

1948 History of the United Nations War Crimes Commission and the Development of the Laws of War

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CHAPTER I

INTRODUCTORY CHAPTER

It is scarcely a hyperbole to assert that the war of 1939-1945 (World War II) is one of the greatest calamities that ever befell the human race. It had further the striking characteristic that it was deliberately created by a number of very evil men, including Hitler and his clique and the corresponding figures in the Far East, in order to acquire further material advantages. The war was purely acquisitive and aggressive. Their motives were naked, blatant and unashamed. In that, as in other respects, it was peculiar in the history of the world. In the course of the war there sprang a vast world wide accumulation of human misery unparalleled in the history of mankind however widely in space and time the survey is extended. War is in itself always a wicked and evil thing; it necessarily involves a systematic infringement of the ordinary human rights of individual men and women over the whole vast theatre in which it operates.

In World War II not only were there these terrible consequences, but there were what would have seemed an incredible multiplication of cruelties and atrocities, all of which were crimes not only under the ordinary criminal laws of all civilised countries, but also were crimes under the law of war, which is an ancient part of the law of nations. In particular the leaders and organisers of the actual war or wars were guilty of the crime of planning and initiating war as an instrument of policy, the crime against peace forbidden by the Kellogg-Briand Pact of 1928 against aggressive war, and also condemned by the Nuremberg judgment. Such detestation of these deliberately planned aggregations of atrocious wickedness was felt by the civilised nations, that the Allied powers made various declarations to ensure that the guilty should not escape. Of these it is enough to mention here only one, the Declaration of Moscow, made in November 1943 on behalf of the Allied powers by President Stalin, President Roosevelt and Mr. Winston Churchill. That Declaration proclaimed the determination of the Allied powers that justice should be done on the evil doers, that the "major" criminals should be dealt with as the Powers should decide, and that the "minor" criminals should be sent back to the countries in which they had done their atrocious deeds, to be dealt with by the laws of those countries. Those described as the "major" criminals were Hitler and his immediate entourage; the "minor" criminals were the vast number of those who carried out their scheme in varying grades of power and responsibility.

War crimes are multiple in character. Hitler, the arch-criminal in the Western theatre of war, headed the major criminals. Because his evil deeds were ubiquitous, not confined to any particular location, he was the architect of the whole hellish programme; along with the associates who worked in his immediate circle, he might be pictured as being as it were, the apex of a vast pyramid of criminals, which went on spreading outward and downward to its base, so as to include the myriads of subordinate

instruments and coadjutors without whom his purposes could not have their atrocious fulfilment. I cannot better describe this inspissated mass of wickedness, or the unimaginable misery and ruin which it entailed to the world than by quoting the impressive summary of the whole delivered by the International Military Tribunal at Nuremberg at the close of the trial in 1946:—

“ The evidence relating to war crimes has been overwhelming, in its volume and its detail. It is impossible for this Judgment adequately to review it, or to record the mass of documentary and oral evidence that has been presented. The truth remains that war crimes were committed on a vast scale, never before seen in the history of war. They were perpetrated in all the countries occupied by Germany, and on the High Seas, and were attended by every conceivable circumstance of cruelty and horror. There can be no doubt that the majority of them arose from the Nazi conception of “ total war,” with which the aggressive wars were waged. 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 barbaric way. Accordingly, war crimes were committed when and wherever the Fuehrer and his close associates thought them to be advantageous. They were for the most part the result of cold and criminal calculation.

“ On some occasions, war crimes were deliberately planned long in advance. In the case of the Soviet Union, the plunder of the territories to be occupied, and the ill-treatment of the civilian population, were settled in minute detail before the attack was begun. As early as the Autumn of 1940, the invasion of the territories of the Soviet Union was being considered. From that date onwards, the methods to be employed in destroying all possible opposition were continuously under discussion.

“ Similarly, when planning to exploit the inhabitants of the occupied countries for slave labour on the very greatest scale, the German Government conceived it as an integral part of the war economy, and planned and organised this particular war crime down to the last elaborate detail.

“ Other war crimes, such as the murder of prisoners of war who had escaped and been recaptured, or the murder of Commandos or captured airmen, or the destruction of the Soviet Commissars, were the result of direct orders circulated through the highest official channels.

“ 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.”

Beating, torture and killing were general. How many millions perished in this way cannot be computed.

Almost at the same moment as the Moscow Declaration the Allied nations, 17 in all, constituted the United Nations War Crimes Commission at a meeting held at the British Foreign Office in London on 20th October,

1943. Its objects and powers were conferred though in very limited terms, as follows:—

- “ 1. It should investigate and record the evidence of war crimes, identifying where possible the individuals responsible.”
- “ 2. It should report to the Governments concerned cases in which it appeared that adequate evidence might be expected to be forthcoming.”

But however limited its powers, its creation was a landmark in the history of human justice in the field of international law, i.e. that body of international law which embraces the law of war. The functions then expressly given were, at the outset, what I have stated, but they soon were extended to include advisory duties which entitled it to make recommendations to member Governments on questions of law and procedure in order to carry out the objects of the Allied nations. It was in date thus closely associated with the Moscow Declaration. It was an international corporation pledged to fulfil its purpose by a definite practical scheme. Its establishment put an end to the days of mere talk or moralising. It stood as an objective symbol or testimony that the splendid declarations of the Allied nations, that war criminals would be pursued and punished, were to be carried out. It had, it is true, no effective power either executive or detective, except in so far as it could record war crimes reported to it, which was a positive act with certain consequences. When it was constituted in 1943, the war had gone on for more than four years and the end seemed if no longer uncertain, still remote. But the Commission could and did begin the preparatory work on the exercise of the advisory capacity conferred upon it. What it did in that way in 1944 and the early part of 1945 was of prime importance. The idea and plans which it elaborated were not indeed published in the Press, but they were communicated to the member nations by their respective representatives and being in that way available to those interested, were thus known to the American lawyers whose labours eventually helped to achieve the London Agreement of 8th August 1945.

Thus, through the work of the Commission and other agencies, the United Nations had ready to their hands when the time came, a more or less practical scheme for the prosecution and punishment of war criminals, which was capable of being completed and put into effect when the Nazi resistance collapsed. The Commission met much public criticism in 1944 on the ground that it was doing nothing. But its records show how valuable was the work done in 1944, though it was of a preparatory character, as was inevitable at that time. In that year Sir Cecil Hurst was Chairman. The object of the United Nations in this connection was in President Roosevelt's memorable words to put teeth into this branch of international law. It was important for it to be ready to begin work at the earliest possible moment. At the end of the 1914-1918 war (World War I) the Allies were found without a practical plan for prosecuting war criminals and, partly for that reason, the edge of their purpose was blunted.

In any case, 1944 was necessarily a year in which the activities of the Commission, other than those in its advisory capacity, could not be fully

exerted. Its work of recording war crimes was delayed and almost stopped for the time because it depended on the submission of reports of the crimes which were being committed in the occupied countries; but terrible as the crimes were they could not be fully reported in England or America, because of the difficulty of communicating with the occupied countries. However, a certain amount of information began to come through. The general picture a little later is indicated in an article contributed by me to the *New York Times* (Sunday Magazine) of 13th May, 1945. This article, I understand, had a circulation of many millions in both Northern and Southern America, and had some effect there on public opinion. The information contained in it is clearly defective when compared with subsequent disclosures, but it shows how even then reports were reaching London and how a practical scheme was forming. The article was necessarily silent as to what would be done in regard to the arch criminals. The Governments had not by then decided whether they should be tried by a Court of Law or dealt with by executive action of the Powers. That was to remain uncertain for some little time yet, indeed until the London Agreement of 1945. There was also the fear of reprisals until the occupied countries were liberated.

But the scheme for the prosecution of the "minor" criminals was outlined and came into effect early in 1945 in the Hadamar, Peleus and Belsen trials; in the first the crime was murder by drugs on the scale of hundreds of "useless" persons, physically infirm, in a medical institution. In the second the charges were for the murder of survivors from a torpedoed ship who were clinging to rafts, the third was for the murders and cruelties; perpetrated in a concentration camp, including the slaughter by poison gas of thousands of unoffending Allied civilians brought from central Europe for the very purpose. The Nazis, who were found guilty in these trials, were sentenced either to execution or long terms of imprisonment. The prosecuting authorities were in two cases the British, and in the third the American military.

These three cases were the earliest of a long series running into many hundreds and involving many thousand accused. Indeed from about the autumn of 1945 until the end of March 1948 there were in the European theatre approximately 1,000 cases tried, involving sentences of death or long imprisonment for atrocious war crimes on some 2,700 persons. These were the "minor" criminals; to be distinguished from those "major" criminals who were eventually tried at Nuremberg. There were in the same period a comparable number of war criminals tried in the Far Eastern theatre. All these numbers also appear in the summary which is included in the later pages of this volume.⁽¹⁾ The enormous number of prosecutions, the conduct of which extended over the large part of the world must (like everything connected with World War II) be almost or entirely unprecedented not only in aggregate numbers and in their complexity variety and geographical area, but also in the comparatively short space of time in which the programme was carried out. It was wisely felt that justice must not be delayed. As I have already observed, the plan of this great machinery for the enforcement of law was sufficiently ready when the time came. To a definite extent and in large part that was due to the

(1) See Appendix IV.

recommendations of the Commission acting in its advisory capacity. The essential elements to be planned and provided for in the administrative organisation of the prosecution were the detection and apprehension of the war criminals, the establishment of the appropriate courts and the examination of the principles of law and procedure relative to war crimes and their trial. All this was preparatory but essential to the actual trials. The whole scheme of prosecuting and punishing war criminals involved the labour of many persons and of co-ordinated effort on their part, aided by the whole-hearted support of the public.

It might seem that it would have been wisest to have had a single great war crimes prosecution agency, created by the concerted action of the Allies, with two great divisions, one for the European theatre, one for the Far East. Some such scheme was examined by the Commission but the objections were insuperable; for instance it must necessarily have involved interference with the independence of national sovereignty. What was recommended and adopted was a dispersion of effort and responsibility. Each Allied nation was, according to the scheme adopted, to be responsible for the prosecution of its own criminals. This was what was envisaged as a general principle in the Moscow Declaration as regards all but the "major" criminals. With this object the scheme adopted was to establish in each country a National Office, charged with the duty of investigating the crimes which fell within its sphere, apprehending the accused, reporting the charges with appropriate *prima facie* evidence to the Commission, and conducting the trials in its own courts. These courts might require, and generally did require, some amendment to their law and procedure to adapt them to fulfil the function of courts enforcing international law.

To assist the National Offices, the Commission, in May 1945, called together and organised a Conference of the National Offices, which was generally recognised to have been a both useful and helpful course. It was indeed only one instance of the services of the Commission as a liaison and consultative agency, not only for the National Offices but also for the military authorities, the importance of which in this connection I shall now seek to explain. For various reasons a large number of prosecutions were conducted by the military authorities in occupation of the enemy countries, instead of by the National Offices in the different countries. That was so in the three particular trials already referred to, where, in one case, the offence had been committed against Allies on the High Seas; in another against Allies in Germany and in the third case of a concentration camp there were a great many defendants involving great procedural difficulties—a problem which arose in many other concentration camp trials. The camps in which the crimes were committed were both in Germany and in occupied countries. Each of these cases involved a great number of victims of so many nationalities that it would have been impossible to apply the test of the nationality of the victims. Hence, in these cases (as in a very large number of others) the appropriate military department, generally the Judge Advocate General's staff, of one of the Allied countries, mostly Britain or the United States, assumed the burden of the trial. This was also the plan adopted in the very numerous class of offences against the military, such as the slaughter of prisoners of war, in particular captured airmen or commandos, and many others. In

this way a great many prosecutions were carried out by military authorities and tried by military courts instead of national courts.

This division of work functioned extremely well. There was a similar co-operation between the different workers engaged in the most important and difficult task of tracing and detecting criminals. Each nation had its investigation team and so, after the occupation, had each headquarters staff. The various teams, some of which belonged to a British operation called for obvious reasons "Operation Haystack," were located at the zonal or other headquarters, though they necessarily travelled about and they were thus able to pool information.

I may now advert briefly to the internal or domestic machinery by which the Commission discharged its functions. What has been described as its primary function, which was certainly important, was to record war crimes and report them to the Governments concerned. But as the Commission had no detective or executive powers it was obliged to wait until the charges were submitted to it by the proper authorities, i.e. generally the National Office concerned. To deal with such cases it formed Committee I which examined the evidence submitted to it in order to decide if a *prima facie* case was shown. If the Committee held that it was, the name of the accused and other particulars of the charge were entered on a List which was kept by the Committee, copies of the List were circulated among the member Governments and later also among other interested bodies. This operation was in no sense a trial. The proceeding was *ex parte*: the man charged was not called to attend; the evidence tendered by the National Office was not under oath but consisted of written statements. It may, however, be noted as a proof of how careful the National Offices generally were that in very few cases, perhaps less than 10, has objection been afterwards taken to the entry of a name on the List. The National Offices clearly felt the responsibility which attaches to those who bring an *ex parte* charge.

The Lists, which now contain over 36,800 names, will be a valuable record for future historians. But they were and still are, so long as prosecutions continue, of present-day practical importance. The listing of a man entitled the proper authority to apprehend him and place him on trial before the proper court. He might also be surrendered by the Allied power which held him prisoner to another Allied power which claimed him for trial. But under Article IV of Control Council Law No. 10, which regulated procedure in war crimes in Germany after the surrender of the German forces, the ultimate decision whether a man should be "extradited," as it was called in this way rested with the Commander-in-Chief of the zone in Germany in which he was held. The mere fact that a man was listed was not necessarily enough to decide the matter. But the List was of great assistance to the investigating teams because it often enabled them to trace a man who was wanted for trial on a charge of war crimes. In the History will be found a description of the more complicated machinery by which the Commission's Lists were used by the investigating teams to establish the whereabouts of a wanted man.

All this, however, was preliminary to the trial. The question of the courts in which war criminals could be tried was a vital inquiry which

early occupied the attention of the Commission, in its Committee II and later, when that Committee was dissolved, in Committee III. The law of war was, of course, a section of international law, and as I shall later explain, involved questions different from and outside the ordinary municipal law of any particular nation. It was thus necessary to have international courts, just as it is necessary to have Prize Courts in belligerent countries. The Commission in the first months of its activity prepared elaborate plans for the constitution of a special court or courts by agreement of Treaty between the Allied nations—such a court was referred to as a Treaty Court. But these plans, admirable as they were, had to be laid aside because they were likely to involve delay before they could be brought into operation and also because of other obvious difficulties.

I shall put the matter very broadly but sufficiently for this very summary survey of the general layout of the system of war crimes prosecution, so far as concerned the "minor" criminals. There were two principal alternatives, the national courts with such additional powers and rules of law and procedure, as were necessary to enable them to function as international courts, and the military courts, such as those that sat in the three trials I have mentioned. These military courts are different from courts martial which deal with the discipline of an army. The business of the military courts is to try offences against the law of war. They are, in practice, convened by the Commander-in-Chief of the zone or area. They act under a Commission or Warrant. The judges generally are military men. Such courts have tried a very large number, probably the larger proportion, of the war crimes adjudicated upon in connection with World War II. They generally have a member with legal qualifications, or, as in the British practice, are assisted and advised as to the law by a member of the staff of the Judge Advocate General who is always a lawyer. The facts are in most cases peculiarly suited to adjudication by experienced soldiers. The use of such courts for the trial of offences against the law of war has long been recognised by international law. I have attended many of these courts as an observer and can speak for the high qualities of care, ability and impartiality which these judges, officers of standing and experience, have shown. There is no appeal, but the Commander-in-Chief has a revising power.

There was a different type of court developed for the trial of the "major" criminals. That was the famous Nuremberg Tribunal. It had some affinity with the type of Treaty Court envisaged by the Commission in the tentative but abortive scheme to which I have referred above; it had also some affinity with the military court. It was called the International Military Tribunal, but only the Russian members were military men. That, however, does not affect its right to be called a military court. Its judges were taken from the four great Allies, one judge and one associate judge from each.

A military court might, in ordinary practice, be composed of members from more than one Allied nation, as for instance was done in the Peleus case. This was a precedent for the International Military Tribunal which was indeed a great and famous Court *sui generis*. It and its Judgment

were a landmark in the history of international law. Its constituent document, the London Agreement of August 1945, is one of the most momentous of international documents. Besides the four Allied Governments which were parties to it, it was acceded to by all the members of the Commission except two. As it deals with the "major" criminals it was to that extent outside the scope of the Commission, though it is well recognised that the deliberations of the Commission on the legal questions were not without influence on the law adopted in the London Agreement. I am not here concerned with controverted issues as to its precise status. As international law is created *inter alia* by the decision of courts of competent authority, what the Nuremberg Tribunal decided will be a landmark in international law, whether it was an international or municipal court or both. It was certainly established to administer international law, even or especially in respect of those principles which are often regarded as novel, such as offences against peace or crimes against humanity. I shall later revert to this matter.

International law is a product of natural law, that is, it has grown and developed from the workings of the moral impulses and needs of mankind by a sort of instinctive growth, as well as by edicts or decrees or authoritative pronouncements. In this it resembles all customary law. Indeed it is itself a body of customary law. Its dictates take shape and definition particularly when they are acted upon and are recognised by the common consensus of mankind and are administered and enforced by competent courts. A great English legal historian similarly described commercial law as an example of natural law. Incidentally the same is true of Prize Law. Later, after a certain stage of development has been reached, such customary law finds a definite form and substance, the moral ideas from which it originates become crystallised and are enforced by competent courts, by various sections of customary law, and the process results in the creation of codes. Thus for instance in the case of commercial law we have Codes, such as the Bills of Exchange Act, which again generally are based on rules laid down by decisions of the national courts. But international law is not the law of any single nation. Any nation may act upon it and adopt it and in that sense it may be said to be the law of that nation, but it is still international law, which is the law of the community of nations. Hence the source of that law is to be found in international documents or conventions and the like, not in the specific laws or legislation of any particular country. That there is such a law of war as part of the law of the community of nations is expressly stated by the Nuremberg Tribunal in its judgment, in the following passage:

"The very essence of the Charter (i.e. the Agreement of 1945) is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorising action moves outside its competence under international law."

The Commission, in order to fulfil its duty to advise the Governments on questions of law, had to deliberate on fundamental issues of international law, issues which were of practical importance in regard to war crimes. The idea of laws of war is not at all novel. Shakespeare in a

familiar passage (Henry V, Act 4, Sc.7) makes the Welsh Captain Fluellen exclaim "Kill the poys and the luggage! 'tis expressly against the law of arms". A little lower down it is apparent that Fluellen could distinguish martial law from the law of war or arms. No doubt the law of war has developed since those days. The name of Grotius is not to be forgotten. There were other great lawyers who advocated more humane rules of war, until a sort of partial codification was attempted by the Hague and Geneva Conventions. But these did not close the tale. Since then there have been two world wars. In both of which, and especially in that recently ended and indeed somewhat earlier, the aggressors set up a theory of totalitarian war, totalitarian not merely because all the nations resources of men and material were swept into the war, but also because the war was waged with a total disregard of all humane and moral or legal restraints.

The Nazi statesmen and soldiers claimed to be "*legibus soluti*." They acted on that principle. That was the new ideology of which Keitel boasted when he approved Hitler's order to kill the captured British airmen or commandos. The conscience of humanity has recoiled from such a doctrine. As always when there have been murderous and destructive wars, there has been since 1919 a great world movement to abolish war or, if that is impossible, to diminish its possibility and to humanise war. That had two main consequences apart from the important factor that a practical and effective system of prosecuting and punishing war crimes had been brought into existence. One was a determination to reform and redefine the law of war, the other was to make aggressive war an international crime. Coupled with these main ideas, was the idea that war crimes involved individual responsibility.

It has often in the past been said that international law was only concerned with affairs between nations. The discussions after World War I left the matter a little vague though the idea of individual responsibility was sufficiently explicit. The Commission, however, in compiling its Lists of persons charged as war criminals and in its debates consistently accepted that idea of individual responsibility. Since then the Nuremberg Tribunal has clinched the matter in its judgment. I quote only a few words "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." Indeed it has always been involved in the idea of war crimes in the conventional sense, e.g. under the Hague and Geneva Conventions. It may now be taken as settled that there is an international criminal law for breach of which, since World War II ended, thousands of individuals have been tried and punished by competent courts all over the world.

That there was a crime of aggressive war has been hotly contested in certain quarters, but on this issue the Nuremberg Tribunal has spoken with no uncertain voice. "The charges" it said, "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 incite a war of aggression therefore, is not only an international crime, it is the

supreme international crime differing only from other crimes in that it contains within itself the accumulated evil of the whole." The arguments of counsel before the Tribunal advanced the same proposition with singular logic and force. I may refer in particular to those of Mr. Justice Robert Jackson, the United States Chief Prosecutor and of the British Attorney General, Sir Hartley Shawcross. These arguments will become classical. In the debates in the Commission this vital topic had been fully discussed. I have been told that these discussions were not without influence in determining the scope of the prosecution and in putting "crimes against peace" in the fore-front of the Charter of the Tribunal.

The concept was not novel either in 1945, or in 1939 when the war was initiated by Hitler and his associates. It was at least implicit in those articles of the Versailles Treaty which provided for the prosecution of the Kaiser. It had been frequently approved by weighty arguments of distinguished lawyers and statesmen in the years between the two wars. In 1928 it was explicitly embodied in a fundamental international document, the Kellogg-Briand Pact, which was based on the distinction between a just and an unjust war, which was certainly an ancient, or at least a mediaeval, Christian principle. It was unpalatable in certain quarters, because it was directly contrary to the theory of totalitarian war. It was, however, just that evil conception which the highest moral forces of the world were bent on eradicating. It was indeed a moral and a political principle which had acquired the status and definiteness of a principle of international law and was by 1939 ripe for enforcement. Finally it was expressly enforced by the Nuremberg Tribunal, an international court of the highest competence and authority. I am quite satisfied that in the future, even though other forces may temporarily and on occasion prevail, the nations of the world will not let the principle go.

Apart from the Kellogg-Briand Pact there were the manifold weighty declarations by the League of Nations and other authoritative international councils and bodies, and the opinions of the most eminent international lawyers. Above all there were the dictates of the moral sense and conscience of mankind. If anything had been wanting, the whole was consummated in the explicit and deliberate judgment on the issue by the Nuremberg Tribunal. It is impossible to suggest that Hitler or any of the criminals did not know they were committing a crime in starting the war. It is not merely that they could not deny what was widely known, especially to the Fuehrer, and his circle; their documents and evidence show consciousness of criminality. Hence it cannot relevantly be contended that a man cannot be punished for what he did not know was a crime. Indeed if it were necessary (as it is not) to go further and say that the law of the Charter under which the Nuremberg Tribunal sat was valid retrospectively, it would fall within the principle stated by a great English judge that there may be offences for which the earlier law for want of prevision failed to meet, and in which the execution of the law as it stood, would involve the injustice that the axiom *summum jus summa injuria* would apply. As the Tribunal said, the objection to retrospective enactment is one of justice not of jurisdiction.

Among other fundamental doctrines debated by the Commission was

what has been called the defence of superior orders. I think it can now be taken as settled that that plea is not a sufficient defence but that it may have effect by way of extenuation. I shall merely mention in passing one important doctrine debated by the Commission; crimes against humanity. I shall be content here to refer to an article on that type of war crime by Dr. Egon Schwelb, until last year one of the Commission's legal advisers, published in the *British Year Book of International Law*, 1946. I am in full agreement with his exposition. The same learned jurist contributed a note on the Commission in the same publication (p. 363), from which I shall take the liberty of quoting a list of detailed rulings on specific legal problems which occurred in connection with the listing of criminals by Committee I. It is a list of examples of "questions of substantive law which the Commission had to decide over and over again when dealing with particular charges brought before it by the National Offices." The list proceeds:

"The defence of military necessity, particularly in connection with charges of the destruction of property, dykes, port installations, a library, works of art; the legality of pecuniary reprisals imposed on the civilian population by an occupant; the question whether and to what extent judges, including military judges, can be called upon to account for crimes committed in the exercise of their functions, particularly in connection with the different types of special courts and courts martial instituted by the German authorities and the Italian "Tribunale Speciale per la Difesa dello Stato"; the definition of crimes against humanity under the basic documents of 1945 in general; the question as to whether perpetrators of crimes committed on Czechoslovakian territory at the beginning of 1939 can be prosecuted under the heading of crimes against humanity, and the legal character of acts of persecution committed during the war by Italian authorities against Italian nationals of Yugoslav race; the question of what extent attempts to denationalise the inhabitants of occupied territory are war crimes; the legal status of guerrilla fighters and partisans, particularly as applied respectively to the Yugoslav Army of National Liberation and the F.F.I. and to the Italian Fascist Republican formations—after September 1943; the criminal responsibility for administrators of seized property in occupied territory, particularly of Jewish property; individual responsibility for violations of conventional and customary rules of international law; the relation between international and municipal law, particularly the question whether and to what extent the *lex loci* is relevant to a charge of a war crime or a crime against humanity; the committing of a war crime or a crime against humanity by enacting legislation which orders or permits such crimes; the responsibility of commanders for offences committed by their subordinates and of administrators of occupied territory; the responsibility of persons holding key positions in the political, military, and economic life of Germany and of Japan; racial discrimination in food allocation by the occupation authorities; compelling the inhabitants of occupied territory to work at places where military operations, as distinguished from military preparations, were being conducted; forced labour of civilians in general; the interpretation of the detailed provisions of the 1929 Prisoners of War Convention; the compulsory enlistment of the inhabitants of occupied territory in the armed forces of the occupant, particularly in connection with Alsace-Lorraine, and the question of the responsibility of judges who sentenced to death, as deserters from the German army, Alsations who had been drafted into the German army; the question whether voluntary recruitment of inhabitants of occupied territory for the armies of the occupant is permitted; the confiscation of property as a war crime; the seizure of means of transport by an occupying force; crimes committed in concentration camps; the responsibility of concentration camp personnel; membership in criminal organizations; responsibility for unjustified imprisonment, the taking of hostages, the killing of hostages; the responsibility of the commander of an Italian submarine who

torpedoed a French merchant vessel on sight after the conclusion of the French-Italian armistice in 1940; the question whether a German officer who scuttled a German submarine after the German surrender committed a war crime; the criminality of the use of Dutch uniforms, on 10th May 1940, by members of the German army; the implications of the war crime of 'usurpation of sovereignty'."

To these I may myself add just one more instance.

The Nazi forces while in occupation of France found an active "black market" in operation. With Teutonic ingenuity, they devised a simple method of profiting by it. They formed a department in the occupational system for the purpose. There was a purchasing section, which went into the illegal market and bought large quantities of valuable articles at the prices there demanded and paid for them by means of paper money which they issued as the government of the country, at no cost to themselves except the cost of paper and printing. They then despatched the goods to Germany. This ingenious transaction certainly involved the pillage, plunder and spoliation of France, even though the particular sellers were content to get the currency and could use it in France. The case also fell within other articles of the Hague Convention. As to the Nazi criminality it would of course be necessary if an individual was to be held guilty to show that he was privy to the whole complex (though in one sense simple) scheme.

The Commission did not give a definition of "war crime". Definition involves limitation and exclusion. Hence the Commission did not think it necessary or desirable to formulate a precise definition nor did it give more than a working list. With modern scientific development in the war machinery and in the modern concept of total war and its methods of barbarism, a final list could not be drawn up, but the working list drawn up from various authoritative sources provided a sufficient guide to Committee I in dealing with war crimes that were submitted to it. Some gaps, if they existed in the Hague and Geneva Conventions, could be filled up according to the liberal scientific method of interpretation provided for by the Code itself.

I turn to another matter. As the Commission was from the first charged with the duty of recording and reporting cases, it has seriously occupied itself with the preparation of a series of Law Reports of Trials of War Criminals. This is a duty of the highest importance, because without such reports future generations would not be able to ascertain the law developed by the various courts nor would future authors engaged in producing works on the laws of war be able to garner the fruits of these few but very busy years of legal elucidation. It has often been said that every great war which has shocked the moral sense of mankind has resulted, at least in modern times, in humanitarian reforms or at least declarations, in the hope of checking at least in some degree the atrocities and murderous practices of war. Such were the Hague and Geneva Conventions and the Kellogg-Briand Pact and the corresponding treaties in regard to war at sea, all intended to be legislative enactments and to go to constitute a code of this part of the law of nations. One main purpose of this great campaign which I have outlined of justice in war, for the protection of human rights in war conditions, or at least some human

rights, was to provide a body of legal doctrines, elaborated in many ramifications of fact, which would enlighten future generations and perhaps help to avert war in future, or if that is impossible, limit its atrociousness.

It is hoped that the publication of these Law Reports will facilitate the elaboration of a jurisprudence in connection with this branch of international law.

I have so far limited this Introduction to the circumstances of the Western theatres including the European, African, Italian and Mediterranean spheres. But in the Far East, including Asia, Malaya, China, the Pacific Islands and Japan, there was a similar activity in the prosecution of war crimes by the Allies. Over these vast spaces of the world, atrocities of the same kind and heinousness were perpetrated. Japan fought hard and fought with a barbarism and ruthlessness comparable at least with their Nazi allies. When the Tokyo Tribunal was set up on the model of the Nuremberg Tribunal even the layout of the court room followed the same arrangements as its prototype; it was constructed and arranged by the United States as was that at Nuremberg. The vast area with which it had to deal was indicated by the number of judges, who were eleven, one for each country which had suffered. Sir William Webb, at first Chief Justice in Queensland and before the case ended promoted to be a Justice of the High Court of the Australian Commonwealth, presided. An explanation of the great length of the hearing may perhaps be found in the language; translation was a grave difficulty and source of delay. Japanese was in any case a difficult language and particularly hard to use to express the complexities of modern Western ideas. When I went to Tokyo in April 1946 the trial was about to begin, though it did not actually get into full operation until the following June. It had not finished when I write.

The Tokyo trial was the trial for the Far East of the "major" criminals. For the "minor" criminals (to adopt the same classification as I have used before) Military Courts were formed by the United States, the British, the Australian, the Dutch and other countries interested, at a number of places, the Phillipines, Shanghai, Hong Kong, Singapore and the various Pacific Islands such as Guam.

All these manifold and widely spaced activities fell within the province of the Commission, but with differences. The Commission was vested with power to appoint sub-commissions or panels, and has established one such at Chungking, which, when the Japanese were defeated and surrendered, eventually removed to Nanking. That body did make some reports to the Commission, but the great part of the very important Far Eastern prosecutions of war criminals, were conducted from a number of central offices, dotted over the whole area, for instance at Yokohama, Singapore, Hong Kong and elsewhere. The constitution and procedure and law of these military courts followed the corresponding European model. The various authorities sent reports and information to the Commission with the total of cases tried and prisoners dealt with, some with figures com-

parable to those in the Western area. At the early stage a question was raised whether it was necessary or convenient to have a system for the Far East of listing war criminals and suspects similar to that adopted by the Commission on this side of the globe. That would have involved the submission of cases to a body similar to Committee I, but it was decided that such a system, when applied to the vast spaces of the East, would involve a complication and delay disproportionate to any possible advantage. Some important cases from the Far East have been and will be included in the Law Reports of War Crimes Trials which the Commission are publishing. What has been said above in reference to the whole question as arising in the Western hemisphere will apply *mutatis mutandis* to its counterpart in the Far East, and need not be repeated here. The Far Eastern system enjoyed the experience acquired by or with the aid of the Commission.

