to above, that a trial of the accused by tribunals appointed by the Allied and Associated Powers would be a one-sided and inequitable proceeding, the Allied and Associated Powers replied that they "consider that it is impossible to entrust in any way the trial of those directly responsible for offences against humanity and international right to their accomplices in their crimes."**

It would appear therefore that the authors of the document referred to above considered acts in violation of the laws and customs of war, or at least some of them, as constituting simultaneously "war crimes" and "crimes against humanity" in a non-technical sense.

---

* See the "Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace", Paris, 16 June 1919, published by H.M. Stationery Office, Miscellaneous, No. 4 (1919).

** Op. cit., Section II, "Penalties".

/However,

However, the first peace treaty with Turkey, namely, the Treaty of Sevres, signed on 10 August 1920, contained in addition to the provisions dealing with violations of the laws and customs of war (Articles 226-228 corresponding to Articles 228-230 of the Treaty of Versailles) a further provision, Article 230, by which the Turkish Government undertook to hand over to the Allied Powers the persons responsible for the massacres committed during the war on Turkish territory. The relevant parts of this article read as follows:

"The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on the 1st August, 1914.

"The Allied Powers reserve to themselves the right to designate the Tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognize such Tribunal.

"In the event of the League of Nations having created in sufficient time a Tribunal competent to deal with the said massacres, the Allied Powers reserve to themselves the right to bring the accused persons mentioned above before such Tribunal, and the Turkish Government undertakes equally to recognize such Tribunal".

The provisions of Article 230 of the Peace Treaty of Sevres were obviously intended to cover, in conformity with the Allied note of 1915 referred to in the preceding section, offences which had been committed on Turkish territory against persons of Turkish citizenship, though of Armenian or Greek race. This article constitutes therefore a precedent for Articles 6 (c) and 5 (c) of the Nurnberg and Tokyo Charters, and offers an example of one of the categories of "crimes against humanity" as understood by these enactments.

The Treaty of Sevres was, however, not ratified and did not come into force. It was replaced by the Treaty of Lausanne, signed on 24 July 1923, which did not contain provisions respecting the punishment of war crimes, but was accompanied by a "Declaration of Amnesty" for all offences committed between 1 August 1914, and 20 November 1922.*

* "Declaration of Amnesty" and the Protocol attached to it, dated 24 July 1923.

III. THE PERIOD BETWEEN THE WORLD WARS

1. The Italo-Abyssinian War of 1935-36

During the Italo-Abyssinian conflict a number of protests, appeals and declarations had been issued by Haile Selassie, the Emperor of Ethiopia, denouncing the many and various crimes committed by Italian forces and authorities against the Ethiopian population, both during the campaign and after the annexation of Ethiopia by Italy had been proclaimed on 9 May 1936.

One category of the crimes committed at that time became of special concern to the League of Nations and an ad hoc Committee of Thirteen was created to consider the use of poison gas by the Italian Army and Air Force. In one of the meetings of this Committee it was specifically pointed out that both parties signed the Geneva Convention prohibiting the use of gases in any form or circumstances, and a reference was made to the fact that numerous cases of gas-poisoning were confirmed by impartial sources.*

In his personal address to the Sixteenth Assembly of the League of Nations, on 4 July 1936, the Emperor of Ethiopia, describing the fate suffered by Ethiopia, stated that "It is not only upon warriors that the Italian Government has made war, it has above all attacked populations far removed from hostilities". First, "towards the end of 1935 Italian aircraft hurled upon my armies bombs of tear gas. The Italian aircraft then resorted to mustard gas". Describing later, how these operations and the technique applied for this purpose were subsequently extended over vast areas of Ethiopian territory, the Emperor said that "it was thus that as from the end of January 1936, soldiers, women, children, cattle, rivers, lakes, and pastures were drenched continually with this deadly rain.... in order to kill systematically all living creatures.... That was the chief method of warfare....the very refinement of barbarism which consisted of carrying ravage and terror into the most densely populated parts of the territory. The object was to scatter fear and death over a great part of the Ethiopian territory."**

In a letter sent to the Secretary-General of the League of Nations on 17 March 1937, the Emperor of Ethiopia requested the appointment of a Commission of Enquiry to investigate all the horrors committed in Ethiopia by the Italian Government. This letter constitutes a further

---

* Statement by Mr. Eden on 8 April 1936, see Keesing's "Contemporary Archives", Volume II, 1934-1937, page 2066.

** See Keesing, op. cit., pages 2173-4.

/indication

indication that crimes coming under different notions had been committed on that territory. It denounces the execution of Ras Desta, a prisoner of war, in violation of the Hague Convention, and the alleged massacre of over 6,000 persons in Addis Ababa, which occurred in February 1937.*

In connection with the Italian crimes committed in Ethiopia it is to be recalled that the Peace Treaty with Italy signed in Paris on 10 February 1947, and now in force, contains in Article 45 provisions dealing with Italy's obligations regarding the apprehension and surrender of war criminals in general. This Article stipulates inter alia that "Italy shall take all necessary steps to ensure the apprehension and surrender of: (a) Persons accused of having committed, ordered or abetted war crimes, and crimes against peace or humanity", who according to paragraph 2 will be brought for trial.

At the same time the Treaty contains a provision concerning Ethiopia, one of the Allied and Associated Powers parties to the Treaty, which has an important bearing on the question of Ethiopia's right to prosecute Italian nationals responsible for crimes committed in that country. The relevant Article 38 reads as follows:

> "The date from which the provisions of the present Treaty shall become applicable as regards all measures and acts of any kind whatsoever entailing the responsibility of Italy or of Italian nationals towards Ethiopia, shall be held to be October 3 1935".

In view of the fact that Article 38 speaks of "all measures and acts of any kind whatsoever" it is clear that the provisions dealing with war criminals in general (Article 45) are necessarily included among the measures entailing the responsibility of Italy or of Italian nationals.

From the foregoing it would appear that the crimes committed in Ethiopia during the Italo-Ethiopian war have by these provisions been qualified as war crimes and crimes against humanity.

2. The Spanish Conflict

A further example of the use between the two World Wars of the expression "dictates of humanity", in a non-technical sense, may be found in the International Agreement for Collective Measures against Piratical Attacks in the Mediterranean by Submarines signed at Nyon on 14 September 1937, and supplemented three days later by an agreement signed at Geneva in respect of similar acts by surface vessels and aircraft. Referring to attacks arising out of the Spanish conflict and committed against merchant ships not belonging to either of the conflicting Spanish parties, the agreement declares them to be violations of the

---

* Op. cit., page 2499.

rules of international law, and to "constitute acts contrary to the most elementary dictates of humanity, which should be justly treated as acts of piracy".*

* Doc. cit., the Preamble.

IV. NOTE ON THE DEVELOPMENTS DURING THE SECOND WORLD WAR

The unprecedented record of crimes committed by Nazi Germany and the other Axis Powers in the course of the Second World War, again made the punishment of those guilty of, or responsible for, these crimes a matter of international concern. Evidence which was reaching the Allied Governments during the war, left no doubt that in attempting to establish a totalitarian order, the Axis Powers had set aside the restraining influence of the laws of war and the laws of Nations. The record showed that many and various crimes were being committed, not only against Allied combatants and prisoners of war, but also against the civilian populations, both of the occupied countries and of the Axis countries themselves.

In the face of so much illegality and inhumanity, the Allied Governments deemed it their duty not merely to issue stern warnings; they resolved that retribution for these crimes and atrocities must take its place among the major purposes of the war. Innumerable official and semi-official Declarations dealing with this problem were issued. A special inter-governmental agency, the United Nations War Crimes Commission, was established in 1943, to investigate the crimes and submit recommendations to the Governments.

In the circumstances, it is not possible to collect or to review these declarations and recommendations adequately in the present Report. Two main features of these pronouncements should, however, be emphasized with regard to the direction in which the retributive action was developing.

Firstly, all these declarations bear witness to the intention of the Allied Governments that not only the lesser war criminals, but also the leaders and organizers responsible for these crimes should be brought to justice. This intention found its expression in the Declaration on German Atrocities in Occupied Europe of 30 October 1943, issued by the Moscow Conference, in which the three major Powers, the United Kingdom, the United States, and the Soviet Union, speaking in the interests of the thirty-two United Nations, solemnly declared that "major war criminals whose offences have no particular geographical location.....will be punished by a joint decision of the Governments of the Allies". This Document, which left open the question whether the major war criminals should be proceeded against by summary administrative action or by a court of law, was subsequently implemented in the London Agreement of 8 August 1945, for the Prosecution and Punishment of the Major War Criminals of the European Axis. The latter Instrument gives evidence that preference was eventually given to their guilt being adjudicated

according to law, rather than on purely moral or ethical grounds. The same attitude was taken in regard to the trial of the major war criminals in the Far East.

Secondly, all these Declarations show that the insertion in the Charters of the International Military Tribunals at Nurnberg and Tokyo, of provisions concerning "crimes against humanity", was due to a desire that the retributive action of the United Nations should not be limited to bringing to justice those who had committed war crimes in the traditional and narrower sense - i.e violations of the laws and customs of war, perpetrated on Allied territory or against Allied citizens - but that such atrocities should also be punished whe they were committed on Axis territory and against persons of other than Allied nationality.

The subsequent Peace Treaties, which, following the Peace Conference of Paris of 1946, have been concluded with Italy and the four satellite countries are a further step in this development. All these Treaties contain provisions regarding not only persons accused of war crimes, in the traditional sense, but also of crimes against humanity and crimes against peace. Thus, the Peace Treaty with Italy, signed in Paris on 10 February 1947, provides in Article 45 that Italy shall take all necessary steps to ensure the apprehension and surrender for trial of persons accused of having committed, ordered or abetted war crimes and crimes against peace or humanity. At the request of the United Nations Government concerned, Italy shall likewise make available as witnesses persons within its jurisdiction, whose evidence is required for the trial of persons referred to above.

Similar provisions have also been included in the Peace Treaties with Roumania, Bulgaria, Hungary and Finland. It must be presumed that the terms "war crimes", "crimes against humanity", as well as the term of "crimes against peace", which are not defined in these Treaties, have the same connotation as in the London Charter of 1945.

PART I

INFORMATION ON HUMAN RIGHTS PROTECTED BY THE LAWS AND CUSTOMS OF WAR

/INTRODUCTION

INTRODUCTION TO THE NURNBERG AND TOKYO TRIALS

In the Resolution of the Economic and Social Council of 21 July 1946, under the heading "Documentation", paragraph 4, emphasis has been laid upon the collection of information arising from the trials of major war criminals held before the International Military Tribunals in Nürnberg and Tokyo respectively.

For reasons given in the Preface, that is, particularly in view of the comparatively short time made available for the submission of this Report, it has not been possible to present a full account of the information which these two trials provide. As to the Tokyo Trial, an additional reason is that it is not completed. More detailed reference to this is made in the Introductory Notes to Chapter II. Specific points concerning the Nürnberg Trial are raised in the various Sections of Chapter I.

Both are outstanding amongst all other trials held so far, in that they deal with two comparatively novel types of international offences, namely crimes against peace and crimes against humanity. In regard to war crimes proper, that is in regard to the violation of the laws and customs of war in the traditional sense, the two trials are conspicuous in that never before have courts of law had to deal with crimes of such magnitude, whether as regards the type or the scale of the crimes committed. This is particularly true in respect of the Nürnberg Trial.

Within the scope of the Report, as limited by the time available for collecting the information, the connection between the crimes perpetrated and the human rights violated has, whenever possible, been stressed. Special attention has been paid to the relationship existing between the law and the human rights concerned, though only in broad lines, and in particular to the extent to which violations of human rights are covered by the existing law. Questions of the sufficiency, clarity or unity of the law have also been considered in this connection.

The importance of the subjects considered in connection with the Nürnberg Trial has made it impossible to include certain questions which have been dealt with in connection with the Tokyo Trial or to go beyond the sources of information provided by the Indictment and the Judgment. For instance, it has not proved possible in the time available to prepare, in connection with the Nürnberg Trial, the section dealing with the sphere within which the rights of the victims and the rights of the accused may be said to have conflicted at the time of the offence. On the other hand, some information on points arising in both trials has, for reasons of technical expediency, been inserted in the Chapter dealing with trials other than those conducted by the Nürnberg and Tokyo Tribunals. Such is the case with the rights of the

/accused at the

accused at the time of the trial. Information on this point will be found in Chapter III, under E, page 250 and following.

The two main aspects in which the information concerning human rights has been collected and presented in the two subsequent chapters, are the jurisdiction of the two Tribunals, on the one hand, and the violations of the rights of the victims of war crimes, on the other. These are preceded by a short outline on the legal basis of the trials.

CHAPTER I - THE NURNBERG TRIAL

A. LEGAL BASIS OF THE TRIAL

The Nürnberg Tribunal found its being in the Agreement entered into in London on 8 August 1945, by the Four Major Powers, in which they provided for the establishment of an International Military Tribunal for the trial of war criminals whose offences had no "particular geographical location". In an Annex to the Agreement, the Four Powers provided a Charter of the Tribunal, setting forth in thirty articles the constitution, jurisdiction and general principles, and powers of the Tribunal, the procedure to be followed in the course of the preliminary investigations and in the conduct of the trial, and the provisions concerning the judgment and sentence.*

In accordance with Article 5 of the Agreement, nineteen Governments of the United Nations** have expressed their adherence to the Agreement and the Charter, both of which had been concluded by the Four Powers "acting in the interests of all the United Nations".***

The establishment of the Tribunal was a natural and logical outcome of the many declarations made from time to time during the recent war by the Governments of the United Nations of their intention that War Criminal should be brought to justice.**** After recalling in the Preamble that, in accordance with the Moscow Declaration of 30 October 1943, those Germans who have been responsible for or have taken a consenting part in atrocities and crimes will be "sent back to the countries in which their abominable deeds were done" in order that they may be tried by the National Courts of those countries, the Agreement provides in Article 1, as already indicated, that an International Tribunal shall be established "for the trial of war criminals whose offences have no particular geographical location" - these being the major war criminals.

This decision of the Signatories is also restated in Article 1 of the Charter itself, with the addition that the Tribunal shall be established for the just and prompt trial and punishment of these criminals.

---

* Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed in London on 8 August 1945, H.M.S.O. Cmd. 6668.

** These Governments are the following:
Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxemburg, Haiti, New Zealand, India, Venezuela, Uruguay and Paraguay.

*** The Preamble to the Agreement, paragraph 4.

**** See, Historical Survey of the Problem of Violations of Human Rights.

/The Tribunal

The Tribunal was invested by the Charter with power to try and punish persons who had committed crimes against peace, war crimes and crimes against humanity as defined in the Charter.

In its Judgment the Tribunal stated that in creating the Tribunal the Signatory Powers "have done together what any one of them might have done singly; for it is not to be doubted that any nation had the right thus to set up special courts to administer law. With regard to the constitution of the court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law".*

In addition, the Tribunal expressed the opinion that the making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world.**

These brief statements of the Tribunal, as well as the relevant provisions of the Agreement and the Charter, raise a number of intrinsic problems and questions as to the exact status of the Nürnberg Tribunal and its military, international, judicial and ad hoc characteristics which are of primary relevance in assessing properly the importance of the Nürnberg Trial and the authority of the Nürnberg Judgment for the development of International Law in general, and for the protection of human rights in particular. Here, the question would arise whether and to what extent the attitude of the Tribunal with regard particularly to the violations of human rights which come within the notion of crimes against humanity, and its interpretation of the law in general, was or is binding in other cases tried or to be tried before other courts, whether the International Military Tribunal for the Far East, or the municipal, occupational or military tribunal of other United Nations or other countries.

An analysis of these highly important problems can, however, be made only after all the preliminary questions concerning the law of the Charter, as well as the exposition of the facts relating to the violations of human rights, as established by the Tribunal, have first been dealt with. They must therefore be left for one of the concluding sections of the Report.***

It may be mentioned that in accordance with Article 2 of the Charter, the Tribunal consisted of four members, each with an alternate, one member

---

* Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nürnberg 1946, H.M.S.O., Cmd. 6964, page 38. (herein after cited as The Judgment)

** Ibid, page 38.

*** See Part II, Chapter I.

/and one alternate

and one alternate having been appointed by each of the Signatories.*

B. JURISDICTION OF THE TRIBUNAL

Part II of the Charter of the International Military Tribunal at Nürnberg** which sets forth the jurisdiction and states the general principles to be followed in the conduct of the trial of the major war criminals of the European Axis countries, and in particular its Articles 6, 7, 8 and 9, is technically speaking the law which the Charter required the Tribunal to administer, and by which the Tribunal was bound.

Article 6 provides that the Tribunal "shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes". According to the specific provisions of this article "the following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

"(a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

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

---

* These members were the following:

Lord Justice LAWRENCE, Member for the United Kingdom of Great Britain and Northern Ireland; Mr. Justice BIRKETT, Alternate Member.

Mr. Francis BIDDLE, Member for the United States of America; Judge John J. PARKER, Alternate Member.

M. le Professeur Donnedieu de VABRES, Member for the French Republic; M. Le Conseiller R. FALCO, Alternate Member.

Major General I. T. NIKITCHENKO, Member for the Union of Soviet Socialist Republics; Lieutenant Colonel A. F. VOLCHKOV, Alternate Member.

Lord Justice Lawrence was elected President of the Tribunal for the Trial at Nürnberg, in accordance with Article 4 (b) of the Charter.

** Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed in London, on 8 August 1945.

/"(c) Crimes against

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

"Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan".

The above text of sub-paragraph (c) is the English text as amended by the Berlin Protocol of 6 October 1945,* by virtue of which the semicolon originally put between "the war" and "or persecutions" was replaced by a comma following the discrepancy which had been found to exist between the originals of Article 6, paragraph (c) of the Charter in the Russian language, on the one hand, and the originals in the English and French languages, on the other, all of which have equal authenticity.

Consequently, the Protocol declares that Article 6 (c) in the Russian text is correct, and that the meaning and intention of the Agreement and Charter require that the said semicolon in the English text should be changed to a comma, and that the French text should be amended to read as follows:

"LES CRIMES CONTRE L'HUMANITE, c'est à dire, l'assassinat, l'extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre, ou bien les persécutions pour des motifs politiques raciaux, ou religieux, lorsque ces actes ou persécutions, qu'ils aient constitué ou non une violation du droit interne du pays où ils ont été perpetrés, ont été commis à la suite de tout crime rentrant dans la competence du Tribunal, ou en liaison avec ce crime".

The original French text of Article 6 (c) prior to the amendment, was as follows:

"LES CRIMES CONTRE L'HUMANITE, c'est à dire l'assassinat, l'extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre; ou bien les persécutions pour des motifs politiques raciaux, ou religieux, commises à la suite de tout crime rentrant dans

---

* Protocol Rectifying Discrepancy in Text of Charter, drawn up by the Governments who had concluded the Agreement of 8 August 1945; published in "Trial of the Major War Criminals before the International Military Tribunal", Vol. 1, Official Documents, Nürnberg, 1947.

/la compétence du

la compétence du Tribunal International ou s'y rattachant, que ces persécutions aient constitué ou non une violation du droit interne du pays où elles ont été perpétrées."

The corrections made by the Berlin Protocol have an important bearing on the interpretation of the notion of crimes against humanity. Their consequence is also that the words "in execution of or in connection with any crime within the jurisdiction of the Tribunal" refer now to the whole text of Article 6 (c).*

It has been said at the outset that the Charter is the law by which the Tribunal was bound. The general attitude of the Tribunal in regard to this particular question found its expression in the Judgment which says that "the law of the Charter is decisive, and binding upon the Tribunal."** As to the character of the Charter itself the Tribunal made the following declaration, which has already been referred to in part when discussing the legal basis of the Tribunal:

"The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law."***

The Tribunal was of course bound by the law of the Charter also in regard to the definition which the Charter gives both of war crimes and crimes against humanity.**** This particular question is the subject of some specific and more elaborated statements made by the Tribunal in the Judgment. Before coming, however, to the exposition of what was the attitude of the Tribunal to the substantive law as laid down in the Charter, it will be necessary first to analyse very briefly the relevant provisions of the Charter and to point out their most characteristic features. For it is only by examining the rules laid down in those provisions and then by comparing them with the manner in which the Tribunal applied these provisions, and the effect which it gave them in its considerations and judgment, that we can find an answer to the question to what extent and in what way human rights violated by various crimes are, or are not, protected by the existing rules of International Law. In

---

* See under I (b), Jurisdiction over Crimes against Humanity

** The Judgment, page 3.

*** Ibid, page 38

**** The Judgment, page 64.

discussing the attitude of the Tribunal, we shall confine ourselves only to its general considerations, reserving a more detailed exposition to a further Section of this part of the Report where the subject of violations of the rights of the victims will be presented.

I. JURISDICTION OVER OFFENCES

(a) War Crimes

In contradistinction to hostile acts of soldiers, by which the latter do not lose their privilege of being treated as lawful members of armed force, and in contradistinction to all sorts of force or means applied by a belligerent against enemy armed forces and other enemy persons or property, and directed to the overpowering of the enemy as well as to the occupying and administering of the enemy territory by all legitimate means, war crimes in the conventional sense are such acts of soldiers or other individuals which constitute violations of the laws and customs of warfare. They include acts contrary to International Law perpetrated in violation of the laws of the criminals' own State, as well as criminal acts contrary to the laws of war committed by order and/or on behalf of the enemy State. Such acts constitute violations of municipal penal laws, of international conventions, and of the general principles of criminal law as derived from the criminal law of all civilized nations. To that extent the notion of war crimes is based on the view that States and their organs are subject to criminal responsibility under International Law.

The right of the belligerent to punish during the war, such war criminals as fall into his hands is a well-recognized principle of International Law. It is a right of which he may effectively avail himself after he has occupied all or part of enemy territory, and is thus in the position to seize war criminals who happend to be there. He may, as a condition of the armistice, impose upon the authorities of the defeated State the obligation to hand over persons charged with the commission of war crimes, regardless of whether such persons are present in the territory actually occupied by him or in the territory which, at the successful end of hostilities, he will be in a position to occupy. For in both cases the accused are, in effect, in his power. And although the Treaty of Peace brings to an end the right to prosecute war criminals, no rule of International Law prevents the victorious belligerent from imposing upon the defeated State the obligation, as one of the provisions of the armistice or of

/the Peace

the Peace Treaty, to surrender for trial persons accused of war crimes.*

In spite of the uniform designation of various acts as war crimes, a number of different kinds and types of war crimes can be distinguished on account of the essentially different character of the acts, namely: (a) according to whether these acts have been committed by members of the enemy armed forces or by individuals who belong to or represent enemy authorities other than military, or are acting in the interest of the enemy; (b) according to what rights of individual persons or groups of persons have been violated, and/or what legitimate interests of other belligerents or general interests of the community of nations have been outraged.

It will be observed that, without exception, all the crimes specifically enumerated in Article 6 (b) of the Charter as constituting war crimes in their technical sense, are crimes which constitute attacks on the integrity or the physical well-being of individuals or groups of people, and of property, thus violating inherent human rights. But, from the law as stated in that article, and in particular from the words: "Such violations (i.e. of the laws or customs of war) shall include, but not be limited to ....." it is clear that these crimes are not the only ones which the authors of the Charter had in mind and with which the Tribunal was expected to be concerned in the Trial. It follows also that not only crimes of the atrocities type, but also violations of any other law or custom of war may be considered war crimes irrespective of whether such crimes might, or might not, violate certain human rights, and whether in the latter case they only constitute purely technical offences.

We shall see later in more detail and in the light of the Indictment and the Judgment which human rights have in fact been violated in connection with specific war crimes committed, and how they have been violated. Here, we are only concerned with the law relating to war crimes. As has already been pointed out the Tribunal considered itself bound by the Charter in the definition

---

* See, L. Oppenheim, International Law, Vol. II, Sixth Edition, Longmans Green & Co., London, 1944, pp. 450-458.

As to examples in the past of provisions of the Peace Treaties imposing upon the defeated State the duty to surrender for trial of persons accused of war crimes, see: Historical Survey of the Problem of Violations of Human Rights.

which it gives of war crimes. The Tribunal stated, however, that the crimes defined by Article 6 (b) "were already recognized as war crimes under International Law. They were covered by Articles 46, 50, 52 and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46 and 51 of the Geneva Convention of 1929. That violations of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument."*

However, when explaining the law of the Charter in connection with the criminality of planning or waging a war of aggression, and in particular when dealing with a fundamental principle of all law that there can be no punishment of crime without a pre-existing law, the Tribunal found an opportunity of touching indirectly upon this question and expressed its view in the following way:

> "The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions have been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offences against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention."**

The Tribunal said, further, that it must be remembered that International Law is not the product of an international legislature, and that international agreements have to deal with general principles of law, and not with administrative matters of procedure. The Tribunal went on to say that:

> "The law of war is to be found not only in treaties, but in the customs and practices c. states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed,

---

* The Judgment, p. 64.

** The Judgment, p. 40

in many cases treaties do no more than express and define for more accurate reference the principles of law already existing."*

The Tribunal also thought it important to recall that in Article 228 of the Treaty of Versailles, the German Government expressly recognized the right of the Allied Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war.**

Dealing with the Defence argument that the Hague Convention does not apply in this case, because of the "general participation clause" contained in Article 2 of the Fourth Hague Convention of 1907, to which several of the belligerents in the recent war were not parties,*** the Tribunal expressed the opinion that it was not necessary to decide this question, and added:

"The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention expressly stated that it was an attempt 'to revise the general laws and customs of war', which it thus recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (b) of the Charter."

"A further submission was made that Germany was no longer bound by the rules of land warfare in many of the territories occupied during the war, because Germany had completely subjugated those countries and incorporated them into the German Reich, a fact which gave Germany authority to deal with the occupied countries as though they were part of Germany. In the view of the Tribunal it is unnecessary in this case to decide whether this doctrine of subjugation, dependent as it is upon military conquest, has any application where the subjugation is the result of the crime of aggressive war. The doctrine was

---

* The Judgment, p. 40.

** Ibid., p. 41.

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

never considered to be applicable so long as there was an army in the field attempting to restore the occupied countries to their true owners, and in this case, therefore, the doctrine could not apply to any territories occupied after the 1st September, 1939. As to the war crimes committed in Bohemia and Moravia, it is a sufficient answer that these territories were never added to the Reich, but a mere protectorate was established over them."*

(b) Crimes against humanity**

As has already been pointed out, the Nürnberg is the first international legal enactment which has formulated the definition of crimes against humanity, though the conception of them is not entirely novel.

Sub-paragraph (c) of Article 6 of the Charter appears prima facie to lay down a set of novel principles or, at least, to pave the way for considerable progress in the relationship between the community of nations, its member states and individual citizens of these states, and between International Law and municipal law.

The following three elements of the definitions of crimes against humanity as laid down in Article 6 (c) appear to contain these novel principles:

(1) "before and during the war",

(2) "against any civilian population",

(3) "whether or not in violation of the domestic law of the country where perpetrated."

We shall therefore analyze in more detail each of these elements as they appear from the context of Article 6 (c) as well as in the light of the Judgment pronounced by the Nürnberg Tribunal.

The first principle indicated by the words "before or during the war" apparently implies that International Law contains penal sanctions against individuals, applicable not only in time of war, but also in time of peace. This means that there is in existence

---

* The Judgment p. 65.

** For a detailed analysis of the notion of crimes against humanity, reference is made to the article of E. Schwelb on "Crimes against Humanity", written for the British Year Book of International Law, 1946, and which has been used as the basis for the drafting of this section, with the author's kind permission.

A number of preparatory papers on this subject issued by the Commission for purposes other than this Report have also been utilized.

a system of international criminal law under which individuals are responsibile to the community of nations for violations of rules of international criminal law, and according to which attacks on the fundamental liberties and constitutional rights of peoples and of individual persons, i.e. inhuman acts, constitute not only in time of war, but also in time of peace, in certain circumstances, international crimes.

The adoption by the Charter of this principle taken in conjunction with the principles that it is irrelevant whether or not such crimes are committed in violation of the domestic law of the country where perpetrated, found its expression in the creation of the international judicial organs* which were called upon to determine the guilt or innocence of a certain category of the alleged criminals responsible for the commission of such inhuman acts, thus over-riding the national sovereignty and the municipal law of the states of which the perpetrators are subjects and where the crimes had been committed.

It must, however, be pointed out at once that this principle is considerably restricted by the specific qualification laid down by the provision, as amended by the Berlin Protocol, namely, that in order to constitute crimes against humanity which call for international penal sanction and which are of special concern to the international community, the inhumane acts specifically enumerated in Article 6 (c) must be committed in "execution of or in connection with any crime within the jurisdiction of the Tribunal", i.e. only if it is established that they were connected with a crime against peace or a war crime proper. This qualification constitutes a very important restriction of the scope of the concept of crimes against humanity, which thus, under the Charter, have no independent status, with a further consequence that their greatest practical importance in peace time is seriously affected.**

The Second principle expressed by the words "against any civilian population" is that any civilian population is under the protection of international criminal law and that the nationality of the victims affected is irrelevant. It seems also to imply that such protection is also extended to cases where the alleged violations of human rights have been perpetrated by a State against its own subjects. The term, therefore, includes crimes both against allied and against enemy nationals.

---

* Reference is made here to the Nürnberg and Tokyo Tribunals.

** The position under Law No. 10 of the Control Council of Germany is different.

In particular, it follows that a civilian population remains under the protection of the provisions regarding crimes against humanity irrespective of whether it is (a) the population of a territory which is under a belligerent occupation effected with or without resorting to war (e.g. Austria and parts of Czechoslovakia in 1938 and 1939); or (b) the population of other States not under occupation, in which armed forces of one belligerent were stationed (e.g. German forces in Italy), or of countries adjacent to a given belligerent (e.g. persons who were subjected to kidnapping or other violence); or (c) the population of a belligerent itself (e.g. German or Italian nationals of the same or different race in their relation to the respective State authorities or other national bodies).

From the words "civilian population" it appears that the term "crimes against humanity" is restricted to inhumane acts committed against civilian populations as distinct from members of the armed forces, which are outside the scope of the provision.

The word "population" appears to indicate that a larger body of victims is visualized and that single or isolated acts committed against individuals may be held to fall outside the scope of the concept of crimes against humanity.

A violation of a certain human right protected by Article 6 (c) may or may not simultaneously constitute a violation of the laws and customs of war and therefore a war crime sensu stricto, coming under Article 6 (b). This results from the fact that the terms "crimes against humanity" and "war crimes" as has already been indicated overlap to a certain extent. We shall see later in more detail how this particular problem has been dealt with by the Prosecution in the Indictment and by the Tribunal in its Judgment. Here, it will be sufficient to point out the following.

The provision dealing with war crimes (Article 6 (b)) expressly states that its enumeration of specific criminal acts is not exhaustive. No such statement is to be found in Article 6 (c). The wide scope of the term "other inhumane acts" indicates, however, that the enumeration in Article 6 (c) is also not exhaustive, at least so far as the substance is concerned.

There are two types of crimes against humanity: crimes of the "murder-type", namely, murder, extermination, enslavement, deportation, and other inhumane acts; and "persecutions". With regard to the latter the provision requires that they must have been

/committed

committed on political, racial or religious grounds.

The acts of the "murder-type" enumerated in Article 6 (c) as crimes against humanity are similar to, but not identical with, those which are mentioned as war crimes in Article 6 (b).

Murder is included both in the list contained in Article 6 (b) and (c). Extermination, mentioned only in Article 6 (c) is apparently to be interpreted as murder on a large scale (mass murder). The inclusion of "extermination" in addition to "murder" may be taken to indicate that taking part in framing a policy of extermination and/or other activities in its implementation not directly connected with actual criminal acts of murder, may be punishable as complicity in the crime of extermination.

Whether there is a difference between "deportation to slave labour or for other purposes" as mentioned under (b), and the two separate items "enslavement" and "deportation" mentioned under (c) is difficult to decide at this stage. "Ill-treatment" which is contained in sub-paragraph (b), has been omitted in sub-paragraph (c). Whether or not this particular crime falls under "other inhumane acts" depends on the general interpretation of the latter expression.

Finally, the third principle that it is irrelevant whether an offence alleged to be a crime against humanity was or was not committed in violation of the domestic law of the country where it was perpetrated, means that it is no defence that the act alleged to be a crime against humanity was legal under the domestic law of that country. The exclusion of this plea is closely connected with the provisions of Article 8 of the Charter regarding the defence of superior orders.

We come now to the question of the attitude of the Tribunal to the law relating to crimes against humanity.

As already indicated, the Tribunal stated that it is bound by the Charter in the definition which it gives of crimes against humanity.* The general considerations of the Tribunal on the law as to crimes against humanity are contained in the following statement:

> "With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and

---

* The Judgment, p. 64.

cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression and murder of civilians in Germany, before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt. To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of or in connection with, the aggressive war, and therefore constituted crimes against humanity."*

From the above statement it follows that the Nürnberg Tribunal proceeded on the basis of the Berlin Protocol and applied the qualification "in execution of or in connection with any crime within the jurisdiction of the Tribunal" to the whole provision. i.e. both to crimes of the murder type and to persecutions, with the consequences already indicated at the outset of this section.

As will be seen in a separate part of the Report, this statement does not imply that no crime committed before 1st September, 1939, can be considered as a crime against humanity. Some crimes committed prior to 1st September, 1939, have been recognized by the Tribunal as constituting crimes against humanity, i.e. in cases where their connection with the crime against peace was established.

On the other hand, in cases where the inhumane acts charged in the Indictment were committed after the beginning of the war and did not constitute war crimes, their connection with the war was presumed

---

* The Judgment, p. 65.

by the Tribunal, and they were therefore considered as crimes against humanity.

Although in theory it remains irrelevant whether a crime against humanity was committed before or during the war, in practice it is difficult to establish a connection between what is alleged to be a crime against humanity, and a crime within the jurisdiction of the Tribunal, if the act was committed before the war.

(c) Crimes against peace

It has already been pointed out that this particular type of crime, as such, is outside the scope of the Report. However, crimes against peace have some definite bearing upon violations of human rights, and for this reason it seems necessary to record here the views of the Tribunal on this point.

When dealing with the question of "the common plan or conspiracy and the aggressive war", the Tribunal declared:

> "The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world.
>
> "To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.
>
> "The first acts of aggression referred to in the Indictment are the seizure of Austria and Czechoslovakia and the first war of aggression charged in the Indictment is the war against Poland begun on the 1st September, 1939."*

Later in the Judgment the Tribunal accepted the contention of the Prosecution as to the aggressive character of the seizure of Austria and Czechoslovakia,** and made the following statement in regard to the war against Poland:

> "The Tribunal is fully satisfied by the evidence that the war initiated by Germany against Poland on the 1st September, 1939, was most plainly an aggressive war, which was to develop in due course into a war which embraced almost the whole world, and resulted in the commission of countless crimes, both against the laws and customs of war, and against humanity."***

---

* The Judgment, p. 13.
** Ibid., pp. 19-22.
*** Ibid., p. 27.

/It will

It will be observed that in making the above statments the Tribunal touched upon the general effect which tho waging of a war of aggression has on violations of human rights. Taking inter alia these consequences into account, the Tribunal thought it justifiable and of primary importance to declare the initiation and waging of wars of aggression as a supreme war crime. This should be construed as meaning a supreme war crime in a wider sense thereby constituting also in a general non-technical sense a supreme crime against humanity.

The question of violations of human rights perpetrated as part of the planning, preparation or conspiracy to wage wars of aggression will be presented in a separate part of the Report.*

(d) Conspiracy to commit war crimes and crimes against humanity

It remains to say a few words on the question of conspiracy, i.e. the doctrine under which it is a criminal offence to conspire or to take part in an alliance to achieve an unlawful object, or to achieve a lawful object by unlawful means. The Charter in its Article 6 (a) provides that "conspiracy" to commit crimes against peace is punishable, but contains no such express provision in regard to a "conspiracy" to commit war crimes or crimes against humanity.

Consequently, the International Military Tribunal in its Judgment allowed only a very limited scope to this doctrine and held that, under the Charter, a conspiracy to commit crimes against peace is punishable, and it convicted some of the defendants on that basis; but it declined to punish conspiracies of the other two types as substantive offences, distinct from any war crime or crime against humanity, and expressed the opinion that the provisions contained in the last paragraph of Article 6 does not define, or add as a new and separate crime, any conspiracy except the one to commit acts of aggressive war. In the opinion of the Tribunal the above provision is only designed to establish the responsibility of persons participating in a common plan, and for these reasons the Tribunal decided to disregard the charges of conspiracy to commit war crimes and crimes against humanity.**

---

* See Part II, Chapter I.

** The Judgment, p. 44.

II. JURISDICTION OVER PERSONS

(From Article 6) "Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

(Article 7) "The official position of the defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."

(Article 8) "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

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

(Article 10) "In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned."

As already stated the Nürnberg Tribunal was invested by the Charter with power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the crimes enumerated in Article 6 under (a), (b) and (c).

In accordance with the purpose for which the Tribunal was established the scope of the individuals over which the Tribunal had to exercise its jurisdiction was limited to the major war criminals. This is evident from Articles 1 and 6 of the Charter, which, however, do not contain any definition or explanation as to who should be regarded as a major war criminal. The only indication in this respect is provided by the Moscow Declaration of the 30th October, 1943, according to which major war criminals are those whose offences have no "particular geographical location".

/Exactly

Exactly the same description is used in paragraph 3 of the Preamble and in Article 1 of the London Agreement of 8th August, 1945, which have thus left open to the discretion of the signatory Powers the question which persons should be included in this category of war criminals. In the Indictment lodged with the Tribunal* a total of 24 persons were charged at Nürnberg, who, in accordance with Article 14 (b) of the Charter had been designated as major war criminals** by the Committee of the Chief Prosecutors of the Signatory Powers.

The opening sentence of paragraph 2 of Article 6 lays down the rule that for acts enumerated in that article as constituting crimes against peace, war crimes and crimes against humanity, there shall be individual responsibility.

On this question the Defence submitted that International Law is concerned with the actions of sovereign states, and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. Both these submissions were rejected by the Tribunal, which expressed the opinion that the principle that International Law imposes duties and liabilities upon individuals as well as upon States has long been recognized. In this connection the Tribunal recalled in its Judgment the recent case of Ex Parte Quirin (1942, 317 US I), before the Supreme Court of the United States, in which persons were charged, during the war, with landing in the United States for purposes of spying and sabotage. In this case the late Chief Justice Stone, speaking for the Court, said that from the

* Indictment presented to the International Military Tribunal sitting at Berlin on 18th October, 1945, etc. H.M.S.O. Cmd. 6696. (herein after cited as Indictment)

** The names of the 24 defendants are as follows:
Herman Wilhelm GÖRING, Rudolf HESS, Joachim von RIBBENTROP, Robert LEY, Wilhelm KEITEL, Ernst KALTENBRUNNER, Alfred ROSENBERG, Hans FRANK, Wilhelm FRICK, Julius STREICHER, Walter FUNK. Hjalmar SCHACHT, Gustav KRUPP von BOHLEN und HALBACH, Karl DÖNITZ, Erich RAEDER, Baldur von SCHIRACH, Fritz SAUCKEL, Alfred JODL, Martin BORMANN, Franz von PAPEN, Artur SEYSS-INQUART, Albert SPEER, Constantin von NEURATH and Hans FRITZSCHE.

All individual defendants named in the Indictment appeared before the Tribunal except: Robert LEY, who committed suicide 25 October 1945; Gustav KRUPP von Bohlen und Halbach, owing to serious illness; and Martin BORMANN, who was not in custody and whom the Tribunal decided to try in absentia.

In the latter case the Tribunal evidently found it necessary, in the interests of justice, to conduct the hearing in his absence, thus availing itself of the right accorded to it by Article 12 of the Charter.

/very beginning

very beginning of its history that Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals. Chief Justice Stone went on to give a list of cases tried by the Courts, where individual offenders were charged with offences against the laws of nations, and particularly the laws of war. Many other authorities on this matter could have been cited, but the Tribunal was satisfied that there is sufficient evidence to show that individuals can be punished for violations of International Law. After recalling the provisions of Article 228 of the Treaty of Versailles as illustrating and enforcing the view of individual responsibility, the Tribunal concluded with the argument that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."*

The scope of individuals liable to prosecution is further determined by the last paragraph of Article 6 of the Charter, which provides that leaders, organizers, instigators and accomplices, participating in the formulation or execution of a common plan or conspiracy to commit any of the crimes enumerated in that Article under (a), (b) and (c) are responsible for all acts performed by any persons in execution of such plan. From this provision, which stipulates the vicarious liability of leaders, organizers, etc., it appears that they are also responsible for acts committed by third persons. Nothing is said in this provision about the responsibility of the actual perpetrators, but it seems to be implied that they also are criminally responsible, though the Charter itself, in general, and this provision, in particular, deals only with persons responsible on a high level. This is borne out by the Control Council Law No. 10, which was promulgated to give effect, inter alia, to the London Agreement of 8 August 1945.

There is also nothing said in the Charter as to what degree of connection with a crime must be established in order to attribute to a defendant, judicial guilt, in other words what degree of responsibility attaches to principals, accessories and accomplices. Nor does the Charter say anything on the very important question of attempts to commit war crimes and crimes against humanity, namely, whether or not an attempt to commit an international crime coming within the notion of those crimes is in itself a crime.** All these questions, in respect of which the International Penal Law is itself most unsettled, have been left open by the Charter.

* The Judgment, page 41.

** The position in regard to crimes against peace is different as the "planning or preparation" of an aggressive war is treated as a crime in itself (Article 6 (a) of the Charter).

/In one

In one respect only has the degree of individual responsibility for the crimes coming within the jurisdiction of the Tribunal been defined by the Charter in Article 7, which states that the official position of the defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considerd as freeing them from responsibility or mitigating punishment.

On this particular question, and in further elaboration of its argument as to individual responsibility, the Tribunal expressed the view that the principle of International Law, which under certain circumstances protects the representatives of a state, cannot be applied to acts which are condemned as criminal by International Law, and that the authors of such acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. As the very essence of the Charter is that individuals in general, and the representatives of a state in particular "have international duties which transcend the national obligations of obedience imposed by the individual State", the Tribunal took the view that he who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside it competence under International Law.*

It may be of interest in this connection to quote some remarks made by Lord Wright in commenting on this particular subject:

> "The Judgment accordingly is proceeding on the basis of the Community of Nations and on the nature of international law as the law not of one nation but of all, which transcends the law of the particular individual, and the obedience which he owes to his state. The fact that the individual is obeying the national law is no defence if he is charged before the competent Court for violation of international law. He is thus subject to a double set of laws which in certain cases may conflict. He has a divided duty. There is nothing peculiar or unusual in this. In every Federal state the citizen owes obedience to the Federal Law and also to the State or Provincial law, and may be punished if he violates either by the appropriate authority. Federal constitutions generally provide for the dominance of one system of law over the other if they conflict, but generally the areas of each are sufficiently distinct.

---

* The Judgment, page 42.

A British soldier remains subject to his country's laws though he is also subject to Military Law as being a solider. In the international penal code a man may be held guilty of violating the code though what he does is justified under the National Law. The principle there is similar to what is often referred to as the defence of superior orders."*

According to the established principles of International Law, the fact that rules of warfare have been violated in pursuance of orders of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle confer upon the perpetrator immunity from punishment by the injured belligerent. This view is governed by the major principle that members of the armed forces or other authorities are bound to obey lawful orders only, and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general principles of humanity.**

Accordingly, Article 8 of the Charter lays down the rule that the fact that the defendent acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires. It may be pointed out that this rule applies to all acts coming within the notions of crimes against peace, war crimes and crimes against humanity.

On behalf of most of the defendants it was submitted that in doing what they did they were acting under the orders of Hitler, and therefore could not be held responsible for the acts committed by them in carrying out these orders. When dealing with this submission the Tribunal stated that it considered the provisions of Article 8 to be in conformity with the law of all nations. The Tribunal added that the true test, which is found in varying degrees in the criminal law of most nations, is not the existance of the order, but whether moral choice was in fact possible.***

---

* See Lord Wright's article on "Nürnberg", recently written for "Obiter Dicta", Canadian Law Journal.

** See L. Oppenheim, l. cit.

*** The Judgment, page 42.

/Finally, there

Finally, there remains the question of groups and organizations of which the individual defendants were members.

Article 9 of the Charter provided that at the trial of any individual member of any group or organization the Tribunal may declare that the group or organization of which the individual was a member was a criminal organization. Such a declaration might have been made by the Tribunal in connection with any act of which an individual defendant may have been convicted.

According to Article 10 of the Charter, in cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory has the right to bring individuals to trial for membership of such bodies before national, military or occupation courts. In any such case the criminal nature of the group or organization is to be considered as proved and shall not be questioned.

The above provision makes it clear that the declaration of criminality against an accused organization is final, and cannot be challenged in any subsequent criminal proceeding against individual members. The effect of such a declaration is well illustrated by Law No. 10 of the Control Council of Germany, which provides that a member of such an organization may be punished for the crime of membership even by death.

As regards the general attitude of the Tribunal in this respect, it should be mentioned that the Tribunal considered these provisions as a far-reaching and novel procedure, the application of which, unless properly safeguarded, might produce great injustice.* The question how the law of the Charter was applied by the Tribunal to the organizations alleged by the Indictment to be criminal would, however, require special attention.

C. VIOLATIONS OF THE RIGHTS OF THE VICTIMS OF WAR CRIMES

Introductory

In the preceding Section it has been pointed out that, without exception, all the crimes specifically enumerated in Article 6 of the Charter as war crimes and crimes against humanity, are crimes which constitute violations of the integrity or the physical well-being of

---

* The Judgment, page 66.

individuals or groups of people, or of property, thus violating inherent human rights. It has also been emphasized that these violations are not the only ones which the authors of the Charter had in mind and with which the Tribunal was expected to be concerned in the Trial.

For this reason, and also because the Tribunal, in laying down what inhumane acts had been committed, referred in its Judgment directly to the Indictment,* it is necessary to examine this document more closely since it throws considerable light on the way in which Article 6 (a) and (b) of the Charter was interpreted by the Prosecution. Taking into account the purpose for which the present collection of material is intended, and the fact that it could not deal indiscriminately with all common crimes and outrages such as murder, ill-treatment and the like, committed against innocent people and without any justification or necessity, it is proposed to limit this investigation to points and problems of particular interest to the question of insufficiency of, or lacunae in, the existing laws and usages of war and in other provisions of international law which purport to afford protection against violations of human rights. However, in order to give a comprehensive picture of the human rights that have been violated during the war, it is proposed to review generally, at the same time, the various crimes or groups of crimes as they were presented in the Indictment, and to indicate the reactions of the Tribunal in regard to them.

In its Judgment, the Tribunal stated that the evidence relating to war crimes and crimes against humanity had been so overwhelming, both as regards volume and detail, as to render it impossible for the Judgment adequately to review it, or to record the mass of documentary and oral evidence that had been presented. Accordingly, the Tribunal dealt only quite generally with these crimes** and did not follow the order of charges or the grouping of crimes as presented in the Indictment. The following survey is based on that part of the Judgment which deals with war crimes and crimes against humanity generally, without taking into account the findings of the Tribunal in relation to the individual defendants.

For the reasons stated in the preceding paragraphs, and also because it was found technically impossible to examine the voluminous transcripts of the proceedings, this survey is intended to serve merely as an introduction to the subject.

---

* The Judgment, page 65.

** The Judgment, pages 44 and 45.

I. General Observations

Under Count Three of the Indictment,* in a statement of a general nature, the defendants were charged with war crimes in the traditional sense of this term, i.e. with violations of the laws and customs of war, committed between 1 September 1939, and 8 May 1945, in Germany and in all those countries and territories occupied by the German armed forces since 1 September 1939. In addition, they were charged with such crimes committed during the period stated above in Austria, Czechoslovakia, Italy, and on the High Seas. The Indictment stated that all the defendants, "acting in concert with others, formulated and executed a common plan or conspiracy to commit war crimes as defined in Article 6 (b) of the Charter .... The said war crimes were committed by the defendants and by other persons for whose acts the defendants are responsible .... as such other persons when committing the said war crimes performed their acts in execution of a common plan and conspiracy to commit the said war crimes...."**

The particular crimes preferred in the Indictment resulted from the practice of "total war" as regards methods of combat and military occupation applied in direct conflict with the laws and customs of war, and perpetrated in violation of the rights of combatants, of prisoners of war, and of the civilian population of occupied territories. The Indictment stated that these methods and crimes constituted violations of international conventions, of internal penal laws and of the general principles of criminal law as derived from the criminal law of all civilized nations, and were involved in, and part of, a systematic course of conduct.

The apparently criminal character of the conception and practice of "total war", as waged by Nazi Germany, was described by the Tribunal in the following statement: "For in this conception of 'total war', the moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity. Everything is made subordinate to the overmastering dictates of war. Rules, regulations, assurances and treaties all alike are of no moment; and so, freed from the restraining influence of international law, the aggressive war is conducted by the Nazi leaders in the most barbarous way. Accordingly, war crimes were committed when and wherever the Führer and his close associates thought them to be advantageous. They were for the most part

---

* The Indictment presented to the International Military Tribunal on 18 October 1945.

** The Indictment, page 13.

the result of cold and criminal calculation".*

The ideas of Nazi Germany, which were contrary to the established principles of all civilized nations, sprang directly from what one of the prosecutors called a crime against the spirit, meaning thereby a doctrine which, "denying all spiritual, rational and moral values by which the nations have tried, for thousands of year, to improve human conditions, aims to plunge humanity back into barbarism, no longer the natural and spontaneous barbarism of primitive nations, but a diabolical barbarism, conscious of itself and utilizing for its ends all material means put at the disposal of mankind by contemporary science"**

In a statement of a summary nature, the Tribunal said the following: "Prisoners of war were ill-treated and tortured and murdered, not only in defiance of the well-established rules of international law, but in complete disregard of the elementary dictates of humanity. Civilian populations in occupied territories suffered the same fate. Whole populations were deported to Germany for the purposes of slave labour upon defence works, armament production and similar tasks connected with the war effort. Hostages were taken in very large numbers from the civilian populations in all the occupied countries, and were shot as suited the German purposes. Public and private property was systematically plundered and pillaged in order to enlarge the resources of Germany at the expense of the rest of Europe. Cities and towns and villages were wantonly destroyed without military justification or necessity".***

With reference to the planning of these violations, the Tribunal found that on some occasions, war crimes were deliberately planned long in advance. This was the case, for instance, in the ill-treatment of civilians and the plunder of the Soviet territories, which were settled in minute detail before the actual attack began. Similarly, the exploitation of the inhabitants for slave labour was planned and organized to the last detail. In other cases, such as the murder of prisoners of war, of Commandos and captured airmen, such crimes were the result of direct orders issued on the highest level.

We will now examine the various types of violations of the rights of persons and groups of people in the light of the Indictment, the Judgment, and the existing provisions of International Law.

---

* The Judgment, page 44

** See: Opening Speech by M. François de Menthon, published in "The Trial of German Major War Criminals", Opening Speeches of the Chief Prosecutors, H.M. Stationery Office, London, 1946, page 93.

*** The Judgment, page 45.

II. Murder and ill-treatment of civilians

It is stated in the Indictment that throughout the period of the occupation of territories overrun by their armed forces the defendants, for the purpose of systematically terrorizing the inhabitants, murdered and tortured civilians, ill-treated them and imprisoned them without legal process. These murders and ill-treatment were carried out by divers means and methods which are fully set forth in the charge.

In respect of these atrocities the Indictment says that they were contrary to International Conventions, in particular to Article 46 of the Hague Regulations, 1907, to the laws and customs of war, to the general principles of criminal law as derived from the criminal laws of all civilized nations, to the internal penal laws of the countries in which such crimes were committed, and to Article 6 (b) of the Charter.

1. Genocide

Among the many and various types of murder and ill-treatment enumerated in the Indictment, there is one which is of particular interest. It is stated therein that the defendants "conducted deliberate and systematic genocide, viz. the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups, particularly Jews, Poles and Gypsies and others."* By inclusion of this specific charge the Prosecution attempted to introduce and to establish a new type of international crime.

The word "genocide" is a new term coined by Professor Lemkin to denote a new conception, namely, the destruction of a nation or of an ethnic group. Genocide is directed against a national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group. According to Lemkin** genocide does not necessarily mean the immediate destruction of a nation or of a national group except when accomplished by mass killings of all its members. It is intended rather to signify a co-ordinated plan of different actions aiming at the destruction of the essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.

---

* The Indictment, page 14.

** See R. Lemkin, Axis Rule in Occupied Europe, Carnegie Endowment for International Peace, Division of International Law, Washington, 1944, pages 79-95.

Genocide has two phases: one, the destruction of the national pattern of the oppressed group, for which the word "denationalization" was used in the past; the other, the imposition of the national pattern of the oppressor. Lemkin believes, however, that the conception of denationalization is inadequate because: (a) it does not connote the destruction of the biological structure; (b) in connoting the destruction of one national pattern, it does not connote the imposition of the national pattern of the oppressor; and (c) denationalization is often used to mean only deprivation of citizenship.

It will be observed that the Prosecution, when preferring against the defendants the charge of genocide, adopted this term and conception in a restricted sense only, namely, in their direct and biological connotation. This is evident not only from the definition of genocide as stated in the Indictment and from the inclusion of this charge under the general count of murder and ill-treatment, but also from the fact that all other aspects and elements of the defendants' activities aiming at the denationalization of the inhabitants of occupied territories were made the subject of a separate charge which, under (J) of Count Three, is described as germanization of occupied territories.

When dealing with the substance of the charge of genocide the Tribunal declared: "The murder and ill-treatment of civilian populations reached its height in the treatment of the citizens of the Soviet Union and Poland. Some four weeks before the invasion of Russia began, special task forces of the SIPO and SD, called Einsatz Groups, were formed on the orders of Himmler for the purpose of following the German armies into Russia, combating partisans and members of Resistance Groups, and exterminating the Jews and Communist leaders and other sections of the population" ....and further down: "The foregoing crimes against the civilian population are sufficiently appalling, and yet the evidence shows that at any rate in the East, the mass murders and cruelties were not committed solely for the purpose of stamping out opposition or resistance to the Germany occupying forces. In Poland and the Soviet Union these crimes were part of a plan to get rid of whole native populations by expulsion and annihilation, in order that their territory could be used for colonization by Germans."* Then the Tribunal referred very briefly to the policy and practice of exterminating the intelligentsia in Poland and Czechoslovakia, and to the problem of race which had been given first consideration by the Germans in their treatment of the civilian populations of or in occupied territories.

---

* The Judgment, pages 50-52.

In a separate chapter of the Judgment the Tribunal devoted special attention to the persecution and extermination of Jews. It stated that the persecution of the Jews at the hands of the Nazi Government had been proved in the greatest detail before the Tribunal and forms a record of consistent and systematic inhumanity on the greatest scale.* The Tribunal then recalled the anti-Jewish policy as formulated in Point 4 of the Party Programme and examined, in great detail, acts committed long before the outbreak of war. After referring to a German Foreign Office circular of 25 January 1939, entitled "Jewish question as a factor in German Foreign Policy in the year 1938", the Tribunal stated: "The Nazi persecution of Jews in Germany before the war, severe and repressive as it was, cannot compare, however, with the policy pursued during the war in the occupied territories. Originally the policy was similar to that which had been in force inside Germany. Jews were required to register, and forced to live in ghettoes, to wear the yellow star, and were used as slave labourers. In the summer of 1941, however, plans were made for the "final solution" of the Jewish question in all of Europe. This "final solution" meant the extermination of the Jews, which early in 1939 Hitler had threatened would be one of the consequences of an outbreak of war, and a special section in the Gestapo under Adolf Eichmann, as head of Section B4 of the Gestapo, was formed to carry out the policy.

"The plan for exterminating the Jews was developed shortly after the attack on the Soviet Union. Einsatzgruppen of the Security Police and SD, formed for the purpose of breaking the resistence of the population of the areas lying behind the German armies in the East, were given the duty of exterminating the Jews in those areas. The effectiveness of the work of the Einsatzgruppen is shown by the fact that in February, 1942, Heydrich was able to report that Estonia had already been cleared of Jews and that in Riga the number of Jews had been reduced from 29,500 to 2,500. Altogether the Einsatzgruppen operating in the occupied Baltic States killed over 135,000 Jews in three months....

"Units of the Security Police and SD in the occupied territories of the East, which were under civil administration, were given a similar task. The planned and systematic character of the Jewish persecutions is best illustrated by the original report of the SS. Brigidier-General Stroop, who was in charge of the destruction of the ghetto in Warsaw, which took place in 1943. The Tribunal received in evidence that report illustrated with photographs, bearing on its title page: 'The Jewish Ghetto in Warsaw no longer exists'."**

---

* The Judgment, p. 60.

** The Judgment, p. 62.

/After describing

After describing other atrocities against Jews which were all part and parcel of the policy inaugurated in 1941, and the gathering of Jews from all German-occupied Europe in concentration camps, which was another method of the "final solution",* the Tribunal finally stated: "Special groups travelled through Europe to find Jews and subject them to the "final solution". German missions were sent to such satellite countries as Hungary and Bulgaria, to arrange for the shipment of Jews to extermination camps, and it is known that by the end of 1944, 400,000 Jews from Hungary had been murdered at Auschwitz. Evidence has also been given of the evacuation of 110,000 Jews from a part of Roumania for 'liquidation'. Adolf Eichmann, who had been put in charge of this programme by Hitler, has estimated that the policy pursued resulted in the killing of 6,000,000 Jews, of whom 4,000,000 were killed in the extermination institutions".**

It will be observed that in these statements the Tribunal did not make any reference to the term and conception of genocide, within which acts like those referred to above are comprised. However, the findings of the Tribunal have not been without influence on the subsequent events in the sphere of the progressive development of International Law. On 11 December 1946, the General Assembly of the United Nations adopted a special Resolution on Genocide, the main part of which reads as follows:

"1. Whereas, genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings, and such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations;

"2. Whereas, many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part;

"3. And whereas, the punishment of the crime of genocide is a matter of international concern;

"The General Assembly

Affirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices, whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds, are punishable".***

---

* The Judgment, p. 63.

** The Judgment, p. 64.

*** Quoted from the "Weekly Bulletin" of the United Nations, Vol. 1., No. 20, of 17 December 1946.

Following the recommendations contained in the above Resolution, this new type of international crime has already been the subject of advanced study and consideration by the appropriate organs of the United Nations with a view to arriving at an international convention for the prevention and punishment of the crime of genocide.

2. Killing of "useless eaters"

In the part of the Judgment which deals with the slave labour policy, the Tribunal referred to the killing of insane and incurable people, in the following statement: "Reference should also be made to the policy which was in existence in Germany by the summer of 1940, under which all aged, insane, and incurable people, "useless eaters", were transferred to special institutions where they were killed, and their relatives informed that they had died from natural causes. The victims were not confined to German citizens, but included foreign labourers, who were no longer able to work, and were therefore useless to the German war machine. It has been estimated that at least some 275,000 people were killed in this manner in nursing homes, hospitals and asylums, which were under the jurisdiction of the defendant Frick, in his capacity as Minister of the Interior. How many foreign workers were included in this total it has been quite impossible to determine". *

It will be noted that the Tribunal was careful to point out that the victims included foreign labourers and were not confined to German citizens. Actually, most of the people killed in this manner were German citizens, a fact which brings these crimes predominantly within the notion of crimes against humanity. However, this new type of violation of the individual's right to live, so far as the persons killed were foreign workers, was considered by the Tribunal as a war crime.

3. Medical experiments

Mention should be made of acts which may be described as medical experiments. It is stated in the Indictment that the murders and ill-treatment of civilian populations were carried out, among other means, by the performance of experiments, by operations and otherwise, on living human beings. These pseudo-scientific experiments, which had also been used as methods of extermination in concentration camps, included sterilization of women, study of the evolution of cancer of the womb, and of typhus, anatomical research, heart injections, bone grafting and muscular excisions. Experiments on children had also been conducted. These experiments had been performed in concentration camps in Germany and in

* The Judgment, p. 60.

occupied territories (Ravensbruck, Buchenwald, Natzweiller and Auschwitz).*

When dealing with crimes committed in concentration camps the Tribunal did not refer to this particular charge and did not mention the experiments.

III. Murder and ill-treatment of prisoners of war, and of other members of the armed forces

It is stated in the Indictment that the defendants murdered and ill-treated prisoners of war by denying them adequate food, shelter, clothing and medical care and attention; by forcing them to labour in inhumane conditions; by torturing them and subjecting them to inhuman indignities and by killing them. Prisoners of war were imprisoned in various concentration camps, where they were killed and subjected to inhuman treatment by various methods. Members of the armed forces of the countries with which Germany was at war were frequently murdered while in the act of surrendering.

The Prosecution alleged that all these murders and ill-treatment were contrary to International Conventions, particularly Articles 4, 5, 6 and 7 of the Hague Regulations, 1907, and to Articles 2, 3, 4 and 6 of the Prisoners of War Convention (Geneva 1929), the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed and to Article 6 (b) of the Charter.**

In a general observation the Tribunal established that prisoners of war were ill-treated and tortured and murdered, not only in defiance of the well-established rules of international law, but in complete disregard of the elementary dictates of humanity. The Tribunal said further, in some detail, that many and various violations of the rights of prisoners of war and of other members of the allied armed forces were committed in the course of the war, often as a matter of deliberate and calculated policy. Particular reference is made to the handing over to the SIPO and SD for execution of recaptured prisoners, and to systematic killing by the civilian population of allied airmen who were forced to land in Germany.

1. Killing of "Commandos"

The Tribunal referred at some length to a directive circulated, with the authorization of Hitler, by the defendant Keitel on 18 October 1942, which ordered that all members of Allied "Commando" units, often when in uniform and whether armed or not, were to be "slaughtered to the last man",

---

* The Indictment, p. 14, 15 and 18.

** The Indictment, p. 20-21.

/even if they

even if they attempted to surrender. This order further provided that if such Allied troops came into the hands of the military authorities after being first captured by the local police, or in any other way, they should be handed over immediately to the SD. This order was supplemented from time to time, and was effective throughout the remainder of the war, although after the Allied landings in Normandy in 1944, it was made clear that the order did not apply to "Commandos", captured within the immediate battle area.

The Tribunal established that under the provisions of this order, Allied "Commando" troops, and other military units operating independently, lost their lives in Norway, France, Czechoslovakia and Italy. Many of them were killed on the spot, and in no case were those who were executed later in concentration camps ever given a trial of any kind. For example, an American military mission which landed behind the German front in the Balkans in January 1945, numbering about twelve to fifteen men and wearing uniform, were taken to Mauthausen under the authority of this order, and all of them were shot.*

2. Application of the law to Soviet victims

The Tribunal devoted much attention to the treatment of Soviet prisoners of war which was characterized by particular inhumanity, due not merely to the action of individual guards, or the exigencies of life in the camps, but the result of systematic plans made some time before the German invasion started.

With regard to the murder and ill-treatment allegedly committed against Soviet prisoners of war, the Defence submitted that the Union of Soviet Socialist Republics was not a party to the Geneva Convention, which therefore was not binding in the relationship between Germany and the Union of Soviet Socialist Republics. This argument, which correctly stated the legal position, was however discarded by the Tribunal. The latter took the view that in this case the principles of general international law on the treatment of prisoners of war apply. Since the eighteenth century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war.**

In making the above statement the Tribunal did not refer to any particular provisions of general international law. It is, however, clear that the provisions which the Tribunal had in mind, and on the basis of which it convicted some of the defendants for offences of this kind, are those

---

* The Judgment, page 45.

** The Judgment, page 48.

/contained

contained in Articles 4-20 of the Hague Regulations to which both Germany and Russia were parties. All these provisions, which contain quite exhaustive rules regarding captivity of prisoners of war, were in fact incorporated in the Geneva Convention, 1929, with the exception of Articles 10-12 relating to release of prisoners on parole.

IV. Taking and Killing of Hostages

The general statement regarding the practice of taking and killing hostages as contained in the Indictment, reads as follows: "Throughout the territories occupied by the German armed forces in the course of waging aggressive wars, the defendants adopted and put into effect, on a wide scale, the practice of taking, and of killing, hostages from the civilian population. These acts were contrary to International Conventions, particularly Article 50 of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed and to Article 6 (b) of the Charter".*

From the wording of this charge, in particular from the words "of taking, and of killing", and "these acts", it would appear prima facie as if the Prosecution was attempting to establish that not only the killing, but also the taking of hostages should be considered as criminal under International Law. Such a contention, if intended, would have had some justification in view of the well-established fact that during the second World War the Germans resorted to the practice of taking hostages, not only on a wide scale, but also to a large extent indiscriminately, for the purpose of terrorizing the population in occupied territories - a practice which far exceeded the legitimate right of the belligerent to prevent hostile acts. Yet any deduction that such was the intention of the Prosecution is weakened by the fact that the text of the above charge, as well as all actual facts and figures enumerated in the Indictment respecting these acts, appear under the heading "Killing of hostages", and all instances cited refer only to the executions and shootings of hostages.

In contradistinction to the practice of taking hostages as a means of securing legitimate warfare, which prevailed in former times, the modern practice of taking hostages is resorted to by the belligerents for the purpose of securing the safety of the armed forces or of the occupation

---

* The Indictment, page 22.

/authorities

authorities against possible hostile acts by the inhabitants of occupied territory. Persons from among the population of such territories are seized and detained, in the expectation that the population will refrain from hostile acts out of regard for the fate of the hostages. It cannot be denied that this measure is a harsh one, as it makes individuals liable to suffer imprisonment for acts for which they are not responsible. But the security of the troops and of the occupation authorities and the safety of military installations etc. seems hitherto to have been held to justify this measure and practice. In fact, there is no rule in International Law preventing a belligerent from resorting to the practice, provided that hostages are not exposed to dangers for the purpose of preventing legitimate hostilities on the part of members of the armed forces of the enemy.

During the first World War, however, Germany adopted the reprehensible practice of shooting hostages in the territories occupied by her armies, whenever she believed that civilians had fired upon German troops. During the second World War Germany followed the practice of the mass shooting of hostages on such an unprecedented scale as to bring it prominently within the category of war crimes. Accordingly, Article 6 (b) of the Charter provides that "killing of hostages" shall be a war crime.

The Tribunal established in its Judgment that "hostages were taken in very large numbers from the civilian populations in all the occupied countries, and were shot as suited the German purposes".* The Tribunal further stated: "The practice of keeping hostages to prevent and to punish any form of civil disorder was resorted to by the Germans; an order issued by the defendant Keitel on 16 September 1941, spoke in terms of fifty or a hundred lives from the occupied areas of the Soviet Union for one German life taken. The order stated that 'it should be remembered that a human life in unsettled countries frequently counts for nothing, and a deterrent effect can be obtained only by unusual severity'. The exact number of persons killed as a result of this policy is not known, but large numbers were killed in France and the other occupied territories in the West, while in the East the slaughter was on an even more extensive scale".**

In making the above statement the Tribunal referred to Article 6 (b) of the Charter, the provisions of which, the Tribunal said, are merely declaratory of the existing laws of war as expressed in this particular connection by Article 46 of the Hague Regulations.*** Article 46 states that "Family honour and rights, the lives of persons and private property, as well as religious convictions and practices must be respected". Article 6 (b) speaks only of the killing of hostages.

---

* The Judgment, page 45. .
** The Judgment, page 49-50.
*** The Judgment, page 48.

It will be observed that the Prosecution took the view that the practice "of taking, and of killing, hostages" was contrary to Article 50 of the Hague Regulations, which states that "no collective penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which it cannot be regarded as collectively responsible."

The Tribunal did not make any reference to Article 50 in connection with the taking and killing of hostages. But, in its statement on the law relating to war crimes in general, the Tribunal mentioned this article among those provisions of International Law under which the crimes defined by Article 6 (b) of the Charter "were already recognized as war crimes".* It is not clear what particular acts the Tribunal had in mind in referring to Article 50, and it is doubtful whether the article could be applied to the case in question, as it deals with general penalties which might be inflicted upon a large body of the population and has hitherto not been regarded as preventing the occupant from taking hostages.** Thus, no clear guidance can be derived from the above statements of the Tribunal on the question whether the mere taking of hostages is to be regarded as criminal.

V. Slave Labour

Article 6 (b) of the Charter provides that the "ill-treatment or deportation to slave labour or for any other purpose, of civilian population of or in occupied territory" shall be a war crime.

The offences coming within the scope of this particular type of crime have been split in the Indictment into two separate groups under (B) and (H) of Count Three. The general statements in respect of these read as follows:

(B) DEPORTATION FOR SLAVE LABOUR AND FOR OTHER PURPOSES

"During the whole period of the occupation by Germany of both the Western and Eastern countries it was the policy of the German Government and of the German High Command to deport able bodied citizens from such occupied countries to Germany, and to other occupied countries for the purpose of slave labour upon defence works, in factories and in other tasks connected with the German war effort.

"In pursuance of such policy there were mass deportations from all the Western and Eastern countries for such purposes during the whole period of the occupation.

---

* The Judgment, page 64, and the Section of this Report dealing with the Jurisdiction of the Tribunal.

** L. Oppenheim, op. cit., page 346.

/"Such deportations

"Such deportations were contrary to International Conventions, in particular to Article 46 of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed and to Article 6 (b) of the Charter".*

(H) CONSCRIPTION OF CIVILIAN LABOUR

"Throughout the occupied territories the defendants conscripted and forced the inhabitants to labour and requisitioned their services for purposes other than meeting the needs of the armies of occupation and to an extent far out of proportion to the resources of the countries involved. All the civilians so conscripted were forced to work for the German war effort. Civilians were required to register and many of those who registered were forced to join the Todt Organization and the Speer Legion, both of which were semi-military organizations involving some military training.

"These acts violated Articles 46 and 52 of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed and Article 6 (b) of the Charter".**

Leaving aside the practice of deporting the civilian populations for slave labour or other purposes, which constitutes a clear contravention of Article 46, we will concentrate on Article 52 which is of primary importance, and to which the Tribunal referred in that part of the Judgment relating to forced labour by the inhabitants of occupied territories. This article reads as follows:

"Requisitions in kind and services shall not be demanded from local authorities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

"Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

"Contributions in kind shall as far as possible be paid for in ready money; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible".

---

* The Indictment, page 19.

** The Indictment, page 28.

/According to

According to these provisions, the occupation authorities may compulsorily employ the inhabitants on various works and compel them to render services necessary either for the administration of the country or for the needs of the army of occupation, always provided that the services are not demanded in order to supply the belligerents' general needs, and that they do not oblige the inhabitants to take part in military operations against their own country.

The interpretation of "taking part in military operations" has, however always been somewhat controversial. Many writers maintain that the words extend to the construction of bridges, fortifications, and the like, even behind the front. But the practice of belligerents as distinguished between military operations and military preparations, and has not condemned as inadmissible compulsion upon inhabitants to render assistance in the construction of military roads, fortifications, and the like behind the front, or in any other works in preparation for military operations. It is true that attempts have been made in the past to obtain the prohibition of requisitioning, or compulsion even in respect of such services as only involve taking part in military preparations. Thus the Russian draft put before the Conference of Brussels in 1874 proposed in Article 48 a stipulation to the effect that the population of an occupied territory might not be forced to take part in the military operations against their own country, or in such acts as are contributory to the realization of the aims of war detrimental to their own country. Similarly, the Institute of International Law in its Oxford Manual of the Laws of War on Land laid down the rule (Article 48, page 2) that an occupant must not compel inhabitants, either to take part in the military operations or to assist him in his works of attack or defence.* But the Brussels Conference struck out the proposed Russian text, the Hague Conferences did not adopt any of these rules, and Article 52 of the Hague Regulations prohibits the requisitioning only of such services as involve the taking part in military operations. Thus, all attempts to extend the prohibition to services which imply an obligation to take part in military preparations and the like have hitherto failed, with the result that during the first World War, not only the Germans in Belgium and France, but also the Russians in Galicia, compelled the inhabitants to construct fortifications and trenches in the rear. During the second World War Germany followed the practice of systematically forcing the inhabitants to labour and of requisitioning their services to an extent that was out of all proportion to the needs of the armies of occupation and on such a scale as to bring into the foreground the necessity of amending the

* L. Oppenheim, op. cit., page 345.

relevant provisions of the Hague Regulations.

As indicated, the Tribunal referred in the Judgment to Article 52 of the Hague Regulations as the law relating to the question under discussion, and stated that "the policy of the German occupation authorities was in flagrant violation of the terms of this Convention". This policy resulted in "forcing many of the inhabitants of the occupied territories to work for the German war effort, and in deporting at least 5,000,000 persons to Germany to serve German industry and agriculture", and "for the purposes of slave labour upon defence works, armament production and similar tasks connected with the war effort". The Tribunal further stated: "In the early stages of the war, man-power in the occupied territories was under the control of various occupation authorities, and the precedure varied from country to country. In all the occupied territories compulsory labour service was promptly instituted. Inhabitants of the occupied countries were conscripted and compelled to work in local occupations, to assist the German war economy. In many cases they were forced to work on German fortifications and military installations. As local supplies of raw materials and local industriel capecity became inadequate to meet the German requirements, the system of deporting labourers to Germany was put into force".*

It will be seen that the general observations of the Tribunal go far beyond the trend of earlier developments and the unsuccessful attempts at an extensive interpretation of Article 52 as outlined above. It would appear that, in the opinion of the Tribunal, not only is it inadmissible to compel the inhabitants to render assistance, falling within the notion of "military preparations" but it is also a criminal act to conscript and compel inhabitants to work in any occupation which might directly assist the enemy belligerents' "war effort" and "war economy".

VI. Plunder of Public and Private Property

The Indictment dealt with this type of war crimes in the following way: "The defendants ruthlessly exploited the people and the material resources of the countries they occupied, in order to strengthen the Nazi war machine, to depopulate and impoverish the rest of Europe, to enrich themselves and their adherents, and to promote German economic supremacy over Europe.

"The Defendants engaged in the following acts and practices, among others:

1. They degraded the standard of life of the people of occupied countries and caused starvation, by stripping occupied countries of foodstuffs for removal to Germany.

* The Judgment, page 57.

/2. They seized

2. They seized raw materials and industrial machinery in all of the occupied countries, removed them to Germany and used them in the interest of the German war effort and the German economy.

3. In all the occupied countries, in varying degrees, they confiscated businesses, plants and other property.

4. In an attempt to give colour of legality to illegal acquisitions of property, they forced owners of property to go through the forms of "voluntary" and "legal" transfers.

5. They established comprehensive controls over the economies of all of the occupied countries and directed their resources, their production and their labour in the interests of the German war economy, depriving the local populations of the products of essential industries.

6. By a variety of financial mechanisms, they despoiled all of the occupied countries of essential commodities and accumulated wealth, debased the local currency systems and disrupted the local economies. They financed extensive purchases in occupied countries through clearing arrangements by which they exacted loans from the occupied countries. They imposed occupation levies, exacted financial contributions, and issued occupation currency, far in excess of occupation costs. They used these excess funds to finance the purchase of business properties and supplies in the occupied countries.

7. They abrogated the rights of the local populations in the occupied portions of the Union of the Soviet Socialist Republics and in Poland and in other countries to develop or manage agricultural and industrial properties, and reserved this area for exclusive settlements, development, and ownership by Germans and their so-called racial brethren.

8. In further development of their plan of criminal exploitation, they destroyed industrial cities, cultural monuments, scientific institutions, and property of all types in the occupied territories to eliminate the possibility of competition with Germany.

9. From their programme of terror, slavery, spoliation and organized outrage, the Nazi conspirators created an instrument for the personal profit and aggrandizement of themselves and their adherents. They secured for themselves and their adherents;

(a) Positions in administration of business involving power, influence and lucrative perquisites.

(b) The use of cheap forced labour.

(c) The acquisition on advantageous terms of foreign properties, business interests and raw materials.

(d) The basis for the industrial supremacy of Germany.

/"These acts

"These acts were contrary to International Conventions, particularly Articles 46 to 56 inclusive of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed and to Article 6 (b) of the Charter".*

The Indictment then enumerated, by way of example, and without prejudice to the production of evidence in other cases, a great number of actual facts and figures respecting plunder, which are divided into the following main groups: (a) Removal of raw materials, (b) Removal of industrial equipment, (c) Removal of agricultural produce, (d) Removal of manufactured products, (e) Financial exploitation, (f) Plundering, and (g) Looting of works of art.

It will be observed that the Prosecution, when preferring against the defendants the above charges, referred inter alia to Article 47 of the Hague Regulations, according to which "pillage is expressly forbidden". This provision means, in the first instance, that the private property of the inhabitants of occupied territory is no longer a lawful object of private booty and that soldiers of the occupant must not plunder for private purposes. The Charter of the Tribunal does not use the term "pillage" but speaks in Article 6 (b) of "plunder of public or private property". On the other hand the Nürnberg Judgment summarized the law in respect of charges of plunder of public or private property in the following statement: "Article 49 of the Hague Convention provides that an occupying power may levy a contribution of money from the occupied territory to pay for the needs of the army of occupation and for the administration of the territory in question. Article 52 of the Hague Convention provides that an occupying power may make requisitions in kind only for the needs of the army of occupation, and that these requisitions shall be in proportion to the resources of the country. These Articles, together with Article 48, dealing with the expenditure of money collected in taxes, and Articles 53, 55 and 56, dealing with public property, make it clear that under the rules of war, the economy of an occupied country can only be required to bear the expenses of the occupations, and these should not be greater than the economy of the country can reasonably be expected to bear".**

The Articles of the Hague Regulations referred to by the Tribunal read as follows:

"Article 48. If, in the territory occupied, the occupant collects the taxes, dues and tolls payable to the State, he shall do so, as far as

---

* The Indictment, page 22-23.

** The Judgment, page 53.

/is possible

is possible, in accordance with the legal basis and assessment in force at the time, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the national Government had been so bound".

"Article 49. If, in addition to the taxes mentioned in the above Article, the occupant levies other money contributions in the occupied territory, they shall only be applied to the needs of the army or of the administration of the territory in question".

"Article 52. Requisitions in kind and services shall not be demanded from local authorities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country".

"Article 53. An army of occupation shall only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations".

"Except in cases governed by naval law, all appliances adapted for the transmission of news, or for the transport of persons or goods, whether on land, at sea, or in the air, depots of arms, and, in general, all kinds of war material may be seized, even if they belong to private individuals, but they must be restored at the conclusion of peace, and indemnities must be paid for them".

"Article 55. The occupying State shall be regarded only as administrator and usufructuary of public buildings, landed property, forests, and agricultural undertakings belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of such properties, and administer them in accordance with the rules of usufruct".

"Article 56. The property of local authorities, as well as that of institutions dedicated to public worship, charity, education, and to science and art, even when State property, shall be treated as private property."

"Any seizure or destruction of, or wilful damage to, institutions of this character, historic monuments and works of science and art, is forbidden, and should be made the subject of legal proceedings".

In its general conclusions the Tribunal stated that the evidence in this case has established, however, that the territories occupied by Germany were

/exploited

exploited for the German war effort in the most ruthless way, without consideration of the local economy, and in consequence of a deliberate design and policy. There was in truth a systematic "plunder of public or private property", which was criminal under Article 6 (b) of the Charter.*

In describing the conduct of the occupying authorities in some of the occupied countries, the Judgment refers to an order of Goering issued as early as 19 October 1939, and states the following: "As a consequence of this order, agricultural products, raw materials needed by German factories, machine tools, transportation equipment, other finished products and even foreign securities and holdings of foreign exchange were all requisitioned and sent to Germany. These resources were requisitioned in a manner out of all proportion to the economic resources of those countries, and resulted in famine, inflation and an active Black Market. At first the German occupation authorities attempted to suppress the Black Market, because it was a channel of distribution keeping local products out of German hands. When attempts at suppression failed, a German purchasing agency was organized to make purchases for Germany on the Black Market, thus carrying out the assurance made by the defendant Goering that it was 'necessary that all should know that if there is to be famine anywhere, it shall in no case be in Germany.'

