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J.P. TRAININ: QUESTIONS OF GUERILLA WARFARE IN THE LAW OF WAR
Originally published in Izvestia Akademmii Nauk, U.S.S.R., Otdelenie ekonomiki i prava, No.4(1945)translated into English by Dr.John N. Hazard and republished by permission in (40) American Journal of International Law, (July, 1946) page 534.

The well known Russian jurist, Director of the Institute of Law of the Academy of Science of the U.S.S.R., one of the two Soviet delegates who signed the Four Power Agreement of 8th August, 1945, and the author of the book "Hitlerite Responsibility under Criminal Law", gives in this paper a history of the law of war, as far as it concerns the status of guerillas. He refers, in addition to the opinions of writers on International law, which are usually quoted in this connection, also to very interesting statements by Engels on the unsuccessful attempt to organise guerilla warfare by the Southern States in the American Civil War and to the Prussian anti-guerilla measures in the 1870-71 war against France. He elaborates upon the idealogical clashes at the Brussels Conference and at the two Hague Peace Conferences. His main proposition is that both on grounds of principle, and on grounds of positive law, the latter being elaborated on the basis of the discussions of the three conferences, the citizens of an invaded country, who defend their fatherland, are under the protection of International Law, irrespective of whether or not they were able to comply with the technical requirements, such as uniforms and insignia.

LESTER NURICK & ROGER BARRETT: LEGALITY OF GUERILLA FORCES UNDER THE LAWS OF WAR (40) AMERICAN JOURNAL OF INTERNATIONAL LAW (JULY 1946) page 563.

This article, which appeared in the American Journal of International Law, together with the article by Professor Trainin, is a valuable complement to the latter. The authors who are both officers in the Judge Advocate General's Department of the United States Army, but who express their own opinions, which are not necessarily those of the Judge Advocate General or the War Department, present to the reader a comprehensive, historical and dogmatic survey of the problems raised by guerilla or partisan warfare,

in analysing both the International Conventions and the historical precedents, in the United States-Mexican War(1847-48), in the Mexican Civil War(1865), in the United States Civil War, in the Franco-German war, in the Philippine Insurrection(1899-1902), in the South African War and in World War II.

GEORG SCHWARZENBERGER: A FORERUNNER OF NUREMBERG
THE BREISACH WAR CRIME TRIAL OF 1474
THE MANCHESTER GUARDIAN, SEPTEMBER 28TH, 1946.

The reader in International Law in the University of London published in the "Manchester Guardian" an article describing a trial held in the 15th Century, which shows many features familiar to the modern student of the problem of war crimes. Because of the difficulty of access to a back number of a daily paper, the article is here reproduced in full.

The trial of Sir Peter of Hagenbach in 1474 appears to be the first international war crime trial. It has even more modern interest than that, for it was conducted throughout in accordance with high judicial standards and the duel between the public prosecutor and counsel for the defence centred in the issue of obedience to superior orders. Clearly the roots of modern international law go much deeper than is commonly assumed.

To appreciate the setting of the trial its political background must be sketched. Duke Charles of Burgundy had raised his country to the zenith of the power which Burgundy was to achieve on the chess board of Europe. His friends called him Charles the Bold. His enemies decried him as Charles the Terrible, and by the massacre of the inhabitants of Nesles in 1472 he had certainly done full justice to this title.

REIGN OF TERROR.

In 1469 financial difficulties forced the Archduke of Austria to pledge to Charles his possessions on the Upper Rhine, including the fortified town of Breisach. Charles installed Sir Peter of Hagenbach as his Governor, or Landvogt. In accordance with the standards set by his master, Hagenbach ignored completely the promise that the ancient liberties of towns and inhabitants in the pledged territories would be respected. He established a regime of arbitrariness and terror that went beyond anything that was customary even in those rather tough times. Life, honour and property counted for nothing. Hagenbach and his soldiers became guilty of outrages which did not lag behind the worst deeds of modern totalitarian gangsterism. They further extended their depredations to Swiss merchants on their way to and from the Frankfurt Fair and frequently encroached upon the rights of neighbouring towns and countries.