II

I have been dealing so far in this brief Introduction with the bare bones of the scheme and purpose of the Commission and of its Constitution. I may, however, descend to some concrete particulars and take the opportunity of developing some answers to objections—even at the risk of some little repetition.

I quoted a memorable passage from the Nuremberg Judgment on Nazi atrocities, but I venture to supplement it by some appalling figures which I take at random from other parts of it. Thus General Ohlendorf, who led one of the Einsatzgruppen invading Russia, states that, in the course of the year, his army liquidated about 90,000 men, women and children, Jews or Communists; at least 5,000,000 of the inhabitants of the occupied countries were deported to Germany for slave labour; it might be asked how many ever came back. Himmler complained of loss of labour because the deportees or prisoners died in hundreds of thousands, of exhaustion and hunger. The Tribunal heard evidence that at Auschwitz concentration camp at least 2,500,000 died of poison gas in the gas chambers and 500,000 died of disease and starvation. The Tribunal quotes an estimate that the policy of exterminating the Jews resulted in the killing of 6,000,000 Jews. Other figures quoted by the Tribunal for 1942 alone were 72,729 Jews in Warsaw, 17,542 in Lodz, 18,000 in Croatia, 125,000 in Rumania, 14,000 in Latvia, 85,000 in Yugoslavia, 700,000 in all in Poland. Streicher, the Jew baiter, boasted that the Jews had virtually disappeared from Europe.

All this was no accident: it was part of the settled policy of extermination and terrorism. It was practised deliberately from the outset. Von Hasselt, a very distinguished German diplomatist, in his Diary as early as 11th October 1939, records how young fellows in the Labour Service had witnessed the way villages were surrounded and set on fire because of civilian snipers, while the population inside shrieked frantically. He also quotes the horror felt at the thousands of unburied corpses in Warsaw.

Poor von Hasselt, a scholar, liberal-minded and a gentleman, at one time a German Ambassador, managed to survive until he was charged with complicity in the Generals' plot against Hitler's life which nearly succeeded on 20th July, 1944: he was tried by the "People's Court," condemned and executed. One cannot help wondering if he escaped, what so many of those accused of that plot suffered, the tortures of the Gestapo. I must not be tempted to multiply instances, but I may perhaps give an illustration of the complete dehumanisation produced in the perpetrators of such cruelties and brutalities. The passage is quoted from the evidence before the Tribunal of Hoess, the commandant of Auschwitz camp: he records in matter of fact terms the ordinary routine operation of gas poisoning, by which millions perished:

"It took from three to fifteen minutes to kill the people in the death chamber, depending upon climatic conditions. We knew when the people were dead because their screaming stopped. We usually waited about one half-hour before we opened the doors and removed the bodies. After the bodies were removed our special commandos took off the rings and extracted the gold from the teeth of the corpses."

I may note that the poison gas used caused excruciating agony before death.

It is not strange that the leaders of the four great Allies issued the Moscow Declaration and announced that punishment of war criminals would be one of the major objects of the war. Nothing less would have satisfied the moral conscience of the civilised world. From this flowed the procedure which I have outlined. What has been criticised in particular has been the trial and condemnation of the "major" criminals on the charge of crimes against peace under the London Charter. I have just read a vigorous article in the *Record* of 6th February, 1948, by a distinguished Professor of international law, Dr. J. L. Brierly of Oxford. He states that "the traditional view" of international law has been that "resorting to war is the right of enemy sovereign states and that whether or not the motive is offence or defence or whether or not the act involves a breach of faith are questions legally irrelevant." He balances pros and cons but considers that the article was not the place for an exhaustive legal argument.

I venture, however, to repeat what I earlier stated, that in my judgment the decision on this momentous issue given by the Nuremberg Tribunal was the right legal decision. I venture to say that it is not good law to put aside the decision which was that of the whole Tribunal, because there was only one judgment, that of the whole Court, though for convenience of deliberating the eight judges took turns in reading it, as merely an *obiter dictum* when it deals with the crime of war. The doctrine of *stare decisis* which is so familiar to Anglo-American lawyers does not apply in Military Tribunals, nor is it generally accepted by Continental lawyers. The tremendous decision of the Tribunal on the crime of war is of the same weight, no more and no less, than any other part of the judgment. It does not bind other courts, but all the same it carried great weight as coming from so august a Tribunal, and goes to form a jurisprudence. The same is true of the ruling in the judgment that "the Charter is not an arbitrary exercise of power on the part of the victorious

nations, but is the expression of international law existing at the time of its creation."

It seems to me that a fundamental fallacy of the opponents of the scheme outlined in the London Charter is the attempt to obliterate the distinction between just and unjust war. That distinction was well-established for many generations, from mediaeval times, and was treated as flowing from natural law, which, I think, has never meant more than the innate sense of right and wrong possessed by all decent-minded human beings. It was sometimes supported by the precepts of the universal Church. But, at a later period, there was introduced a concept of the sovereignty of the individual state and that was carried in the 17th and 18th centuries to some lengths. In more recent times, and particularly in the end of the last century and in the beginning of this century, the doctrine of sovereignty was used to nullify this distinction between the justice or injustice of war. It was said that it was part of the sovereignty of every nation to wage war for any purpose, and in any manner, however atrocious, which appeared to it to be desirable to achieve the purpose of overcoming the opposing power. This may well appear to the moralist a diabolical idea, but there may be some who think it proof of the strength and validity of law that it refuses to find sanctions to correct and punish the most atrocious conduct. Such a mental or moral attitude may even perhaps be sometimes discerned in the views and arguments put forward by those who say that there is no distinction between just and unjust war. It would be easy to find very strenuous opposition to that view, for instance, if I may refer to some of the greatest writers on international law of the present generation, I should point to authorities like Professor Kelsen, Professor Lauterpacht, Professor Goodhart, Professor Quincy Wright and many other authorities. One of the troubles of arriving at a definition of international law rules is that writers in their study, often removed from the realities of life, have expressed so many diverse views, which cannot be reconciled at all; but international law does not depend upon the irresponsible views of theoretical writers. It is to be found rather in international declarations, conventions, treaties, and practices of the nations, to say nothing of the moral consensus of human beings in the world, and the decisions of competent courts.

International law becomes, as I have already explained, a definite and positive reality, both in its character and its consequences, when competent courts acting under it try individuals and sentence them to punishments which are executed by competent authorities. It is said, however, although that may be true of particular violations of the rules of war, there are no such instances of the trial or conviction, of people who have offended against the law laid down in the Pact of Paris. But even before the Pact of Paris, punishments were inflicted, or at least intended by the aggressive nations, against those who had inflicted on them the evil of aggressive war. I refer to the banishment of Napoleon, first to Elba and then to St. Helena, for the aggressive wars which he had initiated. In the same way in 1918, at the end of the war, it was intended to take proceedings against the German ex-Kaiser and that intention was embodied in Article 227 of the Treaty of Versailles. It is true that plain language was evaded by the somewhat rhetorical language which was there used. The Treaty

proclaimed that the ex-Kaiser should be arraigned for a supreme offence against international morality and the sanctity of treaties and provided for this trial by an especially appointed tribunal of the allied and associated powers. That trial was never held because the Dutch Government refused to surrender the accused man to the Allies, he having found shelter in Holland. Rather than start a fresh war, the Allies abandoned their intention, just as they abandoned their intention to try the various war criminals themselves and left them to be tried by the Leipzig Court, with the consequences that are so well-known. But the principle that an unjust war, or war of aggression, is unlawful, was clearly recognised by these two instances and indeed was recognised in the various provisions of the Treaty of Versailles, which provided for reparations; liability to make reparation is proper to illegality. I think, therefore, that there are clear precedents for the rule that it is an unlawful act (*scilicet* crime) to start and wage an aggressive war. It has indeed been long held by humanity that he who does such a thing is guilty of a supreme offence. In the words of the poet "he shuts the gates of mercy on mankind." The world would indeed be shocked, if those who are chiefly responsible for the evils and atrocities either in the war in the Far East, or in the war in Europe, should escape scot-free, especially in view of the treaties which they were instrumental in breaking and of the general condemnation of humanity.

The difficulty which has been recently felt in some quarters has referred to the prosecution of the governing authorities of the conquered state for acts such as initiating or waging an unjust war. At the basis, however, of that class of charges is the distinction which, as I have already pointed out, some have sought to obliterate, between just and unjust or aggressive war and I cannot but think that many of those who have discussed this problem have gone back to earlier pronouncements antecedent to the Pact of Paris, and have not considered the numerous other Conventions which are familiar to all students of international law, some of which have expressly referred to the initiation or waging of unjust war as a crime, as indeed it is in the strict sense of that word. I regard these international agreements as declaratory of the existing law and as giving it a positive place or status. It is true that the Pact of Paris as a treaty only binds the nations which are parties to it but, if it renders the waging of unjust war a crime, then, on familiar principles, the agents in the particular states who are responsible under the constitutional system prevailing in that state for leading the nation into war, cannot escape personal and individual liability for what they have done. In that respect, this is a liability independent of, and additional to, the liability of the treaty breaking nation. The principle of individual liability has always been recognised in military courts. It is apparent in the ordinary war crimes, that those who do the acts are personally liable and equally there is no logical or moral justification for applying any different rule in the case of the more generalized crimes chargeable against the leaders of the unjust belligerent nation. The Pact is not a scrap of paper. Indeed its effect has been recognised in the sanctions applied under it in the cases of China and Abyssinia. I have already referred to the principle of the sovereignty of nations and I fully accept the importance of maintaining the freedom of independent sovereign states; but that is a freedom which must be

regulated by the like freedom of other independent states who are entitled to resist unlawful aggressions against their own freedom and independence; hence, when the aggressive state goes beyond its own boundary and its own domestic affairs in order to interfere with the freedom and independence of other sovereign states, the latter are entitled to resist and punish the aggressor; in that event it is clear to me, that the doctrine of the independent sovereignty of the wrongdoer no longer applies and equally that the concept of sovereignty cannot be invoked to protect those members of the aggressor state who are personally guilty of leading the nation into the criminal courses which involve the trouble. To my mind, it is immaterial that, from the point of view of the aggressor state, the conduct of these men can be described as being acts of state, whatever that may mean. That concept of acts of states is submerged in and is inconsistent with the concept of international crime and of the individual responsibility of international criminals. Some advocates of the doctrine of sovereignty have gone so far as to say that every act of a military commander, or indeed of a soldier, which involves infringement of the laws of war, is an act of state and cannot be proceeded against even though the delinquent has been captured and has fallen into the hands of the other belligerent state. This is indeed a *reductio ad absurdum* of the doctrine of the act of state. I can find no real authority for any such theory.

I think also that the idea that the belligerent state is not entitled to punish the war criminals, or is not entitled to punish them without the consent of their own people, is fallacious and without authority. It is said to be more plausible to describe the decisions of a monarch, or a prime minister or the members of his cabinet, arriving at a decision to initiate an unjust and aggressive war, as acts of state because of the old superstition that the crime ceases to be a crime because done on a large scale with political motives and as an act of policy. The very language, however, of the Kellogg-Briand Pact uses the phrase "renouncing war as an instrument of policy," which seems to be expressly directed against this superstition which has long since been condemned by moralists or humane writers, (for instance, one finds the phrase "necessity the tyrant's plea") and indeed there is almost no crime, however atrocious or however immense in its operation, which might not be described as an act of policy. It seems to me that the whole aim of international law, in recent times, has been to give a definite and positive shape to the moral concepts, which, in some quarters and in some periods, have been thought too fluid and indefinite to deserve the name of positive law.

The strongest argument against the punishment of the war criminals either "major" or "minor," is that men have not been punished previously for the particular offence.

That argument completely fails as regards the "minor" criminals, those who are accused of war crimes *stricto sensu*, but it needs further consideration in the case of what I call the "major" criminals, such as monarchs, prime ministers, cabinet ministers, or the like, even though there are precedents which I have already referred to. Thus there is the case of Napoleon who was punished for what we call a major crime though

by executive instead of judicial act, and the case of Kaiser Wilhelm II who was marked down for trial though, as I have observed, the trial never took place because the Allies had not, and could not, obtain custody of the accused. These are, in any event, precedents but, as I have attempted to show, the law is clear enough. Responsible statesmen cannot pretend to be ignorant of what the law is, especially since the Kellogg-Briand Pact, which is now nearly twenty years old. I can understand the statesmen and the generals asserting that there had so often been immunity allowed to such conduct that they were entitled to speculate on similar immunity when their time came. No doubt they said to themselves that they were certain to succeed; but they did not succeed and that possibility ought to have presented itself to their minds, and have led them to consider what their position might be if that happened. What is quite clear is that, when they started the war, they were or should have been fully aware that they were committing a crime both at ordinary law and at international law and they were really banking on what they thought was the absence of an efficient machinery to punish the crime. If they had thought at all during the years in which they prepared for war and for the crime, they could not have failed to realize the enormity of their purpose and acts. The form in which the argument is sometimes put is that no man should be punished for an offence as to which he could not know at the time when he committed it that it was a punishable offence. I find it impossible to apply that idea to the question relating to these men. Of the criminality of their conduct there could be no doubt, and equally it must have been apparent to them, beyond a doubt, that they were guilty of such criminality. Even if I were wrong in my view that the positive law announcing the crime and defining the criminality was in existence at all times material, at least the criminality of wholesale murder and the like was apparent and all that was lacking was some precise enunciation of positive law and punishment; that defect could, in my opinion, be made good by subsequent declaration and clarification of the particular breach of law and the punishment. If it were necessary, I could go further and say that the definition of a clear and atrocious moral offence as being also an offence of positive law can be lawfully made by the competent court or legislature. This indeed is the normal method of developing international law which extends its boundaries on the principle of analogy just as the common law has done.

I wish to emphasise my opinion that the difference between a war of aggression and a just war is fundamental and that the attempts to obscure it in comparatively recent times ought to fail, and have failed. I have sought to refute some misleading conclusions, as I regard them, from a fallacious idea of the extent of the doctrine of sovereignty. In particular, I wish to protest against the idea that the doctrine of the sovereignty offers a shield of immunity in the case of acts of unlawful aggression. Sovereignty is not the same as autocratic, arbitrary power. It is a limited or regulated doctrine which cannot be extended beyond its proper limits, which are primarily but not necessarily the limits of the sovereign state's own boundaries. I have wished also to protest against an illegitimate application of the idea of acts of state; that concept I think does not

justify the commission by nations or individuals of crimes or other unlawful acts in the realm of international law.

The objection taken by some that the Nuremberg Tribunal is merely a one-sided pronouncement is, I think, inconsistent with the general principle as to the jurisdiction of Military Courts laid down recently on two occasions by the Supreme Court of the United States. The nation attacked is entitled to defend itself, and it is incidental to that that it should be entitled to punish those individuals who are guilty of the aggression if they fall within its custody and a right or duty to try them first is ancillary. Distinguished writers arguing against the validity of the Nuremberg trial have agreed that the punishment suffered by the accused was well merited. They deserved to die. Is that all changed because the victors preferred a judicial proceeding to an act of arbitrary power? All that the criminals were entitled to by way of protection of their human rights was a fair and impartial trial. That they got.

As to the "minor" criminals some, we have seen, were tried by Military Courts of the victors in whose custody they were. The other course contemplated by the Moscow Declaration viz, trial by the National Courts of the countries in which the crimes were committed, involves the same principle of individual criminal responsibility, but bases that on the national law, and recognises the principle of sovereignty. In general the crimes were committed while the country was occupied by the enemy and the normal course of the law was in abeyance. But the law revived when the occupation ended. In effect, however, though the national law had to be enforced then, it was with such qualifications as the law of war required. War is organised murder, devastation and destruction. But the law of war draws a line between legitimate acts done in war and those which are illegitimate. The National Courts must recognise the distinction and in some cases it has been necessary to amend the national law and procedure, to give effect to the requirements of international law. Indeed the National Court is *pro tanto* a Court enforcing international law. That is generally for the benefit of the accused, who, as soldiers, can claim the benefit of the law of war.

Law is the servant, not the master of the human mind which has created it. Its functions are derivative, not overriding. Though it aims at a standard certain of responsibility or of immunity, the standards can only be fixed with due regard to the demands of justice. A wrongdoer who overpasses the normal limits of human conduct, cannot complain if he is tried by a standard comparable to what he has done. Otherwise, (to adopt the words I have already quoted of Mr. Justice Willes), *summum jus* is nothing but *summa injuria*: ordinary national law cannot provide for or foresee all that may be done in totalitarian war. That must be settled by international law, if need be retrospectively, if the existing law of the nation is insufficient.

I may again repeat that these problems cannot be solved unless it is clearly realised that international law not only has its own particular principles, but its own rules and methods for answering them. An attempt to settle them by introducing *vi et armis* principles and procedure

drawn from national law, is responsible for much of the confusion that has invaded this branch of international law. It is hoped that the series of War Crimes Law Reports which the Commission has begun to publish will help to encourage and facilitate the study of these questions from the correct point of view. It is hoped that these reports will include the judgments in the important trials described as the Subsequent Proceedings at Nuremberg which are being conducted by the United States under the supervision of General Telford Taylor.

III

There could be no higher object of human endeavour than the abolition of war, or if that were found to be impossible, the abolition of terrorism in war. No one would now talk complacently of the pride, pomp and circumstance of glorious war. It is seen for what it is, an unmitigated and unrelieved evil. If there is any offset to its vileness, it is that it calls for noble exhibition of courage, endurance, devotion to duty and the higher aspects of patriotism. But even if it is conducted according to what has been called the old ideology, the ideas of chivalry which inspire the finer military spirits, these things are far outweighed by the vast evils, the destruction of the wealth which, if properly used would solve the problems of social well-being, such as freedom for all from want, poverty and disease, and would promote every form of education, social amelioration and happiness. All this is lost in the destruction of the wealth which might otherwise have been used to produce it and in the spiritual degradation due to war.

What then is to be said of the terrible wickedness of totalitarian war. I should like to quote a passage from the abridgment of Professor Toynbee's Study of History which was prepared by D. C. Somerville after the end of World War II, but with the approval and authority of the learned author of the Study:

"Just as the intensification of slavery through the impact of Industrialism led to the launching of the anti-slavery movement, so the intensification of war through the impact of Democracy, and subsequently of course through the impact of Industrialism as well, has led to an anti-war movement. Its first embodiment in the League of Nations after the end of the General War of 1914-1918 failed to save the World from having to go through the General War of 1939-45. At the price of this further affliction, we have now bought a fresh opportunity to attempt the difficult enterprise of abolishing war through a co-operative system of world government, instead of letting the cycle of wars run its course until it ends—too badly and too late—in the forcible establishment of a universal state by some single surviving power. Whether we in our world will succeed in achieving what no other civilization has ever yet achieved is a question that lies on the knees of the Gods."

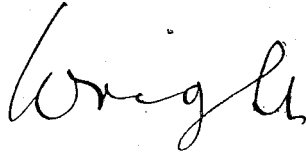
It would indeed be an act of sanguine faith to hope to achieve the abolition of war and many people would resent the idea of a single universal state in place of the richly variegated pattern of what Professor Toynbee calls parochial sovereignties. Even to abolish or mitigate the atrocious-

ness of war as exhibited in World War II would seem to be too good to hope or pray for in dreams. But the great campaign against war crimes, which I have been attempting to describe, is better than a mere acquiescence in what has happened as being a necessary evil like an earthquake or a tornado. War involves the deliberate choice of human agencies; in the last war it was long premeditated and prepared. It still may be hoped that the enforcement, in some small degree, of the principle of the individual responsibility of the human agencies and the exhibition to the world of their complete depravity will tend to weaken the evil impulses. It is at least something that the Nuremberg Trial and judgment has brought home the idea that statesmen and high military officers and administrators can be brought to trial. That is something new. It is that novelty which is responsible for much of the hostility and extreme criticism which have been evoked. If (*di meliora*) the same tragedy should be acted afresh, the idea of punishing the criminals, will be strengthened by precedent and example. When I look round the world horizon, I seem to find on every side the seeds of future wars, but I must not allow myself to yield to pessimism or defeatism.

But apart from the unfamiliarity of the idea of punishing war criminals, especially the most highly placed, the retributive zeal and sense of justice on the part of mankind are slow in developing and in coming to practical activity, and their effective life is short. When I write this only 3 years have elapsed since the Axis powers collapsed and surrendered. The remarkable activities which I have adverted to, seem to be losing their initial impetus, except perhaps in some countries which have suffered most terribly from the invaders' terrorism. Where these natural feelings prevail, the series of prosecutions will no doubt continue by means of the activity of the National Offices and with the aid of the system and machinery now evolved. Russia has always held itself aloof from the Commission and did not become a member. But countries like the United States, Britain and the members of the British Commonwealth are now so overwhelmed by the crowd of problems consequent on the war, that they seem involuntarily to turn aside and forget war crimes. It is natural enough. War crimes are horrible to contemplate, indeed no human mind can realise what is meant in terms of human misery and suffering by the massacres of millions, and the death of millions by every form of cruelty and deprivation. No one can bear to visualise what went on in the torture chambers of the Gestapo—the mind recoils and faints. But once the fiend war has been for the time exorcised, the world goes on and mankind seems to resume as far as possible its former course of life. Once it is felt that the idea of an international rule of law and its suitable enforcement have been established with the support of sufficient precedents, humanity is glad to be relieved of the nightmare of the past. It seems to me that this is what is happening now. The waves of war crime prosecutions are beginning to settle down and will soon subside. The majority of the war criminals will find safety in their numbers. It is physically impossible to punish more than a fraction. All that can be done is to make examples.

So it comes about that the member Governments, or the majority, have decided that the Commission should be wound up. I hope it will

be agreed that its life has not been in vain and that, within its narrow limits, it has helped to establish that the law of war is not only wide and just but can be given practical effect.

A handwritten signature in cursive script, appearing to read "Wrigley".

*Chairman
United Nations War Crimes Commission.*

CHAPTER II

OUTLINE OF THE DEVELOPMENTS OF THE LAWS OF WAR PRIOR TO THE FIRST WORLD WAR

A. SURVEY OF THE LAWS OF WAR

Laws of war are the rules of international law with which belligerents have customarily, or by special conventions, agreed to comply in case of war. They involve certain mutual legal obligations and duties respecting warfare. The origin of the laws of war can be traced back to practices of belligerents which evolved during the latter part of the Middle Ages.

In the centuries-long chain of developments which tended gradually to modify the unsparing cruelty of war practices and which aimed at transforming the usages in war into legal rules of warfare, a decided progress was made after the close of the Napoleonic wars. The 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:

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

(2) *The Geneva Convention of 22nd August, 1864*, for the amelioration of the conditions of wounded soldiers in armies in the field, which was followed by a Convention signed in Geneva on 6th July, 1906. Its principles were later adapted to maritime warfare by conventions of the Hague Peace Conferences of 1899 and 1907.

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

(4) *The Convention* enacting regulations respecting the *Laws of War on Land* agreed upon at the First Peace Conference of 1899, which was 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 Second Peace Conference held at the Hague in 1907 marked the turning point in these developments. This Conference, which had been convened for the purpose of "giving a fresh development to the humanitarian principles" that served as a basis for the work of the First Conference of 1899, drew up a number of Conventions which represented a most important step in "evolving a lofty conception of the common welfare of humanity."⁽¹⁾

(1) See the *Final Act of the Second Peace Conference*, The Hague 1907, Cmd. 4175 of 1914.

The principle which underlines all these enactments and conventions 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 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 realisation 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, recalled in the Preamble that the Contracting Parties "animated by the desire to serve . . . the interests of humanity and the ever-progressive needs of civilisation," and "inspired by the desire to diminish the evils of war, so far as military requirements permit," thought it important to revise 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 intention 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 civilised peoples, from the laws of humanity, and from the dictates of the public conscience."

The preceding declaration was necessitated by the state of development of international law at the time of the drafting of the Convention and was intended to serve as a general rule of conduct in all cases not covered by the rules adopted by the Contracting Parties, until a more complete code of the laws of war could be drawn up. It was a clear expression of the intention of the Parties that unforeseen cases should not, in default of written agreement, be left to the arbitrary opinion of military commanders. It is quite clear that this Convention did not aim at establishing a complete code of the laws of war on land, and that cases beyond its scope would still remain the subject of customary rules and usages.

It is in this sense that the Regulations Respecting the Laws and Customs of War on Land annexed to the Convention must be understood. These Regulations lay down the laws, rights and duties of war which are arranged into three sections; the first one deals with the status of belligerents, prisoners of war, and the sick and wounded; the second with hostilities (i.e. means of injuring the enemy, sieges, and bombardments, spies, flags of truce, capitulations, and armistices); the third with military authority over the territory of the hostile State. According to Articles 1 and 3 of the Convention the belligerents are under the obligation to issue instructions to their armed forces which shall be in conformity with these Regulations, and a belligerent party which violates the provisions of the said Regulations shall be responsible for all acts committed by persons forming part of its armed forces.

The Fourth Hague Convention and the Regulations annexed thereto are the instruments dealing *per definitionem* with war crimes in the con-

ventional and narrower sense. 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 Article 6 and Article 5 of the Charters of the International Military Tribunals at Nuremberg and Tokyo respectively, and Article II of the Control Council (for Germany) Law No. 10.⁽¹⁾ The "interests of humanity" are conceived in these documents 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.

The other Hague Conventions and Declarations agreed upon by the Second Peace Conference of 1907⁽²⁾ and which are of relevance to the development of the laws of war are the following:

First Convention for the Pacific Settlement of International Disputes.

Second Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts.

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. This Convention lays down *inter alia* that a neutral, i.e. a subject or citizen of a State which is not taking part in the war, cannot in principle claim the benefit of his neutrality: (a) if he commits hostile acts against a belligerent; (b) if he commits acts in favour of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties. In such a case, however, the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a subject or citizen of the other belligerent State could be for the same act.⁽³⁾

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. This Convention lays down rules respecting the bombardment by naval forces of undefended ports, towns, and villages, which aim at safe-

(1) 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.

(2) See the *Final Act of the Second Peace Conference and Conventions and Declarations Annexed thereto*, Cmd. 4175 of 1914.

(3) Cf. Article 17 which is to be interpreted in conjunction with Article 18.

guarding the rights of inhabitants and assuring the preservation of the more important buildings, by applying, as far as possible to these operations of war, the principles of the Regulations respecting the Laws and Customs of War on Land.

Tenth Convention for the Adaptation to Naval War of the Principles of the Geneva Convention of 1906.

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

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

Declaration prohibiting the Discharge of Projectiles and Explosives from Balloons. Out of twenty-seven States which signed this Declaration, only a few ratified it before the First World War. When that World War broke out, not one of the Central Powers had ratified it; thus its provisions were not binding, and were not observed.⁽¹⁾

It should also be mentioned that the First Hague Conference of 1899 adopted the Declaration concerning expanding (dum-dum) bullets, stipulating that the contracting Parties should abstain, in case of war between two or more of them, from the use of bullets which expand or flatten easily in the human body. During the First World War the belligerents charged one another with using these bullets. According to Garner⁽²⁾ the evidence at hand did not indicate that any general use of this type of bullet was authorised by any belligerent, or that it was in fact used except perhaps in occasional instances. During the Italo-Abyssinian War in 1935 and 1936 Italy protested to the League of Nations on account of the alleged use of dum-dum bullets by Abyssinia.

The First Hague Conference also adopted the Declaration concerning projectiles diffusing asphyxiating or deleterious gases, stipulating that the signatory Powers should abstain from the use of projectiles the sole purpose of which is the diffusion of such gases. This Declaration gave expression to the customary and one of the oldest and most generally admitted rules of warfare, which prohibits the use of poison and of material causing unnecessary suffering. These rules were formally enacted in Articles 23(a) and 23(c) of the Hague Regulations of 1907, but were not observed during the First World War. Since then there has been a series of attempts to abolish the use of gas and chemical methods of warfare, evidenced by the Treaty of Versailles (Article 171), other peace treaties of 1919, the Treaty of Berlin of 1921, the Treaty of Washington of 1922 (Article 5), the Geneva Convention of 1925 and others.

B. THE BINDING FORCE AND EFFECTIVENESS OF THE LAWS OF WAR

As to the binding force of all these conventions and enactments, it is sufficient to say quite generally that, according to the principles of inter-

(1) See Oppenheim, *International Law*, Vol. II, Sixth Edition, London, 1944, pp. 276-7.

(2) See Garner's *Recent Development in International Law*, 1925, I, §177 and 178, referred to in Oppenheim's *International Law*, §112.

national law, all the conventional and customary 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 military necessity. For instance, from the Preamble of the Fourth Hague Convention it follows that the rules of warfare were framed having regard to military necessities ("as far as military requirements permit"), which means that military necessity has already been discounted in the drawing up of these rules.⁽¹⁾ Moreover, some of the rules are actually qualified by express reference to military necessity (Article 23(g)).⁽²⁾ The only exception to the general principle of the binding force of the rules of warfare is the case of reprisals, which constitute retaliation against a belligerent for illegitimate acts of warfare by the members of his armed forces or his own nationals. Neither do these rules lose their binding force even if their breach would mean an avoidance of extreme danger or affect the realisation of the purpose of war. These guiding principles found their expression in Article 22 of the Hague Regulations which stipulates expressly that the right of belligerents to adopt means of injuring the enemy is not unlimited.

The effectiveness of some of the Hague Conventions 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. Thus, for instance, Article 2 of the Fourth Hague Convention expressly stipulates that the provisions contained in the Convention, as well as in the Regulations, do not apply except between the contracting Parties, and then only if all the belligerents are parties to the Convention. From this it follows that it shall cease to be binding in case of hostilities with a non-contracting Power, except in so far as it is declaratory of the existing customary rules of international law.

On the other hand some of the later Conventions expressly reject the general participation clause or include it in a different and modified form.⁽³⁾ 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."⁽⁴⁾

(1) See Oppenheim, *op. cit.*, p. 185.

(2) Article 23(g): "To destroy or seize enemy property, unless such destruction or seizure be imperatively demanded by the necessities of war"—is particularly forbidden.

(3) See the Geneva Conventions of 1929 and the Protocol of 1925.

(4) See Oppenheim, *op. cit.*, p. 186.

Among other factors which limit, or until recently have limited, 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 History.

C. PUNISHMENT OF WAR CRIMES

The right of the belligerent to punish as war criminals persons who violate the laws or customs of war is a well-recognised principle of international law. It is a right of which a belligerent may effectively avail himself during the war in cases when such offenders fall into his hands, or after he has occupied all or part of enemy territory and is thus in the position to seize war criminals who happen to be there. A belligerent 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 Treaty, to surrender for trial persons accused of war crimes.⁽¹⁾

In contradistinction to hostile acts of soldiers, by which the latter do not lose their privilege of being treated as lawful members of armed forces, and in contradistinction to all sorts of force or means applied by a belligerent against enemy armed forces or other enemy persons or property and directed to the overpowering of the enemy as well as to the occupying and administering of enemy territory by all legitimate means, war crimes are such acts of soldiers or other individuals which constitute violations of the laws and customs of warfare. They also 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 laws as derived from the criminal law of all civilised 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.

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

(1) See Oppenheim, *op. cit.*, pp. 450-458. As to examples of provisions of the Peace Treaties imposing upon the defeated State the duty to surrender for trial of persons accused of war crimes, see: *Chapter III: Developments during the First World War.*

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.