"In many of the occupied countries of the East and the West, the authorities maintained the pretence of paying for all the property which they seized. This elaborate pretence of payment merely disguised the fact that the goods sent to Germany from these occupied countries were paid for by the occupied countries themselves, either by the device of excessive occupation costs or by forced loans in return for a credit balance on a "clearing account" which was an account merely in name.

"In most of the occupied countries of the East even this pretence of legality was not maintained; economic exploitation became deliberate plunder".**

The Tribunal then described in detail the criminal activities of some of the defendants in respect of the systematic looting and seizure of cultural and art treasures.

It is apparent that the foregoing statements, general as they are, raise many important and intricate problems, requiring prolonged study and analysis. All that can be said at this stage, quite generally, is that: (a) the London Charter and the Nürnberg Judgment have developed the rules of international law to the extent that not only pillage, which is the

---

* The Judgment, page 54.

** The Judgment, page 54-55.

/unauthorized

unauthorized outrage of individual soldiers, but also activities which come under the much wider term of plunder of public or private property are punishable; (b) the notions of "pillage" and of "plunder of public and private property" have been substantially extended beyond the scope which the term "pillage" was probably considered to cover at the time of the making of the Hague Regulations.

VII. Wanton destruction of cities, towns and villages and devastation not justified by military necessity

The charge under this heading alleged that the defendants wantonly destroyed cities, towns and villages and committed other acts of devastation without military justification or necessity. The Indictment says that these acts were in violation of Articles 46 and 50 of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed and Article 6 (b) of the Charter.* Article 6 (b) provides that wanton destruction of cities, towns or villages, or devastation not justified by military necessity shall be a war crime.

Among the particular instances of such destruction and devastation the Indictment mentions the following examples: (a) destruction of villages and towns, dynamiting and demolishing of ports and resorts in France; (b) wide-spread and extensive destruction of harbours, locks dykes and bridges, and devastation caused by inundations in Holland; (c) burning to the ground and killing the inhabitants of villages by punitive expeditions in Yugoslavia and Czechoslovakia.

It will be observed that in any case the instances enumerated under (c) constitute clear examples of reprisals resorted to by the Germans against the civilian population. It is to be presumed that in respect of these particular acts the charge was based inter alia on Article 50 of the Hague Regulations, which has already been quoted and analyzed in connection with taking of hostages (Section IV).

However, the Hague Regulations do not mention reprisals at all, because the Brussels Conference of 1874, which accepted the unratified Brussels Declaration, had struck out several sections of the draft code regarding reprisals. These sections stipulated that: (a) reprisals should be admitted only in extreme cases of absolutely certain violations of the rules of legitimate warfare; (b) the acts performed by way of reprisal should not be excessive, but in proportion to the violation; (c) reprisals should be ordered by commanders-in-chief only.**

* The Indictment, page 27.
** L. Oppenheim, op. cit., page 449.

/According to

According to the present state of International Law, reprisals between belligerents are admissible for acts of illegitimate warfare, although in practice innocent people are thereby punished for illegal acts, for which they are neither legally nor morally responsible. Article 50 of the Hague Regulations, upon which the Prosecution based the charge, in no way prevents the burning or destruction, by way of reprisals, of houses or even villages and towns, for treacherous attacks on enemy soldiers or other hostile acts committed by unknown individuals. The right to exercise reprisals carries with it, however, a great danger of arbitrariness as the events of the two World Wars amply illustrate. The atrocities committed by the German army and other military or para-military organizations all over Europe, were always declared by the German authorities to be justified as measures of reprisals. This state of affairs has, for a long time past, called for the enactment of more precise rules regarding the resort to reprisals.

Except for two or three instances illustrating the practice of resorting to reprisals the Nürnberg Judgment does not devote particular attention to this question. The only reference to the charge is contained in the following sentence: "Cities and towns and villages were wantonly destroyed without military justification or necessity".* In this connection the Tribunal referred to Article 46 of the Hague Regulations, and did not mention Article 50.**

VIII. The Exaction of Collective Penalties

In the charge dealing with the exaction of collective penalties the Indictment alleged that the Germans pursued a systematic policy of inflicting, in all the occupied countries, "collective penalties, pecuniary and otherwise", upon the population for acts of individuals for which it could not be regarded as collectively responsible. This was done in many places, including Oslo, Stavanger, Trondheim, and Rogaland. Similar instances occurred in France, among others in Dijon, Nantes, and as regards the Jewish population in the occupied territories. The total amount of fines imposed on French communities adds up to 1,157,179,484 francs. This charge was based on Article 50 of the Hague Regulations.***

In addition to what has already been said in Sections IV and VII

---

* The Judgment, page 45.
** Ibid., page 48.
*** The Indictment, pages 26-27.

regarding the bearing of Article 50 on the questions of taking hostages and of exacting reprisals, it is to be observed that, in spite of a general wording of the first paragraph of the above charge, all instances enumerated in the latter are solely confined to collective penalties of a pecuniary nature.

This particular type of act is not specifically enumerated in Article 6 (b) of the Charter as constituting a war crime, while in the general part of the Judgment there is no reference to this charge.

IX. Forcing civilians of occupied territories to swear allegiance to a hostile power

In respect of the above the following charge was included in the Indictment: "Civilians who joined the Speer Legion, as set forth in paragraph (H) above, were required, under threat of depriving them of food, money and identity papers, to swear a solemn oath acknowledging unconditional obedience to Adolf Hitler, the Führer of Germany which was to them a hostile power.

"In Lorraine, civil servants were obliged, in order to retain their positions, to sign a declaration by which they acknowledged the 'return of their country to the Reich', pledged themselves to obey without reservations the orders of their chiefs and put themselves 'at the active service of the Führer and the great National Socialist Germany'.

"A similar pledge was imposed on Alsatian Civil Servants by threat of deportation or internment.

"These acts violated Article 45 of the Hague Regulations, 1907, the laws and customs of war, the general principles of international law and Article 6 (b) of the Charter."*

Article 45 of the Hague Regulations provides that it is forbidden to force the inhabitants of occupied territory to swear allegiance to the hostile Power. This rule is based on the principle that since the authority of the occupant is not sovereignty, the inhabitants owe no temporary allegiance to him. This principle does not, of course, prejudice another principle, according to which the inhabitants have to render obedience and to submit to the legitimate commands of the occupant. In particular, the occupant can demand, and enforce, from the inhabitants of occupied territory such obedience as may be necessary for the security of his forces, for the maintenance of law and order, and the proper administration of the country.

---

* The Indictment, page 28.

/It is pointed

It is pointed out that this particular type of violation of the rights of the inhabitants is not specifically enumerated in Article 6 of the Charter as constituting a war crime. The Tribunal did not make any observations respecting this kind of violation, from which it would appear prima facie that it decided to disregard this charge. This seems to be corroborated by the fact that in its general statement on the law relating to war crimes in general the Tribunal did not mention Article 45 of the Hague Regulations among those provisions of International Law under which the crimes defined by Article 6 (b) of the Charter "were already recognized as war crimes".*

X. Germanization of occupied territories

The Indictment alleged that in certain occupied territories purportedly annexed to Germany the defendants methodically and pursuant to plan endeavoured to assimilate those territories politically, culturally, socially and economically into the German Reich. "The defendants endeavoured to obliterate the former national character of these territories. In pursuance of these plans and endeavours, the defendants forcibly deported inhabitants who were predominantly non-German and introduced thousands of German colonists". According to the charge this plan included economic domination, physical conquest, installation of puppet Governments, purported de jure annexation and enforced conscription into the German Armed Forces. The Indictment stated that these acts violated Articles 43, 46, 55 and 56 of the Hague Regulations, and Article 6 (b) of the Charter.**

The Indictment then enumerated, by way of example, a number of actual facts and figures respecting this type of war crime.

Apart from some quite general references to the German policy of the Germanization and colonization of certain occupied territories, the Tribunal in its general section makes no observations on this particular set of violations of the rights of the civilian populations which fall within the very involved notion of denationalization.***

D. Summary Observations

Against the background of the historical events which led to the establishment of the International Military Tribunal at Nürnberg we have described in the preceding sections the more important stages of the development of the notions of war crimes and crimes against humanity, the legal basis of the Trial and the Tribunal's jurisdiction. These sections

---

* See the Judgment, page 64; and the Section of this Report dealing with the Jurisdiction of the Tribunal (Part I, Chapter I, Section B).

** The Indictment, pages 28-29.

*** See also Section I, 1. (Genocide).

/which

which, as it would appear, constitute to a large extent independent chapters, were originally written as parts of a more ambitious scheme intended to cover the Nürnberg Trial. However, the limitations of time imposed during the work have only allowed this task to be accomplished incompletely, both as regards the various aspects and the elaboration of many problems arising from this trial which are of vital importance for the purpose of the present Report.

When discussing the law of the Charter, on the basis of which the Tribunal had to determine the responsibility of the defendants, we pointed out that the specific rules relating to war crimes and crimes against humanity have a special bearing on the protection of human rights, for they represent a system of provisions which, if properly developed, would lead to a better protection of fundamental human rights and minimum human standards in time of war and peace.

It has been stated that the specific rules contained in Article 6 of the Charter are, technically speaking, the law which the Signatories of the Agreement of 8 August 1945, required the Tribunal to administer, and by which the Tribunal was bound. It has been shown that the latter considered itself bound by the Charter, the making of which was an exercise of the sovereign legislative power by the countries to which Germany unconditionally surrendered. But his merely technical statement cannot be regarded as complete because it leaves open the questions whether the authors of the Charter were justified in stating the law as they did, and whether this statement of the law was merely a declaration of already existing International Law or the creation of novel and previously unknown principles. In the view of the Tribunal the Charter was not an arbitrary exercise of power on the part of the victorious nations, but the expression of international law existing at the time of the creation of the Charter, and to that extent was itself a contribution to International Law.

In order to test the assertion that the Charter is merely declaratory of international law as it existed at the time of the Tribunal's creation, we have examined separately the two groups of offences, relevant to the subject of this Report, which have been declared criminal by the Charter. We have examined in particular whether the war crimes with which the defendants were charged constituted crimes under International Law at the time when, it was alleged, they were committed. For this purpose, it was also necessary to consider the specific charges which were brought against the defendants.

So far as concerns war crimes in the narrower sense, to which these remarks are confined, they have long been treated as criminal acts for which

members of the armed forces or civilians engaged in illegitimate warfare are held individually responsible by the enemy. In this regard, and especially in the case of violations of the Hague Convention IV of 1907 and the Geneva Conventions, there is no doubt that such crimes are war crimes under international customary law.

In the past there have been hundreds of cases in which national military Tribunals have tried and convicted enemy nationals of breaches of the laws of war, so that the only novelty, so far as the Nürnberg Tribunal is concerned, is that it was an international Tribunal. The only objection to an international Tribunal is a theoretical one, namely, that such a Tribunal is incapable of applying the international laws of war to individuals, because international law is binding only on the States as such, and that only an individual State can therefore punish the offender. It has been shown what was the attitude of the Tribunal in regard to this particular question. The correct answer seems to be that a violation of the laws of war constitutes both an international and a national crime, and is therefore justiciable both in a national and international court.

From the examination of the problem it appears that the Tribunal made a true and correct statement in asserting that the law relating to war crimes, as expressed by the Charter, was an expression of international law existing at the time of its creation. It may be added that the Judgment itself is a contribution to international law to the extent to which it is declaratory of international law, and to which the Tribunal has made itself an instrument for declaring pre-existing law.

Like any other court, the Tribunal was of course entitled to consider the law of war as a dynamic body, which by "continual adaptation follows the needs of a changing world". Therefore, the Tribunal was not, and did not consider itself, limited to leaving this law exactly where it found it. The attitude of the Tribunal in this respect has been described, as far as the circumstances permitted, in Section C. We have tried to show therein the manner in which the Tribunal applied this law, and the effect which it gave to it in regard to various violations of human rights.

In applying the pre-existing law, the Tribunal made two interesting decisions of a general nature which are of particular importance to the protection of human rights in time of war. The first of these concerns the effects of the annexation of a territory in time of war on the criminal character of acts indicated as crimes under the Charter. The second concerns the validity of this law for the protection of the rights of the inhabitants of the occupied territory who, owing to specific circumstances, found themselves on the territory of the occupant.

CHAPTER II - THE TOKYO TRIAL

At the time of writing of this Report and of its submission to the United Nations, the Trial of the Japanese major war criminals at the International Military Tribunal in Tokyo (hereinafter called Far Eastern Tribunal) is still in progress.

The unpredictable developments of the Trial in regard to the numerous questions which will have to be considered by the Tribunal before it passes its final verdict (judgment), make it useless to submit an account based among other sources of information, on the transcripts of the proceedings up to date. Until the conclusion of the Trial all that can be usefully done is to establish, with regard to the human rights involved, the field covered by the Indictment of the prosecuting body and by the Charter of the Tribunal (hereinafter called Far Eastern or Tokyo Charter).

The two above-mentioned sources of information contain, as will be seen in the subsequent pages, certain features which justify us in concluding, even at this stage of the Trial, that it must be distinguished from any previous trial. The importance of these features cannot be underestimated so far as concerns the development of international law in the field of protecting human rights. On the other hand, the Indictment provides a clear survey of the scope of the Trial as a whole and of the various questions which are, or might be, important from the viewpoint of human rights. Finally, the Far Eastern Charter is a definitive source of information as to the laws covering human rights, insofar as they have been violated by the commission of acts declared criminal by the Charter.

It is in view of these features that it was felt more appropriate to submit an account of the Tokyo Trial, however incomplete, than to omit it altogether and postpone its presentation until the Trial is concluded.

A. LEGAL BASIS OF THE TOKYO TRIAL

The trial against the Japanese major war criminals opened on 29 April 1946, in Tokyo before the International Military Tribunal for the Far East (hereinafter called Far Eastern Tribunal). At the time of the writing of this Report the trial is still in progress.

A total of twenty-eight persons were indicted for crimes against peace, war crimes and crimes against humanity, all of whom occupied at one time or another key positions in the conduct of Japanese political and military affairs.*

The charges submitted against the twenty-eight defendants include plans and preparations to wage aggressive wars as far back as in 1928, and the series of actual military aggressions that took place starting from the attack on Manchuria in 1931.

All the violations of human rights alleged were planned and/or actually perpetrated in connection with, or in the course of, those aggressions by means of numerous offences constituting "war crimes" and "crimes against humanity".

Proclamation of the Supreme Commander

The Far Eastern Tribunal was constituted by a Special Proclamation issued on 19 January 1946, by General D. MacArthur in his capacity as Supreme Commander for the Allied Powers.

In issuing the Proclamation the Supreme Commander exercised concurrently the following powers:

(a) The powers conferred upon him by the President of the United States of America as Commander in Chief of the Army and Navy;

(b) The powers deriving from his designation by all the Powers allied in the Far Eastern war as Supreme Commander for these Powers with the

---

* The names of and last positions held by the twenty-eight defendants are as follows: Sadao ARAKI, member of the Cabinet Advisory Council; Konji DOHIHARA, Inspector General Military Training; Kingoro HASHIMOTO, Member of the Lower House of the Diet; Shunroki HATA, Inspector General Military Education; Kiichiro HIRANUMA, President Privy Council; Koki HIROTA, Member of the Cabinet Advisory Council; Naoki HOSHINO, Adviser to Finance Ministry; Seishiro ITAGAKI, Commander Japanese Army in Korea and 7th Area Army in Singapore; Okinori KAYA, Director I.R.A.P.S.; Koicki KIDO, Lord Keeper of the Privy Seal, chief confidential adviser to the Emperor; Keitaro KIMURA, Commander Japanese Army in Burma; Kuniaki KOISO, Prime Minister; Iwane MATSUI, President of the Greater East Asia Development Society; Yosuke MATSUOKA, Foreign Minister; Jiro MINAMI, Member of the Privy Council President of the Political Association of Great Japan; Akira MUTO, Chief of Staff 14th Area Army, Philippines; Osami NAGANO, Supreme Naval Adviser to the Emperor; Takasumi OKA, Vice Navy Minister, Commander of the Naval Station at Chinkai (Korea); Shumei OKAWA, an organiser of the Mukden incident, Director General East Asia Research Institute of the South Manchurian Railway; Hiroshi OSHIMA, Ambassador to Germany; Kenryo SATO, Chief of Military Affairs Bureau, War Ministry; Mamoru SHIGEMITSU, Foreign Minister; Shigetano SHIMADA, Chief of Naval General Staff; Toshio SHIRATORI, Director, I.R.A.P.S.; Teiichi SUZUKI, Cabinet Adviser, Director of I.R.A.A.; Shigenori TOGO, Foreign Minister; Hideki TOJO, Prime Minister and War Minister; Yoshijiro UMEZU, Chief of General Staff.

/general task of

general task of carrying into effect the surrender of the Japanese armed forces;*

(c) The powers vested in him by the Governments of the United States, Great Britain and the Soviet Union, at their conference held in Moscow on 26 December 1945, to issue all orders for the implementation of the Terms of Surrender of Japan. This was done in agreement with the Chinese Government.**

In addition, and with special regard to the constitutional position created within Japanese territory after the capitulation, the Proclamation was based on the express provision of the Instrument of Surrender that the authority of the Emperor and of the Japanese Government was made subject to the Supreme Commander for the Allied Powers, who was empowered to take all steps that he saw proper to implement the terms of surrender.***

Finally, the Proclamation was issued in execution of the specific term of surrender laid down at Potsdam on 26 July 1945, that "stern justice shall be meted out to all war criminals" and with reference to repeated statements made to the same effect by the Allied Nations during the war.****

The Far Eastern Tribunal was thus set up by an act of executive power, which distinguishes it from the establishment of the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis (so-called Nürnberg Tribunal), which was constituted by means of an international agreement signed for the purpose by the Powers concerned.*****

The Charter

The composition, jurisdiction, powers and rules of procedure of the Far Eastern Tribunal were regulated by a Charter, approved and enacted by the Supreme Commander in the said Proclamation.******

This Charter is in every respect similar to the one enacted for the Nürnberg Tribunal, and all points of interest arising from its provisions will be considered in other relevant parts of this Report.

---

* Paragraph 5 of the Special Proclamation of the Supreme Commander for the Allied Powers establishing an International Military Tribunal for the Far East, Tokyo, 19 January 1946.

** See Proclamation, paragraph 6.

*** See paragraph 10 of the Terms of Surrender, Department of State Bulletin, Vol. XIII, No. 318, pages 137-138. Also paragraph 4 of the Proclamation.

**** See Proclamation, paragraphs 1 and 2.

***** See page 33.

****** The Charter attached to the Proclamation of 19 January 1946, was subsequently amended by General Orders No. 20 of 26 April 1946. The items amended are recorded in the appropriate parts of this Report.

/Composition of the

Composition of the Far Eastern Tribunal

Under Article 2 of the Charter, the Far Eastern Tribunal is composed of not less than six, nor more than eleven members.* Members are appointed by the Supreme Commander from the names submitted by the Signatories to the Instrument of Surrender** and, in addition to this, by the Governments of India and of the Commonwealth of the Philippines.***

The trial opened with nine judges from the following countries: Australia, Canada, China, France, Netherlands, New Zealand, Union of Soviet Socialist Republics, United Kingdom and United States.****

B. JURISDICTION OF THE FAR EASTERN TRIBUNAL

Significance for human rights

The question of the law under which the defendants at the Tokyo Trial are being held responsible for crimes violating human rights, is of primary importance for the major purpose of this Report. This answers the question to what extent and in what way human rights, violated by means of war crimes in the wider sense, are or are not covered and protected by rules of contemporary international law.

In this respect the provisions of the Far Eastern Charter, like those of the Nürnberg Charter, represent a positive step forward in the development of international law. They have accomplished a certain amount of codification in the field of war crimes, and they have expressly specified the various punishments which international courts of law are entitled to pronounce for the commission of these crimes. Prior to this step, most of the rules relating to war crimes were uncodified and formed part of customary law, as is still the case with many other branches of international law. As a consequence, the questions of the law to be applied and of the punishment to be imposed had to be determined entirely by the courts on the basis of customs and precedents.

It should be noted that, however important and useful it may be, this development represents the first attempt of its kind and that it embraces a much wider field of criminal offences than was generally understood to exist prior to the Trials at Tokyo and Nürnberg. This fact makes it equally

---

* Originally the Tribunal was to be composed of from 5-9 members, the last figure being intended to coincide with the number of States which signed the Instrument of Surrender.

** The Signatories are: United States of America, China, Great Britain, Union of Soviet Socialist Republics, Australia, Canada, France, Netherlands, New Zealand.

*** The right of these two Nations to nominate candidates was introduced by the said amendments and the maximum number of judges raised from 9 to 11 accordingly.

**** Their names are: Sir William F. Webb (Australia), president of the Tribunal E. Stuart McDougall (Canada); Ju-Ao-Mei (China); Henri Bernard (France); Bernard Victor A. Roeling (Netherlands); Erima Harvey Northcroft (New Zealand); I. M. Zaryanov (USSR); Lord Patrick (United Kingdom) John P. Higgins (U.S.A.)

/important

important to consider the manner in which the Far Eastern Tribunal applied the relevant provisions of the Charter, namely, what effect it gave those provisions in the various cases brought before it for trial. For reasons stated in the Introduction to this Chapter, consideration of this aspect has had to be postponed until such time as the Trial is completed and the Judgment pronounced.

The provisions of the Charter

The following is an account of the relevant provisions of the Far Eastern Charter. They are commented upon in comparison with those of the Nürnberg Charter and only to the extent to which they differ from the latter, with which they are identical in substance. An analysis of the scope, nature and significance of the corresponding rules in the Nürnberg Charter is to be found in the preceding Chapter and applies equally to the rules of the Far Eastern Charter.

Article 1 of the Far Eastern Charter declares that the Tribunal was "established for the just and prompt trial and punishment of the major war criminals in the Far East".

The substantive law for the prosecution and punishment of the defendants tried at Tokyo is formulated in Article 5 of the Charter. This Article lays down in the following terms the rules of law governing the jurisdiction of the Far Eastern Tribunal:

"Article 5: Jurisdiction over Persons and Offences

"The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offences which include Crimes against Peace.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes Against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) Conventional War Crimes: Namely, violations of the laws and customs of war;

(c) Crimes Against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

/Leaders, organizers,

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible, for all acts performed by any person in execution of such plan."*

Comparison with the Nürnberg Charter

In spirit the aforequoted rules are in harmony with and a replica of the corresponding provisions of the Nürnberg Charter (Article 6).** However, there are certain verbal differences which raise interesting points in regard to the unity and clarity of substantive international penal law.

(i) Crimes against peace

The bearing which "crimes against peace" as defined in the above Article have upon violations of human rights can be summed up in the following manner:

On the one hand, the relationship between the two is one of cause and effect. Violations of human rights with which we are concerned in this Report are those which were perpetrated as a consequence of the aggressions constituting World War II. On the other hand, the crimes which were or are being prosecuted before the Tribunals at Tokyo and Nürnberg, were prosecuted on the ground that they were part of the planning or conspiracy to wage wars of aggression.***

Finally, "crimes against peace", taken in themselves are violations of the fundamental rights of States and Nations. Rights such as the right to independence or to territorial integrity which are recognized to all self-governing national communities and which are directly affected by "crimes against peace", are a pre-requisite for a full exercise of individual human rights within the borders of the State and accordingly from part of human rights in a wider, non-technical sense.****

This intimate connection between "crimes against peace" and violations of human rights warrants the importance of analysing the rules of law setting for the legal elements of the former.

The point raised by the definition of "crimes against peace" in the Far Eastern Charter is the following:

---

* The provisions of Article 5 were not affected by the amendments to the Charter introduced by General Orders No. 20 of 26 April 1946.

** See page 26, also page 29 et seq. for the analysis of the provisions of the Nürnberg Charter corresponding to those of the Tokyo Charter.

*** For the Tokyo Trial, see Indictment, Counts 37-38 and 44. See also page 96 n.1 for the ruling made by the Nurnberg Tribunal that a "plan or conspiracy" constitutes a separate criminal offence only in respect of "crimes against peace".

**** See also pages 38-39.

/Whereas the

Whereas the Nürnberg Charter declares the "waging of a war of aggression" to be a criminal act without making reference to or drawing a distinction between wars launched with or without a proper "declaration", the Far Eastern Charter specifically treats as criminals the "waging of a declared or undeclared war of aggression". (Article 5 (a))

The effect of the latter definition is to make it expressly clear that to declare war, as required by the existing Treaties, - namely, with the Hague Convention for the Pacific Settlement of International Disputes of 1899 and 1907 and with the accompanying Convention relative to the Opening of Hostilities, - does not deprive such a war of its criminal nature if it is "aggressive".

In this connection it is important to note that the difference between the two Charters is purely verbal, in the sense that the Far Eastern Charter formulates a rule which is implied in the definition given in the Nürnberg Charter.

While omitting to state that a "declared" war of aggression is criminal in the same way as an "undeclared" war, the Nürnberg Charter nevertheless regards as decisive the fact that a war was "aggressive". From this it follows that any other element linked up with the "aggression" - such as the existence or non-existence of a declaration is to be regarded as incidental, and as irrelevant for the criminal nature of the aggressive war in itself. In other words, the element of "aggression" is made essential, but is at the same time in itself sufficient.

Consequently, all we are confronted with here is a difference in legal technique; in the Far Eastern Charter the irrelevance of a "declaration" of war is established in express terms; in the Nürnberg Charter the same result is achieved by the way of omission.

In this connection it is convenient to point out that it is precisely in the irrelevance of a declaration of war that lies the main feature of the development of international law as formulated in the two charters and as established by the Judgment of the Nürnberg Tribunal. Prior to the signing of the Kellogg-Briand Pact of 1928 and to the interpretation of its meaning in international law by the Nürnberg Tribunal,* no violation of international

* Considering the legal effect of the Kellogg-Briand Pact, the Tribunal made the following decisive statement in its Judgment: "The nations who signed the Pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in doing so. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact." See Judgment, H.M.S.O., Cmd. 6964, London, page 39. Italics are introduced.

/law could be

law could be claimed once a war had been launched in compliance with the conventions referred to above, however aggressive such a war might have been. Today, the position is in a sense reversed. No compliance with these conventions can confer legality to a war which is aggressive.

Yet, however clear this issue may be, there remains the technical aspect which is not unimportant. In formulating rules of international law as they develop in an uncodified system with all that such a situation implies, particularly with the co-existence of Treaties which are or which might be regarded as conflicting, it is undoubtedly preferable to proceed by means of express terms rather than by way of implication. In this respect the definition of "crimes against peace" in the Far Eastern Charter is a good instance.

Before closing this paragraph, it may be observed that the Nürnberg Tribunal did not enter into the question of "declared" and "undeclared" wars, probably for the very good reason that all wars waged by Nazi Germany were in fact both aggressive and launched without declarations. The Tribunal contented itself by ascertaining this fact in each case,* and proceeded directly on the grounds of such concrete circumstances.

(ii) War Crimes

Similar verbal differences appear in the definition of "conventional war crimes" or "war crimes" in the narrower, technical sense. In Article 5 (b) of the Far Eastern Charter this definition is limited to the general statement that "conventional war crimes" represent "violations of the laws or customs of war". In Article 6 (b) of the Nürnberg Charter a similar statement** is followed by an extensive enumeration of specific offences cited exempli causa as representing "war crimes" and "violations of the laws and customs of war".

It is hardly necessary to point out that here again there is no difference in the substance, and that Article 5 (b) of the Far Eastern Charter covers exactly the same field as Article 6 (b) of the Nürnberg Charter.

However, so far as the clarity and certainty of international penal law are concerned, it is the technique chosen in the Nürnberg Charter which has the advantage.

(iii) Crimes against humanity

Finally, three other differences should be noted in regard to the definition of "crimes against humanity" which, combined with the definition of "war crimes", cover the main ground of violations of individual human rights.

---

* See Judgment, H.M.S.O., Cmd. 6964, London, page 17 and the following, particularly pages 36-38.

** In the Nürnberg Charter the word "conventional" does not appear. This term is intended to underline that offences representing "war crimes" are contained in international conventions (treaties).

/(a) In the Far Eastern

(a) In the Far Eastern Charter, it is not expressly stated that "crimes against humanity" are crimes committed "against any civilian population"; those terms were inserted in the Nürnberg Charter chiefly with a view to including criminal violations of human rights perpetrated by the Nazi régime against their own citizens. However, in the context of the provision taken as a whole, there is little doubt that the same field is covered by the Far Eastern Charter.*

(b) In the Far Eastern Charter there is no statement on "persecutions on religious grounds", possibly because such violations by the Japanese major war criminals were non-existent, so that to have mentioned them in the Charter would have served no practical purpose. On the other hand, the relevant provision covers the same field as the Nürnberg Charter in regard to the comparatively more important "persecutions on political or racial grounds". In this connection it may be assumed that, in case any persecutions on religious grounds should be established and brought forward in the course of the proceedings, they could easily be included within the notion of persecution on political grounds. The example of the persecution of Jews in Nazi Germany, which motivated the express reference to persecution on religious grounds in the Nürnberg Charter, is a case in point. Persecutions of this nature, embracing communities or groups of individuals akin on account of their religion, are always carried out in pursuance of a "political" programme and a definite "political" aim so that in that general and wide sense they are invariably of a "political" nature.

(c) Finally, the text of the Far Eastern Charter did not give rise to any differences of opinion as to the effect and meaning of the definition of "crimes against humanity" in Article 5 (c) when such crimes are committed before the outbreak of war. As reported in another connection, in the case of the Nürnberg Charter the original text made it necessary to replace a semi-colon by a comma between the two main types of offences defined as representing "crimes against humanity", a special Protocol for this purpose having been signed between the Powers concerned.**

The text of the Far Eastern Charter was from the outset clear on the point that, to constitute "crimes against humanity", not only acts representing "persecutions on political, racial or religious grounds," but also acts consisting in "murder, extermination, enslavement, deportation" or any other "inhumane act", must have been committed in execution of or in connection with any other crime within the jurisdiction of the Tribunal. This means particularly in execution of or in connection with "crimes against peace".***

---

* For more detailed consideration on this point, see pages 97-99.

** See page 92 n.2

*** See also page 34

/Conclusion as to th

Conclusion as to the jurisdiction over offences

It is thus possible to conclude that the differences appearing in the texts of Articles 5 and 6 of the two Charters are purely verbal and that they do not affect the substance of the law governing the jurisdiction of the Far Eastern Tribunal over criminal offences in comparison with the Nürnberg Charter.

However, it would appear that such differences in texts of law dealing with subjects of the same nature and enacted separately only for reasons of geographical and executive convenience are liable to create uncertainty and even confusion in regard to the law in the spheres concerned. In the interest of the protection of human rights, such verbal differences should, whenever possible, be avoided in future.

Article 5 of the Far Eastern Charter covers the whole field of human rights which were or can be violated by the criminal offences referred to in its provisions. Details concerning the specific human rights thus covered are given in the various parts of this Report, and a general survey is submitted in the Conclusions.

Jurisdiction over persons

Closely connected with the rules of substantive law providing for criminal violations of human rights in the Far Eastern Charter, are the rules dealing with the responsibility of the perpetrators of such offences.

In line with the Nürnberg Charter, the Far Eastern Charter contains in the first place the provision already cited, that the Tribunal has "the power to try and punish Far Eastern war criminals, who as individuals or as members of organizations are charged with offences which include Crimes against Peace". The scope of the individuals comprised is defined in the last provision of Article 5 which declares the responsibility of "leaders, organisers, instigators and accomplices" in addition to the actual perpetrators of these crimes.*

In this connection another rule provides for the degree of responsibility of the individuals involved, in the following terms: (Article 6)

> "Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

This provision corresponds to Articles 7 and 8 of the Nürnberg Charter, which have been analysed in another part of this Report.**

---

* See page 77.

** See pages 40-42.

/Both Charters

Both Charters decide upon two fundamental questions, one in view of the novelty of trying individuals for "crimes against peace", and the other in regard to the uncertainty of the rules of international law.

They proclaim the equal responsibility of all individuals involved, irrespective of:

(a) The official position held by the offenders. (The Nürnberg Charter specifically includes heads of States and responsible officials of the Governments);

(b) The fact that the offender may have acted upon superior orders.

The difference between the two Charters is that the Far Eastern Charter recognizes as one of the circumstances permitting mitigation of punishment the official position of the accused, whereas the Nürnberg Charter excludes this plea and admits only the fact of having acted upon superior orders.*

As far as rules of law are concerned, the provision declaring the irrelevance of the official position of the defendants cuts across a question for which there were no rules in international law before the trials at Nürnberg and Tokyo, although attempts were made to introduce the principle after the first world war.** The provision itself is a logical consequence of the rule that aggressive wars are crimes involving individual penal responsibility, rule which the Nürnberg Tribunal qualified as declaratory of the state which had existed at any rate since the Kellogg-Briand Pact.***

The rule concerning offences committed upon superior orders decides a question concerning which rules of international law were not sufficiently

---

* See Nürnberg Charter, Art. 8: "The official position of defendants whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment". Compare with Art. 6 of Far Eastern Charter, above.

** The attempts referred to concern the case of the Kaiser. In its Report of 1919, the Commission on Responsibilities expressed the view that penal liability for violations of the laws and customs of war should include all persons "however high their position may have been, including Chiefs of States".
In this connection the Allied Powers inserted in the Versailles Treaty express provisions declaring the responsibility of the Kaiser for violations of international law and provided for a penal court to try him. (See Art. 227 of the Versailles Treaty). As is known these measures never materialized and no jurisprudence has ever been formed on the subject.

*** See above, page 78 n.1.

precise and which consequently required to be settled one way or another.*

From the viewpoint of the human rights of the individuals involved in war crimes trials, both rules fall within the field where the rights of the victims of war crimes and those of the persons accused of committing them may conflict. This, however, only affects the sentence to be pronounced by the courts.

This aspect of the problem is considered in a separate chapter, which deals with the question of the extent to which the restricted right of an accused person to plead Not Guilty on the basis of his official position or his having committed violations of human rights under superior orders, may lead to the accused person being either acquitted or visited with reduced penalty.

Criminal organizations

Finally, it is to be noted that the Far Eastern Charter does not contain a special provision empowering the Tribunal to declare that a group or organization is criminal, as in the case with Article 9 of the Nürnberg Charter.** The Far Eastern Charter follows the latter only in enunciating the general principle that the Tribunal is competent to try and punish war criminals "who as individuals or as members of organizations" are charged with crimes against peace, war crimes or crimes against humanity.*** The similarity between the two Charters in this respect does not go beyond this point.

---

* The uncertainty of international law on this issue is emphasized by authoritative writers. See, for instance, H. Lauterpacht, The Law of Nations and the Punishment of War Crimes, British Year Book of International Law, 1944, page 69 and following. This situation is connected with wide divergences existing in the municipal law of various countries dealing with laws and customs of war. (See Lauterpacht, loc. cit.) and even within the scope of the municipal law of a single country. A case in point concerns the British Military Manual and the U.S. Rules of Land Warfare. Until 1944, and including the period of 1914-1919, both texts contained express provisions to the effect that military personnel committing violations of the rules of warfare upon superior orders "are not war criminals and cannot therefore be punished by the enemy". In 1919 the Commission on Responsibilities adopted an opposite attitude, and in 1944 the provisions of the British Military Manual and the U.S. Rules of Land Warfare were amended and the rule of impunity reversed to allow punishment. For texts see below pages 221 and 224.
Before the amendments were made English writers contended that the Chapter concerned (XIV) of the British Military Manual had no statutory force; that its provisions relating to the plea of superior orders were at variance with the corresponding principles of English criminal and constitutional law; and that it represented an exposition of rules of international law only as understood by one country. See Lauterpacht, op. cit. page 66, n. 1, and and page 69, n. 2.

** See pages 40 and 44-45.

*** Far Eastern Charter, Article 5, paragraph 1. The corresponding text in the Nürnberg Charter (Article 6, paragraph 1) reads "The Tribunal...shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes". Then follow the definitions of crimes against peace, war crimes and crimes against humanity. /As a logical

As a logical outcome, there is also no provision such as Article 10 of the Nürnberg Charter. The latter prescribes that when an organization is declared criminal by the Tribunal, its members can be tried by national, military or occupation courts for membership in such organizations, and that in such cases the criminal nature of the organizations involved is considered proved and cannot be questioned by the other courts*

In this manner the whole question of the so-called collective responsibility for war crimes has been left out of the Far Eastern Charter, particularly the question of the presumption of guilt of those individuals who belonged to groups or organizations declared criminal.

It is a matter of opinion whether the Far Eastern Tribunal could avail itself of the same powers as those expressly provided for in the Nürnberg Charter, using as a legal basis the general provision in Article 5 of the Far Eastern Charter, paragraph 1, that it is competent to try individuals guilty of war crimes "as members of organizations". If one is to take the view that the Tribunal can have no other powers than those expressly conferred upon it by the Charter, the answer would be in the negative.

Should this be the correct answer, the general provision of Article 5, paragraph 1, would have no other meaning and consequence than to indicate a purely factual situation. Namely, that individuals tried by the Tribunal can be prosecuted with particular reference to their having belonged to a group or organization involved in the commission of the alleged crimes. This particular connection would have no legal consequences. It would remain entirely in the sphere of fact as a more specific description of circumstances, relating to war criminals whose guilt would be established solely on the basis of crimes committed in their individual capacity.

C. THE VIOLATIONS OF THE RIGHTS OF THE VICTIMS OF WAR CRIMES

1. HUMAN RIGHTS VIOLATED BY "WAR CRIMES"

The Indictment submitted to the Far Eastern Tribunal covers first of all the worst and most brutal types of violations of human rights, i.e. violations directed against the life, health and bodily integrity of the victims. These violations represent clear "war crimes" in the traditional sense of the term and cover a series of atrocities and other offences of an undisputed criminal character, which have been

---

* For text of Article 10 of the Nürnberg Charter see p. [illegible].

/punishable

punishable by the laws of civilized nations for many centuries. They cover the rights of the three most important categories of victims as recognized by the laws and customs of war: the rights of combatants, of prisoners of war and of the civilian population.

The charges brought against nineteen of the twenty-eight defendants by the prosecuting body in its Indictment, were formulated in a statement of a general nature, in the following terms:

> "(The defendants) participated as leaders, organizers, instigators or accomplices in the formulation or execution of a common plan or conspiracy, and are responsible for all acts performed by themselves or by any person in execution of such plan.
>
> The object of such plan or conspiracy was to order, authorize and permit ... subordinates frequently and habitually to commit the breaches of the Laws and Customs of War ... against the armed forces ... and against many thousands of prisoners of war and civilians ..."*

The defendants concerned were accordingly charged with having carried out such a plan or conspiracy by actually ordering, authorizing or permitting breaches of the laws and customs of war.** In addition, they were charged with having "deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches" of the laws and customs of war,*** carried out by their subordinates.****

Some concrete instances of such violations of human rights of the victims of war crimes were briefly mentioned in connection with the various stages of the aggression against China, such as, for example, the "deliberate killing" or "slaughtering" of "large numbers" and "many thousands" of civilians on the occasion of the capture of Nanking and Canton in 1937, and of other towns and inhabited places in 1938 and 1944.*****

---

* See Count 53.

** See Count 54.

*** See Count 55.

**** The question to what extent these acts represent separate substantive crimes, distinct from actual war crimes committed as a result of a "plan or conspiracy", or of the orders, authority and permission to perpetrate them, or finally as a consequence of the failure to prevent them from occurring, is considered later.

***** See Indictment, Appendix A, Section 2.

/On the

On the other hand, the prosecutors summed up in general terms a series of other war crimes perpetrated over the whole period of the aggressive wars waged by Japan against the various countries involved. Express reference was made to the "ruthless submarine warfare" conducted by the Japanese Navy and to the "destruction of crews of ships sunk or captured" pursuant to such a warfare.* Many types of criminal offences actually committed were enumerated in connection with the breaches of existing conventions and assurances: the killing and ill-treatment of prisoners of war and civilian inmates of concentration camps; the illegal use of prisoner of war labour; the use of poison gas; the killing of combatants who had laid down their arms; the destruction of property without military justification or necessity; pillage; the failure to respect family honour and rights, individual life, private property and religious convictions and worship in occupied territories; the deportation and enslavement of the inhabitants of occupied territories; the failure to respect military hospital ships,** and the like.

2. ATTEMPT TO INTRODUCE NEW TYPE OF INTERNATIONAL CRIME

Apart from these classical types or categories of criminal offences committed in violation of the laws and customs of war, the prosecuting body introduced a special category as to which it can be said that it has no parallel in the Nürnberg or any other trial held so far, and which, should it be admitted by the Far Eastern Tribunal, would be entirely new in international law.

The prosecuting body charged the defendants with the loss of life ("killing" and "murder") of the combatants of a number of attacked countries as a direct result of the military operations with which Japan opened the hostilities against these countries. The charge was based upon the fact that Japan "initiated unlawful hostilities" in violation of Article 1 of the Hague Convention relative to the Opening of Hostilities, that is to say without a warning or a declaration of war. The prosecutors submitted the argument that such opening of hostilities being "unlawful", the accused and the Japanese armed forces "could not acquire the rights of lawful belligerents". Accordingly, the killing of servicemen on the occasion of these treacherously opened hostilities was regarded by the prosecutors as representing a separate criminal act deriving from

---

* See Indictment, Appendix A, Section 7.

** See Indictment, Appendix B, Sections 1-19.

/the unlawfulness

the unlawfulness of the attacks themselves.*

Specific charges which were brought forward in this connection include the killing of Admiral Kidd and about 4,000 members of the U.S. Navy and Army on the occasion of the attack on Pearl Harbour on 7th December, 1941;** the killing of British officers and soldiers during the attack on Kota Bahru, Hong Kong and Shanghai on 8th December, 1941;*** the killing of the servicemen of the Philippine forces whilst invading the Philippines territory on 8th December, 1941;**** the killing of servicemen of the Union of Soviet Socialist Republics and Mongolia on the occasion of the aggressions waged against them in the summer of 1939 whilst these two countries were neutral.*****

Jointly with these cases charges were submitted for atrocities against the civilian population and the prisoners of war ("disarmed soldiers")****** committed in the course of similar attacks and aggressions, particularly against China.

All these charges were grouped apart from the section dealing with "conventional war crimes and crimes against humanity", and treated under the heading "Murder". In this section they were described as representing "at the same time Crimes against Peace, Conventional War Crimes, and Crimes against Humanity".*******

Leaving aside the purely technical question whether charges for atrocities perpetrated against "civilians and disarmed soldiers" ought not to have been included in the section dealing with war crimes and crimes against humanity******** rather than in the section headed

---

* So, for instance, in the first Count of this particular section of the Indictment, the prosecutors charged the defendants with having participated in a "plan or conspiracy", the object of which was to "kill and murder the persons described below, by initiating unlawful hostilities... The persons intended to be killed and murdered were all such persons, both members of the armed forces... and civilians, as might happen to be in the places at the times of such attacks. The said hostilities and attacks were unlawful because they were breaches of Treaty Article 5 in Appendix B, and the accused and the... armed forces of Japan could not therefore, acquire the rights of lawful belligerents". See Indictment, Count 37. The Treaty Article referred to is Article I of the Hague Convention relative to the Opening of Hostilities.

** See Count 39.

*** See Counts 40, 41 and 42.

**** See Count 43.

***** See Counts 51 and 52.

****** See Counts 45-50.

******* See Group Two, Introductory paragraph and Counts 37-52.

******** See Group Three, Counts 53-55.

/"Murder",

"Murder", a prosecution for the loss of the lives of combatants during military operations is undoubtedly a novel attempt to develop to the utmost the legal consequences which follow logically from the fact that to open hostilities without a declaration of war is a breach of existing Treaties and consequently represents an illegal act in international law.

The novelty consists in qualifying this illegal act as being at the same time a criminal act, and accordingly, in regarding combatants who lost their lives during military operations as victims of war crimes.

This attempt is the more significant in that identical acts committed by Germany on the occasion of every aggression launched by the Nazis in Europe, were not prosecuted before the Nürnberg Tribunal.

It remains to be seen whether the above mentioned charge made in Tokyo will be accepted by the Far Eastern Tribunal. If so, this would represent a further development of the laws of war. At this stage of the Tokyo Trial it is still difficult to see clearly all the elements which would compose that development. They could, however, be tentatively described as follows:

The loss of lives inflicted upon the military personnel of a nation attacked without a declaration of war would be a crime in itself, presumably on account of the fact that such members of the forces were unprepared to meet a military attack from the adversary. The reason for admitting the element of unpreparedness as relevant would consist in the fact that, in the absence of warning, the members of the attacked armed forces had no chance to fight and did not lose their lives in a fair contest of force. To deprive them of their lives under such circumstances would be tantamount to sheer murder and therefore criminal. The course which could then be taken is an alternative one. One might lay down as a legal presumption that in the absence of a declaration of war the armed forces of the attacked nation are to be deemed unprepared in all cases; or, on the other hand, one might judge each case upon its own merits, i.e. whether the attacked armed forces were <u>in fact</u> ready to meet the aggression or not.

Judging upon, and within the limits of, the concrete instances for which the Japanese war criminals were indicted, the criminal nature of such acts would in either case be restricted to the period of the opening of hostilities, i.e. to the period during which it is justifiable to consider that the armed forces of the attacked nations were taken unaware and could not therefore undertake the requisite

/operations

operations to engage in regular combat with the aggressor. The killing of combatants of the attacked nation after the period of surprise and unpreparedness had elapsed would not represent a crime.

Although limited to the initial stages of a war, the above charge opens a much wider question in connection with the legal argument on which the prosecutors founded their indictment. The argument consists in the contention that, in view of the unlawful opening of hostilities, the defendants did not and "could not acquire the rights of lawful belligerents". If this is to be taken as fundamental for the charge, it could at the same time be said that once the aggressors had acted in such a way as to be deprived of the "rights of lawful belligerents", they remain in the same legal position throughout the whole period of war, and nothing subsequent to an "unlawful" attack can make the war itself "lawful". The logical consequence would be that the killing of any combatant of the attacked nation committed at any time during the aggressive war, is criminal.

It is not in the least suggested that this view should be adopted in any future system of the laws of war, nor that it should be discarded. But in view of the course taken by the prosecution in Tokyo, the question has been raised, and should be answered one way or another, particularly in regard to the logical consistency of the comparatively novel rule according to which a war is criminal much more, if not solely, on the basis that it is aggressive than on the basis that it was launched without a declaration of war.

3. HUMAN RIGHTS VIOLATED OR LIABLE TO BE TREATED AS VIOLATED BY "CRIMES AGAINST HUMANITY"

The prosecutors at the Tokyo Trial dealt with a number of offences which throw light on the violation and protection of certain human rights of particular interest both in time of war and peace.

(a) One of these offences affects the right to health and to life. It concerns the illicit traffic in narcotics, and more particularly in opium. In the description of facts and circumstances relevant to prove inter alia the planning, preparation and waging of unlawful wars, the prosecutors made reference to the following events:

> "During the whole period covered by this Indictment, successive Japanese Governments, through their military and naval commanders and civilian agents in China and other territories which they had occupied or designed to occupy, pursued a systematic policy of weakening

/the native

the native inhabitants' will to resist... by encouraging increased production and importation of opium and other narcotics and by promoting the sale and consumption of such drugs among such people".*

The prosecutors went on to describe how the Japanese Government secretly provided large sums of money for this purpose, how it used the proceeds of the traffic in narcotics to finance aggressive wars, and how it conducted these illegal affairs through governmental channels and organizations.**

The main legal point made by the prosecutors in this respect was that the harm inflicted upon the civilian populations concerned was in violation of existing Treaties, which were all referred to expressly.*** This case could be regarded as representing one of the "inhumane acts" falling within the notion of "crimes against humanity", as defined in Article 5 (c) of the Far Eastern Charter.

(b) Another group of offences affects the political or civic rights of the citizens of Japan itself. If their criminal nature is recognized by the Tribunal they would also fall within the notion of "crimes against humanity" and be qualified as crimes perpetrated in the relation between a State (Japan) and its own citizens.

In the description of relevant events attached to the main body of the Indictment, the prosecutors described in the following manner how the "militarists" imposed their rule on Japan and violated the political and civic rights of their compatriots:

"... Free Parliamentary institutions as previously existed were gradually stamped out and a system similar to the Fascist or Nazi model introduced..."

"...Government agencies ... stamped out free speech and and writing by opponents of this policy ... Opposition to this policy was also crushed by assassinations of leading politicians...The civil and especially the military police were also used to suppress opposition to the war policy.

The educational systems, civil, military and naval, were used to inculcate a spirit of totalitarianism,

---

* See Indictment, Appendix A, Section 4. Italics are introduced.

** See Indictment, Appendix A, Section 4.

*** See Indictment, Appendix B, under 10, 16, 32 and 35.

/aggression,

aggression, desire for war, cruelty and hatred of potential enemies."*

Reference was made to breaches of the then binding Treaties thereby committed, e.g. the reference to Article 22 of the Covenant of the League of Nations.**

(c) Finally, the references made by the prosecutors in the Indictment to a number of other breaches of Treaties give a hint of what they apparently intended to develop before the Tribunal in the field of violations of human rights. Such, for instance, is the reference, already mentioned, to Article 22 of the Covenant which bound mandatory Powers to guarantee in the mandated territories "the prohibition of abuses such as the slave trade, the arms traffic, and the liquor traffic, and the prevention ... of military training of the natives for other than police purposes and the defence of territory..."*** Another instance is a reference made to Article 3 of the Mandate granted by the League of Nations to Japan in 1920, prohibiting slave trade and forced labour in the mandated territories. All these offences are in violation of the "laws of humanity" and could be considered as instances of "crimes against humanity".

In regard to most of the rights included in the parts of the Indictment quoted above under (a), (b) and (c), one major question remains to be elucidated by the Tribunal in its Judgment. It is the question whether violations of human rights caused by offences such as the illicit traffic in narcotics, liquor or arms are to be recognized as being criminal in themselves and consequently as entailing definite penal retribution, or whether they are to be treated as lying only within the limits of violations of international obligations, allowing or calling for certain sanctions but not for those provided by penal law.

Mutatis mutandis, the same question applies to violations of human rights committed by the suppression of political or civic rights on the part of a State (Government) in regard to its own citizens. In this case the question is amplified by the issue whether such doings within the borders of a State call for international penal justice, or merely for concerted international action of a different nature. By the

---

* See Indictment, Appendix A, Section 6. Italics are introduced.

** See Indictment, Appendix B, under 15.

*** See Indictment, Appendix B, under 15. Italics are introduced.

provisions of Article 5 (c) and 6 (c) respectively, of the Tokyo and Nürnberg Charters, which introduced the legal concept of "crimes against humanity"*, the right of the international community to conduct criminal proceedings for "inhumane acts committed against any civilian population, before or during the war," was recognized only inasmuch as such acts were committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal",** particularly in execution of or in connection with the planning, preparation, initiation or waging of an

---

* Prior to the two Charters it is difficult to see to what extent the notion of "crimes against humanity" was used and recognized as a legal term. It seems safe to assume that until that time it was rather used in a moral or philosophical sense. In this connection, see pages 11-12 of this Report regarding the attitude taken by members of the 1919 Commission on Responsibilities as to whether reference should be made to violations of the "laws and principles of humanity" in connection with war crimes. The American members objected to making such a reference on the ground that "laws and principles of humanity" were not a universally recognized standard in international law.

** For the full text of Article 5 (c) of the Far Eastern Charter, see pages 105-106. For text of Article 6 (c) of the Nürnberg Charter, see pages . In its Judgment the Nürnberg Tribunal expressly stated that "to constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal". See Judgment, H.M.S. London, page 65, paragraph 5. See also page 34 of this Report. This statement clears authoritatively a point raised by an amendment introduced in the text of Article 6 (c) of the Nürnberg Charter by a special Protocol signed in Berlin on 6 October 1945, between the four Powers signatories of the Charter, i.e. nearly two months after the signing of the Charter in London on 8 August 1945. The said Protocol was signed in order to remove from the English and French texts a semi-colon which stood between the two main parts of the text defining "crimes against humanity" in Article 6 (c), namely, between the words "..before or during the war", and the words "or persecutions on political..etc." in the English text. The semi-colon was replaced by a comma, appearing in the Russian text, and the wording of the provision itself was left unaltered. The French text had to be re-drafted in order to make clear the issue at stake with the deletion of the semi-colon. The result of this amendment was to make both types of "crimes against humanity", namely, "murder, extermination, enslavement, deportation and other inhumane acts" on the one hand, and "persecutions on political, racial or religious grounds" on the other hand, punishable under the terms of the Charter only if either of them were committed "in execution of or in connection with, any crime within the jurisdiction of the Tribunal", i.e. in execution of, or in connection with, "crimes against peace" or "war crimes". With the semi-colon between the said two parts, and particularly in the original wording used in the French text, the impression left was that this condition applied only to the part coming after the semi-colon, i.e. to "persecutions on political, racial or religious grounds." For the French text, see page 27 of this Report.

aggressive war. In its Judgment the Nürnberg Tribunal dismissed the case for such suppressions of the rights of German citizens committed before the war, on account of lack of evidence to support the charge that they were linked up with aggressive wars prepared and waged by the Nazi Government.*

Consequently, so far the answer seems to be the following: criminal proceedings on behalf of the international community for violations of human rights comprised in the category of political or civic rights committed within the borders of a State against its own citizens by executive or legislative action (so-called "crimes against humanity") are warranted only in connection with a war of aggression planned, prepared, initiated or waged by the same State. This affirms the right to international penal jurisdiction in the above set of circumstances, and leaves open the question of conviction on the factual merits of the case, as in any other criminal proceedings.

On the other hand, no answer is yet available to the question whether similar international penal proceedings could be warranted in time of peace for violations of an identical nature committed irrespectively of the planning, preparation or initiation of aggressive wars.

4. VIOLATIONS OF THE HUMAN RIGHTS OF VICTIMS IN THE TERRITORY OF NON-BELLIGERENT OR NEUTRAL POWERS

Finally, the prosecution included in their indictment war crimes committed or intended to be committed against individuals located in the territory of non-belligerent or neutrual Powers.

This case concerns territories belonging to Portugal and to the Soviet Union. In this respect the important point is that Portugal remained neutral throughout the whole period of the last war and that the Soviet Union entered into a state of war with Japan only on

---

* See Judgment, op. cit., page 65, paragraph 5. The relevant passage reads as follows: "The Tribunal is of the opinion that revolting and horrible as many of these crimes were it has not been satisfactorily proved that they were done in execution of or in connection with" crimes against peace or war crimes. "The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter ..."

8 August 1945, just a few days before Japan's capitulation.* Prior to that date, the Soviet Union and Japan were linked by a Pact of Non-Aggression signed on 13 April 1941, which represented the legal basis of their mutual neutrality in the wars in which they were respectively engaged after that date and until the Soviet Union declared war on Japan.

In their charge relating to war crimes, a part of which was cited above**, the prosecutors indicated the defendants for "breaches of the Laws and Customs of War ... against the armed forces of the countries hereinafter named and against many thousands of prisoners of war and civilians then in the power of Japan belonging to ... the Republic of Portugal and the Union of Soviet Socialist Republics ..."*** Both these countries were named, without distinction, together with those at war with Japan, none of which entered into a state of war with Japan at a date later than 1941.****

The period of time indicated as relevant to the charges is the period between 7 December 1941 and 2 September 1945.*****

The indictment does not provide a clear answer to the question whether the defendants of the Tokyo Trial were charged in connection with crimes which were actually committed in Soviet and Portuguese

---

* The readiness of the Japanese Government to accept the terms of surrender as laid down in the Declaration issued at Potsdam on 26 July 1945, was communicated on 10 August 1945. The formal acceptance of these terms was notified on 14 August. For the text of both communications see Department of State Bulletin, Vol. XIII, 1945, No. 320, page 205, and No. 321, page 255.

** See page 117.

*** See Indictment, Counts 53 and 55.

**** These other countries are: China, the U.S.A., the British Commonwealth of Nations, comprising for the purpose of the indictment (see Count 4), the United Kingdom, Australia, Canada, New Zealand, South Africa, India, Burma and the Malay States; France; the Netherlands; Philippines; Thailand. For particulars concerning the dates of the declarations of war between these countries and Japan, Department of State Bulletin, Vol. XIII, 1945, page 230-238. For dates concerning the aggression made by Japan against the territories of these countries see Indictment in its various counts and Appendix A.

***** See Indictment, Counts 53 and 55.

/territory,

territory, or merely for having taken part in the preparation of these crimes.

The defendants were charged for a threefold criminal activity.

(a) For having "participated as leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy", the object of which "was to order, authorize and permit" the commission of "the breaches of the Laws and Customs of War ... against the armed forces ... prisoners of war and civilians.*

(b) For having actually "ordered, authorized and permitted" the Commission of these offences** as a result of the said plan or conspiracy.

(c) And finally, for having "disregarded their legal duty to take adequate steps to secure the observance and prevent breaches" of the laws and customs of war***, "being by virtue of their respective offices responsible for securing the observance" of the laws and customs of war.****

Whereas it is questionable whether the fact of "planning or conspiring" to commit "war crimes" and "crimes against humanity" can be prosecuted as a separate criminal offence under the terms of the Charter, the defendants were accused of committing acts which are criminal under Article 5 irrespective of whether these acts (giving orders, authorizing or permitting the Commission of war crimes; failure to comply with legal duty to prevent war crimes from occurring) materialized in actual war crimes committed in the field

---

* See Indictment, Count 53, italics are introduced.

** See Indictment, Count 54, italics are introduced.

*** Here the Indictment specifies breaches of "Conventions and assurances and the Laws and Customs of War". See Count 55, italics are introduced.

**** See Indictment, Count 55.

/or not.*

or not.*

In this connection concrete instances of crimes perpetrated against nationals of several countries which were at war with Japan in the relevant period of time (between 7 December 1941, and 2 September 1945) were given, whereas no such cases were produced with regard to Portugal or the Soviet Union. As regards Portugal, the only fact produced was the invasion of the Portuguese portion of the island of Timor on 19 February 1942.** As to the Soviet Union, reference was made to two military aggressions both of which took place before the beginning of the relevant period of crimes. One reference concerns the attack at Lake Hassan in Soviet territory proper, which took place in 1938. The other concerns the attack made on the territory of the Mongolian People's Republic in 1939 at the Halkin-Gol River, which lies outside

---

* The Far Eastern Charter mentions "a plan or conspiracy" as criminal in itself only in regard to "crimes against peace", and not in regard to "war crimes" or "crimes against humanity". The position is the same in the Nürnberg Charter (Article 6). In its judgment, the Nürnberg Tribunal made reference to the final provision of Article 6 according to which "leaders, organizers, instigators and accomplices participating in the formulation, or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan." The Tribunal declared that this provision did not add any other new or separate crime to the three categories specifically defined in Article 6, but was designed only to establish the individual responsibility of persons participating in a criminal plan or conspiracy. Consequently, it discarded the charge for a "plan or conspiracy" to commit "war crimes" or "crimes against humanity". (See Judgment, H.M.SO, Cmd.696 London, page 31, and page 39 of this Report). According to this pronouncement, individual criminal liability for a "plan or conspiracy" to commit crimes exists only inasmuch as such plan or conspiracy is criminal in itself under the respective Articles of the two Charters, which means only with regard to "crimes against peace". This issue was recently confirmed in one of the subsequent trials held by U.S. Military Tribunals in Nürnberg; see pronouncement made by U.S. Military Tribunal No. 1 of 14 July 1947, in Re. U.S.A. versus Karl Brandt et al., U.N.W.C.C. Research Office, Document No. R7/US/9D. As to the individual responsibility for having "ordered, authorized, or permitted" the commission of "war crimes" or "crimes against humanity" or for having failed to prevent them from occurring by virtue of the legal duty incumbent upon the individuals concerned, it is covered by the above quoted final disposition of Article 5 of the Far Eastern Charter (Article 6 of the Nurnberg Charter) establishing the liability of "leaders, organizers, instigators and accomplices."

** See Appendix A, Section 10.

the territory of the Soviet Union but where members of the Red Army were involved in combats as Allies of the Mongolian Republic*.

Finally, the Indictment does not provide information as to whether, assuming crimes to have been actually perpetrated in Portuguese and Soviet territories, their victims included nationals of Portugal and of the Soviet Union, or whether they were confined to nationals of the countries at war with Japan at the relevant time, in this case members of their armed forces, combatants or prisoners of war.

Had this information been to hand it would have furnished all the elements of a complete case regarding war crimes and violations of human rights which at the time of their commission included the rights of nationals of neutral countries.

The main feature of this part of the Indictment is that it extends the provisions of Article 5 of the Charter to acts which, if not actually perpetrated, were none the less criminally intended to be perpetrated against nationals and on the territory of countries which, at the time of the crimes and violations of human rights involved, were not in a state of war with the Power whose nationals were held criminally responsible for the said acts.

To form a final conclusion on this point one will, of course, have to wait until the Far Eastern Tribunal pronounces its Judgment.

However, the elements provided by the Indictment and the Charter make it possible, even at the present stage of the Trial, to draw the following conclusions:

(a) Breaches of laws and customs of war accomplished by the commission of war crimes or by acts preceding them and constituting, as a whole, war crimes, imply that a state of war had been created between two countries. This very situation confers upon the illegal acts involved the nature of war crimes. In the absence of a state of war the same illegal acts are as a rule of an equally criminal nature, but in law they cannot be qualified as "war" crimes in the technical sense.

Yet the prosecutors in Tokyo have expressly included such acts under the same legal qualification as acts representing "war crimes" in the technical sense in regard to the countries at war with Japan at the relevant time. The significance of such a method of procedure will be considered later.**

---

* See Appendix A, Section 8.

** See page 99-102.

(b) No legal problem arises in this respect insofar as members of the armed forces (combatants or prisoners of war) of the countries at war with Japan are concerned. For breaches of Laws and Customs of War committed against them are war crimes, regardless of the territory in which they were committed, including territories of neutral States. Nor, for the same reason, does any legal point arise in regard to civilians, nationals of belligerent powers, located and victimized in territory belonging to a neutral Power, particularly when such territory is invaded and occupied by the aggressive Power.

(c) The point concerns only nationals of the neutral country belonging to the civilian population of the same country.

Under the terms of the Far Eastern Charter the prosecutors were justified in including a charge for crimes committed or directed against such nationals within the framework of a war crimes trial, in view of the field covered by the notion of "crimes against humanity" (Article 5(c)). The latter can be, and as a matter of fact are, regarded as falling within the concept of war crimes in a wider, non-technical sense, namely in the sense that they are defined as criminal acts connected in one way or another with a war of aggression.

A reference to this last point has already been made* and the following considerations can now be added to it:

"Crimes against humanity" comprise crimes committed against <u>any</u> civilian population, not only in time of war but also before the war. The fact that they comprise victims belonging to "any civilian population", i.e to the civilian population of any country, is expressly stated in the Nürnberg Charter, (Article 6(c)); and the fact that they relate to both the time of war and the time preceding war is stressed in both the Nürnberg and the Far Eastern Charter. It has been pointed out that the omission of the terms "against any civilian population" in the Far Eastern Charter is only verbal and that it does not affect the substance of its Article 5(c), which covers the same field as Article 6(c) of the Nürnberg Charter**. This follows from the logical context of Article 5(c) of the Far Eastern Charter. The main effect of declaring acts perpetrated "<u>before</u> or during the war" as "crimes against humanity" is to make it irrelevant which territory or

---

* See page 92-93.

** See page 80 under (a).

which population thus de facto victimized in connection with the preparation or the waging of a war of aggression is involved.* According to the meaning given to the corresponding provision of the Nürnberg Charter, such crimes include acts committed against the nationals of the aggressive State itself in its own territory.** From this it follows that if the terms "before or during the war" in the Far Eastern Charter have any meaning, they at any rate cover the population of any foreign country which Japan victimized or intended to victimize in connection with its war or wars of aggression. And there is little, if any, doubt that they also cover "crimes against humanity" committed against Japanese nationals in the homeland itself.

(d) The preceding remarks make it possible to draw the main conclusion in connection with this part of the Far Eastern Indictment.

The case brought against the defendants in respect of Portugal and the Soviet Union is an illustration of the fact that the scope of contemporary international law providing for the punishment of war criminals is wide enough to include penal retribution for violations of human rights transcending the notion of war crimes in the technical sense. Under the terms of Article 5(c) of the Far Eastern Charter a war criminal can be prosecuted and convicted for violations of human rights where there was no state of belligerency, where the victims were not nationals of a belligerent power, and where the violations were committed in territory of a neutral Power.

One of the results of such a development is to make rules of international law applicable in a field hitherto reserved to municipal law, and particularly in cases where municipal law is incapable of asserting itself on account either of the legal position involved or of the lack of any practical possibility of enforcing its provisions.

This may be regarded as a decisive step forward in widening the basis of both the substantive law and the judicial machinery required for the protection of human rights on an international level.

Yet, however important this development may be, it is, as has been previously stressed subject to a general limitation in international law as it stands at the present time. It is limited

---

* See page 35.

** See Nurnberg Judgment, H.M.S.O. London, Cmd. 6964, page 65.

/to violations

to violations of human rights which, even though committed outside the scope of belligerency between the countries directly involved, were committed in execution of or in connection with a war of aggression. This is a limitation which applies to the rules entailing punishment but also to those permitting the use of international penal justice itself.*

In connection with the preceding considerations it is appropriate to conclude with yet another point of interest. It concerns the clarity of the law applicable to violations of human rights in connection with war crimes.

The comparative novelty of certain parts of the law formulated in the Far Eastern and Nürnberg Charters, and the fact that they represent in themselves a partial and new codification in the field of international penal law which is in the making, give rise to certain difficulties in establishing a precise classification of all the various effects of the law developed and codified in the Charters. This is particularly true in regard to the drawing of a clear line between "war crimes" proper on the one hand and "crimes against humanity" on the other, and in establishing in a precise manner the scope of the latter.

Therefore, when dealing with information intended to show to what extent violations of human rights are or are not covered by existing international law it is important to ascertain at the same time the difficulties to which the text of the law may give rise.

The legal procedure adopted by the prosecutors at the Tokyo Trial in relation to the cases concerning Portugal and the Soviet Union, as outlined in the preceding pages is a case in point.

It has already been mentioned that the prosecutors presented the cases concerning Portugal and the Soviet Union under the same legal qualification which they applied to offences concerning the nationals of countries at war with Japan at the relevant time.** They did so in the counts headed "Conventional war crimes and crimes against humanity".*** Yet, when qualifying their charges under this heading, they made no further reference to "crimes against humanity". All offences, including those concerning Portugal and the Soviet Union, were uniformly qualified as representing "breaches of the Laws and Customs of War" or "violations

---

* See pages 92-93.

** See page 97, under (a).

*** See Indictment, Group Three, Counts 53-55.

of the Laws of War",* i.e. as representing only "war crimes" in the technical sense under the express definition of Article 5(b) of the Far Eastern Charter.

An explanation for such a method of procedure is to be found in the "Summary" which accompanied the text of the Indictment supplied to the United Nations War Crimes Commission. From this text it appears that the prosecutors took the view that paragraph (b) of Article 5 of the Charter, providing for "war crimes" in the technical sense, was adequate to cover also charges coming under paragraph (c) dealing with "crimes against humanity".**

It is difficult to see how such a method of implementing Article 5 of the Charter can be reconciled with the fact that at the relevant period of time Portugal and the Soviet Union were not at war with Japan. As

---

* In count 53 the relevant passage reads: "The object of such plan or conspiracy was to order, authorize and permit the Commanders-in-Chief ... and the officials of the Japanese War Ministry, and the persons in charge of each of the camps and labour units for prisoners of war and civilian internees...and their respective subordinates... to commit the breaches of the Laws and Customs of War, as contained in and proved by...Conventions, assurances and practices...against the armed forces...and against many thousands of prisoners of war and civilians then in the power of Japan belonging to the United States of America, the British Commonwealth of Nations, the Republic of France, the Kingdom of the Netherlands, the Commonwealth of the Philippines, the Republic of China, the Republic of Portugal and the Union of Soviet Socialist Republics...".

In Count 54, the relevant passage reads: "(The defendants)... ordered, authorized and permitted the same persons...to commit the offences... mentioned and thereby violated the laws of war."

In Count 55 the relevant passage is as follows: "(The defendants) ...being...responsible for securing the observance of the said Conventions and assurances and the Laws and Customs of War in respect of the armed forces...and in respect of many thousands of prisoners of war and civilians then in the power of Japan belonging to the United States of America, the British Commonwealth of Nations, the Republic of France, the Kingdom of the Netherlands, the Commonwealth of the Philippines, the Republic of China, the Republic of Portugal and the Union of Soviet Socialist Republics, deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches thereof, and thereby violated the laws of war." (Italics are introduced).

** See U.N.W.C.C. document C.197, page 2, last paragraph. The relevent paragraph reads: "Group Three: The charges are laid under paragraphs (b) and (c) of Article 5 of the Charter, and it will be contended that paragraph (b) is adequate to cover them all. They allege conspiracy to commit and the actual commission of large numbers of breaches of the laws and customs of war, contained in or proved by the practice of civilized nations and the various Conventions governing the conduct of hostilities, the treatment of prisoners of war, and of persons and property in occupied territory." Italics are introduced.

/already

already pointed out* it is the very existence of a state of war which confers upon the offences involved the nature of "war crimes" as distinct from other types or categories of crimes. Consequently, in the absence of a state of war, the offences committed cannot have in law the nature of "breaches of the laws and customs of war". Under the terms of the Charter the answer is that they represent "crimes against humanity", which include offences committed before a state of war has arisen.

The above attitude is undoubtedly due to the difficulty of drawing a clear line of demarcation between the two categories. The difficulty is in a way confirmed in the Judgment of the Nürnberg Tribunal. Referring to the offences perpetrated by the Nazi war criminals, the Tribunal stated that "...from the beginning of 1939 war crimes were committed on a vast scale, which were also crimes against humanity."

However, at the same time the Nürnberg Tribunal states that, insofar as the inhumane acts committed after the beginning of the war "did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity".**

Thus, the Nürnberg Tribunal established the following distinction:

(a). That there are cases in which "war crimes" are simultaneously "crimes against humanity";

(b) That there are other cases in which "crimes against humanity" do not constitute "war crimes".

The Tribunal did not say in what cases and under what conditions or circumstances "crimes against humanity"are at the same time "war crimes" and in what cases they are not. Nevertheless, it established, on the one hand, the fact of the possibility of situations arising where the two categories overlap and intermingle, and on the other hand of situations arising where they remain distinct and separate.

Without entering into the question whether the reason for such a close relationship between the two categories lies in the similar nature of the offences which they are intended to cover, there remains the fact that the law is apparently not clear enough to provide a definite line of demarcation.

On the other hand, the fact remains that, however closely intermingled, both categories preserve their individuality both in the text of the law and in the sphere of facts as established by the Nürnberg Judgment, and that they can never reach the point of being entirely absorbed one by the other.

---

* See pages 97-98 , under (a).

** See Judgment, H.M.S.O, Cmd. 6964, page 65. See also considerations on page 2 of this Report.

/Thus,

Thus, three elements at least lead to the conclusion that there is a need for supplementing and clarifying in some way the existing definition of "crimes against humanity". One is the case concerning Portugal and the Soviet Union as outlined above; another is the findings of the Nürnberg Tribunal; and the last is the way in which the prosecutors at the Tokyo Trial thought it appropriate to proceed by way of absorbing one category into the other in spite of the legal considerations which point in the opposite direction.

D. SPHERES IN WHICH THE RIGHTS OF THE VICTIMS AND THE RIGHTS OF THE ACCUSED MAY BE SAID TO HAVE CONFLICTED AT THE TIME OF THE OFFENCE

The Problem

In the preceding pages information has been compiled regarding the rights of the victims of war crimes so far as it is available in the law of the Far Eastern Charter and in the indictment submitted to the Far Eastern Tribunal.

As a matter of principle, the law is applied pursuant to the rule that every violation of human rights entails personal responsibility by the perpetrator and penal retribution for the rights violated. There is, in this connection, one particular aspect to be considered of the mutual relationship in which the perpetrators and their victims may be placed at the time of the offence.

The relationship referred to can be described as one of conflict, for the following reason:

Persons who violate human rights by committing war crimes or crimes against humanity may have acted as experience has abundantly proved, in such circumstances or situations that their personal guilt or liability is open to question. One such instance occurs when the perpetrator has acted upon orders of his government or of any of his superiors whose instructions he is legally bound to obey. Another instance occurs where the perpetrator has committed violations of human rights within the scope of so-called "acts of states", that is to say in performing a function or duty in the state hierarchy whereby his private personality is superseded by his role as a servant of the state on whose behalf he is acting. Yet another instance, which frequently represents only a variety of the first group (violations committed upon superior orders), concerns cases where human rights have been violated as a result of reprisals conducted by one belligerent against another.

In such cases it is necessary to determine how far the perpetrators can be held personally responsible in the circumstances.

/As an illustration

As an illustration of the complexity of the situations which may be involved the following passages from an analysis by Professor H. Lauterpacht on the subject of superior orders in the armed forces may be usefully quoted:

"In Great Britain and in the United States a soldier cannot adduce superior orders as a circumstance relieving him of liability for an illegal act. This is a rule established by a long series of decisions in both countries. On the other hand, according to English law, the soldier is bound to obey lawful orders of his superiors, and he is liable to punishment by the summary process of a court-martial in case of disobedience.... The result is that in addition to the natural risks of his calling, the soldier has, in theory, to face the dangers of a conflict between his duty of obedience to orders and his duty to obey the law... Numerous decisions of courts in the United States recognise that while, in principle, superior orders are not a valid defence, obedience to an order which is not on the face of it illegal and is within the scope of the superior officer, relieves the soldier of liability... In England... it is generally recognised that the exercise of the right of pardon by the Executive is in such cases a proper remedy... Conversely, many countries which....have adopted the rule that obedience to superior orders excludes liability, make an exception in cases in which the orders are illegal. They, in turn, differ as to the necessary degree of the illegality. The German Code of Military Criminal Law, prior to the second World War, provided that the subordinate is liable to punishment as an accomplice if, when obeying an order, he knows that the act ordered involves a crime or misdemeanour. According to the law of other states, the immunity of the soldier obeying orders ceases if he knows or ought to have known of the unlawful nature of the order. There are indeed some states, in particular France, in which there is, apparently, no qualification for the rule that, in relation to the armed forces, superior orders are in all circumstances a valid excuse... But it has not been asserted that its effect is to relieve French nationals of responsibility when tried before foreign tribunals.... For it is, by necessary implication, a rule applicable only to the State's own nationals and only in respect of its own municipal law. In fact, no country has more emphatically than France, rejected the plea of superior orders when put forward by enemy soldiers and officers accused of war crimes... There is no international judicial authority on the subject, but writers on international law have almost

/universally

universally rejected the doctrine of superior orders as an absolute justification for war crimes."*

In spite of the practices and opinions tending to confine the plea of superior orders within definite limits, it is apparent from the above quoted passages that the rules on the subject are far from providing clear-cut answers to the questions involved.

Difficulties of a similar nature arise in regard to the effect of positions of authority in connection with the doctrine of "acts of State" covering individual responsibility, and in respect of violations of the laws and customs of war committed as reprisals.

It is at this point that the rights of the victims and those of the accused may be regarded as being in conflict. For in all such situations it is the right of only one of two categories that can be made good: either the right of the victim, by imposing a punishment upon the perpetrator; or the right of the accused, by admitting a plea of exoneration from responsibility or of mitigation of punishment.

The Rules

The Far Eastern Charter contains an express provision on this issue as far as the position held by the accused and his relationship with his superiors are concerned. This provision (Article 6) reads as follows:

> "Neither the official position, at any time, of the accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

The above provision is a repetition and confirmation of the principle laid down in the Nürnberg Charter and reaffirmed in the Control Council Law No. 10, that neither the high position nor the fact of having acted upon superior orders can, of itself, exonerate the accused from responsibility. Certain differences between these texts will be considered later.

Precedents

The principle itself is in line with the attitude taken and the recommendations made by the Commission on Responsibilities which was set up in 1919 by the Preliminary Peace Conference in Paris.

---

* See H. Lauterpacht, The Law of Nations and the Punishment of War Crimes, British Year Book of International Law, 1944, pages 71-73.

On the issue of the position held by an individual who had committed violations of the laws and customs of war, the Commission on Responsibilities s declared the following:

"...the Commission desire to state expressly that in the hierarchy of persons in authority, 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 Heads of States."

Considering the argument that heads of States enjoy immunity from prosecution, the Commission discarded it in the following terms:

"... this privilege, where it is recognised, is one of practical expedience in municipal law and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country, the position from an international point of view is quite different.*

Accordingly, the Commission came to the general conclusion that:

"All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity are liable to criminal prosecution."**

The principle expressed in the above conclusion was implemented in the Treaty of Versailles, and in particular in Article 227 which proclaimed the criminal responsibility of the Kaiser and provided for a special tribunal to try him.***

In connection with its findings concerning the irrelevance of the position held by a person accused of violations of the laws and customs of war, the Commission also touched the question of acts committed upon the orders of such persons, and stated the following:

"We desire to say that civil and military authorities cannot be relieved from responsibility by the mere fact that a higher authority might have been convicted of the same offence. It will be for the Court to decide whether a plea of superior orders is sufficient to acquit the person charged, from responsibility."****

---

* See Violations of the Laws and Customs of War, Report of Majority and Dissenting Reports of American and Japanese members of the Commission on Responsibilities, Oxford, Humphrey Milford, 1919, page 19

** The American members disagreed with this conclusion and the Japanese members made a general reservation. See op. cit. pages 65-66 and 79-80. Also pages 11-12 and 13 of this Report.

*** In this connection see also page 82 , n. 2.

**** See Op. Cit., page 14.

/The Commission

The Commission thus opened the way for the subsequent development which materialized in the Far Eastern Charter, the Nürnberg Charter and the Control Council Law No. 10, and which established a general rule resolving the question of the relationship between any superior and his subordinates, at whatever level of the hierarchy.*

Comparison with the Nürnberg Charter

The text of the afore-quoted Article 6 of the Far Eastern Charter shows certain differences from the corresponding provisions of the Nürnberg Charter and of the Control Council Law No. 10.

Under the wording of the Far Eastern Charter, the accused are denied the right to be freed from responsibility on account of their position or of their having committed a crime upon superior orders. But the Tribunal has nevertheless power to take either of these circumstances into consideration in mitigation of the punishment.

Under the terms of the Nürnberg Charter and of the Control Council Law No. 10 this power is confined exclusively to the plea of superior orders, and it is expressly stated that the position of the accused cannot be considered in mitigation of punishment.**

It is difficult to see the reason for which the authors of the Far Eastern Charter have departed from the rule as laid down in the two texts referred to, both of which preceded the enactment of the Far Eastern Charter.

---

* For the changes which recently occurred in the British Military Manual and the United States Rules of Land Warfare, see page 83, n. 1, pages 221 and 223. In 1944, both texts were amended to insert a rule similar to the one appearing in the Far Eastern Charter. Until then the rule was constructed on the opposite principle that individuals committing violations of the laws and customs of war upon superior orders were not war criminals.

** Article 7 of the Nürnberg Charter reads: "The official position of defendants whether as Heads of States or responsible officials in Government Departments, shall not be considered as freeing them from responsibility, or mitigating punishment." Article 8 reads: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires." Article II, paragraphs 4 (a) and (b) of the Control Council Law No. 10 is worded on the same lines and reads as follows: "The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment. The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation." Italics are introduced.

Conclusions

The conclusions which may be drawn from the above analysis are the following:

(a) In the conflict which may arise between the rights of the victims of war crimes and those of the persons accused of the commission of those crimes, in the sense described in the beginning of this section, the rule of international law, as it now stands, is that the accused are denied the right to be exonerated from responsibility on account of their hierarchical position or on the ground of having acted upon superior orders. On this point there is complete unity in the existing rules, which thus extend recognition to the rights of the victims and not to those of the accused.