It was an open secret that Charles' ultimate ambition was the Imperial Crown. Yet more than any other single cause the outrages committed by Hagenbach contributed to bring about what until then had been regarded as impossible - the alliance against Burgundy of all her neighbours. Austria, the Swiss Leagues and towns, France and the towns and knights of the Upper Rhine, who before had all been at loggerheads with one another, realised that they had to make their choice; they had either to make an end of this tyranny or to submit helplessly one by one to every whim of Charles and his subordinates. The support which the Archduke of Austria could draw from his allies enabled him to offer the full amount that was required for the redemption of his possessions. On flimsy pretexts Charles refused to fulfil his treaty obligation. Meanwhile, however, the ball had been set rolling by German mercenaries of Hagenbach and by the citizens of Breisach. Together they

captured Peter of Hagenbach. Then the other allies took the field against the Duke of Burgundy, who met with his death in the Battle of Nancy.

The Archduke of Austria, in whose territory Hagenbach had been captured, ordered his trial. Whereas an ordinary trial would have been conducted before local judges, it was agreed in this case that the allied cities, including the Swiss towns, should delegate judges. As by then these Swiss towns had ceased to form part of the Holy Roman Empire, their participation gave an international character to the bench, before which Hagenbach was tried. To represent the order of knighthood among the judges, sixteen knights were added to their number.

On May 4,1474, the trial took place on the market-place of Breisach. Henry Iselin, of Basle, acted as public prosecutor. Fortunately, records of his speech and of that of counsel for the defence were preserved. The prosecutor arraigned the accused for having committed crimes which went far beyond the breach of contractual obligations. In Iselin's submission, Hagenbach's deeds outraged all notions of humanity and justice and constituted crimes under natural law. In the words of the prosecutor, the accused had "trampled under foot the laws of God and men" and had committed what would be called today crimes against humanity.

Were Hagenbach's crimes war crimes, considering the fact that they had been committed before the outbreak of open hostilities between Burgundy and the allies? It is true that war crimes in the strictest sense of the word involve violations of the rules of warfare. Yet it should be remembered that right down to the beginning of the nineteenth century the border-line between states of peace and war was very thin, if often it existed at all. The hold of Burgundy over the pledged Austrian territories was more akin to the occupation of enemy territory in war-time than to a peace-time occupation of foreign territory under treaty. Further, it may be held that this trial offers a much-needed precedent(in a non-technical sense)of a case in which war crimes in the wider sense of the term - as used in the Charter of the Nuremberg Tribunal - have come before an international bench. If such deeds are considered to be amenable to international criminal jurisdiction such jurisdiction rests less on the rather accidental fact of war than on the abuse of sovereign jurisdiction which such crimes constitute. So, in the Charter of the Nuremberg Tribunal, the jurisdiction of the International Military Tribunal has been made to cover crimes against humanity, whether committed "before or during the war".

THE DEFENCE.

Further accusations were made in interrogatories, witnesses were heard, and then Hagenbach's advocate spoke for the accused. His only point was one on which ever since war criminals have relied - the defence of superior orders:

> Sir Peter of Hagenbach does not recognise any other judge and master but the Duke of Burgundy from whom he had received his commission and his orders. He had no right to question the orders which he was charged to carry out, and it was his duty to obey. Is it not known that soldiers owe absolute obedience to their superiors? Does anyone believe that the Duke's Landvogt could have remonstrated with his master or have refused to carry out the Duke's orders? Had not the Duke by his presence subsequently confirmed and ratified all that had been done in his name?

When the accused himself addressed the tribunal, he based his whole defence on this ground.

The judges deliberated for several hours. When judgment was pronounced the tribunal rejected the advocate's preliminary objections to its jurisdiction. It overruled the plea of superior orders, found Hagenbach guilty

and condemned him to death. The executioner of Colmar was chosen from among eight competitors, and before the execution took place, a representative of the Emperor deprived Sir Peter of Hagenbach of his knighthood as one who had committed all the crimes which it had been his duty to prevent. Finally, the Provost of Einsisheim, the marshal of the Tribunal, gave his order to the executioner with the words "Let justice be done.