So far as war crimes in the conventional and narrower sense are concerned, they have for 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 other belligerent. 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. The trials of war criminals by victorious opponents can be traced back to the dawn of modern international law. The first trial of war crimes in the technical sense of the term, appears to be the trial by an English court in 1305 of Sir William Wallace whose condemnation rested on the charge of his conduct of the war against his liege lord, namely, that he had engaged in an action of extermination against the English population, "sparing neither age nor sex, monk nor nun."⁽¹⁾

Generally speaking, all war crimes may be punished with death or with any other more lenient penalty. In this connection the question arose in the past in legal literature whether, in cases where a penalty of imprisonment is inflicted, persons so punished should be released at the end of the war, although their term of imprisonment has not yet expired. Some of the writers maintain that it could never be lawful to inflict a penalty extending beyond the duration of the war. Such a proposition should, of course, be looked upon as unacceptable as, if a belligerent has a right to pronounce a sentence of capital punishment, it is obvious that he may impose a less severe penalty and carry it out even beyond the duration of the war. It would, as Oppenheim says, in no wise be in the interest of humanity to deny this right, for otherwise belligerents would be tempted always to pronounce and carry out sentences of capital punishment in the interest of self-preservation.⁽²⁾

It must be pointed out that, in so far as prisoners of war in the technical and strict sense of the term are concerned, Article 75 of the Geneva Convention of 1929, dealing with the obligation of belligerents to repatriate prisoners as soon as possible after the conclusion of peace, provides that prisoners of war who are subject to criminal proceedings for a crime or offence at common law may, however, be detained until the end of the proceedings, and if need be, until the expiration of the sentence. The same applies to prisoners convicted for a crime or offence at common law.⁽³⁾ As most war crimes are crimes of the common law type, it is believed

(1) For details of this trial see G. Schwarzenberger's article, *Judgment of Nuremberg*, *Tulane Law Review*, Vol. XXI, No. 3, March 1947, p. 330.

(2) See Oppenheim, *op. cit.* §257.

(3) See the Geneva Convention of 27th July, 1929, relative to the treatment of prisoners of war.

that the above provision of the Geneva Convention is also applicable to prisoners of war who, before their apprehension, committed war crimes, and by analogy and in default of any written agreement, also to enemy persons taken into custody or convicted after the cessation of hostilities and before the conclusion of peace, solely on the ground of their having committed war crimes.

CHAPTER III
DEVELOPMENTS OF THE LAWS OF WAR DURING
THE FIRST WORLD WAR

PART I

THE 1919 COMMISSION ON RESPONSIBILITIES

A. COMPOSITION AND TERMS OF REFERENCE

In January, 1919, the Preliminary Peace Conference of Paris decided to create a Commission composed of fifteen members for the purpose of "inquiring into the responsibilities relating to the war." The member States were the following: United States, British Empire, France, Italy, Japan, each of them having two representatives, and Belgium, Greece, Poland, Roumania and Serbia, each represented by one delegate.

The Commission was charged with inquiring into and reporting upon the following matters:

- (1) The responsibility of the authors of the war.
- (2) 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 1914-1918 war.
- (3) The degree of responsibility for these offences attaching to particular members of the enemy forces, including members of the General Staffs, and other individuals, however highly placed.
- (4) The constitution and procedure of a tribunal appropriate for the trial of these offences.
- (5) Any other matters cognate or ancillary to the above which might arise in the course of the inquiry, and which the Commission found it useful and relevant to take into consideration.

The Commission decided to appoint three Sub-Commissions.

Sub-Commission I, on Criminal Acts, was instructed to discover and collect the evidence necessary to establish the facts relating to culpable conduct which (a) brought about the world war and accompanied its inception, and (b) took place in the course of hostilities.

Sub-Commission II, on the Responsibility of the War, was instructed to consider whether, on the facts established by the Sub-Commission on Criminal Acts in relation to the conduct which brought about the world war and accompanied its inception, prosecutions could be instituted, and, if it decided that prosecutions could be undertaken, to prepare a report indicating the individual or individuals who were, in its opinion, guilty, and the court before which prosecutions should proceed.

Sub-Commission III, on the Responsibility for the Violation of the Laws and Customs of War, was instructed to consider whether, on the facts established by the Sub-Commission on Criminal Acts in relation to conduct which took place in the course of hostilities, prosecutions could be instituted, and if it decided that prosecutions could be undertaken, to prepare a report indicating the individual or individuals who were, in its opinion, guilty, and the court before which prosecutions should proceed.⁽¹⁾

On the 29th March, 1919, the Commission submitted its report to the Preliminary Peace Conference.⁽²⁾ The report was adopted by the Commission unanimously, subject to certain reservations by the United States and Japan. It dealt with the following matters:

- (1) Responsibility of the authors of the war (premeditation of the war, and violation of the neutrality of Belgium and Luxembourg).
- (2) Violations of the laws and customs of war.
- (3) Personal responsibility.
- (4) The constitution and procedure of an appropriate Tribunal.
- (5) Proposals as to provisions which should be inserted in the Preliminaries of Peace.

In the following paragraphs of this Chapter we shall deal only with those findings and recommendations of the Commission which concerned violations of the laws and customs of war, i.e. violations which in the subsequent developments have been brought within the notions of war crimes and crimes against humanity in the technical sense of these terms as laid down in the international enactments of 1945-1946.⁽³⁾

B. FINDINGS AND RECOMMENDATIONS

(i) VIOLATIONS OF THE LAWS AND CUSTOMS OF 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 *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

(1) and (2) *Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of the American and Japanese Members of the Commission on Responsibilities, Conference of Paris, 1919.* Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32.

(3) As to those parts of the Report of 1919 Commission which are relevant to the development of the concept of crimes against peace, see Chapter IX. C. of this History.

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, the issue of counterfeit money, the methodical and deliberate destruction of industries with no other object than to promote German economic supremacy after the war, constitute the most striking examples of such violations, as recorded by the Commission.

(1) *List of War Crimes*

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 denationalise 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 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 unauthorised works.
- (31) Misuse of flags of truce.
- (32) Poisoning of wells.

(2) *War Crimes and Crimes against Humanity*

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⁽¹⁾ 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 in the narrower sense. The second category was 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 the 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 those qualified by the Commission as crimes coming within the notion of violations of the "laws of humanity".

In connection with the massacres of the Armenian population which occurred at the beginning of the First World War in Turkey, it is to be mentioned that the Governments of France, Great Britain and Russia issued a declaration, on the 28th May, 1915, denouncing these massacres as "*crimes against humanity and civilisation*" 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 des dits crimes tous les membres du Gouvernement ottoman ainsi que ceux de ses agents qui se trouveraient impliqués dans de pareils massacres."⁽²⁾

The warning thus given to the Turkish Government on that 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

(1) Reproduced in "*La Documentation Internationale, La Paix de Versailles, Vol. 3, Responsabilités des auteurs de la Guerre et Sanctions*," Paris, 1930, Annex I to the Main Report.

(2) The full text of the declaration is quoted in the *Armenian Memorandum* presented by the Greek Delegation to the Commission on Responsibilities, Conference of Paris, 1919.

cover, namely, inhumane acts committed by a government against its own subjects.

(3) *Views of the Majority and Dissenting Reservations*

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 *laws of humanity*.”

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⁽¹⁾ 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 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

(1) “*Memorandum of Reservations* presented by the Representatives of the United States to the Report of the Commission on Responsibilities, 4th April, 1919,” contained in Annex II to the Report of the Majority of the Commission on Responsibilities.

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 this part of 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.⁽¹⁾

These propositions were the following:

- (1) Slaying and maiming men 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 civilised 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 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 necessities 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 civilisation*, which is without palliation.

(1) "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 on Responsibilities of 1919.

(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.⁽¹⁾

(ii) PERSONAL RESPONSIBILITY AND MACHINERY FOR RETRIBUTION

Following its findings as to the barbarous and illegitimate methods by which the war was carried on, the 1919 Commission recommended 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."⁽²⁾

In this connection the Commission expressly stated that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder from responsibility when that responsibility has been established before a properly constituted tribunal. That this principle should extend even to heads of States was supported by the view that the privileges, where it is recognised, of the alleged immunity and inviolability of a sovereign of a State is one of practical expedience in municipal law, and the fact that he is exempt from being prosecuted in a national court of his own country does not affect the position from an international point of view. The Commission went on to say that if the immunity of a sovereign is claimed to extend beyond the limits above stated, it would involve laying down the principle that the greatest outrages against the laws and customs of war and the laws of humanity, if proved against him, could in no circumstances be punished. The vindication of the principles of the laws and customs of war and the laws of humanity would be incomplete if a sovereign were not brought to trial and if at the same time other offenders less highly placed were punished. Moreover, the trial of the offenders might be seriously prejudiced if they attempted and were able to plead the superior orders of a sovereign against whom no steps had been or were being taken.

On the question of superior orders the Commission expressed the opinion 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."

In accordance with the above considerations, 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 violations of the laws and customs of war, an International Court (a "High Tribunal") should be constituted for the trial of outrages falling under four special categories of charges of violations of the laws and

(1) "*Memorandum on the Principles, etc. . . .*", op. cit. Italics introduced.

(2) Report of the Commission on Responsibilities, op. cit. Chapter III.

customs of war and of the laws of humanity.⁽¹⁾ The four categories of charges are the following:—

(1) 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;

(2) 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;

(3) 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);

(4) 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 . . .⁽²⁾

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 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.”

However, the American representatives were unable to agree with the Commission's conclusion that chiefs of States should be liable to criminal prosecution for offences against the laws and customs of war or the laws of humanity, and presented their reservations. They pointed out that this conclusion, if put into effect, would subject chiefs of States to a degree of responsibility hitherto unknown to municipal or international law, for which no precedents were to be found in the modern practice of nations. In this connection they made reference to the opinion of Chief Justice Marshall, in the case of *Schooner Exchange v. McFadden and Others*,⁽³⁾ in which the reasons are given for the exemption of the sovereign and the sovereign agent of a State from judicial process. The American representatives stated that this opinion “does not mean that the head of the State, whether he be called emperor, king, or chief executive, is not responsible for breaches of the law, but that he is responsible not to the judicial but to the political authority of his country. His act may and does bind his country and render it responsible for the acts which he has committed in its name and its behalf, or under cover of its authority; but he is, and it is submitted that he should be, only responsible to his country, as otherwise to hold would be to subject to foreign countries a chief executive,

(1) See op. cit. Chapter IV.

(2) For more detail as to the jurisdiction, constitution, procedure and the law to be applied by such a Tribunal see Chapter XIV, A, of this History.

(3) Case decided by the Supreme Court of the United States in 1812 (7 Cranch, 116).

thus withdrawing him from the laws of his country, even its organic law, to which he owes obedience, and subordinating him to foreign jurisdictions to which neither he nor his country owes allegiance or obedience, thus denying the very conception of sovereignty.

“ But the law to which the head of the State is responsible is the law of his country, not the law of a foreign country or group of countries; the tribunal to which he is responsible is the tribunal of his country, not of a foreign country or group of countries, and the punishment to be inflicted is the punishment prescribed by the law in force at the time of the commission of the act, not a punishment created after the commission of the act ”.⁽¹⁾

These observations, the American representatives believed, however, to be applicable to a head of a State actually in office and engaged in the performance of his duties, and to his liability for violations of positive law in the strict and legal sense of the term. They were not intended to apply to what may be called political offences and political sanctions, such as for instance violations of the treaties guaranteeing the neutrality of Belgium and Luxembourg.

(iii) PROPOSALS FOR ENFORCEMENT

In order to make the retributive action effective the Commission came to the conclusions, and consequently recommended, that the following shall be provided by the Treaty of Peace:

(1) That the enemy Governments shall, notwithstanding that Peace may have been declared, recognise the jurisdiction of the National Tribunals and the High Tribunal, that all enemy persons alleged to have been guilty of offences against the laws and customs of war and the laws of humanity shall be excluded from any amnesty to which the belligerents may agree, and that the Governments of such persons shall undertake to surrender them to be tried.

(2) That the enemy Governments shall undertake to deliver up and give in such manner as may be determined thereby:—

(i) The names of all persons in command or charge of or in any way exercising authority in or over all civilian internment camps, prisoner-of-war camps, branch camps, working camps and “ commandos ” and other places where prisoners were confined in any of their dominions or in territory at any time occupied by them, with respect to which such information is required, and all orders and instructions or copies of orders or instructions and reports in their possession or under their control relating to the administration and discipline of all such places in respect of which the supply of such documents as aforesaid shall be demanded;

(1) See op. cit. Annex II, Memorandum of Reservations, Section III.

- (ii) All orders, instructions, copies of orders and instructions, General Staff plans of campaign, proceedings in Naval or Military Courts and Courts of Inquiry, reports and other documents in their possession or under their control which relate to acts or operations, whether in their dominions or in territory at any time occupied by them, which shall be alleged to have been done or carried out in breach of the laws and customs of war and the laws of humanity;
- (iii) Such information as will indicate the persons who committed or were responsible for such acts or operations;
- (iv) All logs, charts, reports and other documents relating to operations by submarines;
- (v) All orders issued to submarines, with details or scope of operations by these vessels;
- (vi) Such reports and other documents as may be demanded relating to operations alleged to have been conducted by enemy ships and their crews during the war contrary to the laws and customs of war and the laws of humanity.⁽¹⁾

In addition, the Commission recommended that the neutral Governments shall be approached with a view to obtaining the surrender for trial of persons within their territories who are charged with violations of the laws and customs of war and the laws of humanity.⁽²⁾

PART II

THE PEACE TREATIES OF 1919-1923 AND THEIR IMPLEMENTATION

A. THE PEACE TREATIES OF 1919-1923

(i) PROPOSALS OF THE COMMISSION OF FIFTEEN

The 1919 Commission on Responsibilities concluded its task by preparing a draft of a set of provisions for insertion in treaties with enemy Governments with a view to assuring in a practical form, in accordance with its recommendations, the constitution, the recognition, and the mode of operation of the High Tribunal, and of the national Tribunals which had to be called to try "infractions of the laws and customs of war or the laws of humanity."

These provisions read as follows:

Provisions for Insertion in Treaties with Enemy Governments.

Article I.

The *Enemy* Government admits that even after the conclusion of peace, every Allied and Associated State may exercise, in respect of any enemy or former enemy, the right which it would have had during the war to try and

(1) See *op. cit.* Chapter IV.

(2) For the recommendations concerning the establishment of an International Court (a High Court), see Chapter XIV of this History.

punish any enemy who fell within its power and who had been guilty of a violation of the principles of the law of nations as these result from the usages established among civilised peoples, from the laws of humanity and from the dictates of public conscience.

Article II.

The *Enemy* Government recognises the right of the Allied and Associated States, after the conclusion of peace, to constitute a High Tribunal composed of members named by the Allied and Associated States in such numbers and in such proportions as they may think proper, and admits the jurisdiction of such tribunal to try and punish enemies or former enemies guilty during the war of violations of the principles of the law of nations as these result from the usages established among civilised peoples, from the laws of humanity and from the dictates of public conscience. It agrees that no trial or sentence by any of its own courts shall bar trial and sentence by the High Tribunal or by a national court belonging to one of the Allied or Associated States.

Article III.

The *Enemy* Government recognises the right of the High Tribunal to impose upon any person found guilty the punishment or punishments which may be imposed for such an offence or offences by any court in any country represented on the High Tribunal or in the country of the convicted person. The *Enemy* Government will not object to such punishment or punishments being carried out.

Article IV.

The *Enemy* Government agrees, on the demand of any of the Allied or Associated States, to take all possible measures for the purpose of the delivery to the designated authority, for trial by the High Tribunal or, at its instance, by a national court of one of such Allied or Associated States of any person alleged to be guilty of an offence against the laws and customs of war or the laws of humanity who may be in its territory or otherwise under its direction or control. No such person shall in any event be included in any amnesty or pardon.

Article V.

The *Enemy* Government agrees, on the demand of any of the Allied or Associated States, to furnish to it the name of any person at any time in its service who may be described by reference to his duties or station during the war or by reference to any other description which may make his identification possible and further agrees to furnish such other information as may appear likely to be useful for the purpose of designating the persons who may be tried before the High Tribunal or before one of the national courts of an Allied or Associated State for a crime against the laws and customs of war or the laws of humanity.

Article VI.

The *Enemy* Government agrees to furnish upon the demand of any Allied or Associated State all General Staff plans of campaign, orders, instructions, reports, logs, charts, correspondence, proceedings of courts, tribunals or investigating bodies, or such other documents or classes of documents as any Allied or Associated State may request as being likely to be useful for the purpose of identifying or as evidence for or against any person, and upon demand as aforesaid to furnish copies of any such documents.⁽¹⁾

The recommendations of the Commission were carried by a majority of its members, the only dissenting members being the Americans and the Japanese. The latter were prepared to accept the whole scheme, provided that the recommendations concerning the liability of heads of States as well as those dealing with the responsibility for abstaining from

(1) See *Report of the Commission on Responsibilities* Chapter V and Annex IV.

preventing, putting an end to, or repressing acts in violation of the laws and customs of war would be eliminated.⁽¹⁾ The American members, as has already been set out in the preceding Section, also objected to the recommendations concerning the responsibility of chiefs of States who have been guilty of offences against the laws and customs of war, neither could they agree with those concerning the "laws of humanity," and they proposed to institute a new "Committee of Inquiry." As this would have postponed the whole matter indefinitely, the Commission refused to agree to it, and submitted its report to the Preliminary Peace Conference on 29th March, 1919.

(ii) PROVISIONS OF THE TREATY OF VERSAILLES

On 28th June, 1919, the Versailles Treaty was signed, in which the following provisions dealing with the punishment of war criminals were included:

Article 228.

The German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.

The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.

Article 229.

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.

Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned.

In every case the accused will be entitled to name his own counsel.

Article 230.

The German Government undertakes to furnish all documents and information of every kind, the production of which may be considered necessary to ensure the full knowledge of the incriminating acts, the discovery of offenders and the just appreciation of responsibility.

It will be seen that in this Treaty, as well as in the Peace Treaties with Austria, Hungary and Bulgaria,⁽²⁾ 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 recognised the right of the Allied and Associated Powers to bring to justice persons accused of having committed *acts in violation of the*

(1) See *op. cit.* Annex III, Reservations by the Japanese Delegation.

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

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).

Thus, the Peace Treaties of that period formally sanctioned the principle that any persons, civilians or members of the Armed Forces, accused of violations of the laws of war, could be tried and punished for such violations by the courts of the adversary. The authors of the Treaties, while accepting the main lines of the recommendations of the Commission, restricted, however, the jurisdiction to try the offenders to the *military* courts, either domestic or inter-allied, thus disregarding the existing legal systems of most Continental countries.

It is possible that if the Continental Allies had seen any likelihood of punishment being imposed in this way some of them would have brought to their legislation the alterations necessary for the operation of the measures envisaged in the Peace Treaties. It is, however, a fact that not one of them attempted any such modification. On the other hand, the Germans, finding out the difficulties in which the lack of preparation of suitable machinery had placed the Allies, and realizing that the giving of some sort of satisfaction to public opinion in Allied countries could not be avoided, speedily arranged for the trial of war criminals at home. In December, 1919, a law was passed conferring upon the Supreme Court of the Reich, at Leipzig, jurisdiction to try war criminals, and on 25th January, 1920, the German Government informed the Allies that they had organized the machinery to deal with their criminals themselves.

Similarly, the view of the American and Japanese members of the 1919 Commission eventually prevailed also as regards the question of the responsibility of chiefs of State for offences committed against the laws and customs of war. It is true that 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 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, however, evident 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.

In connection with the provisions of Articles 228-230 it may be recalled that when, during the Paris Peace Conference, the German delegation contended 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."⁽¹⁾

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.

(iii) OTHER PEACE TREATIES

The first peace treaty with Turkey, namely, the Treaty of Sèvres, signed on 10th 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 recognise 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 recognise such Tribunal."

The provisions of Article 230 of the Peace Treaty of Sèvres were obviously intended to cover, in conformity with the Allied note of 1915 referred to in the preceding part, 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 Nuremberg and Tokyo Charters, and offers an example of one of the categories of "crimes against humanity" as understood by these enactments.

The Treaty of Sèvres was, however, not ratified and did not come into force. It was replaced by the Treaty of Lausanne, signed on 24th 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 the 1st August, 1914, and the 20th November, 1922.⁽²⁾

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

(2) "Declaration of Amnesty," and the Protocol attached to it, dated 24th July, 1923.

B. ATTEMPTS AT IMPLEMENTATION⁽¹⁾

(i) ACTION BY THE ALLIED AND GERMAN GOVERNMENTS

In accordance with the second paragraph of Art. 228 of the Treaty of Versailles, a long list of German war criminals, including many military and naval officers of high rank, was prepared in 1919, and handed over to Baron von Lersner, the German Ambassador in Paris, on 3rd February, 1920.

The list comprised 896 persons the surrender of whom was demanded by Great Britain (97), by Belgium (334), by France (334), by Italy (29), by Poland (57), and by Roumania (41). It included such names as Hindenburg, Ludendorff, Mackensen, Tirpitz, Bethmann-Hollweg, the Duke of Wurttemberg and Prince Rupprecht of Bavaria.

By virtue of the Treaty these persons should have been surrendered to the Allies, but the publication of the list roused such opposition that Lersner announced his intention of resigning. The German Government stated that it would find itself in a difficult political position if the Allied Governments insisted on their surrender. They threatened to oppose it by passive resistance and proposed a compromise: instead of handing the accused persons over to the Allies, the German Government would bring the accused persons for trial before the Supreme Court of the Empire in Leipzig.

The Allied Governments appointed a Commission to examine this proposal. This Commission declared the German offer compatible with Art. 228 of the Treaty, and it was accepted with the reservation that if justice was not administered in good faith and a fair punishment was not imposed upon the guilty, the Allies would set aside the proceedings and bring the accused for a new trial before their own courts.

The Allied Governments then selected among the accused the names of 45 persons against whom the most serious charges had been brought (seven of the names were contributed by the British Government) and this list was presented to the German Government.

It was agreed that the prosecution and trial would be conducted by the German authorities, without any interference from the Allies.

The charges against the accused of the British list were of two kinds: three of the accused (Comm. Patzig, Lieut.-Comm. Karl Neumann and Lieut.-Comm. Wilhelm Wernher) were Naval Commanders charged with outrages against the Laws of Maritime Warfare, the four others (N.C.O. Karl Heynen, Capt. Emil Muller, N.C.O. Trinke and Pte. Rob. Neumann) were charged with ill-treatment of prisoners of war.

Many difficulties were experienced: some of the accused had disappeared, others were residing abroad or could not be traced. Moreover, the German Government was not in a position to obtain evidence and information because most of the witnesses were residing in Allied countries where

(1) For this section of the History, the Commission is indebted to the article M. de Baer included in the *Reports on the Punishment of War Criminals* published by the London International Assembly, London, 1943.

they had been demobilised, many had returned to civilian occupations and were scattered over the whole world. So it was agreed, at a Conference held at Spa in July, 1920, that the Allied Governments should themselves collect evidence and provide statements to the Public Prosecutor (Oberreichsanwalt) in Leipzig. Collecting this evidence was a complicated matter and took a long time: several of the witnesses were willing to give evidence in a British, but were unwilling to appear before a German court, and there were no means of compelling them to do so.

At a new Conference which was held in London in February, 1921, it was decided that the witnesses who were unable or unwilling to attend the trials at Leipzig would be examined at Bow Street in the presence of representatives of the accused and of the German Government. This was eventually done, the examination took place in April, and the depositions transmitted to the Leipzig Supreme Court before which the trials were opened on 23rd May.

Out of the seven above mentioned accused, three, namely, Patzig, Wernher and Trinke, could not be found and escaped trial altogether, the only remaining naval officer (Karl Neumann) was acquitted; the three other accused were soldiers, they were sentenced, one of them to ten months, and the two others to six months' imprisonment. True, the German Government, impressed with this inadequate result, ordered the German Public Prosecutor to take action against two other German naval officers whose names, although connected with the Patzig case, did not appear on any of the lists: Lieutenants Dithmar and Boldt, each of whom was eventually sentenced to four years' imprisonment. In the meantime the Leipzig Court had dealt with four other cases: three at the instance of the French Government (General Stenger—Major Crusius—Lieut. Laule) and one at the instance of the Belgian Government (N.C.O. Randohr). All were acquitted, except Major Crusius, who was proved guilty of having shot several prisoners of war and who was sentenced to 2 years' imprisonment.

French and Allied indignation at these trials rose to such a pitch that the French Mission at Leipzig had to be recalled; the French Government made a strong protest to the German Government, the Belgian Government joined in and decided that the documents submitted to the Court would be withdrawn. Two other Generals (Krushka and von Schack), accused at the instance of the French Government, were acquitted after this withdrawal. As to the Italians, their Government submitted dossiers to the Leipzig Court, but in vain; these cases were just disregarded, and no action was taken upon them. In view of this, in February, 1922, Yugoslavia waived her right to try Bulgarian war criminals.

A fortnight before this (15th January, 1922), the Commission of Allied jurists appointed by the Supreme Council to inquire into the Leipzig trials had unanimously recommended to the Supreme Council that it was useless to proceed with further trials and that the German Government should be required to hand over the remaining accused to the Allies for trial. At this moment, the Leipzig Court had dealt with nine cases: three at the instance of the French Government, one at the instance of the

Belgian, four at the instance of the British, two on the initiative of the German Government. The Commission reached the conclusion that the Leipzig Court had not ensured retribution and the following resolution was moved: "in regard to the sentences the Commission is of unanimous opinion that some of the accused who were acquitted should have been condemned and that in the case of those condemned the sentences were not adequate."⁽¹⁾ Therefore it recommended that no fresh cases be sent to Leipzig, that full effect should be given to Art. 228 of the Treaty and that the German Government be made to hand over criminals for trial to the Allies.

This resolution caused considerable indignation in Germany. On 5th March, 1922, in Berlin, Field-Marshal von der Goltz, at a meeting of the Association of National Soldiers, protested against the surrender of war criminals to the Allies: "the world must realise," said he, "that 25,000 national soldiers, and the police and the Reichswehr are in alliance and that no catchpoll shall hand Germans over to the Allies."

In June, 1922, the Leipzig Court decided to proceed with the trials in the absence of any Allied delegation. The Michelson case was tried and the accused was acquitted. In December, a fresh batch of about 93 accused were brought to trial; among these were Mackensen, Bulow, etc. . . . In the vast majority of cases there was no public hearing, only six resulted in condemnation; as to the others, either "their innocence" was proved, or it was declared that "their misdeeds were not covered by German Law."

Thus ended the Leipzig trials. The net result of the trials was that out of a total of 901 cases of revolting crimes brought before the Leipzig Court, 888 accused were acquitted or summarily dismissed, and only 13 ended in a conviction; furthermore, although the sentences were so inadequate, those who had been convicted were not even made to serve their sentence. Several escaped, and the prison warders who had engineered their escape were publicly congratulated.

(ii) THE LEIPZIG TRIALS

Considering the small number of persons tried by the Supreme Court in Leipzig, it may be interesting to give a brief account of the acts with which they were charged.⁽²⁾

(1) *Naval cases submitted by the British Government*

(a) Lieut.-Comm. Karl NEUMANN, who was in command of the submarine U.67, was charged with the sinking of the Hospital Ship "Dover Castle" in the Mediterranean on 26th May, 1917, after having sunk a merchant vessel named the "Elm Moor." This officer was acquitted on the grounds that he had acted in obedience to superior orders, which, by German law, was a good ground of defence.⁽³⁾

(b) Lieutenants DITHMAR and BOLDT,⁽⁴⁾ who were officers on board

(1) See *The Treatment of War Criminals and Crimes incidental to the War* by Judex, Bulletin of International News, February, 1945.

(2) "German War Crimes," Report of Proceedings before the Supreme Court in Leipzig, H.M. Stationery Office, Cmd. 1450, 1921.

(3) *The Times*, 1st, 2nd and 3rd June, 1921.

(4) *The Times*, 12th, 13th, 14th, 15th, 16th, 18th July, 1921.

the German submarine U.86, commanded by First Lieut. Patzig, were charged with the sinking of the Hospital Ship "Llandoverly Castle" in the Atlantic in June, 1918. In this case the Commander had knowingly acted *against* orders. He could not be traced and escaped trial. Together with the two lieutenants, after the "Llandoverly Castle" had been torpedoed and sunk at a place where the German orders forbade firing on any hospital ship, they deliberately shelled the lifeboats loaded with survivors with a view to suppressing any evidence of the crime, and succeeded in destroying all but one of them, with the consequent loss of 234 lives. One boat escaped, thanks to the darkness of the night. In the hope of concealing the crime further, the chart of the course of the submarine was falsified, any mention of the sinking was omitted in the Log Book, the accused pledged themselves to secrecy as to the facts and forced the crew to make the same promise. The date for the trial was only notified to the British Government less than three weeks in advance, and four of the principal British witnesses were at sea: one had just left the West Indies and another was at Vancouver, but they were called by wireless, as well as two others who were intercepted in New York, and, by means of special arrangements, all were able to reach Leipzig, but only just in time for the trials.

The two lieutenants, who were unashamed and proud to be barbarians,⁽¹⁾ refused to make any statements, were sentenced on 17th July, 1921, as accessories, to four years' imprisonment, and the next day the German papers appeared with the headline: "Four years' imprisonment for U-Boat Heroes."⁽²⁾ They did not serve their sentence: Boldt escaped on 18th November from Hamburg prison with the help of German officials; Dithmar escaped on 31st January, 1922, from Naumburg prison, and public rejoicing followed their escape. When explanations were asked, the Allies were told that Dithmar and Boldt were both in Sweden.

(2) *Military cases submitted by the British Government*

(a) HEYNEN was an N.C.O. in charge of a prisoners' camp in Westphalia, who consistently ill-treated British prisoners. In the beginning the prisoners had refused the order to descend a coal-mine, because they had no experience of this sort of work which they considered helpful to the German war effort. The accused ordered the guards to drive them to work, using the butt end of their rifles and fists. He was acquitted on this charge. Other charges of "extremely rough acts of brutality against defenceless prisoners" such as striking and kicking sick prisoners whom he had knocked down were, however, proved against him and he was sentenced to ten months' imprisonment.⁽³⁾

(b) Captain MULLER was in charge of the prisoners' camp of Flavy-le-Martel. In this camp the sanitary conditions were appalling: infectious diseases, intestinal catarrh, ulcers and lice were common, sick men were compelled to work, prisoners collapsed at their work or during roll-call, blows, hits with the riding-cane were the rule, and insults and abuse were incessant. One of the prisoners who had been ill-treated died the next day,

(1) *The Times*, 9th July, 1921.

(2) *The Times*, 18th July, 1921.

(3) *The Times*, 25th, 26th, 27th May, 1921.

but, owing to lack of post-mortem examination, it could not be established that death was due to ill-treatment. A favourite amusement of the accused was to drive his horse into the prisoners' ranks when they were standing at attention so that many were thrown down by the horse; another was to take photographs of the open-air latrine whilst the prisoners were using it in the throes of dysentery, but the court did not construe these facts as an ill-treatment or as an insult, merely as excessive keenness. So the court decided that he had not, according to German standards, behaved disgracefully, "that his honour as a citizen and an officer was untarnished," and merely sentenced him to an imprisonment of six months.