(b) The existing rules are not unified on the issue of the punishment to be imposed upon accused persons in the above two types of cases. The Far Eastern Charter empowers the tribunal to admit a plea for mitigation in both cases. The Nürnberg Charter and the Control Council Law No. 10 confers this power only in regard to the plea of superior orders, and not in regard to a plea based on the position held by the accused. The latter plea is inadmissible in all cases.

(c) None of these sources of international law recognizes a right of the accused to claim mitigation of punishment. There is only the right to submit a plea to this effect, and the tribunal retains full discretionary power to reject or admit the plea on the merits of each individual case.

Reprisals

Texts of international law are still silent on the question of violations of the laws and customs of war committed as reprisals. No trace is to be found on the subject in the Far Eastern Charter, nor in the Nürnberg Charter and Control Council Law No. 10.

This may be due to the fact that such violations may be considered as covered by the two previous types of cases. In any reprisals an order has to be issued for their execution, and this instantly brings into the picture the individual who issued the order and the individual who carried it out. Thus in all instances a solution is attainable on the basis of the rule regulating the effect of the plea of superior orders and of the rule regarding the position of an individual exercising superior authority.

This type of case is however, complicated by the fact that customary law recognizes, under certain conditions, the right to have recourse to reprisals as a counter-measure for breaches committed by the other party,

/who is thus

who is thus assumed to have been guilty of such breaches in the first place.*

The solution of such cases still awaits a precise answer in conventional international law.

E. CONCLUSIONS

The conclusions which may be drawn from this incomplete study of the Tokyo Trial can be summarized as follows:

The law contained in the Far Eastern Charter embodies all the main rules of the contemporary laws and customs of war, and constitutes in a certain degree a new code of these rules. It has its counterpart in the Nürnberg Charter but, although both charters are similar in substance, there exist certain differences which would make it desirable for the future to unify the rules contained in them in a single international instrument. Such differences appear, for instance, in regard to the criminality of a "declared" war of aggression; in regard to the enumeration of war crimes which is of value in order to define their field with greater precision; and in regard to the responsibility of members of criminal organizations. There seems, in particular, to be a case for clarifying further the relationship between the notion of "crimes against humanity" and "war crimes" in the narrower sense, which in the view of the prosecuting body in Tokyo could be regarded as coinciding.

Another point of interest is that the prosecutors indicted the accused for acts which would not necessarily materialize in actual war crimes or crimes against humanity, namely for attempts to commit such crimes. In the case of crimes against peace, the law declares expressly that the "preparation or planning" of a war of aggression is criminal in itself, but nothing of the sort is laid down in regard to war crimes or crimes against humanity, so that this question is left to be decided by the Tribunal on the basis of general rules of warfare.

The Nürnberg Tribunal dismissed the charge for attempting to commit war crimes or crimes against humanity, founding its decision upon a strict interpretation of its Charter. It remains to be seen whether the Far Eastern Tribunal will follow suit or whether it will apply general principles of penal law, according to which attempts to commit most crimes are punishable in themselves under the rules of common law.

---

* See H. Lauterpacht, Op. cit. pages 75-77.

The Far Eastern Charter as it stands undoubtedly covers a wide field of human rights. Nevertheless, the question which are the specific human rights protected by its provisions is left to be decided by the Tribunal itself when dealing with the specific war crimes violating those rights. But it would perhaps be legitimate, even at this stage, to draw the conclusion that certain rights of the civilian population are protected, such as the right to fair trial; the right not to be deprived of life and personal liberty except after fair trial; and the right to personal integrity and humane treatment when under detention. As to the specific rights of prisoners of war, they are left to be determined under the rules of the Hague and Geneva Conventions. They concern, in particular, the right to humane treatment, including the right to health and to sufficient food.

On the other hand, owing precisely to the fact that the solution regarding specific human rights depends upon the findings of the courts in each particular instance, it means that in regard to a large number of human rights the answer is still uncertain. This uncertainty applies to such inhumane acts as the traffic in narcotics, and the restriction or suppression of rights such as those relating to civil and political liberties, both in time of war and peace. Finally, in one part of the Indictment the point was raised as to whether combatants can claim the right to life during military operations, where such operations have been initiated without warning. Any answer to these and similar questions must depend on the Judgment of the Far Eastern Tribunal, when it is pronounced. The main question for consideration is whether such rights are to be recognized to the extent that their violation will involve penal retribution, or whether such violations are to be regarded as remaining outside the scope of international penal law. Another question will be to determine more precisely the human rights which can justifiably be restricted in time of war or in time of emergency. This concerns, in particular, rights such as those connected with freedom of speech, meeting and association, and the exercise of the right to property.

The law contained in the Far Eastern Charter leaves little, if any, uncertainty as regards the various categories of individuals liable to be held penally responsible for violations of human rights. On this point the Far Eastern Charter is as complete and precise as the Nürnberg Charter. It lays down first of all the general rule that not only actual perpetrators, but also "leaders, organizers, instigators and accomplices" are to be held responsible. In addition, there is the rule that neither the official position, including that of heads of states and members of governments, nor the fact of having committed a violation upon superior orders, can free an accused from responsibility. All these rules are

/clear

clear and wide enough to prevent the real culprits from escaping punishment and to act as a deterrent.

Finally, the following two points should be noted. The personal status of the perpetrators or of the victims, i.e. the question of their nationality and more particularly whether they were nationals of belligerent or neutral powers, does not affect the implementation of the laws and customs of war in case of violations of human rights committed by them or against them. On the other hand, whenever a conflict may be said to have arisen between the rights of the victims and those of the accused at the time of the offence, the general rule appears to be that the conflict is solved in favour of the rights of the victims. The rights of the accused are recognized as a rule in the sphere of mitigation of punishment and not in regard to penal responsibility for the crime itself.

The weakest point in this set of rules appears to be that concerning responsibility for acts committed as reprisals. The question is left unanswered by the Tokyo and Nürnberg Charters and it requires a solution in view of the fact that reprisals are still recognized as a lawful means of action in given circumstances and conditions.

CHAPTER III

HUMAN RIGHTS IN TRIALS OTHER THAN THOSE CONDUCTED BY INTERNATIONAL MILITARY TRIBUNALS

A. INTRODUCTION

1. The Approach to the Study of the Protection of Human Rights in Time of War

Previous investigations into the judicial protection of human rights have usually been conducted on the plane of Municipal Law; an examination of this question in the sphere of International Law is rather more unusual, and it is worth asking what guidance can be derived from previous studies of human rights in Municipal Law systems.

Such discussions of the fundamental rights or freedoms as appear in text-books on Constitutional Law (i.e. the constitutional provision of municipal laws) will be found to deal with, inter alia, two aspects of the problem:

(i) The extent to which the law of the land has left the individual free to exercise these rights. Dr. Ivor Jennings, in Chapter VIII (Fundamental Liberties) of The Law and the Constitution* points out that, whereas nearly all written constitutions (such as that of the United States) lay down certain "fundamental rights" which can be limited or taken away only by constitutional amendment, in the United Kingdom there is no written constitution and no such fundamental rights are recognized. In the United Kingdom, he concludes, "the nature of the liberties can be found only by examining the restrictions imposed by the law", and, as examples, the learned writer proceeds to show the extent to which the exercise of the freedom of speech and publication and of the freedom of assembly is permitted under English law.**

A certain amount of information which is to some extent relevant to this aspect can be derived from a study of war crime trials, in so far as an accused is sometimes found not guilty of a war crime because his acts, although they may seem to have violated the human rights of his victims, were held to be justified by the laws and usages of war. Thus, while an attempt to ensure a measure of personal liberty to prisoners of war is made by the final sentence of Article 13 of the Geneva Prisoners of War Convention, which

---

* On pages 237 and 244 of the Second Edition.

** Op cit, pages 247-260.

/provides

provides that prisoners "shall have facilities for engaging in physical exercises and obtaining the benefit of being out of doors",* nevertheless, should a prisoner of war attempt to escape, it has always been regarded as permissible under the laws and usages of war for his captors to shoot at him in order to prevent his escaping. For instance, in their trial before the Eidsivating Lagmannsrett (Court of Criminal Appeal) in Norway in March 1946, allegations of murder were made against ex-Kriminalsekretär Bruns and ex-Kriminaloberassistent Clemens, on the grounds, inter alia, that they shot and killed Norwegian prisoners, but the accused were found not guilty of these charges. The Court were satisfied that Bruns, in trying to stop a prisoner from escaping, had aimed at his legs but that, as the prisoner stooped at that moment, the shot hit him in the head. The Court came to the conclusion that, as the prisoner shot by Bruns had not stopped when ordered to do so, the defendant had acted within his rights in shooting at him. The victim was an important official in the illegal intelligence service whose capture was of great importance to the German authorities, and the only way to stop him from getting away was to shoot at him. The Court, therefore did not consider the defendant guilty of his murder. The Court also established that a prisoner shot by Clemens had been trying to escape, and found that the defendant had not exceeded his rights in trying to prevent him from escaping by shooting at him.** The Judge Advocate serving in the trial before a British Military Court of Karl Amberger for the shooting of prisoners of war even went so far as to advise the Court that: "If the accused, Karl Amberger, did see that his prisoners were trying to escape or had reasonable grounds for thinking that they were attempting to escape then that would not be a breach of the rules and customs of war, and therefore you would not be able to say a war crime had been committed."***

Such information as the above does not, of course, provide an exact example of the first aspect of the question. A true instance

---

* To which, among other provisions, reference was made by the Prosecutor in the trial by a British Military Court at Hanover on 24-26 January 1946, of Arno Heering.

** See Volume III of War Crimes Trial Law Reports (Now in the Press).

*** The Ireierwalde Case, pages 81-7 of Volume 1 of War Crimes Trial Law Reports, published for United Nations War Crimes Commission by H. M. Stationery Office. Italics inserted.

would be a provision of international law which directly restricted the rights of prisoners of war or inhabitants of occupied territories as distinct from a provision permitting the detaining or occupying Power to restrict these rights. The enforcement of such rules, if they exist, could not, however, be illustrated by war crime trials, where the above-mentioned categories figure as victims and not as accused. Far from maintaining that prisoners of war were under a duty under international law not to attempt to escape, the Judge Advocate in the Dreierwalde Trial would appear to have assumed that they had a right to make such an attempt. He claimed that it was "the duty of an officer or a man if he is captured to try to escape. The corollary to that is that the Power which holds him is entitled to prevent him from escaping, and in doing so no great niceties are called for by the Power that has him in his control; by that I mean it is quite right, if it is reasonable in the circumstances, for a guard to open fire on an escaping prisoner, though he should pay great heed merely to wound him, but if he would be killed though that is very unfortunate it does not make a war crime."

(ii) The extent to which the rights of the individual have actually been protected by the law. It is this aspect with which any study of the problem based on an examination of trials of war criminals must be mainly concerned.

Professor Dicey, in his classic The Law of the Constitution, made the following remarks regarding the peculiar character of the British Constitution: ".....the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts.....There is in the English constitution an absence of those declarations or definitions of rights so dear to foreign constitutionalists.....In many foreign countries the rights of individuals, e.g. to personal freedom, depend upon the constitution, whilst in England the law of the constitution is little else than a generalization of the rights which the courts secure to individuals."*

Writing in the same vein, Dr. E. C. S. Wade and Mr. G. G. Phillips LL.M., have stated that: "It is then in the law of crimes and of torts,

---

* Ninth Edition, pages 195-200.

/part of the

part of the Common Law of the Land, the ordinary law and not the fundamental Constitutional Law, that the Englishman finds protection for his liberty against officials of the State as well as others."*

The laws of war are not without instances of the assertion of the rights of certain specific categories of persons, and of principles of an even more general nature, which are in some ways analogous to declarations of fundamental rights and general moral principles. One provision which has often been quoted by Prosecuting Counsel in war crimes trials,** Article 46 of Section III (Military Authority over the Territory of the Hostile State) of the Hague Convention No. IV of 1907 (Concerning the Laws and Customs of War on Land), reads as follows:

> "Article 46. Family honour and rights, individual life, and private property, as well as religious convictions and worship, must be respected.
>
> Private property may not be confiscated".

Again, the preamble to the Hague Convention states that the signatories are "animated also by the desire to serve, even in this extreme case,*** the interests of humanity and the ever-progressive needs of civilization", and the introductory sentences to the Convention include the following passage:

> "Until a more complete code of the laws or war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience."****

Judge Skau, delivering a judgment which was supported by the majority opinion of the Supreme Court of Norway in the appeal of Karl-Hans Hermann Klinge, a German war criminal sentenced to death by the Eidsivating Lagmannsrett, stated that torture constituted a violation of those "laws of humanity" and "dictates of the public conscience" which were mentioned in the text just quoted.

---

* Constitutional Law, Second Edition, page 354.

** For instance, in the Belsen and other concentration camp trials.

*** That is to say, on the event of an outbreak of war.

**** Italics inserted.

Judge Skau added, however, that acts of torture also constituted a breach, inter alia, of Articles 46 and 61 of the Geneva Convention, two specific provisions of International Law.*

Most provisions made by the Laws and Customs of War, which protect certain human rights, are not, however, of such a general nature, as the analysis to be attempted presently** will show. Many of those provisions require the performance or the avoidance of acts of a well-defined nature, and it is in this connection that the maxim ubi remedium ibi ius, to which Dicey made specific reference,*** acquires significance for the purposes of the present study. The human rights protected and the extent of such protection can only be found through an analytical study of the judicial application of a number of legal provisions of a restricted scope.

2. Difficulties Involved in the Study of Human Rights in War Crime Trials

The examination of the extent to which trials of war criminals protect or vindicate human rights confronts the investigator immediately with the question of the segregation and description of such rights as are suitable for treatment.

Certain municipal legal texts, for instance the Civil Criminal Code of Norway,**** make some attempt to arrange their provisions according to the rights of the individual which will be violated by breach thereof. The laws and usages of war, however, are not arranged on any such systematic basis.

In any case it is seldom if ever the practice for the charge against an accused to allege any more specific legal contravention than a breach of the laws and usages of war. Thus, a British Charge Sheet accuses the defendant of "committing a war crime" in that, at a certain place and time, he was responsible for some act or omission "in violation of the laws and usages of war". The Canadian practice has been the same as the British.

United States Charge Sheets have not shown quite the same uniformity of drafting and may allege a "violation of the laws of war" or a "violation of International Law". In the Jaluit Atoll Trial,*****

---

* See Volume III of War Crimes Trial Law Reports (Now in Press).

** i.e. in Section C of this Chapter (Rights of the Victims of War Crimes).

*** Loc cit, page 199

**** Separate Chapters of this Code, deal for instance, with offences against the liberty of the person and offences against life, body and health.

***** War Crime Trial Law Reports, Volume I, pages 71-80.

/held before

held before a United States Military Commission in the Pacific, the charge was one of murder, and the specification, setting out the alleged elements of the offence, ended with the words: ".....all in violation of the dignity of the United States of America, the International rules of warfare and the moral standards of civilized society". An objection made by the accused on the grounds that the inclusion in the charge of the words "moral standards of civilized society" was improper and non-legal was over-ruled by the Commission.

Charge Sheets produced before the Norwegian Courts trying war criminals allege that the accused committed war crimes which violated specified provisions of Norwegian Law. French Actes d'Accusation allege breaches of French law and the Court must decide whether these were justified by the laws and customs of war.

Nor in most cases is it possible to determine with certainty on what ground the Court trying a war criminal came to its decision. In Norwegian trials, the Court's findings and reasons are each delivered in public and recorded. A French Military Tribunal's view of the facts can be gathered from its judgment and the provisions of French law found to be violated are also stated. The British, United States and Canadian practice, however, is for the court simply to announce its finding of guilty or not guilty and to award any punishment on which it may have decided.* The reasoning by which the Court arrives at its verdict and sentence can never be discovered, since its discussions are held in private sitting and only the final decisions announced. The arguments of Counsel are of interest in so far as they throw light on considerations which the Court may have had in mind during their deliberations, but are not of course an infallible guide. In strict law, even the summing up of a Judge Advocate before a British Military Court, when such an officer is is appointed, is not a final indication even of the law on which the Court acted. Two relevant provisions setting out some of the powers and duties of the Judge Advocate are made by Rule of Procedure 103, (e) and (f), which run as follows:**

---

* There are some exceptions among the United States Trials, notably the detailed judgments by the United States Military Tribunals conducting the "Nürnberg Subsequent Proceeding Trials." (see page 135).

** The Royal Warrant under which trials of war criminals by British Military Courts are held provides, in Regulation 3, that, except in so far as therein otherwise provided, the Rules of Procedure applicable in a Field General Court Martial of the British Army shall be applied so far as applicable to the Military Courts for the trial of war criminals. These rules are contained in the British Army Act and the Rules of Procedure are made under the Act by an Order in Council, the latter being a piece of delegated legislation enacted by the Executive in 1926 (S.R. & O. 989/1926).

/"(e) At the conclusion

"(e) At the conclusion of the case he will, unless both he and the court consider it unnecessary, sum up the evidence and advise the court upon the law relating to the case before the court proceed to deliberate upon their finding;

"(f) Upon any point of law or procedure which arises upon the trial which he attends, the court should be guided by his opinion, and not disregard it, except for very weighty reasons. The court are responsible for the legality of their decisions, but they must consider the grave consequences which may result from their disregard of the advice of the Judge Advocate on any legal point. The Court, in following the opinion of the Judge Advocate on a legal point, may record that they have decided in consequence of that opinion."*

From these clauses it follows that, strictly speaking, a British Military Court is the final judge of the law as well as of the facts of a case, and that a Judge Advocate's summing up does not necessarily set out the law on which the Court acted, although in practice his words carry a very high authority.

It is not possible, therefore, in most cases, to divine the view of the Court regarding the precise human rights protected or vindicated by trials of war criminals. This would probably remain the case even if the reasons of the court were always recorded, since these courts, following the traditions of civilized justice and observing the maxim nulla poena sine lege, naturally try alleged criminals for breach of specific legal provisions rather than for offences against more general principles.**

To say this is of course not to maintain that the judges have been concerned with legalities to the exclusion of principles of justice, for these latter have been embodied in the rules applied. In his summing up in the Rheine Airfield Trial (Heinz Stellpflug and five others) by a British Military Court at Osnabruck, 26-29 April 1947, the Judge Advocate said:

"The laws and usages of war have developed out of the following principles. The first is that the belligerent is justified in applying any amount and any kind of force necessary for the purpose of war, and of course that must always be so. By that I mean force

---

* Italics inserted.

** Examples of the worst possibilities involved in taking the latter course are provided by trials by the German Courts in which application was made of an act of 28 June 1935, authorizing punishment for acts which were analogous to acts already punishable by law; in determining whether offences fell within the scope of this provision the Courts were directed to apply "sound popular feeling". (gesundes Volksempfinden)

necessary for the complete submission of the enemy at the earliest possible moment with the least possible expenditure of men and money. The second principle is the maintenance of humanity; that covers the exclusion of all kinds and degrees of violence not necessary for the purposes of war, and which therefore are not permitted under these customs and usages of war to the bel igerent. Thirdly, there is the aim that chivalry shall still remain, chivalry which demands a certain amount of fairness in offence and in defence, and a mutual respect between the opposing forces. That, Gentlemen, is what the observance of the laws and usages of war seeks to attain, a high standard.

"It is upon those principles that it has been held that it is forbidden to kill or wound an enemy who, having laid down his arms or having no longer any means of defence, has surrendered and fallen into captivity, having ceased - and this is the important point here - to resist. In that event it is the proper course, under these laws and usages of war, to take him as a prisoner of war and grant him the protection and custody to which he is entitled as a prisoner of war".

All that is maintained in the present paper is that the Courts trying war criminals have not been called upon to view the cases before them for the analytical angle required of one whose task is to determine how far these trials protected or vindicated human rights.

The literature dealing with questions concerning human rights is vast and cannot be said to provide any agreed catalogue of rights which can be accepted for the purpose of showing whether and how far they have been protected or vindicated in war crime trials. Lawyers, philosophers, sociologists and psychologists are not agreed among themselves as to what rights there are and in what sense they may be said to exist. These topics have been the subject of lively discussion ever since the rise among the Ancient Greeks of the Stoic school of philosophy, which held that legislators should attempt to promote the freedom and equality of all men, to avoid discrimination on account of race or sex and to discourage any oppression of men by other men.*

Furthermore, it can be argued that some commonly recognized rights include others within their scope; thus, Dr. Jennings writes:

"The right to personal freedom is a liberty to so much personal freedom as is not taken away by law. It asserts the principle of legality, that everything is legal that is not illegal. It includes, therefore, the "rights" of free speech, of association, and of assembly. For they assert only that a man may not be deprived of his

---

* See the authorities quoted in Jurisprudence, by Edgar Bodenheimer (New York, 1940) page 109, footnote 1.

/personal

personal freedom for doing certain kinds of acts - expressing opinion, associating, and meeting together - unless in so doing he offends against the law. The "right of personal freedom" asserts that a man may not be deprived of his freedom for doing any act unless in so doing he offends against the law. The last is the genus of which the others are species."*

A possible procedure open to the investigator would be to list the human rights commonly protected by the municipal laws of civilized states, and to find how far these same rights have been protected by the trials of war criminals. This approach would be made the easier by the fact that in many countries, as has already been seen, the fundamental rights of the individual have been set out in a basic written Constitution. In an article on The Rights of Man and International Law,** by Dr. Edward Benes, the following paragraph appears which seems relevent in this connection:

"In the course of the last war the American Institute of International Law, in a meeting held in January 1916, passed a declaration of the rights and duties of nations, in the preamble to which there were expressly invoked the municipal laws of civilized nations such as the right to life, the right to liberty, the right to the pursuit of happiness, the right to legal equality, the right to..... property and the right to the enjoyment of the aforesaid rights, and which demanded that these fundamental rights should be stated in terms of international law."

Yet in so far as the method suggested would involve the examination of formal constitutional texts, and the extraction therefrom of certain fundamental rights, it would not be without its difficulties. There are for instance numerous provisions of international law which aim at securing the right to a fair trial of persons under the temporary jurisdiction of a belligerent. Article 30 of the Hague Convention provides that: "A spy taken in the act shall not be punished without previous trial"; and the right to fair trial may be thought to be protected on behalf of the inhabitants of occupied territory by Article 43: "The authority of the power of the State having passed de facto into the hands of the occupant, the latter shall do all in his power to restore, and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country". Again, Chapter 3 (Penal Sanctions) of the Geneva Prisoners of War Convention of 1929 makes detailed provision for ensuring that prisoners of war charged with offences against the "laws, regulations, and orders in force in the armed forces of the detaining Power"

---

* Op cit pages 243-4.

** Czechoslovak Yearbook of International Law, London 1942, page 3.

/shall be

shall be treated in a judicious manner (see later). Furthermore a considerable section of this paper* is to be devoted to the right of an alleged war criminal to a fair trial. Yet it is arguable that access to a fair trial is not a right, but a means of safeguarding other rights. Thus the United States Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law" (Fifth Amendment), ".....nor shall any State deprive any person of life, liberty, or property, without due process of law;" (Fourteenth Amendment). The phrase "due process of law" includes within its scope the idea of fair trial, but it is debatable, on the face of the text, whether "due process of law" is regarded as constituting a right in itself or whether it is regarded as a means of protecting "life, liberty, or property."

The United Kingdom Draft of an International Bill of Human Rights,** prepared for the consideration of the Drafting Committee of the Commission on Human Rights of the United Nations, though not a legal text, provides an interesting parallel. The preamble to the suggested Bill includes the words: "Whereas the just claims of the State, which all men are under a duty to accept, must not prejudice the respect of man's right to freedom and equality before the law*** and the safeguard of human rights, which are primary and abiding conditions of all just government". Article 12 of the proposed Bill provides that: "No person shall be held guilty of any offence on account of acts or omissions which did not constitute such an offence at the time when they were committed." Yet the clearest and most direct reference to the right of fair trial appears as part of a draft resolution which, according to the proposal of the United Kingdom, might be passed by the General Assembly when adopting an International Bill of Rights. This text suggests that fair trial is classified as a means of safeguarding rights rather than as a right itself: "The General Assembly expresses the opinion that human rights and fundamental freedoms can only be completely assured by the application of the rule of law and by the maintenance in every land of a judicary, fully independent and safeguarded against all pressure, and that the provisions of an International Bill of Rights cannot be fulfilled unless the sanctity of the home and the privacy of correspondence are generally respected and unless at all trials the rights of the defence are scrupulously respected, including the principle that trials shall be held in public and that every man is presumed innocent until he is proved guilty".

Whether a "right" is recognized as such or is regarded as a means of

---

* Section E (The Rights of the Accused at the Time of the Trial).

** London. H.M. Stationery Office, 1947.

*** Italics inserted.

/safeguarding

safeguarding other rights is of no significance as long as it is maintained in practice, but it must be clear from the foregoing pages that anyone making an investigation of war crime trials from the point of view of the protection or vindication of human rights, while deriving valuable guidance from provisions of municipal law, must be left to some extent free to segregate and define for himself the relevant rights in the manner which he finds most convenient for the purpose of arranging and analysing the material with which he is confronted.

3. War Crimes not Resulting in Violations of Human Rights

While it is true that the vast majority of war crimes with which the courts have been called upon to deal have constituted violations of human rights, this has not invariably been so. Thus, in the Scuttled U-Boats Case* held before a British Military Court at Hamburg, on 12 and 13 February 1946, a former German naval officer was condemned as a war criminal and sentenced to imprisonment for a term of years for sinking two German submarines in violation of the terms of the Instrument of Surrender of 4 May 1945. It could hardly be claimed that his acts infringed the rights of any individual person. Similarly, Kapitanleutnant Ehrenrich Stever of the German navy was held guilty of having committed a war crime by a British Military Court at Hamburg on 17 July 1946, because he scuttled the U-Boat, of which he was commander, after the German Command had surrendered all naval ships to the Allied Forces.

A different type of war crime which certainly does not involve the human rights of the living is that for which two Japanese, Jutaro Kikuchi and Masaak Mabuchi, were sentenced respectively to imprisonment for twenty-five years and death by hanging, by a United States Military Commission at Yokohama on 5 April 1946. They were held guilty of wilfully and unlawfully committing "wanton and inhuman atrocities against the dead body of a civilian American Prisoner of War in violation of the Laws and Customs of War". The sentences were confirmed by superior military authority. An Australian Military Court sitting at Wewak on 30 November 1945, found Takehiko Tazaki guilty of mutilating the dead and of cannibalism and sentenced him to be hanged; the evidence showed that he had cut the body of a dead Australian soldier and eaten the flesh. The sentence, however, was mitigated to one of five years' imprisonment with hard labour by superior military authority.

4. The Divisions of Chapter III

Perhaps a word should be said here in explanation of the division into

---

* See War Crime Trial Law Reports, published for the United Nations War Crime Commission by H.M. Stationery Office, Volume I, pages 55-70.

which Chapter III falls.*

Under the heading B. Legal Basis and Jurisdiction of War Crime Courts other than the International Military Tribunals, there appears, first, a brief outline of the legal basis under International Law and under various Municipal Law systems of war crime courts other than the International Military Tribunals. The treatment of the legal basis under International Law is not developed to any extent but appears in summary form, since it is not of major interest to readers of the present Report. It has been thought convenient that the various Municipal Law enactments under which the Courts have been set up and which regulate their procedure (and in some cases the treatment of such matters as the plea of superior orders) should be next mentioned at this early point in the Chapter, together with a brief indication of the types of Court involved.

Finally an attempt is made to analyse some of the jurisdictional provisions contained in these enactments. Since nearly a score of different legal systems are involved, however, and since in many instances the provisions referred to are relatively complex, it has not been possible, in the time available, to subject all of these provisions to a full analysis. Those jurisdictional provisions which it has been possible to collect but not to analyse are contained in an Appendix to Chapter III. The contents of this appendix are set out at the end of the section on the legal basis and jurisdiction of war crime courts.

Under the heading C. Violations of the Rights of the Victims of War Crimes appears the material which it has been possible to collect concerning the extent to which violations of human rights have been punished in war crime trials. This material is divided primarily according to the type of victim, and the information so classified is then sub-divided as far as possible according to the rights violated. The Section ends with a note concerning the question of the nationality of persons accused of having committed war crimes.

The Section headed D. Spheres in which the Rights of the Accused and the Rights of the Victims may be said to have Conflicted at the Time of the Offence is divided into a number of parts, in each of which an attempt is made to show how municipal enactments and judicial practice have struck the balance between conflicting claims to the Court's consideration. As might be expected, most of these parts deal with the various defences raised in war crime trials (the plea of superior orders receiving particular attention), but there are also a number of pages dealing with questions of

---

* See also the statement of Contents at the beginning of this Volume.

/complicity,

complicity, that is to say the problem of how closely connected with the war crime a person must be before he can be held liable himself as a war criminal. The responsibility of a commander for offences committed by his troops which he did not order receives especially detailed attention.

Section E. The Rights of the Accused at the Time of the Trial sets out material relating to the rights of an alleged war criminal which guarantee him a fair trial, as derived from an analysis of the laws and rules of the different countries relating to the trial of war criminals and from a study of their application in practice.

Only certain selected and especially important rights are dealt with, and the section also contains, towards its end, an examination of certain rules, dealing for instance with the types of evidence admitted in war crime trials, which aim at ensuring that the Courts shall not be so bound by technical rules that the guilty shall benefit from the exceptional circumstances under which trials are held and so slip through the net of justice. It is clear of course that the latter provisions indirectly vindicate the rights of the victims of war crimes.

It should be added that this section on the rights of the accused includes not only (as does the remainder of Chapter III) material gained from an examination of the transcripts of trials conducted by courts other than the International Military Tribunals at Nurnberg and Tokyo and of the enactments governing their proceedings, but also relevant information derived from a study of the Charters of the International Military Tribunals.

Finally, in F. Conclusions, such general principles as emerge from the material contained in Chapter III as a whole are set out, and various conclusions are drawn from the study of that material.

B. THE LEGAL BASIS AND JURISDICTION OF THE COURTS TRYING WAR CRIMES OTHER THAN THE INTERNATIONAL MILITARY TRIBUNALS

I. LEGAL BASIS UNDER INTERNATIONAL LAW

1. Insofar as a Court tries enemy nationals for war crimes committed against nationals of the country whose authorities have established the Court, the jurisdiction of the Court is based on the undoubted right under international law of a belligerent to punish, on capture of the offenders, violations of the laws and usages of war committed by enemy nationals against the nationals of that belligerent.

2. Insofar as such a Court tries enemy nationals for war crimes committed against Allied nationals (or persons treated as such) other than nationals of the country whose authorities have established the Court, jurisdiction may be based on either

(a) the general doctrine called Universality of Jurisdiction over War Crimes, under which every independent State has in International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victims or the place where the offence was committed; or

(b) the doctrine that a State has a direct interest in punishing the perpetrators of crimes if the victim was a national of an ally engaged in a common struggle against a common enemy.

The doctrine called Universality of Jurisdiction, which has received the support of the United Nations War Crimes Commission and is generally accepted as sound, received exhaustive treatment by Willard B. Cowles in an article entitled Universality of Jurisdiction over War Crimes (California Law Review, Vol. 33 (1945), page 177), in which the learned author states: ".... when it is a matter of doing justice in places where ordinary law enforcement is difficult or suspended, the military tribunals of the United States .... have acted on the principle that crime should be punished because it is crime. They have no concern with ideas of territorial jurisdiction....No evidence has been found that any of the decisions just discussed were the subject of protest by the governments of the accused persons. Certain it is that in none of these United States cases is there any evidence of a consciousness on the part of the courts of any duty not to assume jurisdiction." The author then argued that "while the state whose nationals were directly affected has a primary interest, all civilized states have a very real interest in the punishment of war crimes", and that "an offence against the laws of war, as a violation of the law of nations, is a matter of general interest and concern". He concluded that "every

independent state has jurisdiction to punish war criminals in its custody regardless of the nationality of the victim, the time it entered the war, or the place where the offence was committed".

3. Insofar as a Court tries enemy nationals for offences which do not constitute war crimes stricto sensu (i.e. offences committed against other enemy nationals or neutrals other than those treated as Allied nationals) jurisdiction may be based on the undoubted right under international law of a belligerent, on the total breakdown of the enemy owing to debellatio, to take over the entire powers of the latter, including the power to make laws and to conduct trials. Thus, by the Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany, made in Berlin on 5 June 1945, the four Allied Powers occupying Germany assumed supreme authority.* The question whether or not the laws enacted and enforced by the Allied Powers as a result of this act technically respect the principle of nullum crimen sine lege, nulla poena sine lege does not effect the complete legality under international law of their actions.**

4. Some few of the enactments which are set out later in the present chapter*** provide for the trial of traitors as well as the trial of war criminals. Insofar as the Courts set up under such legislation try persons accused of treasonable offences they are, of course, exercising the jurisdiction which any state has over its own subjects.

II. LEGAL BASIS UNDER MUNICIPAL LAW

The legal basis under Municipal Law of the various Courts, Commissions and Tribunals set up to try alleged war criminals necessarily varies somewhat from country to country, but it is not possible at the present stage to indulge in any extensive comparative study of the sources under Municipal Law of war crimes jurisdiction. It may, nevertheless, be of value to indicate the relevant enactments and the type of courts to which, in each country, war crime trials have been referred.

It is generally agreed that an alleged war criminal is entitled to trial by military court, but this does not prevent his captors from trying him by a civil court should they choose to do so. For this point of view, the municipal enactments concerning the trial of war criminals fall into

---

* See, in this connection, Professor Hans Kelsen, The Legal Status of Germany in American Journal of International Law, Vol. 39, page 518.

** Before the breakdown of the enemy, the belligerent commander has the right, subject to Hague Convention No. IV of 1907, to legislate for the territories under his occupation and so to provide for the punishment, inter alia, of offences by one enemy national against another.

*** See pp. 288-298.

three categories, according to whether they (i) create new courts; or (ii) refer cases of alleged war crimes to a military court for which legal provision has already been made; or (iii) refer such cases to already existing civil courts.

The relevant United Kingdom and United States municipal provisions fall into the first class. The French Ordinance of 28 August 1944, is an example of the second, while the Norwegian enactments illustrate the third.

The jurisdiction of the British Military Courts for the trial of war criminals is based on the Royal Warrant dated 14 June 1945, Army Order 81/45 as amended. The Royal Warrant states that His Majesty "deems it expedient to make provision for the trial and punishment of violations of the laws and usages of war" committed during any war "in which he has been or may be engaged at any time after the 2nd September 1939." It is His Majesty's "will and pleasure" that "the custody, trial and punishment of persons charged with such violations of the laws and usages of war" shall be governed by the Regulations attached to the Warrant. The Royal Warrant is based on the Royal Prerogative, which, in English law, is "nothing else than the residue of arbitrary authority which at any given time is legally left in the hands of the Crown" (Dicey's definition).*

The United States Military Commissions are an old institution which existed prior to the Constitution of the United States of America. They have been described as the American Common Law War Courts. They were not created by statute, but are recognized by statute law. Whereas the British Royal Warrant of 14 June 1945, has made regulations for the trial of war criminals for all British Military Courts in all theatres of operations and in all

---

* See also pp. 284-5 of this Report and pp. 105-10 of War Crime Trial Law Reports published for the United Nations War Crimes Commission by His Majesty's Stationery Office, London, Vol. I. The constitutionality and legality of the Royal Warrant and of its individual provisions have so far not been challenged in any British Superior Court as have its American counterparts, the orders of the American executive authorities appointing Military Commissions for the trial of war criminals under the law of the United States. The latter have been reviewed by the Supreme Court of the United States in the so-called Saboteur Case, ex parte Quirin and others (1942) and in the cases re Yamashita (1946) and in re Homma (1946). Regulation 6 of the Royal Warrant states explicitly that the accused is not entitled to object to the President or any member of the Court or the Judge Advocate, or to offer any special plea to the jurisdiction of the Court.

territories under the jurisdiction of the United Kingdom Government and armed forces, the United States authorities, on the other hand, have made different provisions for different territories, namely for the Mediterranean, European, Pacific and China Theatres of Operations (pp. 203-6).*

Provisions similar to those contained in the Royal Warrant have in the Commonwealth of Australia been made by an Act of Parliament (War Crimes Act, 1945, No. 48/1945), and in the Dominion of Canada by an Order in Council, made under the authority of the War Measures Act of Canada, and entitled The War Crimes Regulations (Canada) (P.C. 5831 of 30 August 1945; Vol. III, No. 10, Canadian War Orders and Regulations). The latter were re-enacted in an Act of 31 August 1946. The Canadian and Australian war crime Courts are, like the British, Military Courts.**

The competence of French Military Tribunals to try war criminals, apart from those sitting in the French Zone of Germany, is based on the Ordinance of 28 August 1944*** concerning the suppression of war crimes, which, by virtue of Article 6 thereof, is applicable not only to Metropolitan France but also to Algeria and the Colonies.

The first paragraph of Article 1 of the Ordinance provides that persons guilty of offences under the Ordinance shall be tried by French military tribunals in accordance with the French laws in force. Trials held by virtue of the Ordinance have taken place before Permanent Military Tribunals and Military Appeal Tribunals, for which legal provision already existed before its enactment for the trial of offences by French military personnel. Article 124 of the Code de Justice Militaire states that: "In time of war there shall be at least one Permanent Military Tribunal in each military region; the seat of this Military Tribunal shall, in principle, be the chief town of the Military region ...."****

The necessary starting point for a study of Norwegian law relating to the trial of war criminals is the law of 13 December 1946 (No. 14) on the

---

* For further details regarding the Legal Basis of the United States Military Commission see War Crime Trial Law Reports, Vol. I, pp. 73, 75, 76-79 and 111-113.

** See also pp. 284-6.

*** For which see p. 137.

**** It is intended to include in War Crime Trial Law Reports, Vol. III, an Annex dealing with French Law Concerning Trials of War Criminals by Military Tribunals and by Military Courts in the French Zone of Germany.

Punishment of Foreign War Criminals, the text of which differs only in one minor respect relating to punishment from that of a Provisional Decree of the same subject dated 4 May 1945. In promulgating the Provisional Decree, the Norwegian Government in London acted in accordance with the resolution adopted by the Storting at Elverum on 9 April 1940,* and with § 17 of the Norwegian Constitution, which provides that: "The King may make or repeal regulations concerning commerce, customs, trade and industry and police; they must not, however, be at variance with the Constitution or the laws passed by the Storting .... They shall operate provisionally until the next Storting." The Law was passed by the Storting on 12 December 1946, and was sanctioned by the King on 13 December 1946. Paragraph 1 of the Law reads as follows:

> "Acts which, by reason of their character, come within the scope of Norwegian criminal legislation are punished according to Norwegian law, if they were committed in violation of the laws and customs of war by enemy citizens or other aliens who were in enemy service or under enemy orders, and if the said acts were committed in Norway or were directed against Norwegian citizens or Norwegian interests."

One result of the words "are punished according to Norwegian law" is that in Norway no special Courts, military or otherwise, have been set up to try cases of alleged war crimes. Such proceedings are brought before the ordinary Courts of the land.**

The conducting of War Crime trials before the Danish Civil Courts*** is provided for in the Danish Act of Parliament of 12 July 1946, on the Punishment of War Criminals, while the Belgian Law of 20 June 1947, relates to the competence of Belgian Military Tribunals in the matter of war crimes****. Other relevant Belgian enactments are the Decree of 5 August 1943, and the Act of Parliament of 30 April 1947.

A law governing the Trial of War Criminals was enacted by the Chinese Authorities on 24 October 1946; Article XIV of this law provides that:

---

* This resolution gave the Norwegian Government full power to take any steps and to make any decisions which they might find necessary under war-time conditions.

** See pp. 137-8.

*** See p. 139.

**** See p. 288.

"Article XIV. War crime cases shall be within the jurisdiction of the Military Tribunals for the Trial of War Criminals, attached to various Military Organizations by order of the Ministry of Defence."*

For a study of the jurisdiction of the Netherlands Courts trying alleged war criminals, the relevant enactments are the Extraordinary Penal Law Decree of 22 December 1943 (Statute Book D. 61) and the Decrees of 22 December 1943, (Statute Book D. 62) and of 12 June 1945, (Statute Book F. 91) by which five special courts and a special Cour de Cassation were set up having jurisdiction over the crimes to which the Extraordinary Penal Law Decree is applicable. These courts are composed of military and civilian judges.**

The Law of 2 August 1947, of the Grand Duchy of Luxembourg provides for the trial of alleged war criminals in Luxembourg by a specially established War Crimes Court, which, according to Article 20 of the Law, is to have a mixed civil and military composition.***

The jurisdiction of Polish Courts trying war criminals and traitors is based on various decrees, of which the consolidated texts were promulgated by the Polish Minister of Justice on 31 October and 11 December 1946 (see official Gazette of the Republic of Poland 17 November 1946, No. 59, Item 327 and 15 December 1946, No. 69 Item 377). Polish trials of war criminals and traitors are held before civil courts, including a specially established Supreme National Tribunal.****

A Yugoslav Law of 25 August 1945 governs the trial of war criminals and traitors by Yugoslav Courts. Such offences are tried by either civil or military courts, according to the provisions of paragraphs 1 and 2 of Article 14 of the law:

"(1) Criminal acts under this law are tried in the first instance by the People's County Courts, or in the case of military persons, by military courts.

"(2) In particularly important cases, criminal cases under Article 2 of this Law are to be tried by the Supreme Courts of the federative units, or if the act is of general state significance by the Military Bench of the Supreme Federal Court, or otherwise, by the Supreme Federal Court."*****

---

* See page 286.

** See page 144.

*** See page 139.

**** See page 294.

***** See page 295.

/Provisions

Provisions for the trial of war criminals and traitors in Czechoslovakia was made by Decree No. 16 of 19 June 1945, of the President of the Czechoslovak Republic, Law No. 22 of 24 January 1946, of the Provisional National Assembly of the Republic, Law No. 245 of 18 December 1946, of the Constituent National Assembly of the Republic, and Decrees Nos. 33/1945 and 57/1946 of the Slovak National Council. Such trials were to be held before specially appointed People's Courts.*

Trials of alleged war criminals in Greece are held in accordance with the Constitutional Act 73/1945 (Government Gazette page 250), before either the Special Court Martial in Athens of mixed military and civilian composition or Courts Martial of entirely military composition.

Apart from the British and United States Military Courts and Commissions which have been established for the trial of alleged war criminals in Germany (for instance at Wuppertal and Hamburg in the British Zone and at Dachau in the United States Zone) several systems of Military Government Courts have also been set up, in the various zones, with power to try war crimes and other offences.

Proclamation No. 1 of General Eisenhower, acting as Supreme Commander of the Allied Expeditionary Force, provided in Section II:

> "Supreme legislative, judicial and executive authority and powers within the occupied territory are vested in me as Supreme Commander of the Allied Forces and as Military Governor, and the Military Government is established to exercise these powers under my direction. All persons in the occupied territory will obey immediately and without question all the enactments and orders of the Military Government. Military Government Courts will be established for the punishment of offenders. Resistance to the Allied Forces will be ruthlessly stamped out. Other serious offences will be dealt with severely."**

In his Ordinance No. 2, General Eisenhower, again acting as Supreme Commander, established Military Government Courts for the parts of Germany occupied by the western Allies. He also issued Rules of Procedure of Military Government Courts, and, further, Ordinance No. 1 (Crimes and Offences).***

In the Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany, made in Berlin on

---

* See page 291.

** Italics inserted

*** The date of Promulgation of Ordinances Nos. 1 and 2 was 18 September 1944. See also page 298.

/5 June 1945,

5 June 1945,* however, the four Allied Powers occupying Germany assumed supreme authority over Germany. By the establishment of the Allied Control Council the same Allies set up a body which was to have supreme authority over "matters affecting Germany as a whole".

The Declaration states, inter alia, that:

"The Representative of the Supreme Commands of the United Kingdom, the United States of America, the Union of Soviet Socialist Republics and the French Republic, hereinafter called the "Allied Representatives", acting by authority of their respective Governments and in the interests of the United Nations, accordingly make the following Declaration:

"The Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption for the purposes stated above, of the said authority and powers does not effect the annexation of Germany."

Articles I and II of the Proclamation No. 1 establishing the Allied Control Council run as follows:

"I. As announced on 5th June, 1945, supreme authority with respect to Germany has been assumed by the Governments of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom, and the Provisional Government of the French Republic.

II. In virtue of the supreme authority and powers thus assumed by the four Governments, the Control Council has been established and supreme authority in matters affecting Germany as a whole has been conferred upon the Control Council."

Section III of Proclamation No. 1 of the Control Council provides as as follows:

"Any military laws, proclamations, orders, ordinances, notices, regulations and directives issued by or under the authority of the respective Commanders-in-Chief for their respective Zones of Occupation are continued in force in their respective Zones of Occupation."

Shortly after the Declaration of Berlin, the British, United States, French and Russian Zones were brought into being and the jurisdiction of

---

* British Command Paper (1945) 6648.

/General Eisenhower

General Eisenhower as Supreme Commander over the western occupied territories came to an end.

When, after the Berlin Declaration of 5 June 1945, General Eisenhower, in his capacity of Commander-in-Chief of the American Forces in Europe, took over the administration of the American occupation zone, he made a proclamation stating inter alia, that, all orders by the Military Government, including proclamations, laws, regulations and notices given by the Supreme Commander or on his instructions, remained in force in the American occupation zone unless repealed or altered by the Commander-in-Chief himself. The Military Government Ordinance No. 2 and the Rules of Procedure in Military Government Courts are, therefore, the basis of Military Government Courts established in the American zone of occupation.

Similarly, Ordinance No. 4 (Confirmation of Legislation) of the British Zone, runs as follows:

"Whereas on 14th July, 1945, the Commander-in-Chief of the British Zone of Control assumed all authority and power theretofore possessed and exercised by the Supreme Commander Allied Expeditionary Force within the British Zone, NOW IT IS HEREBY ORDERED as follows:

Article I

1. All Military Government Proclamations, Ordinances, Laws, Notices, Regulations and other enactments and orders and all amendments and modifications thereof issued by or under the authority of the Supreme Commander Allied Expeditionary Force and effective within the British Zone of Control on 14th July, 1945, are hereby confirmed and (subject to the provisions of Article II hereof) will continue in force throughout the British Zone until repealed or amended by or under the authority of the Commander-in-Chief of the British Zone of Control.

Article II

2. All the enactments mentioned in Article I hereof shall where the context so requires or admits be read and construed as if throughout the expression "Commander-in-Chief of the British Zone of Control" were substituted for the expression "Supreme Commander Allied Expeditionary Force".

Article III

3. The British Zone of Control is that portion of Germany which is occupied by the forces serving under the command of the Commander-in-Chief of the British Armed Forces of Occupation in Germany. It does not include the British Sector of Berlin."

/Military

Military Government Courts continued, therefore, to operate in the British Zone as under Ordinance No. 2 (with amendments) until 1 January 1947, when under Ordinance No. 68 they were replaced by a system of Control Commission Courts*.

A French High Command in Germany was created on 15 June 1945, and Ordinance No. 1 of 28 July 1945, of the French Commander-in-Chief, which was thus enacted after the Berlin Declaration and after the emergence of the four Allied Zones, maintained in force the two Ordinances of the Supreme Allied Commander referred to above. This brief account of the legal history of the French Military Government Tribunals is repeated in the Preamble to Ordinances Nos. 20 and 36 of the French Commander-in-Chief, which make provisions regarding the jurisdiction of French Military Government Courts.**

On 20 December 1945, Law No. 10 (Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity) of the Allied Control Council came into force; its purpose, according to its preamble was "to give effect to the terms of the Moscow Declaration of 30 October 1943, and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal."

Law No. 10 reaffirms the right of the Commander-in-Chief of each Zone to establish within his zone tribunals for the punishment, inter alia, of war crimes. Article III thereof provides that:

"1. Each occupying authority, within its Zone of occupation,

(a) shall have the right to cause persons within such zone suspected of having committed a crime, including those charged with crime by one of the United Nations, to be arrested.....

(b) shall have the right to cause all persons so arrested and charged, and not delivered to another authority as herein provided, or released, to be brought to trial before appropriate tribunal.....

2. The Tribunal by which persons charged with offences hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone. Nothing herein is intended to, or shall impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any

---

* See pages 135 and 298-9.

** See page 299-300.

/zone

zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8 August 1945..."

The effect of Law No. 10 within the Zones of Germany must now be traced. By Article 1 of Ordinance No. 36 of 25 February 1946, the French Zone Commander has simply bestowed upon the existing Military Government Courts in the French Zone jurisdiction over the offences set out in Article II of Law. No. 10.*

Ordinance No. 7 of the Military Government of the United States Zone of Germany, which became effective on 18 October 1946, provided, in the words of its Article I, for "the establishment of Military Tribunals which shall have power to try and punish persons charged with offences recognized as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes." Article II (a) of the Ordinance, as will be seen presently, referred to Law No. 10 as one of the legal sources from which the power to promulgate the Ordinance arose.** It is in pursuance of this Ordinance that the Military Tribunals were set up to conduct the trials commonly referred to as the "Nuremberg Subsequent Proceedings".*** According to the Opening Speech of the Prosecution in one of these trials, that of Josef Alstotter and fifteen others, Ordinance No. 7 was enacted "for the purpose of implementing Law No. 10 of the Allied Control Council for Germany, and to carry out the purposes therein stated".

Ordinance No. 68 of the British Zone of 1 January 1947, set up a new system of Control Commission Courts; Law No. 10 is not directly referred to in this Ordinance, but paragraph 3 of the latter includes within the criminal offences which Control Commission Courts shall have jurisdiction to try: "All offences under any proclamation, law, Ordinance, Notice or Order issued by or under the authority of the Allied Control Council for Germany in force in the British Zone."****

---

* See page 300.

** See page 301.

*** These Trials are the following: Case No. 1 Trial of Karl Brandt and twenty-two others, Case No. 2, Trial of Erhard Milch, Case No. 3, Trial of Josef Altstötter and fifteen others, Case No. 4, Trial of Oswald Pohl and seventeen others, Case No. 5, Trial of Friedrich Flick and five others, Case No. 6, Trial of Carl Krauch and twenty-two others, Case No. 7, Trial of Wilhelm List and eleven others, Case No. 8, Trial of Ulrich Greifelt and thirteen others, Case No. 9, Trial of Otto Ohlendorf and twenty-three others, Case No. 10, Trial of Alfried Krupp von Bohlen und Halbach and eleven others, Case No. 11, Trial of Ernst von Weizsacker and eighteen others.

**** See page 299.

III. THE JURISDICTION OF WAR CRIME COURTS

1. General Remarks

Had time allowed, those provisions of the enactments mentioned above which define the jurisdiction of war crime courts could have been made the subject of considerable comparative analysis and classification. Such provisions are of first-rate importance to the study of the protection of human rights since they determine which types of offenders can legally be tried before the courts governed by them. The provisions referred to are contained, however, in more than twenty different legal enactments and some are quite complex in character. It has not been possible therefore to subject them to the analysis which they deserve, yet they all call for some kind of treatment. While it has only been possible under the circumstances to make a limited number of remarks of a more general nature regarding them, it has nevertheless been thought of use to make a collection of such jurisdictional provisions as a basis for discussion and thought. Some of these provisions are therefore quoted in the following pages, where an attempt is made to demonstrate and discuss the prevailing Continental legal approach to war crime trials. The remainder are set out in an Appendix to this chapter, the contents of which are shortly set out below.*

2. The French, Norwegian, Danish, Netherlands** and Luxembourg Provisions: The Continental Legal Approach to War Crime Trials

It is possible to discern a difference between the Anglo-Saxon and the prevailing Continental legal approach to the punishment of war criminals, and the French, Norwegian, Danish, Netherlands and Luxembourg provisions may be used to demonstrate the latter.

The first paragraph of Article I of the French Ordinance of 28 August 1944, for instance, reads as follows: "Enemy nationals or agents of other than French nationality who are serving enemy administration or interests and who are guilty of crimes or delicts committed since the beginning of hostilities, either in France or in territories under the authority of France, or against a French national or a person under French protection, or a person serving or having served in the French armed forces, or a stateless person resident in French territory before 17 June 1940, or a refugee residing in French territory, or against the property or any natural persons enumerated above, and against any French corporate bodies, shall be tried by French Military Tribunals in accordance with the French laws in force, and according to the provisions set out in the present

---

* See page 144.

** See page 144.

/Ordinance

Ordinance, where such offences, even if committed at the time or under the pretext of an existing state of war, are not justified by the laws and customs of war."* When a French Military Tribunal tries an alleged war criminal, the judges decide first whether a provision of the French Criminal Code has been violated and, only secondly, whether this breach was justified by the laws and customs of war.

Again, the Norwegian attitude towards the treatment of war criminals follows the general Continental practice by stressing that, before punishment of any individual offender becomes legal, he must be shown to have offenced against some specific provision of Norwegian municipal law as well as against the laws and usages of war. The Norwegian approach is shown in the first sentence of Article 1 of the Law of 13 December 1946 (No. 14): "Acts which, by reason of their character, come within the scope of Norwegian criminal legislation are punished according to Norwegian law, if they were committed in violation of the laws and customs of war by enemy citizens or other aliens who were in enemy service or under enemy orders, and if the said acts were committed in Norwey or were directed against Norwegian citizens or Norwegian interests...."**

A commentary of the Norwegian Ministry of Justice and Police which explained the provisions of the Law claims that this attitude is the same as that adopted in the Moscow Declaration, which provided that war criminals other than major war criminals were to be tried and punished in accordance with the laws of the liberated countries. The Ministry, quoting Article 96 of the Norwegian Constitution: "No one may be convicted except according to law, or be punished except according to judicial sentence...", then goes on to state that: "Norwegian courts can only inflict punishment according to provisions of Norwegian civil or military law. The principle laid down in Article 96 of the Constitution must be interpreted in this connection so as to make an arbitrary application of an undefined provision of international law inadmissible. In Norway, international law is not incorporated into national law as an integral part, as is the case in various foreign legal systems. Before a rule of substantive international law can be applied by Norwegian courts, it must be incorporated into Norwegian national law by a special act. A clear example of this is Article 92 of our military criminal code, which fixes the punishment for a typical war crime committed by enemy soldiers. The paragraph is based on the international regulations which are to be found in the Geneva Convention of 1929, regarding the treatment of sick and wounded: cf. Article 23f of the Hague Regulations."

---

* Italics inserted.

** Italics inserted.

/It is to

It is to be noted, however, that a Norwegian Court is not precluded from sentencing a war criminal to death by the fact that the municipal enactment enabling the supreme penalty to be exacted for his offence was not passed until after the commission thereof. Accordingly, judgment went against Karl Hans Hermann Klinge when he appealed to the Supreme Court of Norway against his being condemned to death as a war criminal by the Eidsivating Lagmannsrett (Court of Appeal), on 8 December 1945. Counsel for Klinge claimed that the Lagmannsrett had unjustly applied the Provisional Decree of 4 May 1945* under which the sentence of death was permissible; as the crimes for which the defendant had been convicted had been committed before the passing of that Decree, the punishment should have been restricted to the limits set by Articles 228, 229 and 62 of the Civil Criminal Code, according to which the death sentence could not have been passed; his argument was based on Article 97 of the Norwegian Constitution, which provides that: "No law may be given retroactive effect." On 27 February 1946, however, for various reasons a majority of the Supreme Court judges rejected these arguments.**

Similarly, Article 1 of the Danish Law of 12 July 1946, on the Punishment of War Criminals provides that: "If a non-Danish subject, being

---

* This was the predecessor of the Law of 13 December 1946, and made, on this point, the same provisions.

** The examination of Klinge's appeal involved the judges in an interpretation of one of the most fundamental provisions of the Norwegian constitution. It was perhaps in the circumstances inevitable therefore that interesting arguments based on principles of justice and public policy should have been raised. Thus, Judge Skau pointed out that circumstances like those facing the Court could not have been foreseen when the constitution was drafted, and expressed the opinion that it seemed unreasonable that provisions made for the protection of the community could be relied upon by an enemy of the same community. To allow such a plea to be put forward by foreign war criminals would be a violation of the high principles which were the foundation of Article 97 and the claim for justice which it supported. Judge Holmboe, on the other hand, clearly regarded Article 97 of the Constitution as a safeguard against despotism, whose full effect was worth preserving even if complete justice would, in consequence, not be done in the present case in so far as Klinge would be punished too leniently. Judge Larssen said that the acceptance of the view of the minority among the judges would offend the natural sense of justice.

Judge Schjelderup and Judge Larssen seem to have considered it correct to interpret the word "law" in Article 97 as including the laws and customs of war as well as Norwegian law, in cases like the one before the Court. For a full account of the trial, see Volume III of War Crime Trial Law Reports, to be published for the United Nations War Crimes Commission by H.M. Stationery Office, London, pages 1 et seq.

/in the

in the service of Germany or serving under one of Germany's allies, has infringed the rules and customs of international law governing Occupation and War and has performed, in Denmark or to the detriment of Danish interests, any deed punishable per se in Danish law, an action can be brought against such person in respect of the crime committed and a punishment imposed in a Danish Court in pursuance of this Act."*

Article 1 of the Law of 2 August 1947, on the suppression of war crimes, of the Grand Duchy of Luxembourg provides that:

> "Agents of other than Luxembourg nationality, who are guilty of crimes or delicts falling within the competence of the Luxembourg tribunals and which were committed after the outbreak of hostilities, if these offences were committed at the time or under the pretext of the state of war and were not justified by the laws and customs of war, whether such agents were captured within the Grand Duchy or on enemy territory or whether the Government secured them by extradition, shall be prosecuted before a War Crime Court and tried in accordance with the Luxembourg laws in force and with the provisions of the present law."*

The Anglo-Saxon legal approach to war crime trials has been a little different in this respect.** Instruments such as the British Royal Warrant or the United States Theatre Regulations and Directives, which have validity in the respective municipal legal systems, have provided in general terms that the Courts operating under them shall have jurisdiction over war crimes, but the practice of these Courts, in so far as they try war crimes stricto sensu, is to require only that a breach of the laws and usages of war must be shown. An enactment governing such a court may sometimes attempt to define the scope of the term "war crime", and further, the provisions of municipal law are often quoted, as analogies, by Counsel, and in British trials by the Judge Advocate or Legal Member, but the violation of any set of legal rules other than the laws and usages of war (possibly as interpreted in the enactment) need not be shown.

3. Comments on the "Continental Approach"

(i) It will be seen that for an offence to be punishable under, for instance, the French war crimes law it must be shown to have violated not only the laws and usages of war but also the relevant municipal laws. While the jurisdiction of courts set up under such laws as the French Ordinance cannot (in theory at least) be wider than that of courts, like the British

---

* Italics inserted.

** See pages 284-7.

Military Courts, which are simply empowered to try violations of the laws and usages of war, it can certainly be narrower than that jurisdiction.

That this possibility is not a merely theoretical one was shown by the successful appeal to the Cour de Cassation of Hugo Gruner, ex-Kreisleiter of Thann, against the sentence of death passed on him (as on Robert Wagner, ex-Gauleiter of Alsace, and others) by the Permanent Military Tribunal at Strasbourg, which sat from 23 April to 3 May 1946.

Gruner was charged and found guilty on 3 May of the premeditated murder of four British prisoners of war on German soil, despite the plea put forward on 23 April by his Counsel that the Tribunal lacked jurisdiction since the acts had not been committed either in France or in territory under the authority of France or against or to the prejudice of any of the persons mentioned in the first paragraph of the Ordinance of 28 August 1944. The Tribunal had rejected this argument, stating that, under Article 177 of the Code de Justice Militaire, the decision on the question whether an offence comes within the jurisdiction of a Military Tribunal and the authority to commit the trial to such Tribunal rests with the juge d'instruction; the Orders for Trial issued by the juge d'instruction (ordonnances de renvoi) have the same effect as Orders for Trial issued by the Indictments Division of the Court of Appeal (arrêts de renvoi). It is an established principle that the "arrêt de renvoi" issued by the Court of Appeal is constitutive of the jurisdiction of the Court to which it commits the case for trial. The same principle applied to the Order for Trial issued by the juge d'instruction where such Order replaces the decision of the Court of Appeal. No reply lying against the Order of the juge d'instruction of 6 April 1946, it had become final.

In its judgment of 24 July 1946, the Cour de Cassation, after quoting the provisions of the first paragraph of Article 1 of the Ordinance, pointed out that the Tribunal's decision of 3 May 1946, stated that Gruner was, by the answers made to the questions Nos. 146 to 153, declared guilty of four acts of voluntary homicide, each specified by questions Nos. 31-38 in the following terms: "Is it proved that on the 7th October, 1944, at Reinweiler (Baden) a homicide was voluntarily committed against the person of an English prisoner of war of unknown address?" "Did this murder immediately precede, accompany or follow the murder set out in the question?"

The crimes set out in the charge against Gruner were shown by the answers made to the above-mentioned questions to have been committed in Germany against the persons of soldiers of an Allied army and were not among those which, according to the terms of the Ordinance of 28 August 1944, could be prosecuted before French Military Tribunals and tried according to French laws.

It followed that, in applying to Gruner provisions of the said Ordinance, the decision which was challenged violated these provisions and had no legal basis.

The Court quashed the ruling of 23 April 1946, which rejected the arguments of Gruner based on lack of competence, together with the judgment of 3 May 1946, as far as it related to Gruner.

Since the acts contained in the charge against Gruner did not fall within the jurisdiction of the existing French Courts, the Court stated that a reference back for re-trial was not possible and that Gruner was to be freed if he was not detained for another reason or required by an Allied authority.

It would seem, on the other hand, that Gruner's offence would have fallen within the jurisdiction, for instance, of the Norwegian Courts. After the sentence already quoted,* Article 1 of the Norwegian Law of 12 December 1946 (No. 14) continues:

> "In accordance with the terms of the Civil Criminal Code, Article 12, paragraph 4, with which should be read Article 13, paragraphs 1 and 3, the above provision applies also to acts committed abroad to the prejudice of Allied legal interests or of interests which, as laid down by Royal proclamation, are deemed to be equivalent thereto."**

---

* See pages 136-7.

** The provisions of the Civil Criminal Code quoted in the text above run as follows:

"Article 12. Norwegian Criminal Law, except when otherwise specified or laid down by agreement with a foreign country, is applicable to acts which have been committed.....

(4) abroad by a foreigner when the act either:

(a) is included among those dealt with in the following Articles of this law: (Here follow a series of paragraph numbers), or,

(b) is a crime which is also punishable according to the municipal law of the country in which it was committed provided that the defendant's temporary or permanent domicile is Norway.

Where the punishability of the act is dependent on or influenced by an actual or premeditated result, the act is considered to have been committed both where the act was actually committed and where the result took place or was intended to take place.

Article 13. The prosecution of crimes mentioned in Article 12 (4) can only be carried out according to Royal decision.

Whenever a person is prosecuted in Norway for an act for which he has already been prosecuted in another country, the punishment already suffered must, as far as possible, be deducted from the new term of punishment."

The Norwegian Ministry of Justice and Police in its explanatory memorandum* stated that the reference to Allied legal interests had been included in the proposed law in order to make it clear that it would be within the competence of Norwegian Courts, where desirable, to try alleged war criminals for offences against the laws and customs of war committed in Allied Countries.

There seems no reason why the same would not apply to offences against the laws and customs of war committed against Allied nationals in Germany.

(ii) The requirement laid down by the French and Norwegian war crimes enactments, among others, to the effect than an alleged war crime must be shown to have offended not only the laws and usages of war but also municipal law, is not without its accompanying difficulties. It has already been seen** that Klinge was enabled thereby to claim that the retroactive application of the Ordinance under which he was sentenced to death was contrary to a more fundamental document having validity in the municipal law of Norway, namely the Norwegian Constitution. A minority of judges of the Supreme Court indeed voted in favour of his appeal.

A more general difficulty, however, arises out of the need on the part of the legislator to see to it that the municipal law is supplemented, where necessary, in order to ensure that the provisions of that law are wide enough to provide against those war crimes, as the term is understood in current legal thought, which it was the intention of the authorities concerned to prosecute.

Thus Article 1 of the French Ordinance of 28 August 1944, states that, "in particular" certain specified provisions of the Code Pénal and Code de Justice Militaire shall be the subject of prosecution in accordance with the provisions set out on page 136 of this Chapter if they have been committed in the circumstances described therein. Further, Article 2 of the Ordinance lays down that certain war crimes shall be treated as the violation of certain specified provisions of the Codes:

"Article 2. The provisions of the Code Pénal and of the Code de Justice Militaire shall be interpreted as follows:

1. The illegal recruitment of armed forces, as specified in Article 92 of the Code Pénal, shall include all recruitment by the enemy or his agents;

2. Criminal association, as specified in Articles 265 et seq of the Code Pénal, shall include within its scope organizations or agencies engaged in systematic terrorism;

---

* See page 137.

** See page 138.

3. Poisoning, as specified in Article 301 of the Code Pénal, shall include the exposure of persons in gas chambers, the poisoning of water or foodstuffs, and the depositing, sprinkling, or applying of noxious substances intended to cause death;

4. Premeditated murder, as specified in Article 296 of the Code Pénal, shall include killing as a form of reprisal;

5. Illegal restraint, as specified in Articles 341, 342 and 343 of the Code Pénal, shall include forced labour of civilians and deportation for any reason whatever of any detained or interned person against whom no sentence which is in accordance with the laws and customs of war has been pronounced.

6. Illegal restraint, as specified in paragraphs 1 and 2 of Article 344 of the Code Pénal, shall include the employment on war work of prisoners of war or conscripted civilians;

7. Illegal restraint, as specified in the last paragraph of Article 344 of the Code Pénal, shall include the employment of prisoners of war or civilians in order to protect the enemy.

8. Pillage, as specified in Articles 221 et seq, of the Code de Justice Militaire, shall include the imposition of collective fines, excessive or illegal requisitioning, confiscation or spoliation, the removal or export from French territory by whatever means of property of any kind, including movable property and money."

Article 2 of the Luxembourg Law of 2 August 1947, contains a similar collection of paragraphs, interpreting provisions of the Code Pénal of Luxembourg so as to cover various types of war crimes.

There are very few provisions in Norwegian criminal law directly and specifically concerned with foreign war criminals. The great majority of the offences which could be punished as war crimes are in their nature, covered by clauses of the Norwegian civil and military criminal codes having general application. There can be no doubt, claimed the Ministry,* "that an execution carried out as means of reprisal constitutes murder (Article 233 of the Civil Criminal Code). It is equally clear that the employment of prisoners of war or civilians as living buffers against enemy forces can be classified as murder, manslaughter, inflicting bodily injury, etc. Collective fines (contrary to the Hague Regulations), requisitioning, confiscation and the like must be regarded as robbery. Any employment of prisoners of war or civilians contrary to the regulations

* See page 137.

of international law, illegal conscription for forced labour, internment, deportation, etc., are to be regarded as illegal deprivation of freedom."

The Ministry maintained, however, that: "The German economic exploitation of Norway stands in this respect in a class by itself. Its scale and the forms in which it has been carried out lie in some respects so far beyond the usual conception of criminal law that it is difficult or even impossible to regard the different acts as being within the scope of existing provisions of the Civil or Military Criminal Codes. In order to amend this deficiency the Ministry consider it necessary to lay down a special provision which covers every kind of German exploitation in Norway performed by force or threat thereof ..... Acts like the excessive issue of currency notes, unreasonable fixing of prices, irresponsible exploitation of clearing agreements, etc., can hardly be assimilated with any particular crime already defined and covered by the law. If criminal prosecution against those individually responsible in this connection should arise, it is deemed necessary that the law should give certain instructions to those administering the law. Those regulations, however, should be given a very comprehensive though general form, considering the varied economic transactions which may arise in this connection."

Accordingly the following provision is made by Article 2 of the Law on the Punishment of Foreign War Criminals:

> "Confiscation of property, requisitioning, imposition of contributions, illegal imposition of fines, and any other form of economic gain illegally acquired by force or threat of force, are deemed to be crimes against the Civil Criminal Code, Article 267 and Article 268, paragraph 3."

The Netherlands Law of July 1947 (Statute Book H.233) has succeeded in following in a sense the Continental approach while at the same time ensuring that no war crime or crime against humanity as defined in Article 6 (b) and (c) of the Charter of the International Military Tribunal will go unpunished because of lack of jurisdiction on the part of the Netherlands Courts. That law adds a new Article 27a to the Extraordinary Penal Law Decree, of which paragraphs 1 and 2 read as follows:

> "1. He who during the time of the present war and while in the forces or service of the enemy State is guilty of a war crime or any crime against humanity as defined in Article 6 under (b) or (c) of the Charter belonging to the London Agreement of 8th August 1945 promulgated in Our Decree of 4th January 1946 (Statute Book No. G.5) shall, if such crime contains at the same time the elements of a

punishable act according to Netherlands Law, receive the punishment laid down for such act.

2. If such crime does not at the same time contain the elements of a punishable act according to the Netherlands law, the perpetrator shall receive the punishment laid down by Netherlands law for the act with which it shows the greatest similarity."*

4. Summary of the Contents of the Appendix to this Chapter

It may be found convenient that a short summary be inserted at this point of the contents of the Appendix to this Chapter.**

The Appendix contains those municipal enactments concerning jurisdiction which, due to shortage of time, could not be subjected to any detailed examination or analysis. Like all such provisions, they are of considerable importance to the study of the protection of human rights since they determine what types of offenders can be brought before the courts, and it seemed essential therefore that they should at least be quoted in this Report. It has been decided therefore that they should be set out in an Appendix to the present Chapter.

The Appendix first quotes the relevant United Kingdom and British Commonwealth provisions, and the difference which exists between the jurisdiction of the Australian War Crimes Courts on the one hand and those of the United Kingdom and Canada on the other is shown.

There follows a brief reference to the United States law on the subject, the relevant regulations being quoted elsewhere. The Chinese provisions are then quoted and those of Greece.

The jurisdiction of the Courts of Belgium, Czechoslovakia, Poland and Yugoslavia over war criminals and traitors are then quoted, and attention is finally paid to the jurisdiction of the Military Government Courts in Germany, both before and after the setting up of the separate Allied Zones of Control. Article II of Law No. 10 of the Allied Control Council and Articles 9, 10 and 11 of the Charter of the International Military Tribunal are quoted and their significance in this connection is indicated.

In respect of each country or legal system, some indication is given of the type of Court responsible for the trial of war criminals.

---

* Italics inserted.

** See pages 284-304.

C. VIOLATIONS OF THE RIGHTS OF THE VICTIMS OF WAR CRIMES

1. Allied Inhabitants of Occupied Territories

(i) The Rights to Life, Health and Personal Integrity

A large number of offences for which war criminals have been condemned have constituted violations of the rights to life, health and personal integrity of allied inhabitants of occupied territories. One relevant general provision which was quoted, for instance, in the indictment in the case against Otto Ohlendorf and twenty-four others, Subsequent Proceedings Case No. 9, held before an American Military Tribunal at Nürnberg, is Article 43 of the Hague Convention, which reads as follows:

> "The authority of the power of the State having passed de facto into the hands of the occupant, the latter shall do all in his power to restore, and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country."

The provision most often quoted during war crime trials in this connection, however, is Article 46 of the Hague Convention, perhaps because it forbids more explicitly the types of offences for which the alleged war criminals are brought before the courts. This article reads as follows:

> "Family honour and rights, individual life, and private property, as well as religious convictions and worship, must be respected.
>
> Private property must not be confiscated."

Article 46 is often quoted, for instance, in concentration camp trials. For example, the prosecutor in the trial of Josef Kramer and forty-four others, held before a British War Crimes Court at Luneburg from 17 September - 17 November 1945 (the Belsen trial), in his closing address, claimed that the inhabitants of occupied territories were protected by Article 46 and went on to quote the text of paragraph 383 of Chapter XIV of the British Manual of Military Law, which bears a strong likeness to the article of the Hague Convention: "It is the duty of the occupant to see that the lives of inhabitants are respected, that their domestic peace and honour are not disturbed, that their religious convictions are not interfered with, and generally that duress, unlawful and criminal attacks on their persons, and felonious actions as regards their property, are just as punishable as in times of peace."*

---

* See War Crime Trial Law Reports published for the United Nations War Crimes Commission by H. M. Stationery Office, London, Volume II, page 105.

In the Zyklon B case (the trial of Bruno Tesch and two others, held before a British Military Court at Hamburg from 1 - 8 March 1946) the owner of a firm which arranged for the supply of poison gas to Auschwitz, among other destinations, and his second-in-command were found to have known of the fact that this poison gas was used for killing Allied nationals interned in concentration camps and were sentenced to death. Here again, the prosecution relied upon Article 46 of the Hague Convention, to which, as the prosecutor pointed out, both Germany and Great Britain were parties.

To quote a trial held in the Far East, it may be pointed out that Article 46 appears among the provisions said to have been violated by Takashi Sakai, tried by the Chinese War Crimes Military Tribunal of the Ministry of National Defence, Nanking, on 27 August 1946. This accused was found guilty, inter alia, of inciting or permitting his subordinates to wound non-combatants, to rape, to plunder, to deport civilians, to indulge in cruel punishments and torture, and to cause destruction of property.

Among the many other trials which are relevant in this connection, the following may be mentioned: The trial of Max Pauly and thirteen others held at Hamburg from 18 March to 3 May 1946, (the Neuengamme Trial), the trial of Hermann Vogel and five others, held before the Polish Special Criminal Court in Lublin from 27 November - 2 December 1944 (the Majdanek trial) and the trial of Yamura Saburoh held before the Netherlands Temporary Courts Martial at Balikpapen (N.E.I.) on 13 September 1946.

France, as an ex-occupied territory, has held a large number of trials for offences committed against civilians, especially offences causing death and personal injury. A large number of reports on such trials are in the custody of the United Nations War Crimes Commission, but the relevant articles of international conventions are not mentioned in the French documents supplied. (cf., page 153). It is clear, however, that the many cases of unjustified killing, wounding, etc. which appear in these trials, would come within the scope of Article 46 of the Hague Convention.

Allegations of terrorism against the civilian population are relevant in this connection. (cf. the Dutch trial mentioned above and the trial of Eberhard von Mackensen and Kurt Maelzer, German nationals, tried by a Military Court for the Trial of War Criminals at Rome on 18 - 30 November 1946.)

Cases of rape fall within this heading. (cf. trial of Hans Muller, held before a Military Tribunal at Angers on 30 November 1945,) and also cases involving medical experiments (cf. the trial of Martin Gottfried Weiss

/and thirty-nine

and thirty-nine others held before a General Military Government Court at Dachau from 15 November - 13 December 1945 [the Dachau Concentration Camp trial] and the trial of Erhard Milch before an American Military Tribunal at Nürnberg from 4 February - 16 April 1947 [Nürnberg Subsequent Proceedings Trial No. 2].)

In connection with mercy killings, reference should be made to the trial of Otto Sukipp and Kurt Kiehne, General Military Government Court at Ludwigsburg, 9 April 1946.

Article II of the Chinese Law of 24 October 1946, governing the trial of war criminals makes some interesting provisions in its paragraph 3 which are relevant:

> "Article II. A person who commits an offence which falls under any one of the following categories shall be considered a war criminal .....
>
> 3. Alien combatants or non-combatants who during the war or a period of hostilities against the Republic of China or prior to the occurrence of such circumstances, nourish intentions of enslaving, crippling, or annihilating the Chinese Nation and endeavour to carry out their intentions by such methods as (a) killing, starving, massacring, enslaving, or mass deportation of its nationals, (b) stupefying the mind and controlling the thought of its nationals, (c) distributing, spreading, or forcing people to consume, narcotic drugs or forcing them to cultivate plants for making such drugs, (d) forcing people to consume or be innoculated with poison, or destroying their power of procreation, or oppressing and tyrannising them under racial or religious pretext, or treating them inhumanly."

(ii) The Right to Freedom of Movement

Cases involving charges of deportation are relevant in this connection. See for instance the trial by a Chinese Military Tribunal referred to on page 147; trial of Robert Wagner and six others, held before a French Military Tribunal at Strasbourg on 3 May 1946; and trial of Wilhelm Artur Konstatin Wagner before the Norwegian Eidsivating Lagmannsrett from August - October 1946. Slave labour is dealt with in the trial of Erhard Milch, tried by an American Military Tribunal at Nürnberg from 4 February - 16 April 1947, in the trial of Carl Krauch and twenty-two others which was opened by an American Military Tribunal at Nürnberg on 14 August 1947, and in the trial of Alfried Krupp von Behlen und Halbach and eleven others, which will be held at Nürnberg before an American Military Tribunal (Subsequent Proceedings Cases Nos. 2, 6 and 10).

/Conditions

Conditions under which deportation becomes a crime are set out in the Judgment of the Milch trial. Reference should also be made to the trial of Captain Eitaro Chinohara and two others before an Australian Military Court at Rabaul from 30 March - 1 April 1946.

The deportation of civilians and the compulsory enlistment of soldiers among the inhabitants of occupied territory are specifically declared war crimes by the Canadian War Crimes Law* and by Article III of the Chinese War Crimes Law. Article 3 (3) of the Yugoslav War Crimes Law makes similar provisions.** Article 2 (1) and (5) of the French Ordinance of 28 August 1944, states that:

"1. The illegal recruitment of armed forces, as specified in Article 92 of the Code Penal, shall include all recruitment by the enemy or his agents;.....

5. Illegal restraint, as specified in Articles 341, 342 and 343 of the Code Penal, shall include forced labour of civilians and deportation for any reason whatever of any detained or interned person against whom no sentence which is in accordance with the laws and customs of war has been pronounced...."

(iii) The right to a Fair Trial

Even members of an underground movement have the right to a fair trial on capture. Many of the trials mentioned under "2. Allied Civilians in Occupied territories who take up Arms against the Enemy" (see page 152) are relevant here. The question of the wrongful extension of the Nazi law and courts to occupied territories is dealt with in the trial of Josef Altstotter and fifteen others, tried by American Military Tribunal at Nürnberg (Subsequent Proceedings Case No. 3), and reference should also be made in this connection to the trial of Robert Wagner and six others before a French Military Tribunal at Strasbourg on 3 May 1946.

In the latter case, the Court established that on several occasions Wagner violated the right to fair trial of French citizens who did not comply with compulsory enlistment in the German forces. On all these occasions Wagner instructed the prosecutors what punishment to request and imposed upon the judges the sentence to be pronounced by them in the trial of such French citizens. In one of two specific cases submitted, concerning a Theodor Witz, the officer in charge of the prosecution was of the opinion that the offence deserved four to five years imprisonment. This prosecutor went on leave and was replaced by another who, jointly with the President of the Court, acted upon Wagner's instructions. The result was that the defendant was sentenced to death and executed.

---

* See page 125.

** See page 295.

/The victim

The victim was a youth and his offence consisted in the possession of a pistol of a very old type.

(iv) Family Rights

"Family Rights" are specifically protected by Article 46 of the Hague Convention, and many of the offences for which war criminals have been condemned have, in fact, constituted violations of these rights. Examples are provided, for instance, by the splitting up of families for purposes of deportation to slave labour.

In the trial of Heinrich Gerike and seven others before a British Military Court at Brunswick from 20 March to 3 April 1946 (the Velpke Children's Home Case), the prosecution relied upon Article 46. In this case, various accused were found guilty of being "concerned in the killing by wilful neglect of a number of children, Polish nationals". It was shown that they were implicated in the establishment and running of a home to which Polish female workers in a district of Germany were forced to send their children; the object being to free the parents for forced labour for the benefit of the German economy. Many of the children died through neglect.

(v) Religious Rights

Violations of religious rights, inter alia, were alleged in the trial of General Tomoyuki Yamashita, tried before an American Military Commission at Manila, Philippine Islands, from 1 October - 7 December 1945. In this case, it was shown that, among the great destruction caused by troops under the accused's command, figured the destruction of religious edifices. Such destruction of religious property may however possibly be better classed under the heading of devastation of property rather than under the heading of violation of individual religious rights.