JACOB ROBINSON: THE NUREMBERG JUDGMENT
CONGRESS WEEKLY, NEW YORK
VOLUME 13, No. 25 (October 25th, 1946)

Dr. Jacob Robinson, the Director of the Institute of Jewish Affairs in New York, gives, in this article on the Nuremberg Judgment, a tentative analysis of the Tribunal's unanimously arrived at concept of "crimes against humanity". He quotes the English text of Article 6 (c) of the Charter of the International Military Tribunal, as it read before it was amended by the Berlin Protocol of 6th October, 1945, and continues: "With the semi-colon after the word "war" there would have been two types of crimes against humanity, some without any relationship to the other two crimes provided for in this Article and some only in relation to them. But nearly two months after the Charter was signed in London, on August 8th, 1945, a discrepancy was discovered between the Russian text and the English and French versions. In the Russian text after the word "war" there came a comma; in the English and French version, a semi-colon. On the basis of the Protocol of October 6th, 1945, it was recognized that the proper punctuation mark was a comma. By the substitution of the semi-colon through a comma a restrictive interpretation was given to the expression "crimes against humanity". As the text now stands, the Charter only defines what kinds of crimes against humanity are within the jurisdiction of the Tribunal. Contrary to crimes against peace and war crimes, both of which have an independent existence, crimes against humanity are "accompanying" or "accessory" crimes to the first two if committed in connection with or execution of the crimes of aggressive war or violations of laws and customs of war". The author submits that for a proper evaluation of the concept of crimes against humanity, as evolving from the Charter, and particularly as interpreted by the International Military Tribunal, the following questions are decisive: what is the relation between this crime and the other two crimes; what is the initial moment of the crime; what about the geographical application of the crime; and what are the methods of the crime?

After analysing the relative passages of the Judgment he concludes: "It is clear from these statements that all crimes committed against humanity after the beginning of the war in 1939, come within the jurisdiction of the Tribunal. A presumption is thus being created which releases the Tribunal from the necessity of investigating each individual act in regard to its connection with war of aggression. The situation is different regarding crimes committed before the war. The Tribunal refuses to make a general statement on their criminality, but a great number of them are classed as criminal acts."

On the second problem, namely the initial date, Dr. Robinson says: "It is important to note that the Tribunal did not find the existence of a common plan or conspiracy, in regard to the commission of war crimes and crimes against humanity. Such a conspiracy existed in the view of the Court only in regard to the crime of aggressive war. This concept is of no great importance for crimes against humanity in view of their connection with war of aggression. It would seem that the initial date of this conspiracy would also be the initial date of crimes against humanity. The Tribunal did not state, in absolutely exact terms, when the conspiracy started. The Court found that plans were made to wage war, as early as November 5th, 1937, and probably before that. If, according to the Court, the conspiracy must not be too far removed from the time of decision and action, it would appear that the Court considers 1937 as the initial date of war of aggression. Thus no anti-Jewish acts committed before that period could be classed as criminal. However, in listing the criminal acts of the individuals and organizations,

the Court does not follow this chronological limitation."

He then refers to the appropriate statements of the Court regarding the defendants Streicher, Frick and Funk.

From the viewpoint of the development of international law, the author says, the gravest issue is that of the problem of crimes committed by a state or its representative, against its own citizens. The Hague and Geneva Conventions drastically limited the rights of belligerents regarding war prisoners and wounded and the rights of occupying countries regarding their native populations. But there was no general provision in regard to treatment by the state of its own nationals. The theory of humanitarian intervention, the protection of minorities, the recently established duty of the United Nations to promote human rights and fundamental freedoms notwithstanding, sovereignty is still generally understood as absolute freedom in treating its own nationals. The Tribunal did not discuss this problem, but the answer is certainly clear that crimes committed by Germans against German nationals are within the general concept of crimes against humanity.

In support of this, Dr. Robinson adduces the Tribunal's ruling on the Leadership Corps of the Nazi Party and on the SS. Respecting the question which methods of persecutions are considered criminal by the International Military Tribunal, Dr. Robinson emphasises that time and again the Court underlines the connection between the initial stage of persecution and the so-called "final solution". While aghast at the mass slaughter and shocked by the dramatic boycott of April 1, 1933 and pogrom of November, 1938, the Court lists as criminal activites: legislative acts; other acts tending to political discrimination; economic discrimination; plundering of property; diplomatic pressure of Germany on satellites; deportation; political segregation (Nuremberg laws); ghettoization; slave labor; starvation; "infection of mind"; religious persecution.

Dr. Robinson's interpretation of the Judgment and its bearing on the term "crime against humanity" proceeds on lines similar to those on which the Commission Document C. 237 (a reproduction of Doc. III/62) is based.