(c) Private Rob. NEUMANN was one of the sentries of Pommernsdorf Camp, where about 200 prisoners were interned; the camp was under the command of N.C.O. Trinke, who could not be traced. Neumann was the most brutal of all the wardens of this camp where the prisoners were driven to work with the butts of the rifles, with the consequence that many of them suffered injuries. When one of them complained Neumann gave him such a thrashing that no more complaints were made. There was insufficient evidence to bring a conviction on the majority of charges, but in respect of thirteen of them, Neumann was proved guilty. Notwithstanding this, it was stated in the sentence that the trial "has not revealed any tendencies to cruelty or any brutal disposition in the accused," and the Court merely imposed upon him a penalty of six months' imprisonment.

(3) *Cases submitted by the French Government*

(a) General STENGER, who was commanding one of the German armies, was charged with having issued the order that no quarter should be given and Major CRUSCIUS was charged with having carried out this order, causing the murder of large quantities of French prisoners, some of whom he had killed with his own revolver. Quantities of German witnesses were heard, all of whom admitted that they had killed prisoners and mainly French prisoners upon Cruscus's orders and they unanimously accused Cruscus of having shot many with his own hand. A German medical officer, who was in charge of a first-aid post, declared that, after some of the wounded prisoners had been attended to by himself, Cruscus had had them shot. Cruscus admitted these facts but said that he had acted by order of General Stenger. This General was, however, acquitted, the Court being of the opinion that Cruscus had misinterpreted some strong language which had been used by the General. As to the Major, he was acquitted on most of the charges on the grounds that he was not master of his nerves, but was sentenced on one charge of manslaughter to two years' imprisonment. When the Court delivered the sentence the crowd in the room cheered the two accused and hooted the members of the French Mission who had been attending the hearing. When General Stenger came out of the Court room he was carrying flowers which had been given by admirers. He received such a large quantity of letters congratulating him on his order for no quarter that on 11th July he published in the Press a notice saying how much he regretted that it was

impossible for him to thank individually all those who had written to him and he begged them to accept this notice as expressing his gratitude.⁽¹⁾

(b) Lieutenant LAULE was acquitted on 7th July for having had a French captain killed after he had been made a prisoner. The Court acquitted him on the grounds that the German private soldier who had shot the prisoner had acted without orders, but it should be noted that this soldier was never prosecuted.

(c) General von SCHACK who was commanding the garrison of Cassel and General KRUSHKA who was commanding a prisoners' camp near Cassel, were charged with having, through carelessness, caused the death of about 3,000 prisoners. The conditions in which these prisoners were housed and fed were veritably appalling and the deaths were mostly due to typhoid. The public prosecution demanded the acquittal and the Court returned with a verdict of "not guilty."

(d) Doctor MICHELSON was accused of having beaten and ill-treated several French prisoners in his own hospital, and of having wilfully caused the death of several of them. Plenty of evidence was given as to these ill-treatments, but nevertheless Michelson was acquitted on 4th July, 1922.⁽²⁾

(4) *Cases submitted by the Belgian Government*

N.C.O. RANDOHR was charged with having arrested and confined Belgian children at Grammont and of having used violence in order to force them to admit that they had sabotaged telephone lines. Randohr admitted having arrested the children but not having tortured them and the Court acquitted him on the grounds that it was impossible to believe child witnesses.

C. CONCLUSIONS

From the preceding it is apparent that the demand by public opinion that the war criminals of 1914-1918 should be made to answer for their crimes had ended in a failure. When one reads Articles 228 and 229 of the Versailles Treaty it is obvious that the German offer to try the war criminals before their own courts was in complete opposition with the letter and with the spirit of the Treaty. The fact that only about ten accused were sentenced to punishments which were quite out of proportion with the gravity of the crimes, and that these penalties were never really served, showed the German public that the provisions of the Treaty of Versailles concerning retribution were being flouted, and led them to believe that the other provisions of the Treaty could be just as easily disregarded.

In the beginning the trials seem to have been conducted impartially: the presiding judge showed a real desire to ascertain the truth and expressed his disgust at the horrors revealed, paying tribute to the objective sincerity of the British witnesses. This did not, however, prevent the Court from accompanying its findings by considerations that were contrary to the principles of all civilised nations. The German public showed indignation that German judges could be found to sentence the war criminals and the

(1) *The Times*, 13th July, 1921.

(2) Von Schack, Krushka and Michelson were tried after the recall of the Allied Missions.

Press brought all possible pressure to bear on the Court, how successfully, its decisions showed. What the more enlightened section of the audience found most shocking was not the horrors brought to light but the fact that those truly responsible were escaping punishment.

As for the reasons why Articles 228-230 of the Treaty of Versailles were not enforced, the following may be noted;

(1) That the sanctions came too late, when public opinion no longer upheld them. The Leipzig trials took place nearly three years after the end of the war, in some cases five years after the actual crime had been committed. The clauses concerning the punishment of war criminals should have been inserted not in the Peace Treaty but in the Armistice terms.

(2) The Allies were no longer united when the war was over; it is curious to note that from the American delegation came the strongest opposition to the creation of an international court, and to the trial of Wilhelm II.

(3) The world in 1919-1920 was not internationally mature to understand the consequences of a failure to ensure respect of the provisions of the Treaty. It was thought that the danger of war was averted for a long period, and the British and Americans, who had not so greatly suffered by the war, were not in favour of a severe enforcement of the clauses in question.

(4) Articles 228-230 were hastily and imperfectly framed, so that it would have been impossible to carry them out. They did not mention by what law penalties should be determined, and the Allied military courts by which the accused should have been tried could not have done so, owing to lack of jurisdiction.

CHAPTER IV

DEVELOPMENTS IN THE LAWS OF WAR BETWEEN THE TWO WORLD WARS

A. THE COVENANT OF THE LEAGUE OF NATIONS

The Covenant of the League of Nations⁽¹⁾ sought to eliminate war, but it stopped half way. It did not outlaw war, but, by means of Articles 12, 13 and 15 it endeavoured to delay the outbreak of wars, by insisting on the submission of disputes likely to lead to war to arbitration or judicial settlement.

Under Article 11 any war or threat of war was declared to be a matter of concern to the whole League, and it was the friendly right of each member of the League to bring to the attention of the Assembly or the Council any situation likely to disturb peace or international understanding. Under Article 12 the members of the League agreed to submit to arbitration or judicial settlement any dispute between them which might lead to rupture, and agreed not to resort to war until three months after the award had been given. Article 13 set up the machinery for the settlement of disputes by arbitration; the Permanent Court of International Justice was set up under Article 14, and action in the event of disputes not submitted to arbitration was dealt with by Article 15. In this latter case, the dispute was to be referred to the Council of the League, which would endeavour to effect a settlement of the dispute. If the dispute was not settled, the Council might publish a report containing a statement of the facts and the recommendations made in regard thereto. Though, in Article 13, members agreed to abide by the award or judicial decision, under Article 15 there was no compulsion to act on the Council's report. Moreover, under paragraph 7 of Article 15 it was laid down that if the Council of the League could not reach a unanimous decision, after the failure of other attempts at settlement under the other Articles of the Covenant, "the members of the League reserve to themselves the right to take such action as they may consider necessary for the maintenance of right and justice." This paragraph was the notorious gap in the Covenant by which any war, even an aggressive one, could be waged within the bounds of legality. However, as a deterrent against war, Article 16 contained provisions for the use of "sanctions," and Article 17 laid down machinery for action by the League in the event of a dispute with a non-member of the League likely to lead to hostilities.

The first occasion on which the Covenant of the League was brought into use as a means of preventing hostilities was in 1921⁽²⁾ when, after a prolonged dispute between Albania and the Serb-Croat-Slovene State, Yugo-Slav forces crossed the frontier of Albania. The British Government called the attention of the Council to the situation, and demanded the

(1) *Recent General Treaties*. League of Nations publication No. 366. February 1934.

(2) *Temperley A History of the Peace Conference in Paris*, Vol. VI, p. 527.

application of sanctions under Article 16, if the Serb-Croat-Slovene State refused to execute its obligations under the Covenant. Yugoslav troops were consequently withdrawn from Albania and the risk of a serious Balkan war was averted.

In 1923, following the murder of the Italian General Tellini on Greek soil, when the Italian forces bombarded and then occupied the island of Corfu, the Greek Government appealed to the Council under Articles 12 and 15, while the Italian Government referred the matter to the Conference of Ambassadors, at that time sitting in Paris. The affair was solved by the Conference of Ambassadors passing to the Greek Government for acceptance, terms suggested to it by the Council⁽¹⁾.

Again in 1925 a dangerous situation on the Graeco-Bulgarian frontier was saved from developing further by the prompt action of the Council. Hostilities in this case opened with a skirmish round a frontier post, as a result of which a Greek Army Corps invaded Bulgarian territory. On the day the Greek troops entered Bulgaria, the Bulgarian Government appealed to the Council, which met four days later, but, in the meantime, the President of the Council sent telegrams to both Governments asking them to refrain from further hostilities. As a result of this appeal, the Greek Government ordered its troops to cease fire; hostilities thus terminated, and a satisfactory conclusion was reached after a Commission of Inquiry, appointed by the League, had investigated the circumstances and recommended the payment of compensation to the Bulgarian Government⁽²⁾.

Under Article 10 of the Covenant—guarantees against aggression—the members of the League undertook to preserve against external aggression the territorial integrity and existing political independence of all members of the League. In the event of such aggression or threat of aggression, the Council was to advise as to the means by which this obligation should be fulfilled. The Second Assembly of the League, meeting in September 1921⁽³⁾, considered a Canadian proposal for the elimination of this Article, on the grounds that it involved a recognition of the legality of the territorial *status quo* and an obligation on the members of the League to guarantee its permanent maintenance. The matter was discussed at considerable length, not only by the Second Assembly, but by the Third and Fourth Assemblies in 1922 and 1923⁽⁴⁾ and it was finally decided to leave the Article as it stood, but to recommend that the Council should take into account the special circumstances and geographical position of each State, when recommending the application of military measures in defence of territorial integrity.

B. THE DRAFT TREATY OF MUTUAL ASSISTANCE AND THE UNRATIFIED GENEVA PROTOCOL 1924

Article 8 of the Covenant laid down the principle of the reduction of armaments, and from the inception of the League various technical

(1) Toynbee's *Survey* 1920-1923, p. 348.

(2) Toynbee's *Survey* 1925, Vol. II., p. 299 et seq.

(3) *Plenary Sessions*, 2nd Assembly, p. 693.

(4) *Monthly Summary*, Vol. II, p. 213 and Vol III, p. 198.

committees had been considering how best to implement this article. By 1923 the experts had reached the conclusion that disarmament must be combined with a system of guarantees against aggression. At its meeting in August 1923⁽¹⁾ the Temporary Mixed Commission for the Reduction of Armaments discussed the text of a Draft Treaty of Mutual Assistance, which was to link up the question of disarmament with that of a general treaty of mutual guarantee. Article I of this Treaty went beyond the terms of the Covenant. By this the Contracting Parties solemnly declared that "aggressive war is an international crime" and severally undertook that none of them would be guilty of its commission⁽²⁾. The rest of the Treaty dealt with disarmament and collective action under the League in the event of aggression.

The Draft Treaty was considered by the Fourth Assembly during its session in September 1923⁽³⁾. During the discussions it appeared that many members did not favour the treaty because they were afraid to reduce their armaments without adequate guarantees of security, and others were afraid that it would give rise to the old system of European alliances. It was decided, however, that the Draft Treaty should be communicated to the Governments members of the League.

During the year between the meetings of the Fourth Assembly in 1923 and the Fifth Assembly in 1924, the Draft Treaty of Mutual Assistance was approved in principle by eighteen governments, but it gave rise to certain misgivings, voiced in the debates of the Fifth Assembly, which were attended by the Prime Ministers of Belgium, Denmark, France and Great Britain⁽⁴⁾. The discussions led to the adoption, by the Assembly, of a joint resolution submitted by the British and French delegations⁽⁵⁾ inviting it to strengthen the solidarity and security of the nations of the world by ensuring the pacific settlement of all disputes which might arise between States. On the basis of this resolution, the Assembly drew up the Protocol for the Pacific Settlement of International Disputes, which contained a system of arbitration from which no international dispute, whether legal or political, should escape. It provided for a military, financial and economic co-operation which, by guaranteeing the security of States, would render possible a considerable reduction of national armaments.

After a preamble, in which the signatory States recognized the solidarity of the members of the international community and asserted that "a war of aggression constitutes a violation of this solidarity and an international crime," the parties to the Protocol⁽⁶⁾ agreed "in no case to resort to war, either with one another or against a State which, if the occasion arises, accepts all the obligations hereinafter set out, except in case of resistance to aggression". By a unanimous resolution the Assembly decided to recommend the Protocol to Governments for acceptance.

By March 1925, there having been a General Election in England in

(1) *Monthly Summary*, Vol. III, p. 167-173.

(2) *Op. cit.* p. 236.

(3) *Op. cit.* p. 193.

(4) *Plenary Meetings*, Fifth Assembly, p. 42 et seq.

(5) *Op. cit.* p. 77.

(6) *Op. cit.* p. 498.

the meantime and a consequent change of Government, the British Foreign Secretary stated, at a Council meeting⁽¹⁾, that the British Government did not believe that the Protocol provided the most suitable method of preventing war. For instance, under Articles 7 and 8 of the Protocol, by which States agreed to restrict the movements of their forces in the event of a threat of war, the victim of aggression is hindered, since that State cannot dispose of its troops, while the aggressor is free to choose the time and place most suitable for making the attack. The British Government, however, considered that the best way of dealing with the matter would be to supplement the Covenant by making special arrangements, in co-operation with the League, in order to meet special needs. "These objects can best be attained by knitting together the nations most immediately concerned and whose differences might lead to a removal of strife, by means of treaties framed with the sole object of maintaining, as between themselves, an unbroken peace"⁽²⁾.

As a result of this declaration, other members of the League also found themselves unable to accept the Protocol and the Sixth Assembly, meeting in September 1925⁽³⁾, noting that there would not be enough ratifications for the Protocol to come into force, declared "afresh that a war of aggression should be regarded as an international crime" and undertook "again to work for the establishment of peace by the sure method of arbitration, security and disarmament." Arising out of this resolution arrangements, which matured in 1932, were made for the holding of a Disarmament Conference.

Thus, although war was declared in two instruments to be an illegal act, neither of the instruments was ever ratified and, for the moment, the principle was not accepted as a statutory part of international law.

C. THE LOCARNO TREATIES

At the time that Sir Austen Chamberlain, British Foreign Secretary, made his statement to the Council of the League refusing, on behalf of the British Government, to accept the Geneva Protocol, negotiations were in progress between the Belgian, British, Czech, French, German, Italian and Polish Governments which resulted in the agreements drawn up at Locarno in October 1925.

The Locarno Treaties consisted of⁽⁴⁾:—first, a Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy; secondly, Arbitration Conventions between Germany and Belgium, and Germany and France, by which the parties agreed to bring disputes of every kind, which could not be settled amicably by the normal methods of diplomacy, either before an arbitral tribunal, or before the Permanent Court of International Justice, or before a Permanent Conciliation Commission, whose machinery was set up in the Convention, or, failing that, before the Council of the League. The third set of Arbitration Con-

(1) *Monthly Summary*, Vol. V, p. 85.

(2) *Op. cit.* p. 90.

(3) *Monthly Summary*, Vol. V, p. 209.

(4) *Recent General Treaties*. League of Nations publication, No. 366, page 25.

ventions were those between Germany and Poland, and Germany and Czechoslovakia, which stated, in their preambles, that sincere observance of the methods of peaceful settlement of international disputes should permit the solving, without recourse to force, of questions which might otherwise become the cause of division between states. These Conventions also set up machinery for the settlement of disputes by peaceful means. The fourth set of Conventions were those of mutual guarantee signed by France and Poland as well as France and Czechoslovakia. These treaties did not go as far as the League instruments in outlawing war, but endeavoured to safeguard peace by the system of mutual guarantees and by setting up machinery to obviate the causes of war.

In a draft note to Germany from the other Governments, parties to the agreements, these Governments defined what they considered to be the obligations under Article 16, the "sanctions" article, of the Covenant of the League. This was understood to mean:

"that each State member of the League is bound to co-operate loyally and effectively in support of the Covenant and in resistance to any act of aggression to an extent which is compatible with its military situation and takes its geographical position into account."

Following the signature of these agreements at Locarno, the other parties to them supported the admission of Germany to the League, and she was formally admitted to that body on 8th September 1926.

The Assembly, during its session in 1926⁽¹⁾, noted the importance of the Treaties of Locarno. It considered that the general ideas embodied in these treaties, whereby provision was made for conciliation and security by the mutual guaranteeing of States against any unprovoked aggression, might be applied to different parts of the world and should be accepted among the fundamental rules which should govern the foreign policy of every civilised nation. The Assembly expressed the hope that other Governments would put these principles into practice.

Germany was guilty of unilateral repudiation of Article I of the Treaty of Mutual Guarantee, by which she had agreed to abide by the provisions of the Treaty of Versailles, when, in March 1936, she remilitarized the Rhineland. France protested to the Council⁽²⁾ which met in special session in London. The German representative, von Ribbentrop, raised the counter accusation that France had violated the Locarno agreements by signing the Franco-Soviet Pact in 1935. The German Chancellor was prepared to conclude pacts of non-aggression with France and Belgium and to offer Europe an agreement guaranteeing peace for 25 years. The British Foreign Secretary took the view that the breach of the Treaty did not carry with it any threat of hostilities or involve immediate action. Consequently, no action was taken, though Britain and France notified Belgium that they considered her released from any obligations under the Treaty of Locarno.

(1) *Monthly Summary*, Vol. VI, p. 283.

(2) *League Year by Year*, 1936, Part I, p. 69.

D. THE PACT OF PARIS 1928

During the years 1926 and 1927 a movement had been growing in the United States in favour of an official declaration outlawing war. Impetus was given to this movement on 6th April 1927, when M. Briand, French Foreign Minister, in a message to the American people to commemorate the tenth anniversary of the entry of the United States into the War, suggested that France and the United States might celebrate the occasion by subscribing publicly to some mutual engagement tending to outlaw war between the two countries.⁽¹⁾ A few months later, M. Briand sent to Mr. Kellogg, United States Secretary of State, a draft treaty on these lines. On the suggestion of Mr. Kellogg it was decided that the draft bilateral treaty should be made multilateral and during 1928 the Governments of Germany, Italy, Japan, Great Britain and the British Dominions, together with Belgium, Czechoslovakia and Poland, the other parties to the Locarno agreements, were invited to join.

Meanwhile during the Eighth Session of the Assembly, meeting during September 1927, the following resolution was adopted⁽²⁾:

“The Assembly . . .

“Being convinced that a war of aggression can never serve as a means of settling international disputes and is in consequence an international crime;

“Considering that a solemn renunciation of all wars of aggression would tend to create an atmosphere of general confidence calculated to facilitate the progress of the work undertaken with a view to disarmament;

“Declares:

(1) “that all wars of aggression are and shall always be prohibited;

(2) “that every pacific means must be employed to settle disputes of every description, which may arise between States.

“The Assembly declares that the States Members of the League are under an obligation to conform to these principles.”

During the correspondence leading up to the signature of the Pact, it emerged that opinion in the United States laid emphasis on the renunciation of war, while thought in Europe laid stress on the pacific methods of settling international disputes. Moreover, the United Kingdom Government had to make some reservations as to its right to use force in defence of peace and tranquillity within the Empire.

On 27th August 1928 the representatives of Australia, Belgium, Canada, Czechoslovakia, Eire, France, Germany, Great Britain, India, Italy, Japan, New Zealand, Poland, South Africa and the United States, met together in Paris and signed the International Treaty for the Renunciation of War as an Instrument of National Policy⁽³⁾ whose terms were as follows:

“*Article 1.* The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

“*Article 2.* The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin

(1) Toynbee's *Survey*, 1928, p. 10 et seq.

(2) *Op. cit.* p. 14.

(3) Cmd. 3410, H.M. Stationery Office.

they may be, which may arise among them, shall never be sought except by pacific means.

“Article 3. The present Treaty shall be ratified by the High Contracting Parties . . . This Treaty shall, when it has come into effect . . . remain open as long as may be necessary for adherence by all the other Powers of the world.”

After the Treaty became effective on 24th July 1929, thirty-one other States adhered to it; it was thus accepted by forty-four States, the only Great Power which did not adhere to it being the Soviet Union.

E. THE GENERAL ACT FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES 1928

From the earliest days of the League, certain of its members had been advocating the establishment of treaties of arbitration. In the First Assembly, Norway and Sweden had suggested incorporating in the Covenant definite provisions for the settlement of disputes by the action of commissions of arbitration and conciliation,⁽¹⁾ but by the time the Assembly met in its third session in 1922 it was decided that, rather than amend the Covenant or draw up a General Arbitration Convention, the League should encourage the development of bilateral conventions among its members. By this means a General Convention might ultimately be desirable and possible.

The Locarno Treaties were an important step in the development of such bilateral treaties. The League had also been encouraging its members to adhere to the Optional Clause of the Statute of the Permanent Court of International Justice, by which States adhering to the Convention agree to accept as binding the decisions of the Tribunal. As a result of this encouragement many of the States members of the League did adhere to the Optional Clause, thereby strengthening the power of the Court in judicial disputes.

The Arbitration and Security Committee of the League had prepared, for the consideration of the Ninth Assembly in September 1928, six conventions for the pacific settlement of international disputes, namely: three conventions for the solution of disputes by arbitration, conciliation and judicial settlement and three model bilateral treaties of mutual assistance or non-aggression.⁽²⁾ Under these latter conventions the parties undertook “in no case to resort to war against another Contracting Party”.⁽³⁾ The Assembly decided that the three model general conventions for the pacific settlement of disputes should be brought together into one instrument, and a committee, whose rapporteur was M. Politis of Greece who had also been rapporteur of the committee which drew up the earlier Geneva Protocol, assembled the three conventions into a single General Act, consisting of four chapters:

- (1) provided for the solution of all disputes;
- (2) contemplated the judicial settlement or arbitration of disputes;

(1) *Monthly Summary*, Vol. II, p. 214.

(2) *Monthly Summary*, Vol. VIII, p. 252.

(3) *Recommendations and Resolutions, Assemblies*, 7-11, pp. 40, 46 and 52.

(3) provided for the arbitration of non-legal disputes; and

(4) laid down general provisions for reservations by which adhering States might accede to the General Act as a whole or limit their engagements to certain Chapters.

This General Act differed from the Geneva Protocol in that it did not need to be negotiated, but would come into force once it had received two adhesions, and would remain open indefinitely for the accession of all other States. It was recommended to the Assembly as the logical implementation of the Pact of Paris on the grounds that the Pact did not contain any positive obligations to resort to the pacific settlement of disputes.

The bilateral treaties contained the three principles embodied in the Locarno Treaties, namely, non-aggression, the compulsory settlement of disputes and the clause for mutual assistance, but it differed from them in that it contained no territorial guarantees, or guarantees by a third State, no provision in cases of flagrant aggression and no stipulation regarding demilitarized zones.⁽¹⁾

The Ninth Assembly invited all States, whether members of the League or not, to accept the procedure for pacific settlement of disputes either by becoming parties to the General Act, or by concluding draft conventions in accordance with the model bilateral conventions; it also hoped that States would take action between themselves to conclude treaties of mutual assistance and non-aggression, on the lines laid down in the model treaties.

The Act, however, received a set-back even on its first introduction into the Assembly, because the Hungarian delegate stated that though his Government acceded fully and sincerely to the Act, it felt it could not fulfil the moral duty of putting it into effect without adequate guarantees of security. "How can we," asked the Hungarian delegate, "disarmed and defenceless conclude a treaty of mutual assistance with nations armed to the teeth?"⁽²⁾ The Hungarian delegation therefore refrained from voting for the General Act.

Up to 15th July 1934 the General Act had received only 19 accessions, namely: Austria, Belgium, United Kingdom, Canada, Denmark, Estonia, Finland, France, Greece, India, Eire, Italy, Luxembourg, the Netherlands, New Zealand, Norway, Peru, Spain and Sweden.⁽³⁾

F. ATTEMPTS TO ASSIMILATE THE PROVISIONS OF THE PACT OF PARIS INTO THE COVENANT OF THE LEAGUE

By September 1929, when the Tenth Assembly of the League met, the Pact of Paris had come into force and the Assembly had to consider whether it was desirable to amend the Covenant to include in it the provisions of the Pact. The British delegation put forward a memorandum showing how the provisions of the Covenant differed from those of the Pact, namely⁽⁴⁾:—under Article 12 of the Covenant, nations could resort to war

(1) *Plenary Session, Ninth Assembly*, p. 170.

(2) *Plenary Meetings, 9th Assembly*, p. 175.

(3) *Monthly Summary*, Vol. XIV, No. 6, p. 158.

(4) *League Year by Year, 1928-1929*, p. 85.

three months after the award of the arbiters or judicial decision; according to the Pact of Paris, nations gave up this right. Under paragraph 6 of Article 15, the party which had accepted the report of the Council might go to war against the party which had not accepted it; under the Pact of Paris States renounced this right. Similarly, under paragraph 7 of Article 15, members of the League reserved to themselves the right to take such action as they should consider necessary for the maintenance of right and justice if the Council failed to reach a unanimous decision on the report; under the Pact of Paris they also renounced that right.

The Tenth Assembly referred the matter to a special committee of eleven members, while the delegates wished to refer the matter back to their respective Governments. The following year, 1930, the Assembly again considered the matter, but again decided that it must be referred back to the respective Governments.⁽¹⁾ It was found difficult to assimilate the provisions of the Pact into the Covenant, because during the negotiations which preceded the Pact, its scope had been defined and certain reservations had been accepted. There seemed, to those States who had not signed the Pact, to be no hurry to amend the Covenant. To others, the proposed amendments proved incompatible with other treaties and with situations which were the object of express reservations when the Pact had been concluded. Moreover, members were not agreed as to how the obligations under the sanctions article would apply to the new conditions.

The matter was again discussed by the Assembly which met in 1931⁽²⁾ and it was decided that some form of general prohibition to resort to war should be embodied in the Covenant, and that a commission consisting of representatives of all the member States should meet during the Disarmament Conference, which was due to be held the following year. When, however, the Council⁽³⁾ in January 1932 authorised the Secretary General of the League to convene such a Commission, the Secretary General, after consultation, replied that the work of the Disarmament Conference had not reached a stage which would justify the calling of the Commission.

The studies, which had been begun by the Committee of Eleven in 1930, dragged on, and in 1936 a Committee of Twenty-Eight was appointed to consider the co-ordination of the Pact of Paris, the Treaty of Rio de Janeiro of 10th October 1933 (the Saavedra Lamas Pact)⁽⁴⁾ and the Covenant of the League. However, the divergent opinions as to the incorporation of the obligations of the Pact and the reluctance of certain States to incur any additional responsibility in the matter of sanctions, resulted in failure to produce any concrete solution. On 4th October 1936 the Assembly accepted a resolution declaring⁽⁵⁾:—

“In the event of war or threat of war, the League of Nations, while not delaying for that purpose its own action in virtue of the Covenant, shall take suitable steps and shall establish such contacts as may appear to be necessary

(1) *Monthly Summary*, Vol. X, p. 252.

(2) *Monthly Summary*, Vol. XI, p. 325.

(3) *League Year by Year*, 1931-33, p. 73.

(4) For further details of the Saavedra Lamas Pact, see Section M (iv) p. 79.

(5) *League from Year to Year*, 1937, p. 39.

to associate in its efforts for the maintenance of peace those States which are not members of the League, but are mutually bound by the above-mentioned covenants, the common aim of which is to maintain peace."

It might be mentioned here that shortly after the Disarmament Conference met in February 1932, the Governments of the United Kingdom, France, Italy, and Germany, in a statement declaring that Germany should be granted an equality of rights as the other Powers not disarmed by Treaty, confirmed that "they will not in any circumstances attempt to resolve any . . . differences by resort for force."⁽¹⁾

G. THE MODEL TREATY TO STRENGTHEN THE MEANS OF PREVENTING WAR

In 1928 the German delegation to the Assembly presented for consideration a model treaty for preventing war, which was circulated to States for their examination.⁽²⁾ The following year the British delegation to the Assembly suggested that the Arbitration and Security Committee should consider the possibility of establishing a draft general convention on the lines of the model treaty.

By the time the Eleventh Assembly met in 1931, a Draft Convention had been drawn up and was presented for approval to the Assembly. The purpose of this Convention was to enable the Council of the League to act more effectively under Article 11—action in case of war or danger of war—by enabling it to pass decisions and recommendations without reckoning the votes of the parties to the dispute. This Convention did not contain any provisions renouncing war, but it included *inter alia*⁽³⁾ an undertaking by the parties that, should a threat of war exist between them, they would comply with certain measures prescribed by the Council, such as: the fixing of lines which must not be passed by their land, naval or air forces, with a view to preventing incidents, and the appointment of commissioners on the spot, whose duty it would be to prevent clashes and, should hostilities occur, to facilitate the determination of responsibility.

This Convention was approved by the Assembly on 26th September 1931, and opened for signature to all States. Only nineteen States signed it, but out of these only three—the Netherlands, Norway, and Peru—ratified it. Since ten accessions had to be received for the instrument to be ratified, it never came into force.

H. THE WAR BETWEEN BOLIVIA AND PARAGUAY (THE CHACO WAR)

Oil having been discovered in the Chaco area of Bolivia, a dispute arose between Bolivia and Paraguay as to which State was the rightful owner of the area. In December 1928 the matter came to a head when Paraguayan forces invaded the Chaco. At its meeting on 11th December 1928, the

(1) *Monthly Summary*, Vol. XII, p. 351.

(2) *League Year by Year*, 1928-29, p. 29.

(3) *Monthly Summary*, Vol. XIV, p. 159.

Council of the League sent an appeal to both parties to terminate hostilities. Bolivia replied by stating that Paraguay had committed aggression contrary to Articles 10 and 12 of the Covenant. On 15th December the Council sent another appeal to both parties not to take any action which would aggravate the situation. Paraguay, in a communication to the Council, said that she had asked for an impartial investigation from the outset, and had never wanted to resort to war. Paraguay also added that she had accepted the good offices of the Pan-American Conference on Conciliation and Arbitration, then meeting at Washington.⁽¹⁾

As a result of the actions of the League and of the Pan-American Conference, the belligerents set up a Commission of Conciliation⁽²⁾ and, as a result, hostilities were broken off. War was thus prevented by the joint action of the League and the Washington Conference.

Hostilities between Bolivia and Paraguay, however, broke out again in July 1932,⁽³⁾ at a time when the delegates of the two countries were pursuing at Washington, under the auspices of the Commission of Neutrals (the United States, Colombia, Cuba, Mexico and Uruguay), negotiations for the institution of a bilateral pact of non-aggression.

On 21st July 1932 the Bolivian delegate brought the matter to the attention of the Secretary General of the League, and a few days later, in reply to an appeal from the League, the Paraguayan Government declared its willingness to submit the dispute to peaceful procedure.⁽⁴⁾ However, hostilities continued and there was much correspondence between the belligerents and the League, which continued to appeal to the parties to recall their obligations under the Covenant. Both parties replied that they were in principle prepared to continue their efforts to reach a peaceful solution, but the fighting continued. Meanwhile, the Commission of Neutrals in Washington tried to bring about a termination of hostilities, and the special Committee of Three set up by the League Council, (composed of representatives of Eire, Guatamala and Spain) co-operated with that body in defining the conditions which were thought likely to lead to the cessation of hostilities and a peaceful settlement of the dispute.