"Forced conversion to another faith" is declared criminal by Article 3 (3) of the Yugoslav War Crimes Law of 25 August 1945.*

(vi) Property Rights

Allegations of violations of property rights have been frequent in war crime trials. Once again, "private property" is specifically mentioned in Article 46 of the Hague Convention.

There are many examples among the trials by French Military Tribunals of the destruction or theft of property in occupied France. Among other trials dealing with destruction of property may be mentioned the trial of Takashi Sakai by the Chinese War Crimes Military Tribunal of the Ministry of National Defence, Nanking on 27 August 1946.

---

* See page 130.

/The trial

The trial of Friedrich Flick and five others, before an American Military Tribunal at Nürnberg (Subsequent Proceedings Trial No. 5), and the Krupp trial, (Subsequent Proceedings No. 10), deal with economic pillage among other matters. Also of interest in the same connection are the Milch trial (Subsequent Proceedings No. 2) the trial of Oswald Pohl and seventeen others, tried before an American Military Tribunal at Nürnberg (Subsequent Proceedings No. 4), and the trial of Carl Krauch and twenty-two others, which was opened before an American Military Tribunal at Nürnberg on 14 August 1947 (the I. G. Farben Industrie case, Subsequent Proceedings No. 6).

It may be relevant to mention under this heading provisions made in several instruments of municipal law declaring it a war crime to inflict certain types of injury upon the economic system of an occupied country, since such offences in a sense do material harm to the economic rights of the individuals living in the territory in question. Thus, Article III of the Chinese Law of 24 October 1946, declares to be war crimes, not only "confiscation of property", "indiscriminate destruction of property", "robbing" and "unlawful extortion or demanding contributions or requisitions" but also "depreciating the value of currency or issuing unlawful currency notes". So also "debasement of the currency and issue of spurious currency" is declared a war crime in the Canadian Instrument of Appointment of the Board of Inquiry appointed on 3 September 1945.* A Norwegian provision treating various types of illegal economic gain as war crimes is quoted elsewhere.**

(vii) Civic Rights

Perhaps cases involving denationalization would fall under this heading; see for instance the trial of Ulrich Greifelt and thirteen others which will be held at Nürnberg before an American Military Tribunal (Subsequent Proceedings No. 8) in which the allegations include charges of Genocide. Genocide is also charged in the trial of Otto Ohlendorf and twenty-three others (the "Einsatzgruppen" trial) which is being held at Nürnberg before an American Military Tribunal (Subsequent Proceedings No. 9). Two further trials which are of interest in this connection are the French trial of Robert Wagner, (see page 149) and also the trial of Josef Altstötter (Subsequent Proceedings No. 3).

The trial of Wagner and others concerns, *inter alia*, recruitment for the benefit of the enemy, and also what amounts to the crime of "genocide" as defined in the resolution adopted by the General Assembly of the

---

* See page 285.

** See page 144.

United Nations on 11 December 1946,* and as prosecuted before the Nürnberg Tribunal against the Major German War Criminals under Article 6 (c) of the Nürnberg Charter.** The prosecutor did not use the expression "genocide", but the allegations made against Wagner included the attempt to achieve a complete Germanization of Alsace.

The following are some typical passages from the Indictment in this connection:

> ".....French inscriptions disappeared even in villages; personal names were germanised, French monuments were taken away or destroyed;.. the French language was eliminated both from administrative institutions, and from public use; German racial legislation was introduced....Jews were expelled as well as nationals whom the German authorities treated as intruders. The property of political associations and Jewish property were confiscated as well as property acquired after 11th November, 1918...Nazi tuition was immediately introduced in schools and universities...only Germans had the right to teach;..... In 1941 the French franc was withdrawn; compulsory labour was introduced.... Various decrees made applicable German penal and civil law, economic and financial legislation, and special laws relating to political crimes.... From August 1942....military service was made compulsory.... Wagner decided to transfer Alsatians inside the Reich. Over 40,000 were interned in the camp of Schirmerk.... Numerous young men were shot for having refused to serve in the Wehrmacht. When the resistance to the compulsory military enlistment grew, Wagner did not hesitate

---

* Cf. United Nations, Resolutions adopted by the General Assembly during the second part of its First Session from 23 October to 15 December 1946, Lake Success, New York, 1947, pages 188-189, Resolution No. 96, declaring the following:

> "Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings....The General Assembly, therefore, affirms that genocide is a crime under international law which the civilized world condemns and for the commission of which principals and accomplices - whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds - are punishable".

** Cf. Indictment of the prosecutors, Count Three, (a), paragraph 2, where it is stated:

> "They conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups....."

to victimize the families which were deported to Germany. He interfered with the administration of justice, giving orders as to the punishments the prosecutors had to request and the judges had to impose in cases considered to be particularly serious."

It may be added that under the Canadian War Crimes Law the expression "war crime" includes "attempts to denationalize the inhabitants of occupied territory", and that Article III of the Chinese War Crimes Law of 24 October 1946, includes within the definition of "war crime" "scheming to enslave the inhabitants of occupied territory or to deprive them of their status and rights as nationals of the occupied country".

2. Allied Civilians in Occupied Territories who Take up Arms against the Enemy

Provisions relative to the question of the legal position of allied civilians in occupied territories who take up arms against the enemy are Articles 1 - 3 of the Hague Convention, which provide as follows:

"Article 1. The laws, rights, and duties of war apply not only to the army, but also to militia and volunteer corps fulfilling all the following conditions:

(1) They must be commanded by a person responsible for his subordinates;.....

(2) They must have a fixed distinctive sign recognizable at a distance;

(3) They must carry arms openly; and

(4) They must conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army".

Article 2. The inhabitants of a territory not under occupation who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly, and if they respect the laws and customs of war.

Article 3. The armed forces of the belligerents may consist of combatants and non-combatants. In the case of capture by the enemy, both have the right to be treated as prisoners of war."

Trials which are of interest in this connection include the trial of Yamamoto Chusaburo by a British Military Court at Kuala Lumpur on 30 January to 1 February 1946, the trial of Karl Buck and ten others before a British Military Court at Wuppertal from 6 to 10 May 1946, the

trial of Heinrich Klein and fourteen others before a British Military Court at Wuppertal from 22-25 May 1946, the trial of General Victor Alexander Friedrich Willy Seeger and five others before a Military Court at Wuppertal from 17 June - 11 July 1946, the trial of General Tomoyuki Yamashita, tried by an American Military Commission at Manila from 1 October - 7 December 1945, the trial of Wilhelm List and eleven others before an American Military Tribunal at Nürnburg (Subsequent Proceedings Case No. 7), the trial of L/Cpl. Rehei Okmura and two others before an Australian Military Court at Rabaul from 13-18 December 1945, the trial of Werner Kretzschmar before a French Military Tribunal at Angers on 27 March 1946 the trial of Johann Gonz before a French Military Tribunal at Toulouse on 16 April 1946, the trial of Richard Wilhelm Hermann Bruns and two others before a Norwegian Eidsivating Lagmannsrett on 20 March 1946 and the trial of Kriminalsekretär Willie August Kesting, and Nils Peter Berhard Hjelmberg by the Gulating Lagmannsrett in March 1946, and by the Supreme Court of Norway, July 1946.

3. Allied Civilians outside Occupied Territory

On a narrow interpretation, the Hague Convention does not protect civilians outside of occupied territory, since the heading of Section II of the Heague Convention is "Military Authority over the territory of the Hostile State". This interpretation has not, however, prevailed. For instance, in the Hadamar trial, (the trial of Alphons Klein and six others before an American Military Commission at Wiesbaden which was completed on 15 October 1945,) various accused were found guilty of taking part in the deliberate killing of, among other people, over 400 Polish and Soviet nationals, many if not most of whom were civilians, by injections of poisonous drugs. Here, the fact that the offences took place in Hadamar, Germany, and not in occupied territory, was, of course, treated as entirely irrelevant. Another example among the many in existence, is the Belsen trial. In this trial, the offences committed in Auschwitz and those committed in Belsen were treated by the court as being on entirely the same footing, the fact that Belsen was on German territory and Auschwitz in occupied Poland being treated as beside the point from the legal point of view. In his opening statement in the trial, the prosecutor quoted paragraphs 442 and 443 of the British Manual of Military Law:

"442. War crimes may be divided into four different classes:

(1) Violations of the recognized rules of warfare by members of the armed forces...

443. The more important violations are the following ... ill-treatment of prisoners of war;... ill-treatment of inhabitants in occupied territory..."

/The Prosecutor

The Prosecutor claimed that although the words "inhabitants in occupied countries" were used, it was obvious that they should be extended to "all inhabitants of occupied countries who have been deported from their own country," the deportation, in fact, being a further infringement.

In the trial of Heinrich Gerike and seven others (the Velpke Children's Home case, to which reference has already been made*), various accused were found guilty of being concerned in the killing by wilful neglect of Polish children born on German territory.

Article 46 of the Hague Convention was drafted at a time when deportations for forced labour on the scale carried out by Nazi Germany could not have been contemplated, and strictly speaking, applies only to the behaviour of the occupying power within the occupied territory. Nevertheless, it is clear that the general rule laid down therein must be valid also in respect of inhabitants of the occupied territory who have been sent into the country of the occupant for forced labour, as had mothers of the children who were sent to the Velpke Baby Home, and to the children born to them while in captivity. The prosecutor in this trial pointed out, as did the prosecutor in the Belsen trial, that such deportation was in itself contrary to international law, as was stated in Oppenheim-Lauterpacht, International Law, Volume II, 6th Edition, on pages 345-6, in the following passage:

> "....there is no right to deport inhabitants to the country of the occupant, for the purpose of compelling them to work there. When during the World War the Germans deported to Germany several thousands of Belgian and French men and women, and compelled them to work there, the whole civilized world stigmatized this cruel practice as an outrage."

It could, of course, have been argued by the defence in both the Belsen trial and in the Velpke Baby Home trial that the offence of deportation was committed by persons other than the accused; nevertheless it seems reasonable to assume that the inhabitants of an occupied territory keep their rights under International Law when forced to leave their own country, even though this is not expressly provided in the Hague Convention.

For the rights of deported labour, reference should be made to the Judgment in the Milch trial (Subsequent Proceedings No. 2).

4. Non-Allied Nationals

Enemy nationals are left unprotected in war crime trials proper, by contrast with trials of what are known as "crimes against humanity".

---

* See page 150.

For instance, the British Royal Warrant provides, in Regulation 1, that the offences to be tried by British Military Courts shall only be violations of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since 2 September 1939.

The question received some discussion during the course of the Belsen trial (see page 146). On 3 October 1945, the defence objected to the proposal of the prosecution to put in affidavits which included the allegation of an offence committed against a Hungarian girl. Defence Counsel pointed out that the charge against the accused referred to the committing of a war crime which involved the ill-treatment and killing of allied nationals. Counsel also thought that it was within the knowledge of the court that a war crime could not be committed by a German against a Hungarian since the latter would not be an Allied national. The Prosecutor made two points in replying: Hungary, he said, left the Axis before April 1945, and had come on to the Allied side; at that time, therefore, the Hungarians were at least some form of Allies, though Counsel did not know to what extent. A more general point made by the Prosecutor was that what he was trying to prove was the treatment of the Allied inmates of the camp. He thought that he was perfectly entitled to put before the Court evidence of the treatment of other persons in the camp. If there were ten people and he wanted to prove that one of them was badly treated, in the Prosecutor's submission, he was perfectly entitled to prove that the ten were badly treated. The treatment of all the inmates in the camp was relevant to show the treatment of any individual inmate.

The Court decided that the paragraph be included in the evidence before the Court.

Colonel Smith* claimed that only offences against Allied nationals could be regarded by the Court as war crimes, and that "Allied nationals" meant nationals of the United Nations. The term therefore excluded Hungarians and Italians. As has been seen, the Prosecutor himself in effect disclaimed any intention of charging the accused of crimes against persons other than Allied nationals. Both Prosecution and Defence therefore recognized that, under the Royal Warrant, the jurisdiction of British Military Courts is limited to the trial of war crimes proper and excludes crimes against humanity as defined in Article 6 (c) of the Charter of the International Military Tribunal. British Military Courts deal with such crimes only if they are also violations of the laws and usages of war.

---

* Counsel for the Defendants in general.

/Nevertheless,

Nevertheless, it must be added that offences against non-allied nationals do fall within the jurisdiction of some courts other than International Military Tribunals in Nürnberg and Tokyo, for instance, some of the United States Miltary Commissions appointed for the Trial of War Crimes.

Of these, the narrowest jurisdiction is that vested in the Military Commissions appointed in the Mediterranean Theatre of Operations. In the Mediterranean Regulations (Regulation 1) the expression "war crime" means a violation of the laws and customs of war.*

Under the European Directive** (paragraph 1 a), Military Commissions are appointed for the trial of persons who are charged with violations of the laws or customs of war, of the law of nations or of the laws of occupied territory, or any part thereof. The European Directive adds therefore to the jurisdiction of Military Commissions violations of the laws of nations other than the laws or customs of war, and violations of the local law of the occupied territory. In Regulation 5 of the Pacific September Regulations, the offences falling under the jurisdiction of the Military Commissions are described as follows:

> "Murder, torture or ill-treatment of prisoners of war or persons on the seas; killing or ill-treatment of hostages; murder, torture or ill-treatment, or deportation to slave labour or for any other illegal purpose, of civilians of, or in, occupied territory; plunder of public or private property; wanton destruction of cities; towns or villages; devastation, destruction or damage of public or private property not justified by military necessity; planning, preparation, initiation or waging of war of aggression, or an invasion or war in violation of international law, treaties, agreements or assurances; murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population, or persecution on political, racial, national or religious grounds, in execution of or in connection with any offence within the jurisdiction of the commission, whether or not in violation of the domestic law of the country where perpetrated; and all other offences against the laws or customs of war; participation in a common plan or conspiracy to accomplish any of the foregoing. Leaders, organizers, instigators, accessories and accomplices participating in the formulation or execution of any such common plan or conspiracy will be held responsible for all acts performed by any person in execution of that plan or conspiracy.

---

* By command of General McNarney, Regulations for the Trial of War Crimes for the Mediterranean Theatre of Operations were made on 23 September 194 by Circular No. 114.

** By command of General Eisenhower, a directive regarding Military Commissions in the European Theatre of Operations was made by an Order of 25 August 1945.

/The Pacific

The Pacific Regulations of 5 December 1945,* define the offences to be tried by the Military Commissions in the Pacific Theatre in the following words (Regulation 2 (b)):

"(1) Military Commissions, established hereunder shall have jurisdiction over all offences including, not limited to, the following:

(a) The planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(b) Violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or internees or persons on the seas or elsewhere; improper treatment of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; or devastation not justified by military necessity.

(c) Murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population before or during the war, or persecutions on political, racial or religious grounds in execution of, or in connection with, any crime defined herein; whether or not in violation of the domestic laws of the country where perpetrated.

(2) The offence need not have been committed after a particular date to render the responsible party or parties subject to arrest, but in general should have been committed since or in the period immediately preceding the Mukden incident of 18 September 1931."

In the China Regulations** the jurisdiction of the Commission is circumscribed as follows: "The military commissions established hereunder shall have jurisdiction over the following offences: Violations of the laws or customs of war, including but not limited to murder, torture, or ill-treatment or prisoners of war or persons on the seas; killing or ill-treatment of hostages, murder, torture or ill-treatment, or deportation to slave labour or for any other illegal purposes, of civilians of, or in, occupied territory; plunder of public or private property; wanton

---

* "Regulations Governing the Trial of Accused War Criminals", issued by General MacArthur.

** A set of Regulations issued for the China Theatre on 21 January 1946.

/destruction

destruction of cities, towns or villages; devastation, destruction or damage of public or private property not justified by military necessity; murder, extermination, enslavement, deportation or other inhuman acts committed against any civilian population, or persecution on political, racial, national or religious grounds, in execution of or connection with any offence within the jurisdiction of the commission, whether or not in violation of the domestic law of the country where perpetrated; and all other offences against the laws or customs of war; participation in a common plan or conspiracy to accomplish any of the foregoing. Leaders, organizers, instigators, accessories and accomplices participating in the formulation or execution of any such common plan or conspiracy will be held responsible for all acts performed by any person in execution of that plan or conspiracy."

In describing the offences subject to trial by Military Tribunals the Regulations used in the Pacific Theatre and in China reflect the influence of the Four Power Agreement of 8 August 1945, and particularly of Article 6 of the Charter of the International Military Tribunal annexed to it. Under the Charter the International Military Tribunal has jurisdiction over:

(a) Crimes against peace,

(b) War Crimes, namely violation of the laws or customs of war, and

(c) Crimes against humanity.

Military Commissions operating under the Pacific Regulations have jurisdiction over all offences, including, but not limited to, the three types of offences enumerated. It is also expressly stated there that the offences need not have been committed after a particular date, but in general should have been committed since or in the period immediately preceding the Mukden incident of 18 September 1931.

Trials held by the courts acting under Law No. 10 of the Allied Control Council for Germany also, of course, possess jurisdiction over crimes against humanity (and indeed over crimes against peace), as well as over war crimes. (See page 134). It should be added that paragraph 2 of the Danish Act of 12 July 1946, regarding the punishment of war criminals states that "... This act shall apply ... also to all acts which, though not specifically cited above, are covered by Article 6 of the Charter of the International Military Tribunal ..."*

Neutral citizens are also, to some degree, protected by war crime trials. For instance, Article 1 of the Norwegian Law of 13 December 1946 on the Punishment of Foreign War Criminals, provides:

---

* Regarding Article 6 of the Charter see above, Chapter I, Section B.

"Acts which, by reason of their character, come within the scope of Norwegian criminal legislation are punishable, according to Norwegian law, if they were committed in violation of the laws and customs of war by enemy citizens or other aliens who were in enemy service or under enemy orders, and if the said acts were committed in Norway or were directed against Norwegian citizens or Norwegian interests. In accordance with the terms of the Civil Criminal Code No. 12, paragraph 4, with which should be read No. 13, paragraphs 1 and 3, the above provision applies also to acts committed abroad to the prejudice of Allied legal rights or of rights which, as laid down by Royal Proclamation, are deemed to be equivalent thereto."*

An explanatory memorandum of the Norwegian Ministry of Justice and Police dealing with this law states that, in referring to rights which are equivalent to Allied rights, the Draftsmen had in mind particularly: (a) Danish citizens and their economic interests, and (b) neutral citizens in Norway or other Allied armed forces or persons employed in other Allied war work.

Certain categories of neutral citizens would seem also to be protected by Article 1 of the French Ordinance of 28 August 1944, concerning the prosecution of war criminals, which provides as follows:

"Article 1. Enemy nationals or agents of other than French nationality who are serving enemy administration or interests and who are guilty of crimes or offences committed since the beginning of hostilities, either in France or in territories under the authority of France, or against a French national, or a person under French protection, or a person serving or having served in the French armed forces, or a stateless person resident in French territory before 17 June 1940, or a refugee residing in French territory, or against the property of any natural persons enumerated above, and against any French corporate bodies, shall be prosecuted by French military tribunals and shall be judged in accordance with the French laws in force, and according to the provisions set out in the present ordinance, where such offences, even if committed at the time or under the pretext of an existing state of war, are not justified by the laws and customs of war."

Article VII of the Chinese Law of 24 October 1946, governing the trial of war criminals, provides that:

"Alien combatants and non-combatants who committed any of the offences provided under Article II against the Allied Nations or their nationals,

---

* Italics not in the original.

or against aliens under the protection of the Chinese Government are subject to the application of the present Law." (Italics inserted.)

Relevant in this connection also is the trial of Johann Schwarzhuber and fifteen others, tried before a Military Court at Hamburg from 5 December 1946 - 3 February 1947, (the Ravensbruck Concentration Camp Trial).

Of some interest in connection with the requirement that a breach of the laws and usages of war cannot involve offences by enemy nationals against enemy nationals, is the question whether territory can be annexed while war is still in progress. Thus, in the Belsen trial* the defence claimed that a number of the victims of atrocities committed in Belsen and Auschwitz had ceased to be Allied nationals and had become German subjects as a result of the annexation of their Homelands by Germany. The prosecution replied that before it was possible for a country to be annexed, the war must be ended. While a war was still in progress, the citizens were entitled to the protection of the Hague Convention.

Oppenheim-Lauterpacht, International Law, Volume I, Fifth Edition, page 450, states that the act of forcibly taking possession of a part of an emeny's territory during the continuance of war, "although the conqueror may intend to keep the conquered territory and therefore to annex it, does not confer a title so long as the war has not terminated either through simple cessation of hostilities or by a treaty of peace. Therefore, the practice, which sometimes prevails, of annexing during a war a conquered part of enemy territory cannot be approved. For annexation of conquered enemy territory, whether of the whole or of part, confers a title only after a firmly established conquest, and so long as war continues, conquest is not firmly established.

This doctrine was underlined in the judgment of the International Military Tribunal at Nürnberg where it was stated:

> "A further submission was made that Germany was no longer bound by the rules of land warfare in many of the territories occupied during the war because Germany had completely subjugated those countries and incorporated them into the German Reich, a fact which gave Germany authority to deal with the occupied countries as though they were part of Germany. In the view of the Tribunal it is unnecessary in this case to decide whether this doctrine of subjugation, dependent as it is upon military conquest, has any application where the subjugation is the result of the crime of aggressive war. The doctrine was never considered to be applicable so long as there was an army in the field attempting to restore the occupied countries to

---

* See page 146.

/their true

their true owners, and in this case, therefore, the doctrine could not apply to any territories occupied after 1 September 1939. As to the war crimes committed in Bohemia and Moravia, it is a sufficient answer that these territories were never added to the Reich, but a mere protectorate was established over them."*

The same problem was touched upon in the Milch trial. (See page 148).

5. Armed Forces

Very few trials have so far been brought to the attention of the United Nations War Crimes Commission in which allegations of violations of laws and customs of war, designed to protect the fighting forces against illegal means of warfare, have been the subject of trials.

In the trial of S.S. Brigadeführer Kurt Meyer, held by a Canadian Military Court at Aurich from 10-28 December 1945, it was alleged, inter alia, that the accused, in violation of the laws and usages of war, during the fighting in 1943 - 1944, in Belgium and France, "incited and counselled troops under his command to deny quarter to allied troops," and this was one of the charges on which Meyer was found guilty. Nevertheless it is doubtful whether such offences should be classified as offences against the members of armed forces or offences against prisoners of war. They are of course specifically prohibited by Article 23 (d) of the Hague Convention which provides:

"Article 23. In addition to the prohibitions provided by special Conventions, it is particularly forbidden:

(d) To declare that no quarter will be given;"

6. Prisoners of War

Cases concerning offences against prisoners of war and against inhabitants of occupied territories form the two main categories of war crime trials.

(i) Interpretation of the term "Prisoner of War"

Under this heading, the following questions, among others, should be examined:

(a) The interpretation of the Hague and Geneva Conventions so as to cover crimes committed not in camps, but on the line of march.

Trials which are relevant to this point include the trial of Arno Heering, held before a British Military Court at Hannover from 24-26 January 1946, in which a member of a guard company was accused of ill-treating members of the British army and other British Allied nationals while on the march with a column of prisoners of war from Marienburg to Brunswick. The accused was found guilty, the prosecutor having submitted that the column of march described in the trial was to all intents the

---

* British Command Paper, Cmd. 6964, page 65.

/same and

same and in the same position as a Prisoner of War Camp. All the duties set out in the Geneva Prisoner of War Convention fell on the shoulders of the accused.

Reference should also be made to the trial of Capt. Shoichi Yamamoto and ten others, Japanese nationals, tried by an Australian Military Court from 20-27 May 1946 at Rabaul.

(b) The Application of the Hague and Geneva Conventions to crimes committed against Prisoners of War in Concentration Camps

During the couse of the Belsen trial (see page 146) Col. Smith (Defence Counsel) pointed out that in one of the instances charged, where victims were prisoners of war, a British subject who had been captured as a prisoner of war was transferred to the concentration camp. This was a clear international wrong, but the wrong consisted in ceasing to treat him as a prisoner of war, in taking him out of the camp, where he was protected by the Geneva Convention, and putting him in a concentration camp where he was exposed to the same treatment as any other inmate. The responsibility rested with those who sent him to Auschwitz or Belsen, but the responsibility of the people at Auschwitz and Belsen was the same in regard to that man as to any other inmate. Counsel did not know whether they even knew he was a prisoner of war. In any case they had no option but to treat him as anyone else.

In his closing address, the Prosecutor claimed that Colonel Smith had suggested that the crime involved was the moving of the prisoner of war from the prisoner of war camp into the concentration camp and that anything which happened to him thereafter was thereby excused. The Prosecutor found it difficult to accept the suggestion that if a man were ill-treated in a prisoner of war camp that was a war crime, but if the ill-treatment took place outside in the street or in a concentration camp, it was not.*

(c) The interpretation given to Article 23 (c)** of the Hague Convention

The Hague Convention was drafted long before the possibility of airmen escaping from aircraft by parachute was thought of; nevertheless, the article of the Convention has, of course, been interpreted to cover baled-out airmen, whether captured by the enemy armed forces or by enemy civilians.

---

* In so far as it did not arrive at a special finding regarding the victim in question, who was mentioned on the Belsen Charge Sheet, the Court would appear to have rejected Colonel Smith's argument.

** See pages 170-71.

/Reference

Reference should be made in this connection for instance to the trial of Josef Hangobl before an American Military Commission at Dachau on 18 October 1945, and to the trial of Alfred Keller before an American Intermediate Military Government Court at Ludwigsburg on 2 April 1946. In connection with the application of this article and of the Geneva Convention to paratroops, see the trial of Hans Wichman before a British Military Court at Hamburg on 29 November 1945 and the trial of Heinrich Klein and fourteen others before a British Military Court at Wuppertal from 22 to 25 May 1946, and also the trial of Kurt Student, before a British Military Court, at Luneberg, Germany from 6-10 May 1946.

(d) The question whether members of Resistance Movements become Prisoners of War on Capture

See for instance, the references made under Allied Civilians in Occupied Territories who take up Arms against the Enemy; see also trial of Carl Bauer and two others before a French Military Tribunal at Dijon, of which the judgment was delivered on 18 October 1945, the trial of Heinrich Sasse and three others, before a French Military Tribunal at Bordeaux, of which the judgment was delivered on 15 April 1946 and the trial of Johann Genz, held before a French Military Tribunal at Toulouse, of which the judgment was delivered on 16 April 1946.

In the first of the French trials referred to above, a detachment of German marines captured three Frenchmen wearing mainly civilian clothes, but having some distinctive military signs as part of their garments, or on the garments themselves. One or two had a French tri-colour band around the arm as worn by members of the FFI and wore an American military cap. The three men were captured in the course of combats between German units and regular French troops assisted by members of the FFI. All were shot without trial and without having committed any offence apart from the fact that they fought with arms against German units. The Tribunal found the defendants guilty of "murdering three prisoners of war" and condemned them to various penalities, one of them to death. In doing so the Tribunal apparently admitted the argument of the prosecution that what mattered more than the fact that the three captured men wore some distinctive signs, was the fact "that troops of the FFI were resisting for a whole day against the...(German) column, alongside the regular French troops, to the knowledge of the Germans, that they were fighting against invading troops without having had the time to organize themselves and that, consequently, they were covered by the IV Hague Convention..." This was a reference to Article 2 of the Hague Regulations, which covers civilians "of a territory not under occupation", who take up arms to resist the invading troops without having had time to organize themselves in accordance

/with Article 1,

with Article 1, if they carry arms openly, and if they respect the laws and customs of war. In this case the Tribunal established in addition that the chief defendant tried to invoke the right to "reprisals" by submitting in his defence that he had ordered the shooting of captured French combatants only if they resumed fighting.

In the trial of Lieutenant W. Kretzschmar by a French Military Tribunal at Angers (judgment pronounced on 25 March 1946) it was shown that two members of the French Resistance Movement had attacked a small German outpost with the intention of making prisoners and bringing them to their headquarters. They failed and were instead captured themselves, one of them being wounded. Both had civilian clothes, but one wore a tri-colour band around his arm and a tri-colour badge in his buttonhole. The accused denied having noticed these distinctive signs and invoked in his defence an order by Hitler to shoot summarily all irregular combatants. The Tribunal found the defendant guilty of homicide "not justified by the laws and customs of war" and condemned him to death. It is to be assumed that the Tribunal admitted the Prosecutor's plea which was entirely based on the existence of the distinctive tri-colour signs and that, as in the previous case, it treated the victims as prisoners of war entitled to the protection of international law.

The above two trails are an illustration of the ways in which it is possible to interpret the meaning of Article 1 and 2 of the Hague Regulations, and to extend recognition to human rights in war time in cases where a narrow interpretation would have led to the opposite result.

(c) The Question of the circumstances in which Prisoners of War could be treated as suspected war criminals

See trial of General Victor Alexander Friedrich Willy Seeger and five others, held before a British Military Court at Wuppertal from 17 June - 11 July 1946.

(ii) A General Provision Protecting Prisoners of War

One general provision protecting prisoners of war is Article 18 of the Geneva Prisoners of War Convention, which provides that:

"Each Prisoner of War Camp shall be placed under the authority of a responsible officer..."

This article was quoted, for instance, by the prosecutor in the trial of Arno Heering, held before a British Military Court at Hannover, from 24-26 January 1946.

(iii) The Right to Life and Health

Numerous provisions of the Hague and Geneva Conventions attempt to secure for prisoners of war their rights to life and health. These may be divided into two categories:

/(a) Those aimed

(a) Those aimed at maintaining general minimum conditions conducive to life and health and placing on the authorities holding prisoners, a duty to maintain prisoners of war. This class includes the following, all of which have been quoted in actual war crime trials:

Hague Convention, Article 4:

"Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them.

They must be humanely treated.

All their personal belongings, except arms, horses and military papers, remain their property."

Hague Convention, Article 7:

"The Government into whose hands prisoners of war have fallen is charged with their maintenance.

In default of special agreement between the belligerents, prisoners of war shall be treated, as regards rations, quarters and clothing, on the same footing as the troops of the Government which captured them."

Geneva Prisoners of War Convention, Article 2:

"Prisoners of war are in the power of the hostile Government, but not of the individuals or formation which captured them.

They shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity.

Measures of reprisal against them are forbidden."

Geneva Convention, Article 3:

"Prisoners of war are entitled to respect for their persons and honour. Women shall be treated with all consideration due to their sex.

Prisoners retain their full civil capacity."

Geneva Convention, Article 4:

"The detaining Power is required to provide for the maintenance of prisoners of war in its charge.

Differences of treatment between prisoners are permissible only if such differences are based on the military rank, the state of physical or mental health, the professional abilities, or the sex of those who benefit from them."

Geneva Convention, Article 7:

"As soon as possible after their capture, prisoners of war shall be evacuated to depots sufficiently removed from the fighting zone for them to be out of danger.

/Only prisoners

Only prisoners who, by reason of their wounds or maladies, would run greater risks by being evacuated than by remaining may be kept temporarily in a dangerous zone.

Prisoners shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone....."

Geneva Convention, Article 9:

"Prisoners of war may be interned in a town, fortress, or other place, and may be required not to go beyond certain fixed limits. They may also be interned in fenced camps; they shall not be confined or imprisoned except as a measure indispensable for safety or health, and only so long as circumstances exist which necessitate such a measure.

Prisoners captured in districts which are unhealthy or whose climate is deleterious to persons coming from temperate climates shall be removed as soon as possible to a more favourable climate.

....."

Geneva Convention, Article 10:

"Prisoners of war shall be lodged in buildings or huts which afford all possible safeguards as regards hygiene and salubrity.

The premises must be entirely free from damp, and adequately heated and lighted. All precautions shall be taken against the danger of fire.

As regards dormitories, their total area, minimum cubic air space, fitting and bedding material, the conditions shall be the same as for the depot troops of the detaining Power."

Geneva Convention, Article 11:

"The food ration of prisoners of war shall be equivalent in quantity and quality to that of the depot troops.

Prisoners shall also be afforded the means of preparing for themselves such additional articles of food as they may possess.

Sufficient drinking water shall be supplied to them. The use of tobacco shall be authorized. Prisoners may be employed in the kitchens.

All collective disciplinary measures affecting food are prohibited."

Geneva Convention, Article 12:

"Clothing, underwear and footwear shall be supplied to prisoners of war by the detaining Power. The regular replacement

/and repair

and repair of such articles shall be assured. Workers shall also receive working kits wherever the nature of the work requires it.

In all camps, canteens shall be installed at which prisoners shall be able to procure, at the local market price, food commodities and ordinary articles.

The profits accruing to the administrations of the camps from the canteens shall be utilised for the benefit of the prisoners."

Geneva Convention, Article 13:

"Belligerents shall be required to take all necessary hygienic measures to ensure the cleanliness and salubrity of camps and to prevent epidemics.

Prisoners of war shall have for their use, day and night, conveniences which conform to the rules of hygiene and are maintained in a constant state of cleanliness.

In addition and without prejudice to the provision as far as possible of baths and shower-baths in the camps, the prisoners shall be provided with a sufficient quantity of water for their bodily cleanliness.

They shall have facilities for engaging in physical exercises and obtaining the benefit of being out of doors."

Geneva Convention, Article 14:

"Each camp shall possess an infirmary, where prisoners of war shall receive attention of any kind of which they may be in need. If necessary, isolation establishments shall be reserved for patients suffering from infectious and contagious diseases.

The expenses of treatment, including those of temporary remedial apparatus, shall be borne by the detaining Power.

Belligerents shall be required to issue, on demand, to any prisoner treated, an official statement indicating the nature and duration of his illness and of the treatment received.

It shall be permissible for belligerents mutually to authorize each other, by means of special agreements, to retain in the camps doctors and medical orderlies for the purpose of caring for their prisoner compatriots.

Prisoners who have contracted a serious malady, or whose condition necessitates important surgical treatment shall be admitted, at the expense of the detaining Power, to any military or civil institution qualified to treat them."

/Geneva

Geneva Convention, Article 17:

"Belligerents shall encourage as much as possible the organization of intellectual and sporting pursuits by the prisoners of war."

Geneva Convention, Article 25:

"Unless the course of military operations demands it, sick and wounded prisoners of war shall not be transferred if their recovery might be prejudiced by the journey."

Geneva Convention, Article 27:

"Belligerents may employ as workmen prisoners of war who are physically fit, other than officers and persons of equivalent status according to their rank and their ability.

. . . . . .

Non-commissioned officers who are prisoners of war may be compelled to undertake only supervisory work, unless they expressly request remunerative occupation.

. . . . . .

Geneva Convention, Article 28:

"The detaining Power shall assume entire responsibility for the maintenance, care, treatment and the payment of the wages of prisoners of war working for private individuals."

Geneva Convention, Article 32:

"It is forbidden to employ prisoners of war on unhealthy or dangerous work.

Conditions of work shall not be rendered more arduous by disciplinary measures."

Geneva Convention, Article 33:

"Conditions governing labour detachments shall be similar to those of prisoners-of-war camps, particularly as concerns hygienic conditions, food, care in case of accidents or sickness, correspondence and the reception of parcels.

Every labour detachment shall be attached to a prisoners' camp. The commandant of this camp shall be responsible for the observance in the labour detachment of the provisions of the present Convention."

It will be noted, of course, that Articles 14 and 25 are also relevant in connection with the rights of the sick and wounded (see page 178).

Examples of trials in which these articles have been quoted and in which the rights of prisoners of war to life and health have been vindicated, are the following: Trial of Martin Gottfried Weiss and thirty-nine others, before an American General Military Government Court at Dachau, from 15 November - 13 December 1945, (the Dachau Concentration Camp case), the trial of

Major General Otsuka and forty-three others before an American Military Commission at Singapore from 8 August - 10 October 1946, the trial of Giulio Oldani, an Italian national, tried before an American Military Commission at Florence from 31 October to 7 November 1946; the trial of Oswald Pohl and seventeen others, before an American Military Tribunal at Nürnberg (Subsequent Proceedings Case No. 4); the trial of Friedrich Flick and five others, before an American Military Tribunal at Nürnberg (Subsequent Proceedings Case No. 5); the trial of Carl Krauch and twenty-two others before an American Military Tribunal at Nürnberg (the I. G. Farben Industrie case), (Subsequent Proceedings No. 6); the trial of Josef Altstotter and fifteen others, before an American Military Tribunal at Nürnberg, (Subsequent Proceedings Case No. 3); the trial of Alfried Krupp von Bohlen und Halbach, before an American Military Tribunal at Nürnberg, (the Krupp case), (Subsequent Proceedings No. 10); the trial of Captain Wadami Shirozu and thirty-five others, before an Australian Military Court, from 2 to 18 January 1946 at Ambon and from 25 January to 15 February 1946 at Morotai; the trial of Lieutenant Taisuke Kawazumi and eight others, before an Australian Military Court at Morotai from 5 - 14 February 1946; the trial of Erich Killinger and four others before a British Military Court at Wuppertal, from 26 November to 3 December 1945; the trial of Arno Heering, before a British Military Court at Hannover from 24 to 26 January 1946 and the trial of Kurt Student before a British Military Court at Luneberg from 6 to 10 May 1946.

(b) Those aimed at ensuring that prisoners of war are not exposed to unnecessary danger, or wounded or killed without due cause. The following articles of this class have been quoted in war crime trials:

Hague Convention, Article 6:

"The State may employ the labour of prisoners of war other than officers, according to their rank and capacity. The work shall not be excessive, and shall have no connection with the operations of the war.

. . . . . ."

Hague Convention, Article 23:

"In addition to the prohibitions provided by special Conventions, it is particularly forbidden:

. . . . . .

(c) To kill or wound an enemy who, having laid down his arms, or no longer having means of defence, has surrendered at discretion;

(d) To declare that no quarter will be given;"

. . . . . .

Geneva Convention, Article 31:

"Work done by prisoners of war shall have no direct connection with the operations of the war. In particular, it is forbidden to employ

/prisoners

prisoners in the manufacture or transport of arms or munitions of any kind, or on the transport of material destined for combatant units.

. . . . . ."

Article 32 of the Geneva Convention, which has been quoted above, is also relevant in this connection.

Trials in which these articles have been quoted and in which these rights have been vindicated, are the following: United States trial of General Tomohuki Yamashita, (see page 150), United States trial of Tikitaki Yaichi before a Military Commission at Yokohama on 7 March 1946; trial of Genji Matsuda and Jeichi Kuwashima, before an American Military Commission at Shanghai from 5 - 13 September 1946; trial of Tomoki Nakamura, before an American Military Commission at Yokohama from 18 September to 28 December 1946; trial of Hiroshi Fujii, a Japanese national before an American Military Commission at Yokohama from 28 September to 31 December 1946; trial of Giulio Oldani, an Italian national before an American Military Commission at Florence from 31 October to 7 November 1946; trial of Erhard Milch, (Subsequent Proceedings case No. 2); trial of Oswald Pohl and seventeen others, (Subsequent Proceedings No. 4); trial of Friedrich Flick and five others, (Subsequent Proceedings No. 5); trial of Carl Krauch and twenty-two others (Subsequent Proceedings No. 6); trial of Alfried Krupp von Bohlen und Halbach and eleven others (Subsequent Proceedings No. 10); trial of General Anton Dostler, before an American Military Commission, Rome, from 8 to 12 October 1945; trial of Otto Sandrock and three others (the "Almelo Trial") before a British Military Court at Almelo, Holland, from 24 to 26 November 1945; the trial of Rear-Admiral Nisuke Masuda and four others, before a United States Military Commission at Kwajalein Island, Marshall Islands, from 7 - 13 December 1945, (the "Jaluit Atoll Case"); the trial of Leo Rosenau, before a British Military Court at Hannover on 13 August 1946, and the trial of Kurt Student before a British Military Court at Luneberg from 6 to 10 May, 1946.

The above are, of course, only examples of this type of trial, since cases involving allegations of the killing or wounding of prisoners of war, probably form the largest category of trials.

Two trials in which the prohibition contained in Article 23 (d) of the Hague Regulations was referred to, are the trial of S. S. Brigadefuhrer Kurt Meyer before a Canadian Military Court at Aurich, from 10 to 28 December 1945, and the trial of Karl Maria von Behren before a British Military Court at Hamburg on 28 to 31 May 1946.

(iv) The Right to Integrity of the Person

General articles protecting this right are the Hague Convention, Article 4 and Article 23 (c) (see pages 166, 170,) and the Geneva Convention, Articles 2 and 3, (see pages 166, 99).

/These provisions

These provisions have been quoted in numerous trials, particularly where obvious ill-treatment of prisoners of war is involved. In the nature of the offences alleged, no such comparatively detailed regulations are required to prohibit these offences as are required to protect the health of prisoners of war. (The latter must include, for instance, provisions relating to food and clothing, hygiene, washing facilities, provisions for physical exercise, etc.)

Examples of trials which are relevant in this connection, include various of the concentration camp cases. Reference should also be made to the trial of Takashi Sakai, before a Chinese War Crimes Military Tribunal of the Ministry of National Defence at Nanking on 27 August 1946, the trial of Karl-Hans Hermann Klinge, before the Supreme Court of Norway on 27 February 1946, the trial of S. S. Brigadefuhrer Kurt Meyer (see page 162) the trials of Erich Killinger and four others and Arno Heering, (see pages 162, 163; and 170); the trial of Willi Mackenser before a British Military Court, Hannover, on 28 January 1946; the trial of Giulio Oldani, before an American Military Commission (see page 170); Nurnberg Subsequent Proceedings Cases Nos. 2, 3 and 4; the French trial of Richard Raith before a Military Tribunal at Nancy, of which judgment was delivered on 18 May 1946; trial of Heinrich Heusch, before a French Permanent Military Tribunal at Metz on 7 November 1946, and the trial of Pierre Humbert before a French Permanent Military Tribunal at Metz on 9 January 1947.

It is, perhaps, relevant to include here cases illustrating the prohibition of the infraction of excessive punishment on prisoners of war. The relevant articles are:

Geneva Convention, Article 46:

"Prisoners of war shall not be subjected by the military authorities or the tribunals of the detaining Power to penalties other than those which are prescribed for similar acts by members of the national forces.

Officers, non-commissioned officers or private soldiers, prisoners of war, undergoing disciplinary punishment shall not be subjected to treatment less favourable than that prescribed, as regards the same punishment, for similar ranks in the armed forces of the detaining Power.

All forms of corporal punishment, confinement in premises not lighted by daylight and, in general, all forms of cruelty whatsoever, are prohibited.

Collective penalties for individual acts are also prohibited."

Geneva Convention, Article 54:

"Imprisonment is the most severe disciplinary punishment which may be inflicted on a prisoner of war.

/The duration

The duration of any single punishment shall not exceed thirty days..."

Relevant trials include United States trial of Giulio Oldani, (see page 170 and British trial of Arno Heering. (See pages 162, 163).

A trial illustrative of the prohibition contained in Article 2 of the Geneva Convention, concerning the exposing of prisoners of war to insults and public curiosity, is the trial of Lieutenant General Kurt Maelzer, before an American Military Commission at Florence from 9 to 14 September 1946.

(v) The Right to Freedom of Movement

Reference is made to pages 114 - 115 for certain material relating to the shooting of prisoners of war while trying to escape. A prisoner of war must not, of course, be shot for attempting to escape.

Article 50 of the Geneva Convention, provides as follows:

"Escaped prisoners of war who are re-captured before they have been able to rejoin their own armed forces or to leave the territory occupied by the armed forces which captured them shall be liable only to disciplinary punishment.

Prisoners who, after succeeding in rejoining their armed forces or in leaving the territory occupied by the armed forces which captured them, are again taken prisoner shall not be liable to any punishment for their previous escape."

Relevant trials are: Trial of Sub-Lieutenant Matagi Honji and P/O Eizo Kurokawa, before an Australian Military Court at Morotai on 18 February 1946; trial of Captain Hyotaro Yamamoto and twelve others, before an Australian Military Court at Rabaul from 3 - 6 May 1946 and the trial of Captain Toma Ikeba and three others, before an Australian Military Court at Rabaul from 15 to 16 May 1946.

Further, the defence that the "prisoner was shot while trying to escape" cannot be pleaded successfully if the only purpose of his escape was to save himself from being killed, contrary to international law; see trial of Johann Melchior and Walter Hirschelmann before an American General Military Government Court at Ludwigsburg from 22 to 24 January 1946.

The Geneva Convention provides, in Article 13, that prisoners of war "shall have facilities for engaging in physical exercises and obtaining the benefit of being out-of-doors". The Hague Convention provides, in Article 5, that:

"Prisoners of war may be interned in a town, fortress, camp or other place, and are bound not to go beyond certain fixed limits; but they cannot be placed in confinement except as an indispensable measure of safety, and only while the circumstances which necessitate the measure continue to exist."

/This last

This last pair of provisions seems to fall more naturally under the heading "Right to Freedom of Movement" than does the previous discussion of the position regarding prisoners who attempt to escape. Nevertheless, the legal position regarding prisoners who try to escape has some interest and this section would seem to be the most appropriate one in which to include a reference to the point.

Further trials illustrative of the protection of the right of freedom of movement of prisoners of war are the following: the trial of Colonel Stefano Orofalo, an Italian national, before a British Military Court at Afragola on 20 and 21 May 1946; the Dachau Concentration Camp case, (see page 147); the American trial of Johann Melchior and Walter Hirschelmann, (see page 172); Subsequent Proceedings cases Nos. 2, 3, 4 and 10, and the Canadian trial of Johann Neitz before a Military Court at Aurich from 15 to 25 March 1946.

(vi) The Right to Fair Trial

A number of provisions deal with the right to fair trial. The Geneva Prisoners of War Convention provides as follows in Articles 60 to 67, which comprise the contents of the section headed "Judicial Proceedings":

Article 60:

"At the commencement of a judicial hearing against a prisoner of war, the detaining Power shall notify the representative of the protecting Powe as soon as possible, and in any case before the date fixed for the opening of the hearing.

The said notification shall contain the following particulars:

(a) Civil status and rank of the prisoner.

(b) Place of residence or detention.

(c) Statement of the charge or charges, and of the legal provisions applicable.

If it is not possible in this notification to indicate particulars of the court which will try the case, the date of the opening of the hearing and the place where it will take place, these particulars shall be furnished to the representative of the protecting Power at a later date, but as soon as possible and in any case at least three weeks before the opening of the hearing."

Article 61:

"No prisoner of war shall be sentenced without being given the opportunity to defend himself.

No prisoner shall be compelled to admit that he is guilty of the offence of which he is accused."

Article 62:

"The prisoner of war shall have the right to be assisted by a qualified advocate of his own choice, and, if necessary, to have recourse

/to the offices

to the offices of a competent interpreter. He shall be informed of his right by the detaining Power in good time before the hearing.

Failing a choice on the part of the prisoner, the protecting Power may procure an advocate for him. The detaining Power shall, on the request of the protecting Power, furnish to the latter a list of persons qualified to conduct the defence.

The representatives of the protecting Power shall have the right to attend the hearing of the case.

The only exception to this rule is where the hearing has to be kept secret in the interests of the safety of the State. The detaining Power would then notify the protecting Power accordingly."

Article 63:

"A sentence shall only be pronounced on a prisoner of war by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power."

Article 64:

"Every prisoner of war shall have the right of appeal against any sentence against him in the same manner as persons belonging to the armed forces of the detaining Power."

Article 65:

"Sentences pronounced against prisoners of war shall be communicated immediately to the protecting Power."

Article 66:

"If sentence of death is passed on a prisoner of war, a communication setting forth in detail the nature and the circumstances of the offence shall be addressed as soon as possible to the representative of the protecting Power for transmission to the Power in whose armed forces the prisoner served.

The sentence shall not be carried out before the expiration of a period of at least three months from the date of the receipt of this communication by the protecting Power."

Article 67:

"No prisoner of war may be deprived of the benefit of the provisions of Article 42 of the present Convention as the result of a judgment or otherwise."*

* Article 42 lays down the right of prisoners of war to make petitions to the captor authorities and to bring the notice of the protecting Power to such petitions.

/Any trial

Any trial in which the allegation is made that prisoners were shot without cause is, of course, an illustration of the violation of the right to a fair trial. In some cases, however, the right to a fair trial has been discussed in further detail. Reference is made to the following trials: the trial of Karl-Hans Hermann Klinge, before the Supreme Court of Norway on 27 February 1946; the trial of Karl Adam Golkol and thirteen others before a British Military Court at Wuppertal from 15 to 21 May 1946; the trial of Heinrich Klein and fourteen others before a British Military Court at Wuppertal from 22 to 25 May 1946; the trial of General Victor Alexander Friedrich Willy Seeger (see page 153 ; the trial of General Tomoyuki Yamashita (see page 150); the trial of Jitsuo Dato and seven others before an American Military Commission at Shanghai, from 1 to 22 July 1946; the trial of Tanaka Hisakasu and five others, before an American Military Commission at Shanghai from 16 - 31 August 1946; the trial of Shigeru Sawada and three others, before an American Military Commission at Shanghai from 27 February - 15 April 1946 and also the trial of Oswald Pohl and seventeen others, (Subsequent Proceedings Case No. 4).

The above trials show, inter alia, that all types of prisoners, even captured guerrillas are entitled to some form of trial before being subjected to execution or severe punishment.

(vii) Religious Rights

The religious rights of a prisoner or war are protected by Hague Convention, Article 18 and Geneva Convention, Article 16. These provide as follows:

- Hague Convention, Article 18:

"Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of their own church, on the sole condition that they comply with the police regulations issued by the military authorities."

Geneva Convention, Article 16:

"Prisoners of war shall be permitted complete freedom in the performance of their religious duties, including attendance at the services of their faith, on the sole condition that they comply with the routine and police regulations prescribed by the military authorities

Ministers of religion, who are prisoners of war, whatever may be their denomination, shall be allowed freely to minister to their co-religionists."

Article 18 of the Hague Convention appears among those whose violations is alleged in the Subsequent Proceedings trials against Carl Krauch and twenty-two others, and Alfried Krupp von Bohlen und Halbach and eleven others, (Nos. 6 and 10).

/In the trial

In the trial of Oswald Pohl and seventeen others, (Subsequent Proceedings, Case No. 4), it is alleged, inter alia, that Geneva Convention, Article 16 was violated by various of the accused.

(viii) Property Rights

Article 4 of the Hague Convention provides that all the personal property of prisoners of war, "except arms, horses and military papers, remain their property". Article 6 of the Geneva Convention provides as follows:

> "All personal effects and articles in personal use - except arms, horses, military equipment and military papers - shall remain in the possession of prisoners of war, as well as their metal helmets and gas masks.
>
> Sums of money carried by prisoners may only be taken from them on the order of an officer and after the amount has been recorded. A receipt shall be given for them. Sums thus impounded shall be placed to the account of each prisoner.
>
> Their identity tokens, badges of rank, decorations and articles of value may not be taken from the prisoners."

Examples of the protection of these rights are afforded by the trials of Guilo Oldani and of Oswald Pohl and seventeen others, (Subsequent Proceedings, No. 4). (See page 151).

(ix) Civic Rights

Article 3 of the Geneva Prisoners of War Convention lays down: "...prisoners retain their full civil capacity." It has been impossible, however, so far, to find a trial which would throw light on the significance of this provision.

(x) The Right not to be put to Slavery

Article 27 of the Geneva Convention provides:

> "Belligerents may employ as workmen prisoners of war who are physically fit, other than officers and persons of equivalent status according to their rank and ability.
>
> Nevertheless, if officers or persons of equivalent status ask for suitable work, this shall be found for them as far as possible.
>
> Non-commissioned officers who are prisoners of war may be compelled to undertake only supervisory work, unless they expressly request remunerative occupation."

Nevertheless, there are limits to the extent to which the labour of prisoners of war may be used by the capturing power. Trials which are relevant in connection with the right of prisoners of war and others not to be put to slavery include the trials of Erhard Milch, Josef Alstotter and fifteen others, and of Oswald Pohl and seventeen others, (Subsequent Proceedings Cases Nos. 2, 3 and 4).

7. The Sick and Wounded

Special provision is made for the protection of the sick and wounded by the Geneva Convention of 1929 for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Of this Convention, the following articles have been quoted in war crime trials:

Article 1:

"Officers and soldiers and other persons officially attached to the armed forces who are wounded or sick shall be respected and protected in all circumstances; they shall be treated with humanity and cared for medically without distinction of nationality, by the belligerent in whose power they may be.

Nevertheless, the belligerent who is compelled to abandon wounded or sick to the enemy, shall, as far as military exigencies permit, leave with them a portion of his medical personnel and material to help with their treatment."

Article 19:

"As a compliment to Switzerland, the heraldic emblem of the red cross on a white ground, formed by reversing the Federal colours, is retained as the emblem and distinctive sign of the medical service of armed forces.

Nevertheless, in the case of countries which already use, in place of the Red Cross, the Red Crescent or the Red Lion and Sun on a white ground as a distinctive sign, these emblems are also recognized by the terms of the present Convention."

Article 20:

"The emblem shall figure on the flags, armlets, and on all material belonging to the medical service, with the permission of the competent military authority."

Article 22:

"The distinctive flag of the Convention shall be hoisted only over such medical formations and establishments as are entitled to be respected under the Convention, and with the consent of the military authorities. In fixed establishments it shall be, and in mobile formations it may be, accompanied by the national flag of the belligerent to whom the formation or establishment belongs.

Nevertheless, medical formations which have fallen into the hands of the enemy, so long as they are in that situation, shall not fly any other flag than that of the Convention.

Belligerents shall take the necessary steps, so far as military exigencies permit, to make clearly visible to the enemy forces, whether

/land, air or sea

land, air, or sea, the distinctive emblems indicating medical formations and establishments, in order to avoid the possibility of any offensive action."

In Article 2 of the Convention it is stated that:

"Except as regards the treatment to be provided for them in virtue of the preceding article, the wounded and sick of an army who fall into the hands of the enemy shall be prisoners of war, and the general provisions of international law concerning prisoners of war shall be applicable to them.

Belligerents shall, however, be free to prescribe, for the benefit of wounded or sick prisoners, such arrangements as they may think fit beyond the limits of the existing obligations."

Examples of the protection of the rights of the stick and wounded are provided by the trial of Kurt Meyer before a Canadian Military Court at Aurich from 10 to 28 December 1945; the trial of Captain Wadami Shirozu and thirty-five others before an Australian Military Court from 2 to 18 January 1946 at Ambon and from 25 January to 15 February 1946 at Morotai; the trial of Lieutenant Taisuke Kawazumi and eight others before an Australian Military Court at Morotai from 5 to 14 February 1946; the trial of Hiroshi Funii, before an American Military Commission at Yokchama from 28 September to 31 December 1946; and the trial of Kurt Student before a British Military Court at Luneberg from 6 to 10 May 1946.

8. Medical Personnel

Provision is made for the safeguarding of the personal security of medical personnel by Articles 6 and 9 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, which provide as follows:

Article 6:

"Mobile medical formations, that is to say, those which are intended to accompany armies in the field, and the fixed establishments of the medical service shall be respected and protected by the belligerents."

Article 9:

"The personnel engaged exclusively in the collection, transport and treatment of the wounded and sick, and in the administration of medical formations and establishments, and chaplains attached to armies, shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be treated as prisoners of war.

Soldiers specially trained to be employed, in case of necessity, as auxiliary nurses or stretcher-bearers for the collection, transport and treatment of the wounded and sick, and furnished with a proof of

/identity

identity, shall enjoy the same treatment, as the permanent medical personnel if they are taken prisoners while carrying out these functions."

It will be noted that medical personnel are not to be treated as prisoners of war on capture.

Reference is made in this connection also to the trial of Kurt Student, mentioned on page 163.

9. Captured Spies

Articles 29 and 30 of the Hague Convention makes the following provisions relating to captured spies:

Article 29:

"A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

Accordingly soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army for the purpose of obtaining information are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians entrusted with the delivery of dispatches intended either for their own army or for the enemy's army, and carrying out their mission openly. To this class likewise belong persons sent in balloons for the purpose of carrying dispatches and, generally, of maintaining communications between the different parts of an army or a territory.

Article 30:

A spy taken in the act shall not be punished without previous trial.

Trials which are relevant in this connection are the "Almelo Trial" (see page 171): the trial of Werner Rohde and eight others before a British Military Tribunal at Wuppertal from 29 May - 1 June 1946; the trial of Karl Maria von Behren before a British Military Court, at Hamburg, from 28 to 31 May 1946; and the trial of Lieutenant General Takeo Ito and eight others before an Australian Military Court at Rabaul on 24 May 1946.

10. A Note on the Nationality of the Accused

According to the classic conception of the nature of a war crime, such an offence can only be committed by an enemy.* An elastic interpretation has been given to the meaning of the word "enemy", however, and in this way violations of human rights have been punished in instances where such action would not otherwise have been possible.

---

* i.e. an enemy or ex-enemy from the point of view of the Country setting up the Court.

/Thus, six of the

Thus, six of the accused in the Belsen Trial* who were found guilty were Poles, that is to say, nationals of a country allied to the United Kingdom, before one of whose Military Courts the trial was held. Their Counsel had claimed that the offences which they were alleged to have committed against Poles and other nationals could not amount to war crimes. By finding them guilty, however, the Court approved the argument of the Prosecution that if the Polish accused, whether to save themselves from being beaten or from whatever motive, accepted positions of responsibility in the camp under the S. S. and beat and ill-treated prisoners, acting on behalf of the S. S., they had identified themselves with the Germans, and were as guilty as the S. S. themselves.

Similarly, a national of Luxembourg, an allied country, was found guilty of war crimes by a French Military Tribunal at Lyon on 23 November 1945. The accused, a Lucien Fromes, joined the ranks of the Gestapo as a Hauptsturmfuhrer and was tried for murder, pillage and wanton destruction of property committed on French territory. Found guilty on all counts, he was consemned to death.

Again, the Military Tribunal in Paris on 25 April 1947 at least assumed jurisdiction over Lendines Monte, a national of a non-belligerent country, Spain. He was tried on two different counts: for "violations against the external security of the State", and for "murder and ill-treatment". In both cases the place of the alleged crimes was in Germany, where the defendant was interned in concentration camps from 1940-1945 after having been found in France as a Spanish Republican refugee. On the first count he was charged with having "maintained relations during the war with subjects and agents of an enemy country", acting against the security of the French state, and on the second count with having physically ill-treated French, Belgian and Spanish inmates in the camps and with having killed a Spaniard. The defendant was acquitted on the first count and on the second the Court ordered additional investigations. The essence of the second charge was that, as an inmate in German concentration camps, he allied himself with the German authorities and ill-treated other inmates in the same way as the authorities themselves.

---

* See page 146.

D. SPHERES IN WHICH THE RIGHTS OF THE ACCUSED AND THE RIGHTS OF THE VICTIMS MAY BE SAID TO HAVE CONFLICTED AT THE TIME OF THE OFFENCE

It often happens that the facts of a case before a war crime court are not such as to enable the court to declare an accused unqualifiedly guilty. In such instances it falls to the court to strike a balance between conflicting claims to its consideration, in fact between the rights of the victim on the one hand and what may be regarded as the rights of the accused on the other. The decision of the Court in such cases is not always an easy one to make, even if their proceedings are regulated (as they sometimes are) by legal enactments which make provision governing such situations. How, for instance, is a court to act when faced with the plea that the offence was committed under superior orders, duress or coercion or under pressure of some form of necessity, or in accordance with the municipal law which governed the acts of the accused at the time of the offence? How far can a commander be held liable for offences committes by troops under his command which he did not order them to commit? How nearly connected with an offence must an accused be shown to have been before he can be made liable as an accomplice in its perpetration? How far can it be regarded as legitimate to take reprisals which violate human rights? What recognition is it possible to allow to the pleas of mistake of fact, mistake of law and self defence?

These are the questions on which the enactments, legal arguments and judicial decisions quoted in this section are intended to throw some little light.

1. Responsibility of Commanders for Offences Committes by their Troops

(i) Liability of Officers for Offences Ordered by Them

There have been many trials in which an officer who ordered the commission of an offence has been held guilty of its perpetration.

One example among many is the trial of General Anton Dostler, by a United States Military Commission, Rome, 8 - 12 October 1945, in which the accused was found guilty of having ordered the illegal shooting of fifteen prisoners of war.*

While the principle of the responsibility of such officers is not in doubt, it is nevertheless interesting to note that it has even been specifically laid down in certain texts which have been used as authorities

---

* See War Crime Trial Law Reports, published for the United Nations War Crimes Commission by His Majesty's Stationery Office, London, Vol. I, pages 22-34.

in war crime trials. For instance, paragraph 345 of the United States Basic Field Manual, F.M. 27-10, in dealing with the admissibility of the defence of Superior Orders, ends with the words: "....The person giving such orders may also be punished."

Reference has already been made to the provisions of the Nürnberg and Tokyo Charters which formulate the general principle that 'leaders, organizers, instigators and accomplices, participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.'*

(ii) Liability of a Commander for Offences Not Shown to have been Ordered by Him

A more interesting question, however, is the extent to which a commander of troops can be held liable for offences committed by troops under his command which he has not been shown to have ordered, on the grounds that he ought to have used his authority to prevent their being committed or their continued perpetration, or that he must, taking into account all the circumstances, be presumed to have either ordered or condoned the offences. The extent to which such liability can be admitted is not easy to lay down.

(iii) Relevant Legal Provisions

Some relevant legal provisions exist. Thus, Article 4 of the French Ordinance of 28 August 1944, provides that:

> "Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices insofar as they have organised or tolerated the criminal acts of their subordinates."

In a similar manner, Article 3 of Law of 2 August 1947, of the Grand Duchy of Luxemberg, on the Suppression of War Crimes, reads as follows:

> "Without prejudice to the provisions of Articles 66 and 67 of the Code Pénal, the following may be charged, according to the circumstances, as co-authors or as accomplices in the crimes and delicts set out in Article 1 of the present Law: superiors in rank who have tolerated the criminal activities of their subordinates, and those who, without being the superiors in rank of the principal authors, have aided these crimes or delicts."

---

* See Chapters I (B) and II (B)

Article IX of the Chinese Law of 24 October 1946, Governing the Trial of War Criminals states that:

"Persons who occupy a supervisory or commanding position in relation to war criminals and in their capacity as such have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as the accomplices of such was criminals."

A special provision was also made in the Netherlands relating to the responsibility of a superior for war crimes committed by his subordinates. The Law of July 1947 adds, inter alia, the following provision to the Extraordinary Penal Law Decree of 22 December 1943:

"Article 27.a(3): Any superior who deliberately permits a subordinate to be guilty of such a crime shall be punished with a similar punishment as laid down in paragraphs 1 and 2."

The following interesting provisions are made in the Canadian War Crimes Act of 31 August 1946:

"Article 10 (3):

Where there is evidence that a war crime has been the result of concerted action upon the part of a formation, unit, body or group of persons, evidence given upon any charge relating to that crime against any member of such a formation, unit, body, or group may be received as prima facie evidence of the responsibility of each member of that formation, unit, body or group for that crime ...."

Article 10 (4):

Where there is evidence that more than one war crime has been committed by members of a formation, unit, body or group while under the command of a single commander, the court may receive that evidence as prima facie evidence of the responsibility of the commander for those crimes.

Article 10 (5):

Where there is evidence that a war crime has been committed by members of a formation, unit, body or group and that an officer or non-commissioned officer was present at or immediately before the time when such offence was committed, the court may receive that evidence as prima facie evidence of the responsibility of such officer or non-commissioned officer, and of the commander of such formation, unit, body or group, for that crime."*

Regulation 8(ii) of the British Royal Warrant makes a provision similar to Article 10(3) of the Canadian provisions:

---

* Italics inserted.

/"Where there

"Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as prima facie evidence of the responsibility of each member of that unit or group for that crime".

(iv) Trial of Kurt Meyer

A Canadian trial of great importance in this connection is the trial of Brigadeführer Kurt Meyer by a Canadian Military Court at Aurich, Germany, on 10 - 28 December 1945.

Kurt Meyer was accused of having, as Commander of the 25th S.S. Panzer Grenadier Regiment of the 12th S.S. Panzer Division, incited and counselled his men to deny quarter to allied troops;* ordered** (or alternatively been responsible for***) the shooting of prisoners of war at his headquarters; and been responsible for other such shootings both at his headquarters**** and during the fighting nearby.***** He pleaded not guilty. In connection with the last set of charges, (Charges 2 and 5) and with the alternative charge (Charge 4), the Prosecution referred to the presumptions contained in Regulations 10 (3), (4) and (5) of the War Crimes Regulations (Canada).****** The accused was found guilty of the incitement and counselling, and was held responsible for the shootings at his headquarters, though not guilty of ordering them, and was found not to be responsible for the shootings outside his headquarters. The sentence of death passed against him was commuted by the Convening Authority to one of life imprisonment, on the grounds that Meyer's degree of responsibility did not warrant the extreme penalty.

In his summing up the Judge Advocate said that, if an officer, though not a participant in or present at the commission of a war crime, incited, counselled, instigated or procured the commission of a war crime, and a fortiori, if he ordered its commission, he might be punished as a war criminal. The first and third charges fell within this category of offences. In the second, fourth and fifth charges, however, Meyer was alleged to have been "responsible for" the crimes set out therein. In this connection, the Judge Advocate pointed out that Regulations 10 (3), (4) and (5) of the War Crimes Regulations (Canada) stated that when certain evidence was adduced,

---

* This constituted Charge 1 against the accused.
** Charge 3
*** Charge 4
**** Charge 5
***** Charge 2
****** Later re-enacted in the Act of 31 August 1946, referred to on page 2.

/that evidence

that evidence might be received by the Court as prima facie evidence of responsibility. By virtue of these Regulations, it was unnecessary, as far as the second, fourth and fifth charges were concerned, for the Prosecution to establish by evidence that the accused ordered the commission of a war crime, or verbally or tacitly acquiesced in its commission, or knowingly failed to prevent its commission. The facts proved by the Prosecution must, however, be such as to establish the responsibility of the accused for the crime in question or to justify the Court in inferring such responsibility. The secondary onus, the burden of adducing evidence to show that he was not in fact responsible for any particular war crime then shifted to the accused. All the facts and circumstances must then be considered to determine whether the accused was in fact responsible for the killing of prisoners referred to in the various charges. The rank of the accused, the duties and responsibilities of the accused by virtue of the command he held, the training of the men under his command, their age and experience, anything relating to the question whether the accused either ordered, encouraged or verbally or tacitly acquiesced in the killing of prisoners, or wilfully failed in his duty as a military commander to prevent, or to take such action as the circumstances required to endeavour to prevent, the killing of prisoners, were matters affecting the question of the accused's responsibility.

(Dealing with the third charge, the Judge Advocate said: "There is no evidence that anyone heard any particular words uttered by the accused which would constitute an order, but it is not essential that such evidence be adduced. The giving of the order may be proved circumstantially; that is to say, you may consider the facts you find to be proved bearing upon the question whether the alleged order was given, and if you find that the only reasonable inference is that an order that the prisoners be killed was given by the accused at the time and place alleged, and that the prisoners were killed as a result of that order, you may properly find the accused guilty of the third charge". He drew attention however, to paragraph 42 of Chapter VI of the Manual of Military Law regarding circumstantial evidence, which states: "....before the Court finds an accused person guilty on circumstantial evidence, it must be satisfied not only that the circumstances are consistent with the accused having committed the act (that is, said the Judge Advocate, that he gave the order) but that they are inconsistent with any other rational conclusion than that the accused was the guilty person".

In addition to the view of the Judge Advocate in the case of these provisions, it would not be out of place to set out the remarks of Counsel

/on these interesting

on these interesting paragraphs. In his opening address, prosecuting Counsel said that the vicarious responsibility of a high-ranking officer for atrocities committed by troops under his command, in the absence of a direct order was based "firstly, on a known course of conduct and expressed attitude of mind on the part of the accused; secondly, upon his failure to exercise that measure of disciplinary control over his officers and men which it is the duty of officers commanding troops to exercise; and, thirdly, on a rule of evidence applicable in these cases, which in effect says that, upon proof of certain facts, the accused may be convicted, if he does not offer an explanation to the court sufficient to raise in their minds a reasonable doubt of his guilt".

Paragraphs (4) and (5) were important to the present case because evidence would be submitted to show that the accused was prima facie guilty for war crimes under both provisions, quite apart from positive evidence of guilt. The Prosecution would produce evidence to show, in charges 1, 3 and 4, that an officer or N.C.O. or both were present at the time when these offences were committed, and that this was probably also the case with respect to charges 2 and 5. Furthermore, the offences proved would be such as to constitute "more than one war crime" within the meaning of paragraph (4). Discussing further the presumptions laid down in paragraphs (3), (4) and (5), Counsel expressed the opinion that: "Technically it could be said that an Army Commander might be held responsible for the unlawful acts of a private soldier hundreds of miles away, simply because an N.C.O. happens to be present at the time the offence was committed ... It is only pedantic nonsense, to suggest that any such meaning is intended. A reasonable line must be drawn in each case, depending on its circumstances. The effect of the provision is simply that, upon proof of the facts there set out, the burden shifts to the accused to make an explanation or answer, and the court may convict but is not obliged to do so, in the absence of such explanation or answer. The section does not say that the court must receive such evidence as prima facie evidence of responsibility, but merely that it may".

Counsel for the Defence did not touch upon the provisions in question.

From the fact that Meyer was found guilty on the fourth and fifth charges but not on the third, it seems clear that the Court made an express application of the presumptions contained in Regulation 10, and considered that it was justifiable thereupon to pass the death sentence on the accused.

The Convening Authority, however, was of the opinion that "Meyer's degree of responsibility was not such as to warrant the extreme penalty".

/(v) The Trial

(v) The Trial of Josef Kramer and Others. (The Belsen Trial)

At one point in the Belsen Trial, evidence was admitted by a witness as to acts of a person not identified by him. This incident illustrates the application of Regulation 8 (ii) of the Royal Warrant (see page 236) and the possible operations against Kramer, the Kommandant of Belsen, of the principle of vicarious liability.

During the interrogation of the witness, Abraham Glinowieski, the Prosecutor put to him a question concerning a person named Erich whom the witness had mentioned in his affidavit but whom he had not identified among the accused. Captain Corbally (Counsel for Erich Zoddel) submitted that the Court ought not to hear this evidence. This witness had failed to identify Erich; therefore this evidence was worthless, and not only against Erich himself. As it was a joint trial, Counsel considered himself entitled to object to it on behalf of the other prisoners whom he represented, and he thought that the other Defending Officers too would be entitled to object to it on those grounds. If the witness could not identity the man to whom he referred, the evidence was clearly worthless and it could only prejudice the whole mass of the prisoners before the Court.

The Prosecutor maintained that he was entitled to ask the question. He had a right to call evidence of cruelty and ill-treatment which went on at both camps, whether by the accused or not, so long as Kramer was the commandant of the camp and responsible for their behaviour. The accused were some of a group of people who set out to ill-treat and kill persons under their charge and evidence against other members of the group became evidence against them. That was the Prosecution's case, and on that ground alone, the Prosecutor would submit that, even if it were quite impossible to say who Erich was, or even if he did not know his name, the fact that he was one of the guards under Kramer and was permitted to behave in a way which the witness might say he behaved, made evidence of his acts admissible.

Addressing Captain Corbally, the Judge Advocate said: "I would be prepared to advise the Court that if this witness does not identify the accused whom you represent, then I shall tell the Court in my summing up exactly what you are saying now, but I am bound to tell the Court that in my view it is allowed to hear this evidence on the grounds that the Prosecutor has put forward. So far as you are concerned, unless he is identified I agree, you are entitled to say there is no evidence against the man you represent."

Unless the accused was identified, the Judge Advocate agreed that Captain Corbally was entitled to say that there was no evidence against the man whom he represented. The Prosecutor said that he had made, up to then, no attempt to connect offences with any particular person because the

/witness

witness had not recognized anybody.

The Judge Advocate pointed out that the Prosecutor was offering a picture of the camp and at any rate the evidence would be relevant as regards Kramer, the Kommandant.

The Court decided to over-rule the objection made by the Defence and invited the Prosecutor to continue with his examination.

How far the Court relied upon Regulation 8 (ii) in finding Kramer guilty and sentencing him to death cannot be ascertained, however, since the record of the trial shows that he could have been found guilty of offences personally committed by him.

(vi) Trial of Karl Rauer and Others

On 18 February 1946, a British Military Court at Wuppertal, Germany, tried several officers and men formally attached to the aerodrome at Dreierwalde, Germany, for being "concerned in" the killing, contrary to the laws and usages of war, of Allied prisoners of war on one or more of three occasions on 22, 24 and 25 March 1945, respectively. Of particular interest in the present connection is the outcome of the trial of Karl Rauer, formerly a Major and Kommandant of the camp, and Wilhelm Scharschmidt, formerly Hauptmann and Rauer's Adjutant.*

It was shown that on 21 March the aerodrome was heavily bombed and five Allied airmen were captured by the Germans. Rauer, the Kommandant of the camp, claimed that he issued no specific orders regarding these prisoners, but expected that they would be sent to a prisoner of war camp in the usual way. Scharschmidt, his Adjutant, after questioning them, detailed Oberfeldwebel Karl Amberger to lead their escort, despite the warnings of Chief Clerk Lauter that Amberger was unsuitable for the task in view of his open hostility to Allied prisoners of war; the Adjutant did make some attempt to find a substitute. On the night of the 22nd, four of the party of prisoners were shot dead on the way to the station.

Rauer admitted that he was primarily responsible for prisoners of war, but added that the administration of questions relating to them was a matter for Scharschmidt, the Adjutant. Both he and Scharschmidt accepted a report that the prisoners had been shot while trying to escape and Rauer passed this report on to higher authority. Rauer pleaded that he had no time to make a personal investigation, and Scharschmidt pleaded that he had no orders to do so.

---

* The other accused were as follows: Otto Bopf, Bruno Bottcher, Herman Lommes, Ludwig Lang and Emil Gunther. The first two of these were officers.

/On 24 March,

On 24 March, a further party of prisoners, captured after a second serious air raid, were sent at night to help in filling in bombholes on the runways of the aerodrome. This was done under Rauer's orders, transmitted through Scharschmidt, though there was some evidence that the immediate order came from Bopf. In Court, Gunther claimed that Lang had told him that Bopf had ordered the shooting of the prisoners. The latter was taken out by Gunther, Lommes, Lang (all of whom came under Bopf's orders) and one other, not before the Court. Seven or eight prisoners were shot, and there was evidence implicating Gunther, Lommes and Lang in the shooting. Bottcher, who was in charge of repairs, claimed to have reported the matter to Scharschmidt, but the latter denied this. Lommes claimed that Scharschmidt said to the N.C.O.s involved: "You must make a report that they were shot whilst trying to escape, so that I can pass it on". Lang told Bopf that the shooting had been committed, but Bopf took no action and jumped to the conclusion that Scharschmidt must have ordered it. Bottcher was also inactive, and Scharschmidt took no action because Rauer had intended to interrogate the escort. The Kommandant, however, could not find the time to do so. An unchecked report stating that the prisoners had been shot while trying to escape was thereupon sent to higher command. Lommes claimed in Court that Bottcher said that the killing was justified in view of the German deaths caused by bombing.

Finally, on 25 March, a wounded prisoner was taken out of the aerodrome in a motor cycle side-car by Lang and Lommes and shot by Lang. Rauer and Scharschmidt stated in Court that they knew nothing of this incident until long afterwards. Bottcher admitted lending his motor cycle to Lommes, and claimed that he had the impression that the victim was being taken to hospital. Lommes claimed that both Bottcher and Bopf had said that the remaining prisoner must disappear like the others; the two officers denied this.

There was evidence that both Rauer and Scharschmidt expressed hostile opinions towards captured enemy air crews, in the presence of N.C.O.s. Rauer, however, denied issuing any orders for the shooting of prisoners of war, and explained that he was prevented from making personal investigations into the shootings by his other duties; the Allied armies were near, air-raids were severe and necessitated expensive repairs by hundreds of prisoners of war, internees and civilians, which he had to supervise, and his task was made worse by ill-feeling among the officers on the aerodrome. No witness claimed that the killings were carried out on the specific orders of either Rauer or Scharschmidt.

Subject to confirmation by higher military authority, the following findings were pronounced.

/Rauer

Rauer and Scharschmidt were found not guilty of the first charge, which concerned the events of 22 March, but guilty of the other two charges, which concerned those of 24 and 25 March. The remaining accused except Gunther, were found guilty of the second and third charges, not having been accused of the first charge, Gunther was found guilty of the second charge, concerning the events of 24 March, there being no other charge against him.

All of the accused were sentenced to death by being hanged. The sentence on Rauer was commuted to life imprisonment by higher military authority, and the other sentences confirmed.

The names of two of the accused, ex-Major Rauer and ex-Haupmann Wilhelm Scharschmidt, the Kommandant of the aerodrome and his adjutant, appeared, therefore, on all three charges, these accused being thereby charged with being "concerned in the killing" of twelve Allied Prisoners of War on three different dates in March 1945. It was agreed that there was no direct proof that either had given any specific orders for the offences to be committed. Yet both were found guilty on the second and third charges, and sentenced to death by hanging. They were found not guilty on the first charge, and the sentence on Rauer was commuted by higher military authority to one of life imprisonment.

Counsel for Rauer submitted that this accused "must be proved to have been a party to a crime or to have acted in consort with others in committing that crime or to have been guilty of criminal negligence of the highest order or to have been an accessory after the killings". He could not be convicted merely because he was the commander of people who were responsible for killings. In his closing address, Counsel claimed that Rauer should not be convicted of being concerned in a crime merely because he was the commander of the responsible parties. He must be proved to have participated in the crime, either by issuing orders in connection with the killings or by allowing the perpetrators to believe that they could kill airmen with impunity. Above all it must be proved that the accused Rauer had the necessary mens rea or guilty mind.

In his closing speech, Counsel for Scharschmidt submitted that utterances by the latter hostile to British pilots, made after heavy air raids, were not sufficient to prove him guilty of possessing that guilty mind which was an essential ingredient of the charges. Counsel's submission regarding the first charge was that there was no evidence that Scharschmidt instigated this crime or, realizing that a crime had been committed, condoned it. If the Court considered that he was negligent in any of his duties, Counsel submitted that negligence was not enough on this charge. As to the charges as a whole he claimed that there was no evidence that Scharschmidt

/instigated

instigated any killing or condoned any killing. In every case he made an immediate report to his Kommandant, who must bear the responsibility for any neglect of duty that occurred. It was never Scharschmidt's duty to carry out any interrogations himself.

In closing his case, the Prosecutor pointed out that a man is deemed to intend the natural consequences of his acts. He contended that the murder in these charges came about if not on direct orders then because the Kommandatur in the form of Rauer and Scharschmidt let their hostile views towards prisoners of war be known to their subordinates, who thereupon took action against the prisoners. He considered that the offence of incitement to murder came properly within the scope of the words "were concerned in the killing". In Section 4 of the Offences Against the Person Act (1861) such incitement was defined as to solicit, encourage, persuade, endeavour to persuade, or propose to any person to murder any other person. The Court might well think that this wording included in its scope exactly a situation where there existed a chain of command. If the Court were not satisfied that the evidence of the activities of any of the officers was enough to show that he was an accessory before the fact, then it was submitted there was evidence on which the Court might find that the accused officers were guilty of inciting to murder.

Scharschmidt, continued the Prosecutor, could have delayed sending the prisoners until a more reliable escort became available. After the killings, untested reports were accepted by Rauer or Scharschmidt from the escorts, to the effect that the prisoners were shot while trying to escape, and were automatically forwarded to higher command. Was it not strange that the prisoners involved in the second incident were not sent out by Rauer to mend the runways till midnight, whereas the work had been begun at 8 o'clock, and that Rauer claimed not to know that his action was wrong? Rauer ought to have anticipated further trouble in view of the deaths on the 22nd.