At a meeting of the Council of the League on 3rd February 1933,⁽⁵⁾ the Committee of Three recommended that a small commission should be despatched to the spot. The belligerent States, when approached about this suggestion, however, asked that the League should wait because the neighbouring States of the Argentine, Brazil, Chile and Peru were then engaged in negotiations for peace.

On 22nd February, the British Government drew the attention of the Secretary General to the fact that since neither of the belligerents were producers of arms, implements and munitions of war, the Council might study measures for preventing the furnishing of arms to those countries, in accordance with Article 11 of the Covenant. The Committee of

(1) *League Year by Year*, 1929, p. 140.

(2) For more detailed account of Pan-American Conferences, see Section M (iii) p. 78.

(3) *League Year by Year*, 1932, p. 177.

(4) *Monthly Summary*, Vol. XII, p. 344.

(5) *League Year by Year*, 1933, p. 175 et seq.

Three accepted this suggestion, but on 10th May Paraguay declared war on Bolivia, and Bolivia accordingly asked the League to take action under Article 16 of the Covenant.

In May the Council agreed to the suggestion of the Committee of Three to send a commission to the spot. During June and July the Council tried to secure agreement between the belligerents, but Paraguay demanded the cessation of hostilities before arbitration, and Bolivia insisted that arbitration should precede the cessation of hostilities.

The four adjacent States were still continuing their efforts in peace-making and on 3rd August, following a request to this effect from both belligerents, the Council agreed that their commission on the spot should consist of representatives of these four countries. However, by 1st October these Governments notified the Council that they were unable to agree to this, so a commission consisting of representatives of Great Britain, France, Spain, Italy and Mexico was appointed by the Council, and constituted itself in Montevideo on 3rd November.

This League Commission, having visited both fronts, arranged an armistice from 19th to 30th December 1933, and summoned representatives from both parties to a discussion at Montevideo. The Commission proposed the extension of the truce until 14th January and the appointment of a commission of neutral officers to supervise the observation of the armistice. As a solution to the dispute, the Commission recommended that it be submitted to the Permanent Court of International Justice, that the armed forces be withdrawn and a general settlement be made.

The Seventh Pan-American Conference, meeting also at Montevideo from 3rd to 26th December, 1933, sent its good wishes and support to the League Commission. The efforts for peace failed, however, with the refusal of the Government of Paraguay to prolong the truce beyond 6th January 1934.

Since the League Commission on the spot had failed, it returned to Geneva and in May 1934⁽¹⁾ published its report. In its report, the Commission did not decide on the question of responsibility for the war, since both parties claimed the Chaco as their territory and therefore pleaded that they were fighting a war of self-defence, but it recommended that "it is essential that the system of intervention from many quarters should come to an end—that there should be no longer a doorway through which the parties can leave one procedure for another and experiment with a fresh formula when the negotiations take a turn unsatisfactory to them."⁽²⁾

On 31st May 1934 the Bolivian Government appealed to the League under Article 15 of the Covenant, but it was held that since the conciliation procedure under Article 11 was not closed, the provisions of that Article did not apply. The Council asked the Committee of Three to continue its efforts to effect a settlement of the dispute. Meanwhile the Committee, which had been investigating the problem of organising an embargo on the export and transit of arms and war material to Bolivia and Paraguay,

(1) *Monthly Summary*, Vol. XIV, p. 103 et seq.

(2) *Op. cit.* p. 105.

reported to the Council that none of the 35 nations consulted had raised any objection to the principle of an arms embargo except Japan, which, though it had never exported arms to either country, declined to associate itself with this proposal.

Since the Bolivian Government had availed itself of the right, under paragraph 9 of Article 15, to bring the matter before the Assembly, it was discussed by that body during its session in September 1934. Since the parties concerned had both claimed that the limitation of arms was beyond the scope of the Covenant, a special committee was appointed to investigate the question, but it was reported that, out of 35 Governments consulted concerning the embargo, 28 States, including the U.S.A. and U.S.S.R., had replied that they had taken steps to prohibit the export of arms, etc., to both belligerents.

The efforts at conciliation having proved fruitless, the Assembly was summoned to an extraordinary session in November.⁽¹⁾ The views of the two parties still proved irreconcilable, Paraguay being primarily concerned with the cessation of hostilities and guarantees of security, while Bolivia insisted on a final settlement of the controversy. The Assembly adopted a report under Article 15, paragraph 4, whose recommendations provided for the cessation of hostilities, measures for security, peace negotiations, and an embargo on arms and war material. The United States and Brazil, non-members of the League, were asked to collaborate in the work of an advisory committee which was to watch over the application of the report. Bolivia accepted the recommendations of the League, but Paraguay only with reservations; Bolivia consequently asked that the arms embargo against herself might be raised. This the Advisory Committee agreed to, recommending at the same time that the embargo against Paraguay, which had rejected the League's recommendations, should be tightened.⁽²⁾ As a result of this the Government of Paraguay, on 24th February 1935, notified the Secretary General of its intention to withdraw from the League.

In March⁽³⁾ the Advisory Committee discussed whether the continuation of the war did not involve the immediate application of Article 16, but since the Governments of Argentine and Chile were making overtures to the parties to accept a plan, based on the League's recommendations, the matter was deferred.

Although there was a special meeting of the Assembly in May 1935, it was as a direct result of the mediation of the Governments of Argentine, Brazil, Chile, the United States, Peru and Uruguay that the fighting ceased in June 1935. On 13th June the Argentine Foreign Minister informed the Secretary General of the League that the Mediation Commission of representatives of these Governments, over which he presided in Buenos Aires, had obtained agreement between the belligerents. As a result of the efforts of this Commission a Peace Conference was held at Buenos Aires and on 12th July peace was signed between Bolivia and Paraguay.

(1) *Monthly Summary*, Vol. XIV, p. 256.

(2) *Monthly Summary*, Vol. XV, p. 2.

(3) *Op. cit.* p. 62.

Some hold that the failure of the League to end the Chaco war was one of the reasons for its impotence in the Italo-Abyssinian and Sino-Japanese wars.

I. THE WAR BETWEEN COLOMBIA AND PERU (THE LETICIA INCIDENT)

According to a treaty signed at Lima on 24th March 1922 between Colombia and Peru and ratified in 1928, a district on the Amazon of which Leticia was the capital, had been included in Colombian territory. At the beginning of September 1932, individuals coming from Peru entered Leticia, from which they drove the Colombian authorities. They then occupied the territory known as the Trapezium of Leticia and fortified their positions, while the Colombian Government armed a small flotilla, which advanced up the Amazon. The Peruvian Government claimed that Leticia had been transferred to Colombia without the wishes of the inhabitants being consulted, and protested at the military preparations of the Colombian Government.

In January 1933 the Colombian Government brought the matter to the notice of the Council of the League.⁽¹⁾ The President of the Council asked the Committee of Three (Eire, Guatamala and Spain) already concerned with the war between Bolivia and Paraguay, to watch the progress of the dispute. The Council appealed to both parties to refrain from further hostilities, but the situation did not improve. In March the Council suggested that a commission of the League should administer the territory in dispute; that it should be evacuated by Peruvian troops and that Colombia should place at the disposal of the League troops which, regarded as international forces, would be responsible for maintaining order. The Colombian Government accepted these proposals but they were rejected by Peru. The Council published a report on these lines which was also accepted by Colombia, but rejected by Peru. The Council recalled that the Assembly, in March 1932, "had declared that the Members of the League were bound not to recognise any situation, treaty or agreement, which might be obtained by measures contrary to the Covenant or the Pact of Paris."⁽²⁾

There were further encounters between the Colombian and Peruvian forces in March 1933, but by 25th May the two Governments had accepted the recommendations of the Council. It was decided that the proposed League Commission should proceed to Leticia within 30 days; that Peruvian forces within Colombian territory should be withdrawn immediately, and that the Commission should take a hand in the administration of the evacuated territory, using forces of its own selection. The Commission to administer the territory, consisting of representatives of the United States, Brazil and Spain, took possession of Leticia on 23rd June 1933, the Peruvian forces having been evacuated. Negotiations between the parties opened in Rio de Janeiro in November 1933, under the Chairmanship of the Brazilian Minister of Foreign Affairs. By August 1934 the

(1) *League Year by Year*, 1933, p. 182 et seq.

(2) *Op. cit.* p. 184.

League Commission handed back to Colombia the territory of Leticia, since the boundary question between Colombia and Peru had been settled at Rio de Janeiro.⁽¹⁾

In this case the League did succeed in securing the termination of hostilities, but the magnitude of the dispute can be judged by the fact that the League Commission reported that the town of Leticia had had 400 inhabitants when it took over, though by the time it left these had been increased to several thousand.

J. THE ITALO-ABYSSINIAN WAR

On 13th December 1934 the Abyssinian Foreign Minister complained to the Council of the League of an attack made by Italian troops on Abyssinian troops at Walwal on 5th December, and continued attacks by Italians in that neighbourhood.⁽²⁾ The Italian Government, in a note to the Secretary General, stated that there had been no advance on Abyssinian territory, but that Italian aircraft had been shot at on reconnaissance. Both parties, however, expressed themselves willing to continue direct negotiations for a settlement. The two Governments attempted to settle the dispute by means of the arbitration machinery set up by the Italo-Abyssinian Treaty of 1928. When in March the Ethiopian delegate tried to lay the matter before the Council, Italy claimed that Article 15 was not applicable, since direct negotiations were still continuing. The Ethiopian Government suggested that if, after a period of 30 days, the arbitration machinery had not succeeded in concluding an agreement, the Council should be asked to arbitrate.

In May 1935⁽³⁾ the Council noted that since direct negotiations had failed, both countries had appointed arbiters, and they therefore fixed the 25th August as the date by which both conciliation and arbitration should be finished.

Since, by August, the arbitration machinery had failed to reach a solution, and Ethiopia reported, in the meantime, that Italian troops and war materials had been arriving in East Africa, an extraordinary meeting of the Council was called. The Council decided to appoint a fifth arbiter on the Commission, but meanwhile noted that the Governments of Britain, France and Italy were to enter into direct negotiations with the aim of settling the dispute. These negotiations took place in Paris between 16th and 19th August, but no reasonable basis for discussion could be found and they achieved no result. The Sixteenth Assembly, meeting in 1935, discussed the dispute.⁽⁴⁾ Fifty members of the Assembly approved a report in which Italy was declared to have "resorted to war in disregard of its covenants under Article 12 of the Covenant." Having regard to Article 16, the Assembly set up a Committee, consisting of one delegate from each member of the League other than the parties concerned, to consider and facilitate the co-ordination of action for the application

(1) *Monthly Summary*, Vol. XIV, p. 186.

(2) *Monthly Summary*, Vol. XIV, p. 284.

(3) *Op. cit.* p. 106.

(4) *League Year by Year*, 1936, p. 19 et. seq.

of sanctions. The Council offered its services to the parties in an endeavour to bring about a cessation of hostilities, while the Governments of France and Britain took separate action to achieve the same end.

On 2nd November, the Co-ordination Committee decided that a prohibition on the import of Italian goods and an embargo on certain exports to Italy should come into force on 18th November. A few days later it was recommended that the embargo should be extended to cover oil, iron and coal.

By 13th December the text of the Franco-British (Hoare-Laval) proposals were communicated to the Council. Ethiopia protested that these entailed the cession to Italy of part of her territory, of economic privileges and of privileges which amounted to granting Italy predominant control over the administration of the capital and a large part of the territory of Ethiopia. To this the British and French Foreign Ministers replied that the proposals were put forward to ascertain the views of both parties and were not terms to be imposed.

During December the war flared up, with complaints from the Ethiopian Government that ambulances had been bombed and poison gas used by the Italians, while the Italian Government alleged that the Ethiopian forces were using dum-dum bullets.

Two Committees of the League were concerned in the Italo-Abyssinian dispute, the Committee of Thirteen, which was trying to bring about the termination of hostilities, and the Committee of Eighteen, which was concerned with the application of sanctions. In January 1936 the Committee of Thirteen, in answer to an appeal from the Ethiopian Government to appoint a commission to investigate allegations of breaches of the laws of war, stated that, since the Swedish Government had made a report to the International Red Cross, it was unnecessary for the League to appoint a Commission. It also considered a request made by the Ethiopian Government for financial assistance, but found itself unable to approve the request.

On 3rd March 1936, both the Committee of Eighteen and the Committee of Thirteen met. The latter body made an urgent appeal to the belligerents to open negotiations within the framework of the League. At the Committee of Eighteen, the British delegate said that his Government was in favour of the imposition of an oil embargo on Italy, and that it would be willing to join in the application of this sanction.

Both parties having agreed in principle to the opening of negotiations, a meeting of the Committee of Thirteen was summoned for the purpose, and the Italian Government was asked to send a representative to Geneva by 12th April. By this date the Ethiopian delegate was in Geneva, but the Italian delegate did not arrive until 15th April, and proposed that the negotiations should be conducted directly between the two belligerents. The Ethiopian delegate refused to accept this, on the plea that such negotiations would not be carried out within the framework of the League. The effort to secure peace, initiated on 3rd March, therefore failed.

Allegations continued to be received from both parties that the opposing

forces were using illegal methods of warfare. On 9th April the Committee of Thirteen appealed to both parties to refrain from such offences, but both Governments replied that they had adhered to the rules of war, while their opponents had not. The documents received by the League on the subject were referred to a Committee of Jurists for investigation.

At a meeting of the Council on 20th April, the Italian delegate stated his case. He blamed Ethiopia for the break-down of negotiations and queried the competence of the Committee of Thirteen to deal with the question of the breaches of the laws of war. The Council reviewed with approval the work of the Committee of Thirteen and addressed to the Italian Government a supreme appeal to bring to the settlement of her dispute with Ethiopia that spirit which the League was entitled to expect from one of its original members and a permanent member of the Council. It also recalled that both parties were bound by the Protocol of 17th June 1925 limiting the use of asphyxiating, poisonous and other gases. The Italian delegate voted against the draft resolution, which was adopted by the other members of the Council.

In spite of all these appeals, the Italian forces continued their advance and on 5th May 1936, the Emperor having fled from Addis Ababa, the capital was occupied by the Italians. On 9th May Italy formally annexed Abyssinia.

On 10th May, from Jerusalem, the Emperor sent an appeal to the League asking it to pursue its efforts to ensure the respect of the Covenant, and not to recognise any territorial extensions or the exercise of an alleged sovereignty resulting from the illegal recourse to armed force or in violation of international obligations.

On 11th May the Council met to discuss the situation. Because the Ethiopian delegate was in the room, the Italian representative refused to take his place at the Council table and was recalled to Rome on the following day. In his absence, the Council decided to adjourn the discussion until 15th June, though some delegates queried the continuance of sanctions against Italy.

Such were the measures taken by the League to bring an end to the war by negotiation. It had also adopted *the application of sanctions* under Article 16. In October 1935 the Committee of Eighteen had recommended that any embargo on arms to Ethiopia should be lifted; that Governments should at once impose an embargo on the export, re-export or transit of arms, ammunition and implements of war to Italy and the Italian colonies; that financial pressure should be brought to bear on Italy; that there should be a prohibition on the import of Italian goods and an embargo on the export of certain goods to Italy. At the time that the League was considering these measures, the President of the United States issued a proclamation placing an embargo on the export of arms, ammunition and implements of war to both belligerents. In November the Committee decided that the embargo on exports to Italy should include petroleum, iron, steel, coal and coke, and appointed a committee of experts to examine the conditions of trade in these items. This committee reported on 12th February that the embargo would take about three and

a half months to become effective, and that, if it were placed only on exports from States members of the League, it would merely mean that the purchase of petroleum by Italy would be more difficult and expensive.

The war having come to an end by May 1936, when the Assembly met in June⁽¹⁾ it received from the Italian Government a statement that in view of the backwardness of the Ethiopian people, Italy had stepped in to safeguard their fundamental rights and that Italy regarded her mission in Ethiopia as a "sacred mission of civilisation."

The Ethiopian delegate presented a resolution to the Assembly asking, first that the League should not recognise any annexation obtained by force and, secondly, that the Governments members of the League should provide a guaranteed loan of £10,000,000 to the exiled Ethiopian Government. The Assembly approved by forty-four votes to one against and four abstentions, a motion that action should be taken to wind up sanctions, but the request of the Ethiopian Government for a loan had only one vote in favour, twenty-three against and twenty-five abstentions. This resolution of 4th July 1936, winding up sanctions, had recognised the fact that the League was unable, in the matter of Ethiopia, to assure the full application of the provisions of the Covenant; in other words, it recognised that the League had failed in this matter.

On 16th April 1938⁽¹⁾ the British Government concluded an agreement with Italy whereby it recognised the *de facto* Italian Government in Abyssinia. This action was welcomed not only in Europe, but also in the United States, and France was reported to be negotiating a similar agreement. The British Government brought to the notice of the Council the anomalous situation arising from the fact that many States members of the League, including five States represented on the Council, had recognised that the Italian Government exercised sovereignty over Ethiopia, or had taken action implying such recognition, whereas other States had not done so. The British Government considered that the matter should be clarified. The Ethiopian delegate reported to the Council that the situation in Ethiopia was such that, over three-quarters of the country, Italian authorities exercised no military control beyond a radius of ten to thirty miles around the larger towns, and that the Ethiopian civil and military administration was maintained in a large part of the country. The attitude of the British Government, as expressed by its Foreign Secretary, was that the recognition of a *de facto* situation could not be held up indefinitely by adherence to international principles of morality. Ethiopia protested that this was a violation of the rule laid down by the Assembly in March 1932, and confirmed on 4th July 1936 for non-recognition of situations brought about contrary to the Covenant and the Pact of Paris, and asked that the matter should be brought before the Assembly. The Council, however, decided, in view of the admission in the Assembly's resolution of 4th July 1936 that the League had failed in this matter, that the question of the recognition of Italy's position in Ethiopia was one which every member of the League must be held entitled to decide for itself in the light of its own situation and obligations.

(1) *League Year by Year*, 1938, p. 59 et seq.

K. THE JAPANESE OCCUPATION OF MANCHURIA AND THE SINO-JAPANESE WAR

In 1922 a Conference met at Washington to frame a treaty governing the relations between China and the other Powers having trade and other relations with her, since the 1914-18 war had resulted in a rearrangement of the position of the Powers in the Far East.

This Conference drew up the Nine Power Treaty, signed and ratified by Belgium, the United States, the British Empire, China, France, Italy, Japan, the Netherlands and Portugal. Under this Treaty the Powers agreed "to respect the sovereignty, the independence and the territorial and administrative integrity of China" and "to provide the fullest and most unembarrassed opportunity to China to develop and maintain for herself an effective and stable government."⁽¹⁾ The Contracting Powers also agreed that "whenever a situation arises which in the opinion of any one of them involves the application of the stipulations of the present treaty, and renders desirable discussion of such application, there shall be full and frank communication between the Contracting Powers concerned."

In September 1931⁽²⁾ the Chinese Government appealed to the Council, under Article 11 of the Covenant, on the grounds that Japanese troops had been operating outside the railway zone of Southern Manchuria. However, due to the good offices of the Council, the Japanese Government agreed to withdraw its troops to the railway zone. On 10th December 1931 the Council recorded the undertakings of the Chinese and Japanese Governments to make the necessary arrangements for the withdrawal of Japanese troops to within the railway zone, to be effected as soon as possible, and it unanimously decided to send to the spot a Commission of Investigation of five members. This Commission was to report to the Council on any circumstance likely to disturb the peace or good understanding between China and Japan. During these discussions of the Council a representative of the United States had been present as an observer.

During the closing days of December 1931 the Japanese Government stated that the security of its forces was threatened by the activities of bandits in Manchuria, and that the Japanese troops had, therefore, begun a general movement with a view to quelling the bandits, especially in the region of Chinchow.

The Commission of Inquiry, presided over by Lord Lytton (Great Britain) with representatives from Italy, France, Germany and the United States, proceeded to China and, as a result of its activities, as well as those of the Council and Special Assembly, which met in March 1932,⁽³⁾ hostilities in the Shanghai area were brought to an end by an armistice initiated in Shanghai on 14th March, and Japanese troops were withdrawn by the end of May. On 11th March 1932 the Assembly passed a resolution declaring that it was impossible for any State member of the League to recognise a

(1) *League of Nations Treaty Series*, Vol. 38, p. 278.

(2) *Monthly Summary*, Vol. XI, p. 324.

(3) *Monthly Summary*, Vol. XII, p. 344.

situation brought about by means contrary to the Covenant of the League and to the Pact of Paris.

This resolution of the Assembly followed the lines already laid down by Mr. Stimson, the U.S. Secretary of State, in his note dated 7th January 1932 in which he stated:⁽¹⁾

“ In view of the present situation and of its own rights and obligations therein, the American Government deems it to be its duty to notify both the Governments of the Chinese Republic and the Imperial Japanese Government that it cannot admit the legality of any situation *de facto* nor does it intend to recognise any Treaty or agreement entered into between these Governments or agents thereof, which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence or the territorial and administrative integrity of the Republic of China, commonly known as the Open Door Policy, and that it does not intend to recognise any situation, treaty or agreement which may be brought about by means contrary to the Covenants and obligations of the Pact of Paris of August 27th 1928.”

In October 1932 the conclusions of the Lytton Commission were published. The report recommended, among measures for the termination of hostilities, the establishment in Manchuria of a large measure of autonomy compatible with the sovereignty and administrative integrity of China.

The Lytton Report was considered by an Extraordinary Assembly which met from 6th to 9th December 1932.⁽²⁾ The Chinese delegate appealed to the Assembly on the following lines:—

(1) that the Assembly, working on the findings of the Lytton Commission, should declare that Japan had violated the Covenant of the League, the Pact of Paris and the Nine Power Treaty of Washington;

(2) that the Assembly should call upon Japan to put into execution forthwith the Council resolution of 10th December 1931 so that all Japanese troops should be withdrawn to the so-called Railway zone and the so-called Manchukuo Government be dissolved;

(3) that the Assembly, pending the dissolution of the so-called Manchukuo Government and recalling its own resolution of 11th March wherein it pledged itself not to recognise situations brought about contrary to international obligations, should declare that it would not recognise the said “ Manchukuo Government ”;

(4) that the Assembly should produce as soon as possible a report for the final settlement of the dispute as laid down in Article 15 paragraph 4.

The Japanese representative replied that the independence of Manchuria was necessary to Japan and that the Assembly, in considering the matter, should be governed by the following principles:—

(1) that the terms should be such that they would be effectively put into operation and that they would accomplish and preserve peace in the Far East;

(1) *American Journal of International Law*, Vol. XXVI (1932), p. 342. See also article by Prof. McNair in *British Year Book of International Law*, 1933, p. 65.

(2) *Monthly Summary*, Vol. XII, p. 357.

- (2) that a solution must be found for the disordered condition of China;
- (3) that in case any plan for settlement was found by the League, that body must take upon itself the responsibility for its execution.

In the debate that followed various suggestions were made for a settlement of the dispute, for instance: that the two powers should submit the matter for conciliation, with the collaboration of the United States and Russia; that the Assembly should make attempts at conciliation; that a Committee of Nineteen should be appointed as a conciliatory body, with the collaboration of the United States and Russia, and that the League itself should draw up a constructive plan to settle the dispute. It was finally decided that the Committee of Nineteen should be appointed to study all relevant documents and submit, at the earliest possible moment, proposals with a view to settling the dispute.

Early in 1933, however, the Japanese troops crossed the Great Wall and occupied Shanhaikwan.⁽¹⁾ The Committee of Nineteen found it impossible to draft a resolution acceptable to both parties, so it drew up a report recommending that Japanese troops should be evacuated from outside the zone of the Southern Manchuria Railway and that a regime, compatible with the administrative integrity of China, should be established in Manchuria. This report was considered by a Special Assembly which met in February 1933, and was adopted by 42 votes in favour, one against and one abstention. The Japanese delegate then left the Assembly and on 27th March Japan declared its intention of withdrawing from the League. The Assembly directed the Committee of Nineteen, to which the United States sent a delegate, to consider the question of the exports of arms to the Far East and the application of the provisions of non-recognition of Manchukuo.

The affairs of the Far East remained somewhat in abeyance in the discussion of the League until August 1937⁽²⁾ when the Chinese Government notified the League of the attacks made by Japan, since 7th July 1937, in the Peiping-Teintsin area. The Chinese Government protested that Japan had violated the fundamental principles of the Covenant, the Pact of Paris and the Washington Treaty. It appealed to the League under Articles 10, 11 and 17, Japan being no longer a member of the League.

On 28th September the ordinary session of the Assembly condemned the action of Japan and appointed a Committee of Eleven to watch the situation. In October this Committee presented a report in which it found that the Japanese action was in contravention of her obligations under the Washington Treaty and the Pact of Paris, and it recommended that the signatories of the Washington Treaty should initiate consultations between the contracting parties concerned. The Assembly approved these recommendations, expressed its moral support of China and appealed to its members to refrain from any action which might have the effect of weakening China's resistance. The United States Secretary of State also declared that the Japanese action was contrary to the Washington Treaty and the Pact of Paris. A meeting of the signatories of the Washington

(1) *League Year by Year*, 1933, p. 161.

(2) *League Year by Year* 1937 p. 70 et seq.

Treaty was held in Brussels in November, but reached no satisfactory conclusions for the settlement of the dispute.

The Council, at its meeting at the end of January 1938,⁽¹⁾ reminded members of the Assembly resolution instructing members to refrain from any action which might weaken China's position and asked them to consider how far they individually might extend aid to China. The Council also expressed its confidence that the interested Powers would do their best to consider any steps which might lead to a just settlement of the conflict in the Far East. After the Chinese delegate had protested that this resolution was inadequate, it was adopted with two abstentions.

At the meeting of the Council held in May 1938, the Chinese representative reported on breaches of the laws of war, such as use of poison gas by the Japanese, and appealed, under Article 17 of the Covenant, for material aid and effective co-operation from other members of the League. He asked that the resolutions of the Assembly and the Council should be implemented by concrete measures. The Council, however, adopted a resolution merely calling on members to assist the Chinese Government and condemned the use of poison gas.

In September 1938, before a meeting of the Assembly, the Chinese delegate again stated that the resolutions remained "unexecuted and inoperative" and asked for action under Article 17. He asked for the application of an embargo on the supply of arms and certain raw materials to Japan, and the adoption of measures of financial and material assistance to China. The Council, meeting also in September, following repeated appeals from the Chinese delegate, decided to send a telegram to the Japanese Government appealing to it, in accordance with Article 17, to accept the provisions binding on members of the League for the final settlement of their disputes. The Japanese Government replied that it did not consider this to be a method of obtaining a just and adequate solution of the conflict, and was therefore unable to accept the invitation. The Council produced a report on 30th September 1938, in which it found that the provisions of Article 16 would apply to Japan. However, it made no attempt to implement them, since all the European nations at this time were too preoccupied with events nearer home; it declared that China had a right to the sympathy and aid of other members of the League and the resolution continued:—

"the grave international tension that had developed in another part of the world could not make them forget the sufferings of the Chinese people, their duty of doing nothing that might weaken China's power of resistance, or their undertaking to consider how far they could individually extend aid to China."

The Chinese representative accepted this resolution, but reserved the right to appeal to the League again for co-operation.

During the following year, 1939, the deterioration of the international situation rendered it impossible for the League or its members to give any further material or moral assistance to China.

(1) *League Year by Year*, 1938, p. 73 et seq.

L. DEVELOPMENTS IN THE INTERNATIONAL SITUATION IN EUROPE 1937-39

The Spanish War, being a civil war, was not a violation of any international undertakings, until, as a result of the intervention of the Italian and German forces on one side and Russian forces on the other, it took on the nature of an international war. To prevent the conflict spreading beyond the confines of Spain, the London Non-Intervention Committee, supported by the Council and Assembly of the League, worked to ensure that the fight was a purely civil one. From the point of view of international law, however, the Nyon Agreement of 14th September 1937,⁽¹⁾ which declared that attacks by submarines against merchant ships not belonging to either of the conflicting Spanish parties, should be treated as acts of piracy, is of interest.

Following the murder of King Alexander of Yugoslavia and M. Barthou of France, in Marseilles in October 1934, and the consequent failure of the French Government to secure from Italy the extradition of the assassins on the grounds that the crime committed had been of a political character and therefore not extraditable, a Committee of Experts was appointed by the Council in May 1935⁽²⁾ to prepare a draft convention for the Repression of Terrorist Outrages. This resulted in the International Conference on the Repression of Terrorism which met in Geneva in November 1937, and drew up the Convention on the subject which was signed by 24 States, of which the Soviet Union was the only Major Power. Attached to the Convention for the Repression of Terrorism⁽³⁾ was a Convention for the Creation of an International Court, to try persons accused of terrorist activities, whom the States concerned prefer not to try in their own courts.⁽⁴⁾

After Hitler came to power in Germany, the Nazis had been pursuing the policy of infiltration into Austria through the growth of the Nazi party there. Matters came to a head in January 1938, when the Schuschnigg Government unearthed details of a Nazi plot to overthrow the existing Government and to replace it by a Chancellor of Nazi complexion, such as Seyss-Inquart.⁽⁵⁾ On 5th February 1938 Schuschnigg was invited to see Hitler at Berchtesgaden, where he was presented with a demand that he should grant an amnesty to all political prisoners, make legal the holding of Nazi meetings and appoint Seyss-Inquart to the key Ministry of Public Order and Security. Threatened with the invasion of Austria, Schuschnigg was compelled to accept these terms, in return for which Hitler promised to respect the continued independence of Austria.

As a result of the political amnesty and the legalising of Nazi party meetings, the situation in Austria became more and more disorderly, with the Nazis in practical control of certain towns, such as Graz. On 9th March 1938 Schuschnigg, in an attempt to regain control of the situa-

(1) *League from Year to Year*, 1937.

(2) *Monthly Summary*, Vol. XV, p. 107.

(3) League of Nations publication *Proceedings of the International Conference on the Repression of Terrorism*, C.94.M.47. 1938V.

(4) For further details of this Convention see Chapter XIV, Section A. (ii) (6) p. 440.

(5) Toynbee's *Survey*, 1938, Vol. I, p. 185 et. seq.

tion, announced that a plebiscite would be held on 13th March, but on 10th March he was forced by Seyss-Inquart to resign, following the presentation of three ultimatums by Germany. On 11th March Schuschnigg announced over the wireless that he was resigning, following receipt of an ultimatum from Germany and that, to prevent bloodshed, Austrian troops had been ordered not to resist. That night German troops, already massed on the frontier, started to move and on 12th March Seyss-Inquart was appointed Chancellor, the Germans occupied Austria and Hitler arrived in the country. By 13th March the Anschluss was complete. Hitler had planned his aggression so skillfully that he achieved his coup without the active intervention of any of the other Powers.

Similarly, in the early Autumn of 1938 the Germans began to stir up their Nazi agents in the Sudetenland of Czechoslovakia.⁽¹⁾ In August a British representative, Lord Runciman, was sent to Czechoslovakia to act as arbiter between the Czech Government and the Sudeten Germans under Henlein. On 2nd September Henlein went to Berchtesgaden to confer with Hitler, and, on his return, presented a further plan to the Czech Government for the settlement of the situation. The position deteriorated, with the Sudeten party breaking off negotiations on 7th September and resuming them again two days later. Then, on 13th September, the Sudeten party presented an ultimatum to the Government, which was refused, and, on 15th September, Henlein demanded the cession of Sudetenland to Germany. The British Prime Minister flew to Berchtesgaden on 15th September, returning to London the next day. The French Prime Minister Daladier and Foreign Minister Bonnet visited Downing Street on 18th September, while the Czech Prime Minister broadcast the refusal of his Government to hold a plebiscite. On 19th September the Czech Government was presented with the Franco-British plan, which it accepted with reservations; on 22nd September Mr. Chamberlain flew to Godesburg to see Hitler, while the Czech Government resigned. That same day, in Geneva, M. Litvinov announced the readiness of the U.S.S.R. to support Czechoslovakia if France would do so, and general mobilisation was ordered in Czechoslovakia. On 24th September Chamberlain returned to London and the Godesburg terms were sent to Prague. The French Prime Minister and Foreign Minister again visited London, and the Czech Government rejected the Godesburg terms. On 26th September, when President Roosevelt appealed to Hitler and Dr. Benes to come to terms, Hitler, in a speech, threatened to use force unless Sudetenland was ceded to Germany. The following day he announced that German troops were prepared to enter Czechoslovakia. On 28th September Chamberlain, Mussolini and Daladier attended a conference at Munich, at which they signed the Four Power Pact, but, on 1st October, the German troops entered the Sudetenland and Henlein was appointed the Commissioner of that area. On 5th October President Benes resigned and on 30th October Henlein was appointed Gauleiter of the Sudetenland, which was thus incorporated into the Reich. The rape of Czechoslovakia had thus begun and Hitler carried his action to its next stage by marching into Prague in March 1939 and annexing the whole of Bohemia and Moravia.

(1) Toynbee's *Survey*, 1938, Vol. II.

Although these actions were in violation of Germany's treaty agreements, particularly of the Pact of Paris renouncing war as an instrument of national policy, owing to the military weakness of the other Powers, Germany was able to annex Czechoslovakia without shedding the blood of her own forces.

M. PAN-AMERICAN CONFERENCES, CONVENTIONS AND TREATIES 1923-38

By 1920 there were already in existence in the Americas two bodies whose duty it was to safeguard relations between the American Republics. The first of these was the Pan-American Union, which consisted of the diplomatic agents of these States accredited to Washington, under the chairmanship of the U.S. Secretary of State. The second was the system of inter-American conferences held every five years. It was at these latter meetings that much work was done to safeguard peace in the Americas during the years between the two World Wars.⁽¹⁾

(i) THE FIFTH PAN-AMERICAN CONFERENCE AT SANTIAGO IN 1923

At the Fifth Pan-American Conference which met at Santiago from March to May 1923⁽²⁾ the American States drew up and signed a Treaty to Avoid Conflicts Between the American States, which came to be known as the Gondra Treaty. By this Treaty, States agreed to submit to arbitration all disputes which could not be settled by diplomatic methods. Two permanent commissions of inquiry were to be established at Washington and Montevideo, to consist of the three diplomatic agents longest accredited to those capitals. The functions of these commissions were limited to receiving from the interested parties the request for a convocation of a commission of inquiry, and notifying the other party thereof. The *ad hoc* commissions of inquiry were to consist of two members appointed by each Government, but only one of each to be a national of that State and a fifth, to be of yet another nationality, to be chosen by common accord. The fifth member was to act as president of the commission. The commission must report within a year, and the States concerned undertook not to commence hostilities until six months after the commission had reported. If, after these delays, the parties were still unable to settle their differences, each of them was to recover its freedom of action. The disadvantage of this machinery was that one of the contestants could, if it so desired, postpone the establishment of a commission of inquiry by refusing to name its commissioners. The Treaty was signed by the eighteen States present at the Conference, with the subsequent adherence of Costa Rica, Mexico, Peru and Salvador, but it was never ratified by Bolivia or the Argentine.

The Costa Rican delegation had put forward a proposal for the creation

(1) *The Inter-American System. A Canadian View* by John Humphrey. Published by MacMillan for the Canadian Institute of International Affairs.

(2) *The International Conference of American States, 1889-1928*, edited by James Brown Scott, p. 285 et seq. Humphrey op cit. p. 89.

of a Permanent Court of American Justice, but this matter was shelved by being referred to a Committee of Jurists which was to meet in Rio de Janeiro in 1925.⁽¹⁾ Uruguay also produced a proposal for the establishment of an American League of Nations, but the matter was not favoured by the United States and was shelved.⁽²⁾

(ii) THE SIXTH CONFERENCE AT HABANA IN 1928

The Sixth Pan-American Conference which met at Habana, Cuba, in January and February 1928 passed two important resolutions concerning the maintenance of peace. In connection with the crime of aggression the Conference declared:⁽³⁾

“ That there is no international controversy, however serious it may be, which cannot be peacefully arranged if the parties desire in reality to arrive at a pacific settlement;

“ That war of aggression constitutes an international crime against the human species;

“ (The Assembly therefore) resolves:

(1) “ That aggression is considered illicit and as such is declared prohibited.

(2) “ The American States will employ all pacific means to settle conflicts which may arise between them.”

The second resolution,⁽⁴⁾ after stating that the American Republics “ condemn war as an instrument of national policy in their mutual relations,” continued with a declaration that they would adopt obligatory arbitration as the means of securing pacific settlement of international differences, and agreed that a Conference should meet at Washington within a year to draw up a convention to this effect.

(iii) THE WASHINGTON CONFERENCE ON CONCILIATION AND ARBITRATION, 1928

The Inter-American Conference on Conciliation and Arbitration consequently met in Washington from 10th December 1928 to 5th January 1929. This drew up three instruments for the pacific settlement of disputes,⁽⁵⁾ first, a Convention of Conciliation, by which the commissions of inquiry set up by the Gondra Treaty were to be commissions of conciliation as well; this was signed by all the American Republics except the Argentine, and subsequently ratified by eighteen of them. The second was the General Treaty of Inter-American Arbitration, which bound the contracting parties to submit to arbitration any dispute which could be decided by the application of legal principles. The Treaty, however, set up no permanent arbitration body, since in each case the arbiter or tribunal was to be decided by the disputants, and no sanctions were to be applied. It was, in effect, nothing more than an agreement to agree to arbitrate. The third instrument was a Protocol of Progressive Arbitration, which did not receive many ratifications.

(1) Brown Scott, *op. cit.* p. 283.

(2) Humphrey, *op. cit.* p. 86.

(3) Brown Scott, *op. cit.* p. 441.

(4) Brown Scott, *op. cit.* p. 437.

(5) Humphrey, *op. cit.* pp. 105-111, Brown Scott, *op. cit.* pp. 455-462.

It was while the Conference was sitting that the Chaco War⁽¹⁾ broke out. The Conference offered its good offices for the purpose of promoting conciliatory machinery, and appointed a special committee to follow developments. As a result of the action of this committee, the two Governments signed a protocol creating a conciliation commission, but it was not set up under the new Washington machinery, or even under the Gondra Treaty, since that had never been ratified by Bolivia, one of the parties to the dispute.

(iv) THE ARGENTINE ANTI-WAR TREATY (SAAVEDRA LAMAS TREATY), 1933

The Argentine had not been represented at the Washington Conference, and in 1933 initiated a Peace Pact of its own. This was the Anti-War Treaty of Non-Aggression and Conciliation, which was known as the Saavedra Lamas Treaty, after the Argentine Foreign Minister who initiated it. It was signed at Rio on 10th October by Argentine, Brazil, Chile, Mexico, Paraguay and Uruguay and was open to the adherence of all States.⁽²⁾

Under Article I of this Treaty the contracting Parties solemnly declared that

“ they condemn wars of aggression in their mutual relations or in those with other States, and that the settlement of disputes or controversies of any kind that may arise among them shall be effected only by the pacific means which have the sanction of international law.”

Under Article II they declare that they “ will not recognise any territorial arrangement which is not obtained by pacific means, nor the validity of the occupation or acquisition of territories that may be brought about by force of arms.” The contracting Parties therefore obliged themselves to resort to conciliation or other peaceful means of settling disputes. This Treaty thus combined the provisions of the Pact of Paris with the doctrine of non-recognition enunciated by the U.S. Secretary of State on 7th January 1932 and the League resolution of 11th March 1932.⁽³⁾ Paraguay signed the Pact although she was engaged in hostilities with Bolivia over the Chaco at the time. This Pact was subsequently signed by all the Latin-American States and ratified by the United States. Italy and Spain also acceded to it.⁽⁴⁾

(v) THE SEVENTH CONFERENCE AT MONTEVIDEO IN 1933

In December 1933, when the Seventh Pan-American Conference met at Montevideo, the Chaco war was being waged. The League Commission sent to negotiate on the spot⁽⁵⁾ had just arrived in Montevideo, and the Conference offered it all its support.

The Executive Committee of the American Institute of International Law had suggested the creation of a body to be known as the International American Commission of Conciliation. Its intention was to replace the two permanent commissions under the Gondra Treaty. This proposal was

(1) See Section H, p. 62 for details of the Chaco War.
(2) Brown Scott, *op. cit. First Supplement*, pp. 496-499.
(3) See Section K pp. 71 & 72 Sino-Japanese War.
(4) *Monthly Summary*, Vol. XIV, p. 159.
(5) See Section H, p. 64, the Chaco War.

not, however, accepted by the Conference, but an Additional Protocol to the General Convention of Inter-American Conciliation was adopted under which the signatories undertook to constitute permanent commissions of investigation and conciliation to take the place of the *ad hoc* commissions under the Gondra Treaty.⁽¹⁾ The Mexican delegation to the Conference proposed the adoption of a Peace Code, which would assimilate the various instruments for the pacific settlement of international disputes; this contained *inter alia* provision for the establishment of an American Court of International Justice.⁽²⁾ This suggestion was shelved by the Conference, but instead the delegates declared their intention to try and interest their respective Governments in signing instruments such as the Gondra Treaty, the Pact of Paris, the two Washington Treaties of 1929 and the Argentine Anti-War Treaty, if they had not already done so.

(vi) THE BUENOS AIRES PEACE CONFERENCE, 1936

The end of the Chaco war, which was finally brought about in June 1935 by the combined mediation of the five neighbouring States and the United States, provided a reason for holding a special Inter-American Peace Conference at Buenos Aires in December 1936.⁽³⁾

A number of perennial suggestions were submitted to this Conference and shelved, for instance: the suggestion for the establishment of an Inter-American Court of International Justice, the proposal for the creation of an Inter-American League of Nations, and the Mexican recommendation for a Peace Code. With regard to the humanisation of war, the Conference passed a resolution to the effect that:⁽⁴⁾

(1) it declared the formal repudiation of war as a means of settling differences between States;

(2) it proscribed the use of chemical elements of warfare;

(3) it excluded civilian populations as far as possible from the effects of international conflagrations;

(4) it recommended to Governments that in the pacts they conclude for the limitation of armaments they should exclude by statute such methods of war as use of poison gas, poisoning of water, etc.

The Conference drew up a Convention for the Maintenance, Preservation and Re-establishment of Peace⁽⁵⁾ in which, having noted that almost all civilised States had ratified the Pact of Paris and that twenty-one States had approved the Saavedra Lamas Pact, the High Contracting Parties agreed that, in the event of the peace of the American Republics being menaced, the Governments of the other American Republics should consult together. In the event of war between two American States, the others should take joint action to bring about a peaceful settlement; this would also apply in the event of a threat from a non-American State.

(1) Brown Scott, *First Supplement*, p. 120.

(2) Brown Scott, *First Supplement*, pp. 50-65.

(3) Humphrey, *op. cit.* p. 131 et seq and Brown Scott, *First Supplement*, p. 143 et seq.

(4) Brown Scott, *First Supplement*, pp. 164-65.

(5) Brown Scott, *First Supplement*, pp. 188-190.

The Conference also drew up a Treaty of Good Offices and Mediation, whereby it was agreed that when there is a controversy between States which cannot be settled by diplomatic means, the contracting Parties might choose to have recourse to the good offices and mediation of an eminent citizen of one or other of the American countries. To this end, each Government agreed to nominate two such of their nationals, and communicate their names to the Pan-American Union.

(vii) THE EIGHTH CONFERENCE AT LIMA IN 1938

The Eighth Pan-American Conference which met in Lima in December 1938⁽¹⁾ was much concerned with the question of assembling and codifying the various agreements for the peaceful settlement of disputes which had been signed, and the proposals which had not yet been officially adopted, such as for an Association of American Nations, a Peace Code, and the United States proposal for the Consolidation of American Peace Agreements. The Conference referred these matters to a committee of experts, and attempted to define an aggressor and to decide on a system of sanctions in the event of aggression, but no satisfactory conclusion was reached and the matter was shelved. The plan for the creation of an Inter-American Court of International Justice was also shelved. In a resolution in defence of human rights⁽²⁾ the Conference declared that the American Republics did not recognise war as a legitimate means of settling national or international controversies; the hope was also expressed that if war were waged in any part of the world "respect would be given to those human rights not necessarily involved in the conflict, to humanitarian sentiments and to the spiritual and material inheritance of civilisation." Again, in a Declaration of American principles,⁽³⁾ the use of force as an instrument of national or international policy was proscribed and it was declared that relations between States should be governed by the precepts of international law.

The most important resolution of the whole Conference was the Declaration of the Principles of the Solidarity of America⁽⁴⁾, which became known as the Declaration of Lima. Under item four of this Declaration, it was decided that

"in order to facilitate the consultations established in this and other American peace instruments, the Ministers of Foreign Affairs of the American Republics, when deemed desirable and at the initiative of any one of them, will meet in their several capitals by rotation and without protocolary character . . ."

The first meeting of the Ministers of Foreign Affairs of the American Republics for consultation under the Agreements of Buenos Aires and Lima was held at Panama on 23rd September 1939, on the outbreak of the European War. It was the Foreign Minister of Panama, one of the smallest of the American Republics, who summoned the Conference.

Thus, during the years between the two World Wars, the Republics of the Americas were building up a system of international law outlawing war and setting up machinery for the peaceful settlement of disputes

(1) Brown Scott, *First Supplement*, p. 243 et seq and Humphrey, p. 152.

(2) Brown Scott, *First Supplement*, p. 245.

(3) *Op. cit.* p. 309.

(4) *Op. cit.* p. 308.

between them, or of action in the event of war or threat of war, which should ensure peace in that hemisphere.

N. INTERNATIONAL CONVENTIONS ESTABLISHING RULES OF WARFARE

(i) GENEVA PROTOCOL FOR THE PROHIBITION OF THE USE OF POISONOUS AND OTHER GASES AND OF BACTERIOLOGICAL METHODS OF WARFARE

On 17th June 1925 thirty-nine nations, at Geneva, signed a Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous and other Gases and of Bacteriological Methods of Warfare.⁽¹⁾ Under the terms of this Protocol the High Contracting Parties declared that, whereas the use in war of asphyxiating, poisonous and other gases and all analogous liquids, materials and devices, had been justly condemned by the general opinion of the civilised world, they agreed that, so far as they were not already parties to Treaties prohibiting such use, they accepted this prohibition and agreed "to extend this prohibition to the use of bacteriological methods of warfare." Twenty-five nations, including Great Britain and each of the Dominions, France, Germany, Italy, China and the Soviet Union but not Japan, had given their adherence to this document by 6th May 1930.

(ii) INTERNATIONAL CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMIES IN THE FIELD

This Convention was signed at Geneva by the representatives of forty-seven states on 27th July 1929.⁽²⁾ Its provisions laid down that officers and soldiers of the armed forces who are wounded or sick should be treated with humanity, though those who fall into enemy hands should be regarded as prisoners of war. It also laid down that the personnel of medical and similar units must be respected and protected by the belligerents, so long as they do not violate the privileges to which their position entitles them. Persons of this nature, such as doctors, padres, etc., thus exempted from normal treatment as prisoners of war, should be sent back to the belligerent state to which they belong as soon as a route for their return should be open and military considerations permit. Such privileged persons should wear the distinctive sign of the Red Cross, the Red Crescent or the Red Lion and Sun, as appropriate, and Governments should make it their responsibility to ensure that these signs are not used as trade marks or for any other purpose than that laid down in the Convention. Provisions were also made for the safeguarding of these rights by members of the Protecting Power and the facilities which should be granted by belligerents to representatives of the Protecting Power. The Convention was to come into force six months after two ratifications had been received; it could be denounced subject to a year's notice, but such denunciation might not take effect during a war in which the denouncing power was involved.

Germany, Italy and Japan were among the nations signing this Convention, but by 23rd June 1931, when the United Kingdom signed on behalf

(1) H.M.S.O. Treaty Series, No. 24 (1930), Cmd. 3604.

(2) H.M.S.O. Treaty Series, No. 36 (1931), Cmd. 3940.

of the Dominions, Italy was the only one of these three countries which had ratified it.

(iii) INTERNATIONAL CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR

This Convention⁽¹⁾ was signed at Geneva, also by forty-seven governments, on the same day as the International Convention concerning the Condition of Sick and Wounded in the Field. The intention of this Convention was to ameliorate the "inevitable rigours" which must be suffered by prisoners of war. Its provisions were to apply to the persons referred to in the Hague Convention of 18th October 1907 concerning the Laws and Customs of War on Land, who are captured by the enemy, namely, members of the armed forces, militia or volunteer corps, on condition that they are commanded by a person responsible for his subordinates, that they wear a distinctive sign, that they carry arms openly and that they conduct their operations according to the laws and customs of war. Prisoners of war are declared to be in the power of the hostile government, not of the individuals or formations which capture them and measures of reprisal against them are forbidden. On capture every prisoner of war is required to declare his true name and rank or his regimental number, but no pressure may be exerted on prisoners to obtain information regarding the situation in their armed forces or their country. Prisoners should be evacuated from the fighting area as soon as possible, and belligerents should notify one another of details of their captures as soon as possible. Prisoners of war should be lodged in buildings or huts which afford all possible safeguards concerning hygiene and salubrity. Premises must be entirely free from damp and adequately heated and lighted. Food should be equivalent to that of the depot troops of the detaining authority and all collective disciplinary measures affecting food are prohibited. Provisions were also made for:—hygiene in camps; satisfying the intellectual and moral needs of prisoners; internal discipline in camps; pecuniary resources of prisoners and their transfer from one camp to another. With regard to their relations with the exterior, prisoners must be enabled to correspond with their families, within the limit of the number of letters and postcards per month allowed them by the detaining authority. Prisoners should be enabled to bring complaints to the attention of the military authorities and should have the right to communicate with the Protecting Power. They should have a representative, usually the senior officer of the camp, who could put forward their complaints. With regard to punishment, imprisonment is the most severe disciplinary punishment which could be inflicted on a prisoner and the duration of this must not exceed thirty days. With regard to judicial action, the prisoner should be allowed full rights of defence. Provisions were also made for:—the repatriation through a neutral country of prisoners, and their liberation and repatriation at the end of hostilities; action in the event of the death of a prisoner and the establishment of Bureaux of Relief and Information. Civilians attached to the armed forces, such as war correspondents and contractors, were to be treated as prisoners of war if they fell into enemy hands. As with the other Convention, this one

(1) H.M.S.O. Treaty Series, No. 37 (1931), Cmd. 3941.

was to come into force six months after two ratifications had been deposited. By 23rd June 1931, when Great Britain ratified it on behalf of herself, Australia, New Zealand, South Africa and India, the only other States which had adhered to it were Italy, Norway, Portugal, Spain, Sweden, Switzerland and Yugoslavia.

(iv) PROCES-VERBAL RELATING TO THE RULES OF SUBMARINE WARFARE SET FORTH IN PART IV OF THE TREATY OF LONDON OF 22ND APRIL 1930

Since the London Naval Treaty of 1930 for the Limitation and Reduction of Naval Armaments was not ratified by all its signatories and was due to expire on 31st December 1936, with the exception of Part IV thereof, which dealt with the action of submarines with regard to merchant ships, representatives of the Governments of the United States, Australia, Canada, France, Great Britain, India, Eire, Italy, Japan, New Zealand and South Africa came together in London on 9th November 1936, and agreed to the following rules, to which they invited other Governments to accede:⁽¹⁾

(1) "In their action with regard to merchant ships, submarines must conform to the rules of international law to which surface vessels are subject.

(2) "In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board."

O. THE ACTIVITIES OF UNOFFICIAL BODIES

(i) THE INTERNATIONAL LAW ASSOCIATION

This body held meetings annually, at some of which matters affecting the laws of war were discussed. For instance, at its Thirtieth Conference held at The Hague in 1921, it considered a proposal that there should be a codification of the laws of war, which was not implemented,⁽²⁾ and it also adopted certain Proposed International Regulations for the Treatment of Prisoners of War.⁽³⁾

At the Thirty-first Conference held at Buenos Aires, it was resolved that the creation of an International Criminal Court was essential in the interests of justice. Dr. H. L. Bellot consequently presented to the Thirty-third Conference, which met at Stockholm in 1924, a draft Statute for the Permanent International Criminal Court.⁽⁴⁾ The Conference after much discussion, however, referred the matter to a committee for further examination.

Encouraged by the reception which had been accorded to the "Proposed International Regulations for the Treatment of Prisoners of War" prepared in 1921, the Association had acted upon the request made to it after the Hague Conference by the Committee of the International Red

(1) H.M.S.O. Treaty Series, No. 29 (1936), Cmd. 5302.

(2) *LL.A. Report of the Thirtieth Conference, The Hague*, Vol. I, p. 173.

(3) *Op. cit.* p. 237.

(4) For more details of this International Court see Chapter XIV, Section A (ii) (2) p. 438.

Cross, to collaborate in framing regulations for the treatment of civilian prisoners of war. Accordingly, a Committee was set up to investigate the matter, and the Stockholm Conference adopted, with small amendments,⁽¹⁾ the "Draft Regulations for the Treatment of Civilian Prisoners of War" submitted to it by this Committee. The Committee had not attempted to deal with the question of deportation of interned and other civilian prisoners, but left this task to be dealt with at a later date. The Conference also discussed, without reaching any definite conclusions, certain suggested regulations for War in the Air.

The Thirty-fourth Conference of the Association, held at Vienna in 1926, was largely concerned with discussing new proposals submitted for the creation of an International Criminal Court. The crimes which were to be included in the jurisdiction of the Court were:⁽²⁾ "violations of any treaty, convention or declaration binding on the States . . . which regulate the methods and conduct of warfare" and "violations of the laws and customs of war generally accepted as binding by civilised nations".

The Thirty-sixth Conference, which was held in the United States in 1931, was largely concerned with neutral rights at sea. Two resolutions were discussed, which seemed logically to result from observance of the Pact of Paris, the one refusing belligerent rights to pact-breakers as against neutral trade, and the other condemning the supply by neutrals of any aid or comfort to a pact-breaker⁽³⁾. No conclusion was reached, however, because a minority managed to adjourn the discussion.

The subject of neutrality was again discussed at the Thirty-seventh Conference held at Oxford in 1933. Opinions expressed in the discussion showed that many members thought that the principle of neutrality should be abandoned, on the grounds that under the Covenant of the League, the Pact of Paris and other international instruments, the old-fashioned laws of neutrality were obsolete.⁽⁴⁾ It was decided that a study should be made of the subject, as affected by these conventions.

The result of this was the important discussion held by the Association at its Thirty-ninth Conference in Budapest in 1934. The Committee on Conciliation between Nations presented a report to the Conference on the effect of the Kellogg-Briand Pact on international law. The report suggested Articles of Interpretation, which were adopted with slight modifications by the Conference.

These Budapest Articles of Interpretation opened with a recognition that the Pact "is a multilateral law-making treaty whereby each of the High Contracting Parties makes binding agreements with each other and all the other High Contracting Parties"⁽⁵⁾ and recites the purpose of the Treaty. It recognised *inter alia* that a signatory State cannot by denunciation or non-observance of the Pact release itself from its obligations thereunder; that a signatory State by threatening a resort to armed force or aiding a violating State itself violates the Pact; that a non-belligerent

(1) *I.L.A. Report of 33rd Conference, Stockholm, 1924*, p. 229.

(2) *I.L.A. Report of 34th Conference, Vienna, 1926*, p. 118.

(3) *British Year Book of International Law, 1931*, p. 142.

(4) *British Year Book of International Law, 1933*, p. 158.

(5) *I.L.A. Report of 38th Conference, Budapest, 1934*, p. 67.

State may refuse to a violating State the rights of visit and search, blockade, etc., and decline to observe the old-fashioned duties of a neutral, but on the other hand may even with armed forces assist the State attacked, without itself violating the Pact. It also declared that signatory States are not entitled to recognise territorial or other advantages acquired by a violating State, as having been acquired *de jure*, but that such a State must indemnify all damage caused by it.

The Conference also passed additional resolutions recognising the right of all signatory States to insist on their interests being safeguarded in a subsequent treaty of peace, and reminding States of their duty to enact domestic legislation without delay to implement their treaty obligations.

The Conference held in Paris in September 1936 adopted a substantive declaration which aimed at invoking the speedy jurisdiction of the Permanent Court of International Justice in the case of any violation of the Pact of Paris, and the Conference which met in Amsterdam in 1937, considered the question of neutrality in the light of the Pact of Paris, but had such a full programme that it reached no satisfactory conclusion.

(ii) OTHER UNOFFICIAL BODIES

There were other bodies engaged in the study of questions of international law during the period between the wars, for instance, the Institute of International Law, the Hague Academy of International Law and the Grotius Society. These were not, however, much concerned with questions effecting crimes against peace or war crimes.

In October 1934, however, the Institute of International Law, at a meeting in Paris,⁽¹⁾ discussed the subject of reprisals. It was considered that reprisals, being the use of force falling short of war, had a particular importance in the light of the Pact of Paris and the conciliation procedure under the League. The Institute adopted a resolution defining the limits within which reprisals might still be effective; they must not involve the use of military, naval or air force but, being declared a matter of international concern, must be subject to international supervision.

The Hague Academy of International Law⁽²⁾ was an organisation to promote the study of international law, by experts of all nations, but it made no constructive contribution to the conception of war crimes or the laws of war.

(1) *British Year Book of International Law*, 1935, p. 181.

(2) See article by E. N. Van Kleffens in the *British Year Book of International Law*, 1925.

CHAPTER V

VARIOUS DEVELOPMENTS IN THE CONCEPT OF WAR CRIMES DURING THE SECOND WORLD WAR 1939-1943

A. DECLARATIONS OF STATESMEN AND GOVERNMENTS

From the very beginning of the War in 1939, it had been apparent that the Germans were waging a ruthless and savage war, and were ignoring the established rules of warfare. In their rule in the occupied countries also, the Germans pursued the same policy of brutality, violating international conventions concerning the rights of the victors towards the population of occupied territories, to which Germany had given her adherence.

(i) DECLARATIONS OF THE POLISH AND CZECH GOVERNMENTS

It was from the Polish and Czechoslovak Governments in exile that the denunciation of these crimes first came. In November 1940, in a joint statement ⁽¹⁾, they declared that the violence and cruelty to which their two countries had been subjected was unparalleled in human history. Among the brutalities instanced were—expulsion of population, banishment of hundreds and thousands of men and women to forced labour in Germany, mass executions and deportations to concentration camps, plundering of public and private property, extermination of the intellectual class and of cultural life, spoilation of treasures of science and art and the persecution of all religious beliefs.

A month later, in December 1940, the Polish Government, in a separate statement⁽²⁾, denounced the German policy of denationalisation in Poland as being contrary to international law, and, in particular, to the Hague Convention of 1907 on the rights and usages of land warfare, which had been adhered to by the German Reich. It also denounced the German regulation which demanded complete allegiance to the German administration from persons engaged in any form of public service, and relieved them of any loyalty or obligation to the Polish state. This was held to be contrary to the principles by which an occupying power is free to carry on only a *de facto* government, and may not compel the population of an occupied country to undertake activities directed against their own state.

(ii) ROOSEVELT-CHURCHILL STATEMENTS OF 25TH OCTOBER 1941

The first public action of the Great Powers in denouncing to the world the atrocities committed by the Germans in occupied territory, was taken on 25th October 1941, when simultaneous declarations were made by the President of the United States—then a neutral nation—and the Prime Minister of Great Britain.

(1) *The Times*, 12th November, 1940.

(2) *The Times*, 20th December, 1940.

The text of President Roosevelt's message ran as follows⁽¹⁾ :—

"The practice of executing scores of innocent hostages in reprisal for isolated attacks on Germans in countries temporarily under the Nazi heel revolts a world already inured to suffering and brutality. Civilized peoples long ago adopted the basic principle that no man should be punished for the deed of another. Unable to apprehend the persons involved in these attacks, the Nazi characteristically slaughter fifty or a hundred innocent persons. Those who would 'collaborate' with Hitler and try to appease him cannot ignore this ghastly warning.

"The Nazis might have learned from the last war the impossibility of breaking men's spirit by terrorism. Instead, they develop their *lebensraum* and *new order* by depths of frightfulness which even they have never approached before. These are the acts of desperate men who know in their hearts that they cannot win. Frightfulness can never bring peace to Europe. It only sows the seeds of hatred which will one day bring frightful retribution."

On the same day Mr. Winston Churchill issued a declaration from No. 10 Downing Street, which ran as follows⁽²⁾ :—

"His Majesty's Government associate themselves fully with the sentiments of horror and condemnation expressed by the President of the United States upon the Nazi butcheries in France. These cold-blooded executions of innocent people will only recoil upon the savages who order and execute them.

"The butcheries in France are an example of what Hitler's Nazis are doing in many other countries under their yoke. The atrocities in Poland, in Yugoslavia, in Norway, in Holland, in Belgium and above all behind the German fronts in Russia, surpass anything that has been known since the darkest and most bestial ages of mankind. They are but a foretaste of what Hitler would inflict upon the British and American peoples if only he could get the power.

"Retribution for these crimes must henceforward take its place among the major purposes of the war."

(iii) MOLOTOV NOTES ON WAR CRIMES

The atrocities committed behind the German lines in Russia, mentioned by Mr. Churchill as being among the crimes whose retribution would be one of the major purposes of the war, reached such brutality that on 7th November 1941 M. Molotov sent a note,⁽³⁾ on the atrocities committed against Red Army prisoners, to all nations having diplomatic relations with the U.S.S.R.

The note instanced, among other atrocities, that Red Army prisoners had been tortured and crushed by tanks; others had been burnt at the stake, others had been left to die of disease, or been exterminated by starvation, wounded in hospital had been bayoneted, while nurses and other women medical assistants had been raped. The note concluded with the words :—

"All these facts are an outrageous violation by the German Government of the elementary principles and regulations of international law and of the International Agreement signed by representatives of Germany itself.

(1) *Punishment for War Crimes—the Inter-Allied Declaration signed at St. James's Palace London on 13th January and relative documents.* Published by H.M. Stationery Office for the Inter-Allied Information Committee, page 15.

(2) *Loc. cit.*

(3) *The Molotov Notes on German Atrocities. Notes sent by V. M. Molotov, People's Commissar for Foreign Affairs, to all Governments with which the U.S.S.R. has diplomatic relations.* Issued on behalf of the Embassy of the U.S.S.R. in London. (H.M. Stationery Office).

"In bringing these horrible facts to the notice of all countries with which the Soviet Union has diplomatic relations, the Soviet Government indignantly protests before the whole world against the barbaric violation by the German Government of the elementary rules of international law.