Summing up on a submission on behalf of Rauer of no case to answer, the Judge Advocate said: "In my view the charge does not envisage anything in the nature of negligence. The words: 'When concerned in the killing', to my mind, are a complete and direct allegation that Rauer was either instigating murder or condoning it. In my view that is the real basis of the charge which is before you, and I do not propose to embark upon any questions as to whether Rauer was negligent either at the time or afterwards in not making a proper investigation".

The Judge Advocate in his final summing up, dealing with the first charge, said that there seemed no direct evidence that Karl Rauer or

Scharschmidt deliberately gave orders to Amberger and his companions to shoot the captives. Neither did he see any direct evidence upon which the Court could properly arrive at a finding that, though they were not giving direct orders they were passing on to these N.C.O.s the impression that the killing was what they wanted to happen, and that if the latter killed the prisoners nothing would be said about it and they would not be punished. He reminded the Court, however, that the Prosecution maintained that none of the killings alleged in the three charges could have occurred on the aerodrome without the connivance, without the direction and without the complicity of the Commanding Officer and the Adjutant of the station, and that as a corollary to the reliance which was placed on superior orders in trials of German war criminals the Prosecution was claiming that no German N.C.O.s would dare to take prisoners' lives unless they were satisfied that they had been told that such action would be approved by the Commanding Officer.

The Judge Advocate felt that the Court would be prepared to say without question that it was probably a sound view to take, in regard to the German Army, that the persons who did the killings did not commit these crimes without having some orders from their superiors, but the question was who did give these orders, who were the superiors involved? Apart from Rauer and Scharschmidt, Bottcher and Bopf were also officers. The finding of the Court was that all four officers were guilty of being concerned in the killing of the prisoners on the aerodrome and of the wounded prisoner. The decision of the Court to find Rauer and Scharschmidt not guilty of the first charge, concerning the shootings on the way to the station, may have been influenced by the consideration, which was pointed out in the trial, that it was less reasonable for these officers to believe after the second incident that the prisoners involved were shot while trying to escape than it was after the first, and that measures should have been taken after the first shootings to prevent a repetition.

(vii) Trial of Kurt Student

In the trial of Kurt Student by a British Military Court at Luneberg, Germany, 6 - 10 May 1946, the accused was faced with eight charges alleging war crimes committed by him in the kingdom of Greece (according to the last three charges, on the Island of Crete itself) as Commander-in-Chief of the German forces in Crete, at various times during May and June 1941. The charges alleged respectively that he was "responsible for", first, the use on or about 22 May of British prisoners of war as a screen for the advance of German troops, when, near Maleme on the Island of Crete, troops under his command drove a party of British prisoners of war before them, resulting in at least six of these British prisoners of war being killed

/by the fire

by the fire of other British troops; secondly, the employment in May of British prisoners of war on prohibited work, when, at Maleme aerodrome on the Island of Crete, troops under his command compelled British prisoners of war to unload arms, ammunition and warlike stores from German aircraft; thirdly, the killing on or about 23 May of British prisoners of war, when, at Maleme aerodrome on the Island of Crete, troops under his command shot and killed several British prisoners of war for refusing to do prohibited work; fourthly, the bombing on or about 24 May of No. 7 General Hospital when, near Galatos on the Island of Crete, aircraft under his command bombed a hospital which was marked with a Red Cross; fifthly, the use on or about 24 May of British prisoners of war as a screen for the advance of German troops, when, near Galatos on the Island of Crete, troops under his command drove a party of British prisoners of war before them (these British prisoners of war being the Staff and patients of No. 7 General Hospital), resulting in a named Staff Sergeant of the Royal Army Medical Corps and other British prisoners of war being killed by the fire of British troops; sixthly, the killing on or about 27 May, of British prisoners of war, when, near Galatos, troops under his command killed three soldiers of the Welch Regiment who had surrendered to them; seventhly, the killing on or about 27 May, of a British prisoner of war, when, near Galatos, troops under his command wilfully exposed British prisoners of war to the fire of British troops, resulting in the death of a named Private of the Welch Regiment; and finally, the killing in June of British prisoners of war, when, at a prison camp near Maleme, troops under his command shot and killed several British prisoners of war. He pleaded not guilty to all the charges.

The offences alleged all took place in connection with an attack by German parachutists on the Island of Crete under the direction of the accused. The latter, then General Student, was shown to have been at his base in Greece until the morning of 25 May 1941, and to have been in Crete from that time until the end of June 1941. Air support was in the control of General von Richthoven, Commander of the 8th Air Corps, though a certain degree of co-operation between the two generals was shown to have existed.

The accused was found not guilty of the first, fourth, fifth, seventh and eighth charges but guilty of the second, third and sixth.

Subject to confirmation by superior military authority, he was sentenced to imprisonment for five years. This sentence was not, however, confirmed.

The eight charges brought against the accused alleged, not offences committed by him, but offences for which he was responsible. The Prosecutor pointed out in his closing address: "This case falls really into two parts and there are two separate matters which it will be your duty to decide. First whether these events which you have heard sworn to in the

/witness box

witness box or any of them in fact took place and if you decide that they did take place the second point will arise as to whether this man was responsible for them".

Student was not proved to have ordered any of the offences alleged, and if follows that in finding him guilty on three charges the Court must either have applied the doctrine of the indirect responsibility of a commander for offences committed by his troops, or found that it could be inferred from the circumstances that orders had in fact been given by the accused. As has been seen, the Confirming Authority differed from the Court in his estimate of Student's responsibility.

The Prosecutor claimed that: "General Student was very keen on the capture of Crete. He had pitted his opinion against the opinion of Hitler and it was up to him to get Crete at all costs and in my submission all these things were done by subordinates with the full knowledge that they would have been supported by their Commander-in-Chief". Defence Counsel, on the other hand, pointed out that: "When a General decides to make a big scale operation on a corps basis he makes his appreciation of the situation and his staff work out the orders regarding details. Any general policy is obviously that General's responsibility but I maintain that the details are not. The orders which have been worked out by his staff are passed on to all commanders at all levels until the small details are arrived at. It is the small tasks such as the attack on a given hill which are planned and carried out by the junior commanders and their troops. Therefore surely is it not the junior commanders who are responsible for any small and isolated incidents happening within their platoons or sections and are not the senior commanders responsible for what happens throughout their command as a whole". The basis principles relating to the extent of the responsibility of a commander for offences committed by his troops, however, were not fully examined in the present case.

Certain facts may nevertheless be set out which were considered of some importance in the case, and which may have taken into account by the Court and by the Confirming Authority in making their respective decisions.

In the first place, it was recognized as more probable that repeated or wide-spread offences were performed under the General's orders than isolated offences. Counsel for the Defence observed that all the charges related to acts done in the Maleme/Canea area, whereas actually troops were dropped at four main points, Maleme, Canea, Rhethymnon and Herakleion. In other words, he claimed, only about half of the troops concerned in the invasion were in the Maleme/Canea area. It could not, therefore, be said that it was the general policy of the Parachute troops to commit atrocities and to capture Crete at any price. Why, he asked, if the shooting of

/prisoners

prisoners of war was General Student's general policy, did not incidents occur at the prison camps at Canea and Skenia similar to those alleged to have happened at the camp near Maleme?

The Prosecutor claimed that three instances had been proved in which captured troops had been forced by German soldiers to advance ahead of them, either to act as a screen to the latter in their attack or to cause the Imperial troops to reveal their positions by firing on the prisoners in mistake for their enemies. The fact that no less than three instances of such behaviour had been proved gave rise to an inference, in the Prosecution's submission, that an instruction had been given that in certain circumstances such action was correct. He pointed out that General Student had said that he was responsible for the whole of the training of the parachute division.

In his summing up the Judge Advocate set out very clearly what had been the Prosecution's position in the case; the Prosecution, he said, "are going to say that, when you look at this list of atrocities deposed to by the ordinary decent type of soldier or airman, you will have to draw the inference that it was calculated; that it was part of the policy and that it would only arise in the well disciplined German forces if those troops and the officers knew that they had been either ordered to do it by their commander or, alternatively, that they had been led to believe that nothing would have been heard about it and it would be condoned and appreciated".

A second important question in connection with the responsibility of the accused was that of his official relationship with General von Richthoven, Commander of the 8th Air Corps. Clearly if the latter was able to act entirely independently of Student, the accused could not be held responsible for the bombing of the aerodrome. Defence Counsel claimed that during a conference between the accused and General von Richthoven, only general outlines for air support were discussed. The Prosecutor, on the other hand, claimed that the hospital could not have been selected as a target without the knowledge of the accused and his staff. The Judge Advocate's opinion was that the Court would "be satisfied that, in any major operation on that island, there would be no bomb dropped without Student knowing why and ensuring that the parachute troops should not be bombed"; he thought that the Court would accept "that there was, in this German expedition, the closest liaison between the staff of the air force and the staff on the ground". Nevertheless the accused was found not guilty of the fourth charge.

The physical presence of the accused in Crete at the time of the alleged offences, on the other hand, was not regarded by Counsel as important. The Prosecutor submitted that it was "quite immaterial" whether he was in

/Athens

Athens or in Crete "at the time"; he was supreme commander during the whole operation. The Defence made no particular use of the fact that the accused did not arrive in Crete until 25 May 1941. The Judge Advocate restricted himself to the observation that: "It is common ground that General Student was not in this area at all before the morning of the 25 May, and therefore anything that he may be responsible for up to that date would have been done from his base in Greece".

(viii) Trial of Fritz Hartjenstein and Five Others

Another interesting British Trial is that held before a British Military Court sitting at Wuppertal, Germany, 4 - 5 June 1946, of Fritz Hartjenstein and Five Others, who were accused of being concerned in the killing of a British prisoner of war at Struthof/Natzweiler prison camp on or about 30 July 1944.

Of Hartjenstein's responsibility in the alleged crime; the Judge Advocate, in his summing up, said: "The position of Hartjenstein was that he was Kommandant of this camp ..... Obviously you would have no doubt about his implication if you were satisfied that he gave orders for the execution. There is another aspect you will have to consider; to what extent he is liable if he did not give orders for this execution... There is no direct evidence that he authorized this execution. Some implied it because he was the Kommandant of the camp; there is some little vague evidence". He reminded the Court that, according to the Prosecution's case, Hartjenstein "either authorized the execution or was running a camp where authorization was not required". Hartjenstein was sentenced to death and this sentence was confirmed.

(ix) Trial of Victor Seeger

The remarks of the Judge Advocate in one other case tend to show that a Commander can in certain circumstances, be held liable for offences which were committed, not on his orders, but as a result of his negligence. A Military Court sitting at Wuppertal on 10 and 11 July 1946, sentenced General Victor Seeger to imprisonment for three years on a charge of being concerned in the killing of a number of Allied prisoners of war; the Judge Advocate said of this accused: "The point you will have to carefully consider - he is not part of any organization at all - is: was he concerned in the killing, in the sense that he had a duty and had the power to prevent these people being dealt with in a way which he must inevitably have known would result in their death ..... it is for you with your members, using your military knowledge going into the whole of this evidence to say whether it is right to hold that General Seeger, in this period between, let us say the middle of August or towards the end of August, was holding a

military position which required him to do things which he failed to do and which amounted to a war crime in the sense that they were in breach of the Laws and Usages of War".

(x) The Yamashita Trial

Of the United States trials which are relevant in this connection easily the most important is the trial by a United States Military Commission at Manila, Philippine Islands, of General Yamashita, Commanding General of the 14th Army Group of the Imperial Japanese Army, which took place between 1 October and 7 December 1945. The indictment against him alleged that he violated the laws of war in that, between 9 October 1944 and 2 September 1945, at Manila and at other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies, he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines.

The opening statement of the Prosecution contains the following words:

> "The charge .... states that the accused, during a certain period of time while he was Commander of Armed Forces of Japan then at war with the United States of America and its Allies, unlawfully disregarded and failed to discharge his duty as such Commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and its Allies and dependencies, particularly the Philippines; and thereby violated the laws of war. That is the charge, that is the case: Disregarded his duty to control the members of his command, and permitted them to commit violations of the laws of war".

It was not alleged that Yamashita had ordered any of the crimes set forth in the Bills of Particulars presented to the Commission. The first Bill of Particulars stated simply that "members of the Armed Forces of Japan under the command of the accused" committed the offences enumerated therein; and the Supplemental Bill of Particulars alleged that such armed forces "were permitted to commit" further offences set out; it is not even explicitly stated who gave the necessary permission, though the accused is clearly meant.

Counsel for the Defence was mainly concerned to show, not that the atrocities had not been committed, but that the accused neither knew of, condoned, excused or ordered them. One of his sentences is reminiscent of the claim of Rauer's Counsel that Rauer was too overworked and harassed by

/the approaching

the approaching Allied forces to be able to exercise proper supervision over the prisoners of war in his hands;* Counsel for Yamashita said: "Can it be seriously contended that a commander, beset and harassed by the enemy, staggering under a successful enemy invasion to the south and expecting at any moment another invasion in the north, that such a commander could in the period of a handful of weeks gather in all the strings of administration?" Other factors on which he relied were the newness of the accused's command and the distance separating him and his troops: "How can the man possibly be held accountable for the action of troops which had passed into his command only one month before, at a time when he was 150 miles away - troops which he had never seen, trained or inspected, whose commanding officers he could not change or designate, and over whose actions he has only the most nominal control?"**

The judgment of the Commission included the following passages, which serve to show, inter alia, the types of violations of human rights involved:

> "The crimes alleged to have been committed by the accused in violation of the laws of war may be grouped into three categories: (1) Starvation, execution or massacre without trial and mal-administration generally of civilian internees and prisoners of war; (2) Torture, rape, murder and mass execution of very large numbers of residents of the Philippines, including women and children and members of religious orders, by starvation, beheading, bayoneting, clubbing, hanging, burning alive, and destruction by explosives; (3) Burning and demolition without adequate military necessity of large numbers of homes, places of business, places of religious worship, hospitals, public buildings and educational institutions. In point of time, the offences extended throughout the period the Accused was in command of Japanese troops in the Philippines. In point of area, the crimes extended throughout the Philippine Archipelago, although by far the most of the incredible acts occurred on Luzon. It is "noteworthy that the Accused made no attempt to deny that the crimes were committed, although some deaths were attributed by Defence Counsel to legal execution of armed guerrillas, hazards of battle and action of guerrilla troops favourable to Japan.....
>
> "The Prosecution presented evidence to show that the crimes were so extensive and widespread, both as to time and area, that they must either have been wilfully permitted by the accused, or secretly ordered by the accused. Captured orders issued by subordinate officers of the accused were presented as proof that they, at least, ordered certain acts leading directly to exterminations of civilians under

* See pages 269-73.

** Yamashita claimed to have been given only very slender powers over the

the guise of eliminating the activities of guerrillas hostile to Japan. With respect to civilian internees and prisoners of war, the proof offered to the Commission alleged criminal neglect, especially with respect to food and medical supplies, as well as complete failure by the higher echelons of command to detect and prevent cruel and inhuman treatment accorded by local commanders and guards. The Commission considered evidence that the provisions of the Geneva Convention received scant compliance or attention, and that the International Red Cross was unable to render any sustained help. The cruelties and arrogance of the Japanese Military Police, prison camp guards and officials, with like action by local subordinate commanders were presented at length by the prosecution.

"The Defence established the difficulties faced by the accused with respect not only to the swift and overpowering advance of American forces, but also to the errors of his predecessors, weaknesses in organization, equipment, supply with especial reference to food and gasoline, training, communication discipline and morale of his troops. It was alleged that the sudden assignment of Naval and Air Forces to his tactical command presented almost insurmountable difficulties. This situation was followed, the Defence contended, by failure to obey his orders to withdraw troops from Manila, and the subsequent massacre of unarmed civilians, particularly by Naval forces. Prior to the Luzon Campaign, Naval forces had reported to a separate ministry in the Japanese Government and Naval Commanders may not have been receptive or experienced in this instance with respect to a joint land operation under a single commander who was designated from the Army Service. As to the crimes themselves, complete ignorance that they had occurred was stoutly maintained by the accused, his principal staff officers and subordinate commanders; further, that all such acts, if committed, were directly contrary to the announced policies, wishes and orders of the accused. The Japanese Commanders testified that they did not make personal inspections or independent checks during the Philippine campaign to determine for themselves the established procedures by which their subordinates accomplish their missions. Taken at full face value, the testimony indicates that Japanese senior commanders operate in a vacuum almost in another world with respect to their troops, compared with standards American Generals take for granted.....

"This accused is an officer of long years of experience, broad in its scope, who has had extensive command and staff duty in the Imperial Japanese Army in peace as well as war in Asia, Malaya, Europe,

/and the

and the Japanese Home Islands. Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nonetheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them. Should a commander issue orders which lead directly to lawless acts, the criminal responsibility is definite and has always been so understood. The Rules of Land Warfare, Field Manual 27-10, United States Army, are clear on these points. It is for the purpose of maintaining discipline and control, among other reasons, that military commanders are given broad powers of administering military justice. The tactical situation, the character, training and capacity of staff officers and subordinate commanders as well as the traits of character, and training of his troops are other important factors in such cases. These matters have been the principle considerations of the Commission during its deliberations....

"General Yamashita: The Commission concludes: (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command against people of the United States, their allies and dependencies throughout the Philippine Islands; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and non-commissioned officers; (2) that during the period in question you failed to provide effective control of your troops as was required by the circumstances.

Accordingly, upon secret written ballot, two-thirds or more of the members concurring, the Commission finds you guilty as charged and sentences you to death by hanging."

The case eventually came before the Supreme Court of the United States and on an application for leave to file a petition for writs of habeas corpus and prohibition in that Court, and on a petition for certiorari to review an order of the Supreme Court of the Commonwealth of the Philippines, denying the petitioner's application to the court for writs of habeas corpus and prohibition. Judgment was delivered on 4 February 1946.

In the majority judgment of the Supreme Court, delivered by Chief Justice Stone, the following passage appears:

/"The charge,

"The charge, so far as now relevant, is that petitioner, between 9 October 1944 and 2 September 1945, in the Philippine Islands, 'while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he... thereby violated the laws of war' ... It is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged as against him. But this overlooks the fact that the gist of the charges is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by 'permitting them to commit' the extensive and widespread atrocities specified. The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result. That this was the precise issue to be tried was made clear by the statement of the prosecution at the opening of the trial.

"It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violations is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

"This is recognized by the Annex to Fourth Hague Convention of 1907, respecting the laws and customs of war, on land. Article I lays down as a condition which an armed force must fulfill in order to be accorded the rights of lawful belligerents, that it must be "commanded by a person responsible for his subordinates". Similarly Article 19 of the Tenth Hague Convention, relating to bombardment by naval vessels,

/provides

provides that commanders in chief of the belligerent vessels "must see that the above Articles are properly carried out". And Article 26 of the Geneva Red Cross Convention 1929 for the amelioration of the condition of the wounded and sick in armies in the field, makes it "the duty of the commanders-in-chief of the belligerent armies to provide for the details of execution of the foregoing articles (of the convention) as well as for unforseen cases". And, finally, Article 43 of the Annex of the Fourth Hague Convention requires that the commander of a force occupying enemy territory, as was petitioner, "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".

"These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese Forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognised, and its breach penalised on our own military tribunals.* A like principle has been applied so as to impose liability on the United States in international arbitrations. Case of Jenaud, 3 Moore, International Arbitrations, 3000; Case of "The Zafiro", 5 Hackworth, Digest of International Law, 707.

"We do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution. There is no contention that the present charge, thus read, is without the support of evidence, or that the commission held petitioner responsible for failing to take measures which were beyond his control or inappropriate for a commanding officer to take in the circumstances. We do not here appraise the evidence on which petitioner was convicted. We do not consider what measures, if any, petitioner took to prevent the commission, by the troops under his command, of the plain violations of the law of war detailed in the bill of particulars, or whether such measures as he may have taken were appropriate and sufficient to discharge the duty imposed upon him. These are questions within the peculiar competence of the military officers composing the commission and were for it to decide. See Smith v. Whiting, supra, 178. It is plain that the charge on which petitioner was tried charged him with a breach of his duty

---

* A footnote to the judgment at this point runs: "Failure of an officer to take measures to prevent murder of an inhabitant of an occupied country committed in his presence. Gen. Orders No. 221, Hq. Div. of the Philippines, August 17, 1901. And in Gen. Orders No. 264, Hq. Div. of the Philippines September 9, 1901, it was held that an officer could not be found guilty for failure to prevent a murder unless it appeared that the accused had "the power to prevent" it."

/to control

to control the operations of the members of his command, by permitting them to commit the specified atrocities. This was enough to require the commission to hear evidence tending to establish the culpable failure of petitioner to perform the duty imposed on him by the law of war and to pass upon its sufficiency to establish guilt.

"Obviously charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment. Cf. Collins v McDonald, supra, 420. But we conclude that the allegations of the charge, tested by any reasonable standard, adequately alleges a violation of the law of war and that the commission had authority to try and decide the issue which it raised. Cf. Dealy v United States, 152 U.S. 539; Williamson v United States, 207 U.S. 425, 447; Glasser v. United States, 315 U.S. 60, 66, and cases cited".*

It will have been noted that Chief Justice Stone delivered the judgment of a majority of the Supreme Court. Mr. Justice Murphy and Mr. Justice Rutledge dissented for this opinion. The two dissenting judges held the opinion, inter alia, that the atrocities proved to have taken place were committed while Yamashita's troops were disorganized largely due to the onslaught of the United States forces, and that since Yamashita had not ordered these offences to be committed and had not even known of their happening he could not be held responsible for their perpetration.

(xi) Trial of Yuicki Sakamoto

Another relevant United States Trial, is that of Yuicki Sakamoto, held at Yokohoma, Japan, on February 13th, 1946. The accused was sentenced to life imprisonment after being found guilty on a charge alleging that he "between 1 January 1943 and 1 September 1945, at a prisoner of war camp Fukuoka #1, Fukuoka, Kyushu, Japan did commit cruel and brutal atrocities and failed to discharge his duty as Commanding Officer in that he permitted members of his command to commit cruel and brutal atrocities."

(xii) Trial of Yoshio Tachibana and Others

A charge entitled Neglect of Duty in Violation of the Laws and Customs of War was brought against Lt. General Yoshio Tachibana and Major Sueo Matoba of the Imperial Japanese Army and against Vice Admiral Kunizo Mori, Captain Shizuo Yoshii and Lt. Jisuro Sujeyoshi of the Imperial Japanese Navy, in their trial by a United States Military Commission at Guam,

---

* A footnote to the judgment repeats: ".....We do not weigh the evidence. We merely hold that the charge sufficiently states a violation against the law of war, and that the commission, upon the facts found, could properly find petitioner guilty of such a violation."

Marianas Islands, in August, 1946. The Specifications appearing under this charge alleged that various of the above accused unlawfully disregarded, neglected and failed to discharge their duty, as Commanding General and other respective ranks, to control members of their commands and others under their control, or properly to protect prisoners of war, in that they permitted the unlawful killing of prisoners of war, or permitted persons under their control unlawfully to prevent the honourable burial of prisoners of war by mutilating their bodies or causing them to be mutilated or by eating flesh from their bodies. The Prosecution claimed that there had been an intentional omission to discharge a legal duty.

All of the accused mentioned above were found guilty of the charge alleging neglect of duty, and although a sentence of life imprisonment was the highest penalty imposed by the Commission on an accused sentenced on this charge alone, yet the trial does serve as further proof that neflect on the part of a higher officer of a duty to restrain troops and other persons under his control can render the officer himself guilty of a war crime when his omission has lead to the commission of such a crime.

(xiii) The Milch Trial

The Prosecution in the Trial of Field Marshal Milch before a United States Military Tribunal in Nürnberg, claimed that a close analogy could be drawn between that case and the *Yamashita proceedings*. The facts were similar and the opinion of the Supreme Court was "particularly in point in the matter of responsibility for senior officers". The Prosecutor said:

> "In the cases of the medical experiments, we have a much less complex situation. There is no question of a senior officer in an occupied country, rather we are faced with a simple direct chain of command problem. Milch - Foerster - Hippke. Had Milch given the order, the experiments would have been terminated, but no order of termination was given - people were murdered and Rascher remained in the Luftwaffe until he was transferred to the S.S. in March of 1943. The defendant had an affirmative duty to know what was going on, and an affirmative duty to act so as to stop the experiments. That he was ignorant of the true state of affairs is unbelievable in view of the letters and the testimony of those who were below him. Field Marshals are not made as are non-commissioned officers..... By holding the office which he held, he had the duty to control the activities of those who were his subordinates, to insure that they conducted themselves as soldiers and not as murderers. He has failed woefully in the task."

/The judgment

The judgment of the Court on Count two, which alleged that the defendant was a principle in, accessory to, ordered, abetted, took a consenting part in and was connected with, plans and enterprises involving medical experiments without the subjects' consent, in the course of which experiments, the defendant, with others, perpetrated murders, brutalities, cruelties, tortures and other inhuman acts, includes the following passage:

"In approaching a judicial solution of the questions involved in this phase of the case, it may be well to set down seriatim the controlling legal questions to be answered by an analysis of the proof:

1. Were low-pressure and freezing experiments carried on at Dachau?

2. Were they of a character to inflict torture and death on the subjects?

(The answer to these two questions may be said to involve the establishment of the corpus delicti).

3. Did the defendant personally participate in them?

4. Were they conducted under his direction or command?

5. Were they conducted with prior knowledge on his part that they might be excessive or inhuman?

6. Did he have the power or opportunity to prevent or stop them?

7. If so, did he fail to act, thereby becoming particeps criminis and accessory to them?"

The Court later expressed the following conclusions, having declared the corpus delicti to be proved:

"(3).The prosecution does not claim (and there is no evidence) that the defendant personally participated in the conduct of these experiments.

"(4).There is no evidence that the defendant instituted the experiments or that they were conducted or continued under his specific direction or command .....

"(5).Assuming that the defendant was aware that experiments of some character were to be launched, it cannot be said that the evidence shows any knowledge on his part that unwilling subjects would be forced to submit them or that the experiments would be painful and dangerous to human life. It is quite apparent from an over-all survey of the proof that the defendant concerned himself very little with the details of these experiments. It was quite natural that this should be so. His most pressing problems

/. .

involved the procurement of labour and materials for the manufacture of airplanes.....

"(6).Did the defendant have the power or opportunity to prevent or stop the experiments? It cannot be gainsaid that he had the authority to either prevent or stop them in so far as they were being conducted under the auspices of the Luftwaffe. It seems extremely probable, however, that, in spite of him they would have continued under Himmler and the S.S. But certainly he had no opportunity to prevent or stop them, unless it can be found that he had guilty knowledge of them, a fact which has already been determined in the negative.....

"(7).In view of the above findings, it is obvious that the defendant never became particeps criminis and accessory in the low-pressure experiments set forth in the second count of the indictment.

As to the other experiments, involving subjecting human beings to extreme low temperatures both in the open air and in water, the responsibility of the defendant is even less apparent than in the case of the low-pressure experiments....."

In a concurring opinion, Judge Phillips said: "I am of the opinion and find as a fact from the evidence in this case that the defendant Milch between the years 1939 and 1945 was Secretary of State in the Air Ministry, Inspector General of the Air Force, Deputy to the Commander-in-Chief of the Air Force, a member of the Nazi Party. The defendant Milch was also Field Marshal in the Luftwaffe, 1940 to 1945; Air Quarter Master General, 1941 to 1944; member of the Central Planning Board, 1942 to 1945; and Chief of the Jaegerstab, 1944 to 1945, and also was Generalluftzeugmeister".

Nevertheless, he concurred in the finding of not guilty on the second Count: "All of the testimony and the evidence, both for the Prosecution and the Defence, is to the effect that the defendant Milch did not have such knowledge of the high altitude or low-pressure experiments which were carried out and completed by Luftwaffe physicians at Dachau until after the completion of such experiments. The evidence offered as to the knowledge or responsibility of the defendant Milch was not such a nature as to show guilty knowledge on his part of said experiments.

"As to the cooling or freezing experiments performed at Concentration Camp Dachau, for which the defendant is charged with responsibility, I find as a fact that the defendant ordered experiments to be conducted at the camp for the benefit of the Luftwaffe.....

/"The

"The defendant admits giving orders for the conduct of certain experiments....but contends that he did not know of, or contemplate, that the experiments would be conducted in an illegal manner or would result in the injury or death of any person. The defendant further asserts that he did not know or have any reason to believe that the experiments were conducted in such manner until after they had been completed. He therefore insists that he was and is not responsible for the unlawful manner in which the experiments were actually conducted by the Luftwaffe officers and that he is not guilty of any crime as a result thereof.

"The Tribunal in its majority opinion has fully considered the decision of the United States Supreme Court in the Judgment in re Yamashita and has found that said decision is not controlling in the case at bar. In weighing the evidence, the Tribunal was mindful of the fact that the defendant gave the order and directed his subordinates to carry on such experiments, and that thereafter he failed and neglected to take such measures as were reasonably within his power to protect such subjects from inhumane treatment and deaths as a result of such experiments. Notwithstanding these facts, the Tribunal is of the opinion that the evidence fails to disclose beyond a reasonable doubt that the defendant had any knowledge that the experiments would be conducted in an unlawful manner and that permanent injury, inhumane treatment or deaths would result therefrom.

"Therefore the Tribunal found that the defendant did not have such knowledge as would amount to participation or responsibility on his part and therefore found the defendant not guilty on charges contained in Count No. 2."

(xiv) Trial of Takashi Sakai

The extent to which the Chinese Courts have been willing to go in pinning responsibility of this kind onto commanders was shown by the Trial of Takashi Sakai by the Chinese War Crimes Military Tribunal of the Ministry of National Defence, Nanking, 27 August 1946. The accused was sentenced to death after having been found guilty, inter alia, of "inciting or permitting his subordinates to murder prisoners of war, wounded soldiers and non-combatants; to rape, plunder, deport civilians; to indulge in cruel punishment and torture; and to cause destruction of property". The Tribunal expressed the opinion that it was an accepted principle that a field Commander must hold himself responsible for the discipline of his subordinates. It was inconceivable that he should not have been aware of the acts of atrocity committed by his subordinates during the two years when he directed military operations in Kwantung and Hong Kong. This fact had been borne out by the English statement

made by a Japanese officer to the effect that the order that all prisoners of war should be killed, was strictly enforced. Even the defendant, during the trial, had admitted a knowledge of murder of prisoners of war in the Stovensons Hospital, Hong Kong. All the evidence, said the Tribunal, went to show that the defendant knew of the atrocities committed by his subordinates and deliberately let loose savagery upon civilians and prisoners of war.

It will be noted that the Tribunal pointed out that the accused must have known of the acts of atrocities committed by his subordinates; the question is therefore, left open whether he would have been held guilty of breach of duty in relation to acts of which he had no knowledge.

(xv) Conclusion

It is clear that the knowledge that he might be made liable for offences committed by his subordinates even if he did not order their perpetration would in most cases act as a spur to a commander who might otherwise permit the continuance of such crimes of which he was aware, or be insufficiently careful to prevent such crimes from being committed. Any rule making a commander to some degree responsible for the offences of his subordinates even in the absence of specific orders must go some way towards preventing the violation of human rights and towards vindicating such rights if they have been infringed.

The relevant material whose collection has so far been possible has been set out at above some length, in view of the importance of the subject and the present state of flux in the law and practice concerning it. The following general remarks may, however, also be made.

1. The law on this matter is in a formulative stage and it would be wrong to expect to find hard and fast rules in universal application. In the circumstances it is inevitable that considerable discretion is left in the hands of the Courts to decide how far it is reasonable to hold a commander responsible for such offences of his troops as he did not order.

2. It is clearly established that a responsibility may rest in the absence of any direct order for the commission of crimes.

3. The material contained in the regulations* and the cases** relating to such responsibility may be separated into two categories:

(i) material illustrating how, on proof of certain circumstances, the burden of proof is shifted, so as to place on an accused

---

* See pages 183-4.

** See pages 185-209.

the task of showing to the satisfaction of the Court that he was not responsible for the offences committed by his troops,

(ii) material actually defining the extent to which a commander may be held responsible for his troops' offences.

The first type of material relates to a matter of evidence, the second type to a matter of substantive law.

4. Mainly of interest in connection with the shifting of the burden of proof are the Canadian and British provisions (see pages 183-4) and the Trial of Kurt Meyer (see pages 184-188) during which the Court heard not only a discussion of the effect of these provisions, but also some remarks on the part of the Judge Advocate (pages 186-7) on the proving by circumstantial evidence of the giving of a direct order. The arguments quoted on pages 195-7 from the Trial of Kurt Student are of the same kind. Of particular importance is the stress placed on the repeated occurrence of offences by troops under one command as prima facie evidence of the responsibility of the commander for those offences (see pages 183 and 195-6).* The Trial of Rauer (see pages 188-93) seems to suggest that responsibility may be inferred from surrounding circumstances, including the prevailing state of discipline in an army.

5. The above mentioned trails throw some light also on the facts which must be proved in order to make a commander responsible for the offences of his troops. (cf. (ii) above).

Thus, in the Trial of Student, Counsel and the Judge Advocate spoke in terms of "General Student's general policy", of no bomb being dropped "without Student knowing why" and of the troops believing either that the offences had been ordered by the commander or that their offences would be "condoned and appreciated". It is to be noted that the possibility of Student being made liable in the absence of knowledge, on the grounds that he ought to have found out whether offences were being committed or were likely to be committed, or that he ought to have effectively prevented their occurrence, is not mentioned.

In the Trial of Kurt Meyer, the Judge Advocate stated that anything relating to the question whether the accused either order, encouraged or verbally or tacitly acquiesced in the killing of prisoners, or wilfully failed in his duty as a military commander to prevent, or to take such action as the circumstances required to endeavour to prevent, the killing of prisoners, were matters affecting the question of the accused's responsibility.

---

* See page 200 for an example of the same line of thought in the Yamashita Trial.

/Here it

Here it will be noted that the possibility of a commander being held responsible for offences on the grounds that he ought to have provided against them before their commission is not ruled out.

The Judge Advocate in the Trial of Rauer and Others (see page 191), however, stated that the words, contained in the charge against Rauer, "concerned in the killing" were a direct allegation that he either instigated murder or condoned it. The charge did not envisage negligence.

6. The enactments and cases which relate mainly or entirely to substantive law show the same divergence in the matter of the extent to which the commander can be held liable. Two questions await an answer:

(i) how far can a commander be held liable for not taking steps before the committing of offences, to prevent their possible perpetration?

(ii) how far must he be shown to have known of the committing of offences in order to be made liable for not intervening to stop offences already being perpetrated?

The French enactment (see page 183) mentions only crimes "organized or tolerated", the Luxembourg provision only those "tolerated" (see page 183) and the Netherlands enactment only those "deliberately permitted" (see page 183). The accused Milch (see pages 206-8) was held not guilty of being implicated in the conducting of illegal experiments because the Tribunal was not satisfied that he knew of their illegal nature; no duty to find out whether they had such a nature is mentioned. While the Chinese enactment (see page 183) does not define the extent of commanders' "duty to prevent crimes from being committed by their subordinates", the Tribunal which tried Takashi Sakai (see pages 208-9) was careful to point out that the accused must have known of the offence proved to have been committed by his subordinates.

On the other hand, the Supreme Court of the United States (see pages 201-4), held that General Yamashita had a duty to "take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population", that is to say to prevent offences against them from being committed. The use of the terms "appropriate in the circumstances" serves to underline the remark made previously, namely, that a great discretion is left to the Court to decide exactly where the responsibility of the commander shall cease, since no international agreement or usage lays down what these measures are. The commission which tried Yamashita seemed to assume that he had had a duty to "discover and control" the acts of his subordinates, and the majority judgment of the Supreme Court would appear to have left open

/the possibility

the possibility that, in certain circumstances, such a duty could exist. In dissenting, Mr. Justice Murphy expressed the opinion that: "Had there been some element of knowledge or direct connection with the atrocities the problem would be entirely different".

The Judge Advocate in the Trial of General Seeger (see page 197) also made it clear that a commander could be held to have occupied a military position which required him to take certain measures, the failure to take which would amount to a war crime.

The Prosecution in its opening statement in the Trial of Carl Krauch and others (the I.G. Farben Trial*) seems to have followed the more extreme doctrine in making the following observation:

> "Moreover, even where a defendant may claim lack of actual knowledge of certain details, there can be no doubt that he could have found out had he, in the words of Military Tribunal No. 1 made "the slightest investigation". Each of the defendants, with the possible exception of the four who were not Vorstand members, was in such a position that he either knew what Farben was doing at Leuna, Bitterfeld, Berlin, Auschwitz, and elsewhere, or, if he had no actual knowledge of some particular activity, again in the words of Military Tribunal No. 1, "occupying the position that he did, the duty rested upon him to make some adequate investigation".** One cannot accept the prerogatives of authority without shouldering responsibility."

2. Other Degrees of Liability

It would not be entirely irrelevant to include at this point some investigation of the various ways in which alleged war criminals may be found guilty of offences which constitute violations of human rights. Such liability may attach to various other categories of persons apart from the person who actually shoots the prisoner of war or strikes a concentration camp inmate. The following paragraphs set out some of the categories whose legal status will be investigated here.

(i) Persons who Keep Watch While a Crime is Committed

Trials which are relevant in this connection are: the trial of Karl Adam Golkel and thirteen others, before a British Military Court at Wuppertal, from 15 to 21 May 1946; and the trial of Werner Rohde and eight others, before a British Military Tribunal at Wuppertal, from 29 May to 1 June 1946.

---

* Not yet completed.

** Italics inserted.

/In both

In both of these trials, the offences alleged and proved was the illegal killing of a prisoner of war, but the various accused were not all implicated in the same way. For instance, some of them were shown to have stood by while prisoners were shot or injected with a lethal drug. The Judge Advocate acting in the second of the trials, in dealing with the meaning of the term "concerned in the killing", which appeared in the charge, explained that to be concerned in a killing it was not necessary that a person should actually have been present. None of the accused was actually charged with killing any of the victims concerned. If two or more men set out on a murder and one stood half a mile away from where the actual murder was committed, perhaps to keep guard, although he was not actually present when the murder was done, if he was taking part with the other man with the knowledge that that other man was going to put the killing into effect, then he was just as guilty as the person who fired the shot or delivered the blow.

(ii) Persons who Pass on Orders from Above

There have also been cases in which an accused has been found guilty of offences although he was only implicated in the crime insofar as he passed on to his subordinates orders for its perpetration which he had received from his superiors.

(iii) Persons who Participate in Lynching

There have also been cases in which various accused have contributed to the killing of a victim without it being clear which one actually delivered the fatal shot or blow. Thus, the Essen Lynching Case, (trial of Erich Heyer and six others before a British Military Court for the trial of War Criminals at Essen from 18 - 22 December 1945), involved neglect, of allied prisoners of war on the part of a German private who had the duty to act as their escort, and lynching on the part of German civilians who took part in their killing. It was shown that as the prisoners of war were marched through one of the main streets of Essen, the crowd round them grew bigger and started hitting them and throwing stones and sticks at them. When they reached the bridge, the captives were eventually thrown over the parapet. One was killed by the fall, others were killed by shots from the bridge and by members of the crowd who beat and kicked them to death.

It was the submission of the prosecution that every person who, following the incitement to the crowd to murder these men, (given by Captain Heyer, another of the accused who was found guilty*), voluntarily took aggressive action against any one of the three airmen, was guilty

---

* See page 216.

/in that

in that he was concerned in the killing. It was impossible to separate any one of these acts from another; they all made up what is known as lynching. From the moment they left those barracks, the men were doomed and the crowd knew they were doomed and every person in that crowd who struck a blow was both morally and criminally responsible for the deaths of the three men.

The military escort was sentenced to imprisonment for five years for refraining from interfering to protect the captives under his charge. Three of the civilians accused in the trial were sentenced to death by hanging and sentences of imprisonment for life and for ten years; they were found guilty because each one of them had, in one form or another, taken part in the ill-treatment which eventually led to the deaths of the victims, although against none of these accused had it been exactly proved that he had individually shot or given blows which caused the deaths.

In the trial of Hans Renoth and three others before a British Military Court at Elten from 8 to 10 January 1946, Hans Renoth, Hans Pelgrim, Friedrich Wilhem Grabowski and Paul Herman Nieke, at the time of the alleged offence, two policemen and two customs officials respectively, were accused of committing a war crime, "in that they at Elten, Germany, on 16 September 1944, in violation of the laws and usages of war, were concerned in the killing of an unknown Allied airman, a prisoner of war". All pleaded not guilty.

It was alleged that a British pilot crashed on German soil, and after emerging from his machine unhurt was arrested by Renoth, then attacked and beaten with fists and rifles by a number of people including the other three accused. Renoth stood aside for a while then shot the pilot.

All the accused were found guilty. Renoth was sentenced to death by hanging, and Pelgrim, Grabowski and Nieke to imprisonment for fifteen, ten and ten years respectively. The sentences were confirmed and put into effect.

Here, as in the Essen Lynching Case, several persons who contributed to the deaths of a prisoner of war were all held responsible for his murder, though not punished alike.

(iv) Instigators

Short of actually ordering offences, an accused may be found guilty because of his having, in some way, instigated its perpetration. Thus, in the Essen Lynching Case, referred to above, the prosecution alleged that Heyer had given to the escort instructions that they should take the prisoners to the nearest Luftwaffe unit for interrogation. It was

/submitted

submitted by the Prosecution that this order, though on the face of it correct, was given out to the escort from the steps of the barracks in a loud voice so that the crowd, which had gathered, could hear and would know exactly what was going to take place. It was alleged that he had ordered the escort not to interfere in any way with the crowd if they should molest the prisoners.

Hauptmann Heyer admittedly never struck any physical blow against the airmen at all. His part in this affair was an entirely verbal one; in the submission of the Prosecution this was one of those cases of words that kill, and he was as responsible, if not more responsible, for the deaths of the three men as any one else concerned.

The Prosecutor expressly stated that he was not suggesting that the mere fact of passing on the secret order to the escort that they should not interfere to protect the prisoners against the crowd was sufficiently proximate to the killing, so that on that alone Heyer was concerned in the killing. The Prosecutor advised the Court that, if it was not satisfied beyond reasonable doubt that he had incited the crowd to lynch these airmen, he was then entitled to acquittal, but if the Court was satisfied that he did in fact say these people were to be shot, and did in fact incite the crowd to kill the airmen, then, in the submission of the Prosecution, he was guilty.

The Prosecution referred to the rule of British law in which an instigator may be regarded as a principal. The same held good in this case if a man incited someone else to commit a crime and that crime was committed. Although the person who incited was not present when the crime was committed, he was triable and punishable as a principal and it made no difference in this respect whether the trial took place under British law or under the Regulations for the trial of war criminals.

The Court sentenced Heyer to death by hanging.

(v) Common Design and the General Principles of Liability

The paragraphs set out above are not intended to exhaust all aspects of complicity in war crimes. For instance, it has not been possible, due to shortage of time to deal with the many interesting discussions, which have taken place during various trials, on the question of the liability of persons who commit crimes while acting in pursuance of a common plan or design. (See for instance the Belsen Trial, (see page 146); the Trial of Martin Goltfried Weiss and forty-one others before a Military Government Court at Dachau, Germany, from 15 November to 13 December 1945 (the Dachau Trial), and the Trial of Hans Altfuldisch and sixty others before a Military Government Court at Dachau, Germany, from 29 March to 11 May 1946, (the Mauthausen Trial)).

/Further,

Further, the general principles governing the liability of accessories and of aiders and abettors have often been discussed during trials. (See for instance the Trial of Franz Shonfeld and nine others before a British Military Court, Essen, from 11 to 26 June 1946.)

(vi) Persons Guilty of Attempted Crime

Some recognition has been given to the possibility that a person may be guilty of a war crime even, though he merely attempted to commit an offence and the offence was never completed. Thus, Article 4 of the Norwegian Law of 13 December 1946, on the punishment of foreign war criminals, provides that:

> "The attempted commission of any crime referred to in Article No.1 of the present law is subject to the same punishment as an accomplished act. Complicity is likewise punishable."

Again, Article 13(1) of a Yugoslav Law of 25 August 1945, which provides for the trial of war criminals and traitors, lays down that:

> "An attempt to commit acts outlined in this Law shall be punishable as a complete criminal act."

Under the Dutch Extraordinary Penal Law Decree of 22 December 1943, (Statute Book D. 61), an attempt to commit a war crime is equally punishable with the crime itself.

Regarding the degrees of implication in war crimes, Brigadier General Telford Taylor, in his address to the Fifth International Criminal Law Congress, said:

> "Now this concept of conspiracy, at bottom, is merely one manifestation of a problem which is basic in all systems of penal law; what degree of connection with a crime must be established in order to attribute, to a defendant, judicial guilt? Other manifestations of this same question are the doctrines of principals, accessories, and accomplices, and of attempts.
>
> International penal law with respect to this question is most unsettled. Take, for example, the doctrine of attempts. Neither The Hague and Geneva Conventions, nor the London Charter, nor Law No. 10 mention attempts. Does it follow that an attempt to commit an international crime is not itself a crime? I should not think so. Let us assume that a soldier is about to shoot an unarmed and innocent prisoner of war, but is himself captured with his pistol poised just in time to prevent the shooting. I believe that, under internal or international penal law, he could be rightly accused of the attempted murder of a prisoner of war."

/3. Superior

3. Superior Orders, Duress and Coercion

(i) Introductory Remarks

The plea of superior orders has been raised by the Defence in war crime trials more frequently than any other. The most common form of the plea consists in the argument that the accused was ordered to commit the offence by a military superior and that under military discipline orders must be obeyed. A closely related argument is that which claims that had the accused not obeyed he would have been shot or otherwise punished; it is sometimes also maintained in court that reprisals would have been taken against his family. It has to be admitted that a serious conflict must inevitably exist in the mind of a soldier in particular when faced with the choice between the probability of immediate punishment for insubordination and the possibility of ultimate punishment as a war criminal should his country be defeated. Nevertheless, the rights of the unfortunate victim of the crime must equally be kept in mind.

This section on superior orders, duress and coercion is arranged on the following lines:

First, certain relevant municipal enactments are quoted. Next, various authorities which have been cited in trials other than texts having binding legal force are set out and discussed. Thirdly, the trial of Rear Admiral Nisuke Masuda and four others receives special attention in view of its particular interest in this connection. Under a fourth heading a number of other trials are quoted in order to demonstrate the extent to which the plea of superior orders has been successfully put forward in war crime trials. Finally, in a conclusion, the information set out in this section is classified, and a passage from the work of a French legal authority, Professor de Juglart, is quoted as setting out what has in fact been the attitude generally taken in war crime courts towards the plea.

(ii) Municipal Enactments

Municipal enactments regarding the punishment of war crimes have shown a great reluctance to regard the plea of superior orders as a complete defence, and have preferred to admit that the fact that a war crime was committed under orders may constitute a mitigating circumstance and to leave to the court the power to consider each case on its merits.

Thus the United States Mediterranean Regulations* provide in Regulation 9:

---

* See page 157.

/"The fact

"The fact that an accused acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the commission determines that justice so requires."

The corresponding provisions of Regulation 16(f) of the Pacific Regulations of September 1945, of Regulation 5(d) (6) of the Pacific Regulations of December 1945, of Regulation 16(f) of the China Regulations* provide as follows:

"The official position of the accused shall not absolve him from responsibility, nor be considered in mitigation of punishment. Further, action pursuant to order of the accused's superior, or of his government, shall not constitute a defence, but may be considered in mitigation of punishment if the commission determines that justice so requires."

Similarly Article 5 of the Norwegian Law of 13 December 1946, on the Punishment of Foreign War Criminals provides that:

"Necessity and superior order cannot be pleaded in exculpation of any crime referred to in § 1 of the present law. The court may, however, take the circumstances into account and may impose a sentence less than the minimum laid down for the crime in question or may impose a milder form of punishment. In particularly extenuating circumstances the punishment may be entirely remitted."

Other provisions of a like nature are the following:

"The fact that an accused acted pursuant to the order of a superior or of his government shall not constitute an absolute defence to any charge under these Regulations; it may, however, be considered either as a defence or in mitigation of punishment if the military court before which the charge is tried determines that justice so requires." (Article 15 of the Canadian War Crimes Act of 31 August 1946).

"The fact that the criminal deed was performed by a person acting under orders or in a subordinate capacity does not exempt the criminal from responsibility, but may be taken into consideration as an extenuating circumstance, and in specially extenuating circumstances the punishment may be waived altogether." (Article 4 of the Danish Act on the Punishment of War Crimes of 12 July 1946).

"In the case of trials instituted under the provisions of Article 2 of the present law, the fact that the accused acted in accordance with the provisions of enemy laws or regulations, or at the orders of a superior officer cannot be regarded as a reason for justification, within the meaning of Article 70 of the Criminal Code, when the act committed constituted a flagrant violation of the laws and customs of war, or the laws of humanity. The plea may be taken into consideration as an extenuating circumstance." (Article 3 of the Belgian Law of 20 June 1947, relating to the Competence of Military Tribunals in the Matter of War Crimes).

---

* See page 157 et seq.

/"T...

"Laws decrees or regulation issued by the enemy authorities, orders or permits issued by these authorities, or by authorities which are or have been subordinated to them, cannot be pleaded as justification within the meaning of Article 327 of the Code Pénal,* but can only, in suitable cases, be admitted as extenuating or exculpating circumstances." (Article 3 of the French Ordinance of 28 August 1944, Concerning the Prosecution of War Criminals).

So also Law No. 10 of the Allied Control Council (see pages 134-5) provides in paragraph 4(b) of its Article II that: "The fact that any person acted pursuant to the order of his government or of a superior does not free him from responsibility for a crime but may be considered in mitigation of punishment".

Article 5 of the Polish Law, promulgated on 11 December 1946, concerning the punishment of war criminals and traitors, provides that:

"Article 5, Paragraph 1

The fact that an act or omission was caused by a threat, order or command does not exempt from criminal responsibility.

Paragraph 2

In such a case the Court may mitigate the sentence taking into consideration the circumstances of the perpetrator and the deed."

Article VIII (in paragraphs 1-2) of the Chinese Law of 24 October 1946, simply provides that:

"The following circumstance under which offences have been committed shall not exonerate war criminals:

1. The fact that crimes were committed by order of Superior Officers.

2. The fact that crimes were committed as result of official duty."

So also Article 4 of the Luxembourg War Crimes Law of 2 August 1947, provides, inter alia, that orders or permission given by the enemy authority or by authorities depending on the latter shall not be regarded as justifying circumstances within the meaning of Article 70 of the Luxembourg Code Pénal.

Again, Article 13(3) of the Czechoslovak Law No. 22 of 24 January 1946, provides that:

"(3) The irresistible compulsion of an order from his superior does not release any person from guilt who voluntarily became a member of an organization whose members undertook to carry out all, even criminal orders."

---

* See page 235.

/No special

No special provision relating to the plea of superior orders has been made in the Netherlands War Crimes Law of July 1947 (Statute Book H. 233), since the existing provisions of the Netherlands Penal Code concerning superior orders are deemed sufficient. Article 43 of that Code states that:

"Not punishable is he who commits an act in the execution of an official order given him by the competent authority.

"An official order given without competence thereto does not remove the liability to punishment unless it was regarded by the subordinate in all good faith as having been given competently and obeying it came within his province as a subordinate".

The authority giving the order is not considered to be competent to give orders to commit a crime.

(iii) Authorities Other Than Legally Binding Enactments

(a) The British Royal Warrant contains no provisions regarding the admissibility of the defence of Superior Orders, and there has been considerable discussion during trials before British Military Courts of the admissibility of this plea.

Chapter XIV of the British Manual of Military Law has often been quoted by Counsel as authority on this point. It must be stated at the outset that Chapter XIV (The Laws and Usages of War on Land) of the British Manual of Military Law is intended only as a guide for the use of the military forces. It has not therefore the authority as a statement of International Law which attaches to an international treaty. Such publications, prepared for the benefit of the armed forces of various nations, are frequently used in argument in the same way as other interpretations of International Law, and, in so far as their provisions are acted upon, they mould state practice, which is itself a source of International Law. The British Manual of Military Law is not a legislative instrument; it is not a source of law like a statutory or prerogative order or a decision of a court, but is only a publication setting out the law. It has, therefore, itself no formal binding power, but has to be either accepted or rejected on its merits, i.e. according to whether or not in the opinion of the Court it states the law correctly.

Until April 1944, Chapter XIV of the British Manual of Military Law contained the much discussed statement (Paragraph 433) that "members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their Government, or by their commander, are not war criminals and cannot therefore be punished by the enemy. He may punish the officials or commanders responsible for such orders if they

/fall into

fall into his hands, but otherwise he may only resort to other means of obtaining redress..."

This statement was based on the Fifth edition of Oppenheim's International Law, Volume II, page 454. Considerable doubts were cast on the correctness of this statement by most writers upon the subject and it was replaced in the Sixth edition of Oppenheim by its learned editor, Professor Lauterpacht, by a statement to the effect that the fact that a rule of warfare has been violated in pursuance of an order of a belligerent government or of an individual belligerent commander does not deprive the act in question of its character as a war crime.

The fallacy of the opinion expressed in the pre-1944 text (Paragraph 443 of Chapter XIV) of the British Manual and the corresponding rule of the United States Rules of Land Warfare (Paragraph 347 of the 1940 text),* was demonstrated in an article by Professor Alexander N. Sack in the Law Quarterly Review (Volume 60, January 1944, page 63). The relevance of the plea of superior orders became also the subject of research and critical examination by official and semi-official international bodies which dealt with problems of war crimes during the second world war (United Nations War Crimes Commission; London International Assembly, etc.).

In April 1944, the British Manual was altered, the sentences just quoted being replaced by the following statement of the law:

> "The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. Undoubtedly, a court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received. The question, however, is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity."

---

* See page 224.

/A similar

A similar though not identical alteration of the American Field Manual has been brought about by Change No. 1 to the Rules of Land Warfare dated 15 November 1944.*

In the course of the Peleus Trial,** an objection was raised to the application of the law as stated in the amendment to the British Manual of Military Law and, by way of analogy, the decision of the British Privy Council in the Zamora case was invoked, where it had been stated that a British Prize Court administers International Law and not Municipal Law and that although it may be bound by acts of the legislature, it is not bound by executive orders of the King in Council. If that be so, then it was said, a fortiori, the Court is not bound by an amendment published by the War Office.

This objection was not referred to by the Judge Advocate in his summing up, but it was implied in his direction to the Court that the plea of Superior Orders was not well founded.

The Judge Advocate accepted the law as stated in the 1944 amendment to the British Manual and advised the Court accordingly.

Counsel for the Defence, asked by the Judge Advocate whether he challenged the accuracy of the statement that the question was governed by the major principle that members of armed forces are bound to obey lawful orders only, stated that he was not prepared to challenge that.

The Court rejected the plea of superior orders.

A further discussion of the question arose during the Belsen Trial.*** Colonel Smith, in delivering a closing argument in defence of the accused as a whole, submitted that the original text of Paragraph 443 was correct in law and that the amended version was incorrect and he repeated that the court was its own judge of law and was not bound to take it from the War Office, the Privy Council or any other authority.**** The original text was in accordance with the ordinary experience of the necessities of military discipline and was, moreover, in precise agreement with the American Manual.***** It would surely be most unfortunate if the Court were to

---

* See page 224.

** See Law Reports of Trials of War Criminals, published by His Majesty's Stationery Office for the United Nations War Crimes Commission, Volume I, pages 1-21.

*** See Volume II of the same series, (at present being printed) especially pages 69-78 and 104-110.

**** Like the Defence in the Peleus Trial, Colonel Smith also quoted the Zamora Case and pointed to the parallel between a war crimes court and a prize court, in arguing that the Manual was not binding on the Court.

***** Which was then unamended; see page 224.

/condemn people,

condemn people, in cases where the defence of superior orders was pleaded, by virtue of an amendment to the British Manual, the text of which was at variance with the American and other official manuals, as a result of a change introduced in April 1944, whereas the dates in the Charge Sheet began in October 1942.

Replying to Colonel Smith's arguments, the Prosecutor in the Belsen Trial claimed that the amendment to the Manual was made to bring it in line with almost every writer on the subject, including Professor Lauterpacht and Professor Brierly. It was in fact made in consultation with the American Judge Advocate General, and it was in line with American law as set forth in America, as opposed to the American Manual, which had not yet been amended.

The Prosecutor could have added that, if a statement contained in the Manual was, as is stated in the footnote to the British Amendment No. 34, "inconsistent with the view of most writers upon the subject and also with the decision of the German Supreme Court in the case of the Llandovery Castle", there was no obstacle, constitutional, legal or otherwise, to correcting the mistake in the statement of law on the one hand, and to proceeding in the future on the basis of the law, as it had thus been elucidated.

A second authority on which great reliance has been placed by counsel, and which has been quoted as stating correct law by Judge Advocates in British Trials* has been the celebrated work, International Law (Oppenheim-Lauterpacht), of which Volume II, (Sixth Edition) contains on pages 453-5 a passage which is idential with the amended version of Paragraph 443.**

The Judge Advocate acting in the Trial of Karl Buck and ten others by a British Military Court at Wuppertal, Germany, 6 - 10 May 1946, after quoting this passage, added that an accused would be guilty if he committed a war crime in pursuance of an order, first if the order was obviously unlawful, secondly if the accused knew that the order was unlawful, or thirdly if he ought to have known it to be unlawful had he considered the circumstances in which it was given.

(c) Despite the fact that most of the regulations governing trials by United States Military Commissions have included provisions defining the applicability of the plea of Superior Orders, reference has often been

---

* For instance the Judge Advocate in the Belsen Trial advised the court to follow the law laid down in this text on the question of Superior Orders.

** Page 454 of this work sets out the literature on the subject.

/made during

made during trials before such Commissions, to the United States Basic Field Manual F.M. 27-10 (Rules of Land Warfare) which is similar in scope and purpose to the British Manual of Military Law.

Until 15 November 1944, Paragraph 347 of the United States Basic Field Manual provided that individuals of the Armed Forces would not be punished for war crimes if they were committed under the orders or sanction of their governments or commanders. The commanders ordering the commission of such acts, or under whose authority they were committed by their troops, might be punished by the belligerent into whose hands they fell. It will be appreciated that this provision of Paragraph 347 of the American Rules of Land Warfare corresponds exactly to the original text of Paragraph 443 of Chapter XIV of the British Manual of Military Law.

By Change No. 1 to the Rules of Land Warfare dated 15 November 1944, the sentences quoted above from Paragraph 347 of the Rules of Land Warfare have been omitted and the following provisions have been added to Paragraph 345:

> "Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defence or in mitigation of punishment. The person giving such orders may also be punished."

It will be seen that the statement of the law contained in the new text of the American Basic Field Manual differs somewhat from the 1944 text of the British Manual, though both abandon the sweeping statements contained in the former text regarding the plea of superior orders. The new British text appears to exclude an unlawful order as a defence, and it is interesting to compare both with Article 8 of the Charter of the International Military Tribunal of 8 August 1945, under which superior orders were not to free a defendant from responsibility, but might be considered in mitigation of punishment.

The statement contained in the new text of Paragraph 345 of the American Basic Field Manual makes it possible to consider superior orders or Government sanction in determining culpability, either by way of defence or in mitigation of punishment.

The provisions of the Field Manual on this point were quoted for instance by the Defence in the Trial of General Anton Dostler, by a United States Military Commission in Rome (8 - 12 October 1945);* although

---

* Law Reports of Trials of War Criminals, Volume I, pages 22-34.

/this trial

this trial was held under the Regulations for the Trial of War Crimes issued for the Mediterranean Theatre of Operations on 23 September 1945, (see page 217), the provisions contained therein relating to the defence of superior orders were not referred to.

(d) Sheldon Glueck, on pages 118-9 his authoritative work, War Criminals, their Prosecution and Punishment, also provides some guidance in the matter. Glueck, seeking to reconcile the dilemma in which a subordinate is placed by an order manifestly unlawful, compliance with which may later subject him to trial for a war crime, and refusal to comply with which may immediately subject him to a disciplinary action, perhaps death, suggests that the following rule be applied: "An unlawful act of a soldier or officer in obedience to an order of his government or his military superior is not justifiable if when he committed it he actually knew, or, considering the circumstances, he had reasonable grounds for knowing that the act ordered is unlawful under (a) the laws and customs of warfare, or (b) the principles of criminal law generally prevailing in civilized nations, or (c) the law of his own country. In applying this rule, whenever the three legal systems clash, the last shall be subordinate."

(iv) The Masuda Trial Examined

Interesting material relating to the defence of superior orders is to be derived from a study of the Trial of Rear-Admiral Nisuke Masuda and Four Others of the Imperial Japanese Navy, before a United States Military Commission, United States Naval Air Base, Kwajalein Island, Kwajalein Atoll, Marshall Islands, on 7 - 13 December 1945.

Masuda, who committed suicide before the trial, had ordered three subordinates in the Imperial Japanese Navy to shoot to death three United States airmen, who had become unarmed prisoners of war, and a fourth subordinate, who had custody of the prisoners, to hand them to the three executioners. These four were brought to trial for the part which they had played in the killing of the airmen.

The accused pleaded not guilty. They admitted their part in the execution of the American Prisoners of War, but claimed as a defence that, as military men of the Japanese Empire, they were acting under orders of a superior authority, which they were bound to obey.

One of the defending Council, himself a Lieutenant-Commander in the Imperial Japanese Navy, described the absolute discipline and obedience which was expected from the Japanese forces, and quoted an Imperial Rescript which included the words: "Subordinates should have the idea that the orders from their superiors are nothing but the orders personally

/from His Majesty

from His Majesty the Emperor." The Japanese forces were exceptional among the world's armed forces in this respect and, therefore, he claimed, it was impossible to apply therein "the liberal and individualistic ideas which rule usual societies unmodified to this totalistic and absolutistic military society." The strategic situation was so critical in early 1944 that the characteristic referred to was displayed in the Jaluit unit* to an exceptional degree. Furthermore the order was given direct by a Rear-Admiral to "mere Warrant Officers and Petty Officers." If they had refused to obey it, "everyone would have fallen upon them."

As the accused had no criminal intent, it was clear that they had committed no crime.

The other defending Counsel pointed out that the executioners each requested that they should not be assigned the task of carrying out the killing, but when emphatically ordered by Masuda, a man of strong character, they had obeyed, in accordance with their training. Their actions were not of their own volition; they were the will of another.

Taseki, the custodian of the prisoners of war, who arranged their handing over to the executioners, also merely acted in accordance with the orders of the Rear-Admiral. Certainly the latter had told him why he was to surrender the prisoners, but this fact in no way placed him in the position of a participant in the commission of a crime.

In presenting the case for the Prosecution, one of the two Judge Advocates quoted three authorities with the intention of securing the rejection by the Commission of the plea of superior orders. The Judge Advocate General, he said, had made reference, in Court Martial Orders 212-1919, to the following dictum in U.S. v. Carr (25 Fed. Cases 307): "Soldier is bound to obey only the lawful orders of his superiors. If he receives an order to do an unlawful act, he is bound neither by his duty nor by his oath to do it. So far from such an order being a justification it makes the party giving the order an accomplice in the crime."

In another case quoted by the Prosecution, involving the killing of a Nicaraguan citizen by a member of the United States forces, the Judge Advocate stated: "An order illegal in itself and not justified by the rules and usages of war, or in its substance clearly illegal, so

---

* The unit under the command of Masuda.

/that a man

that a man of ordinary sense and understanding would know as soon as he heard the order read or given that it was illegal, will afford no protection for a homicide, provided the act with which he may be charged has all the ingredients in it which may be necessary to constitute the same crime in law" (United States Court Martial Orders, 4-1929).

In the opinion of the Judge Advocate, however, the statement of the law most clearly in point was contained in "the rules promulgated by the Supreme Command of the Allied Powers for use in war crime cases. This body of International law, briefly known as the SCAP rules* and adopted by the Commission at the direction of the Judge Advocate General of the Navy, has the following provision applicable to the defence raised by the accused, quoting sub-paragraph (f) of Paragraph 16:

> "The official position of the accused shall not absolve him from responsibility, nor be considered in mitigation of punishment. Further, action pursuant to order of the accused's superior, or of his government, shall not constitute a defence but may be considered in mitigation of punishment if the commission determines that justice so requires".

Two problems arise from the above arguments. In the first place the question may be asked what is meant, in the three passages quoted by the Judge Advocate in securing the rejection of the defence of superior orders, and elsewhere in the literature on the subject, by the statement that a soldier is entitled under International Law to obey only commands which are lawful? Must these commands be lawful under the Municipal Law governing the soldier, or under International Law? The extract from the judgment in U.S. v. Carr leaves the point in doubt. So, strictly speaking, does the dictum taken from the Nicaraguan case since it is not clear whether the passage "and not justified by the rules and usages of war" is intended to amplify, or to be in addition to, the words "illegal in itself". If it were the latter, the word "illegal" could be taken to mean illegal "under Municipal Law".

The question is one of great importance. If an order is legal under International Law, it is difficult to see how an act committed in obedience to it could be illegal under that system. If the act

---

* These are the Pacific Regulations referred to on page 217.

/were thus

were thus legal in itself there would be no need for an accused to have recourse to the defence of superior orders. On the other hand, if the order need only be legal under Municipal Law, it would be possible for the head of an authoritarian state to order the execution of all prisoners of war and for all his armed subordinates to carry out such an order and remain entirely innocent of any war criminality.

Secondly, if the plea of superior orders is to be recognized as a defence, or even only an argument in mitigation of sentence, some principles must be evolved which would determine the limits of its validity. Four possible criteria were touched upon during the trial:

(a) The degree of military discipline governing the accused at the time of the commission of the alleged offence.

Defending counsel laid great stress on the exceptionally strict obedience to orders which was expected from a Japanese soldier. In so far as the plea of superior orders derives what strength it may have from the presence of conflicting loyalties and compulsions in the mind of the accused, this argument is perfectly valid. On the other hand, in view of the fact that the Allied Powers included among their war aims the overthrow of the dictatorial system of government, it is not likely that the prevailing legal opinion would allow a person accused of war crimes to plead in defence the very disease against which the war was fought. Furthermore, general agreement will probably be given to the Judge Advocate's opinion that: "The Japanese Army must observe the same rules that the United States fighting man, the man from Russia and the man from Great Britain must observe. The law is no respector of individual nations. If it is to be an effective law, it must govern the actions of all nations."

(b) The relative positions in the military hierarchy of the person who gave and the person who received the order.

Counsel for the defence pointed out that the order was given by a Rear-Admiral, to "mere Warrant Officers and Petty Officers". Legally perhaps, such commands should bind the subordinate no more and no less than those of an immediate superior, yet it has to be recognized that, since the whole defence is based on a psychological condition, the state of mind of the accused, the argument of the defence has some weight.

(c) The military situation at the time when the alleged offence was committed.

/The defence

The defence pointed out that discipline at Jaluit was the stricter because of the nearness of the United States forces. This defence is not the same as that based on military necessity, when using which the accused pleads that, irrespective of any superior orders, he acted as he did because the military situation made it necessary for him to do so.

If this argument were to be admitted, it would be for the defence to prove that the situation had actually altered the accused's attitude towards his superiors so as to make him feel that his obligation to obey them had become stricter.

(d) The degree to which "a man of ordinary sense and understanding", (quoting the Judge Advocate in the Nicaraguan case) would see that the order given was illegal.

This test is equally valid, whether legality under Municipal Law or under International Law is meant. For Anglo-Saxon lawyers its use would be reminiscent of the frequent references to the hypothetical "average reasonable man", and of a passage of Dicey's in reference to the analogous conflict between a soldier's duty to obey orders and his allegiance to the general law of the land: "....a soldier runs no substantial risk of punishment for obedience to orders which a man of common sense may honestly believe to involve no breach of law" (The Law of the Constitution Eighth edition, page 302, quoted by Professor Lauterpacht in British Yearbook of International Law, 1944, page 72).

The first three of these suggested criteria demonstrate an awareness of the heavy pressure under which an accused may be acting in obeying an order. The International Military Tribunal at Nürnberg, commenting in its judgment on Article 8 of its Charter apparently had the same consideration in mind when it said: "The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."*

(v) Some Trials Illustrating the Degree to Which the Defence Has Been Successfully Pleaded

Some instances in which the plea has been successful and some in which it has failed are now to be quoted in order to illustrate the extent of recognition given thereto.

---

* British Command Paper, Cmd. 6964, page 42.

The Judge Advocate in the Masuda trial,* quoting the "SCAP" rules, admitted that the plea might be effective in mitigation of sentence. The custodian of the prisoners, in his evidence, stated: "I had no intent to kill them as well as no malice. All I did was to relay the order mechanically and let the flyers be released". The plea was effective in reducing his sentence to one of imprisonment for ten years.

Sitting from 23 April to 3 May 1946, the French Permanent Military Tribunal of Strasbourg tried ex-Gauleiter Wagner and certain of his underlings for offences committed by them in Alsace during the German occupation. One of the accused, Ludwig Luger, formerly Public Prosecutor at the Sondergericht of Strasbourg, was charged with having been an accomplice in murder. The charge was made in the Indictment that, during the trial of a group of thirteen Alsatians accused of murdering a frontier guard during an attempted escape to Switzerland, Luger acknowledged that there was no evidence of the guard having been killed by any of the accused yet demanded the death sentence, which was passed on all thirteen accused. Nevertheless Luger was acquitted, the Permanent Military Tribunal finding that he had acted under pressure from Wagner, then Gauleiter and Reich Governor of Alsace (The Indictment alleged that it was Wagner's normal routing to examine an Indictment before a trial was held before the Sondergericht, and to communicate to Luger his orders concerning the penalty which the latter was to demand).

This French case is interesting also because it represents an instance in which the defence of superior order was pleaded, and successfully, not by a member of the armed forces but by a civilian, a member of the German administration of an occupied territory.

The Supreme Court of Norway provides the next example. Hauptsturmführer Wilhelm Artur Konstantin Wagner was charged before the Lagmannsrett (District Court) at Eidsivating with having committed war crimes in that he, in violation of the laws of humanity, was concerned in the deportation and death of 521 Norwegian Jews. The Lagmannsrett found him guilty and sentenced him to death. He appealed to the Supreme Court on the ground, inter alia, that the punishment decided by the Lagmannsrett was too severe, the majority of the judges having failed to consider that he had acted on superior orders and that in his capacity of a subordinate he could not have prevented the carrying out of the decision of the German and Quisling Governments.

---

* See pages 225-229.

/When discussing

When discussing the severity of the punishment decided upon by the Lagmannsrett, the President of the Court agreed with the minority of that Court that it had been established that the defendant held a very unimportant position in the Gestapo and that there was nothing to show that he had taken any initiative in the action. His part had been to pass on the orders from Berlin to the Chief of the State Police and to execute the orders of his superiors. He was sure that if the defendant had refused to obey orders, he would have had to pay for the refusal with his life.

On the other hand, it had been ascertained that the defendant, when superintending the embarkation of the Jews, had personally gone to see to it that more provisions were handed out to them.

He therefore proposed to fix the punishment to twenty years penal servitude. The sentence was approved by a majority of three to two.

Two more examples of trials in which the court considered as a mitigating factor the circumstance that an accused acted under superior orders may be quoted, each relating to trials by United States Military Commissions. On 24 January 1946, a General Military Government Court sitting at Ludwigsburg found two German civilians, Johann Melchior and Walter Hirschelman, guilty of aiding, abetting and participating in the killing of two prisoners of war by shooting them, but sentenced them to life imprisonment; the records make it clear that the death sentence was not inflicted because the accused had acted under the orders of a Kreisleiter. Karl Neuber was found guilty on 26 April 1946, by a General Military Government Court at Ludwigsburg, of aiding, abetting and participating in the killing of prisoners of war by leading them to execution and standing by while they were shot. He had acted on the orders of Criminal Commissar Weger, in whose office he was a filing clerk. The sentence passed was one of imprisonment for seven years, and an examination of the record shows that the Court, in fixing the sentence, bore in mind the fact that Neuber acted under pressure of superior orders.

Trials abound in which the defence of superior orders, duress or coercion, has been unsuccessfully pleaded. In a number of these, reliance was placed by the Defence on either the so-called Führerbefehl of 18 October 1942, or upon alleged orders that "terror flyers" were no longer to be granted the protection accorded to prisoners of war.

In Articles 3, 4, and 5 of the former,* Hitler addressed the following orders to all officers in the German army:

---

* According to the text produced by the Defence in the Trial of General Anton Dostler (see page 232).

/"3. Therefore

"3. Therefore I command that: Henceforth all enemy troops encountered by German troops during so-called commando operations, in Europe or in Africa, though they appear to be soldiers in uniform or demolition groups, armed or unarmed, are to be exterminated to the last man, either in combat or in pursuit. It matters not in the least whether they have been landed by ships or planes or dropped by parachute. If such men appear to be about to surrender, no quarter should be given them on general principle. A detailed report on this point is to be addressed in each case to the OKW for inclusion in the Wehrmacht communique'.

4. If members of such commando units, acting as agents, saboteurs, etc., fall into the hands of the Wehrmacht through different channels (for example, through the police in occupied territories), they are to be handed over to the Sicherheitsdienst without delay. It is formally forbidden to keep them, even temporarily, under military supervision (for example, in P/W camps, etc.,).

5. These provisions do not apply to enemy soliders who surrender or are captured in actual combat within the limits of normal combat activities (offensives, large-scale air or sea-borne landings). Nor do they apply to enemy troops captured during naval engagements, nor do aviators who have baled out to save lives, during aerial combat."

Unsuccessful reliance was placed upon these orders by the Defence in the Dostler Trial* and upon similar orders (or perhaps the same orders, a slightly different account of them being given in evidence) in the Trial of Karl Buck and Ten Others by a British Military Court in Wuppertal, Germany, 6 - 10 May 1946, in the Trial of Karl Adam Golkel and Thirteen Others by a British Military Court, also in Wuppertal, 15 - 21 May 1946, and in other trials.

In a trial before a United States Military Commission at Freising, Germany, Bury, ex-police chief of Langenselbod, Kreis Hanau, Germany, and Hafner, ex-policeman in the same place, were accused of unlawfully killing a United States prisoner of war. It was alleged that the former accused delivered the prisoner to the latter, with instructions to kill him, and that Hafner carried out these orders. The airman was taken to a secluded spot and shot. Bury stated that he had orders that "terror flyers" were no longer to be granted the protection of prisoners of war and were to be killed by lynching or beating and that the police were not to protect "terror flyers" if the populace lynched them. Both accused were sentenced to death by hanging and the sentences were confirmed.

---

* See War Crime Trial Law Reports, Volume I, pages 22-34.

/The plea

The plea of superior orders was raised on behalf of both accused, but the Commission rejected it.

It is worthy of note that his own testimony showed that Bury had some latitude in determining whether or not any specific flyer should be killed. He received no explicit order with respect to the victim, and there was nothing to show that the haste and callousness with which the American flyer was dispatched was made necessary by the circumstances. Hafner is not recorded as having made any protest against the order. When he reported to Bury that the Job was done, Bury replied: "It is right so."

(vi) Conclusion.

As was suggested at the beginning of this section,* the argument that a soldier cannot, under conditions of military discipline, lightly disobey an order is not without some weight, and pleas based on the argument by Defence counsel in the Masuda Trial has often been repeated elsewhere. A variation is to be found in the argument of Counsel for Dr. Klein, one of the accused in the Belsen Trial;** Counsel claimed that if a British soldier refused to obey an order he would face a Court Martial, where he would be able to contest the lawfulness of the order, whereas Dr. Klein has no such protection.

Nevertheless the rights of the unfortunate victim must also be kept constantly in mind.

The material comprising this section (pp. 217-233) has been of two kinds:

(a) Material setting out the circumstances in which the plea may be or has been successfully put forward. Quotations from the various authorities which make the illegality, or the recognition of the illegality or otherwise, of the order in some way or other the criterion (see pp. 221-3, 224-5 and 226-227) fall into this category, as do also the description of such trials as the Wagner Trial*** and the Masuda Trial**** in which the plea had some effect.

It is difficult to say at present how far such criteria as those set out on pages 33-34 are followed by Courts and how far they constitute suggestions de lege ferenda, but indications of a realization that all cases cannot be treated alike are not lacking. The Prosecution in its opening statement in the Trial of Wilhelm List and others,***** in discussing the controversy which had arisen over the trial of high-ranking ex-enemy commanders, said:

---

* See p. 217.

** See War Crime Trial Law Reports, Volume II, p. 79 (now being printed).

*** See p. 229-30.

**** See p. 230.

***** By a United States Military Tribunal in Nuremberg. The trial has not yet been completed.

/"Others

"Others and quite different doubts have been raised by some who, with a blurred vision of military discipline, suppose that military men are a sort of race apart, who are not responsible for their actions because they are expected to obey orders. But the law and code of the German Army itself says that it is the duty of every soldier to refuse to obey orders that he knows to be criminal. This may be hard for the ordinary soldier acting under pistol-point orders from his lieutenant. It is far less difficult for high-ranking commanders such as the men in the dock."*

(b) Material defining the legal effect of the plea when successfully put forward. Enactments and other authorities set out above** make it clear that, while the Defence can never claim that superior orders represent an absolute defence which would remove the legal guilt of the prisoner (as would, for instance, a successful plea of insanity), the Court may consider the fact that an offence was committed under orders as a mitigating circumstance and may therefore inflict a lighter penalty than would have been imposed, or may impose no penalty at all.

The following translated extract from pages 243-5 of Professor Michel de Juglart's work, Repertoire Methodique de la Jurisprudence Militaire is reproduced here since it sums up, not only the problem involved in the admissibility or otherwise of the plea of superior orders, but also the various possible approaches to the question, and, in its conclusion, the solution generally adopted:

"Will it be necessary to punish without discrimination those who, in obedience to Superior Orders, have struck prisoners, shot hostages and pillaged property? A distinction has always been made in this connection between civilians and soldiers. Civilians are assumed to have an opportunity for consideration, for discussing the orders they received from their superiors, and one therefore considers in general that they commit an offence if they carry out an order which they regard as illegal...On this question, the rules of (French) substantive law were in consequence sufficiently* flexible and sufficiently precise to permit of the punishment of the many offences committed during the war against Frenchmen by

---

* Italics inserted.

** See pages 218-20 and 224.

German civilians in Germany or in France.

"For soldiers on the other hand the demands of hierarchical authority and of discipline profoundly alter the situation. But is it necessary to admit that a soldier shall escape all criminal consequences under the pretext that he was bound to obey the one who gave him illegal orders? This question occupied the minds of French penologists to a great extent during the war of 1914 to 1918, when the application of Municipal Law to acts of war in violation of International Law was being discussed by the Societe des Prisons. The majority agreed to recognize that military discipline was absolutely indispensable, that one could not admit that soldiers, non-commissioned officers, or even commissioned officers should discuss the orders which were given them, it being admitted that they cannot in general estimate the legality of these orders. The exculpating circumstances described in Article 327* were thus in large part admitted. Consequently the extent of the application of punishment to acts of war was considerably reduced and there only remained, as a last shrift, the possibility of the resort to reprisals, dangerous though it was for a people such as ours to make use of such a method.

"It was on this question that the legislator in 1944 was led to make a new departure. In amending the legal texts he had the choice between three alternatives. He could first conceive of legislation in which the circumstances set out in Article 327 would always have been excluded not only as a complete defence but also as an extenuating circumstance or an excuse from the moment he found himself faced with an offence committed by a civilian or a soldier during the war. This was the solution which M. Hugueney seems to approve, in a much more general way it is true, for orders given to officers, and he quoted the example of a colonel who received from his superior officer orders to make his troops intervene to support a coup d'etat. (Hugueney, Traite de droit penal militaire, page 398.) It is not so much the manifest illegality of the order received as the very situation in which the accused is placed which would account for this solution. For others it would seem best to examine in detail each particular case in order to find whether a criminal element is

---

* Article 327 of the French Code Penal provides: "No crime or delict is committed when the homicide wounding or striking was ordered by the law or by legal authority."