"The Soviet Government indignantly protests against the brutal attitude of the German authorities towards Red Army prisoners, an attitude which violates the most elementary rules of human morality. It lays all the responsibility for these inhuman actions of the German military and civil authorities on the criminal Hitlerite Government."

Following the receipt of further information as to atrocities committed by members of the German Forces against the Soviet civilian population, Monsieur Molotov on 6th January 1942 circulated a further note⁽¹⁾ to all Governments having diplomatic relations with the Soviet Union.

In this note the Soviet Government told of the deliberate policy of the German Government against the civilians in the territories they had conquered; whole villages wiped out, robbery by German units, children robbed of food and clothing, public hangings, civilians forced to work on mine clearing and fortification building and shot after the task was completed, despoilation of cultural and religious monuments, children murdered by hundreds, women raped or used as a screen in front of advancing troops and other such horrors. The note repeated the protest made in the earlier note against the brutal attitude of the Germans, and declared that the Soviet Government held the Hitlerite Government responsible for these crimes committed by German troops.

(iv) THE INTER-ALLIED COMMISSION AND THE DECLARATION OF ST. JAMES'S OF 13TH JANUARY 1942

Statements such as these, however authoritative, have not the intrinsic value of law and after the 1914-18 war similar statements had been made and even an election won on the promise to "hang the Kaiser". To be effective, political statements must be transformed into a concrete scheme, officially supported by authority, suitable for practical realisation and provided with the necessary machinery. The first such steps were taken by the signature of the Declaration of St. James's⁽²⁾ on 13th January 1942, by the representatives of the Governments of Belgium, Czechoslovakia, France, Greece, Luxembourg, Norway, the Netherlands, Poland and Yugoslavia. The body which initiated the scheme was known first as the Inter-Allied Conference on the Punishment of War Crimes, but changed its name to the Inter-Allied Commission on the Punishment of War Crimes.

It had originally been arranged that the Chair of this Commission should be taken by each Power in rotation, with a different chairman for each meeting, but in June 1942, Monsieur Kaeckenbeek, Judicial Adviser to the Belgian Ministry of Foreign Affairs, was elected Chairman. The duties of the Secretariat were undertaken by Poland.

The Declaration ran as follows⁽³⁾ :—

(1) Loc. cit.

(2) *Punishment for War Crimes—the Inter-Allied Declaration signed at St. James's Palace, London, on 13th January, 1942.* (H.M. Stationery Office).

(3) Loc. cit.

“Whereas Germany, since the beginning of the present conflict which arose out of her policy of aggression, has instituted in the occupied countries a regime of terror characterised amongst other things by imprisonments, mass expulsions, the execution of hostages and massacres,

“And whereas these acts of violence are being similarly committed by the Allies and Associates of the Reich and, in certain countries, by the accomplices of the occupying Power,

“And whereas international solidarity is necessary in order to avoid the repression of these acts of violence simply by acts of vengeance on the part of the general public, and in order to satisfy the sense of justice of the civilised world,

“Recalling that international law, and in particular the Convention signed at The Hague in 1907 regarding the laws and customs of land warfare, do not permit belligerents in occupied countries to commit acts of violence against civilians, to disregard the laws in force, or to overthrow national institutions,

- (1) affirm that acts of violence thus inflicted upon the civilian populations have nothing in common with the conceptions of an act of war or a political crime as understood by civilised nations,
- (2) take note of the declarations made in this respect on 25th October 1941, by the President of the United States of America and by the British Prime Minister,
- (3) place among their principal war aims the punishment, through the channel of organised justice, of those guilty of or responsible for these crimes, whether they have ordered them, perpetrated them or participated in them,
- (4) resolve to see to it in a spirit of international solidarity that (a) those guilty or responsible, whatever their nationality, are sought out, handed over to justice and judged, (b) that the sentences pronounced are carried out.”

The Prime Ministers of Belgium, Czechoslovakia, Greece, the Netherlands, Poland and Yugoslavia signed on behalf of their Governments, General de Gaulle signed as President of the Free French Committee in Great Britain, Mr. Bech, Minister for Foreign Affairs, on behalf of Luxembourg and Mr. Trygve Lie, Minister for Foreign Affairs, on behalf of Norway. Mr. Anthony Eden, British Foreign Secretary, was present at the Conference, as were representatives of Australia, Canada, India, New Zealand, the Union of South Africa, the U.S.A., the U.S.S.R. and China.

An examination of the texts of the speeches⁽¹⁾ made at the time, reveals that many of the subsequent developments in the concept of the law of war crimes were already in the minds of the allied statesmen. Both Monsieur Pierlot, Prime Minister of Belgium, and Count Raczynski, Polish Foreign Minister, stressed the fact that the crimes committed by the Germans were offences against the common law, and should be treated with all the law's severity; Monsieur Pierlot further added that exemplary punishment to fit the greatness of the crime must be meted out. Monsieur Jan Sramek, Prime Minister of Czechoslovakia, pointed out that the crimes committed by the Germans could not be classified either as acts of war or as political crimes, and stated that these crimes were part of a pattern; they were part of a “criminal campaign well thought out and prepared in advance down to the smallest detail”.

(1) Loc. cit. pp. 6-14.

General de Gaulle touched on the principle of the crime of aggressive war, later developed in the Nuremberg Charter, when he declared that "Germany alone is responsible for the outbreak of this war and that she shares with her allies and accomplices responsibility for all the atrocities that proceed from it." Monsieur Emanuel Tsouderos, Prime Minister of Greece, touched on the question of superior orders when he stated that "henceforth butchers, gaolers, and looters of every kind will no longer be allowed individually to elude their responsibilities on the pretext that they are acting under orders from above." "In this way," declared M. Tsouderos, "a new principle of international penal law has come into being." Monsieur Terje Wold, Norwegian Minister of Justice, declared the willingness of the Norwegian Government "to co-operate with all the other Allies to ensure that these Nazi criminals—for they are nothing but criminal—shall find retribution whenever and wherever they may be apprehended."

It was Monsieur Joseph Bech, Minister of Foreign Affairs of Luxembourg, who combined the sentiments of all the other delegates when he declared:—

"President Roosevelt and Mr. Winston Churchill, in their rightful condemnation of such acts, have made themselves the interpreters of the conscience of outraged humanity . . . The application of the principles laid down in the Declaration submitted for our signature, will prevent the war criminals from evading their just punishment . . . It will be useless, when the day of victory comes, for the torturers of our peoples to claim that they only did what they were ordered to do and acted according to their laws. These laws and the application of them are now stigmatised by the Declaration of the Governments of the Occupied Countries as being contrary to law, the moral law as well as national and international law . . . The guilty will be liable to the laws of the countries in which their crimes have been committed. If need be, our national legislative systems must be adapted to the aims laid down in our common Declaration and, if necessary, the repression of such crimes must be organised on an international bases."

Mr. Wunz King, delegate of China, declared that the Chinese Government subscribed to the principles outlined in the Declaration, by which the crimes committed by the enemy occupying authorities were severely condemned and the authors were to be held accountable therefor, and it intended to apply the same principles to the Japanese occupying authorities in China when the time came.

Having secured the signature of the Declaration of St. James's by the Governments of the occupied countries of Europe, the Inter-Allied Commission for the Punishment of War Crimes next attempted, by means of a questionnaire, to examine questions of broad principle. This action was, however, somewhat premature, since the different questions could not be resolved immediately, largely because none of the Great Powers were represented on the Commission.

The following points were studied :—

(1) Should provisions concerning the arrest and trial of Germans or their allies, accused of having committed crimes against the laws and customs of war, be included in the terms of the Armistice ?

(2) Should the question of quislings be treated separately from that of guilty Germans?

(3) Should consideration be limited to those Germans accused of committing crimes against the Allies, or should it also include Germans guilty of crimes against German Jews?

(4) Should the degree of criminality be based on the law of the tribunal responsible for the trial, or should it merely be based on the more general provisions of the Hague Convention of 1907?

(5) Will the accused be entitled to plead superior orders? How are the different parties to the crime to be dealt with? Namely, those responsible for planning, inciting and carrying out the action, and those benefitting from it?

(6) Should the sentences imposed be those within the normal competence of the court, or should they be on a separate scale of punishment?

(7) Should the extradition of guilty Germans be agreed between the nine allied nations?

(8) Should a central interallied organisation be set up to collect evidence, detect and arrest the accused, with the aim of bringing the criminal before a competent tribunal?

The third question touched on a very delicate matter, raised moreover by Jewish organisations, which sought to enlarge the scope of the Declaration of St. James's, but, after some consultation, the matter was settled satisfactorily. It was recognised that the Declaration of St. James's was not limited and that if no particular mention had been made of the suffering of the Jews, it was because it had been considered that such a mention would have been a recognition of German racial theories.

The Commission arranged, with the assistance of the British Ministry of Information, that a pamphlet relating to the Conference of St. James's on 13th January 1942, should be published. This publication was discussed at the meetings of the Commission in May and June 1942, and was published under the title "Punishment for War Crimes" by the Inter-Allied Information Centre.

(v) NOTES DELIVERED TO THE VATICAN AND THE GREAT POWERS

In June 1942, atrocities having broken out afresh in the occupied territories, the Commission discussed the measures that could be taken to counteract them. The nine powers who signed the Declaration of St. James's decided to make a collective approach to the Governments of the United States, Great Britain, Soviet Russia and the Holy See.

In July 1942 the following note was presented, on behalf of the nine signatories, to the British Government by the Norwegian and Greek diplomatic representatives in London⁽¹⁾:—

(1) *Punishment for War Crimes* (2)—*Collective Notes presented to the Governments of Great Britain, the U.S.S.R. and the U.S.A. and relative correspondence.* Published for the Inter-Allied Information Committee, London, by H.M. Stationery Office.

"The invader's acts of oppression and terrorism have recently developed to such an extent and assumed such forms as to arouse the fear that as the defeat of the enemy countries approaches, the regime of occupation will assume an ever more barbarous and merciless character, not excluding the extermination of whole groups of people.

"As is made clear in Dr. Goebbels' Berlin speech on June 15th 1942, Germany has severed all links with the rest of the world. This being so, to rely exclusively on the influence of public opinion would be in vain. No sense of responsibility will any longer exercise restraint on the action of the invaders.

"The signatories to the Inter-Allied Declaration of January 13th 1942 are therefore convinced that only very definite steps by the most powerful among the Allies can exert a deterrent influence.

"The Allied Ministers . . . express their firm hope that His Britannic Majesty's Government, whose Prime Minister, Mr. Winston Churchill, as early as October 25th 1941, included the punishment of war crimes among the principal war aims of the Allied countries, will take all measures, which they may consider timely in order to save innumerable innocent lives in the territories occupied by the enemy."

At the same time the Czechoslovak and French diplomatic representatives in Moscow, delivered a note in similar terms to the Soviet Government, ending with the words :

" . . . the above-mentioned Governments, anxious to spare, as much as possible the population of invaded countries trials more terrible than those already endured, and relying on the spirit of solidarity of all the United Nations in the face of a menace which is in reality nothing else than an inhuman method of forcing nations, against their will, to contribute to the enemy war effort or of extorting acts of adherence to the so-called "new order," have decided to send an urgent appeal to the President of the Council of the People's Commissars of the Union of Soviet Socialist Republics, to give a solemn warning to the guilty."

The diplomatic representatives of the Netherlands, Yugoslavia and Luxembourg in Washington, presented a similar note to the President of the United States, asking him to issue a solemn warning to the guilty. In September 1942 a similar note was presented to the Holy See by the representatives of Belgium and Poland, to which the Governments of Brazil, Cuba, Peru and Uruguay gave their spontaneous support. Copies of reports on the atrocities committed in the occupied countries were attached to each of these notes.

(vi) DECLARATIONS OF THE STATESMEN OF THE GREAT POWERS

President Roosevelt was the first to reply to the note presented on behalf of the Governments of the Occupied Countries. On 21st August he issued a declaration to the effect that⁽¹⁾:

"When victory has been achieved, it is the purpose of the Government of the United States, as I know it is the purpose of each of the United Nations, to make appropriate use of the information and evidence in respect to these barbaric crimes of the invaders, in Europe and Asia. It seems only fair that they shall have to stand in courts of law in the very countries they are now oppressing and answer for their acts."

(1) Loc. cit. p. 9.

Mr. Churchill, in a speech in the House of Commons on 8th September 1942 declared⁽¹⁾:

"I wish most particularly to identify the British Government and the House of Commons with the solemn words which have been lately used by the President of the United States, namely, that those who are guilty of the Nazi crimes will have to stand up before tribunals in every land where their atrocities have been committed, in order that an indelible warning may be given to future ages and that successive generations of men may say 'so perish all who do the like again'."

The Soviet Government, in a note dated 14th October 1942, replying to the note of the nine Governments, declared⁽²⁾:

"The Soviet Government once more declares to the world its inflexible determination that the criminal Hitlerite Government and all its accomplices must and shall suffer deserved, stern punishment for the crimes perpetrated against the peoples of the Soviet Union and against all freedom-loving peoples in territories temporarily occupied by the German army and its accomplices.

"The Soviet Government approves and shares the just desire expressed in the collective note received that those guilty of the crimes indicated shall be handed over to judicial courts and prosecuted, and that the sentence passed on them shall be put into execution.

"The Soviet Government consider it essential to hand over without delay to the courts of the special international tribunal and to punish according to all the severity of the criminal code, any of the leaders of Fascist Germany who, in the course of the war, have fallen into the hands of States fighting against Hitlerite Germany."

Thus, for the first time in official pronouncements, it was agreed that the guilty should be handed over to the country in which their crimes had been committed, and should be tried by the courts of that country.

Meanwhile, in England, two semi-official bodies, namely the Cambridge Commission on Penal Reconstruction and Development, and the London International Assembly, had set up sub-committees to investigate problems relating to the punishment of war crimes; the deliberations of these bodies show the trend of thought which was developing on the subject in the minds of certain jurists during 1942 and 1943. Many of the subjects discussed by these bodies, at a time when the fortunes of war went very ill for the Allies, were developed and executed after the war. They also had their value in educating opinion, so that when the time came steps were taken to mete out just punishment.

B. THE WORK OF UNOFFICIAL BODIES

(i) THE WORK OF THE INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

A Conference⁽³⁾ was organised in Cambridge on 14th November 1941 by the Cambridge Commission on Penal Reconstruction and Development

(1) *Loc. cit.* p. 3 and Parliamentary Debates, House of Commons, Vol. 383, No. 100 Col. 97.

(2) *Loc. cit.* pp. 5-7.

(3) *International Commission for Penal Reconstruction and Development—Proceedings of the Conference held in Cambridge on 14th November 1941 between the representatives of nine allied countries and of the Department of Criminal Science in the University of Cambridge.* Edited by L. Radzinowicz and J. W. Cecil Turner.

—a body, composed of members of the Faculty of Law of Cambridge University and of jurists from the occupied countries of Europe, which was engaged in collecting information relative to the re-establishment of justice in Europe after the war. This was attended by representatives not only of the Universities of Oxford and Cambridge, but also of Belgium, Czechoslovakia, France, Greece, Luxembourg, the Netherlands, Norway, Poland and Yugoslavia. After hearing speeches on the subject of war crimes, the Conference set up a committee to consider the rules and procedure to govern the case of "Crimes against International Public Order".

In May and June 1942 the members⁽¹⁾ of this Committee submitted their opinions as to the types of crimes to be punished, the courts which should adjudicate and the law to be applied. All were agreed that the Committee should consider the question of war crimes and should exclude acts committed by quislings and traitors, whose offences would be justiciable by municipal law. The definition of war crimes given by the Cambridge representative⁽²⁾ was accepted as a basis for future discussion, namely:

"War crimes may properly be defined as such offences against the law of war as are criminal in the ordinary and accepted sense of fundamental rules of warfare and of general principles of criminal law by reason of their heinousness, their brutality, their ruthless disregard of the sanctity of human life and personality, or their wanton interference with rights of property unrelated to reasonably conceived requirements of military necessity."

The opinion generally expressed was that, wherever possible, municipal law should be the system of law applicable to the trial of war criminals, but where this was not possible, it was suggested that the general principles of international law should be applied, and in this connection it was recommended that the Committee might undertake some work on the codification of international criminal law. Since municipal courts would, generally speaking, be the ones competent to try such cases, it was recommended that guarantees of impartiality should be included in their constitution, such as the inclusion of civil judges in military courts or the institution of quasi-international courts of appeal. It was evident that there would be a residue of cases outside the scope of the municipal courts and to deal with these cases some members recommended the formation of an international criminal court; others, however, did not think the time was ripe for the creation of such a court.

The judges of an international court should be allied and neutral nationals, but, in the event of only allied judges being available, it was considered that full publicity and freedom of press-reporting would ensure impartiality. It was recommended that an international prosecuting body should be set up or, failing that, that the prosecutor should be of the nationality of the victim. The State bringing the charge should also be

(1) *Confidential Report of the International Commission for Penal Reconstruction and Development.*

The members of this Committee were: M. Aulie (Norway), Dr. Benes (Czechoslovakia), M. Bodson (Luxembourg), Prof. Cassin (France), M. de Baer (Belgium), Dr. de Moor (Netherlands), Dr. Glaser (Poland), M. Kaeckenbeck (Belgium), M. Stavropoulos (Greece) and Dr. Vljajic (Yugoslavia).

(2) Dr. Lauterpacht. See *Confidential Report of the International Commission for Penal Reconstruction and Development*, section D.3, page 13.

responsible for the custody of the offender before trial and execution of the sentence after trial, unless, as was visualised by some members, an international police force was in existence, in which case *it* would be the body responsible for such detention. The consensus of opinion was that a public pronouncement should be made warning the neutrals against granting asylum to war criminals wanted by the Allies. In this connection, some members considered that war crimes could not be regarded as political crimes, and therefore would be extraditable offences, and that application for extradition must be made for specific crimes, such as murder. There must be no repetition of the mistakes made by the Allies in 1919 when they applied for the extradition of the Kaiser for acts of international policy.

Concerning the plea of superior orders, the general opinion was that it should be limited in application, note being taken of the rank of the offender, and the degree of duress to which he was subject. The members considered that the immunity of heads of State outside their respective countries is a matter of courtesy, which can be withdrawn especially in time of war.

(1) *Interim Report of 15th July 1942*

By 15th July 1942 the Committee had reached certain conclusions, and, at a meeting held on that day, the following resolutions were agreed upon :—

(1) that, while many members held that the time was ripe for the institution of an international criminal court, they considered that the majority of war crimes would come within the jurisdiction of the municipal courts.

(2) that the Armistice terms should contain stipulations concerning the surrender of war criminals.

(3) that the Allied Governments should, by public declaration, warn neutral states of the inadvisability of granting asylum to war criminals.

Since these were only interim conclusions, it was decided to establish three sub-committees for further examination of the question of war crimes. The first of these⁽¹⁾ was to examine the scope of war crimes, how far they come within the competence of the municipal courts, and what crimes could not be covered by such courts. The second sub-committee⁽²⁾ was to consider the plea of superior orders and the third⁽³⁾ was to examine and report on the subject of extradition.

(2) *Sub-Committee on War Crimes*

This sub-committee never drew up a comprehensive report, but the consensus of opinion of the members divided war crimes into three main categories :—

(1) The members of this sub-committee were:—Monsieur de Baer (Belgium) Chairman, M. Burnay (France), Dr. Glaser (Poland) and Dr. Lauterpacht (Cambridge University).

(2) The members of this sub-committee were: Dr. de Moor (Netherlands), Chairman, Dr. Goodhart (Oxford) and Dr. Lauterpacht (Cambridge).

(3) The members of this sub-committee were: Dr. Benes (Czechoslovakia) Chairman, and Minister Vlatsch (Yugoslavia).

- (1) Acts connected with warfare and contrary to the laws of war, e.g. use of poison gas, attacks on hospital ships, etc.
- (2) Acts not connected with warfare committed :
 - (a) without authority, e.g. rape, murder, etc.
 - (b) with the approval of or at the order of authority, e.g. mass murder, murder of hostages, deportation, etc.
- (3) Serious crimes committed against property:—
 - (a) without authority, e.g. looting.
 - (b) with the approval of or at the order of authority, e.g. wanton destruction, plundering of art treasures, etc.

The sub-committee set out to ascertain the extent to which the competence of municipal courts would cover war crimes committed in Germany and occupied Europe. It was found that most countries had competence to try their own nationals for crimes committed abroad, but none of the countries represented on the committee, with the exception of Poland, had jurisdiction over foreigners for crimes committed abroad, unless they were directed against the safety of the State. The municipal courts of these countries would, therefore, be unable to try Germans guilty of ill-treating slave-workers or internees of concentration camps in Germany.

With regard to the jurisdiction which military courts could exercise over civilians, it was ascertained that with the exception of the military courts of the United Kingdom, France and Czechoslovakia, which supersede civil courts in times of emergency, no other military courts had competence to try civilians for offences unconnected with the services. It was also found that British military courts would be the only ones with authority over civilians in enemy occupied territory, though Belgium and Luxembourg possessed constitutional means of establishing such courts.

It was also found that municipal courts would not have jurisdiction in such matters as the deliberate starvation of populations, the segregation of portions of the population and judicial murder.

To remedy the defects in municipal law with regard to war crimes, it was suggested that the codes of law of the respective Governments should be extended; as opposed to this, it was argued that it would be extremely difficult for Governments in exile to effect such changes in their legal codes. To deal with the residue of cases, such as those not covered by municipal courts, those affecting Jews and stateless persons in Germany, as well as cases where two or more states possessed jurisdiction, it was suggested that an international criminal court should be set up. Critics of the plan, however, considered that it would take too long to establish such a court, and the administration of justice by existing courts would be much speedier. Another suggestion was to the effect that military courts should be set up in Germany, but this was countered by the argument that this would necessitate an international convention on the lines of Article 228 of the Versailles Treaty, which, in turn, would entail an extension of national codes of law, and such courts would, moreover, appear to be purely vindictive. The general opinion was that the trial of residuary

cases, outside the scope of municipal courts, would require the establishment of some form of international criminal court.

(3) *Sub-Committee on Superior Orders*

The conclusion of this sub-committee was that, generally speaking, the codes of law of the respective countries recognise the plea of superior orders to be valid if the order is given by a superior to an inferior officer, within the course of his duty and within his normal competence, provided the order is not blatantly illegal. The conclusion reached was that each case must be considered on its own merits, but that the plea is not an automatic defence.

(4) *Sub-Committee on Extradition*

After examining the divergencies in the laws of extradition in peacetime, as between one nation and another, the sub-committee considered that this might, in itself, provide a protection for war criminals. The extradition of war criminals from Germany itself should be one of the conditions of the Armistice, and the German authorities should be compelled to co-operate with the Allies in finding, arresting and surrendering the wanted persons. With regard to extradition from neutral countries, the sub-committee recommended that a convention for the delivery of war criminals should be concluded with the neutral countries—possibly as part of the convention for the institution of an international criminal court—which should be operative for a period of three years after the war, whereby the *delivery* of war criminals should be treated as separate from the normal *extradition* of ordinary criminals.

(5) *General Contributions of the Cambridge Commission*

The Committee of the Cambridge Commission for Penal Reconstruction and Development, responsible for examining the question of crimes against international public order, never made any definite recommendation or produced a comprehensive report. Apart from collecting much information, which was subsequently used by other bodies, its members did, in several cases, prevail upon their respective Governments to extend their national codes of law to cover crimes committed against their own nationals abroad.⁽¹⁾ It also contributed to the creation in official and

(1) The following laws have subsequently been promulgated, extending the jurisdiction of national codes of law to cover war crimes committed on national and enemy territory (this does not necessarily cover the laws promulgated extending the competence of national tribunals to try war criminals):—

Belgium—Decree of 5th August 1943, published in *Moniteur Belge* of 20th September 1943. (UNWCC doc. Misc. 95).

Czechoslovakia—Decree No. 16 of 1945 (UNWCC doc. III/14).

Denmark—Act on Punishment of War Crimes, assented to by the King of Denmark on 12th July 1946 (see UNWCC doc. Misc. 47).

France—Decree of 28th August 1944 (made in Algiers) (see UNWCC Document Series No. 26).

Greece—Law No. 533 of 3rd September 1945 (see UNWCC doc. Misc. 38).

Luxembourg—Grand-Ducal decree of 3rd July, 1945, published in *Mémorial*, No. 33, p. 373. Law of 2nd August, 1947, published in *Mémorial*, No. 38, p. 755.

Norway—Law No. 14 of 12th December 1946 (see UNWCC doc. Misc. 87).

Poland—Proclamation of the Minister of Justice of 11th December 1946, published in the Official Gazette of the Republic of Poland, 15th December 1946, No. 69, item 377 (see UNWCC doc. Misc. 87).

Yugoslavia—Law of 25th August 1945, published in No. 66 of Vol. I of the Official Gazette of Democratic Federal Yugoslavia, p. 645 under No. 619 (see UNWCC doc. Misc. 60).

semi-official circles of an atmosphere favourable to the conception of the punishment of war criminals.

(ii) THE WORK OF THE LONDON INTERNATIONAL ASSEMBLY

This body, created under the auspices of the League of Nations Union by Viscount Cecil of Chelwood, was not an official body, although its members were designated by the Allied Governments which were then in London. It was not committed to any policy, but made recommendations, through its members, to the Allied Governments.

The question of war crimes eventually became one of its major concerns having been first placed on the agenda of the Assembly on 20th October, 1941, when it was recommended that there should be some discrimination between acts of war that are permissible and those that are not; it was recommended that the study of this question should begin at once, and not be left until it was too late.

It was decided to set up a Commission to study the problem, but it was not until March 1942, after another discussion in the Assembly, that it was actually formed.⁽¹⁾ This Commission held about 30 meetings and, in December 1943, produced a report of about 450 pages. Detailed work on the subject was done in the Commission, with occasional discussions during plenary meetings of the Assembly.

The Commission's work was closely followed by the Allied Governments in London and Washington, to whom, from the beginning, copies of all its proceedings were sent. Furthermore, since most members held important posts and were in a position to speak authoritatively, the discussions in the Commission and in the Assembly soon found an echo in legislative assemblies and government circles, in spite of the fact that the proceedings of the Assembly were kept strictly secret, and that, except on one or two occasions, no word was published about them in the Press.

There was an important discussion in the Assembly on 28th September 1942 when the Chairman of the Commission on War Crimes presented a report⁽²⁾ on the interim conclusions of his Commission. The first conclusion was that, at the earliest possible moment, a Protocol should be agreed between the Governments of the United Nations, defining what acts should be punishable as war crimes, and setting up machinery for the prosecution and punishment of such crimes, to take effect immediately after the Armistice. Secondly, that the Governments should begin at

(1) The members of the Commission were: M. de Baer (Belgium) Chairman, M. V. Benes (Czechoslovakia), Secretary, Mlle. I. van Steenkiste (Belgium), Asst. Secretary; Belgium—M. Dumon, M.Ch. Tschoffen; Brazil—Senor Luis Felipe de Rego Rangel; China—Dr. Liang; Czechoslovakia—Dr. J. Cisar, Dr. B. Ečer, H. E. M. V. Slavic; France—Prof. René Cassin, M. J. Burnay M. Thurneyssen; Great Britain—Dr. W. R. Bisschop, Mr. Vernon Gattie, C.B.E., Mr. W. Latey, M.B.E., Dr. V. Lehmann, Dame Adelaide Livingstone, D.B.E., Dr. H. Winkel; India—Mr. A. Jusuf Ali, Dr. S. N. Ghose; Luxembourg—H. E. M. V. Bodson; Norway—Dr. A. Aulie, H.E.M. E. A. Colban, M. P. P. Stabell; Poland—M. Nagorski; United States—Prof. Sheldon Gleuck, Rev. M. Spencer; Yugoslavia—H.E.M. B. Vlajitch; Observers—M. Karavaev (U.S.S.R.), Miss Lazarus (L.I.A.). Occasional Contributors—Lt.-Gen. Sir George MacDonagh, G.C.B., K.C.M.G., etc., Major-Gen. Prof. George Lelewer and M. Otto Friedburg.

(2) *Reports on the Punishment of War Criminals: London International Assembly*, p. 117. See also pp. 135-136.

once to study the question of revising their extradition laws and treaties and of establishing or codifying the fundamental principles of international law. The matter was debated at considerable length by the Assembly and members stressed the urgency of the problem, expressing the hope that official action should be taken at once to study the matter and the necessary legislation passed to provide adequate machinery.⁽¹⁾

In view of the subsequent developments in the conception of war crimes, it is interesting to note the discussions which were held even before December 1942 on matters such as the definition of war crimes, the defence of superior order etc.

(1) *Definition of War Crimes*

As early as July 1942 the Commission had considered, alongside war crimes proper and atrocities against allied nationals, whether the violation of the Kellogg-Briand Pact, i.e. aggression⁽²⁾, and crimes committed in Germany against Jews and stateless persons, which later became known as "crimes against humanity," should not be included in the scheme of punishment.

In respect of war crimes proper, i.e. violations of the law of war, the Commission soon found that the concept of war crimes is not a stable one, since it is subject to change according to the events of war (e.g. in respect of maritime warfare, aerial bombardment, etc.), and, therefore, mainly governed by moral law, the conscience of mankind and custom. The Commission first worked on a list based on that drafted in 1919 by the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, but, by November 1943⁽³⁾, the Commission recommended that the expression "war crimes" should also be understood to cover not only war crimes proper but also the preparation and the waging of an aggressive war, and crimes committed, within or outside any Axis country, for the purpose of racial or political extermination.

The question of the crime of aggression was touched upon in a resolution passed by the Assembly on 12th October 1942⁽⁴⁾, which, after considering the fact that the Assembly of the League of Nations had declared by a resolution in November 1927 that aggression was an international crime and that the Pact of Paris condemned recourse to war for the solution of international controversies, concluded that the Axis Powers had violated both the resolution and the Pact of Paris, to which they were both parties

Dr. Ečer, a Czech member of the Commission, in November 1943, studied the question of the crime of aggressive war and, after examining the provisions of the unratified Geneva Protocol of 1924 and the Pact of Paris, reached the following conclusions⁽⁵⁾:—

(a) "Aggressive war is a crime, and by its character an international crime, because it aims against peace and international order. The total aggressive war started by Germany and her allies in 1939 is additionally an international crime in its territorial extent and the number of victims of the aggression.

(1) Op. cit. pp. 117-139.

(2) Op. cit. p. 33.

(3) Op. cit. p. 167.

(4) Op. cit. p. 139.

(5) Op. cit. p. 172(h).

(b) "Not only the aggressor States as such, but also their rulers and military leaders are personally responsible in the eyes of the law for the gigantic chain of crimes which compose this war and which are punishable under the criminal laws of the countries affected.

(c) "The penalty according to all these laws is death."

Concerning racial extermination, the Commission came to the conclusion that covering their crimes under a cloak of apparent legality should not help the Nazis to escape justice or that mere terminology or technicalities should not obscure the main issue. It recommended that "some crimes against mankind should be branded as such and made punishable by international law"⁽¹⁾ even when they were not punished by the *lex loci*. It is interesting to note that the official Declaration of 17th December 1942⁽²⁾ on the policy concerning the atrocities against the Jews, was framed on the same lines as the views of the Commission.