/involved.

involved. Was he who committed the offence acting on specific orders? Was he, for example, a member of an execution squad? Then one should not condemn him because he could do no other; on the other hand was he relying on a kind of general order or a general authorization which stated: "You may kill", and did he perform the killing in virtue of an order of this nature? He has then committed a crime for which he is fully responsible. (Normand, Société des prisons, 16 June 1915; Revue pénitentiaire, 1915, page 470) It is this approach which Judge Jackson seems to support in his report to President Truman, in which he writes:

> "'There exists a province in which obedience to superior orders shall prevail as a defence; if a soldier is placed in an execution squad he must not be made responsible for the validity of the sentence. But the question is very different when a person, by reason of his rank or of the latitude of the orders which he has received has full liberty of action. Superior orders as a means of defence could not apply in the case of voluntary participation in an organization of criminals or conspirators like the Gestapo or the S.S.'

"There exists an intermediate approach which the legislators of the Ordinance of 1944 have adopted; it consists in excluding in general the command of the law or the orders of legitimate authority as a justifying circumstance, while retaining them as an extenuating factor or excuse. The criminal character of the act therefore always remains but an individualization of the penalty, imposed more or less severely according to the case, permits a modification of the consequences. It is by this system that the draftsmen of the Code Penal and the Code de Justice Militaire have sometimes been inspired. It is thus that in the circumstances described in Article 441 of the Code Penal and Article 221 Paragraph 3 of the Code de Justice Militaire, a lessening of the penalty is provided for in the case of certain persons prosecuted for pillage in gangs, or destruction; for if these persons prove that they had with them persons who instigated or provoked the offence they may (by the first provision) or must (by the second) benefit from a lessening of the penalty. An examination of these texts shows that the legislator has two ways at his disposal of securing in this connection an individualization of the penalty; he can in the first place impose a lessening of the

/penalty,

penalty, and this is what he has done in Article 221 Paragraph 3 of the Code de Justice Militaire, but he can also leave it to the Judge to apply where desirable (s'il y a lieu) a less severe penalty (Article 441 of the Code Penal), or even to impose no penalty. It is the latter course which the Ordinance of 28 October 1944 has adopted....."

4. Legality under Municipal Law

The sense of duty to obey the law of one's country is likely to be more abiding than the sense of duty towards the orders of a superior officer, but is probably in many circumstances less intense. Here again, however, the path of absolute justice has not always been easy to find.

The municipal enactments quoted in connection with superior orders (see pages 217-220), are, in a sense, all relevant in this connection, and in fact, the Belgian law of 20 June 1947, relevant to the competence of Military Tribunals in the matter of war crimes actually includes the words: "The fact that the accused acted in accordance with the provisions of enemy laws or regulations" in setting out the circumstances which cannot be regarded as a reason for justification of crimes.

Article 3 of the French Ordinance of 28 August 1944, has a similarly worded provision; so also has Article 4 of the Luxembourg War Crimes Law of 11 August 1947.

Again, Article 13(1) of a Czechoslovak Law of 24 January 1946, relating to the punishment of war criminals and traitors, states that:

> "Acts punishable under this law are not justified by the fact that they were ordered or permitted by the provisions of any law other than Czechoslovak Law or by organs set up by any state authority other than the Czechoslovak, even if it is claimed that the guilty person regarded these invalid provisions as legal".

The defence that the accused's acts were justified in their own municipal law received consideration in the Belsen trial. In his argument in defence of all the accused, Colonel Smith submitted that wherever there was a conflict between International Law and the law of a particular country it was the duty of the citizen of that country to obey his national law. For that there was overwhelming legal authority from which he selected two cases. The first was that of Mortensen v. Peters heard in 1906 in the Scottish High Court of Justiciary (Eight Sessions Cases, ninety-three; forty-three Scottish Law Reports 872). The British Parliament had passed an Act prohibiting certain forms of fishing in the whole of the Moray Firth in Scotland,

/including

including a considerable area beyond the recognized limits of territorial waters. A Norwegian fished outside territorial waters, but within the area covered by the Statute. He was convicted in a Scottish Court and the High Court of Justiciary on appeal unanimously held that they were not concerned as to whether the Statute violated International Law or not. The Law of the land, expressed in an Act of Parliament, was binding on the court and they had to uphold the conviction. Counsel commented that if Parliament inadvertently overstepped the limits of International Law that was a matter not for the individual citizen or judge, or policeman, but for discussion between the governments concerned.

The facts of the second case, Fong Yare Ting v. United States (93,149 United States Reports 698) heard by the Supreme Court, were that Congress passed legislation restricting Chinese immigration in direct violation of a Treaty with China. The decision was that the provisions of an Act of Congress passed in the exercise of its constitutional authority must, if clear and explicit, be upheld by the Courts, even in contravention of the stipulations of an earlier Treaty.

The attitude of the German Courts was exactly the same. The principle that where there was a conflict between International Law and Municipal Law the citizen was bound to obey his Municipal law did not diminish the responsibility of the State towards the offended State for its failure to make its internal law correspond with its international obligations.

Applying this argument to the facts of the present case, Counsel suggested that insofar as the accused obeyed orders, all these orders were legal. There had been in Germany a most extraordinary situation in which there was not and could not normally be any conflict between a legal executive order and one illegal in the sense that a law did not permit it. In the very first stages of Hitler's regime the Reichstag abandoned all its powers and Hitler became the Executive and Legislator in one. Not only did Hitler himself combine all these powers but he also delegated them to certain persons who were directly responsible to him. The orders of each of these had the force of law within his limits, and among their number was Himmler. By various stages, Himmler became head of the police, including the Gestapo and the S.S., and in 1943 he became Minister of the Interior. Under the German legal framework he could issue an order which as such had the force of law. That was reinforced by a law of 10 February 1936 which put the Gestapo and, in fact, all police activities beyond the reach of the law insofar as they were of a political nature. The substance of it was that no

action undertaken by the Gestapo or by any police, insofar as it had a political character, was subject to any control of the courts; and, Counsel commented, the word "police" had a wide meaning in German. Neither could any police action be questioned by anybody except at the peril of his life. Counsel could not produce a law legalizing the gas chambers at Auschwitz, but submitted that all that was needed was an order from Himmler saying: "Have a gas chamber". That order was a law which every German had to obey insofar as it concerned him. In the case of the average German it was impossible to have the kind of conflict which might arise in England, where a man might question the order of his superior officer and say: "You cannot give me that order under the Army Act."

In his closing statement, the prosecutor did not deal with the principle involved but simply pointed out that Colonel Smith had suggested that a decree gave absolute power to the competent authority, so that any order that Himmler gave automatically became law, whereas an examination of the Decree showed that it did nothing of the kind. What the Decree in fact did was simply to say that cases against certain privileged bodies would be tried not in the ordinary courts but in the courts of those privileged bodies. It gave the S.S., amongst other people, immunity from trial in an ordinary Court for matters which they considered to be matters of politics. Therefore, if the crime against German Law which they committed was one which Himmler himself was condoning, in all probability they would be absolved from responsibility. That was the most that could be said. Could these acts be said to be done under cover of authority when they were kept secret even in Germany, and when any records that were kept were covered by the words "Special Treatment"? In his submission, there was no pretence of legality about this procedure. Everyone in the camps knew that the daily murders were wrong.

In finding thirty of the accused guilty, the court clearly rejected this argument put forward by the defence.

Also relevant in this connection is the trial of Robert Holzer, Walter Weigel and Wilhelm Ossenbach before a Canadian Military Court at Aurich, from 25 March to 6 April 1946.

Insofar as the cases involving denial of justice involved the simple application of the German law, such cases are relevant here.

5. Necessity

Dealing with the plea of Necessity, Oppenheim-Lauterpacht, International Law, Volume II, Sixth Edition (Revised), pages 183-184, states:

/"As soon

"As soon as usages of warfare have by custom or treaty evolved into laws of war, they are binding upon belligerents under all circumstances and conditions, except in the case of reprisals as retaliation against a belligerent for illegitimate acts of warfare by the members of his armed forces or his other subjects. In accordance with the German proverb, Kriegsraeson geht vor Kriegsmanier (necessity in war overrules the manner of warfare), many German authors before the World War were already maintaining that the laws of war lose their binding force in case of extreme necessity. Such a case was said to arise when violations of the laws of war alone offers, either a means of escape from extreme danger, or the realization of the purpose of war namely, the overpowering of the opponent. This alleged exception to the binding force of the law of war was, however, not at all generally accepted by German writers.... The proverb dates very far back in the history of warfare. It originated and found recognition in those times when warfare was not regulated by laws of war, i.e. generally binding customs and international treaties but only by usages (Manier, i.e. Brauch).... In our days, however, warfare is no longer regulated by usages only, but to a greater extent by laws - firm rules recognized either by international treaties or by general custom. These conventional and customary rules cannot be overruled by necessity, unless they are framed in such a way as not to apply to a case of necessity in self preservation .... Article 22 of the Hague Regulations stipulates distinctly that the right of belligerents to adopt means of injuring the enemy is not unlimited, and this rule does not lose its binding force in case of necessity. What may be ignored in the case of military necessity are not the laws of war, but only the usages of war."

The plea of Military Necessity was raised in the trial of Gunther Thiele and Georg Steinert before a United States Military Commission at Augsburg on 13 June 1945.

The accused, a German Army Lieutenant and Grenadier respectively, were charged with a violation of the Laws of War. The specification against Thiele alleged that he "did, at or near Billingsbach, Germany, on or about 17 April 1945, wrongfully and unlawfully order that ... an American prisoner of war, be killed, which order was then and there executed by a member of his command." It was alleged that Steinert "did, at or near Billingsbach, Germany, on or about 17 April 1945, wrongfully and unlawfully kill" the same named prisoner of war.

Both accused pleaded not guilty.

/It was

It was shown that a United States officer was wounded and taken prisoner by members of the command of Lieutenant Thiele. Captain Schwaben, the Battalion Commander and superior officer of Lieutenant Thiele, sent an order to Lieutenant Thiele to kill the prisoner. Lieutenant Thiele then ordered Grenadier Steinert to do the killing, and Grenadier Steinert carried out this order. The accused were, at the time of the offence, part of a German unit which was closely surrounded by United States troops, from whom the Germans were hiding.

The court rejected the plea raised by the defence that the acts of the accused were legal because based on military necessity.

The accused were sentenced to death by hanging. On the recommendation of his Staff Judge Advocate, however, the appointing authority commuted the sentences to terms of imprisonment for life.

The Norwegian Law of 13 December 1946, on the punishment of foreign war criminals, makes the following provision:

Article 5:

"Necessity and superior order cannot be pleaded in exculpation of any crime referred to in No. 1 of the present law. The court may, however, take the circumstances into account and may impose a sentence less than the minimum laid down for the crime in question or may impose a milder form of punishment. In particularly extenuating circumstances the punishment may be entirely remitted."*

Other trials which are relevant are the Milch trial, (Subsequent Proceedings No. 2), the Dachau Concentration Camp trial, (see page 215); the trial of Mineno Genji, before a United States Military Commission at Yokohama, on 25 June 1946; the trial of Lt. Comd. Naoomi Suzuki and Lt. Yoshio Nara before an Australian Military Court at Rabaul on 26 April 1946; trial of Capt. Shoichi Yamamoto and ten others before an Australian Military Court at Rabaul from 20 to 27 May 1946; the Neuengamme Concentration Camp trial (mentioned on page 147); and the trials of General Victor Alexander Friedrich Willy Seeger and five others, (see page 165) and the Ravensbruck Concentration Camp Trials, (see page 161).

In the Masuda trial, (see pages 225 et seq), none of the accused explicitly pleaded military necessity as such as a defence. The evidence given by Masuda before his suicide, however, contained the

---

* Article VIII of the Chinese Law of 24 October 1946, Governing the trial of War Criminals provides, inter alia, that the circumstance that war crimes were committed out of political necessity shall not exonerate the offenders. Under Article 40 of the Netherlands Penal Code, which is applicable to war crime trials, however, an act is not punishable if "forced by necessity".

/passages:

passages: "Day by day the general trend of the war was getting more grave for the Japanese, therefore we decided that it was impossible to find any way to send the prisoners of war back to Truk or to Japan in spite of our earnest desire to do so..... Every day the enemy's air attacks were so fierce we began to realize it was difficult to continue detaching guard to protect the prisoners and to keep them provided". The Judge Advocate stated: "...it is inferred strongly in the Admiral's report that the fliers were executed because an American invasion of Jaluit was imminent. Even the accused would have to admit that that would be without justification". It is hard to conceive in what circumstances the military situation would justify the killing of prisoners of war. It is interesting also to note that it has been argued (in note 1 to page 185 of Oppenheim-Lauterpacht, International Law, Sixth Edition (Revised)), that the Hague Regulations were drawn up in the light of military necessities, and that due allowance was given to the latter in framing the Convention.

6. Reprisals

It has sometimes been pleaded on behalf of the persons accused of committing war crimes that acts proved against the defendants were justified as constituting reprisals. For instance, in the Dostler trial,* defence counsel quoted that part of the well-known passage from Oppenheim-Lauterpacht, International Law, Sixth Edition, Volume II, page 453, on superior orders which runs as follows:

> "Undoubtedly, a Court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact .... that an act otherwise amounting to a war crime may have been executed in obedience to orders conceived as a measure of reprisals. Such circumstances are probably in themselves sufficient to divest the act of the stigma of a war crime".

Professor Lauterpacht has elaborated this view somewhat in the course of an article entitled: The Law of Nations and The Punishment of War Crimes in The British Yearbook of International Law for 1944 (pages 58-95). Part of his passage on The Effect of the Operations of Reprisals runs as follows:

---

* Trial of General Anton Dostler, before a Military Commission at Rome from 8 - 12 October 1945.

/The element

"The element of reprisals may have a significant and perplexing bearing upon the plea of superior orders. It has been shown that the strength of the plea of superior orders is conditioned by the degree of heinousness of the offence and its approximation to a common crime apparently divorced both from belligerent necessity and from elementary considerations of humanity. But the force of this latter consideration may become considerably impaired - though never totally eliminated - when the act has been ordered, or represented to the subordinate as having been ordered, in pursuance of reprisals against a similar or identical crime committed by the adversary. The subordinate may be expected, when confronted with an order utterly and palpably contemptuous of law and humanity alike, to assert, at the risk of his own life, his own standard of law and morality. This is an exacting though unavoidable test. But no such independence of conviction and action may invariably be expected in cases where the soldier or officer is confronted with a command ordering an act admittedly illegal and cruel but issued as a reprisal against the similarly reprehensible conduct of the adversary. We may attribute to the accused a rudimentary knowledge of the law and an elementary standard of morality, but it may be more difficult to expect him to be in possession of the necessary information to enable him to judge the lawfulness of the retaliatory measures in question in relation to the circumstances alleged to have given rise to them."

Judge Larssen, delivering the judgment of the Norwegian Supreme Court on the appeal of Kriminalsekretär Bruns and two others against the death sentences passed on them by the Eidsivating Lagmannsrett on 20 March 1946, made certain remarks which throw light on the question of the admissibility of the defence of legitimate reprisals. Judge Larssen said that it had not been established that the acts of torture of which the accused had been found guilty had been carried out as reprisals. Reprisals were generally understood to aim at changing the adversary's conduct and forcing him to keep to the generally accepted rules of lawful warfare. If this aim were to be achieved, the reprisals must be made public and announced as such. During the whole of the occupation there was no was no indication from the German side to the effect that their acts of torture were to be regarded as reprisals against the Underground Military Organization (to which the victims had belonged). They appeared to be German police measures designed to extort during interrogations information which could be used to punish people or could eventually have

lead to real reprisals to stop activities about which information was gained. The method of "verscharfte Vernehmung" was nothing but a German routine police method and could, therefore, not be regarded as a reprisal.

In Judge Larssen's opinion it was not, therefore, necessary to deal with the question whether the various acts of the Military Organization were contrary to International Law and whether as such they justified reprisals.

In a number of war crime trials before French Military Tribunals, various crimes were shown to have been perpetrated by German soldiers allegedly as a "reprisal" for offences committed by French nationals against members of the German forces. These crimes were generally of the "murder" type, and the French nationals whom the Germans treated as having provoked "reprisals" were mostly members of the French Resistance Movement, who often conducted military operations against the German units stationed in France. The victims were invariably French local inhabitants, quite innocent of the alleged offences which were committed by members of the Resistance Movement.

In all these cases, the French Tribunals found the accused guilty of acts "not justified by the laws and customs of war" and condemned them to heavy penalties, including capital punishment.

The following trial can be regarded as a pattern case:*

> On 20 August 1944, members of the French Forces of the Interior (FFI), attacked St. Girons and on this occasion engaged in battle against a German column in the neighbourhood of a village called Rimont. The inhabitants of the village formed a "home guard" of twenty-three men and had the assistance of eight Spaniards, members of the FFI. This small force resisted the advance of the German troops for several hours and then retreated, while a large number of inhabitants took refuge in the nearby woods. When entering the village the German commanding officer gave orders to set on fire the houses and to shoot all civilians over fourteen years of age. 152 houses were burnt down out of a total of 169, and nine civilians were captured and shot on the spot. In addition to this two old men, of seventy and seventy-two years of age, were deliberately killed while trying to get out of the village. During the trial it was established that none of the victims took part in the armed resistance.

---

* Trial of Lt. Helfer and five others. Judgment pronounced by the Military Tribunal at Toulouse on 16 April 1946.

/Such trials

Such trials as this seem to lead to the following conclusions:

(1) In all cases under review there were in fact no "reprisals" in the proper sense, but merely arbitrary acts of revenge against co-nationals of those who fought against members of the occupying forces. This is an important distinction since it is always possible to label atrocities as lawful reprisals, as this was done in innumerable instances by the Germans both during the first* and the second world war.

(2) The French Tribunals presumably recognized fully the status of lawful belligerents to members of the French Resistance Movement under the terms of Article 1 of the Hague Regulations, and treated their acts against the German forces as military operations conducted within the limits of the laws and customs of war. Such acts would consequently not represent a valid ground for reprisals, unless the French combatants themselves were guilty of an offence, which was in no case under review invoked in defence of the accused. In the above instance, the recognition was implicitly extended to the ad hoc "home guard" constituted by the villagers.

(3) Presumably in no cases were the acts against the Germans committed by individuals not entitled to the status of belligerents under the Hague Regulations. This presumption is important since it could be open to discussion whether reprisals in the proper sense could not be lawfully undertaken against non-combatants were serious offences against the security of the occupying forces perpetrated by the civilian population proper.**

Other trials which are relevant are the trial of Wilhelm List and eleven others (see page 153) (Subsequent Proceedings No.7); British trials of Karl Maria von Behren (see page 171) and of General Seeger and five others (see page 165) and the trial of Eberhard von Mackensen and Kurt Maelzer, tried by British Military Court at Rome from 18 to 30 November 1946.

---

* Cf. Oppenheim-Lauterpacht, International Law, Volume II, Sixth Edition, page 447, n. 1.

** Cf. for instance Oppenheim-Lauterpacht, op.cit. page 449, where it is stated: "There is no doubt that Article 50 of the Hague Regulations enacting that no general penalty, pecuniary or otherwise, may be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible, does not prevent the burning by way of reprisals, of villages, or even towns, for a treacherous attack committed there on enemy soldiers by unknown individuals, and this being so, a brutal belligerent has his opportunity". (Italics are introduced.)

/Brigadier-General

Brigadier-General Telford Taylor, United States Chief of Counsel for War Crimes, in the speech to which reference has already been made (see page 215), in dealing with reasons why the rules of warfare are not more highly respected today, said that:

"Another reason is that the partial codifications of the laws of war are silent or ambiguous on many important matters. The Hague Conventions, for example, say nothing explicit about the taking or execution of hostages in occupied territories; international penal law on this subject can be, and is, applied today where it is quite clear that atrocities quite beyond the bounds of military necessity have been committed, but in closer cases we are left largely to the speculations of legal scholars, without much practical guidance. From the standpoint of internal penal law, we are not much better off. The American military manual, for example, tells us that hostages may be executed, but does not give the soldier much guidance as to when and under what circumstances such executions may be legitimate. The internal military law of other important countries is silent on this fundamental question."*

7. The Defence of Mistake of Law

In general, mistake of law is not regarded as an excuse.

It is a rule of English law that ignorance of the law is not an excuse: Ignorantia juris neminem excusat. There is some little indication, however, that this principle, when applied in war crime trials, is not regarded universally as being in all cases strictly enforceable. Thus, Oppenheim-Lauterpacht, International Law, Sixth Edition (Revised), pages 452-3, states that "a Court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact ... that [a member of the armed forces] cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received."

In the trial of Karl Buck and ten others before a British Military Court at Wuppertal, from 6 to 10 May 1946, the Judge Advocate, in his summing up, said that the Court must ask itself: "What did each of these accused know about the rights of a prisoner of war? That is a matter of fact upon which the court has to make up its mind. The court may well think that these men are not lawyers: they may not have heard either of the Hague Convention or the Geneva Convention; they may

---

* Italics inserted.

not have seen any book of military law upon the subject; but the court has to consider whether men who are serving either as soldiers or in proximity to soldiers know as a matter of the general facts of military life whether a prisoner of war has certain rights and whether one of these rights is not, when captured, to security for his person. It is a question of fact for you."*

In the Trial of Heinz Eck and four others by a British Military Court, Hamburg, 17 - 20 October 1945, (The Peleus Trial), four of the accused relied on the plea of superior orders against a charge of killing the survivors of a sunken ship. Professor Wegner, Defence Council for the accused as a whole, pointed out that many rules of International Law were rather vague and uncertain. Could one decide to find an individual guilty of having violated a rule of International Law if the States themselves had always quarrelled about that rule, its meaning and bearing, if they had never really approached recognizing it in common practice and hardly knew anything precise concerning it? If the States did not know, how could the individual know? Counsel then went on to claim that confusion existed in many branches of International Law including that relating to superior orders.

In his summing up the Judge Advocate said: "It is quite obvious that no sailor and no soldier can carry with him a library of international law, or have immediate access to a professor in that subject who can tell him whether or not a particular command is a lawful one. If this were a case which involved the careful consideration of questions of international law as to whether or not the command to fire at helpless survivors struggling in the water was lawful, you might well think it would not be fair to hold any of the subordinate accused in this case responsible for what they are alleged to have done."

(He then went on: "But is it not fairly obvious to you that if in fact the carrying out of Eck's command involved the killing of these helpless survivors, it was not a lawful command, and that it must have been obvious to the most rudimentary intelligence that it was not a lawful command, and that those who did that shooting are not to be excused for doing it upon the ground of superior orders?")

For another instance in which the defence has not proved successful, see the Canadian trial of Robert Hölzer and two others, mentioned on page 238.

---

* Italics inserted.

8. The Defence of Mistake of Fact

Mistake of fact may, however, constitute a defence just as it may in a trial before the ordinary municipal courts.

In the trial of Karl Buck and ten others, the counsel acting for the accused in general pointed out that in Germany there has been not only courts-martial but also "so-called S.S. and police courts for German persons and members of the S.S." He claimed that the interrogations of the victims* by one Kommandefuhrer Ernst, on whose reports Dr. Isselhorst acted in deciding on the fate of the victims, constituted a trial by the Security Police. The accused, who obeyed the latter, had had no other information on the matter than that the prisoners had been tried and condemned, and had acted on that assumption. They had "neither the sense for technicalities nor the mental abilities to look deeper into this case". The prosecutor, on the other hand, submitted that the obliteration of all traces of the crime and the steps taken by the accused to suppress all knowledge of the crime belied any contention that they thought that they were performing a legal execution. Lawful executions did not take place in woods, nor were those shot buried in bomb craters with their valuables, clothing and identity markings removed.

To the Judge Advocate there seemed to be no evidence that the victims were ever tried before a Court. Dr. Isselhorst had said that they were sentenced by decision of Ernst and "not through a court". If his evidence was believed, they were condemned as a result of an administrative decision and not after a trial.

Assuming that co-operation between certain of the victims and the Maquis was not contrary to the laws and usages of war and assuming that the original Fuhrerbefehl** was contrary to International Law, the question whether or not the deceased had ever been subjected to trial to find whether they came within the scope of the latter would hardly seem relevant to the question of the legality of the executions. On the other hand, could it have been shown that a bona fide impression

---

* The victims were British and United States prisoners of war, and certain French nationals.

** See pages 231-2.

The Defence claimed that there was evidence that the victims of the shooting had established such contact with the Maquis and with "Terrorists" as to bring them within the scope of the Fuhrerbefehl, and that a "security police case" preceded the execution.

/had existed

had existed in the minds of the accused that the execution was the consequence of a trial in which the victims had been legally condemned to death, the plea of mistake of fact, which the defence raised, might well have been effective. In the circumstances of the case, however, the Court did not see fit to allow it.

Also relevant are the following: the trial of Sub-Lt. Hideo Katayama and two others before an Australian Military Court at Morotai from 25 to 28 February 1946; trial of Capt. Toma Ikeba and two others before an Australian Military Court at Rabaul on 14 and 15 May 1946; the Neuengamme Concentration Camp trial (see page 147); the trial of Josef Muth and five others before a British Military Court at Wuppertal on 4 and 5 June 1946; the trial of Heinrich Klein and fourteen others before a British Military Court at Wuppertal on 22 to 25 May 1946; and the trial of Karl Maria von Behren mentioned on page 171

9. Self Defence

Not unnaturally, a plea of self defence may also be successfully put forward in suitable circumstances in war crime trials.

Trials which are relevant in this connection are: the trial of Yamamoto Chusaburo before a British Military Court at Kuala Lumpur on 30 January and 1 February 1946 (plea unsuccessful); the trial of Erich Weiss and Wilhelm Munde before an American General Military Court at Ludwigsburg on 9 and 10 November 1945 (plea successful); the trial of Georg Hitzer before an American General Military Government Court at Ludwigsburg on 11 March 1946 and the Canadian trials of Johann Neitz and Robert Holzer and two others, mentioned on pages 174 and 238.

E. THE RIGHTS OF THE ACCUSED AT THE TIME OF TRIAL

The rules relating to evidence and procedure which are applied in trials by courts of the various countries, and by the International Military Tribunals in Nurnberg and Tokyo, when viewed as a whole are seen to represent an attempt to secure to the accused his right to a fair trial while ensuring that the obviously guilty shall not escape punishment because of legal technicalities. Certain typical examples are examined in the following paragraphs.*

1. Right of Accused to know the Substance of the Charge

Paragraph (a) of Article 16 of the Charter of the Nurnberg International Military Tribunal, which falls under the heading:

IV. Fair Trial for Defendants, provides that:

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

Similarly, Article 9 (a) of Section III - Fair Trial for Accused - of the Tokyo International Military Tribunal runs as follows:

> "(a) Indictment. The indictment shall consist of a plain, concise, and adequate statement of each offence charged. Each accused shall be furnished, in adequate time for defence, a copy of the indictment, including any amendment, and of this Charter in a language understood by the accused."

The Pacific September and December Regulations and the China Regulations for trials by United States Military Commissions all provide that: "The accused shall be entitled: 'a. To have in advance of trial a copy of the charges and specifications, so worded as clearly to apprise the accused or each offence charged'."

A similar provision is made in Article IV (a) of Ordinance No. 7 of the Military Government of the United States Zone of Germany, under which the Nurnberg Subsequent Proceedings are being held, and in Article V of Ordinance No. 2 under which Military Government Courts were established.

---

* The following sections are not intended to be a complete collection of texts, and the fact that the law of any given country is not mentioned under one of the headings under which the subject matter is divided does not signify that the right dealt with is not safe-guarded in the legal system of that country.

/The equivalent

The equivalent provision governing trials by British Military Courts is Rule of Procedure 15, which states that:

"15 (A). The accused, before he is arraigned, shall be informed by an officer of every charge on which he is to be tried .... the interval between his being so informed and his arraignment should not be less than twenty-four hours. (B). The officer, at the time of so informing the accused, shall give the accused a copy of the charge-sheet, and where the accused is a soldier, should, if necessary, explain the charge-sheet and charges to him, and should also, if he is illiterate, read the charges to him."

Article 179 of the French Code de Justice Militaire provides that an alleged war criminal ordered to appear before a Military Tribunal established in a territorial district in a state of war must, twenty-four hours at least before the meeting thereof, receive notification of the summons containing the order of convocation of the Court as well as the indication of the crime or delict alleged, the text of the law applicable and the names of the witnesses which the prosecution proposed to produce.

2. Right of Accused to be Present at Trial and to give Evidence

Article 16 (c) of the Charter of the Nurnberg International Military Tribunal provides that:

"A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defence, and to cross-examine any witness called by the Prosecution."

Article 9 (d) of the Charter of the International Military Tribunal for the Far East runs as follows:

"d. Evidence for Defence. An accused shall have the right, through himself or through his counsel (but no through both), to conduct his defence, including the right to examine any witness, subject to such reasonable restrictions as the Tribunal may determine."

Rule of Procedure 40 makes the following provision relating to trials by British Military Courts:

"40 (A). At the close of the evidence for the prosecution the accused shall be told by the court that he may, if he wishes, give evidence as a witness, but that if he gives evidence he will subject himself to cross-examination."

The practice is for the Judge Advocate or, if there is none, the President of the Court, to tell the accused that he has three alternatives: to give evidence on oath, to make a statement not on oath or to remain silent, and to explain to him his position along the lines set out in the following footnote to Rule of Procedure 40 (A):

"The Judge Advocate or, if there is none, the president must

/explain

explain in simple language to the accused, especially if he is not represented by counsel or defending officer, that he need not give evidence on oath unless he wishes to do so. He must also be told that if he gives sworn evidence he is liable to be cross-examined by the prosecutor and questioned by the court and judge advocate. He should also be informed that evidence upon oath will naturally carry more weight with the court than a mere statement not upon oath."

The right of an accused to appear at his own trial and to give evidence if he pleases is also safe-guarded, either explicitly or implicitly, by the regulations governing trials by United States Military Commissions, Military Government Courts and Military Tribunals.

3. Right of Accused to have the Aid of Counsel

Article 16 (d) of the Charter of the International Military Tribunal provides that:

"(d) A Defendant shall have the right to conduct his own defence before the Tribunal or to have the assistance of Counsel."

Article 9 (c) of the Charter of the International Military Tribunal for the Far East seems to go even further, in view of its final sentence:

"(c) Counsel for Accused. Each accused shall have the right to be represented by counsel of his own selection, subject to the disapproval of such counsel at any time by the Tribunal. The accused shall file with the General Secretary of the Tribunal the name of his counsel. If an accused is not represented by counsel and in open court requests the appointment of counsel, the Tribunal shall designate counsel for him. In the absence of such request the Tribunal may appoint counsel for an accused if in its judgment such appointment is necessary to provide for a fair trial."

Regulation 7 of the Royal Warrant provides that Counsel may appear on behalf of the Prosecutor and accused in like manner as if the Military Court were a General Court Martial. The appropriate provisions of the Rules of Procedure, 1926, apply accordingly. In practice accused persons tried as war criminals are defended either by advocates of their own nationality or by British serving officers appointed by the Convening Officer, who may or may not be lawyers.

The relevant United States provisions assure a similar right to the accused. The following provision is contained in Article 5 (b) of the Pacific December Regulations:

"The accused shall be entitled: ....To be represented, prior to and during trial, by counsel appointed by the convening authority or counsel of his own choice, or to conduct his own defence.

/"To testify

"To testify in his own behalf and have his counsel present relevant evidence at the trial in support of his defence, and cross-examine each adverse witness who personally appeared before the commission."

The corresponding wording in the China Regulations (Article 14 (b)), even contains a mandatory element:

"The accused shall be entitled: ....To be represented prior to and during trial by counsel of his own choice, or to conduct his own defence. If the accused fails to designate his counsel, the commission shall appoint competent counsel to represent or advise the accused." (Italics inserted).

Similarly, Article IV (c) of Ordinance No. 7 of the United States Zone of Germany provides that a Military Tribunal set up thereunder "....shall appoint qualified counsel to represent a defendant who is not represented by counsel of his own selection", and the Polish Decree of 31 October 1946, on the establishment of a Supreme National Tribunal lays down in its Article 12 (1) that:

"At the trial, the defendant must appear with counsel. If he does not appoint one, the President of the Supreme National Tribunal is to appoint a counsel ex officio from among the advocates residing in Poland."

Again, under Articles 99, 101 and 107 of the Norwegian General Law No. 5 of 1 July 1887, on Criminal Procedure, which is applied in war crime trials before Norwegian Courts, the Court officially appoints a Counsel at the State's expense to defend an alleged war criminal; this Counsel is usually that already chosen or engaged by the accused.

4. The Right of the Accused to have the Proceedings made Intelligible to him by Interpretation

Most persons accused of war crimes do not speak the same language as the members of the court, or of most of the witnesses (particularly those called by the Prosecution) or of counsel. Consequently the question of making the proceedings intelligible to the accused usually arises.

Article 16 (c) of the Charter of the International Military Tribunal states that:

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

Article 9 (b) of the Charter of the International Military Tribunal for the Far East provides as follows:

"b. Language. The trial and related proceedings shall be conducted in English and in the language of the accused. Translations

/of documents

of documents and other papers shall be provided as needed and requested."

In Article 9, the United States European Directive lays down that:

"The accused shall have the right to have the proceedings of the commission interpreted into his own language if he so desires."

The Pacific September Regulations in Article 14 (d) provide that the accused shall be entitled:

"To have the charges and specifications, the proceedings and any documentary evidence translated when he is unable otherwise to understand them."

The China and Pacific December Regulations contain the same rule, except that the latter makes reference to "the substance of the charges and specifications" instead of "the charges and specification", while similar provisions are made by Articles IV (a) and (b) of Ordinance No. 7.*

An examination of the records of war crime trials indicates that this right of the accused has been well preserved.

Thus, in the Belson Trial, immediately before the hearing of the evidence of the Prosecution witness Dr. Ada Bimko, Lieutenant Jodrzejowicz, Defence Counsel to the Polish accused, said that, if the witness gave evidence in German, he would not require it to be translated into Polish.

The Judge Advocate felt bound to advise the Court that in his view, in this particular kind of Court, the accused must hear the evidence in the language which they could understand. Counsel could not possibly know how to cross-examine except on instructions from the accused whom he represented and his instructions must necessarily be determined by the evidence. The Judge Advocate advised the Court that he did not think that anybody should waive the rights of a person who did not understand a language when serious accusations of fact were being made. The Defending Officers were no doubt endeavouring to shorten the proceedings but he thought that the suggestion would be wrong in law.

The Court decided that the evidence must be translated into Polish so that the Polish accused would understand it, except in any case where a particular witness was called to make a specific accusation against one or two of the German accused and there was no question of that witness raising any point against the Polish accused. In cases where the Polish accused might be implicated by the witness, however, the evidence must be translated into Polish.

Again, in the trial of Erich Killinger and four others by a British Military Court, Wuppertal, 26 November - 3 December 1945, presumably since they were ex-members of an interrogation centre the accused all had a knowledge of English. The Court, after receiving a reassurance on the point

/from the Defence,

* See page 251.

from the Defence, permitted the non-translation of the oral evidence from English into German, while at the same time stating that a translation would be provided should any accused ask for it.

Some indication of the limits beyond which the courts would not be prepared to go in this matter is provided, however, by the Trial of Oberleutnant Gerhard Grumpelt by a British Military Court held at Hamburg, Germany, on 12 and 13 February 1946.* At the very outset of the proceedings, defending Counsel applied for the whole of the proceedings to be translated to the accused. Counsel stated that he would himself address the Court and speak during the whole trial in German.

The Judge Advocate thereupon explained the position as follows:

> "The language of the Court is English, and it is quite unusual for the Court to be addressed in German. What we normally do is to translate all the evidence so that the accused understands it, but it is quite unusual to translate everything the defending Counsel says."

After ascertaining that Counsel had some knowledge of English, the Judge Advocate requested that Counsel should do his best to address the Court in English, and so far as the evidence was concerned, that would be translated to the accused. The defending Counsel's reply was as follows:

> "I must insist upon it that all the most important parts which will be decisive for the judges to judge Gerhard Grumpelt must be in the German language, and I must insist that the German language should be acknowledged here as having the same rights as the English language. I am quite satisfied that things which are not important need not be translated so that the proceedings should not be unduly interrupted, but my opening and closing speech, which are decisive, I shall give in German."

After the Court had conferred, the Judge Advocate provisionally ruled that all the evidence would be translated, but that the Prosecutor's opening address should not be translated in the ordinary way. Counsel stated that this was agreeable to him and added that he understood enough English to follow the Prosecutor, but not enough to deal with the witnesses when in the witness box or in his addresses to the Court. In fact, the defending Counsel's short opening address was made in German and translated at once, and the German text of his final address, written by himself, was attached to the proceedings.

The interests of the accused in this case were fully safeguarded by the fact that two, and later on, during the evidence for the defence, a further three, officers and soldiers were detailed to act as interpreters.

---

* The Scuttled U-Boats Case, see War Crime Trial Law Reports, Vol. I, pages 55-70.

/It is to be noted

It is to be noted that the rules of procedure as specified in the Royal Warrant do not contain any express provision either as to the language of the Military Courts trying war crimes cases, or as to the rights of the accused and duties of the defending Counsel as to the language in which they should address the court.

The rules of procedure followed in war crimes trials by British Military Courts are with certain exceptions those followed in English civil courts. It seems beyond doubt that an English Court would have a right to insist on Counsel addressing it in English. The English law on the rights of a non-English speaking accused is at present contained in an obiter dictum of Lord Reading, C. J., in R. v. Lee Kun (1916) 1 K.B. 337, to the following effect: When a foreigner who is ignorant of the English language is on trial on an indictment for a criminal offence, and is not defended by Counsel, the evidence given at the trial must be translated to him, and compliance with this rule cannot be waived by prisoner. If he is defended by Counsel, the evidence must be translated to him unless he or his Counsel express a wish to dispense with the translation and the judge thinks fit to permit the omission, but the judge should not permit it unless he is of opinion that the accused substantially understands the nature of the evidence which is going to be given against him.

The action of the Court in the Grumpelt trial could in any case be fully explained by reference to two relevant provisions. Regulation 13 of the Royal Warrant states that "In any case not provided for in these Regulations such course will be adopted as appears best calculated to do justice." The same is provided by Rule 132 of the Rules of Procedure made under the authority of the Army Act.

5. Rules Regarding Appeal and Confirmation

An accused may be further preserved from any kind of summary treatment by provisions relating to appeal and confirmation.

While Article 26 of the Charter of the International Military Tribunal states that: "The judgment of the Tribunal as to the guilt or the innocense of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review", Article 29 provides for possible intervention by a higher agency in the determination of sentence: "In case of guilt, sentences shall be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof...."

While the question of appeal is not specifically mentioned in the Article, various of those sentenced at Nurnberg did in fact appeal to the Control Council for Germany, though without success.

/Similarly

Similarly Article 17 of the Charter of the International Military Tribunal for the Far East contains the following passage:

> "Judgment and Review. The judgment will be announced in open court and will give the reasons on which it is based. The record of the trial will be transmitted directly to the Supreme Commander for the Allied Powers for his action. Sentence will be carried out in accordance with the Order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence, except to increase its severity."

No right of appeal in the ordinary sense of that word exists against the decision of a British Military Court. The accused may, however, within forty-eight hours of the termination of proceedings in Court, give notice of his intention to submit a petition to the Confirming Officer against the finding or the sentence or both, and the petition must be submitted within fourteen days. If it is against the finding it must be referred by the Confirming Officer to the Judge Advocate General or to his deputy.*

Confirmation by higher military authority is in any case necessary. The finding and any sentence which the Court had jurisdiction to pass, if confirmed, are valid, notwithstanding any deviation from the Regulations or the Rules of Procedure or any defect or objection, technical or other. An exception exists only in the case where "it appears that a substantial miscarriage of justice has actually occurred."** Provision for review by higher military authority is also made in Article 5 of the Australian War Crimes Law.

Similarly, the sentence of a United States Military Commission must not be carried into execution until it has been approved by the appointing authority. Death sentences must, in addition, be confirmed also by the Theatre Commander. The approving and confirming authorities have before them, in acting, a review and recommendation by the appropriate Judge Advocate. Thus, while no "appeal" as that term is used in judicial proceedings is provided for, every record of trial is scrutinized as to the facts and points of law, and the Commanding General has trained legal advice as to the right course to take.

A person convicted by a United States Military Government Court has the right to petition for review of the finding or sentence. The petition must be filed with the Court within ten days of conviction.

No sentence of a Military Government Court shall be carried into execution until the case record has been examined by an Army/Military District Judge Advocate and the sentence approved by the officer appointing the Court or by the Officer Commanding for the time being. No sentence of death shall be carried into execution until confirmed by higher authority.

---

* Regulation 10 of the Royal Warrant.

** Regulation 11 of the Royal Warrant

/The reviewing

The reviewing authority may, upon review, inter alia,

confirm or set aside any finding,

substitute the finding of guilty by an amended charge,

confirm, suspend, reduce, commute or modify any sentence or order, or

increase any sentence, where a petition for review which is considered frivolous has been filed and the evidence in the case warrants such increase.

The reviewing authority may at any time remit or suspend any sentence or part thereof.

The proceedings shall not be invalidated nor any findings or sentences disapproved for any error or omission, technical or otherwise, occurring at any such proceedings, unless in the opinion of the reviewing authority it shall appear that the error or omission has resulted in injustice to the accused. Provision is made in Article XVII of Ordinance No. 7 for the review by higher military authority of decisions of United States Military Tribunals.

A war criminal sentenced by a Norwegian Lagmannsrett has the right to appeal to the Supreme Court of Norway on points of Law or on the question of the severity of sentence, but not on the facts.

French Law makes provisions regarding appeals from French Military Tribunals of which persons condemned by the Permanent Military Tribunals can avail themselves.

In time of war, according to the provisions of a Decree of 3 November 1939, Permanent Military Appeal Tribunals are to be set up, their number, seat and jurisdiction being fixed by decree. They are to deal only with cases involving persons convicted by Military Tribunals. Article 135 of the Code de Justice Militaire states that such persons shall have twenty-four hours during which they may appeal to such a court. This period begins to run at the end of the day on which the judgment of the Military Tribunal is read.

This appeal to a Permanent Military Appeal Tribunal is the only one possible in war time against a decision of a Permanent Military Tribunal. The former, in accordance with Article 133 of the Code de Justice Militaire is not concerned with reviewing the whole trial conducted by the inferior tribunal, but only with finding whether the judgment delivered thereby constituted a correct application of the law.*

Article 134 states that: "Military Appeal Tribunals can annul decisions only in the following cases:

(1) when the Military Tribunal has not been composed in accordance with the provisions of the Code,

* The Permanent Military Appeal Tribunal does not, therefore, enquire into mere questions of fact.

/(2) when the rules of

(2) when the rules of competence have been violated,

(3) when the penalty laid down by the law has not been applied to the acts declared to be proved by the Military Tribunal or when a penalty has been pronounced which goes beyond the cases stated by the law.

(4) when there has been a violation or omission of the formalities laid down by law as a condition of validity, and

(5) when the Military Tribunal has omitted to decide upon a request of the accused, or an application of the Public Prosecutor, which aims at making use of a power or a right accorded by the law."

According to the provisions of the Decree of 3 November 1939:

"In all cases where a Military Appeal Tribunal has been established, persons sentenced by Military Tribunals cannot appeal to the Court of Appeal (Cour de Cassation) against the decisions of Military Tribunals and of Military Appeal Tribunals."

In peace-time,* in accordance with Article 100 of the Code de Justice Militaire, judgments delivered by Military Tribunals can only be challenged by way of an appeal to the Court of Appeal, for the reasons and under the conditions set out by Article 407 et seq of the Code d'Instruction Criminelle. A convicted person has three whole days, after that on which his sentence has been notified to him, in which to inform the Clerk of the Court of his desire to appeal.

Provision is made for a right of appeal also in Article 16 of the Yugoslav War Crimes Law of 25 August 1945, and Article 15 of the Polish Law of 31 October 1946, establishing the Supreme National Tribunal provides for an appeal for mercy to the President of the National Counsel. Provision for review by higher authority is made by the second of these provisions and by Article XXXII of the Chinese War Crimes Law of 24 October 1946.

6. Stress placed on Expeditious Procedure

The care shown in ensuring to the accused his essential rights during trial is balanced by an attempt at ensuring that there shall be no unnecessary delays arising out of purely technical disputes.

Article 12 of the Charter of the International Military Tribunal for the Far East makes the following provisions in its paragraphs a - c (which are substantially the same as those made in Article 18 of the Charter of the Nurnberg International Military Tribunal):

"Conduct of Trial. The Tribunal shall:

(a) Confine the trial strictly to an expeditious hearing of the issues raised by the charges.

(b) Take strict measures to prevent any action which would cause

* The legal date of the end of war time is, for purposes of French Law, 1 June 1946.

/any unreasonable

any unreasonable delay and rule out irrevelant issues and statements of any kind whatsoever.

(c) Provide for the maintenance of order at the trial and deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any accused or his counsel from some or all further proceedings, but without prejudice to the determination of the charges."

Similar provisions were laid down by the Pacific September and December and by the China Regulations and by Ordinance No. 7 of the Military Government of the United States Zone of Germany.

The clearest examples of the attempt to avoid miscarriage of justice through unnecessary legal technicality are provided by the rules of evidence applied in war crime trials, to which attention is now turned.

7. Rules of Evidence in General

In general the rules of evidence applied in War Crime trials are less technical than those governing the proceedings of courts conducting trials in accordance with the ordinary criminal law. This is not to say that any unfairness is done to the accused; the aim has been to ensure that no guilty person will escape punishment by exploiting technical rules. The circumstances in which war crime trials are often held make it necessary to dispense with certain such rules. For instance many eye witnesses whose evidence was needed in trials in Europe had in the meantime returned to their homes overseas and been demobilized. To transport them to the scene of trial would not have been practical, and it was for that reason that affidavit evidence was permitted and so widely used. In the Belsen trial, the Prosecutor pointed out that although the trial was held under British law, the Regulations had made certain alterations in the laws of evidence for the obvious reason that otherwise many people would be bound to escape justice because of movements of witnesses. A number of affidavits had been taken from ex-prisoners from Belsen, but many of the deponents had since disappeared. Therefore the Prosecution would call all the witnesses available and would then put the affidavits before the Court and ask for the evidence contained therein to be accepted.

Article 13 (Evidence) of the Charter of the Military Tribunal for the Far East provides as follows:

"(a) Admissibility. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible."*

* With the exception of the omission of the final sentence, Article 19 of the Charter of the International Military Tribunal of Nurnberg has the same wording.

/The President's

The President's order of 2 July 1942, appointing a Military Commission for the trial of the alleged saboteurs,* included the provision that "Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man." The provisions laid down in overseas theatres were clearly influenced by this drafting.

The Mediterranean Regulations (Regulation 10) provide expressly that the technical rules of evidence shall not be applied but any evidence shall be admitted which, in the opinion of the president of the Commission, has any probative value to a reasonable man. Similar provisions are contained in paragraph 3 of the European Directive, in Regulation 16 of the Pacific September Regulations, in Regulation 5 (d) of the SCAP Rules and in Regulation 16 of the China Regulations.

In the Mediterranean Regulations it is added that without limiting the scope of this rule the following in particular will apply:

"(a) If any witness is dead or is unable to attend or to give evidence or is, in the opinion of the president of the commission, unable to attend without undue delay, the commission may receive secondary evidence of statements made by or attributed to such witness.

"(b) Any document purporting to have been signed or issued officially by any member of any allied or enemy force or by any official or agency of any allied, neutral or enemy government shall be admissible as evidence without proof of the issue or signature thereof.

"(c) Any report by any person when it appears to the president of the Commission that the person in making the report was acting within the scope of his duty may be admitted in evidence.

"(d) Any deposition or record of any military tribunal may be admitted in evidence.

"(e) Any diary, letter or other document may be received in evidence as to the facts therein stated.

"(f) If any original document cannot be produced, or, in the opinion of the president of the commission, cannot be produced without undue delay, a copy or translated copy of such document or other secondary evidence of its contents may be received in evidence. A translation of any document will be presumed to be a correct translation until the contrary is shown.

"(g) Photographs, printed and mimeographed matter, and true copies of papers are admissible without proof.

---

* The Case Ex Parte Quirin, 317 U.S.1 (1942).

/"(h) Confessions

"(h) Confessions are admissible without proof of circumstances or that they were voluntarily made. The circumstances surrounding the taking of a confession may be shown by the accused and such showing may be considered in respect of the weight to be accorded it, but not in respect of its admissibility."

Similar but not identical provisions are contained in other United States instruments and in the Charters of the International Military Tribunals. Article VII of Ordinance No. 7 of the United States Zone in Germany provides that:

"The tribunals shall not be bound by technical rules of evidence. They shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which they deem to have probative value. Without limiting the foregoing general rules, the following shall be deemed admissible if they appear to the tribunal to contain information of probative value relating to the charges: affidavits, depositions, interrogations, and other statements, diaries, letters, the records, findings, statements and judgments of the military tribunals and the reviewing and confirming authorities of any of the United Nations, and copies of any document or other secondary evidence of the contents of any document, if the original is not readily available or cannot be produced without delay. The tribunal shall afford the opposing party such opportunity to question the authenticity or probative value of such evidence as in the opinion of the tribunal the ends of justice require."

In the Pacific December Rules it is also provided (Regulation 5 (d) (2)) that the Commission shall take judicial notice of the facts of common knowledge, official government documents of any nation and the proceedings, records and findings of Military or other Agencies of any of the United Nations, a provision which corresponds to Article 21 of the Charter of the International Military Tribunal, annexed to the Four-Power Agreement of 8 August 1945, and which is also similar to Article IX of Ordinance No. 7 of the Military Government of the United States Zone of Germary.

The Royal Warrant provides that, except in so far as therein otherwise provided, the Rules of Procedure applicable in a Field General Court Martial of the British Army shall be applied so far as applicable to the Military Courts for the trial of war criminals. In so far as rules of evidence are concerned exceptional provisions are made by paragraph 8 (i) and 8 (ii) of the Royal Warrant. Of these the former runs as follows (its opening words being substantially the same as Article 9 (i) of the Australian War Crimes Act):*

---

* Regarding Regulation 8 (ii), see page 185.

/"8 (i) At any

"8 (i) At any hearing before a Military Court convened under these regulations the Court may take into consideration any oral statement or any document appearing on the face of it to be authentic, provided the statement or document appears to the Court to be of assistance in proving or disproving the charge, notwithstanding that such statement or document would not be admissible as evidence in proceedings before a Field General Court Martial, and without prejudice to the generality of the foregoing in particular:

(a) If any witness is dead or is unable to attend or to give evidence or is, in the opinion of the Court, unable so to attend without undue delay, the Court may receive secondary evidence of statements made by or attributable to such witness,

(b) any document purporting to have been signed or issued officially by any member of any Allied or enemy force or by any official or agency of any Allied, neutral or enemy government, shall be admissible as evidence without proof of the issue or signature thereof;

(c) the Court may receive as evidence of the facts therein stated any report of the "Comite International de la Croix Rouge" or by any representative thereof, by any member of the medical profession or of any medical service, by any person acting as a "man of confidence" (homme de confiance), or by any other person whom the Court may consider was acting in the course of his duty when making the report;

(d) the Court may receive as evidence of the facts therein stated any depositions or any record of any military Court of Inquiry or (any Summary) of any examination made by any officer detailed for the purpose by any military authority;

(e) the Court may receive as evidence of the facts therein stated any diary, letter or other document appearing to contain information relating to the charge;

(f) if any original document cannot be produced or, in the opinion of the Court, cannot be produced without undue delay, a copy of such document or other secondary evidence of its contents may be received in evidence;

It shall be the duty of the Court to judge of the weight to be attached to any evidence given in pursuance of this Regulation which would not otherwise be admissible." Substantially the same is provided by Article 10 (1) and (2) of the Canadian War Crimes Regulations.

A study of the application of these rules shows that the practice of the Courts has been to interpret them widely, so as to render admissible a considerable range of evidence and to allow the Court then to decide what weight to place on each item.

8. The Admissibility of Affidavits

Much reliance as evidence has been placed during war crime trials on affidavits, that is to say on written sworn and signed statements by a witness. Defence Counsel have more than once protested against such evidence, mainly on the ground that, unlike a witness in the box, an affidavit cannot be cross-examined, but there can be no doubt as to their admissibility at least in proceedings before such courts as operate under the rules quoted under the last heading.

In this connection certain arguments which arose during the Belsen Trial are worth quoting, since the way in which they were decided strongly influenced the British practice in subsequent trials.

In his Opening Speech, the Prosecutor pointed out that although the trial was held under British law, the Regulations had made certain alterations in the laws of evidence for the obvious reason that otherwise many people would be bound to escape justice because of movements of witnesses. A number of affidavits had been taken from ex-prisoners from Belsen, but many of the deponents had since disappeared. Therefore the Prosecution would call all the witnesses available and would then put the affidavits before the Court and ask for the evidence contained therein to be accepted.

On 3 October, the Judge Advocate asked the Prosecutor what he relied on in putting in the affidavits. The Prosecutor replied that he relied on Regulation 8 (i).

The Judge Advocate asked whether Regulation 8 (i) (a) was not intended to be read, at any rate so far as an affidavit was concerned, to the effect that the Court had first to be satisfied that the witness was dead, or was unable to attend or to give evidence or was in the opinion of the Court, unable to attend without undue delay.

The Prosecutor replied that the general introductory provision of Regulation 8 (i) made paragraph (a) academic by stating that Regulation 8 (i) (a) was "without prejudice to the generality of the foregoing." To the question whether the Prosecutor took the view that, even if there was a witness in the flesh who could be obtained, the Prosecutor would still be inclined to rely on the affidavits, the Prosecutor replied that technically he should take that view. It would, of course, be a matter for the Court to decide whether they considered that the statement or document appeared to be of assistance.

The Judge Advocate advised the Court that the Regulation was so wide that the Prosecution's view of it was a correct one,

/Captain Phillips

Captain Phillips* then objected to the use of affidavit evidence, which would generally not be admissible before a Court. It was, he said, only admissible, if at all, as a result of Regulation 8 (1), and that Regulation, in his submission, was merely permissive. It said that the Court might take into consideration certain types of evidence. The objection of the Defence was that this was not a case in which the Court should receive such evidence. The Defence did not say that the Court could not do so, but they said that the Court had a discretion and that it should exercise its discretion here in favour of the Defence by refusing to accept the evidence. The whole of the evidence contained in these affidavits was, in the submission of the Defence, completely unreliable, thoroughly slipshod and incompetent.

The Judge Advocate said that it was entirely a matter for the Court's discretion whether they accepted this evidence or not. It was for the Court to consider what weight should be attached to any affidavit. In his view, all these exhibits would be admissible in evidence, but what was left for the Court to decide was how much weight they would attach to any particular document, having heard the whole of the circumstances and having considered it in the light of other evidence.

The Court decided that they would receive in evidence the affidavits tendered by the Prosecution. They added, however, that when they came to decide what weight should be attached to any particular affidavit, they would bear in mind any observation which the Defence might address to them.

On 19 September 1945, the affidavit of Colonel Johnston was put in by the Prosecutor. One of the Defending Officers objected to three paragraphs of the affidavit on the ground that they contained merely comment on points which it was the Court's duty to decide. A difficulty arose from the fact that the Court must know what was in a paragraph in order to decide whether to admit it or not. The Prosecutor pointed out that this was inevitably so in a system of Courts Martial, under which the Court was judge both of law and of fact. The Court must, in fact read themselves, or have read to them, the paragraphs in order that they might consider the legal point; then they must do the impossible and say "we refuse to allow this to be put before us and in our capacity of judges of fact, we will ignore them, although in our capacity of judges of law we must consider them first."

One of the paragraphs objected to was left out on the advice of the Judge Advocate, who remarked that the deponent was going rather outside his province. As to the two remaining paragraphs, the Court decided that there should not be entered the words "In short such orders and the carrying out of such orders was mass murder" and a reference to "accomplices in mass murder.

---

* One of the Defence Counsel.

/During the hearing

During the hearing of the evidence for the defence, the question arose whether, at that stage of the trial, affidavits made by witnesses who had been heard by the Court in person could be put in, in order to show the unreliability not of the witnesses involved but of the affidavits as a whole, all of them having been produced by the same War Crimes Investigation Unit.

The Defence argued that it was essential, in the present case, where the evidence for the Prosecution was largely documentary, for the Defence to be able to challenge the whole system whereby that documentary evidence was produced by pointing out discrepancies between what witnesses had said in Court and what they had said in written statements not yet entered as evidence.

This was opposed by the Prosecution on the ground that the examination and the cross-examination of the respective witnesses was the proper time to point out discrepancies between the affidavits and the oral evidence of witnesses and that if the defending officers had missed this opportunity, they could not submit the affidavit at a time when the witnesses had no opportunity of explaining the alleged discrepancy in the course of their cross-examination.

The Court ruled that, if there were any witnesses who gave evidence in Court personally and were cross-examined in regard to affidavits that they had made, and if those affidavits were not put in as evidence, the Court would allow any Defending Officer to put in such affidavits during the course of his defence, for the purpose of establishing the manner in which these affidavits had been taken.

On the other hand the Court felt that, in the case of witnesses who gave evidence in person and were not cross-examined in regard to their affidavits, the Court should not admit such affidavits, because they would carry no weight with them unless accompanied by a cross-examination of the witnesses so that the Court could appreciate exactly what their evidence would be in regard to the taking of the affidavits.

During the trial of Erich Killinger and four others by a British Military Court, Wuppertal, 26 November - 3 December 1945, before the tendering of the affidavit evidence for the Prosecution, the Defence applied for one deponent to be produced in person. The Defence had been given to understand that the British Officer in question would be available for questioning. The Court decided, after hearing argument, that the deponent could not be produced "without undue delay" (in the wording of Regulation 8 (i) (a)), and the President of the Court added the significant statement that "we realize that this affidavit business does not carry the

/weight of the man

weight of the man himself here, as evidence, and when it is read we will hear what objections you have got to anything that the affidavit says, and we will give that, as a Court, due weight." The President's words may fairly be taken as a reference to the fact that if evidence is given by means of an affidavit the person providing the evidence is not present in Court to be examined, cross-examined and re-examined.

Nevertheless, in his summing up, the Judge Advocate in the trial of Karl Adam Golkel and thirteen others, by a British Military Court, Wuppertal, Germany, 15 - 21 May 1946, stressed that: "There is no rule that evidence given in the witness box must be given more weight than evidence, statements, taken on oath outside the court. As I said earlier, take into account all the circumstances..." A discussion of the relative value as evidence of pre-trial statements produced in Court in documentary form and of oral testimony delivered in the witness box had arisen from the fact that four of the accused withdrew in Court wholly or in large part the evidence which they had given in pre-trial statements against five other accused. It may fairly be said that five accused, Pahl, Pilz, Limberg, Thilker and Bott, were found not guilty as a direct result of this fact. There were also less sensational but similar recantations of evidence relating to others among the accused.

9. The Admissibility of Pre-Trial Statements by one Accused against Another.

In the Special Order appointing the Commission which conducted the trial of Albert Bury and Wilhelm Hafner, a United States Military Commission sitting at Freising, Germany, 15 July 1945, power was granted to it to make such rules for the conduct of the proceedings, consistent with the powers of a Military Commission, as were deemed necessary for a full and fair trial. The Commission announced at the outset that its proceedings were to "be governed generally by the rules of procedure and evidence as laid down in the Manual for Courts-Martial with the following changes. Statements made by the accused in the course of investigations which appear to be regularly and properly authenticated will be admitted in evidence, subject to such attack as the accused may desire to make. The statements made by the accused that are admitted in evidence will be received generally against all of the accused subject to such rebuttal as the accused or any of them may elect to make..."

During the Belsen Trial, (see page 146), on 5 October, objection was raised by Major Cranfield, one of the Defence Counsel, to the admission of an affidavit made by the accused Kopper. It was submitted that the affidavit was objectionable as evidence against any of the other accused.

Major Cranfield pointed out that while this affidavit was admissible

/under Regulation 8

under Regulation 8 of the Royal Warrant, that provision was merely permissive. He called on the Court to reject the evidence as being completely worthless. The Prosecution's own witnesses had called Kopper an informer and one who lied. In support of his argument he quoted a passage from page 94 of the British Manual of Military Law governing the procedure followed in Courts Martial: "If the Prosecution find it necessary to call one suspected participator in a crime as a witness against the others the proper course is not to arraign him or, if he has been so arraigned, to offer no evidence and to take a verdict of acquittal." The reason was clear. The spectacle of one criminal turning on his fellow criminals to save his own skin was not one which was attractive to British justice.

The Prosecutor submitted that the meaning of the Regulations was that the Court could admit evidence that would not otherwise be admitted, but that if they found that they might accept it then they must accept it, subject to such weight as they might attach to it afterwards. The Court had not a discretion to say: "all this evidence is legal and we will accept this part and reject that part". The case came within a specific category mentioned under Regulation 8 (i). Any deposition, any summary, or any examination made by any officer detailed for the purpose by any military authority was included, and the Court had heard that Major Champion and Major Smallwood, (two officers who had appeared as witnesses), were in fact both detailed. Regulation 8 (ii) rendered it permissible to enter evidence by one accused against another.*

Replying, Major Cranfield said that in his view the object of Regulation 8 (ii) was to introduce into the law of procedure governing the Court the proposition that if one of the accused were proved a member of a unit, then evidence against another member of that unit would be evidence against the accused, merely because he was a member of the unit. Regulation 8 (ii) did not render the affidavit admissible.

After quoting Regulation 8 (i) the Judge Advocate said that he saw no reason in law why the Court should reject this affidavit. They would have to read the document and then say whether they were satisfied that it appeared to be an authentic document on the face of it. They must then say whether it was a document which would help in proving or disproving the charges.

The Court decided that the document would be admitted, while reserving the right to judge what weight to place on it.

One view of the attitude which a court might possibly be expected to take towards such evidence, whether in affidavit form or from a "live"

---

* Regarding Regulation 8 (ii), see page 185.

/witness,

witness, is provided, however, by the Judge Advocate in the trial of Werner Rohde and eight others by a British Military Court at Wuppertal, Germany, on 29 May - 1 June 1946, who in his summing up, pointed out that a great deal of the evidence in the case was provided by accomplices "that is, persons who are also charged, or obviously could be charged, with having taken part in the same offence." He warned the Court "that the evidence of an accomplice must be regarded always with the greatest suspicion. Every accomplice is giving evidence which is of a tainted nature. He may have many reasons for not telling the truth himself. He may be trying to exculpate himself and throw the blame on somebody else, and there may be a hundred and one reasons why he should not be telling the truth.... This does not mean that you cannot believe him or you cannot accept the evidence of an accomplice, but it means that before you do so you must first caution yourselves on those lines. If, having done so and in spite of having so warned yourselves, you believe that what he is saying is true, you are perfectly free to act upon his evidence." He added: "When you are looking for corroboration of an accomplice's evidence one accomplice cannot corroborate another."

In making these remarks the Judge Advocate was applying to the case the practice followed in English Criminal Law, according to which, "where a witness was himself an Accomplice in the very crime to which an indictment relates, it is the duty of the judge to caution the jury strongly as to the invariable danger of convicting upon such evidence without corroboration. Moreover this corroboration must confirm not merely a material particular of the witness's story, but some particular which connects the prisoner himself with it..... Corroboration by another accomplice, or even by several accomplices, does not suffice.....But these common-law rules as to the necessity of corroborating accomplices amount only to a caution and not to a command."*

10. The Admissibility of Hearsay Evidence

Further examples of the more drastic rules of evidence permissible before courts trying war criminals are found in the frequency with which "hearsay" evidence is admitted. For instance, in English Civil Courts, subject to exceptions, a statement, whether oral or written, made by a person who is not called as a witness is not admissible to prove the truth of any matter contained in that statement (see Harris and Wilshere's Criminal Law, Seventeenth Edition, page 482). Such evidence is rendered permissible by Regulation 8 (i) of the Royal Warrant provided it satisfied

---

* Kenny, Outlines of Criminal Law, 15th Edition, pages 459-61.

/the conditions

the conditions laid down therein.* In the Belsen Trial much hearsay evidence was admitted, including some contained in the affidavits entered.

11. Accused not Entitled to the Rights of a Prisoner of War as Regards Trial

In the trial of General Anton Dostler, Commander of the 75th German Army Corps by a United States Military Commission in Rome, 8-12 October 1945, and in the Trial of General Yamashita by a United States Military Tribunal at Manila, Philippine Islands, 29 October - 7 November 1945, the Defence unsuccessfully claimed on behalf of the accused and in connection with their trial the benefits of the 1929 Geneva Prisoners of War Convention. The reply of the Prosecutor in the former trial was that the provisions of the Geneva Convention with regard to the trial of prisoners of war, which the Defence had put forward, pertained to offences committed by a prisoner of war in captivity, and did not pertain to offences committed against the Law of Nations prior to his becoming a prisoner of war.

If the argument of the Defence regarding the interpretation of the Geneva Convention were correct, it would have far-reaching consequences with regard to the trial of such war criminals as had been members of the armed forces of the enemy and had therefore, on being captured, acquired the status of prisoners of war. War Criminals would be protected by Article 63 of the Geneva Convention which provides that: "A sentence shall only be pronounced on a prisoner of war by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power." This Article would guarantee them, within the United States jurisdiction, the statutory safeguards of the Articles of War and the protection of the "due process of law" clause of the Fifth Amendment, and in other jurisdictions all the procedural rights granted by the law of the capturing State to its own soldiers. Furthermore the interpretation of the Defence would make the provisions of Articles 60 - 66 of the Geneva Convention applicable. It would therefore, be necessary for the authorities instituting the proceedings to notify the representative of the Protecting Power (Article 60), the representative of the protecting Power would have the right to attend the hearing of the case (Article 62, paragraph 3), the alleged war criminal would have the right of appeal against any sentence against him in the same manner as persons belonging to the armed forces of the detaining Power (Article 64), sentences pronounced against prisoners of war would have to be communicated immediately to the Protecting Power (Article 65) and, if sentence of death were passed on a prisoner of war, a communication setting forth in detail the nature and the circumstances of the offence would have to be addressed

---

* See page 51.

/to the representative

to the representative of the protecting Power for transmission to the Power in whose armed forces the prisoner served (Article 66, paragraph 1); and it would, finally, be forbidden to carry out the sentence before the expiration of a period of at least three months from the date of the receipt of this communication by the protecting Power (Article 66, paragraph 2).

The Military Commission in the Dostler trial decided that the provisions of Article 63 of the Geneva Convention were not applicable to the case. As is customary, the reasons of the Military Commission were not given.

The decision of the Military Commission on this point is in accordance with the decision of the majority of the Supreme Court of the United States in the case of the Japanese General Yamashita (delivered on 4 February 1946).* The Supreme Court, per Stone, C.J., held that Article 63 (and Article 60) of the Geneva Convention have reference only to offences committed by a prisoner of war while a prisoner of war and not to violations of the law of war committed while a combatant. This conclusion of the majority of the Supreme Court is based upon the setting in which these articles are placed in the Geneva Convention. Article 63 of the Convention appears in Part 3 ("Judicial Suits") of Chapter 3, entitled "Penalties applicable to Prisoners of War." This forms part of Section V, "Prisoners' Relations with the Authorities", one of the sections of title III, "Captivity". All taken together relate only to the conduct and control of prisoners of war while in captivity; Chapter 3 is a comprehensive description of the substantive offences which prisoners of war may commit during their imprisonment, of the penalties which may be imposed on account of such offences, and of the procedure by which guilt may be adjudged and sentence pronounced. The majority of the Supreme Court therefore thought it clear that Part 3, and Article 63 which it includes, apply only to judicial proceedings directed against a prisoner of war for offences committed while a prisoner of war.

Mr. Justice Rutledge, in his minority opinion, in which Mr. Justice Murphy joined, held that the context in which Articles 60 and 63 are placed did not give any support to the argument of the majority of the Court. Neither Article 60 nor Article 63 contained, in the opinion of the minority, such a restriction of meaning as the majority read into them. In the absence of any such limitation, it would seem that they were intended to cover all judicial proceedings, whether instituted for crimes allegedly committed before the capture or later. In Mr. Justice Rutledge's opinion, policy supported this view. For such a construction was required for the security of United States soldiers, taken prisoner, as much as for that of prisoners taken by the United States. And the opposite view would leave

---

* See pp. 198 et seq. and 270

prisoners of war open to any form of trial and punishment, for offences against the law of war, which their captors might wish to use,. while safeguarding them, to the extent of the treaty limitations, in cases of disciplinary offences. This, in many instances, the minority contended, would be to make the treaty strain at a gnat and swallow a camel.

The view that an alleged war criminal is not entitled to the rights as regards his trial of a prisoner of war is, however, generally acted upon* and was specifically laid down also by the French Cour de Cassation in the appeal of Robert Wagner, Ex-Gauleiter of Alsace, and others against the sentences of death passed on them by the Permanent Military Tribunal at Strasbourg on 3 May 1946. The attitude of the Court on the question here under discussion arose out of one of the less important arguments put forward by the appellants, a plea put forward by Wagner, Röhn and Schuppel, and based upon the alleged violation of Article 156 of the Code de Justice Militaire, claiming that the Military Tribunal was irregularly composed because Wagner had the rank of a General commanding an Army Corps and the Tribunal could not, therefore, properly be presided over by a Colonel.

The Judgment of the Court of Appeal pointed out that, according to Article 5 of the Ordinance of 28 August 1944 (under which war crime trials before French Military Tribunals are held), "For adjudicating on war crimes the Military Tribunal shall be constituted in the way laid down in the Code de Justice Militaire."

The provisions of Article 10 et seq. and 156 of the Code de Justice Militaire, which varied the composition of Military Tribunals according to the rank of the accused applied only to French military personnel and to persons treated as such.

Paragraph 13 of Article 10, according to which Military Tribunals called upon to try prisoners of war are composed in the same way as for the trial of French military personnel, that is according to rank, would not be applied to Wagner, who was not sent before a Military Court as a prisoner of war.

12. Conclusion

In a large number of instances war crimes were perpetrated during the last war either by denying the victims a fair trial altogether or by circumscribing their right to such a trial in the course of judicial proceedings in such a way that a sheer traversty of justice resulted.**

---

* The question received attention in the trial of Martin Gottfried Weiss and others (the Dachau Trial) by a General Military Government Court in Dachau, 15 November - 13 December 1945, the Commission ruling in the same way as the court in the Dostler trial.

** See page 149.

/This circumstance

This circumstance may be thought to make it all the more important that the victor nations should avoid the same practices and that persons accused of having committed war crimes should see that the minimum rights essential to a fair trial are being safeguarded during proceedings taken against them. The survey set out above of information illustrating the protection of certain selected and more important rights (see headings 1-5) makes it clear that an attempt has in fact been made to secure an alleged war criminal his rights to a fair trial.

The latter part of the section, however, makes it clear that the aim has also been to ensure that the courts are not so bound by technical rules that the guilty shall benefit from the exceptional circumstances under which war crime trials are necessarily held, and so escape just punishment. Without such rules as those illustrated by the material appearing under headings 6-11, it is clear that the rights of the victims would often go unvindicated.

Finally it will have been noted that a marked general similarity exists between the rules laid down in the Charters of the International Military Tribunals and in the various municipal enactments governing all the matters discussed in this section on the rights of the accused. These procedural rules, as much as those quoted elsewhere which lay down provisions of substantive law, represent a further contribution to the development of an international penal law. They will prove of value in the sphere of the codification of international law and will serve as a convenient basis for further developments in this sphere.

F. CONCLUSION TO CHAPTER III

In common with all parts of the Report on Human Rights in War Crime Trials, the shortage of time has prevented Chapter III, dealing with information on Human Rights in trials other than those conducted by International Military Tribunals, from being drafted in its entirety. The reason for this will be clear if it is stated that the Secretariat of the United Nations War Crimes Commission had in its possession on 6 August 1947, records of 1,084 such trials, ranging from full verbatim transcripts of up to 4,055 pages in one instance (exclusive of separately printed exhibits) down to the barest of summaries. The countries whose Courts have held these trials are the following: Australia, Canada, China, Czechoslovakia, France, Greece, the Netherlands, Norway, Poland, the United Kingdom and the United States. These records, therefore, are numerous and varied and it should be added that a large number of further such documents have arrived since 6 August, some, as was inevitable, too late for treatment in this Chapter.

It has been thought of some value, nevertheless, by the Officer charged with drafting this Chapter to attempt to cover all the relevant aspects of these trials, even if the result has been that the treatment of some points has been unavoidably unequal and disconnected. It has been possible to deal with some topics in full, as for instance the question of the responsibility of commanders for offences committed by their troops other than those specifically ordered by them,* the defence of superior orders** and the rights of the accused at the time of trial.*** The aim throughout, however, has been to supply the Commission on Human Rights with at least a classification of significant trials according to the questions to which they are relevant, together with a quotation of the Articles from the Hague and Geneva Conventions and other authorities which were cited in the trials described or mentioned under each heading.

This classification of trials and quotation of authorities represents the lowest level of analysis and minimum treatment to which each of the 1,000 to 1,100 trials referred to above has been subjected in the course of recent months. As has already been indicated, many have been subjected to much fuller analysis, but it is thought that, should it be decided at some future date to complete the research on Human Rights in War Crime Trials, even the collections of enactments and

---

* See pages 182-212.

** See pages 215-236.

*** See pages 250-273.

/references

references to relevant trials will prove at least a valuable guide and starting point.

It is not the intention of this Conclusion to summarize the whole of the contents of Chapter III, since parts of that Chapter simply analyze, from the point of view of the protection of human rights, certain enactments and judicial decisions which give rise to no kind of debate from the legal point of view; the aim of this Conclusion is rather to point out certain significant topics on which there may or could have been legal doubts or on which there have been in the past discussions in legal circles, and to draw the readers attention, by means of cross-references, to the fuller treatment of these points in the main body of Chapter III. An examination of the following typical subjects will illustrate how these legal questions have in most cases been decided in the direction of extending, rather than restricting, the protection of human rights:

(i) In Article 2 of the Hague Convention, No. IV of 1907* which has been quoted so often in war crime trials,** there appears what is generally referred to as the "general participation clause" which provides that the Convention shall be binding only if all the belligerents are parties to it. In strict law the effect of this clause is to deprive the Convention of its binding force as soon as one or more non-signatory states join the ranks of the belligerents, as happened in both the 1914-1918 war and the more recent World War. Such doubts as may have existed in legal minds during the first world war as to the effect of the clause*** have not been seriously entertained in the treatment of war crimes committed during the second world war; the view has in fact been generally taken that the Regulations attached to the Hague Convention are in any case declaratory of existing international law and so binding on all belligerents, whether they signed the Convention or not.****

---

* In this instance, Article 2 of the actual Convention is meant and not Article 2 of the Regulations attached to the Convention.

** See for instance Section C of this Chapter (pages 146-181), passim.

*** See Oppenheim-Lauterpacht, International Law, Vol.II, Sixth Edition Revised, page 182, footnote 2.

**** It may be added that the Geneva Conventions do not include any "general participation clause."

(ii) An examination of the Hague and Geneva Conventions reveals that very few of the provisions contained therein seem on a narrow and literal interpretation to lay down individual responsibility. By and large the obligations contained therein rest upon states and not upon individuals. Article 3 of the text of the Hague Convention No. IV of 1907 provides for instance that "a belligerent party which violates the provisions of the said Regulations* shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

Nevertheless, not only the trend of legal opinion**, but also the course followed in numerous important decisions of the courts has been to make the individual responsible for his acts in breach of international conventions and to punish him for them. That this policy is upheld in the accepted jurisprudence is illustrated by the authoritative decision. pronounced by the International Military Tribunal at Nurnberg, that certain accused had made themselves criminals by waging war in breach of the terms of an international agreement renouncing war undertaken as an instrument of national policy, the Briand-Kellogg Pact.*** Indeed, the International Military Tribunal made use of the fact that the Hague Convention No. IV of 1907 had been enforced personally against its violators. The judgment on this point runs:

"But it is argued that the Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regards to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, improper use of flags of truce and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offences against the laws of war; yet the Hague Convention no where designates such practices as criminal, nor is any sentence described, nor any mention made of a court to try and punish offenders. For many years past, however military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal those who wage aggressive

---

* i.e. the Regulations attached to the Convention.

** See for instance Professor H. Lauterpacht, in the British Year Book of International Law, 1944, page 64; Lord Wright in the Law Quarterly Review, January, 1946, page 42; and Professor A. L. Goodhart in the Judicial Review, April 1946, pages 14-15.

*** "Treaty Series No. 29 (1929)" Cmd. 3410.

/war are doing

war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention."*

(iii) In the course of the Belsen trial,** the defence assumed that the accused could not, as concentration camp officials, be regarded as members of the German armed forces and, having at the same time no connection with belligerent activities, could not therefore be deemed war criminals.

The Prosecutor claimed that those accused who had been members of the SS. were members of the German armed forces. It would be more difficult, however, to claim that the camp prisoners who were given minor official positions by the authorities were anything but civilians. In holding some such accused guilty of war crimes along with others who were definitely members of the SS., the Court plainly regarded it as irrelevant whether an accused was or was not a civilian.

Many subsequent court decisions have made it quite clear that civilians can commit war crimes. For example, in the Zyklon B Case*** two German industrialists, undoubtedly civilians, were sentenced to death as war criminals for having been instrumental in the supply of poison gas to Auschwitz, knowing of its use there in murdering allied nationals. Another instance among many is provided by the Essen Lynching Case**** where civilians appeared among persons found guilty of being concerned in the killing of three British Prisoners of War. The Hadamar Trial***** provides an example from among the trials held before United States Military Commissions: here the civilian personnel of a medical institution were found guilty of unlawfully putting to death Russian and Polish nationals.

(iv) The term "war crime" has been interpreted so as to include within its scope any offence by an enemy against Allied nationals committed during war time on enemy soil or occupied territory, irrespective of any necessary direct connection with the war.

---

* Cmd. 6964, page 40.

** See page 190. In this early trial by a British Military Court, several important issues such as the present one were raised and settled by Court decision. A report on this trial is contained in War Crime Trial Law Reports, published by His Majesty's Stationery Office, London, for the United Nations War Crimes Commission. Volume II.

*** See pages 93-103 of Vol.I of War Crime Trial Law Reports.

**** Ibid. pages 88-92.

***** Ibid. pages 46-54.

During the Belsen trial, Colonel Smith, Defence Counsel, claimed that all recognized war crimes were bound together by the common principle that they were directly connected with the operations of war, and that the purpose of the punishment of war crimes was to secure the legitimate conduct of the operations of war. In the present trial, however, Counsel submitted that the Court was dealing with incidents, which certainly occurred in time of war, but which had no logical connection with the war whatever. They were done in accordance with what was begun in peace as a peace time policy and was intended to be carried on as a permanent and long term aim until its purpose was achieved, the extermination of the unfortunate races involved. The only difference which the war made to this long term policy was to increase the geographical area over which it could operate. In what way did it assist the security of the British forces to punish someone who had been guilty of misbehaviour in a German concentration camp?

The Court may be taken by its decision to have held this approach to be unsound and the wider view set out in the beginning of this paragraph (iv) has been that which has prevailed in war crime trials arising out of the recent world war.

(v) A war crime can only be committed by a person who, looked at from the point of view of the country setting up the war crime court, is an enemy. As has been shown,* however, the word "enemy" has, on suitable occasions, been interpreted so as to include within its scope not only enemy nationals but also neutral and even Allied nationals who in some way identified themselves with the policies of the enemy authorities.

(vi) The protection of the Courts has been extended in certain instances not only to Allied nationals but also to certain neutrals.**

(vii) Some of the municipal enactments which have bestowed jurisdiction on the various non-Military Government Courts*** have given the latter powers to try not only war crimes in the traditional sense but also crimes against humanity and even crimes against peace. Thus, the Danish and Greek Courts have power to try all acts in violation of Article 6 of the Charter of the International Military Tribunal, (that is to say, War

---

* See page 180.

** See pages 159-60 and 287.

*** It goes without saying that all Military Government Courts have wide powers bestowed upon them, and are not restricted to the trial of offences against the laws and usages of war.

Crimes, Crimes against Humanity and Crimes against Peace), and the Netherlands Courts all acts in violation of Article 6 (b) and (c), (War crimes and Crimes against Humanity).* The Australian and Chinese Courts have been given jurisdiction over, not only war crimes, but also crimes against peace.**

Furthermore, it has been seen that certain of the United States Military Commissions have been provided with jurisdiction over offences other than war crimes stricto sensu; the jurisdictional provisions which govern these commissions have clearly been drafted under the influence of the Charter of the Nürnberg International Military Tribunal.***

The precedents which have been created in these jurisdictional matters are, of course, very wholesome ones which clearly go far towards extending the protection of human rights.

(viii) It has been seen also**** that the Hague Convention has been interpreted so as to cover offences committed outside occupied territory and even offences committed against children who were not born in occupied territory but on German soil. On a narrow interpretation, the Hague Convention does not protect civilians outside of occupied territory since the heading of Section II of the Hague Convention is "Military authority over the territory of the Hostile State", but this interpretation has not in fact prevailed.

(ix) Courts have in some instances (as for instance in Norway, Australia and China) been given jurisdiction to treat as war crimes offences against the general economic well-being of a country, such as the debasement of its currency.*****

(x) Recognition has been afforded to the illegality of offences similar to and including that commonly referred to as "judicial murder", committed by persons while in a judicial capacity.******

(xi) The Geneva Prisoner of War Convention of 1929 has been applied not only to prisoners interned in prisoner of war camps but also to those prisoners of war who have been incarcerated in concentration

---

* See pages 145, 159 and 288.

** See pages 285 and 287.

*** See page 158.

**** See pages 154-5.

***** See pages 144 and 151.

****** See page 149.

camps.*

(xii) Again, the Prisoner of War Convention speaks in terms of conditions in prisoner of war camps and the treatment of prisoners of war while in such camps; nevertheless, the provisions of the Convention have been held applicable also to the treatment and conditions of prisoners of war while on the line of march between camps.**

(xiii) Article 23 (c) of the Hague Convention forbids the killing or wounding of an enemy who, having laid down his arms, or no longer having means of defence, has surrendered at discretion. The Convention was drafted long before the possibility of airmen escaping from aircraft by parachute was a practical possibility; nevertheless, Article 23 (c) has been interpreted so as to protect baled-out airmen, whether captured by armed forces or civilians, and, despite the wording of the article, it has been considered irrelevant that the flyer had a weapon on his person on landing, provided he showed no intention of using it.***

(xiv) The pages discussing the various types of liability for war crimes show that the war crime courts have cast their net quite widely.**** For example, war criminals have been found guilty, not only for being physically concerned in actual killing, but also (for instance) for keeping watch while it was committed and for participating in a lynching which led ultimately to the death of the victim.***** The British practice is to charge an accused with being "concerned in" a specific war crime, and the English law relating to aiders and abettors and accessories is often related by Judge Advocate and Counsel, as providing analogies on which the Court might act. In French trials also, complicity in one war crime or another is often charged.

(xv) The responsibility of commanders for offences committed by troops under their command has in many cases been extended to a considerab

---

* See pages 163-4.

** See pages 162-3.

*** See page 164.

**** See pages 212-16.

***** A further relevant trial which was not included in the discussion of trials illustrating complicity but which has been referred to earlier in these conclusions and also on page 147 of Chapter III was the trial of Bruno Tesch and two others. In this trial two business men were held liable and condemned to death for having arranged for the supply (not supplied) poison gas to Auschwitz and various other concentration camps, knowing that it was to be used in the mass destruction of prisoners interned therein. (See War Crime Trial Law Reports. Vol. I, pages 93-103).

/degree;

degree; the principles governing this sphere of international law have not yet been crystallized, but at least it can be said that it is not in every instance necessary to prove that the commander actually ordered the offences, and it has frequently been laid down in enactments and in judicial decisions that a commander has a duty to prevent crimes from being committed by his subordinates.*

(xvi) It has also been recorded that to some degree it is recognized that an attempt to commit a war crime may be punished equally with the war crime itself.**

(xvii) The defence of necessity has not in fact, often been pleaded, but is not, save in exceptional cases, regarded as constituting an effective defence.***

(xviii) The defence of legitimate reprisals has been given only a limited scope, though its extent is still rather obscure.****

(xix) The defence that an accused was the head of a state has not been pleaded in trials before the courts with which Chapter III deals, since no such person has been brought before such a court. Nevertheless it is worth noting that the similar defence, that an accused in committing offences was in some way acting in an official capacity, has not been allowed to prevail.

Sometimes it has been expressly laid down in municipal enactments that an accused's official position does not excuse him. Thus, the Chinese Law of 24 October 1946, Governing the Trial of War Criminals provides in its Article VIII that the fact that crimes were committed as a result of official duty or in pursuance of governmental policy shall not exonerate war criminals. Similarly, Article 4 of the Law of 2 August 1947 of the Grand Duchy of Luxembourg on the Suppression of War Crimes lays down that: "In no instances can the application of the laws mentioned in Article 1***** be set aside under the pretext that the authors or co-authors of, or the accomplices in, the offences set out therein acted in the capacity of an official, a soldier, or an agent in the service of the enemy..."

---

* See pages 181-212.

** See pages 215-6.

*** See pages 239-42.

**** See pages 242-46.

***** See page 139.

/(xx) A strong

(xx) A strong disposition has been shown to exclude from war crime trial proceedings such unnecessary technicalities as might lead to a miscarriage of justice in favour of the accused; this tendency has been demonstrated for instance in the explicit requirements that expeditious procedure must be followed* in provisions that a trial cannot be invalidated after its completion merely because of technical faults of procedure which caused no injustice to the accused** and in the following examples of the policy of leaving wide discretionary powers in the hands of the Courts:

(a) Some of the enactments and authorities dealing with the plea of superior orders have laid it down that if the defence is to be at all effective the orders relied on must be shown not to have been illegal, or obviously illegal, or known to the accused to be illegal or of such a nature that he ought to have known that they were illegal;*** in general, however, the practice has been to lay down that the defence of superior orders does not take away the criminal character of an act but may constitute a mitigating circumstance, and to leave it to the court to decide in each case whether to treat it as such.****

The circumstances in which the defence is to prevail are less certain, but some possible principles have been set out on pages 228-30.

(b) The attitude taken by the courts to the defence of legality under municipal law has been substantially the same as that taken towards the defence of superior orders.*****

(c) In matters of evidence the tendency has been to allow the putting in of a wide variety of evidence (sometimes it is stated that any evidence having probative value to the average man may be admitted), and to leave it to the court to decide what weight to place on each item of evidence.

(xxi) It may be mentioned that wide rules regarding judicial notice have been applied in war crime trials. Thus, for instance, Article IX of Ordinance No. 7 of the United States Zone of Germany makes the following provision relating to Military Tribunals set up thereunder:

---

* See page 259.

** See for instance pages 256-7 and 257-8.

*** See page 233.

**** See pages 234-36.

***** See page 236.

/"The tribunals

"The tribunals shall not require proof of facts of common knowledge but shall take judicial notice thereof. They shall also take judicial notice of official governmental documents and reports of any of the United Nations, including the acts and documents of the committees set up in the various allied countries for the investigation of war crimes, and the records and findings of military or other tribunals of any of the United Nations."

(xxii) International Law lays down that a war criminal may be punished with death whatever the crime he committed. Some use has been made of the latitude allowed in this matter insofar as certain offences other than killing have been punished with death, for instance, cases of torture punished by the Norwegian and Australian courts.

In each of the above instances, draftsmen or the courts have resolved a legal problem in such a way as to afford a wider protection to human rights. It must, of course, be borne in mind that if a court is restricted in its jurisdiction to trials of offences against the laws and usages of war, as are for instance the British Military Courts,* then crimes by enemy nationals against enemy nationals are definitely outside its jurisdiction. It has further been noticed** that few if any of the trials held before war crime courts and whose reports have reached the United Nations War Crimes Commission have involved the use of illegal methods of warfare against opposing troops. Nevertheless, sufficient has been said in the earlier pages of this Conclusion to indicate that this branch of International Law, which deals with the trial and punishment of War Criminals, is one which has grown rapidly in recent years and is moreover developing, in most of its aspects, in the direction of a greater protection of human rights.

---

* See pages 155-7.

** See page 162.

G. APPENDIX TO CHAPTER III*

1. United Kingdom and British Commonwealth Enactments

The jurisdiction of British Military Courts appointed for the trial of war criminals derives from the Royal Warrant of 14 June 1945, Army Order 81/45, of which Regulation 1 provides that the term "war crime" means a violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since 2 September 1939.

Similarly, the War Crimes Regulations of Canada of 30 August 1945 (later re-enacted as a Statute of 31 August 1946) define a war crime simply as "a violation of the laws or usages of war committed during any war in which Canada has been or may be engaged at any time after the ninth day of September 1939".

The jurisdiction of British and Canadian War Crimes Courts is limited, then, to the trial of violations of the laws and usages of war, and is therefore narrower than the jurisdiction of, e.g., the International Military Tribunal established by the Four-Power Agreement of 8 August 1945, which, according to Article 6 of its Charter, has jurisdiction not only over violations of the laws and customs of war (Article 6 (b)) but also over what the Charter calls "crimes against peace" and "crimes against humanity" (Article 6 (a) and (c)).

A Court trying only offences against the laws and usages of war is not, however, limited to the trial of offences against nationals of the country whose authorities set up the Court.** Thus, for instance in the trial of Otto Sandrock and Three Others before a British Military Court at Almelo, Holland from 24-26 November 1945 (the Almelo Trial), a British Military Court tried and sentenced German nationals for offences against, not only a British prisoner of war, but also a Dutch civilian. In the trial by a British Military Court at Singapore of W/O Tomono Shimio of the Japanese Army, the accused was charged, found guilty and sentenced to death by hanging for having unlawfully killed American prisoners of war at Saigon, French Indo-China. The locus delicti commissi was French territory, the victims were United States nationals.

---

* See pages 136 and 145.

** See above, pages 125-6.

/The jurisdiction

The jurisdiction of Australian Military Courts for the trial of alleged war criminals is rather wider than that of the British and Canadian Military Courts.

Article 3 of the Commonwealth of Australia War Crimes Act of 11 October 1945 (No. 48 of 1945) states that:

> "In this Act, unless the contrary intention appears ...
>
> "war crime" means:
>
> (a) a violation of the laws and usages of war; or
>
> (b) any war crime within the meaning of the instrument of appointment of the Board of Inquiry appointed on the third day of September, one thousand nine hundred and forty-five, under the National Security (Inquiries) Regulations (being Statutory Rules 1941, No. 35, as amended by Statutory Rules 1941, Nos. 74 and 114 and Statutory Rules 1942, No. 273), committed in any place whatsoever, whether within or beyond Australia, during any war.*

The Instrument of Appointment referred to states that the expression "war crime" includes, inter alia:

> "(i) 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."

This definition of "crime against peace" is the same as that used in Article 6 (a) of the Charter attached to the Four-Power Agreement of 8 August 1945. The effect of this is that "crimes against peace" form part of the term "war crimes" as defined by the Australian statute.

The Australian Act does not, on the other hand, comprise in its definition of "war crime" crimes against humanity within the meaning of Article 6 (c) of the Charter of the International Military Tribunal, excepting of course "crimes against humanity" which also fall under the term "violations of the laws and customs of war".

---

* The Preamble to the Act contains the words: "Whereas it is expedient to make provision for the trial and punishment of violations of the laws and usages of war committed during any war in which His Majesty has been engaged since the second day of September, one thousand nine hundred and thirty-nine, against any persons who were at any time resident in Australia or against certain other persons."

Of particular interest are those Australian provisions which determine the territorial application of the Act and the extent of the jurisdiction of the Australian Military Courts. The Preamble states the expediency of making provision for the trial and punishment of violations of the laws and usages of war committed against "any persons who were at any time resident in Australia or against certain other persons". The main basis for the power of Military Courts is Section 7 of the Act, which provides that:

> "A military court shall have power to try persons charged with war crimes committed, at any place whatsoever, whether within or beyond Australia, against any person who was at any time resident in Australia, and for that purpose, subject to any direction by the Governor-General, to sit at any place whatsoever, whether within or beyond Australia."

Article 12, however, adds the following:

> "The provisions of this Act shall apply in relation to war crimes committed, in any place whatsoever, whether within or beyond Australia, against British subjects or citizens of any Power allied or associated with His Majesty in any war, in like manner as they apply in relation to war crimes committed against persons who were at any time resident in Australia."

Under the Act the Australian Military Courts have, therefore, jurisdiction in all cases where the victim has been either resident in Australia or a British or an allied subject.

The jurisdiction of the Australian Military Courts does not extent to crimes committed "against any civilian population", e.g., against neutrals or enemy subjects, because crimes against other than British and allied nationals are outside the scope of the term "war crime" as defined in the Australian Statute.

2. United States Provisions

As has been seen,* the United States authorities have made different provisions for different territories, and the jurisdictions conferred have not been the same. The narrowest jurisdiction is that vested in the Military Commissions appointed in the Mediterranean Theatre of Operations. In the Mediterranean Regulations (Regulation 1) the expression "war crime" means a violation of the laws or customs of war. United States Commissions other than those appointed in the Mediterranean Theatre of Operations have, however, been empowered to try other offences in addition to war crimes.

* See pages 157-59 where the relevant provisions are set out.

3. The Jurisdiction of Chinese War Crime Tribunals

Article II of the Chinese Law of 24 October 1946, Governing the Trial of War Criminals provides that:

"Article II. A person who commits an offence which falls under any one of the following categories shall be considered a war criminal.

1. Alien combatants or non-combatants who, prior to or during the war, violated an International Treaty, International Convention or International Guarantee by planning, conspiring, preparing to start or supporting, an aggression against the Republic of China, or doing the same in an unlawful war.

2. Alien combatants, or non-combatants who during the war or a period of hostilities against the Republic of China, violate the Law and Usages of War by directly or indirectly having recourse to acts of cruelty.

3. Alien combatants or non-combatants who during the war or a period of hostilities against the Republic of China or prior to the occurrence of such circumstances, nourish intentions of enslaving, crippling, or annihilating the Chinese Nation and endeavour to carry out their intentions by such methods as (a) killing, starving, massacring, enslaving, or mass deportation of its nationals, (b) stupefying the mind and controlling the thought of its nationals, (c) distributing, spreading, or forcing people to consume narcotic drugs or forcing people to consume or be innoculated with poison, or destroying their power of procreation, or oppressing and tyrannizing them under racial or religious pretext, or treating them inhumanly.

4. Alien combatants or non-combatants who during the war with, or a period of hostilities against the Republic of China, commit acts other than those mentioned in the three previous sections but punishable according to Chinese Criminal Law."

Article III of the law enumerates thirty-eight types of offences which are to be deemed violations of the laws and usages of war within the meaning of Article II, Section 2, but are said to be included among the offences mentioned in Section 2; the list is not therefore to be regarded as exhaustive.

Article IV makes the following provisions:

"Article IV. All provisions under Article II apply to acts committed between 18 September 1931 and 2 September 1945 only, with the exception of cases set out in Sections 1 and 3 which are also subject to prosecution."

The protection of the Chinese Courts is not, however, afforded only to Chinese Nationals, since Article VII proves that:

"Article VII. Alien combatants and non-combatants who committed any of the offences provided under Article II against the Allied Nations or their nationals, or against aliens under the protection of the Chinese Government are subject to the application of the present Law."

It will be noted that the Chinese War Crimes Law resembles the Australian* in that both provide Courts acting under their provisions with jurisdiction to try, in addition to alleged war crimes proper (i.e., violations of the laws and usages of war), what may be termed "crimes against peace" (cf. Article II, Section 1 of the Chinese Law) but not such crimes against humanity as do not at the same time represent war crimes. Thus, while offences against certain types of victims other than Chinese and Australian Nationals may be tried before Chinese and Australian Courts respectively (cf. Article VII of the Chinese provision and Article 12 of the Australian), offences by enemy nationals against enemy nationals definitely cannot be so tried.

4. Jurisdiction of the Greek Courts over War Criminals

Under the provisions of the Greek Constitutional Act 73/1945 (Government Gazette, page 250), enemy nationals may be tried before Greek War Crime Courts for any offence which would be a violation of Article 6 of the Charter of the International Military Tribunal. The Greek Courts therefore have jurisdiction over crimes against humanity and crimes against peace as well as over war crimes.** Acts which constitute offences against the Greek Penal Code may also be brought before such Courts when they have been committed by enemy nationals and were not justified by the laws and usages of war.

---

* See page 285.

** See a similar Danish provision referred to on page 239. For the provisions of Article 6 of the Charter, see Chapter I, Section B.

5. Jurisdiction over Treasonable Acts

It should be noted that the Belgian, Czechoslovak, Polish and Yugoslav enactments mentioned above* provide for the trial, not only of war crimes but also of acts of a treasonable nature.

6. The Jurisdiction of Belgian Military Tribunals over War Crimes and Certain Treasonable Acts

Article 2 of the Belgian Law of 20 June 1947, relating to the competence of Belgian Military Tribunals in the matter of war crimes provides that:

"Article 2. Crimes falling within the jurisdiction of the Belgian Criminal Code committed in violation of the laws and customs of war between 9 May 1940 and 1 June 1945, by persons who, at the time of the commission of the offence, were in the enemy forces or the forces allied to those of the enemy of whatever standing, but especially in the capacity of a functionary in the judicial and administrative services, in the military or auxiliary services as an agent or inspector of an organization, or a member of a formation of any sort whatever, who is charged by such persons with a mission of any nature at all, shall be tried by military tribunals in accordance with the provisions of this present law and those which are not contrary to the Code of Military Penal Procedure."

Apart from this general enactment there exist certain other provisions relating to the competence of Military Courts over war crimes and treasonable offences committed outside of Belgium.

Article 1 of the above-mentioned law states that:

"Article 1. Article 2 of the Decree of 5 August 1943, is replaced by the following text:

Article 10 of the Preliminary Chapter of the Code of Criminal Procedure, which enumerates the cases in which a foreigner can be tried in Belgium for crimes committed outside the territory of the Kingdom, is completed by the addition of the following paragraph:

'4. In time of war, against a Belgian citizen or a foreigner resident in Belgium at the time of the outbreak of hostilities, a crime of homicide, wilful bodily injury, rape, indecent assault or denunciation of the enemy'."

---

* See pages 129 and 130-1.

/The original

The original Article 2 made the same provision except for the omission of the words "or a foreigner resident in Belgium at the time of the outbreak of hostilities".

Articles 1 and 3 of the Decree of 5 August 1943, have been amended by an Act of Parliament of 30 April 1947, which provides as follows:

"Article 1

Article 1 of the decree of 5 August 1943, conferring exceptional jurisdiction on the Belgian courts in the matter of certain crimes and misdemeanours committed outside national territory in time of war is replaced by the following article:

"The following addition shall be made to Article 8 of the preliminary chapter of the Code of Criminal Procedure:

'A Belgian who, in time of war, committed outside national territory a crime or misdemeanour against a national of a country allied to Belgium as defined in paragraph 2 of Article 117 of the Criminal Code, can be tried in Belgium, either on the request of the injured foreigner or of his family, or on receipt of an official notice served to the Belgian authorities by the authorities of the country where the crime was committed or of the country of which the injured party is or has been a national. This applies even if the crime is not one of those mentioned in the law of extradition'."

"Article 2

Article 3 of the decree of 5 August 1943, is replaced by the following:

"Article 12 of the preliminary chapter of the Code of Criminal Procedure is replaced by the following article:

'Except in cases covered by Nos. 1 and 2 of Articles 6 and 10, the trial of crimes dealt with in the present decree can only be held if the accused is arrested in Belgium.

'However, when the crime has been committed in time of war, the trial can be held in all cases, provided the accused is a Belgian, even if he is not arrested in Belgium, but if the accused is a foreigner, the trial can be held in Belgium if the accused is found in enemy territory of if his extradition can be obtained; the trial can also be held in Belgium in the cases mentioned in the preceding paragraph'."

/7. Jurisdiction

7. Jurisdiction of the People's Courts in Czechoslovakia over War Criminals and Traitors

The Czechoslovak Decree No. 16 of 1945, as amended by Law No. 22 of 24 January 1946, makes detailed provisions regarding the types of offences punishable thereunder and the penalties attaching to each category of offences. The following provisions are of particular interest:

(i) Section 1 of the Decree provides that:

"Any person who during the period of imminent danger to the Republic (see paragraph 18) committed, either on the territory of the Republic or outside it, any of the following offences under the Law on the Defence of the Republic of 19 March 1923, No. 50 in the Collection of Laws, is to be punished according to the provisions set out below:

conspiracy against the Republic (paragraph 1) is to be sentenced to death;

any person guilty of planning conspiracies (paragraph 2), or of threat to the security of the Republic (paragraph 3), treason (paragraph 4, Article 1), betrayal of State secrets (paragraph 5, Article 1), military treachery (paragraph 6, Articles 1, 2 and 3) or of violence against constiutional agents (paragraph 10, Article 1), is to be sentenced to penal servitude for a period varying from twenty years to a life sentence and in the case of especially aggravating circumstances is to be sentenced to death."

(ii) Section 2 of the Decree makes it a punishable offence to have been at the time of imminent danger to the Republic a member of the following organizations: Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei (SS), Freiwillige Schutzstaffeln (F.S.), Rodobrana (a Slovak fascist organization) or the Szabadcsapatok (a Hungarian fascist organization active during the war in the Hungarian occupied part of Czechoslovakia), or of other, not enumerated, organizations of a similar kind."

(iii) According to paragraph 1 of Section 3:

"(1) Any person who during the period of imminent danger to the Republic (see paragraph 18) carried out propaganda for or supported the Nazi or Fascist movement, or who approved or defended the enemy government on the territory of the Republic or any of the illegal acts of the occupation High Command and the authorities and organs under its orders during this period in

/the press,

the press, on the wir'less, in films or plays or at public gatherings shall, if not guilty of an offence punishable by a severer penalty, be sentenced for his crime to penal servitude for from five to twenty years, but if he committed the said crime with the intention of destroying the moral, national or state consciousness of the Czechoslovak people, and especially of Czechoslovak youth, he shall be sentenced to penal servitude for from ten to twenty years and in the presence of especially aggravating circumstances to penal servitude for a period varying from twenty years to a life sentence or to death."

(iv) Under Section 3, paragraph 2, a person who, at the time of imminent danger to the Republic, was a functionary or commander in one of certain organizations, is punishable by hard labour from five to twenty years. The organizations are: the Nazi Party, the Sudetendeutsche Partei (the party led by Henlein), Vlajka (a Czechoslovak Quisling organization), Hlinkova Garda (a Slovak Militant Quisling organization). Here it is not membership as such, that establishes the criminal liability, since only functionaries or commanders in these organizations are to be punished.

(v) Section 6 of the Decree makes the ordering of forced labour and the taking part in giving effect to such orders, during the same period of danger, a criminal offence. The punishment is to be more severe if forced labour was connected with deportation abroad.

(vi) Section 7 of the Decree makes it a criminal offence, punishable by death or lesser penalties, to have caused, during the same period, loss of liberty or bodily harm in the interests of Germany or her Allies. Under the express provision of paragaraph 3 of Section 7 this applies also to causing such an effect by means of a court decree or an administrative decision. A related provision is that of Section 11, which provides sanctions for denunciations effected in the interests of the enemy. If the loss of life was the effect of such denunciation, the death penalty may be imposed; otherwise such denunciations are punishable by hard labour from ten to twenty years, and under aggravating circumstances by life imprisonment.

/(vii) Offences

(vii) Offences against property during the same period and cloaked in the form of judicial or official acts, are also punishable (Sections 8 and 9).

(viii) Section 10 makes it a punishable offence to have exploited, at the time of the imminent danger to the Republic, the distress caused by national, political or racial persecution, in order to enrich one's self, to the detriment of the State, a legal corporation or any person.

(ix) Section 12 provides that:

"Under this law any foreigner who committed the crime mentioned in Section 1, or any of the crimes mentioned in Sections 4-9 while on foreign territory, shall be punished if he committed them against a Czechoslovak citizen or against Czechoslovak public or private property."

(x) The "time of the imminent danger to the Republic" is defined in Section 18 of the Decree as the time between 21 May 1938, the time of the first Czechoslovak mobilization against the threat of German invasion, and a day to be appointed by Government decree.

The Slovak Decree No. 33/1945 as amended by Decree Nos. 83/1945 and 57/1946 sets out detailed provisions defining various types of quislings and collaborators, and the punishment to be meted out to each. In addition, Section 1 of the Decree states that:

"Any foreign national* who

(a) has supported the dismemberment of the Czechoslovak Republic or destruction of its democratic government, or who

(b) has taken part in political, economic or any other kind of oppression of the Slovak nation, especially any person who has terrorized or plundered the Slovak people, fought with the Germany Army on the territory of the Czechoslovak Republic against the Red Army, the other Allied Armies, the Slovak uprising or the partisans in Slovakia, or who has in the course of such action committed murder, robbery, arson, extortion, or has been an informer or committed other outrages or acts of violence or been in the service of Nazi Germany or Horthy's Hungary, or has ordered or aided the deportation of Slovak nationals abroad, or been guilty of any other act against the Slovak national interest, shall be sentenced to death for his crime."

* Italics inserted.

/8. Jurisdiction

8. Jurisdiction of Polish Courts over War Crimes and Treasonable Activities

The types of offences which fall within the jurisdiction of the Polish Courts for the trial of alleged war criminals and traitors are succinctly set out in Articles 1, 2, 3, 4 and 9 of the Decree of 11 December 1946, which provide as follows:

"Article 1

Any person who, assisting the authorities of the German State, or of any State allied with it,

1. took part in committing acts of murder against the civilian population, members of the armed forces or prisoners of war; or

2. by giving information or detaining, acting to the detriment of persons wanted or persecuted by the authorities on political, national, religious or racial grounds,

is liable to the death penalty."

"Article 2

Any person, who, assisting the authorities of the German State, or of a State allied with it, acted in any other manner or in any other circumstances than those indicated in Article 1 to the detriment of the Polish State, or of a Polish corporate body, or of civilians, members of the armed forces or prisoners of war,

is liable to imprisonment for a period of not less than three years, or for life, or to the death penalty."

"Article 3

Any person who, taking advantage of the conditions created by the war, compelled persons to act under threat of persecution by the authorities of the German State, or by a State allied with it, or acted in any other manner to the detriment of persons wanted or persecuted by the said authorities,

is liable to imprisonment for a period of not less than three years, or for life."

"Article 4, paragraph 1

Any person who was a member of a criminal organization established or recognized by the authorities of the German State or of a State allied with it, or by a political association which acted in the interest of the German State, or a State allied with it,

is liable to imprisonment for a period of not less than three years, or for life, or to the death penalty.

/Paragraph 2

Paragraph 2

A criminal organization in the meaning of paragraph 1 is a group or organization:

(a) which has as its aim the commission of crimes against peace, war crimes or crimes against humanity; or

(b) which while having a different aim, tries to attain it through the commission of crimes mentioned under (a).

Paragraph 3

Membership of the following organizations especially is considered criminal:

(a) the German National Socialist Workers' Party (National Sozialistische Deutsche Arbeiter Partei - NSDAP) as regards all leading positions,

(b) the Security Detachments (Schutzstaffeln - S.S.),

(c) the State Secret Police (Geheime Staats-Polizei - Gestapo),

(d) the Security Service (Sicherheits Dienst - S.D)."

"Article 9

The provisions of the present Decree are applicable to criminal acts committed between 1 September 1939 and 9 May 1945."

Article 6 provides that:

"Article 6

To inform against or to hand over to the authorities of the German State, or of a State allied with it, persons wanted for a common crime is not punishable, provided the person responsible for giving information or handing over acted in the greater public or private interest."

9. Jurisdiction of Yugoslav Courts over War Crimes and Treasonable Activities

Articles 2 and 3 of the Yugoslav Law of 25 August 1945, set out the types of offences which fall within the jurisdiction of Courts acting under that Law.

"Article 2

1. As a criminal act against the people and the State is considered an act aimed at the forcible overthrow of or threat to the existing State system of Democratic Federal Yugoslavia, or any menace to its foreign security, or to the basic democratic, political, national and economic achievements of the liberation war, e.g., the Federal structure of the State, the equality and fraternity of the Yugoslav peoples, and the system of the people's authorities.

/2. As a criminal

2. As a criminal act under this Law any act outlined in the preceding paragraph directed against the security of other States with which Democratic Federal Yugoslavia has a treaty of alliance, friendship or co-operation, is punishable with due regard to the principle of reciprocity."

"Article 3

As guilty of criminal acts under Article 2, the following shall be liable to punishment:

1. Any person who undertakes an act aimed at the forcible overthrow of the people's representative body of Democratic Federal Yugoslavia or of the Federative Units, or at overthrowing the Federal or Federative Units, organs of supreme State administration, or the local organs of State administration, or at preventing these by menace from fulfilling their legal rights and duties, or at compelling them to fulfil those to the end desired by the person thus exercising force.

2. Any subject of Yugoslavia who commits an act to the detriment of the military strength, the defensive capacity or the economic power of Democratic Federal Yugoslavia, or which threatens the independence or integrity of its territory.

3. Any person who commits a war crime, i.e., who during the war or the enemy occupation acted as instigator or organizer, or who ordered, assisted or otherwise was the direct executor of murders, of condemnations to the punishment of death and the execution of such, or of arrests, torture, forced deportation or removal to concentration camps, of interning, or of forced labour of the population of Yugoslavia; any person who caused the intentional starvation of the population, compulsory loss of nationality, compulsory mobilization, abduction for prostitution, or raping, or forced conversion to any other faith; any person who under these circumstances was responsible for any denunciation resulting in any of the measures of terror or terrorization outlined in this paragraph, or any person who in these circumstances ordered or committed arson, destruction or loot of private or public property; any person who entered the service of the terroristic or police organizations of the occupying forces, or the service of any prison or concentration or labour camp, or who treated Yugoslav subjects and prisoners-of-war in an inhumane manner.

/4. Any person

4. Any person who during the war organized or recruited others to enter, or himself entered any armed military or police organization composed of Yugoslav subjects, for the purpose of assisting the enemy and fighting with the enemy against his own Fatherland, accepting from the enemy arms and submitting to the orders of the enemy.

5. Any person who during the war against Yugoslavia or against the allies of Yugoslavia, accepted service in the enemy army, or took part in the war as a fighter against his Fatherland or its allies.

6. Any person who during the war and enemy occupation entered the police service or accepted service in any organ of enemy authority, or assisted these in the execution of requisition orders for the taking of food and other goods, or in the pursuance of any other measures of force against the population of Yugoslavia.

7. Any person who organized armed revolt or took part in this, or organized armed bands or their illegal entry to the territory of the State for the purpose of effecting acts outlined in Article 2 of this Law, or any person who abandoned his place of residence and joined any armed and organized group for the commission of such acts.

8. Any person who in the country or outside, organized any association having fascist aims, for the execution of any act outlined in Article 2 of this Law.

9. Any citizen of Yugoslavia who incites a foreign State to war against his Fatherland, or to armed intervention, to economic warfare, to seizure of any property of Democratic Federal Yugoslavia, or of its subjects, to the rupture of diplomatic relations, the cancellation of international treaties, or to any interference in the internal affairs of his Fatherland, or who in any way whatsover assists any foreign State at war with Yugoslavia.

10. Any person who carries out espionage, i.e., who either hands over or steals or collects data and documents which by their content constitute any particularly guarded State or military secret for the purpose of handing such information to any foreign State, or any fascist or enemy organization, or any unknown person.

/11. Any person

11. Any person who during the war undertook any action aimed at any defensive objects or positions or any means for waging war or other war needs passing to enemy hands or being destroyed or put out of service, or the use of these being frustrated, or action resulting in the Yugoslav Army or the armies of any allied lands or any individual soldiers falling into enemy hands, or in any military enterprise or measure being hindered or endangered.

12. Any person who kills any military person or representative or person in the service of the people's authorities either when these are carrying out their official duties or because of these, or commits such act against any person of an allied or friendly State.

13. Any person who for the purposes outlined in Article 2 destroys or damages by arson or any other means any transport, building or other material, any water supply system, public warehouse or any public property."

10. Jurisdiction of the Military Government Courts Set Up in Germany

The jurisdiction of the Military Government Courts set up by General Eisenhower as Supreme Commander was defined in Article II of Ordinance No. 2* as follows:

"1. Military Government Courts shall have jurisdiction over all persons in the occupied territory except persons other than civilians who are subject to military, naval or air force law and are serving under the command of the Supreme Commander, Allied Expeditionary Force, or any other Commander of any forces of the United Nations.

"2. Military Government Courts shall have jurisdiction over:

(a) All offences against the laws and usages of war.

(b) All offences under any proclamation, law, ordinance, notice or order issued by or under the authority of the Military Government or of the Allied Forces.

(c) All offences under the laws of the occupied territory or of any part thereof."

As has been seen,** these Courts continued to exist in the British Zone, from the time when the latter came into existence until the setting up

---

* See page 132.

** See page 134.

/of the

of the Control Commission Courts, under Ordinance No. 68 of the British Zone. Paragraph 2 of Ordinance No. 68 makes the same provision as Article II, paragraph 1 of the Supreme Commander's No. 2, with the substitution of "Control Commission Courts" for "Military Government Courts", of "British Zone" for "occupied territory", and of "Commander-in-Chief" for "Supreme Commander, Allied Expeditionary Force". For purposes of greater clarity, commas have been placed at the beginning and end of the phrase "other than civilians".

Paragraph 3 of Ordinance No. 68 makes the following provision, which is similar to that of paragraph 2 of Article II of Ordinance No. 2:

"Criminal Jurisdiction

3. Control Commission Courts shall have jurisdiction to try:

(a) All offences against the laws and usages of war;

(b) All offences under any proclamation, law, Ordinance, Notice or Order issued by or under the authority of the Allied Control Council for Germany in force in the British Zone, or by or under the authority of the Supreme Commander of the Allied Forces or of the Commander-in-Chief;

(c) All offences against German law."

Paragraph 4 of Ordinance No. 68 adds a provision relating to civil jurisdiction:

"4. The Control Commission Courts shall exercise such jurisdiction in civil matters as the Commander-in-Chief may by order published in the Gazette, from time to time direct."

Articles 1 and 2 of Ordinance No. 20 of the French High Command in Germany* provide that:

"Article 1

Military Government Tribunals are competent to try all war crimes defined by international agreements in force between the occupying Powers whether the authors of such war crimes, committed after 1 September 1939, are of enemy nationality or are agents, other than Frenchmen, in the service of the enemy, and whenever such crimes have been committed outside of France or territories which were under the authority of France at the time when the crimes were committed."

"Article 2

These crimes are punishable by all the penalties which such Tribunals are empowered to pronounce, including the death penalty."

---

* See page 134.

Article 1 of Ordinance No. 36 lays down that:

"Military Government Tribunals in the French Zone of Occupation in Germany are competent, in virtue of Law No. 10 of the Allied Control Council concerning the punishment of persons responsible for war crimes, crimes against peace and crimes against humanity, to try the crimes set out in that law."

The provisions of Law No. 10 which are important in this connection are those contained in Article II, of which paragraphs 1 and 2 run as follows:

"1. Each of the following acts is recognized as a crime:

(a) Crimes Against Peace. Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(b) War Crimes. Atrocities or offences against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

(c) Crimes against Humanity. Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

(d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

"2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or

/(d) was

(d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a), if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in financial, industrial or economic life of any such country."

In the United States Zone of Germany, Military Government Courts continued to operate under Ordinance No. 2 of the Supreme Commander after establishment of the four allied Zones,* but were later supplemented by the setting up of Military Tribunals under Ordinance No. 7 of the Military Government of the United States Zone, which enactment became effective on 18 October 1946.**

Articles I and II (a) in full of Ordinance No. 7 provide that:

"Article I. The purpose of this Ordinance is to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offences recognized as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes. Nothing herein shall prejudice the jurisdiction or the powers of other courts established or which may be established for the trial of any such offences.

"Article II. (a) Pursuant to the powers of the Military Governor for the United States Zone of Occupation within Germany and further pursuant to the powers conferred upon the Zone Commander by Control Council Law No. 10 and Articles 10 and 11 of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945, certain tribunals to be known as "Military Tribunals" shall be established hereunder."

Article II of Control Council Law No. 10 which is referred to in Article I of Ordinance No. 7 has already been quoted.***

Articles 10 and 11 of the Charter of the International Military Tribunal, to which specific reference is made in Article II of Ordinance No. 7, and implicit reference in Article II, 1 (d) of

---

* See page 133.

** See page 135.

*** See page 300.

Law No. 10, makes the following provisions:

"Article 10. In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

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

In its judgment of 30 September and 1 October 1946, the International Military Tribunal came to certain decisions regarding the criminality of the Gestapo and S.D., the S.S. and the Leadership Corps of the Nazi Party;* in doing so it acted in accordance with Article 9 of its Charter which states that:

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

Certain organizations and parts of organizations having thus been declared criminal by the Nürnberg International Military Tribunal, allegations of membership in such organizations are included in the charges against many, if not most, of the defendants at present being tried at Nürnberg before Military Tribunals set up under Ordinance No. 7, and the power of these Tribunals to find an accused guilty of such membership arises from Article II (a) of that Ordinance which has been quoted above.**

---

* See British Command Paper, Cmd. pages 66-83.

** For details of the Jurisdiction of the Spruchkammern in the British and United States Zones over cases involving membership of criminal organizations, see Part II of the Report.

In trials before the Military Tribunals acting under Ordinance No. 7 the criminal nature of groups or organizations declared criminal by the International Military Tribunal cannot be questioned, and in a very similar way the ordinary Military Government Courts in the United States Zone are bound by a directive of 26 June 1946, issued by Headquarters, United States Forces, European Theatre, which contained certain new provisions as to the trial of persons accused of being participants in mass atrocities when the principal participants in such atrocities had already been convicted. A further directive was issued by Headquarters, European Theatre on 11 July 1946, and this in turn was replaced by one dated 14 October 1946, extending to General Military Government Courts the jurisdiction in this matter which had previously rested only with Intermediate Military Government Courts.

The Directive of 14 October 1946 contains in its paragraph 12 detailed provisions under the heading "Mass Atrocity Subsequent Proceedings". It is there recalled that "certain mass atrocity cases have heretofore been tried, i.e., Hadamar, Dachau and Mauthausen cases, wherein the principal participants of the respective mass atrocities were charged with violating the laws and usages of war under particulars alleging that they acted in pursuance of a common design to subject persons to killings, beatings, torture, starvation, abuses and indignities, or particulars substantially to the same effect. The courts pronounced sentence in those cases involving imprisonment and death and of necessity, in view of the issues involved therein, found that the mass atrocity operation involved in each was criminal in nature and that those involved in the mass atrocities acting in pursuance of a common design did subject persons to killings, beatings, tortures, etc." The Directive now provides, with regard to subsequent proceedings against accused other than those involved in initial or "parent" mass atrocity cases, inter alia, that: "In such trial of additional participants in the mass atrocity, the prosecuting officer will furnish the court certified copies of the charge and particulars of the findings and sentences pronounced in the parent case." Thereupon the court "will take judicial notice of the decision rendered in the parent case, including the finding of the court (in the parent case) that the mass atrocity operation was criminal in nature and that the participants therein, acting in pursuance of a common design, did subject persons to killings, beating, tortures, etc., and no examination of the record in such parent cases need be made for this purpose. In such trials of additional participants in the

/mass atrocity,

mass atrocity, the court will presume, subject to being rebutted by appropriate evidence, that those shown by competent evidence to have participated in the mass atrocity knew of the criminal nature thereof."*

A further relevant provision is made by Regulation 16 (e) of the China Theatre Regulations:**

"(e) The findings and judgment of a commission in any trial or a unit, group or organization with respect to the criminal character, purpose or activities thereof shall be given full faith and credit in any subsequent trial by that or any other commission of an individual person charged with criminal responsibility through membership in that unit, group or organization. Upon proof of membership in such unit, group or organization convicted by a commission, the burden of proof shall shift to the accused to establish any mitigating circumstances relating to his membership or participation therein."

---

* Italics inserted.

** See page 158.

P A R T II

INFORMATION ON HUMAN RIGHTS ARISING OUT OF THE RELATIONSHIP BETWEEN THE STATE AND PERSONS UNDER ITS JURISDICTION

I N T R O D U C T I O N

Encroachments by the legislature or executive of a State upon the fundamental rights and freedoms of its own subjects have rarely figured in war crimes trials, in the strict sense of the term; so far as they concern criminal courts at all they have usually formed the subject of trials of persons accused of offences against their co-nationals.

Even in the preparatory stages of the work it became apparent that the Report would not fully accomplish its purpose if it were based solely on war crimes trials and limited to a study of human rights protected by the laws and customs of war. It has therefore seemed necessary that other trials, less closely connected with the work of this Commission, should also be investigated.

A study of the legislative measures by which duly established guarantees of civic and individual rights have been destroyed, and of the acts by which a compliant judiciary and executive implemented - and frequently exceeded - those measures, would necessarily extend to the trials of quislings and traitors and also of former enemy nationals whose offences constituted violations of the human rights of their fellow-citizens.

The extent and variety of the material available in the trials of Germans for offences against other Germans, or Stateless persons, suggests that the examination of those trials should be given a foremost place, all the more so because the transcripts of their proceedings are more readily accessible than those of the other trials referred to above - a technical, but none the less, an appreciable advantage.

Accordingly, though the value of a comparative study of the trials of quislings and traitors conducted by the courts of allied countries or ex-enemy States, other than Germany, is fully recognized, the following chapter has been confined to the trials of Germans for offences committed against other Germans and Stateless persons.

This restriction is not the only one which had to be accepted. The time available has only allowed of the examination of one - albeit the most important - of the questions arising from a study of the sources surveyed, namely the extent to which violations of the human rights and fundamental freedoms in question are covered by the jurisdiction of the International Military Tribunal, the Military and the Military Government Courts, and the German Courts that have functioned since the occupation of Germany.

To clear the ground it has first been necessary to consider the nature of the courts and of the law which they apply and to distinguish between the International Military Tribunal which applies international law and the

/Occupation

Occupation Courts and German Courts whose jurisdiction is based on municipal law.

The analysis, given in the following chapter of the first Nurnberg Trial, - so far as it dealt with offences committed by Germans or Stateless persons - shows, in the first place, to what extent violations of human rights have been brought within the notion of crimes against humanity. It makes it clear that even a wider interpretaion of that notion than was given in the first Nurnberg Indictment would only partly cover the violations of civic and individual rights committed under the Nazi Regime. Without attempting any precise definition, it can be said that in the Nurnberg trial, and also in the trials before the above-mentioned municipal courts, it was mainly violations of the rights to life and personal liberty, and to a lesser extent violations of property rights that were treated as crimes against humanity. These violations were directed against political, racial and religious minorities. On the other hand, - to mention the most important - violations of political rights guaranteed by the Weimar Constitution, as by any other democratic constitution, which affected all citizens without exception, were considered outside the definition of crimes against humanity.

It will be shown in the following part of the Report that the notion of crimes against peace (in particular, conspiracy to commit such crimes) as conceived by the Nurnberg Prosecution, covers a far wider field and comprises violations of civic and individual rights which do not constitute crimes against humanity.

However, the restrictive interpretation given by the Tribunal to the provisions of the Charter relating to the common plan or conspiracy reduced the legal basis for the punishment of violations of human rights of German citizens and Stateless persons exclusively to such violations as could be classified as crimes against humanity.

The opinion expressed in some quarters that every misuse of national sovereignty, denying the rights of individuals, was a matter of international concern and punishable under international law, had already been rejected by the authors of the Charter of the International Military Tribunal. It is not the task of this Report to determine whether the jurisdiction conferred on the International Military Tribunal by the Agreement of 8 August 1945 and the Charter covers all acts of the so-called major war criminals for which a criminal responsibility exists under international law. The fact remains that only crimes against humanity which were committed in connection with crimes against peace, or war crimes, are covered by this jurisdiction. The following Chapter shows which were the

violations of civil and individual rights taken into account by the Tribunal. Finally, it contains a survey of the municipal courts established in Germany, exercising jurisdiction over offences similar to those dealt with by the International Military Tribunal, and of the law applied by these courts.

It has, however, been felt that an examination of the trials held by these courts could not be usefully undertaken at this time, and had better be postponed to a later period. For the most important of the trials known as "Subsequent Proceedings" at Nurnberg are still proceeding, and a representative selection of transcripts of the many trials held before Military Government Courts and German Courts, will only be available some months hence.

To mention only some of the points which would need consideration in the course of such an examination, it is observed that in three of the Indictments which have so far been submitted to the Military Tribunals at Nurnberg and on which judgment has not yet been pronounced, the notion of crimes against peace, (in particular conspiracy to commit such crimes) has been interpreted in the same way as in the first Nurnberg Indictment, - i.e. as comprising violations of civic and individual rights during the earlier stages of the Nazi regime in Germany - although the International Military Tribunal rejected that interpretation.

It will be of interest to see how far the Military Tribunals follow the authority of the International Military Tribunal in regard to such charges, bearing in mind that they do not apply the Charter of the International Military Tribunal, but Control Council Law No. 10 which, however, defines "crimes against peace" in substantially the same way as the Charter.

Great importance will also attach to trials dealing with crimes against humanity. In regard to these crimes the law applied by the above-mentioned courts differs from the Charter of the International Military Tribunal. Crimes against humanity as defined by Control Council Law No. 10 - the most important of the enactments applied by these courts - are not necessarily connected with crimes against peace or with war crimes; in the words of General Telford Taylor they were given an "independent status".*

An examination of the trials in which Control Council Law No. 10 and similar laws have been applied should assist in clarifying the scope of the conception of crimes against humanity and in differentiating

---

* "Domestic Law and the Preservation of Peace". Address delivered by Brigadier General Telford Taylor at the V^me Congres International de Droit Penal at Geneva on 28 July 1947.

/between those

between those and common crimes, the practical importance of this distinction being that the provisions of Control Council Law No. 10 which exclude the benefits of any statute of limitation, pardon or amnesty granted under the Nazi Regime, apply only to the former category of crimes.

Some hundred charges of great variety, many of them essentially different from those submitted to the International Military Tribunal, have been examined by the municipal courts. The atrocities and persecutions dealt with at the trial of the major war criminals were, as a rule, the effect of laws or orders which could be traced back to the highest authorities of the Nazi hierarchy. Atrocities adjudicated upon in the other courts have been, in many cases, of a different type, the role played by the Nazi executive being passive and consisting in the withdrawal of public protection from certain groups of citizens. It was the opportunity thus offered which rendered possible many offences committed solely for the private ends of the perpetrators. Even the material at present available shows that considerable doubt exists as to whether cases of this sort which - so far as concerns the criminal's motives cannot be distinguished from common crime - ought to be treated as crimes against humanity.

The above does not purport to be an exhaustive enumeration of the possibilities which might be offered by an examination of the trials before the municipal courts established in Germany. Among other questions which might present themselves during such an examination would be, for instance, the extent to which retroactive laws had to be relied on in the prosecution of crimes against humanity.

An examination of these and other related problems could, it is thought, be usefully undertaken in conjunction with the study of the jurisdiction over violations of rights of individuals for which their national Government is responsible.

It must, however, be borne in mind that hitherto the Nurnberg Tribunal alone has dealt with the question which of these violations are offences under international law and subject to the jurisdiction of an international court, and that the tribunals referred to in the preceding paragraphs are municipal courts applying municipal laws. A comparison of the practice of these courts with that of courts exercising a similar jurisdiction and established in allied and ex-enemy countries, would, however, reveal the principles which are common to all these countries.

CHAPTER I

JURISDICTION OVER VIOLATIONS OF HUMAN RIGHTS OF GERMAN CITIZENS AND STATELESS PERSONS COMMITTED WITHIN THE TERRITORY OF THE GERMAN REICH

A. The International Military Tribunal for the Trial of German Major War Criminals

Violations of human rights of German citizens and Stateless persons, for which the National Socialist Regime is considered responsible, formed the subject matter of the trial before the International Military Tribunal at Nurnberg; they also form the subject of a number of trials which are being held before the municipal courts (military as well as civil) established in Germany and Austria by the four occupying Powers; and they are being dealt with by the ordinary German courts.

The International Military Tribunal, created by the Agreement of 8 August 1945, differs in its character, in its jurisdiction and in the law which it applied from the other courts which have been concerned with those violations of human rights that are of interest in this connection. For this reason, and in view of its outstanding importance, it is proposed, first of all, to devote a separate chapter to the Nurnberg trial insofar as it was concerned with violations of human rights of German citizens and Stateless persons.

1. The International Character of the Tribunal

The Nurnberg Tribunal is an International Tribunal. It came into existence by virtue of an Agreement between the Governments of the United Kingdom, the United States of America, the Union of Soviet Socialist Republics and the Provisional Government of the French Republic. It originated, in fact, like any other international court or tribunal, in an international treaty.

The great majority of writers who deal with the Nurnberg Trial have never questioned the international character of the Tribunal.* It has, however, been suggested** that the Nurnberg Tribunal can only in a formal sense be considered as an international tribunal and that, in substance, it is a municipal tribunal of extraordinary jurisdiction, which

---

* Cf. Lord Wright - War Crimes under International Law: The Law Quarterly Review, Vol. 82 (January 1946), p. 40 et seq; G.A. Finch: The Nurnberg Trial and International Law - The American Journal of International Law Vol. 41 (January 1947), p. 20 et seq; Quincy Wright: The Law of the Nurnberg Trial - The American Journal of International Law, Vol. 41, (January 1947), p. 38 et seq; H. Kelsen: "Will the Nurnberg Trial constitute a Precedent?" - International Law Quarterly, Vol. I, No. 2, (1947), p. 153, et seq.

** G. Schwarzenberger: "The Judgment of Nurnberg" - Tulane Law Review, Vol. XXI (March 1947), p. 329, et seq.

/the four Powers,

the four Powers, parties to the Agreement of 8 August 1945, share in common. It has been argued that by debellatio the Allies became the joint sovereigns of Germany and that "little importance need be attached to the circumstance that the joint sovereigns exercised their jurisdiction as the fountain of law and justice in Germany by an international treaty; for this mode of co-ordinating their sovereign wills is not so much determined by the object of their joint deliberations as by the character of the joint sovereigns as four distinct subjects of international law".*

The municipal character of the Tribunal, the argument continues, could hardly be questioned, had it been established by one State after this State alone had conquered Germany instead of four victorious Powers which combined their efforts towards the same end.**

The view that it was the intention of the parties in substance to establish joint military tribunals under municipal law rather than a truly international tribunal has been inferred chiefly from a statement of Mr. Justice Jackson,*** who declared in the course of the Nurnberg trial:

> "One of the reasons this (Tribunal) was constituted as a military tribunal instead of an ordinary court of law was to avoid the precedent-creating effect of what is done here on our own law and the precedent control which would exist if this were an ordinary judicial body."****

It has been pointed out that "if the Tribunal had been conceived by the Powers as an international tribunal there was no need to guard either against precedent control or against the precedent-creating effect of the judgment on the municipal law of the four Powers. If, however, the Tribunal was a joint tribunal under municipal law and had not been given the status of an extraordinary tribunal by being labelled a military tribunal, it could at least have been argued that the Judgment of the Tribunal had such effects."*****

The present report seeks to show no more than that, in the opinion of the great majority of the leading writers on the subject, the Nurnberg Tribunal is to be considered as an international tribunal, but that this

---

* G. Schwarzenberger: op.cit, p. 334.

** G. Schwarzenberger: op.cit, p.334.

*** G. Schwarzenberger: op.cit, p.334.

**** Quoted by G. Schwarzenberger, p.333.

***** G. Schwarzenberger, op.cit, p.334.

opinion has been contested. Without assuming to decide a question which, to some extent, is controversial, it is pointed out that it was not the Control Council for Germany but the Governments of the United States of America, Great Britain, France and the Soviet Union which established the Tribunal* and appointed its members.**

That it was not the intention of the parties to the Agreement of 8 August 1945 to create "joint military tribunals under municipal law" seems to be shown by the Preamble of the Agreement wherein the four signatories declared that they were acting (not as the sovereigns over the former German territory but) "in the interest of all the United Nations."***

In addition, it has been stressed that the Agreement makes no difference between Germany whose national government had been abolished and replaced by a condominium government of the four Occupant Powers, and the other European Axis States over which the signatories had not assumed sovereign legislative power. The Agreement was concluded - not for the prosecution of German war criminals only, but "for the prosecution of European Axis war criminals."**** - It was an international treaty which expressly denoted the tribunal created by it as an "international" tribunal and which was concluded not only by the four Occupying Powers, but also by the many other United Nations which adhered to it, after being invited in Article 5 of the Agreement to do so.*****

2. The Jurisdiction of the Tribunal

The judgment of the International Military Tribunal derives the Tribunal's jurisdiction from two different sources. It states: "the making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world ..."

"The signatory Powers created this Tribunal, defined the law it was to administer and made the regulations for the proper conduct of the trial. In doing so they have done together what anyone of them might have done singly; for it is not to be doubted that any nation has the right thus to

---

* Art. I of the Agreement of 8 August 1945 ("...after consultation with the Control Council for Germany...")

** Article 2 of the Charter.

*** H. Kelsen, op.cit, p.168.

**** H. Kelsen, op.cit. p.168.

***** H. Kelsen, op.cit, p.168.

/set up

set up special courts to administer law. With regard to the constitution of the court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law"*

Thus the jurisdiction of the Tribunal is based, in the first instance, on the joint sovereignty of the four Allied Powers over Germany. By the Berlin Declaration of 5 June, 1945, the four Allied Powers, then in complete control of Germany, 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". The purpose of this measure was "to make provision for the cessation of any further hostilities on the part of the German armed forces for the maintenance of order in Germany and for the administration of the country...."**

It is held that a State may acquire sovereignty over a territory by declaration of annexation after subjugation of the territory, if that declaration is generally recognised by the other States of the world; and it is a fact that the Berlin Declaration has been recognised not only by the United Nations but also by neutral States.*** "This Declaration, however, differed from the usual declaration of annexation in that it was by several States, its purposes were stated, and it was declared not to effect the annexation of Germany."****

It has been argued that the greater right comprises the lesser one, and that therefore a State or States which are in a position to annex a territory appear to be entitled to declare the lesser policy of exercising sovereignty temporarily and for specific purposes. The Berlin Declaration has been constructed in this way. The exercise of powers of legislation, adjudication and administration in Germany by the four Allied Powers is thus permissible under international law and limited only by the rules of international law applicable to sovereign States in territory they have subjugated. From this it follows that the parties to the Agreement of 8 August 1945, had the power to enact the Charter annexed to the Agreement as a legislative act for Germany, provided they did not transgress fundamental principles of justice which even a conquerer ought to observe towards the inhabitants of annexed territory.*****

---

* Judgment, p.38

** Preamble of the Declaration of 5 June 1945, quoted by Quincy Wright, op.cit, p.50.

*** Quincy Wright op.cit. p.50; cf. A. Finch, op.cit, p.22; G. Schwarzenberger, op.cit, p.339, etc.

**** Quincy Wright, op.cit, p.50.

***** Quincy Wright, op.cit, pp.50-51.

/In the passage

In the passage of the Judgment quoted above,* reference is further made to the international basis of the Tribunal's jurisdiction. It has been pointed out that the words of the Judgment which are relevant in this connection: "...for it is not to be doubted that any nation has the right thus to set up special courts to administer law"** is subject to certain qualifications. For international law limits the criminal jurisdiction of a State; there is no doubt, however, that every State has the authority to set up special courts to try any person within its custody who commits war crimes - at least if such offences threaten its security.*** It is believed that this jurisdiction is broad enough to cover the jurisdiction over violations of human rights of German citizens and Stateless persons which the Tribunal assumed.****

A third source of the jurisdiction of the International Military Tribunal is suggested by the Preamble of the Agreement of 8 August 1945. It says that the "signatories" when concluding the Agreement, were "acting in the interests of all the United Nations", and Article 5 of the Agreement declares that "any Government of the United Nations may adhere to this Agreement". It is held by Quincy Wright ***** that also Article 5 of the Moscow Declaration and Article 2 (6) of the Charter of the United Nations support to some extent the idea that the Four Powers, acting in the interest of the United Nations, had the right to legislate for the entire community of nations. He points out that the Charter of the United Nations assumed that the Organization could declare principles binding on non-members. It is, in his view, therefore possible that the United Nations which created the Agreement of 8 August 1945, intended to act for the community of nations as a whole, thus making universal international law.

The Judgment of the International Military Tribunal does not make any reference to this conceivable source of its jurisdiction. Quincy Wright, too, is of the opinion that it is not necessary to employ the source, since the right of the parties to the Agreement to give the Tribunal the jurisdiction which it asserted is amply supported by the position of these powers as the Government of Germany or by the sovereign right of each of them to exercise universal jurisdiction over the offences stated.

---

* Judgment, p.38. (cf. p.312 note 2, above).

** Idem.

*** Quincy Wright, op.cit, p.49.

**** As this part of the Report deals exclusively with the jurisdiction over violations of human rights of German citizens and Stateless persons no attempt has been made here to examine the wider question of the jurisdiction conferred by the Charter in its full extent. (Cf. however, Part I, Chapter I, B. of the Report. As to the Universality of Jurisdiction over War Crimes, Cf. H. Lauterpacht, The Law of Nations and the Punishment of War Crimes. The British Year Book of International Law, 1944, (Vol.21), p.63 et. seq. Quincy Wright, op. cit, p.45 and the authorities quoted there.

***** Op.cit, p. 51

3. The Law applied by the Tribunal

Article 6 of the Charter annexed to the Agreement of 8 August 1945, enumerates the offences falling within the Tribunal's jurisdiction. The provisions of Article 6 are in the words of the Judgment, "binding upon the Tribunal as the law to be applied to the case".*

As early as January 1946, Lord Wright expressed the view** that it was not the Agreement which gave the acts defined in Article 6 of the Charter the character of offences, but that these acts were placed by the four Powers under the jurisdiction of the Tribunal because they were considered as offences already under existing law. He continued: "On any other assumption the court would not be a court of law but a manifestation of power." The Judgment expresses the same view: "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 an expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law."***

It is not necessary to deal here with those parts of the Judgment which set out that the provisions of the Charter concerning crimes against peace are merely declaratory of international law as it existed before the execution of the Agreement of 8 August 1945; for although the violations of human rights which are alone of interest in this part of the Report, - i.e., violations of human rights of German citizens and Stateless persons - were referred to in Count One of the Indictment, the restrictive interpretation given by the Judgment to the provisions of the Charter relating to the "common plan or conspiracy"**** increases the importance of those provisions which concern crimes against humanity as a legal basis for the punishment of violations of human rights of German citizens and Stateless persons.

Article 6 (c) of the Charter***** provides that crimes against humanity "committed against any civilian population before or during the war" - "whether or not in violation of the domestic law of the country where perpetrated" fall within the jurisdiction of the International Military Tribunal if they are connected "with any crime within the jurisdiction of the Tribunal" (that is crimes against peace, or war crimes).

---

* Judgment, page 3.

** "War Crimes under International Law, The Law Quarterly Review, Volume 62 (January, 1946), page 41.

*** Judgment, page 38.

**** Cf. below, pp. 316 et seq.

***** As amended by the Protocol of 6 October 1945, cf. Part I, Chapter I, A of the Report.

It is obvious that these provisions were chiefly meant to extend the jurisdiction of the Tribunal to acts of inhumanity which were committed by the Nazi regime against Germans and Stateless persons.

The authorities differ as to whether acts mentioned in Article 6 (c) of the Charter constitute crimes under international law when undertaken in a State's own territory against its own nationals. Quincy Wright points out* that acts of this kind have repeatedly led to a "humanitarian intervention" by other States. He further refers to the numerous Conventions which place States under an obligation to respect certain fundamental rights of minorities, backward peoples, workers and other persons within their jurisdiction. He mentions finally that the acts which constitute crimes against humanity have repeatedly been the subject of extradition treaties and that the States have thus recognized the duty of co-operating in bringing to justice persons guilty of such crimes.

In opposition to these and other weighty arguments, it has been contended that there is no rule of international law, customary or conventional, establishing criminal responsibility for every misuse of national sovereignty. In particular, those of the acts mentioned in Article 6 (c) of the Charter which were committed in peace time are, according to this view, covered by the conception of exclusively domestic jurisdiction.**

The International Military Tribunal examined with great care whether the crimes against humanity charged against the defendants were committed in connection with or in furtherance of a policy of planning and waging aggressive war or the perpetration of war crimes as defined in Article 6 (b) of the Charter, and the Tribunal declined "to make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter."*** As has been said above**** every State is entitled under international law, to set up special courts to try any person within its custody who commits war crimes - at least if such offences threaten its security; crimes against humanity committed in connection with crimes against peace, or war crimes in the technical

---

* Op.cit., page 43.

** G.A. Finch, op.cit. page 23. G. Schwarzenberger, op.cit. pages 353 and 354

*** Judgment, page 65.

**** Page 313 above.

/sense of the

sense of the word, appear to fall within this category of offences.*

It can be said, therefore, that at the time of the creation of the Charter, an international basis existed for the jurisdiction over crimes against humanity connected with crimes against peace or war crimes,** and that the Tribunal confined itself to the jurisdiction over this type of crimes against humanity.

4. Violations of Human Rights of German Citizens and Stateless Persons referred to in Count One of the Indictment, (The Common Plan or Conspiracy.)

Violations of human rights of German citizens and Stateless persons are mentioned in Count I of the Indictment*** in connection with the measures taken by the Nazis in order first to seize totalitarian control of Germany and then to consolidate their position of power.

Under the heading "The acquiring of totalitarian control of Germany: Political", the following is stated:

> "In order to accomplish their aims and purposes, the Nazi conspirators prepared to seize control over Germany to assure that no effective resistance against them could arise within Germany itself."

In this connection, it is said that a few weeks after Hitler's appointment as Reich Chancellor the clauses of the Weimar Constitution guaranteeing personal liberty, freedom of speech, of the Press, of association and assembly were suspended, that the Nazis shortly afterwards secured the passage by the Reichstag of a "law for the Protection of the People and the Reich" giving Hitler and the members of his cabinet plenary powers of legislation and that again a short time later all political parties except the Nazi Party were prohibited.

---

* Cf. however; "Note on the Nurnberg Trials", signed P.D., The Law Quarterly Review, Volume 62, July 1946, pages 230 and 231, where it is said that the provisions of Article 6 (c) of the Charter which consider crimes against humanity committed in connection with crimes against peace or war crimes as crimes under international law are "the only element of novelty in the law" (that is in the Charter). Cf. also, G. Schwarzenberger, op.cit, page 351 et.seq.

** cf. page 314, note 2 above

*** Indictment, Count I, Section IV (D) and (E), Proceedings.

The Indictment goes on to describe how the Nazis set about the "consolidation of their position of power within Germany, the extermination of potential internal resistance and the placing of the German nation on a military footing". This policy included the reduction of the Reichstag to a body of Nazi nominees; the curtailment of the freedom of popular elections, the transformation of the states, provinces and municipalities, which had formerly exercised semi-autonomous powers, into hardly more than administrative organs of the central government; the purge of civil servants; and the restriction of the independence of the judiciary, which was rendered subservient to Nazi ends". "In order to make their rule secure from attack and to instil fear in the hearts of the German people", the Nazis established "a system of terror against opponents and supposed or suspected opponents of the regime". They imprisoned such persons without judicial process, holding them in "protective custody" and concentration camps, and subjected them to persecution, degradation, despoilment, enslavement, torture and murder. In addition to the suppression of distinctively political opposition, certain other movements and groups, which the Nazis "regarded as obstacles to their retention of total control in Germany and to the aggressive aims of the conspiracy abroad" were suppressed. These were, according to the Indictment, in particular the free trade unions, the Christian churches, and certain pacifist groups. The free trade unions were destroyed by confiscating their funds and properties, persecuting their leaders, prohibiting their activities, and supplanting them by an affiliated Party organization. With these and other measures, "any potential resistance of the workers was frustrated and the productive labour capacity of the German nation was brought under the effective control" of the Nazis. To eliminate the Christian churches in Germany a programme of persecution of priests, clergy and members of monastic orders, who were thought opposed to the purposes of the Nazis, was pursued, and church property was confiscated. "Particularly relentless and cruel" was the persecution of pacifist groups, including religious movements dedicated to pacifism. Among the measures which were to serve the Nazis for the consolidation of their position in Germany, the persecution of the Jews is also mentioned. The Nazis embarked on a policy of relentless persecution of the Jews designed to exterminate them. The annihilation of the Jews became indeed an official State policy, carried out both by official action and by incitement to mob and individual violence. The programme of action against the Jews included disfranchisement, stigmatization, denial of civil rights, violence, deportation, enslavement, enforced labour, starvation, murder and mass extermination. It was further alleged in the Indictment that "in order to make the German people amenable to their will and to prepare them psychologically for war", the Nazis reshaped the educational

/system

system and particularly the education and training of the German youth, imposed a supervision of all cultural activities and controlled the dissemination of information and the expression of opinion within Germany as well as the movement of intelligence of all kinds from and into Germany.

Under the heading "The Acquiring of Totalitarian Control in Germany: Economic", the Indictment next describes how the Nazis, after they had gained political power "organized Germany's economy to give effect to their political aims"; and it proceeds to show how the Nazis used the political and economic control of Germany, which they had gained by innumerable violations of individual and civic rights guaranteed by the Weimar Constitution, for the realization of their aggressive plans.

In the submission of the Indictment, the measures adopted by the Nazis in furtherance of their intentions to acquire totalitarian control of Germany and then to consolidate their power within that country, are to be considered as "steps deliberately taken to carry out the common plan".* It follows that all violations of civil and individual rights which enable the Nazis to gain and retain power in Germany, are covered by Article 6 (a) of the Charter.

It is now proposed to examine the attitude of the Tribunal towards the above-mentioned submissions presented by the Prosecution.

The Judgment begins by reviewing the growth of the Nazi Party "to a position of supreme power from which it controlled the destiny of the whole German people and paved the way for the alleged commission of all the crimes charged against the defendants."**

It examines the origin and aims of the Nazi Party and shows that the Party programme, which was proclaimed in February 1920, and remained unchanged until the dissolution of the NSDAP in 1945, foreshadowed the atrocities against the Jews, the measures for large-scale rearmament, the seizure of Austria and Czechoslovakia, and the war.***

Continuing, the Judgment speaks of the political activities of the Party and of the leaders of the NSDAP who, as early as their first election campaigns, hardly troubled to conceal their intention of destroying the democratic structure of the Weimar Republic and replacing it by a totalitarian regime "which would enable them to carry out their avowed policies without opposition."****

---

* Judgment, page 43.

** Judgment, page 3.

*** Judgment, page 4.

**** Judgment, page 5.

/The first steps

The first steps towards the realization of this aim were taken within a few weeks of Hitler's appointment as Reich Chancellor. In the same section* the Judgment draws attention to the Reichstag fire, which was used by Hitler and his Cabinet as a pretext for passing a decree suspending the constitutional guarantees of freedom; and points out that, soon afterwards on the basis of this decree, a substantial number of members of the parliamentary opposition was taken into "protective custody", with the final result that the Reichstag, intimidated by these and similar measures, passed the so-called "Enabling Act" which gave the Hitler Cabinet full legislative powers including the power to deviate from the Constitution.

In the paragraphs which follow the Judgment describes the measures which served the NSDAP for the consolidation of their position of power within Germany.** In this connection it recalls the violations of civic and individual rights which were set forth in the Indictment.*** The Judgment evidently considers these violations to be part of a policy which aimed at the elimination of all opposition, the complete control of Germany's political and economic life, the uniting of the people in support of the Nazi Government's policies (in particular the policy of large-scale rearmaments) and the organization of the nation's resources so as best to serve the purposes of war. Yet, in this part of the Judgment, it already becomes clear that the Tribunal does not share the opinion of the Prosecution, which regarded any participation in these policies and the resulting violations of civic and individual rights as constituting evidence of a participation in a conspiracy declared criminal under Article 6 (a) of the Charter.

The history of the Nazi Party and the steps which it took first to seize and then to retain power in Germany, are reviewed by the Judgment merely in order to show "the background of the aggressive war and war crimes charged in the Indictment".**** When this has been done, and only then, the Judgment turns to "the question of the existence of a common plan and the question of aggressive war."***** It is only after it has examined the activities of the Nazi Party in Germany that the Tribunal turns to Counts One and Two of the Indictment and to the facts which appear

---

* Judgment, page 6.

** Judgment, page 7 et seq.

*** Section IV (D), (E), cf. page 317 et seq. above.

**** Judgment, page 3.

***** Judgment, page 13.

/relevant in

relevant in connection with them: "The Tribunal now turns to the consideration of the crimes against peace. Count One of the Indictment charges the defendants with conspiring or having a common plan to commit crimes against peace. Count Two of the Indictment charges the defendants with committing specific crimes against peace .... It will be convenient to consider the question of the existence of a common plan and the question of aggressive war together ..."*

The Judgment goes on to observe that in "Mein Kampf", Hitler had already stated the aims of his foreign policy, which were later to lead to war. It next deals with the all-important meetings of 5 November 1937, 23 May 1939, 22 August 1939 and 23 November 1939, where Hitler disclosed his concrete plan of aggression to his confidants.**

The Judgment then discusses the several aggressive acts and aggressive wars undertaken by the Nazis, the invasion of Austria being the first and the war against the United States of America the last.***

In the section dealing with "The Law as to the Common Plan or Conspiracy"**** the Judgment pronounces in general terms its opinion on the concept of the Prosecution referred to above.***** Summarizing the argument of the Prosecution, it declares: "The Prosecution says in effect, that any significant participation in the affairs of the Nazi Party or Government is evidence of a participation in a conspiracy that is in itself criminal";****** and it continues: "Conspiracy is not defined in the Charter but in the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning to be criminal must not rest merely on the declarations of a Party programme such as are found in the twenty-five points of the Nazi Party announced in 1920, or the political affirmations expressed in "Mein Kampf" in later years. The Tribunal must examine wether a concrete plan to wage war existed, and determine the participants in that concrete plan."*******

---

* Judgment, pages 12 and 13.

** Judgment, pages 14-17.

*** Judgment, pages 17-36.

**** Judgment, pages 42 et seq.

***** Page 319 above.

****** Judgment, page 43.

******* Judgment, page 43.

The Judgment then observes once more that the seizure of power by the Nazi Party and the subsequent extension of its power over all spheres of Germany's economic and social life must be remembered when the later plans for waging wars are examined,* and it declares: "That plans were made to wage wars as early a. 5 November 1937** and probably before that, is apparent..."*** In the opinion of the Tribunal, however, it is not necessary to decide "whether a single master conspiracy to the extent and over the time set out in the Indictment has been proved..." "But the evidence establishes with certainty the existence of many separate plans rather than a single conspiracy embracing them all".****

The tie which binds the defendants together is, in the submission of the Indictment, the common plan or conspiracy to commit crimes against peace.***** All the defendants were charged in the Indictment with this offence, and it was moreover the only offence alleged against all the defendants.

An examination of the parts of the Judgment which deal with the individual defendants shows that, first of all, Goering, Keitel, Raeder and Neurath were found to be participants in a concrete plan to wage war. Goering, Raeder and Neurath took part in the so-called Holzach Conference of 5 November 1937****** where Hitler spoke of the problem of living space and of the annexation of Austria and Czechoslovakia, which would remove "any threat from the flanks in case of a possible advance westwards", and moreover strengthen the German war potential. The detailed statement of Hitler's objects and the definite time-table given at this Conference make it clear that this statement was not just a repetition of the rather indefinite aims announced so often before; the latest dates for the annexation of Austria and Czechoslovakia were now laid down by Hitler as falling between 1943 and 1945 at the latest.*******

---

* Cf. Judgment, page 3, and page 320 above.

** The first of the meetings mentioned on page 320 above in which Hitler disclosed his concrete plans of aggression.

*** Judgment, page 43.

**** Judgment, page 43.

***** It is not necessary to discuss here the opinion of the Prosecution concerning the conspiracy to commit war crimes and crimes against humanity which has been rejected by the Tribunal; cf. however, Judgment, page 44, and Part I, Chapter I, B of the Report.

****** Cf. pages 320 and 321 above and Judgment, pages 84, 111 and 125.

******* Judgment, page 16.

Keitel was present at the Conference of 23 May 1939* when Hitler announced his decision "to take Poland at the first suitable opportunity".** Participation in the above-mentioned conference*** constitutes only one of the grounds on which the four above named defendants were found guilty on Count 1. However, in several cases where defendants were declared not guilty under Count 1, the Tribunal mentions expressly that they had not taken part in any of those conferences,**** and shows in this way the importance which it attached to this point. Yet it must be noted that Hess, Ribbentrop, Rosenberg and Jodl were found guilty on Count 1 for different reasons, none of them having been present at any of these conferences.***** The remaining defendants were found not guilty on Count 1.

It is shown with the greatest possible clarity in the part of the Judgment which deals with Frick, that in the opinion of the Tribunal the responsibility for violations of human rights of German citizens committed during the period of seizure of power by the NSDAP and the consolidation of its position in Germany cannot be considered as participation in a conspiracy within the meaning of Article 6 (a) of the Charter.

Frick took over the office of Minister of the Interior in the Cabinet formed by Hitler in 1933, and it cannot be doubted that he was largely responsible for the previously mentioned violations of civic and individual rights of German citizens. In regard to these the Judgment says: "...The new Minister of the Interior immediately began to incorporate local governments under the sovereignty of the Reich. The numerous laws he drafted, signed and administered abolished all opposition parties and prepared the way for the Gestapo and their concentration camps to extinguish all individual opposition. He was

---

* Cf. pages 320 and 321 above.

** Judgment, page 91.

*** Pages 320 and 321 above.

**** Cf. Judgment, page 99 (Frick); page 100 (Streicher); page 107 (Doenitz); page 128 (Bormann).

***** As regards Hess, the Judgment says, inter alia, ...Hess was Hitler's closest personal confidant; their relationship was such that Hess must have been informed of Hitler's aggressive plans when they came into existence (Judgment, page 87). Ribbentrop's participation in concrete plans is proved by his role in the diplomatic activity preceding the aggression against Poland (Judgment, page 89). In the case of Rosenberg it has been proved that he was one of the originators of the plan for attack on Norway (Judgment, page 95) and in Jodl's case his participation in the plan concerning the aggression against Norway, Greece, Yugoslavia, and Russia (Judgment, page 117).

largely responsible for the legislation which suppressed the trade unions, the Church, the Jews. He performed his task with ruthless efficiency".* It is nevertheless in accordance with the notion of conspiracy, as defined by the Judgment, that he was not found guilty on Count 1. Thus the Judgment continues: "Before the date of the Austrian aggression Frick was concerned only with domestic administration within the Reich... Consequently, the Tribunal takes the view that Frick was not a member of the common plan or conspiracy to wage aggressive war as defined in this Judgment."**

The Judgment arrives at a similar conclusion when dealing with the "Leadership Corps" of the Nazi Party, the Gestapo and S.D., and the S.S. It was, in the words of the Judgment, "the primary purposes of the Leadership Corps from its beginning.... to assist the Nazis in obtaining and, after 30 January 1933, retaining control of the German State."*** In its examination of the detailed activities of this organization, the Judgment states, inter alia, that it was one of the tasks of the Leadership Corps to ensure the highest possible proportion of "Yes" votes in the plebiscites, and that high ranking political leaders were engaged in collaboration with the Gestapo and S.D., in tracking down political opponents, many of whom were arrested and deported to concentration camps.**** Continuing, the Judgment declares: "These steps which relate merely to the consolidation of control of the Nazi Party are not criminal under the view of the conspiracy to wage aggressive war which has previously been set forth."***** This is one of the reasons why persons had ceased to hold the positions enumerated in the Judgment prior to 1 September 1939, did not fall within the group of members of the Leadership Corps, which has been declared criminal.******

The view adopted in regard to the Leadership Corps applies, mutatis mutandis, in the cases of the Gestapo and S.D. and the S.S. The participation of these organizations in the so-called consolidation of the Nazi Party's position in Germany is, in the opinion of the

---

* Judgment, pages 98 and 99.

** Judgment, page 99. In view of his activities concerning the annexation of Austria, the Sudetenland, Memel, Danzig, the Eastern Territories, etc., Frick was found guilty on Count 2 (Crimes against Peace).

*** Judgment, page 68.

**** Judgment, page 68.

***** Judgment, page 68.

****** Judgment, page 71.

Tribunal, not less important than that of the Leadership Corps. In this case, again persons who resigned their relevant functions before 1 September 1939, did not fall within the groups declared criminal, for the same reasons as were set out in the case of the Leadership Corps.*

A view deviating from the opinion of the Judgment, discussed in the preceding paragraphs, appears to be represented in the "Dissenting Opinion" of the Soviet member of the International Military Tribunal Major-General Jurisprudence I. T. Nikitchenko. Dealing with "The Unfounded Acquittal of Defendant von PAPEN"** the learned judge begins with summarizing the facts which, in his opinion, show von Papen's responsibility. He points out, inter alia, that Papen revoked Bruening's order dissolving the S.S. and S.A., "thus allowing the Nazis to realize their programme of mass terror;" that "by the application of brute force (he) did away with the Social-Democratic Government of Braun and Severing"; he "participated in the purge of the State machinery of all personnel he considered unrealiable from the Nazi point of view; on 21 March 1933, he signed a decree creating special political tribunals"; he also signed "an order granting amnesty to criminals whose crimes were committed in the course of the 'national revolution'."

From these and other facts the learned judge concludes that "von Papen actively aided the Nazis in their seizure of power"; and "used both his efforts and his connections to solidify and strengthen the Hitlerian terroristic regime in Germany...."

As von Papen was only charged under Counts 1 and 2, it is obvious that he was considered by the Soviet Judge as having participated in the conspiracy to commit crimes against peace.

The opinion of the Soviet member of the International Military Tribunal that the responsibility for violations of civic and individual rights of German citizens, which occurred in the period of consolidation of the Party's position in Germany, is to be treated as participation in a conspiracy within the meaning of Article 6 (a) of the Charter, can also be deduced from Section V, "Incorrect Judgment With Regard to the Reich Cabinet"*** of the "Dissenting Opinion". After it has been stated that the Reich Cabinet was "the directing organ of the State with a direct and active role in the working out of the criminal enterprises", the legislative activities of the Cabinet which violated civic and individual

---

* Judgment, pages 75 and 79.

** Judgment, pages 137-8.

*** Judgment, page 142 et seq.

/rights

rights guaranteed by the Weimar Constitution are reviewed. The following enactments and measures are mentioned, inter alia: the decrees ordering the confiscation of the property of all communistic and social-democratic organizations, respectively; the law of the "Reconstruction of the Reich", whereby democratic elections were abolished for both central and local representative bodies; the previously mentioned Law of 7 April 1933, and others whereby politically unreliable persons were removed from Government service; the destruction of the free trade unions; the creation of the Gestapo and concentration camps; the Nurnberg laws against the Jews, etc.

It is in view of these activities, that, in the opinion of the Soviet member of the International Military Tribunal the Reich Cabinet ought to be declared a criminal organization.

However, the "Dissenting Opinion" deals - apart from the case of HESS where the death penalty is considered more appropriate than the sentence passed - exclusively with accused persons who were acquitted. No dissenting opinion is expressed, for instance, on the verdict whereby FRICK was found not guilty on Count 1, nor on the findings which excluded members of some organizations who had resigned their functions prior to 1 September 1939, from the groups declared criminal. The verdict concerning FRICK and the findings with regard to members of certain organizations follow, as has been shown above,* from the opinion of the Tribunal that the participation in the previously mentioned measures during the "seizure of power" and "consolidation" cannot be qualified as participation in a conspiracy as defined by the Tribunal.

5. Violations of Human Rights of German Citizens and Stateless Persons referred to in Count 4 of the Indictment, (Crimes against Humanity)

Count 4 of the Indictment,** comprises crimes against humanity committed within and outside of Germany, committed before and during the war, and crimes directed against co-nationals and aliens.

As this part of the report is concerned exclusively with crimes against humanity committed against German citizens (and Stateless persons), it is first of all proposed to extract those offences from the material contained in the Indictment.

The Indictment distinguishes between "murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations before and during the war",*** on the one hand,

---

* Page 323 et seq.

** Indictment, Section X.

*** Indictment, Section X (A).

/and "persecutions

and "persecutions on political, racial, or religious grounds in execution of and in connection with the common plan"* mentioned in Count 1,** on the other hand. The Indictment does not, however, contend that only the second type of crimes against humanity (persecutions, etc.), is connected with a common plan, for it makes the same contention with regard to the first type (Murder, extermination, etc.)***. Neither does the Indictment contend that only crimes against humanity of the first type were committed before and during the war, for it alleges that those of the second type were also committed in both periods.

The following crimes against humanity cited under the heading "murder, extermination, etc.", are of interest in this part of the report: the "policy of persecution, repression and extermination of all civilians in Germany who were, or who were believed to, or who were believed likely to become hostile to the Nazi Government and the common plan or conspiracy described in Count 1"; the imprisonment of such persons without judicial process; their detention in "protective custody" and concentration camps where they were subjected "to persectuion, degradation, despoilment, enslavement, torture and murder."

The Indictment speaks also of special courts the task of which it was to carry out the will of the Nazis; of "favoured branches or agencies of the State and Party", which were permitted "to operate outside the range even of Nazified law and to crush all tendencies and elements which were considered undesirable"; and of various concentration camps, in particular of Buchenwald and Dachau, which were established as early as 1933 and 1934 respectively, and of their inmates who were put to slave labour and murdered and ill-treated, - acts and policies which were continued (and extended to the occupied countries) after 15 September 1939, and until 8 May 1945.

Under the heading "Persecution on Political, Racial and Religious Grounds ..."**** the Indictment mentions persecutions directed against Jews and persons whose political belief or spiritual aspirations were deemed to be in conflict with the aims of the Nazis. It is stated that Jews were systematically persecuted since 1933; that they were deprived of their liberty, thrown into concentration camps where they were murdered and ill-treated; and that their property was confiscated. The

---

* The common plan to which reference is made comprises not only crimes against peace, but also war crimes and crimes against humanity. Cf. Judgment, page 44 and Part I Chapter I.B of the Report.

** Indictment, Section X (D).

*** "This plan involved ... murder and persecution of all who were, or who were suspected of being, opposed to the common plan alleged in Count 1". (Indictment, Section X -Introduction).

**** Indictment, Section X (B).

Indictment adds "hundreds of thousands of Jews were so treated before the 1st of September 1939". Going into details, the Indictment speaks of the anti-Jewish demonstrations which, by order of the Gestapo, took place all over Germany in November 1938. During these demonstrations Jewish property was destroyed and 30,000 Jews were arrested and sent to concentration camps, and their property was confiscated.

The Indictment also deals with the persecutions of the Jews after 1 September 1939, which were directed against both German Jews and the Jewish part of the inhabitants of occupied territories. As examples of the persecution of political opponents (of German nationality) of the regime, the murder of the social-democrat, Breitscheid, and the Communist, Thaelmann, and the internment of "numerous political and religious personages" are quoted.

It would appear from the survey of the acts of inhumanity and persecution committed on political, racial or religious grounds, and enumerated in the Indictment, that only part of the violations of human rights dealt with in Count One of the Indictment have been classified by the prosecution as crimes against humanity.

It is not the intention of this report to examine in detail which specific human rights have been violated by this or that crime against humanity. It is, however, possible to indicate some violations of human rights which manifestly do not constitute crimes against humanity.

It has been pointed out* that, in the opinion of the Prosecution, the notion of conspiracy to commit crimes against peace covers acts such as the destruction of the parliamentary system in Germany; the prohibition of all political parties, with the exception of the NSDAP; the curtailment of the freedom of popular elections; and the transfer of plenary powers of legislation to Hitler and his Cabinet. The Indictment also considers participation in the legislative and administrative measures which reduced the powers of regional and local governments throughout Germany, transforming them into subordinate divisions of the Central Government, as evidence of participation in a conspiracy which is criminal under Article 6 (a) of the Charter. The same applies to the restriction of the Independence of the Judiciary, the removal of Jews from the Bench for political or racial reasons, and the discharge of civil servants of "non-Aryan descent", and of those whose political views did not comply with the requirements of the regime. Similarly, in the opinion of the Prosecution, participation in the destruction of the free trade unions in

---

* cf. page 316 et seq. above.

Germany, the attempt of the National-Socialist regime to subvert the influence of the Churches over the people and, in particular, over the youth of Germany, the educational measures of the regime and its control over the dissemination of information and the expression of opinion within Germany, constitutes participation in a common plan to commit war crimes, as set out in Count One.

These and similar violations of civic and individual rights of German citizens remain, however, outside the field covered by Count 4.* The crimes against humanity (committed against German citizens) which are contained in the Indictment, are violations of the integrity of life and body, violations of the right to life and of the right to personal liberty, and - to a minor extent - violations of property rights. They were directed against members of political and religious groups, who were deem to be opponents of the National Socialist regime, and, above all, against the Jews.

The field of violations of human rights of German citizens covered by Count 1 is wider than that of the violations of this kind covered by Count 4. And, moreover, the violations in Count 1, so far as they concern German citizens, include those in Count 4. The violations of human rights of German citizens, which appear in Count 4, are, in other words, part of the violations included in Count One.

The Indictment cites both acts of inhumanity and persecution on political, racial or religious grounds, which were committed prior to the outbreak of war, and those committed during the war.

Their connection with crimes within the jurisdiction of the Tribunal required by Article 6 (c) of the Charter** is established in the opinion of the Indictment, by the policy in which the crimes against humanity originated. The Indictment emphasizes repeatedly that they were persecution, repression and extermination of all civilians who were considered by the Nazi Regime as hostile to the common plan or conspiracy described in Count 1.***

---

* As basis for comparing the contents of Count 1 and Count 4, use has been made of the Indictment and Judgment. After examination of the transcripts, some qualifications may become necessary.

** Cf. page 316 above, and Part I, Chapter I, B of the Report. Article 6 (c) of the Charter speaks of the connection with either crimes against peace or war crimes. The Indictment attempted to show the connection of crimes against humanity (committed before the war) with crimes against peace, but not with war crimes.

*** Cf. page 326 above, particularly footnote No.

/To discover

To discover the opinion of the Tribunal, it is proposed first to examine the section of the Judgment dealing with war crimes and crimes against humanity in general.*

Here we find that the section "Murder and Ill-treatment of Civilian Population"** is concerned exclusively with war crimes and crimes against humanity committed during the war. It dwells at some length on the brutal suppression of all opposition to the German occupation authorities, but it refrains from examining the persecution of opponents of the Nazi Government in Germany, as mentioned in the Indictment.

This section of the Judgment alludes moreover to the measures taken against Jews (during the war); and more especially to those directed against the Jews in occupied territories. It does not, however, attempt to distinguish between Jews of Allied nationalities and German Jews.

The fate of the German Jews before and during the war is reviewed in detail in the section "Persecution of the Jews".*** This section recounts the discriminatory laws, enacted after the seizure of power, which limited the offices and professions permitted to Jews; and the restrictions which were placed on their family life and their rights of citizenship.****

It is observed that, by the autumn of 1938, the Nazi policy towards the Jews had reached the stage where it was directed towards the complete exclusion of Jews from German life. Among the measures instanced as belonging to this period were: the organized Pogroms, the collective fine of one billion marks imposed on the Jews; the seizure of Jewish estates; the regulations restricting the movement of Jews to certain specific districts within certain hours; the creation of Ghettos, etc. The Judgment then turns to the extermination of the Jews during the war. The offences described here occurred mostly in the occupied territories. Their victims were millions of Jews, mainly of Polish and Russian origin. It is, however, clear from the text that the Jews of no country were spared.

After dealing in general terms with war crimes and crimes against humanity, the Judgment discusses "The Law Relating to War Crimes and Crimes against Humanity"***** and states with respect to the crimes against humanity of interest here: ".....There is no doubt whatever that political

---

* Judgment, pages 44-46.

** Judgment, page 48 et seq.

*** Judgment, page 60 et seq.

**** The violations referred to in this passage interfered partly with fundamental rights and freedoms which are not involved in the crimes against humanity mentioned in the Indictment. (cf. page 327 et seq., above). However, in view of the negative attitude of the Tribunal towards the question of crimes against humanity committed before the war, little practical importance attaches to this difference.

***** Judgment, page 60 et seq.

opponents were murdered in Germany before the war and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale and, in many cases, was organized and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt."*

After having established the facts, the Judgment continues: "To constitute crimes against humanity the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal."**

As mentioned above, the necessity of establishing a connection between crimes against humanity committed before the war and crimes against peace, or war crimes, had been appreciated in the Indictment.***

Without expressing any opinion on the points put forward by the Prosecution, the Judgment proceeds: "The Tribunal is of the opinion that, revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhuman acts charged in the Indictment and

---

* Judgment, page 65.

** Judgment, page 65.

*** Cf. page 330 above. Additional arguments for this connection were submitted by the Prosecution during the proceedings. It was pointed out that the collective fine imposed on the Jews in 1938 and the confiscation of their financial holdings were apparently intended to procure the means required for armaments

Moreover, an article entitled "Jewish question as a factor in German policy in the year 1938" published in 1939 in the German Foreign Office Circular, was submitted with the object of showing that the connection of the anti-Semitic policy with aggressive war was not limited to economic matters. The article said, inter alia, "It is certainly no coincidence that the fateful year 1938 has brought nearer the solution of the Jewish question simultaneously with the realization of the idea of Greater Germany, since the Jewish policy was both the basis and the consequence of the events of the year 1938.. The destructive Jewish spirit in politics, economy and culture paralyzed the power and the will of the German people to rise again... The healing of this sickness among the people was therefore certainly one of the most important requirements for exerting the force which in the year 1938 resulted in the joining together of Greater Germany in defiance of the world" (cf. Judgment, page 61).

/committed

committed after the beginning of the war did not constitute war crimes they were all committed in execution of, or in connection with, the aggressive war and therefore constituted crimes against humanity."*

The Tribunal declined to make a general declaration "with regard to crimes against humanity committed before the war". It remains to be examined in what manner the law established by the Tribunal has been applied in the sections of the Judgment dealing with the accused individually.

It will be necessary to investigate whether, at least in specific cases, inhuman acts committed against German citizens before the war were considered as crimes against humanity within the meaning of Article 6 (c) of the Charter. Further, since, in the opinion of the Tribunal, all inhumane acts cited in the Indictment and committed during the war constitute war crimes or crimes against humanity within the meaning of the Charter, it will probably be possible to discover among the offences for which the accused have been held responsible crimes against humanity committed against German citizens or Stateless persons during the war.

The two sections of the general part of the Judgment which deal inter alia, with crimes against humanity committed against German citizens and Stateless persons, have already been reviewed.**

Offences of this type falling within the pre-war period are, also, the subject of the parts of the Judgment concerning Goering, Frick, Stricher and Funk.

Of Goering it is said:*** "Goering persecuted the Jews, particularly after the November 1938 riots, and not only in Germany where he raised the billion Mark fund as stated elsewhere..."****

Concerning Frick, the Judgment states: "Always rabidly anti-Semitic, Frick drafted, signed and administered many laws designed to eliminate Jews from German life and economy. His work formed the basis of the Nuremberg Decrees, and he was active in enforcing them: Responsible for prohibiting Jews from following various professions and for confiscating their property..."*****

---

* Judgment, page 65.

** Page 331 et seq. above.

*** These and the following quotations are taken from the sections of the relevant parts of the Judgment entitled "War Crimes and Crimes against Humanity".

**** Judgment, page 85.

***** Judgment, page 99.

/"The police

"The police officially fell under the jurisdiction of the Reich Minister of the Interior, but Frick actually exercised little control over Himmler and police matters. However, he signed the law appointing Himmler Chief of the German Police, as well as the decrees establishing and regulating the execution of orders for protective custody. From the many complaints he received and from the testimony of witnesses the Tribunal concludes that he knew of atrocities committed in these camps."*

And in regard to Streicher: "For his twenty-five years of speaking, writing and preaching hatred of the Jews, Streicher was widely known as "Jew-baiter No. 1". In his speeches and articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism and incited the German people to active persecution. Each issue of the "Stürmer" which reached a circulation of 600,000 in 1935, was filled with such articles, often lewd and disgusting.

"Streicher had charge of the Jewish boycott of 1 April 1933. He advocated the Nuremberg decrees of 1935. He was responsible for the demolition, on 10th August 1938, of the Synagogue in Nuremberg; and on 10th November 1938 he spoke publicly in support of the Jewish Pogrom which was taking place at that time.

"But it was not only in Germany that this defendant advocated his doctrines. As early as 1938 he began to call for the annihilation of the Jewish race... Typical of his teaching was a leading article in September 1938, which termed the Jew a germ and a pest, not a human being, but 'a parasite, enemy ... who must be destroyed...'"

"Other articles urged that only when world Jewry had been annihilated would the Jewish problem have been solved, and predicted that fifty years hence the Jewish graves "will proclaim that this people of murderers and criminals has, after all, met its deserved fate..." A leading article of "Der Stürmer" in May 1939, shows clearly his aim: "A punitive expedition must come against the Jews in Russia..The Jews in Russia must be killed..."

"As the war in the early stages proved successful in acquiring more and more territory for the Reich, Streicher even intensified his efforts to incite the Germans against the Jews. In the record are twenty-six articles from "Der Stürmer", published between August 1941 and September 1944, twelve by Streicher's own hand, which demanded annihilation and extermination in unequivocal terms...

"With knowledge of the extermination of the Jews in the occupied Eastern territories, this defendant continued to write and publish his

---

* Judgment, pages 99-100.

propaganda of death...

"Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes as defined by the Charter, and constitutes a crime against humanity."*

Of Funk it is said: "In his capacity as Under-Secretary in the Ministry of Propaganda and Vice-Chairman of the Reich Chamber of Culture, Funk had participated in the early Nazi programme of economic discrimination against the Jews. On 12th November 1938, after the Pogrom of November, ... he attended a meeting held under the Chairmanship of Goering to discuss the solution of the Jewish problem, and proposed a decree providing for the banning of Jews from all business activities which Goering issued the same day under the authority of the Four-Year Plan. Funk had testified that he was shocked at the outbreak of 10th November, but on 15th November he made a speech describing these outbreaks as a "violent explosion of the disgust of the German people"; and saying that the elimination of the Jews from economic life followed logically their elimination from political life."**

Goering, Frick, Streicher and Funk were found guilty on Count 4; crimes against humanity committed against German citizens (and Stateless persons) before the war constitute, however, only part of their offences, which include crimes against humanity committed against Allied nationals during the war. Consequently, it cannot be demonstrated with certainty in these cases that their crimes against humanity, committed against German citizens before the war, were relevant for the verdict on Count 4. The last paragraph of the section quoted above,*** where the Judgment deals with Streicher, points rather in the opposite direction.

More enlightenment can be derived from the parts of the Judgment which concern the accused organizations. In the part referring to the Leadership Corps, under the heading "Aims and Activities," the pre-war activities of the organization are reviewed,**** and it is mentioned that members of the Leadership Corps collaborated with the Gestapo and S.D. in searching for political opponents and contributed to their arrest and detention in concentration camps. Under the heading "Criminal Activity" the Judgment

---

* Judgment, pages 101-102.

** Judgment page 103.

*** Page 333 above.

**** Cf. page 324.

/says: "These

says: "These steps which relate merely to the consolidation of control of the Nazi Party are not criminal under the view of the conspiracy to wage aggressive war,* which has previously been set forth". .Persons who have resigned their membership prior to 1 September 1939, fall therefore outside the group declared criminal.**

In the case of the Gestapo and S.D., under the heading "Criminal Activity" it is said: "Originally one of the primary functions of the Gestapo was the prevention of any political opposition to the Nazi regime, which it performed with the assistance of the S.D. The principal weapon used in performing this function was the concentration camp. The Gestapo...was responsible for the detention of political prisoners in those camps. Gestapo officials were usually responsible for the interrogation of political prisoners at the camps.

"The Gestapo and the S.D. also dealt with charges of treason and with question relating to the Press, the Churches and the Jews. As the Nazi programme of anti-Semitic persecution increased in intensity the role played by these groups became increasingly important. In the early morning of 10th November 1938, Heydrich sent a telegram to all offices of the Gestapo and S.D. giving instructions for the organization of the Pogroms of that date, and instructing them to arrest as many Jews as the prison could hold "especially rich ones"...By November 11th, 1938, 20,000 Jews had been arrested and many were sent to concentration camps..."***

In a subsequent passage, the Judgment deals with crimes against humanity committed in the occupied territories during the war. It then arrives at the following "Conclusion": "The Gestapo and S.D. were used for purposes which were criminal under the Charter involving the persecution and extermination of the Jews, brutalities and killings in concentration camps, excesses in the administration of occupied territories..."**** A group of members of the Gestapo and S.D. more closely defined in the Judgment was declared criminal: "The basis for this finding is the participation of the organization in war crimes and crimes against humanity connected with the war."***** Here, too, persons who had ceased to be

---

* No reference is made in the Judgment to crimes against humanity committed by members of this organization before the war and to the opinion of the Tribunal with regard to such offences. (cf. page 330 et seq. above.

** Judgment, page 71

*** Judgment, page 73.

**** Judgment, page 75.

***** Judgment, page 75.

/members prior

members prior to 1 September 1939, are excluded from the criminal group.

In the case of the S.S., the picture is similar to that in the case of the Gestapo and S.D. Here, too, under the heading "Criminal Activity", the Judgment speaks of offences against German citizens committed before the war. To mention one example only: "From 1934 onwards the S.S. was responsible for the guarding and administration of concentration camps. The evidence leaves no doubt that the consistently brutal treatment of the inmates was carried out as a result of the general policy of the S.S., which was that the inmates were racial inferiors to be treated only with contempt".*

Also in the case of the S.S. (as in the case of the Leadership Corps and the Gestapo and S.D.) persons who belonged to the organization only before the war, i.e. during a period in which nothing but crimes against humanity committed against German citizens and Stateless persons can be charged against the organization,** are excluded from the group declared criminal. They are the persons who left the organization prior to 1 September 1939, that is, before the organization became responsible for war crimes and crimes against humanity other than the type mentioned above.

The same principles were applied in the case of the S.A. Of the S.A. the Judgment says: "The S.A. was also used to disseminate Nazi ideology and propaganda and placed particular emphasis on anti-semitic propaganda...

"After the Nazi advent to power and particularly after the elections of 5th March, 1933, the S.A. played an important role in establishing a Nazi reign of terror over Germany. The S.A. was involved in outbreaks of violence against the Jews and was used to arrest political opponents and to guard concentration camps, where they subjected their prisoners to brutal mistreatment.

"On 30th June and 1st and 2nd July, a purge of S.A. leaders occurred... This purge resulted in a great reduction in the influence and power of the S.A. After 1934, it rapidly declined in political significance....

"Some S.A. units were used to blow up synagogues in the Jewish pogrom of 10th and 11th November, 1938".

After having established these facts, the Judgment concludes:

"Up until the purge beginning on 30th June 1934, the S.A. was a group composed in large part of ruffians and bullies who participated

---

* Judgment, page 77.

** The part played by these organizations (in particular by the Gestapo and S.D.) in the atrocities committed in Austria and Czechoslovakia before 1 September, 1939, raises legal problems which have not been touched upon in this section of the report (c.f. however, Part I, Chapter I, B of the Report.) But nothing to be said in this connection affects the argument put forward in the text above.

in the Nazi outrages of that period. It has not been shown, however, that these atrocities were part of a specific plan to wage aggressive war, and the Tribunal therefore cannot hold that these activities were criminal under the Charter."*

There was, moreover, no evidence to show that the members of the S.A. generally participated in war crimes and crimes against humanity committed after 1 September 1939 The Tribunal therefore declined to declare the S.A. to be a criminal organization.**

The Soviet member of the International Military Tribunal, who expressed a dissenting opinion in all cases of acquittal, and, in particular, in all other cases where the Tribunal did not declare an accused organization to be criminal, omitted to do so in the case of the S.A. He therefore seems to concur in the opinion of the Tribunal, as set forth in the preceding paragraphs in regard to crimes against humanity committed against German citizens and Stateless persons before 1 September 1939

In view of the above mentioned findings, it is submitted that in the cases of Goering, Frick, Streicher and Funk*** also the verdict of guilty on Count 4 was not based on the crimes against humanity committed against German citizens or Stateless persons with which the defendants were charged.

The parts of the Judgment dealing with the accused individually frequently mention under headings such as "Crimes Against Peace", "War Crimes and Crimes Against Humanity", "Criminal Activities", etc., (evidently by way of illustration), facts which in themselves do not constitute offences falling, in the opinion of the Tribunal, within its jurisdiction.**** No reliable conclusion can therefore be drawn from the fact that atrocities are mentioned under headings such as those mentioned above.

Crimes against humanity committed against German citizens and Stateless persons during the war are repeatedly mentioned in the parts of the Judgment dealing with individual defendants.*****

It will be convenient in this connection, to deal first with the organizations which were declared criminal.

---

* Judgment, page 80.

** Judgment, page 80.

*** Cf. page 332 et seq., above.

**** Cf., for instance, the section relating to Goering where reference is made to facts which, in the opinion of the Tribunal (in this respect contrary to the opinion of the Prosecution) did not constitute participation in a conspiracy within the meaning of Article 6 (a) of the Charter. (Judgment, page 84). Cf. further, the section "Criminal Activities of the Gestapo and S.D." (page 334 et seq., above) and others.

***** As to the general part of the Judgment, cf. page 326 et seq. abcve.

/The Judgment

The Judgment says of the Leadership Corps that it was used to prevent German public opinion from reacting against the measures taken against the Jews in the East. In 1942, a confidential information bulletin was sent to all Gauleiters and Kreisleiters, entitled "Preparatory measures for the final solution of the Jewish question in Europe. Rumours concerning the conditions of the Jews in the East." This bulletin contained no explicit statement that the Jews were being exterminated, but it did indicate that they were going to labour camps, and spoke of their complete segregation and elimination and the necessity of ruthless severity. The Judgment remarks that "Even at its face value it indicated the utilization of the machinery of the Leadership Corps to keep German public opinion from rebelling at a programme which was stated to involve condemning the Jews of Europe to a lifetime of slavery". Further, there is evidence that in August 1944, the Leadership Corps had knowledge of the deportation of 430,000 Jews from Hungary.

As to the Gestapo and S.D., the Judgment says: "On the 24th January 1939, Heydrich, Chief of the Security Police and S.D., was charged with furthering the emigration, evacuation of Jews from Germany, and on 31st July 1941, with bringing about a complete solution of the Jewish problem in German dominated Europe. A special section of the Gestapo office of the RSHA under Standartenfuhrer Eichmann was set up with responsibility for Jewish matters... Local offices of the Gestapo were used first to supervise the emigration of Jews and later to deport them to the East, both from Germany and from the territories occupied during the war".* The Judgment continues with the notorious history of the Einsatzgruppen and the wholesale slaughter of Jews.**

Describing the criminal activities of the S.S., the Judgment says:

> "Through its control of the organization of the police, particularly the Security Police and S.D., the S.S. was involved in all the crimes which have been outlined in the section of this Judgment dealing with the Gestapo and S.D."***

Mention has already been made of the responsibility of the S.S. as established by the Tribunal, for the guarding and administration of concentration camps.****

In regard to the individual defendants accused, the Judgment states, inter alia, that Goering was "the creator of the oppressive programme against the Jews...at home and abroad;"***** and that Kaltenbrunner, as chief of the RSHA since 1943 was responsible for the offences which have been discussed in

---

* Judgment, pages 73-74.

** Judgment, page 74.

*** Judgment, page 77.

**** Cf. pages 335-336.

***** Judgment, page 86.

/connection

connection with the Gestapo and S.D.*

According to the Judgment, Rosenberg is held responsible for the confiscation of Jewish property. As Minister for Occupied Eastern Territories (from 1941 onwards) "he helped to formulate the policies of... extermination of Jews....., and set up the administration which carried them out"....."his directives provided for the segregation of Jews ultimately in Ghettos, his subordinates engaged in mass killing of Jews....." In December 1941, "Rosenberg made the suggestion to Hitler that in a case of shooting 100 hostages Jews only be used."**

In the opinion of the Tribunal, Frank, too, in his capacity of Governor General of the Occupied Polish Territory, is to be held responsible for the persecution of the Jews in the General Government. "The area originally contained from 2,500,000 to 3,500,000 Jews. They were forced in Ghettos, subjected to discriminatory laws, deprived of the food necessary to avoid starvation and, finally, systematically and brutally exterminated....By 25th January 1944, Frank estimated that there were only 100,000 Jews left."***

The crimes against humanity, against German citizens and Stateless persons, both before and during the war, for which Frick, Streicher and Funk were held responsible have been mentioned above.

Schierach, as the Tribunal established, was implicated in the persecution of the Jews.****

The examples of crimes against humanity committed against German citizens and Stateless persons during the war, which are instanced in the Judgment, were, speaking generally, directed against Jews regardless of their nationality. The Judgment indicates, in one or two passages, that there were German Jews amongst the victims;***** as a rule, no attention is paid to the nationality of Jewish victims.

Crimes against humanity, committed against German citizens other than Jews, during the war, are only sparingly mentioned in the Judgment. All that can be discovered, indeed, apart from the facts stated in the general part of the Judgment and recorded above,****** are one or two remarks in the section concerning Frick. There, it is said, that Frick signed the decrees establishing Gestapo jurisdiction over concentration camps, including the

---

* Judgment, pages 93 and 94 (cf. pages 334 and 335 above.)

** Judgment, pages 95 and 96.

*** Judgment, page 97

**** Judgment page 114.

***** Cf. for example, Judgment, page 74 and page 338 above.

****** Cf. page 329 et seq., above.

/execution

execution of orders for protective custody.* The Judgment points out in several passages that these decrees also affected German nationals both before and during the war.

No defendant was found guilty on Count 4 (Crimes against Humanity) merely in view of crimes against humanity committed against German citizens and Stateless persons during the war. The general opinion as to these offences held by the Tribunal** however, leaves no doubt that they were considered as falling within the jurisdiction of the Tribunal and were therefore taken into account.

6. Summary and Conclusions

The conclusions reached so far may be summarized as follows:

1. The International Military Tribunal is, in substance as well as in name, an international tribunal.

It has been suggested in certain quarters that it was the intention of the parties to the agreement of 8 August 1945, who, by debellatio had become the joint sovereigns of Germany, to establish in substance, joint military tribunals under municipal law, rather than a truly international tribunal. On the other hand, it must be pointed out that the Tribunal originated, like any other international court or tribunal, in an international treaty and that it was not the Control Council for Germany but the Governments of the States parties to the agreement, which established the Tribunal and appointed its members. Moreover, it should be noted that the four signatories were acting, to use the words of the Preamble of the Agreement, "in the interest of all the United Nations". The agreement was concluded, not only by the four occupying Powers, but also by the many other United Nations which adhered to it, and it was intended - not for the prosecution of German war criminals only - but for the prosecution of the "Major War Criminals of the European Axis".

2. The judgment derives the jurisdiction of the Tribunal from two different sources:

(a) from the joint sovereignty over Germany assumed by the four Allied Powers which created the Tribunal. It is generally accepted that sovereignty over territory is acquired if, after subjugation of this territory, a State declares its annexation and if, moreover, such declaration has been recognized by the other States of the world. The four Powers, then in complete control of Germany, assumed by the Berlin Declaration of 5 June 1945, "supreme

---

* Judgment, pages 99-100.

** Judgment, page 65 (cf. pages 331-32 above).

authority with respect to Germany". They announced the limited purposes of their declaration and it was said not to effect any annexation. Since the wider right of annexation includes the lesser rights claimed by the Berlin Declaration, and since this declaration has been recognized by the United Nations and neutral States, the exercise of powers of legislation, adjudication and administration in Germany by the four Allied Powers, appears permissible under international law. Consequently, the parties to the Agreement of 8 August 1945, have the power to enact the Charter annexed to the Agreement as a legislative act for Germany.

(b) The Judgment further makes reference to the international basis of the Tribunal's jurisdiction. International law limits the criminal jurisdiction of a State; there is no doubt, however, that every State has the authority to set up special courts to try any person within its custody who commits war crimes - at least if such offences threaten its security. It is believed that this jurisdiction is broad enough to cover the jurisdiction over violations of human rights of German citizens and Stateless persons, which the Tribunal assumed.*

(c) A third source of the jurisdiction of the Tribunal is suggested by the Preamble to the Agreement of 8 August 1945; it says that the "signatories" when concluding the Agreement, were "acting in the interests of all the United Nations"; and Article 5 of the Agreement declares that "any Government of the United Nations may adhere to this Agreement". Legal writers have pointed out that also Article 5 of the Moscow Declaration and Article 2 (6) of the Charter of the United Nations support, to some extent, the idea that the Four Powers, acting in the interest of the United Nations, had the right to legislate for the entire community of nations.

The Tribunal does not make any reference to this conceivable source of its jurisdiction.

3. The provisions of the Charter annexed to the Agreement of 8 August 1945 are the law applied by the Tribunal. The acts defined in the Charter did not acquire the character of offences only by virtue of the Charter; they were offences under international law already at the time of the creation of the Charter.

With regard to crimes against peace, this has been shown in great detail by the Judgment. As the legal basis for the punishment of violations of human rights which are of interest in this part of the

---

* Cf. page 314, Note 2.

report, i.e. the violations of human rights of German citizens and Stateless persons, will chiefly be found in the provisions of the Charter concerning crimes against humanity, it seemed appropriate to examine first, whether these provisions of the Charter, are merely declaratory of international law as it existed before the execution of the Agreement of 8 August 1945.

Crimes against humanity, as defined in Article 6 (c) of the Charter cover acts of inhumanity, and persecution on political, racial and religious grounds, committed within the territory of a State against its own nationals, whether they fall within the period before or during the war.

The question whether the Charter, insofar as it includes this type of crimes against humanity, is "an expression of international law, existing at the time of its creation",* is controversial.

The Judgment repeatedly stresses that the jurisdiction of the Tribunal is limited to those crimes against humanity which are connected with crimes against peace or war crimes and only atrocities where the Tribunal found sufficient evidence for this connection were taken into account in the verdict.

It has been said before that international law authorizes every State to set up special courts to try any person within its custody who commits war crimes, - at least if such offences threaten its security; it appears that this jurisdiction comprises crimes against humanity connected with crimes against peace or war crimes. It is, therefore, submitted that at the time of the creation of the Charter an international basis existed for the jurisdiction over crimes, against humanity connected with crimes against peace or war crimes; and that the tribunal confined itself to the jurisdiction over this type of crimes against humanity.

4. The core of the Nuremberg indictment is "the common plan or conspiracy" to commit crimes against peace (Count 1 of the Indictment). All defendants were charged with this offence and it is, at the same time, the only offence charged against all of them.

In the submission of the Indictment, the measures of the Nazis intended to promote their aims first to seize totalitarian control over Germany and later to consolidate their position of power within Germany are to be considered as "steps deliberately taken to carry out the common plan."** The destruction of the parliamentary system; the

---

* Judgment, page 38.

** Judgment, page 43.

/transformation

transformation of the States, provinces and municipalities, which had formerly exercised semi-autonomous powers, into administrative organs of the central government; the purge of the civil service; the restriction of the independence of the judiciary and their being rendered subservient to Nazi ends; the suppression of movements and groups which the Nazis regarded as obstacles to their retention of total control in Germany, such as the suppression of the free trade unions, the attempt to subvert the influence of the Churches over the people and in particular over the youth of Germany, and the persecution of pacifist groups; interference with the educational system; the strict control of the expression of opinion and the dissemination of information; the system of terror against opponents and suspected opponents of the regime, their imprisonment without judicial process, their detention in concentration camps where they were subjected to degradation, despoilment, enslavement, torture and murder; the policy of relentless persecution of the Jews, etc. - all these violations of civic and individual rights, which served the Nazis to gain power in Germany and to retain it, are covered by Article 6 (a) of the Charter, as conceived by the Prosecution.

This ambitious scheme of the Prosecution which treats all violations of the fundamental rights and freedoms of German citizens, guaranteed by the Weimar Constitution, which can be traced back to the Nazi regime, as phases in the execution of the "common plan" - that is as crimes against peace which fall within the jurisdiction of the International Military Tribunal, - was rejected by the Tribunal.

The Judgment, too, considers the violations of civic and individual rights of German citizens as part of a policy, the aim of which was to eliminate all opposition; to control completely the political and economic life of Germany; to unite the people in support of the policies of the Nazi Government, in particular of their policy of large scale re-armament; to organize the resources of the nation so as to serve best the purposes of war - and thus to prepare for war itself. Yet in the opinion of the Tribunal, all this forms part of a policy which in itself, is not criminal; it preceded the conspiracy, which is criminal under Article 6 (c) of the Charter, creating its political and economic pre-requisites; a conspiracy to be criminal, must centre round a concrete plan "clearly outlined in its criminal purpose" and "not too far removed from the time of decision and action".*

* Judgment, page 43.

/Only those

Only those accused whose participation in concrete plans of this sort were proved, were found guilty on Count 1 of the Indictment, (Common Plan or Conspiracy). They were Goering, Keitel, Raeder and Neurath, who were present at one or more of the meetings where Hitler disclosed his plans of aggression against Austria, Czechoslovakia and Poland; Hess, whose intimate relationship with Hitler places it beyond doubt that he knew of this and similar plans of Hitler's though he did not take part in any of those meetings; Ribbentrop, who was involved in the diplomatic activities preceding the aggression against Poland, and Rosenberg and Jodl who participated in the planning of the attack against Norway and Greece, Yugoslavia and Russia respectively.

On the other hand, Frick, for many years the Minister of the Interior of the Hitler Regime, whose responsibility for the violations of civic and individual rights of German citizens was established by the Tribunal beyond doubt, was not found guilty on Count 1, as "before the date of the Austrian Aggression he was concerned only with the domestic administration within the Reich."*

The opinion of the Tribunal that responsibility for violations of human rights of German citizens during the period of seizure of power by the NSDAP and consolidation of its position in Germany cannot be considered as participation in a conspiracy in the meaning of Article 6 (a) of the Charter, is, further shown in the parts of the Judgment dealing with the accused organizations. Also, the participation of the Leadership Corps, of the Gestapo and S.D., and of the S.S., in violations of human rights of German citizens, committed before the war, has been proved sufficiently. Nevertheless, persons who ceased to be members of these organizations prior to 1 September 1939, were excluded from the groups declared criminal.

5. An examination of the Indictment insofar as it refers to crimes against humanity committed against German citizens and Stateless persons, shows that only a part of the violations of human rights dealt with in Count 1 of the Indictment have been brought under the notion of crimes against humanity. The destruction of the parliamentary system in Germany and of the existing local government institutions, the purge of the civil service and the judiciary rendering them subservient to Nazi ends, the suppression of the free trade unions, the elimination of the influence of the churches, the interference with the educational system, the control of the expression of opinion and the dissemination of information, etc., all of which are covered by Count One, remain outside the field covered by Count 4 (crimes against humanity).

---

* Judgment, page 99.

/Crimes against

Crimes against humanity (committed against German citizens) which are cited in the Indictment are violations of the integrity of life and body, violations of the right to life and of the right to personal liberty, and, to a minor extent, violations of property rights. They are directed against members of political and religious groups, who were deemed opponents of the National Socialist Regime, and above all, against the Jews.

The category of offences classified in the indictment as crimes against humanity, was somewhat extended during the proceedings, but the fact remains that the field of violations of fundamental rights and freedoms of German citizens covered by Count 1 is considerably wider than that covered by Count 4 and that moreover, the first includes the latter; that, in other words, the violations of human rights of German citizens which are cited in Count 4 form part of those dealt with in Count 1.

The Indictment considers acts of inhumanity and persecution on political, racial or religious grounds, which were committed prior to the outbreak of war, not less crimes against humanity than those which fall within the time of war. The connection with crimes within the jurisdiction of the Tribunal required by Article 6 (c)* of the Charter is, in the submission of the Indictment, shown by the policy from which these atrocities originated. The Indictment stresses repeatedly that they are to be considered as persecution, repression and extermination of all civilians in Germany who were deemed hostile to the common plan or conspiracy described in Count 1. They are the measures taken during the period of the seizure of power and of consolidation of the position of the Nazis in Germany. It has been said before that in the opinion of the Tribunal, these measures formed part of a policy which, in itself, was not criminal, but created the political and economic basis for a conspiracy criminal under Article 6 (a) of the Charter. The crimes against humanity referred to in the Indictment are, therefore, merely connected with measures which preceded a conspiracy in the meaning of Article 6 (a) of the Charter as conceived by the Tribunal which, in itself, however, did not constitute crimes against peace (i.e. participation in a common plan or conspiracy to commit crimes against peace.)

The Judgment states that acts of inhumanity and persecution referred to in the indictment which were committed before the outbreak

---

* Cf. page 329 Note 1.

/of war,

of war, constitute crimes against humanity only if they were in connection with any crime within the jurisdiction of the Tribunal and declared, without expressing any view on the argument of the prosecution with respect to this point, that "it has not been satisfactorily proved that they were done in execution of or in connection with any such crime."*

The Tribunal declined to "make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter."**

The parts of the Judgment dealing with the accused individually, mention frequently under headings such as "crimes against peace", "war crimes and crimes against humanity" and "criminal activities", etc., acts of inhumanity or persecution committed against German citizens before the war.

The verdicts in the cases of the Gestapo and S.D., and the S.S., show, however, clearly, that such atrocities were not considered as offences which fell within the jurisdiction of the Tribunal. Persons who belonged to the organizations only before the war, that is, during the period in which nothing but acts of inhumanity and persecution directed against German citizens and Stateless persons can be charged against the organizations, are excluded from the groups declared criminal. They are the persons who left the organizations prior to 1 September 1939, that is, before the organizations became responsible for war crimes, and crimes against humanity, other than the type mentioned before. The same principles were applied in the case of the S.A., which the Tribunal declined to qualify as a criminal organization.

With regard to the inhumane acts charged in the Indictment and committed after the beginning of the war, the Judgment states that insofar as they do not constitute war crimes they constitute crimes against humanity, as "they were all committed in execution of or in connection with aggressive war".***

Crimes against humanity committed against German citizens and Stateless persons during the war are referred to in the Judgment in exceptional cases only, and none of the accused was found guilty on Count 4 solely in view of such offences. The opinion as to these offences held by the Tribunal in general, however, leaves no doubt that they were considered to fall within the jurisdiction of the Tribunal and therefore taken into account.

---

* Judgment, page 65

** Judgment, page 65

*** Judgment, page 65

B. MILITARY COURTS, MILITARY GOVERNMENT COURTS AND GERMAN COURTS

The jurisdiction of the International Military Tribunal is limited to Major War Criminals whom Article 1 of the Agreement of 8 August 1945, using the words of the Moscow Declaration of 30 October 1943, describes as "war criminals whose offences have no particular geographical location."*

A broader legal foundation, a basis for the punishment of "war criminals and other similar offenders",** regardless of their rank and of the place where the offence was committed, is provided by Control Council Law No. 10 dated 20 December 1945.

Similar enactments of allied and former enemy States (other than Germany) cover offences committed in their respective territories or against their own citizens. Control Council Law No. 10 does not, as it were, complementing these enactments, refer only to offences committed Germany or against German citizens; nevertheless, except for the Charter of the International Military Tribunal, it is the most important legal basis for the punishment of these offences which has been created since the occupation of Germany.

Of the crimes enumerated in Article II of Control Council Law No. 10, only crimes against peace (Article II.1.a), crimes against humanity Article II.1.c) and membership in groups or organizations declared criminal by the International Military Tribunal (Article II.1.d) come under consideration in this part of the Report. Violations of human rights of German citizens and Stateless persons have been treated in the trials which are of interest in this connection as crimes against humanity; in one or two indictments, they were brought under the heading of crimes against peace and, as will be shown later, they are indirectly connected with the crime defined as membership in a criminal organization.

Article III of Control Council Law No. 10 provides that the occupying authorities have the right to cause all persons charged with a crime under Control Council Law No. 10 to be brought to trial before an appropriate tribunal; and that, in each zone, the respective zone commander determines or designates the tribunal by which such persons shall be tried; "such tribunals may, in the case of crimes committed by persons of German citizenship or nationaltty against other persons of German citizenship or nationality or Stateless persons, be a German court if authorized by the occupying authorities".***

---

* Cf. Part I, Chapter I, B. of the Report.

** Preamble of Control Council Law No. 10.

*** Article III.1.d, Control Council Law No. 10.

/Article III of Control

Article III of Control Council Law No. 10 adds that none of these provisions shall impair or limit the jurisdiction of power of any court or tribunal now or later established by a zone Commander in his zone, and that the same applies with regard to the International Military Tribunal.*

As a result of this provision, a considerable number of courts of a different type, exercise a more or less concurrent jurisdiction over offences relevant in this connection, both in the United States Zone, and in the British Zone.**

Courts which existed before Control Council Law No. 10 was enacted and which were henceforth to exercise jurisdiction also over offences defined by this law are the "Military Government Courts". They were established by Ordinance No. 2, issued by the Supreme Commander, Allied Expeditionary Force, on 18 September 1944, and they were continued for a period in both zones,*** after the zones of occupation had been determined. In the British Zone they were later**** replaced by the so-called "Control Commission Courts".*****

The Military Government Courts (as well as the Control Commission Courts) have jurisdiction over "all offences under any proclamation, law or ordinance, notice or order issued by or under the authority of the Military Govt****** or of the Allied Forces".******* Their Jurisdiction, therefore, covers the offences defined by Control Council Law No. 10, in particular crimes against peace, crimes against humanity and membership in criminal organizations.

---

* Article III.2 of Control Council Law No. 10.

** As at present sufficient information is available only with regard to the British and United States Zones, this section is limited to the courts in these zones of occupation.

*** Cf. Note 3.

**** By Ordinance No. 68 dated 1 January 1947.

***** The Control Commission Courts differ from the Military Government Courts mainly in their composition: the members of the latter are officers of the allied forces (Article IV.4, Ordinance No. 2, cf. later amendments, in particular U.S. Amendment to Military Government Ordinance No. 2 of 30 January 1946 and British Ordinance No. 27 of 30 March 1946); judges of the Control Commission Courts may be civilians. A judge of a Control Commission Court of higher standing (i.e. the Court of Appeal and High Court), must be qualified to practice as an advocate or a solicitor in any part of the British Empire, or must have held judicial office therein (Article IV, Ordinance No. 68), whereas no legal qualification is required for the appointment of a judge to a Military Government Court.

****** Or after its establishment on 30 August 1945 issued by or under the authority of the Allied Control Council for Germany.

******* Article II.2.b, Ordinance No. 2; cf. Article III.3.b, Ordinance No. 6 enacted for the British Zone.

/The same offences

The same offences are subject to the jurisdiction of the "Military Tribunals", which were set up in the United States zone after Control Council Law No. 10 had been issued. Pursuant to Article I of Ordinance No. 7* by which they were established, Military Tribunals have the "power to try and punish persons charged with offences recognized as crimes in Article II of Control Council Law No. 10...". Their jurisdiction, does not, however, prejudice "the jurisdiction or the powers of other courts established or which may be established for the trial of such offences".

The German courts could not apply Control Council Law No. 10 immediately after its enactment because by virtue of Law No. 2, issued by the Supreme Commander, Allied Expeditionary Force, on 18 September, 1944, "cases involving offences against any order of the allied forces or any enactment of Military Government or involving the construction or validity of any such order or enactment", (Article VI.10.d) were placed outside their jurisdiction.**

Law No. 2 remained in force after the zones had been established; later it was amended, both in the British and the United States zones of occupation.

In the United States zone, an Instruction issued as early as 12 January 1946*** deals with the jurisdiction of ordinary German courts over German citizens charged with crimes against humanity committed against German citizens or Stateless persons. This Instruction provides that German courts will "perform the duty of bringing to justice Germans or other non-United Nations nationals other than major war criminals accused of crimes against humanity, where such crimes are offences against the local law and where the victims of the crimes are of German or other non-United Nations nationality".

The above-mentioned Article VI.10.d. of Military Government Law No. 2 was modified by Amendment No. 2 to this law.**** Also, Article VI of Military Government Law No. 2, as amended, provides that "except when expressly authorized ... no German court shall assert or exercise jurisdiction" inter alia, "in cases involving offences against any order of the Allied Forces or any enactment of the Control Council or Military Government"; on the other hand, cases "involving the construction or validity of any such order or enactments" were no longer outside their jurisdiction.

---

* The Ordinance became effective on 18 October 1946.

** Pursuant to Article VI, Law No. 2, "German Courts within the occupied territory" may assert or exercise jurisdiction in cases of this type only "when expressly authorized by Military Government".

*** Letter, Hq, USFET, dated 12 January 1946, A.G. 014.1, GEC-AGO, Subject: Amendment to Directive "Administration of Military Government in the United States Zone in Germany, 7th, July 1945".

**** "Amendment No. 2 to Military Government Law No. 2" became effective on 15 October 1946.

/From this

From this it was concluded that the German courts were now empowered "to apply the provisions of Control Council Law No. 10 in all cases which have been properly brought before them, that is, where the alleged crime against humanity is likewise an offence against German law and was committed by a German or non-United Nations national against Germans or persons of non-United Nations nationality".*

Consequently even after the enactment of Amendment No. 2 to Military Government Law No. 2, German courts, unless specifically authorized, were prevented from exercising jurisdiction over those crimes against humanity (committed against German citizens or Stateless persons) which did not constitute an offence under German law.

In the British Zone first Ordinance No. 20 of 1 January 1946, stipulated that "Military Government may ... confer upon the German courts jurisdiction to try offences against any Military Government enactment or against any provision of any such enactment". (Article I.1 of the Ordinance). Article II.3.d of the same Ordinance provides that such jurisdiction shall not be exclusive but concurrent with that of Military Government Courts.

Article VI.10.d of Military Government Law No. 2 was amended by Ordinance No.29** of 16 April 1946. Article I of the latter Ordinance provides in a similar way to the corresponding amendment issued in the United States zone - that "except when expressly authorized by Military Government, no German court within the occupied territory shall assert or exercise jurisdiction inter alia in "cases involving offences against any enactment of the Control Council or Military Government or any order of the Allied Forces where such enactment or order does not expressly grant jurisdiction to the German courts in respect of offences against it".

Finally, with reference to Article III.1.d, of Control Council Law No. 10,*** Ordinance No. 47 of 30 August 1946 authorized the ordinary German courts to exercise jurisdiction "in all cases of crimes against humanity as defined by Article II, paragraph 1.c. of Control Council Law No. 10, committed by persons of German nationality against other persons of German nationality or Stateless persons".

---

* Letter of the Office of Military Government for Bavaria dated 15 September 1947 - AG.014.1, MGB.LGC, Subject: "Trial by German Courts of crimes against humanity".

** Ordinance No. 29 as well as the United States Amendment No. 2 to Military Government Law No. 2 are based on Control Council Law No. 4 dated 30 October 1945.

*** Cf. page 348 above.

/In the United States

In the United States zone, the jurisdiction of the German courts over crimes against humanity is concurrent with that of the Military Government Courts* and the Military Tribunals** and in the British Zone, with the jurisdiction of the Control Commission Courts.***

Article 10 of the Charter annexed to the Agreement of 8 August 1945, stipulates that "in cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts."

As stated above, cases of this type fall within the jurisdiction of Military Government Courts and Control Commission Courts respectively and are further subject to the jurisdiction of the Military Tribunals.****

In the United States Zone, Tribunals were established by the "Law for Liberation from National-Socialism and Militarism" of the Land Governments for Bavaria, Greater Hesse and Wurttemberg-Baden, dated 5 March 1946. The said Tribunals were to classify persons "who have actively supported the National-Socialist tyranny, or are guilty of having violated principles of justice and humanity or of having selfishly exploited the conditions thus created",***** according to the categories defined by this Law and to impose the sanctions prescribed therein.****** After the termination of the first Nurnberg trial,

---

* Cf. page 348 et seq., above.

** Cf. page 349 above.

*** Cf. page 347, note 6, above.

**** Military Government Courts and Control Commission Courts have dealt with such cases only exceptionally, if at all. The indictments submitted to the Military Tribunals charged the accused in appropriate cases with membership in criminal organizations in addition to other crimes.

***** Article 1 of the "Law for Liberation from National-Socialism and Militarism".

****** Article 24.1 of the Law for Liberation.

these tribunals* were entrusted with the trials of members of criminal organizations.**

In the British Zone, the trial and punishment of members of criminal organizations was entrusted by Ordinance No. 69 of 1 November 1946*** to "German Tribunals", the so-called Spruchkammern, established simultaneously.****

The preparation of cases against members of criminal organizations and their prosecution is the responsibility of Central German Legal Authority for the British Zone,***** the so-called Central Legal Office.******

1. Jurisdiction

It has been shown in the preceding section that in the United States Zone of Control in Germany, crimes against peace, crimes against humanity and the crime of membership in criminal organizations, as they are defined in Control Council Law No. 10, fall within the jurisdiction of "Military Government Courts" and "Military Tribunals"; that in the British Zone the same crimes fall within the jurisdiction of the Control Commission Courts, which in this zone replaced the Military Government courts; that in both zones concurrent jurisdiction

---

* The United States authorities are in doubt whether these tribunals ought to be considered as courts of law. These doubts arise mainly in view of Article 22 of the Law for Liberation which provides that criminal offences by "National-Socialists or Militarists" especially "war crimes and other offences which have remained unatoned under the National Socialist tyranny",...may be criminally prosecuted independently of this law" and that "proceedings under this law shall not bar prosecution under criminal law for the same offence". - On the other hand it must be noted that the members of the Tribunals are "independent and subject only to the law" (Article 27.1 of the Law for Liberation) and that the Tribunals are authorized and obligated "to decide on all cases without being bound by previous decisions of other agencies" (Article 31.1 of the Law for Liberation): In other words, unlike those of administrative authorities, the Tribunals' decisions are not subject to instructions from authorities superior to them; the "Minister for Political Liberation" exercises only administrative supervision over the Tribunals (Article 27.3 of the Law for Liberation). The Tribunals' decisions are, however, subject to the control and supervision which, pursuant to Article VII.12 of Military Government Law No. 2 is exercised over the decisions of all German Courts. It may, therefore, be justifiable to classify these tribunals as courts, that is as special courts. It should be added that in "in imposing sanctions" under the Law for Liberation, the Tribunals may take into account "penalties imposed in criminal proceedings for the same act". (Article 22.2 of the Law for Liberation).

** Letter of the Office of Military Government for Germany (United States) dated 9 April 1947, AG.010.6 (I.A.) Subject: Trial of Members of Criminal Organizations under the Law for Liberation.

*** Ordinance No. 69 became effective on 31 December 1946.

**** Article I.1 of Ordinance No. 69.

***** Article IV.8 of Ordinance No. 69.

****** Established by Ordinance No. 41 of 1 October 1946.

/over crimes

over crimes against humanity, so far as they are directed against German citizens and Stateless persons, is exercised by the ordinary German Courts; and that in both zones German Special Tribunals are entrusted with the trials of members of organizations declared criminal.

The Military Government Courts were established during the initial stage of the occupation of Germany. Proclamation No. 1 of 18 September 1944 declared that "supreme legislative, judicial and executive authority and powers within the occupied territory are vested" in General Eisenhower "as Supreme Commander of the Allied Forces and as Military Governor and (that) the Military Government is established to exercise these powers (under his) directions".*

Ordinance No. 2, by which the Military Government Courts were established, was issued on the same day, pursuant to the powers under Proclamation No. 1.

The Military Government Courts were established under the rules of international law which permit an occupying power to replace the ordinary courts of the occupied territory by its own military courts.**

The Jurisdiction of the Military Government Courts thus established is derived from the right of every occupying power to administer law in occupied territory, and is subject to the limitations which are imposed by international law upon the jurisdiction of an occupying power.

The basis of the jurisdiction of the Military Government Courts was, however, modified by the Berlin Declaration of 5 June 1945*** and by the subsequent establishment of the zones of occupation.

After the Governments of the United States, the United Kingdom and the Union of Soviet Socialist Republics and the Provisional Government of the French Republic had assumed "supreme authority with respect to Germany", it was announced by Proclamation No. 1 - Military Government, United States Zone, dated 14 July 1945 - that in the latter Zone a Military Government had been established under the authority of the Commanding General, United States Armed Forces in Europe,**** orders issued by or under the authority of the Supreme Commander, Allied Expeditionary Force remained in force until revoked or modified; "in applying such orders now outstanding within this Zone, all references to Supreme Commander, Allied Expeditionary Force and to Allied Military Authorities shall be construed as referring from this date forward

---

* Proclamation No. 1, Section II.

** Cf. L. Oppenheim, International Law, Volume II, (6th Edition, revised, edited by H. Lauterpacht) London, 1944, page 348, et seq.

*** Cf. page 312 et seq. above.

**** United States Proclamation No. 1, Section II.

/to the Commanding

to the Commanding General, United States Armed Forces in Europe, to the Armed Forces of the United States in Germany and to the United States Military Authorities in Germany respectively."*

Finally, Proclamation of 30 August 1945** announced the establishment of the Control Council and conferred upon it "supreme authority in matters affecting Germany as a whole".*** The Proclamation declared that any orders issued under the authority of the Commanders in Chief, for their respective zones of occupation, were continued in force.****

The jurisdiction of the Military Government Courts is therefore no longer based on the authority and power of the Supreme Commander, Allied Expeditionary Force. These courts are, at present, the judicial agencies of the Military Governments of their respective zones. Moreover, their jurisdiction is no longer subject to the limitations imposed on an occupying Power. The source of their jurisdiction is now the sovereignty of the four Allied Powers over Germany.*****

The position of the Military Tribunals set up in the United States Zone is similar. It has been expressly said of them****** that they were established "pursuant to the powers of the Military Governor for the United States Zone of Occupation within Germany and further pursuant to the powers conferred upon the Zone Commander by Control Council Law No.10******* and Articles 10 and 11******** of the Charter of the International Military Tribunal...."

For the same reasons the Control Commission Courts, established in the British Zone, may assume a jurisdiction which is not subject to the limitations of the jurisdiction exercised by an occupying Power.

---

* United States Proclamation No.1, Section III; similarly the British Ordinance No.4 of the same date declares "that on 14 July 1945, the Commander-in-Chief of the British Zone of Control assumed all authority and power theretofore possessed and exercised by the Supreme Commander, Allied Expeditionary Force within the British Zone." Here too, orders previously issued remained in force for the time being and were based from that date onwards on the authority of the Commander-in-Chief of the British Zone of Control.

** Control Council Proclamation No.1.

*** Control Council Proclamation No.1, Section II.

**** Control Council Proclamation No.1, Section III.

***** Cf. page 312 et seq. above.

****** Article II of Ordinance No.7.

******* Cf. page 347 above, et seq.

******** Cf. page 352 above.

/Finally,

Finally, the German courts which are of interest in this part of the Report are also subject to the sovereign powers of the Control Council and the Military Governor of their respective Zones.*

2. The Law Applied

Control Council Law No.10 concerning the "punishment of persons guilty of war crimes, crimes against peace and against humanity"** defines crimes gainst peace (Article II.1.a) and crimes against humanity, (Article II.1.c.) in a similar way*** to Articles 6(a) and (c) of the Charter of the International Military Tribunal. Pursuant to Articles 9 and 10 of the Charter, Control Council Law No.10 deals, in addition, with the crime of "membership in categories of a criminal group or organization declared criminal by the International Military Tribunal". (Article II.1.d).

The provisions of substantive law contained in Control Council Law No.10, further lay down the punishment which may be imposed for crimes defined by that Law. (Article II.3.). They deal also with the responsibility of a Head of State or responsible officials of Government Departments (Article II.4.a) and with the defence of superior order (Article II.4.b),**** and finally with questions concerning the statutes of limitation, immunity, pardon and amnesty (Article II.5).*****

Control Council Law No.10 was intended, inter alia, "to give effect to ... the London Agreement of 8 August 1945, and the Charter issued pursuant thereto", and in Article I it made the Agreement of 8 August 1945 an integral part of this Law. It has been said****** that by Control Council Law No.10, provisions of international law - namely the provisions

---

* The German courts and their control by Military Government respectively are dealt with by Military Government Law No.2 of 10 September 1944, Control Council Proclamation No.3 of 20 October 1945, Control Council Law No.4 of 30 October 1945, British Ordinance No.29 of 16 April 1946 and United States Amendments Nos. 1 and 2 to Military Government Law No.2 of 2 March and 15 April 1946, respectively.

** Enacted on 20 December 1945.

*** As to deviation, cf. page 356 below.

**** Article II.4.a and b. of Control Council Law No.10, correspond with Articles 7 and 8 respectively of the Charter of the International Military Tribunal.

***** The text of Article II.5 of Control Council Law No.10 runs as follows:
"In each trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute or limitation in respect of the period from 30 January 1933 to 1 July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment."

****** Schwarzenberger, Op.cit, page 335, No.21.

/of substantive

of substantive law contained in the Agreement of 8 August 1945, and in the Charter annexed to it - were transformed into German municipal law.

However that may be, there is no doubt that Control Council Law No.10, in substance, is to be considered as municipal law. It was issued in exercise of the sovereign legislative power which the Four Allies had assumed with respect to Germany, in virtue of the Berlin Declaration of 5 June 1945, and it was enacted by the Control Council for Germany upon which, by the Proclamation of 30 August 1945, these powers had been conferred "in matters affecting Germany as a whole."* It is, in other words, a legislative act of the Control Council as the legitimate successor of the last German Government.**

It has already been pointed out*** that only those crimes against humanity fall within the jurisdiction of the International Military Tribunal which were committed "in execution of or in connection with any crime within the jurisdiction of the tribunal"**** (that is, in connection with crimes against peace or war crimes). It has been submitted that only this type of crimes against peace is covered by the concept of universality of jurisdiction over war crimes,***** and that the remaining crimes against humanity are left exclusively to domestic jurisdiction.

The jurisdiction of the courts and tribunals which apply Control Council Law No.10, rests on the sovereignty over Germany which the four Allied Powers have assumed. Law No.10 was enacted by the Control Council, the supreme authority in Germany. It is municipal law, not international law like that embodied in the Agreement of 8 August 1945 and in the Charter of the International Military Tribunal.

---

* Cf. page 355 above.

** H. Kelsen, the Legal Status of Germany According to the Declaration of Berlin - The American Journal of International Law, Volume 39 (1945) page 518 et seq.

*** Cf. page 314 and page 315 et seq. above.

**** Article 6(c) of the Charter of the International Military Tribunal.

***** Cf. page 314 note 2.

The jurisdiction of these courts and tribunals with respect to crimes against humanity is, therefore, not limited in the same way as the jurisdiction of the International Military Tribunal. Control Council Law No.10 similarly to Article 6(c) of the Charter defines as crimes against humanity, atrocities and offences committed against any civilian population, or persecutions on political, racial or religious grounds, whether or not in violation of the domestic law of the country where perpetrated;* deviating from the Charter, it includes, however, both crimes against humanity committed in connection with crimes against peace, or with war crimes, and those where no such connection can be shown.

Consequently the jurisdiction of the previously mentioned military and occupation courts as well as the German courts, extends to crimes against humanity which were committed (against German citizens and Stateless persons) before the war and did not fall within the jurisdiction of the International Military Tribunal.

In the United States zone, it was stated expressly, as early as the beginning of 1946** that the existing limitations*** of the jurisdiction of the German courts did not exclude their jurisdiction over crimes against humanity committed by Germans against German citizens and Stateless persons, and constituting offences under German Law.****

To make them accessible to German Courts in the United States Zone, which were at that time prevented from applying Military Government enactments,***** the contents of Control Council Law No.10 concerning crimes against humanity were re-enacted****** in a Law of the Land Governments for Greater Hesse, Wurttemberg-Baden and Bavaria.*******

This "Law Concerning the Punishment of National-Socialist Crimes" deals with "acts of violence and persecution on political, racial or

---

* Article II.1.c. of Control Council Law No.10.

** Cf. page 350 Note 1.

*** Cf. page 349 et seq.

**** Also the jurisdiction of the German courts in the British Zone has at all times covered this type of crimes against humanity.

***** Cf. page 349 above.

****** An identical law was later enacted for the Land Bremen.

******* Identical laws were enacted by each Land Government on 1 May 1946 with effect from 15 June 1946, pursuant to the legislative powers granted to these Land Governments by the United States Proclamation No.2 dated 19 September 1945.

/anti-religious

anti-religious grounds, that have gone unpunished under the National-Socialist tyranny for political, racial or anti-religious reasons" (Article I of the Law). It provides that "prosecution shall not be barred because the act in question has at any time by a law, a decree, an ordinance or order of the National-Socialist Government or of one of its persons in power, been declared exempt from punishment or after its commission to be deemed lawful ..." (Article II of the Law.)* The Law of 1 May 1946 also contains provisions with regard to statutes of limitation, immunity, pardon or amnesty, similar to those of Article II.5 of Control Council Law No.10.**

The interpretation given by the United States authorities to Amendment No.2 of Military Government Law No.2 (of 15 October 1946) eventually enabled the German Courts to apply Control Council Law No.10 in cases of crimes against humanity committed against German citizens and Stateless persons and constituting an offence under German Law.***

The jurisdiction of the German Courts in the British Zone, over crimes against humanity against German citizens and Stateless persons is based on Ordinance No.47 of 30 August 1946.**** The German Courts exercising this jurisdiction apply the provisions of substantive law of Control Council Law No.10.***** Article II of the Ordinance moreover, provides that in cases of crimes against humanity which constitute offences under German law, "the charge against the accused may be framed in the alternative and the provisions of Article II, paragraph 5 of Control Council Law No.10****** shall apply mutatis mutandis to the

---

* The definition of Control Council Law No.10: "... whether or not in violation of the domestic laws of the country where perpetrated" covers a wider field since it includes acts for which no penal sanction was provided at the time they were committed. The practical significance of this distinction is apparent in cases of denunciation which are tried and punished under Control Council Law No.10 to which, however, as a rule, the Law of 1 May 1946, does not apply.

** Cf. page 356 Note 2.

*** Cf. page 349 et seq, in particular page 450 Note 3. The practical effect of this development could only be demonstrated by a minute investigation into the differences between Control Council Law No.10 and the Law of 1 May 1946, which would go beyond the scope of this Report.

**** Cf. page 350 above.

***** Cf. Article I.2 of the Ordinance No.47.

****** Cf. page 356 Note 2.

/offence

offence under ordinary German law".*

Cases of membership in organizations declared criminal by the International Military Tribunal are left, as a rule, in both zones of occupation, to German Special Tribunals.**

In the United States zone, these Tribunals apply the "Law for Liberation from National Socialism and Militarism" of 5 March 1946*** enacted by the Land Governments of Bavaria, Greater Hesse and Wurttemberg-Baden;**** the corresponding Special Tribunals established in the British Zone, apply the British Ordinance No.69.*****

3. Summary

To summarize:

(i) Violations of human rights of German citizens and Stateless persons so far as they constitute crimes against peace (that is, conspiracy to commit crimes against peace) or crimes against humanity within the meaning of Control Council Law No.10, fall, in the United States Zone of Occupation, within the jurisdiction of the "Military Government Courts" and "Military Tribunals"; in the British Zone of Occupation,****** within the jurisdiction of the Control Commission Courts which, in this zone, replaced the Military Government Courts. In both zones, crimes against humanity committed against German citizens and Stateless persons are subject to the concurrent jurisdiction of the ordinary German Courts.

The crime of membership in organizations declared criminal by the International Military Tribunal, which can also be brought into relation with violations of human rights of German citizens

---

* Also Military Government Courts (cf. page 349 et seq.) and Control Commission Courts (cf. page 348 note 5 and note 6.), exercise jurisdiction over "all offences under the laws of the occupied territory or of any part thereof". (Article II.c of the Ordinance No. 2 of 18 September 1945, and similarly Article III.c of the British Ordinance No.68 of 1 January 1947). Whether and to what extent in cases of crimes against humanity German law has been applied by these courts besides Control Council Law No.10, can only be shown by an examination of the cases tried.

** Cf. page 352 et seq.

*** Cf. page 358 note 6.

**** Cf. page 352 et seq, in particular page 353 note 1 and the letter of the Office of Military Government for Germany (United States) of 9 April 1947, quoted there.

***** Cf. page 353 above.

****** Cf. page 348 note 2.

/and Stateless

and Stateless persons, falls likewise under the jurisdiction of the Military Government Courts, Control Commission Courts and Military Tribunals. Apart from a comparatively small number of cases which have been included in the Indictments submitted to the Military Tribunals, these cases are, however, dealt with by German Special Tribunals.

(ii) At the outset, the jurisdiction of the Military Government Courts rested upon the "supreme legislative, judicial and executive authority and powers vested in General Eisenhower as Supreme Commander of the Allied Forces and as Military Governor". (Proclamation No.1 of 18 September 1944). They were Military Courts of an Occupying Power; their jurisdiction was subject to the limitations which international law imposes on the jurisdiction of an occupying power. The basis of their jurisdiction, however, underwent some change when the Governments of the United States, United Kingdom, Union of Soviet Socialist Republics and the Provisional Government of the French Republic assumed "supreme authority with respect to Germany" (Berlin Declaration of 5 June 1945), when zones of occupation were created (United States Proclamation No.1 and British Ordinance No.4 of 14 July 1945), and when eventually the Control Council was established (Control Council Proclamation No.1 of 30 August 1945). Since then the jurisdiction of the Military Government Courts has no longer rested on the authority and powers of the Supreme Commander, Allied Expeditionary Force, but on those of the Military Governors of their respective zones; the source of their jurisdiction has been the sovereignty of the four Allied Powers over Germany, and their jurisdiction has ceased to be subject to the limitations by which an occupying power is bound.

The basis of the jurisdiction of the Control Commission Courts established by British Ordinance No.68 of 1 January 1947 and of the Military Tribunals set up by the United States Ordinance No.7 of 18 October 1946, is the same.

Moreover, the German courts and tribunals in question are in the last resort subject to the sovereign powers exercised by the Control Council and the Military Governor of their respective zones.

(iii) The Control Council Law No.10 dated 20 December 1945, which in cases of crimes against peace and membership in organizations

/declared

declared criminal by the International Military Tribunal and in particular in cases of crimes against humanity is applied by the above-mentioned courts, was enacted by the Control Council, the supreme authority in Germany. Unlike that embodied in the Agreement of 8 August 1945, and the Charter of the International Military Tribunal, it is not international law, but municipal law.

German courts in the British zone apply in cases of crimes against humanity, both Control Council Law No.10 and the German Criminal Code; the Tribunals dealing with cases of membership in criminal organizations, apply Ordinance No.69 of 1 November 1946 enacted by the Military Government of their zone. The German courts in the United States Zone try and punish cases of crimes against humanity and membership in criminal organizations under laws enacted by the Land Governments for Greater Hesse, Wurttemberg-Baden and Bavaria, pursuant to the legislative powers granted by United States Proclamation No.2.

(iv) Only those crimes against humanity which were committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal" (that is, in connection with crimes against peace or war crimes) are subject to the jurisdiction of the International Military Tribunal. It is submitted that this type of crime against humanity alone is covered by the concept of universality of jurisdiction over war crimes and that the remaining crimes against humanity are left exclusively to domestic jurisdiction.

The courts referred to above are municipal courts; their jurisdiction rests on the sovereignty over Germany which the four Allied Powers have assumed. The law applied by these Courts is not the international law of the Agreement of 8 August 1945 and the Charter of the International Military Tribunal, but municipal law. Their jurisdiction therefore is not subject to the same limitations as that of the International Military Tribunal.

Correspondingly crimes against humanity, as defined by Control Council Law No.10 and similar laws enacted by the previously mentioned Land Governments, unlike Article 6(c) of the Charter of the International Military Tribunal, include both types of atrocities and persecutions, those connected with crimes against peace or war crimes, and others in regard to which such connection cannot be shown.

The jurisdiction of the courts in question therefore covers crimes against humanity directed against German citizens and Stateless persons committed before the war which, as a rule, fall outside the jurisdiction of the International Military Tribunal.

CHAPTER II

TRIALS OF QUISLINGS AND TRAITORS

For reasons given in the Preface, it has not been possible for the United Nations War Crimes Commission to submit a full account of the trials of quislings and traitors.*

The following is a brief analysis of only one trial, that of Pierre Laval, which is submitted as an illustration of the type of information which can be found in trials of this kind if and when research on this subject is undertaken.

Since no official documents regarding trials of quislings and traitors have been submitted or made available to the Commission, the following analysis is based upon an unofficial account of the Laval trial which reproduces a verbatim record of the proceedings of the Court. Although unofficial, this account can be safely regarded as accurate, having been published in the well-known collection of important trials edited by Maurice Garçon, the distinguished French barrister.**

The Trial of Laval

As could be expected the main, or rather, the sole object of the trial was to establish whether or not the defendant had committed high treason as a leading member of the Vichy regime. Therefore, insofar as violations of human rights came into the picture, they did so only inasmuch as they were incidental to the alleged treasonable activities of the accused. This is apparent in all stages of the trial, namely in the indictment of the prosecutor, in the course of the proceedings of the Court and in its judgment. In all these stages the place allotted to such violations is comparatively insignificant, and there is no express reference to "human rights" by name, but only in substance.

However, to the extent to which such violations were the object of the prosecution, of the proceedings and of the judgment, the information which conerns them can be regarded as valuable. Its chief value lies not so much in the magnitude of the trial within the field of French national and international affairs. It lies more in the fact that trials of traitors

---

* See page vii.

** Collection des grands proces contemporains, publiee sous la direction de Maurice Garçon, Le proces Laval, Compte-rendu stenographique, Editions Albin Michel, Paris, 1946.

/which include

which include violations of human rights as punishable under penal law are a novel phenomenon, and that in view of the aims declared in the United Nations Charter and of the purposes of its organs, entrusted with promoting a more effective protection of human rights, they are a welcome source of information of how this protection is operating on a national level.

The Court

Pierre Laval was tried by a High Court of Justice instituted by an Ordinance of 18 November 1944.*

The Court was formed for the specific purpose of dealing with charges against persons having taken part in the activities of the so-called Vichy government. The competence of the Court over accused persons included the head of the State, heads of the Government, ministers and other high officials holding responsible positions, such as Secretaries of State, Governors General, High Commissioners and the like.**

The Court was composed of three judges (magistrates) and twenty-four members of the jury. The judges were the First President of the Court of Cassation; the President of the Criminal Chamber of the Court of Cassation; and the First President of the Court of Appeal in Paris. The members of the jury were chosen by drawing lots from two lists drawn up by the Provisional Consultative Assembly. Half of those nominated and chosen were Senators or Deputies on 1 September 1939.***

The criminal investigation was carried out by a special commission upon charges submitted to it by the Prosecutor General.**** The indictment was drawn up by the Prosecutor and approved by the commission acting as a Chamber of Prosecution.*****

The procedure before the Court was that of a regular penal court competent in similar cases (Cour d'Assize), with the difference that all decisions and sentences were taken and pronounced after joint deliberation of the judges and the jury. The Court was empowered to impose any punishment from a fine to the death penalty, and to pronounce the national indignity and confiscation of property of the defendant. The judgment was final, giving only the right to submit a plea for pardon.******

---

* See Journal Officiel de la République Francaise, No.128, 19 Novembre 1944, pages 1382-1383.

** Article 2.

*** Article 3.

**** Articles 6 and 7.

***** Article 9.

****** Article 10.

The trial began on 4 October 1945 and was terminated a few days later, on 9 October. Laval was found guilty of the charges, was condemned to death and executed on 15 October. He had lodged a plea for pardon, which was rejected by the Head of the French State.*

The Charges

Laval was indicted under two counts:

(a) for "conspiracy against the internal security of the State",

and

(b) for "intelligence with the enemy with a view to favouring the latter's enterprises in connection with his own".

All the charges submitted under these two counts covered the period when Laval was member of the Vichy Government. He entered the cabinet of Petain on 23 June 1940 as Minister of State, and on 11 July 1940 became Vice-Premier and successor-designate of Petain as head of State. He was dismissed by Petain on 13 December 1940, and was returned to power in April 1942, when he became Premier, a post which he kept until the liberation of France in August 1944.

It is mainly under the second count that violations of the individual rights of French citizens were involved, although it is possible to trace some violations of a broader significance under the first count.

All the evidence regarding violations of human rights was submitted only with a view to proving high treason, but as such the said evidence and violations formed a distinct part of the trial.

The charge of conspiracy against the internal security of the State

Under this charge the accused was alleged to have caused and personally brought about the end of the constitutional basis of the III Republic, by the abolition of its democratic foundations, and by the establishment of an authoritarian State with Marechal Petain at its head. The indictment specified that the defendant brought about on 10 July 1940 "the suppression of the Presidency of the Republic, the cumulation of all powers in Petain's hands and the adjournment of the Parliament sine die". His motives in doing so were alleged to include the desire to see Germany win the war, and one of the reasons for this was said to be his hatred of Great Britain.**

---

* This position was held at the time by General de Gaulle, as an interim post until the setting up of a definite constitutional regime in post-war France.

** See op. cit., pages 27-28, 267-269, 273-274.

/Under this

Under this count, and as part of acts which undermined the "internal security of the State", the prosecution included a specific charge which concerned the violation of civic or political rights of French citizens. The charge was that the Vichy Government had disbanded the so-called Conseils generaux, whose functions approached those of local parliaments, and had abolished the election of mayors in towns with a population of more than 2,000 inhabitants.* However, this was not developed beyond being a point briefly mentioned as contributing to establish the violation of the "internal security of the State."

The Charge of Intelligence with the Enemy

Most of the information regarding human rights is to be found under this count.

The main charge was that the defendant, in collaborating with the enemy, undertook legislative and executive measures in order to "adapt the French constitution to German institutions", and acted with a view to shaping the French state on the model of Nazi Germany.

It is in connection with this part of the trial that the concept of the violation of human rights was involved.

Referring to the period when Laval became Prime Minister in 1942, the prosecutor submitted facts regarding persecutions of French citizens on racial, religious or political grounds:

> "The so-called French policy (of Laval) became then an entirely German policy: persecutions (were started) of Jews, Freemasons, communists and members of the Resistance from all parties; the police (was) put at the disposal of the Gestapo; 22,000 arrests (were made) in Paris during the night of 15-16 July".**

The prosecutor made a specific case of the persecution of the Jews upon the Nazi model:

> "On 30 October 1940 appeared a law signed by Pierre Laval, then Vice-Premier, excluding a whole category of Frenchmen from the French community, (namely) banning the Jews from all public functions and from most professions...A law of 11 December 1942... forced the Jews to report...for the purpose of inscribing the word "Jew" in their identity cards, as well as in their ration cards, in order to make it easier for the Gestapo to detect them".***

---

* See op. cit., pages 177-181, with the defence of Laval on this point, and page 276.

** Op. cit., page 29.

*** Op. cit., page 276.

/Another

Another charge was that he had introduced, by legislative and executive measures, compulsory labour, with the purpose of forcibly transporting French workers to Germany:

> "...Voluntary enlistment having become a rare occurrence, Laval resorted to compulsory measures. First, a law (was enacted) for the "use and orientation" of man-power, subjecting men and women to any work the Government would find useful. After this a ban (was imposed) on employing workers without permission...Then compulsory labour (was introduced), a real organized conscription, (establishing) markets of slaves to be delivered to Germany; ration cards were denied to those not complying...and all this was accompanied by the strictest instructions issued to the Regional Prefects."*

Instructions issued by Laval on 12 July 1943 were quoted as an illustration, showing that the defendant had warned medical officers not to exempt workers on the ground of "physical ineptitude without good reason". In this connection, the medical officers were threatened that they would be forbidden to exercise their profession, and the administrative personnel in charge of conscription was threatened with internment. A passage quoted was to the effect that "the Government had undertaken to send 220,000 workers. This obligation must be abided by".** On the other hand, evidence was submitted to show that the defendant had not only violated the rights of those conscripted for slave labour, but also of members of their families. On 11 June 1943, following a broadcast made by Laval where he warned those evading labour conscription in that sense, a law was enacted prescribing internment, imprisonment and fines for members of the families of those not reporting for labour duties.***

Finally, the Secretary-General of the National Federation of Deported Workers and their Families was heard as a witness and testified concerning the forcible transfer of 785,000 workers to Germany. He read to the Court a number of telegrams signed by Laval or his subordinates and containing instructions to make the scheme effective. The witness also testified that about 220,000 workers were "conscripted" by being arrested at random in the streets, and that about 50,000 workers disappeared or lost their lives in Germany.****

---

* Op. cit., page 29-30.

** Op. cit., page 30. See also page 287-288.

*** Op. cit. page 288-289.

**** Op. cit., pages 233-237

/The Defence

The Defence

The accused pleaded "Not Guilty" to all counts. Regarding the charges involving violations of human rights he adopted a general line of defence. He contended that whatever he did was undertaken under the duress of the occupation and in order to avert much worse measures which the enemy would have introduced had there been no French Government during the occupation. On specific points, such as the instructions and laws signed by him, he either evaded a direct answer or let it be understood that he was not personally responsible for the tenor of the texts themselves.*

The Judgment

The accused was found guilty on both counts submitted by the prosecution and condemned to death.

Of all the charges involving violations of human rights the court retained the following in its judgment:

(a) The dissolution of political or administrative bodies constituted by elections, which involves the violation of civic or political rights;

(b) The persecution of Jews;

(c) The mass deportation of workers "put at the disposal of Germany with a view to assisting her in her war effort."**

Conclusions

The above Judgment indicates that there are provisions of municipal law which permit the imposition of punishment for violations of human rights for which there is generally no retribution within the sphere of common penal law in time of peace. The dissolution of publicly elected political or administrative bodies through which political rights are violated, when carried out by governmental action is generally understood as warranting political responsibility only. The same can be said in respect of depriving a class of individuals of their civic rights, such as in the case of the Jews, or of suppressing individual liberties, such as in the case of French workers conscripted for compulsory labour. In the municipal law of many a country, the violation of such rights through acts of State leads only to political sanctions, and leaves the violator undisturbed under the rules of penal law. In the instance of the trial of Laval such violations fell within the scope of penal law.

---

* See for instance, op. cit., pages 131 and 252.

** Op. cit., pages 305-309

/However,

However, this result has been attained indirectly, that is to the extent to which human rights were violated through acts representing separate crimes under French law. And, although violations of such rights were taken into account by the Court, punishment was imposed in so far as, by committing these violations, the defendant had been guilty of other offences punishable under French laws as separate crimes.

It is only after a full study of the trials of quislings and traitors that it would be possible to draw conclusions on the sufficiency or insufficiency of municipal law in this respect.

Nevertheless, the trial reviewed here has the merit of indicating the problems which arise in connection with trials of quislings and traitors and of showing that the collection of information deriving from them would no doubt be of great use for the purpose of filling the gaps in the body of law intended to protect human rights.

The trials which would deserve special attention are those conducted against individuals who held responsible positions in quisling governments or administrations of the various occupied countries. Such is the trial of Vidkun Quisling in Norway; the trial of ex-Marshal Antonescu in Roumania; the trial of Bela Imredy in Hungary; the trial of Father Tiso in Czechoslovakia, and many others. They all include the prosecution of and conviction for persecutions on political, racial or religious grounds; suppression of civil liberties and political rights, and offences against other rights or freedoms, all of which are to be protected under the Bill of Rights now being considered by the Commission on Human Rights of the United Nations.

The information to be collected in this connection may prove to be of a greater value for the immediate object of the Human Rights Commission's work than the trials of war criminals proper.