Another of the Commission's proposals was that acts whose intention was to prevent the re-establishment of peace after the war should be considered as war crimes. This time, however, the military occupation of Germany and the ensuing jurisdiction conferred upon allied military courts, made it unnecessary to follow that proposal.

(2) *Superior Orders*

One of the main objections against the punishment of war criminals had been that they had all acted by order of their superiors, and that, therefore, only the superior officer should be punished. This same objection had been made in 1921, when Hindenburg had rendered the whole scheme ludicrous, by accepting responsibility for all criminal orders, thereby exculpating the Kaiser. To prevent a repetition of that deadlock, the Commission on war crimes proposed :—

(1) that an order given by a superior to an inferior to commit a crime is not in itself a defence, but that the Court may consider whether the accused was placed in a state of compulsion and acquit him or mitigate the punishment accordingly ;

(2) the defence that the accused was placed in a state of compulsion should be excluded in two cases. The first was when the act was so obviously heinous that it could not be accomplished without revolting the conscience of an average human being. The second was when the accused, at the time, was a member of an organisation whose membership implied the execution of criminal orders⁽³⁾. This was the first time that expression was given to the view that members of criminal organisations should be dealt with in a special manner.

(3) *Responsibility of Statesmen, High Officials and Key Men*

The members of the London International Assembly took great pains to destroy the prevailing theory, defended at Versailles by the United States representatives, that a head of State cannot be held personally responsible or tried for having framed a policy of aggression or one which

(1) Resolution adopted by the L.I.A. on 12th October 1942, see *L.I.A. Reports*, p. 139.

(2) See page 106.

(3) Pamphlet *Recommendations of the L.I.A.*, page 15.

disregards the fundamental laws of mankind, and that even for violations of positive law he is responsible only to the tribunals and laws of his own country⁽¹⁾. It was unanimously agreed⁽²⁾ that rank and position, however exalted, confers no immunity upon the accused in respect of war crimes, and that those in high places who ordered them should be held responsible, as well as the actual perpetrators. It would be illogical to punish the obscure subordinate, while the high official, who had, by legislative or administrative action, contrived to plan the criminal policy, escaped retribution.

(4) *The Judicial Court*

On 21st June 1943 a resolution⁽³⁾ was carried to the effect that, as far as possible, the domestic courts should deal with all war crimes which came within their respective jurisdictions. It was recommended that, whenever possible and necessary, each Ally should adjust its legislation and machinery to provide adequate and speedy punishment and extend the jurisdiction of domestic courts to war crimes committed abroad against its own nationals. It appeared, however, that few municipal courts would have competence to try Germans for crimes committed in Germany against allied nationals, stateless persons and Jews, and it was recommended that there should be some form of international tribunal to deal with these cases.

(5) *International Criminal Court*

The institution of such a court was one of the most important questions treated by the London International Assembly. It was placed on the Commission's agenda in April 1942⁽⁴⁾, and, in the following months, was the subject of many studies, papers and discussions⁽⁵⁾. Important contributions were made by Lord Maugham, Viscount Cecil of Chelwood, Dr. de Moor, Professor Cassin, Dr. Winiarski, Justice Minister Bodson and others; Professor Sheldon Glueck of the Harvard Law School submitted his views in writing⁽⁶⁾. The Chairman of the Commission had already, in 1942, circulated a "Draft Convention for the Creation of an International Criminal Court," which took into account, *inter alia*, the proceedings of the Geneva Conference on the Repression of Terrorism⁽⁷⁾ and the Report of the Vienna Conference of the International Law Association. After amendment the draft reached its final form in October 1943⁽⁸⁾.

In the view of the Assembly the jurisdiction of an international court should be defined in the widest possible manner and should cover crimes hitherto unlisted as war crimes, such as the crime of aggression, but there

(1) Op. cit. p. 7. See also *Conférence de la Paix* 191-20. *Recueil des actes de la Conférence. Partie IV-B.2. Commission des Responsabilités*, pp. 223-224.

(2) *L.I.A. Reports*, p. 168-169. Pamphlet p. 7.

(3) *Reports on the Punishment of War Crimes*, page 153.

(4) Op. cit. p. 9.

(5) Op. cit. pp. 225-345.

(6) Prof. Glueck's views were subsequently published in the *Harvard Law Review*, Vol. LVI, No. 7, June 1943—"By What Tribunal Shall War Offenders be Tried?" by Sheldon Glueck.

(7) Series of League of Nations Publications V. Legal 138.

(8) Pamphlet *Recommendations of the L.I.A.*, p. 13.

were some categories of crimes which could definitely be considered to be within its jurisdiction, namely :

(1) crimes in respect of which no national court had jurisdiction (e.g. crimes committed against Jews and stateless persons and possibly against Allied nationals in Germany); this category was meant to include offences subsequently described as "crimes against humanity"

(2) crimes in respect of which a national court of any of the United Nations has jurisdiction, but which the State concerned elects, for political or other reasons, not to try in its own courts.

(3) crimes which have been committed or taken effect in several countries, or against the nationals of different countries.

(4) crimes committed by heads of State.

In these two latter categories of criminals were included the dictators, major criminals and key men who had conceived and framed the plans of aggression, racial extermination, systematic terrorism, mass murder, deportations, economic looting in Axis and occupied countries, and the establishment of concentration camps.

The Assembly considered that a codified international criminal law, agreed by the United Nations, would be the law which should be applied by the court. Failing such a codification, the court's decisions were to be governed by international custom, treaties, the generally accepted principles of criminal law, as well as judicial precedents and doctrine. The penalty to be imposed was at the discretion of the court.

With regard to the prosecuting authority, it was felt that, with a view to achieving harmony and unity in the prosecution and subsequently to the whole body of law which would be created by the judgments of the court, the decision as to what criminals should be prosecuted, and the task of prosecuting them, should be conferred on one Chief Prosecutor. He should act on behalf of the United Nations as a whole, assisted by a number of deputies of the nations interested in punishment. He should be in a position to control the type of cases that were brought before the court and to maintain an even balance between the requests of the nations concerned, whilst seeing that only heinous crimes with grievous consequences were tried.

This International Criminal Court was to be split up into a number of divisions. The members of the court were to be judges of the highest standing and repute.

(6) *Apprehension of War Criminals*

The Commission felt that the machinery of extradition is a slow and cumbersome business, ill-suited to speedy retribution after a war. Under existing conditions it was possible that a war criminal, charged by one United Nation, might find refuge in another United Nation and enjoy immunity there, thanks to a technical imperfection in legislation.

It was therefore suggested that the term *extradition* should be reserved for the traditional handing over of persons charged with extraditable

offences, and a new terminology was proposed, viz: (a) *surrender* for the handing over of a war criminal by an Axis to a United Nation; (b) *transfer* for the handing over of a war criminal by one United Nation to another. Both these operations could be carried out administratively, without judicial process or interference by any court⁽¹⁾. Provisions for these operations were to be made respectively in the Armistice terms and in conventions to be agreed between the United Nations.

Surrender was to be carried out at the moment of the Armistice and afterwards by the authorities of the Axis countries, or by such local authorities as might be allowed to function in Axis countries after the victory. Serious penalties were proposed for Axis officials who refused to co-operate or obstructed the course of justice.

Transfer was to be a post-war measure, destined to last for three years only, during which period each Ally would undertake to hand over to any other Ally, on request, any persons whose transfer was demanded. This would ensure that the major war criminals, whose offences might be considered by some states as of a political character, should not escape under that plea.

In respect of neutral countries, it was envisaged that requests for the handing over of war criminals should be made after careful investigation by an inter-allied body, and that they should be backed by the full authority of the United Nations as a whole. It was pointed out that there always exists efficient and convenient means whereby the stay of a politically undesirable person can be prevented or stopped, namely by expulsion or refusal of admission, as had happened in the case of Trotsky. It was also urged that the names of war criminals should be communicated to neutral Governments to enable them to refuse admission.

(7) *General Contributions of the London International Assembly*

It is difficult to gauge the value of the work of the London International Assembly, but certain members of that body, namely M. de Baer (Belgium), Dr. Liang (China), Dr. Eéer (Czechoslovakia), M. Stavropoulos (Greece), Dr. de Moor (Netherlands), M. Bodson (Luxembourg) and M. Colban (Norway), subsequently became the representatives of their respective Governments on the United Nations War Crimes Commission, and therefore, brought to its deliberations the value of their earlier experience and study of the question of war crimes.

C. ACTIVITIES IN THE UNITED STATES 1942-43

It is not possible to cover the activities of the various bodies in the United States and elsewhere, who were engaged in discussing the question of the punishment of war crimes, but mention might perhaps be made of the activities of the Faculty of Law at Harvard University. As has been mentioned above, Professor Sheldon Glueck of that University was contributing, in writing, to the deliberations of the London International Assembly. In the early summer of 1943 he held a seminar among the students of the Faculty of Law on the subject of war crimes.

(1) *Reports on the Punishment of War Crimes, L.I.A., p. 372.*

Another body, under the direction of Mr. Charles Warren, historian of the U.S. Supreme Court and an international lawyer, advocated that provisions for the surrender of a specific list of war criminals should be included in the terms of surrender and that these terms should make it clear that the victors reserved the right to fix any punishment they chose. It was held that, owing to deficiencies in the law, many of the criminals could not be brought to trial, and it must be recognised that many minor criminals would escape punishment, owing to the impossibility of listing all their names in the terms of surrender⁽¹⁾.

On the other hand, a group of lawyers under Mr. Emilio von Hofmannstal, advocated the creation of a number of international criminal courts, with the collaboration of neutral lawyers, applying the law either of the place of the crime or else of the victim of the crime⁽²⁾.

D. OFFICIAL PRONOUNCEMENTS

(i) DEBATE IN THE HOUSE OF LORDS 7TH OCTOBER 1942 AND THE SIMULTANEOUS DECLARATION OF PRESIDENT ROOSEVELT

A debate was initiated in the House of Lords by Lord Maugham, who was also a member of the London International Assembly, on 7th October 1942⁽³⁾. Lord Simon, the Lord Chancellor, in replying to the debate, made two announcements. First, he announced the formation of a United Nations War Crimes Commission for the Investigation of War Crimes, whose task would be the naming and identifying, wherever possible, of the persons responsible for Nazi atrocities, and in particular of organised atrocities⁽⁴⁾. Secondly, he announced that "named criminals wanted for war crimes should be caught and handed over at the time of and as a condition of the Armistice, with the right to require delivery of others as soon as the supplementary investigations are complete".

On the same day, President Roosevelt made the following statement⁽⁵⁾:

"I now declare it to be the intention of this Government that the successful close of the war shall include provision for the surrender to the United Nations of war criminals.

"With a view to establishing responsibility of the guilty individuals through the collection and assessment of all available evidence, this Government is prepared to co-operate with the British and other Governments in establishing a United Nations Commission for the Investigation of War Crimes.

(1) *Evening Standard* of 11th December, 1942.

(2) *New York Times* of 17th December, 1943.

(3) *Parliamentary Debates, House of Lords*, Vol. 124, No. 86, col. 563.

(4) *op. cit.* cols. 577-587. On 3rd October 1942, the Foreign Office had written a note to the Inter-Allied Commission on the Punishment of War Crimes, asking whether it agreed that provisions for the arrest and surrender of war criminals should be included in the terms of the Armistice, and whether it was agreeable to the institution of a "Fact Finding Commission". The Commission gave its general agreement to both these provisions, so the Lord Chancellor was speaking with the support of the Governments of the Occupied Countries. The Inter-Allied Commission did continue to hold meetings in February, March and June 1943, when it discussed and drafted provisions concerning war criminals to be inserted in the Armistice. Its activities ceased on 23rd October 1943, with the establishment of the United Nations Commission for the Investigation of War Crimes. For details of the Debate in the House of Lords see Chapter VI, p. 109 et seq.

(5) "Punishment for War Crimes (2)" published by H.M. Stationery Office for the Inter-Allied Information Committee, pp. 9-10.

"The number of persons eventually found guilty will undoubtedly be extremely small compared to the total of enemy populations. It is not the intention of this Government or Governments associated with it to resort to mass reprisals. It is our intention that just and sure punishment shall be meted out to the ringleaders responsible for the organised murder of thousands of innocent persons and the commission of atrocities which have violated every tenet of the Christian faith."

(ii) STATEMENT MADE BY MR. EDEN IN THE HOUSE OF COMMONS ON 17TH DECEMBER 1942

Meanwhile, reports reached London of the deliberate German policy of exterminating the Jews by mass-execution or extermination in concentration camps. On 17th December 1942, in reply to a question as to whether he had any statement to make regarding the plan of the German Government to deport all Jews from occupied countries of Eastern Europe and to put them to death, Mr. Eden, the Foreign Secretary, stated⁽¹⁾:

"I regret to have to inform the House that reliable reports have recently reached His Majesty's Government regarding the barbarous and inhuman treatment to which Jews are being subjected in German-occupied Europe. They have in particular received wide publicity in the Press. His Majesty's Government in the United Kingdom have, as a result, been in communication with the other Allied Governments directly concerned, and I should like to take this opportunity to communicate to the House the text of the following declaration which is being published to-day at this hour in London, Moscow and Washington.

"The attention of the Governments of Belgium, Czechoslovakia, Greece, Luxembourg, the Netherlands, Norway, Poland, the U.S.A., the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics and Yugoslavia, and the French Committee of National Liberation, has been drawn to numerous reports from Europe that the German authorities, not content to denying to persons of Jewish race in all the territories over which their barbarous rule has been extended the most elementary human rights, are now carrying into effect Hitler's oft repeated intention to exterminate the Jewish people in Europe. From all the occupied countries Jews are being transported, in conditions of appalling horror and brutality, to Eastern Europe. In Poland, which has been made the principal Nazi slaughterhouse, the ghettos established by the Nazi invaders are being systematically emptied of all Jews except a few highly-skilled workers required for war industries. None of those taken away are ever heard of again. The able-bodied are slowly worked to death in labour camps. The infirm are left to die of exposure and starvation or are deliberately massacred in mass executions. The number of victims of these bloody cruelties is reckoned in many hundreds of thousands of entirely innocent men, women and children.

"The above-mentioned Governments and the French National Committee condemn in the strongest possible terms this bestial policy of cold-blooded extermination. They declare that such events can only strengthen the resolve of all freedom-loving peoples to overthrow the barbarous Hitlerite tyranny. They reaffirm their solemn resolution to ensure that those responsible for these crimes shall not escape retribution, and to press on with the necessary practical measures to this end."

(iii) THE UNITED KINGDOM DECLARATION OF 30TH AUGUST 1943

Following the receipt of further information which reached the British Government concerning crimes committed in Poland by the German invaders, such as mass murder, deportation for forced labour in Germany,

(1) *Parliamentary Debates, House of Commons*, Vol. 385, No. 17, Cols. 2082-2084.

the forced separation of families, with children being brought up in Germany or sold to German settlers, and in other cases men, women and children sent to concentration camps, the British Government declared its resolve:

“to punish the instigators and actual perpetrators of the crimes. They declare that, so long as such atrocities continue to be committed by the representatives and in the name of Germany, they must be taken into account against the time of the final settlement of Germany.”⁽¹⁾

(iv) THE MOSCOW DECLARATION OF 1ST NOVEMBER 1943

The most important pronouncement made by Allied statesmen on the subject of war crimes, and one which set the pattern for the trial, not only of the major war criminals, but also of those responsible for atrocities in occupied countries, was the declaration made at the Moscow meeting of Marshal Stalin, President Roosevelt and Prime Minister Churchill. This Declaration ran as follows:—⁽²⁾

“The United Kingdom, the United States and the Soviet Union have received from many quarters evidence of the atrocities, massacres and cold-blooded mass executions which are being perpetrated by the Hitlerite forces in many of the countries they have overrun and from which they are now being steadily expelled.

“The brutalities of Hitlerite domination are no new thing and all peoples or territories in their grip have suffered from the worst form of government by terror.

“What is new is that many of these territories are now being redeemed by the advancing armies of the liberating powers and that, in their desperation, the recoiling Hitlerite Huns are redoubling their ruthless cruelties. This is now evidenced with particular clearness by the monstrous crimes of the Hitlerites on the territory of the Soviet Union which is being liberated from the Hitlerites and on French and Italian territory.

“Accordingly, the aforesaid three Allied Powers, speaking in the interest of the 32 United Nations, hereby solemnly declare and give full warning of their declaration as follows :

“At the time of the granting of any armistice to any Government which may be set up in Germany, those German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the Free Governments which will be erected therein. Lists will be compiled in all possible detail from all these countries, having regard especially to the invaded parts of the Soviet Union, to Poland and Czechoslovakia, to Yugoslavia and Greece, including Crete and other islands, to Norway, Denmark, the Netherlands, Belgium, Luxembourg, France and Italy.

“These Germans who take part in wholesale shootings of Italian officers or in the execution of French, Dutch, Belgian or Norwegian hostages or of Cretan peasants, or who have shared in the slaughters inflicted on the people of Poland, or in the territories of the Soviet Union which are now being swept clear of the enemy, will know that they will be brought back to the scene of their crimes and judged on the spot by the peoples they have outraged.

“Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three

(1) *The Manchester Guardian*, 30th August 1943.

(2) *The Times*, 3rd November 1943.

Allied Powers will pursue them to the uttermost ends of the earth and will deliver them to the accusers in order that justice may be done.

“The above declaration is without prejudice to the case of the major criminals whose offences have no particular geographical location and who will be punished by a joint decision of the Governments of the Allies.”

It was thus publicly declared that the Germans who had been responsible for the commission of offences in occupied territory would be taken back to the scene of their crime and judged according to the law of the country in which the crime had been committed, while the Allies reserved to themselves the right to deal with the major criminals whose offences had no specific location.

The declarations of the Allied leaders following this often contained reference to the punishment of war criminals, but it was the Moscow Declaration which set the pattern that was followed after the war for the punishment of the guilty men, and the trial of the major war criminals.

CHAPTER VI

THE ESTABLISHMENT AND ORGANISATION OF THE UNITED NATIONS WAR CRIMES COMMISSION.

A. ESTABLISHMENT OF THE COMMISSION

(i) THE DEBATE IN THE HOUSE OF LORDS, 7TH OCTOBER, 1942

Largely as a consequence of the discussions by the unofficial bodies referred to in Chapter V.B. and because of the increasing insistence of public opinion that war criminals should be brought to justice a first step in that direction was taken by an announcement in the House of Lords on 7th October, 1942.

Lord Maugham, who had contributed actively to the deliberations of the London International Assembly, had announced his intention of bringing the subject up in Parliament, but the date of the discussion had been twice postponed till the Lord Chancellor should be in a position to reply on behalf of the British Government. When the debate was eventually opened in the House of Lords on 7th October, 1943, Lord Maugham reminded his hearers that both Great Britain and the United States of America were pledged to the principle that retribution for war crimes was among the major purposes of the war. He referred, in particular, to the Declaration signed in St. James's Palace on 13th January, 1943, by nine of the United Nations, who affirmed, among their principal war aims, the punishment of those guilty or responsible for these crimes "through the channel of organised justice"—a phrase which the speaker specially emphasised. The necessary action must, he contended, be begun before the end of the war. "I cannot," he said, "too strongly state that delay will mean the escape of the guilty." To illustrate this point, Lord Maugham went on to review the futile attempts at retribution which were made after the First World War, including the Leipzig trials, the story of which has already been narrated in Chapter III. The conclusion that he drew from this survey was that, if the criminals were not again to escape scot-free, the Allies must provide courts to try them and all the necessary machinery for doing so. Under this head he analysed in some detail the arguments in favour of national or international courts, and the legislation which would be necessary to give them jurisdiction—questions which will be referred to in another chapter.⁽¹⁾

Lord Cecil of Chelwood, who spoke from his own experience at the Paris Conference after World War I, and who, as President of the London International Assembly, had taken an active part in the deliberations on the subject of war crimes, agreed that too little previous consideration had been given between 1914 and 1918 to the question of war criminals, and urged that plans should be worked out this time before the end of hostilities.

(1) See Chapter XIV, Section A. (ii) (3) p. 442.

Lord Simon, the Lord Chancellor, who spoke on behalf of the British Government, referring first to the question of the tribunal which would be required for trying war criminals, observed that there were two prerequisites without which no war crimes tribunal could act effectively: the recording of evidence, and the presence of the accused. These two points had, he said, been studied for some time past by the British Government in consultation with others of the United Nations. He was now in a position to make an announcement.

"The proposal is," he said, "to set up with the least possible delay a United Nations Commission for the Investigation of War Crimes. The Commission will be composed of nationals of the United Nations selected by their Governments. The Commission will investigate war crimes committed against nationals of the United Nations recording the testimony available, and the Commission will report from time to time to the Governments of those nations cases in which such crimes appear to have been committed, naming and identifying wherever possible the persons responsible. The Commission should direct its attention in particular to organised atrocities. Atrocities perpetrated by or on the orders of Germany in occupied France should be included. The investigation should cover war crimes of offenders irrespective of rank, and the aim will be to collect material, supported wherever possible by depositions or by other documents, to establish such crimes, especially where they are systematically perpetrated, and to name and identify those responsible for their perpetration."

Lord Simon added that a corresponding statement was being issued on the same day in Washington by the President of the United States (see below). The proposal for a United Nations War Crimes Commission, thus jointly supported, had, he said, been communicated to the United Nations directly concerned, including the U.S.S.R., China, the Dominions, India, and the Fighting French, with a view to obtaining their concurrence and co-operation; replies, welcoming the proposal, had been received from the Governments established in London and from the French National Committee.

Lord Simon specially emphasised that the aim of the proposed Investigating Commission was not to promote wholesale execution of enemy nationals, but the punishment of individuals who had proved themselves responsible for atrocities, whether as ringleaders or as actual perpetrators.

In regard to the second prerequisite—the production of the accused persons—Lord Simon said that the United States and Great Britain were "taking a common stand and making a contemporaneous declaration" on that point. The reason, he reminded the House, why the Treaty of Versailles had failed to secure the effective punishment of the principal war criminals was because provision for this purpose was only contained in the final Treaty of Peace, which was signed several months after the Armistice. That mistake, he said, must not be repeated; therefore named criminals wanted for war crimes should be handed over at the time of, and as a condition of, the Armistice, and there would be a right to require the delivery of others as soon as the supplementary investigations were

complete. This proposal, likewise, had been welcomed by the Allied Governments established in London and by the Fighting French, all of whom attached extreme importance to it. The British Government, he added, was in communication with Soviet Russia and China on that point, as well as with the Dominions and India, but their replies had not yet been received.

In conclusion, Lord Simon observed that the proposals contemplated post-war action in a region where there were few precedents to guide them, but they should act in the spirit of the above-quoted declaration by the British Prime Minister that among the major purposes of the war must henceforth be included retribution for the cold-blooded execution of innocent peoples.

The statement by President Roosevelt to which Lord Simon had alluded as being issued on the same day as the debate in the House of Lords (7th October, 1942) contained the following passage:

"I now declare it to be the intention of this Government that the successful close of the war shall include provision for the surrender to the United Nations of war criminals. With a view to establishing responsibility of the guilty individuals, through the collection and assessment of all available evidence, this Government is prepared to co-operate with the British and other Governments in establishing a United Nations Commission for the Investigation of War Crimes . . . It is not the intention of this Government, or of the Governments associated with us, to resort to mass reprisals. It is our intention that just and sure punishment shall be meted out to the ringleaders responsible for the organised murder of thousands of innocent persons and the commission of atrocities which have violated every tenet of the Christian faith."

In the meanwhile, however, on 17th December, 1942, a further Declaration had been made simultaneously in London, Moscow, and Washington in connection with the reports, unhappily true, that the Germans were engaged in exterminating the Jewish people in Europe. In this declaration, the Governments of Belgium, Czechoslovakia, Greece, Luxembourg, the Netherlands, Norway, Poland, the United States of America, the United Kingdom, the Soviet Union, Yugoslavia and the French National Committee once more announced their resolve that those responsible should not escape retribution and their intention to press on with the necessary practical measures to that end.

(ii) THE INTERVENING YEAR 1942-1943; REASONS FOR THE DELAY

The announcement made by Lord Simon in the House of Lords on 7th October, 1942, did not, as had been expected, lead immediately to the constitution of the projected "Investigation Commission." It was not indeed till twelve months later that this step was undertaken.

The delay was no doubt due in part to the reluctance that was observable in official circles to embark on measures which might lead to a repetition of the fiasco of the Leipzig trials. Another evident cause of delay was the correspondence which, as Lord Simon had said in the debate in the House of Lords on 7th October, 1942, was still in progress with the more distant Governments, and especially with the Soviet Government.

In regard to the latter Government, some light was thrown on the nature of the obstacles to agreement in an account by Dr. Eéer (Czecho-

slovakia) of an interview which he had on this subject with the Soviet Chargé d'Affaires.⁽¹⁾ On that occasion Dr. Ečer was shown: an aide-memoire of 27th July, 1943, sent by the Soviet Ambassador in reply to a communication from the British Foreign Office dated 6th March, 1943; a letter from Mr. Cadogan to the Soviet Ambassador, dated 19th May, 1943; a memorandum of 18th October, 1943, sent by the Soviet Ambassador to Mr. Cadogan in answer to a note from the British Foreign Office dated 30th August, 1943; and a letter of 18th October, 1943, accompanying the above-mentioned memorandum.

From these documents, and from his conversation with the Soviet Chargé d'Affaires, Dr. Ečer gathered that the Soviet Government had been disposed to participate in the United Nations War Crimes Commission, on condition, however, that the right to be represented would be granted to the Soviet Republics which had been actively engaged in the war against the enemy, namely, the Ukranian, Byelorussian, Moldavian, Lithuanian, Latvian, Estonian and Karelo-Finnish Republics.⁽²⁾

(iii) THE DIPLOMATIC CONFERENCE AT THE FOREIGN OFFICE, 20TH OCTOBER, 1943

It was not till a year after Lord Simon had announced in the House of Lords the proposal to set up a United Nations Commission for the Investigation of War Crimes that a meeting of Allied and Dominion representatives was at last convened for this purpose at the Foreign Office in London.

Its composition was as follows:

The Lord Chancellor (in the Chair)

Australia :	New Zealand:
Rt. Hon. S. M. Bruce	Mr. W. Jordan
Lord Atkin	Norway:
Belgium:	M. Colban
Vicomte de Lantsheere	Poland:
Lt. General de Baer ⁽³⁾	Count Raczynski
Canada:	Professor Glaser
Rt. Hon. Vincent Massey	Union of South Africa:
China:	Mr. Jones
Dr. Wellington Koo	United Kingdom:
Dr. Liang Yuen-Li	The Lord Chancellor
Czechoslovakia:	Mr. George Hall
M. Lobkowicz	Sir Cecil Hurst
Dr. Bohumil Ečer	United States:
Greece:	Mr. Winant
M. Aghnides	Yugoslavia:
M. Stavropoulos	Mr. Yevtic
	M. Milanovitch

(1) C.76, page 7 dated 8th February, 1945. *Memorandum on the present position of the U.N.W.C.C.*

(2) For subsequent developments in the matter of Soviet participation in the Commission, see Chapter VII, Section D: (ii) p. 158 et seq.

(3) Described at his request as Monsieur de Baer in the course of this volume.

India:

Sir Samuel Ranganadhan

Luxembourg:

M. Clasen

French Committee of National
Liberation:

M. Vienot

Professor Cassin

Netherlands:

Jonkheer Michiels van Verduynen

Dr. J. M. de Moor

The Soviet Government was not, it will be seen, among the participants. Lord Simon, who opened the conference, said that the Soviets were, he understood, in agreement with the establishment of the Commission and the general objects which it was to serve; there were, however, one or two points still outstanding which had unfortunately prevented them from being represented at the meeting; while it was right that he should inform the meeting of this circumstance it need not, he said, prevent them from establishing the Commission. As will be seen from the narrative of the proceedings, members of the conference were still not without hope that the Soviets would participate, and they showed regard, on various points, to what was believed to be the Soviet standpoint. The regret which the Lord Chancellor expressed at the absence of the Soviet Government from the conference was, however, fully justified, for their non-participation was destined to be a serious obstacle to the effective discharge of the Commission's mandate.⁽¹⁾

In outlining the steps that were now to be taken, Lord Simon recalled the statements which he, as representing the British Government, and President Roosevelt, on behalf of the United States Government, had made on 7th October, 1942, announcing the intention of the Allied Governments to set up a Commission for the Investigation of War Crimes. Discussions had, he said, been proceeding since then between the various Allied Governments concerned, and the British Government felt that the time had come when a formal decision to set up the Commission should be taken without further delay.

It was apparent, he continued, from the statements of the British and United States Governments on 7th October, 1942, that the Commission was intended to serve two primary purposes:

- (1) It should investigate and record the evidence of war crimes, identifying where possible the individuals responsible.
- (2) It should report to the Governments concerned cases in which it appeared that adequate evidence might be expected to be forthcoming.

These two activities were, Lord Simon said, essential preliminaries if the just and orderly trial of war criminals was to be ensured. He considered it important, however, to draw a clear distinction between the preparatory investigatory work of the Commission and the procedure for the eventual trial of war criminals. The latter would represent a later

(1) See in this connection Chapter VII.D.—Relations with the Soviet Government: and M. de Baer's report on his visit to CROWCASS (M.80—3rd October, 1945).

stage and would be a question for decision by the Governments concerned rather than by the proposed Commission. The Governments concerned would also be specially interested in the treatment of those who might properly be described as the arch-criminals. It might well be felt, he suggested, that this was primarily a political question.

Before the formal decision to set up a United Nations Commission for the Investigation of War Crimes was put to the meeting, certain declarations were made by some of the representatives on behalf of their Governments.

The Netherlands Government, starting from the supposition that justice would in principle be administered by national courts, considered that a fact-finding committee of the Commission should be competent to prepare the trial of enemy subjects and to decide, having regard to the evidence, what names of enemy subjects should be placed on the list of persons whose surrender would be demanded, and what national courts would have jurisdiction to try them if they were claimed by more than one country; and that the committee in question would also make proposals in regard to the tribunal and the procedure for the trial of major criminals. It would not, however, be competent in regard to the bringing to trial of nationals of Allied States. The trial of quislings would be left exclusively to the National Governments, which could demand their surrender without the intermediary of the Committee.

The Chinese Ambassador said that, while his Government were in full agreement with the proposal to establish the Commission, they wished to make it clear that they reserved the right, after the Commission had been set up, to raise the question of the period of time which its investigations should cover in so far as war crimes committed in China were concerned. In this connection Dr. Wellington Koo pointed out that China had suffered the consequences of enemy invasion for a longer period than the other Governments represented at the meeting.

The meeting took note of these statements.

In regard to the Netherlands declaration Lord Simon, on behalf of the British Government, agreed that the trial of quislings was the business of the Government individually concerned; but he doubted whether there would be agreement on the proposal that the War Crimes Commission should make preparations for the bringing to trial of war criminals.

He proposed therefore that the meeting should take a decision to set up the Commission forthwith, but that the possible expansion of the scope of its investigations and functions should be reserved for future consideration.

This was unanimously agreed to.

It was also agreed that the headquarters of the Commission should be established in London.

(1) Panels

The Lord Chancellor, on behalf of the British Government, proposed

that the Commission should be empowered to set up panels or arrange otherwise, in the light of the wishes of the Governments most closely concerned, for investigations on its behalf so far as these seemed appropriate. He understood—and the Chinese Ambassador confirmed this—that the Chinese Government was in favour of the establishment of a panel in Chungking. The Soviet Government, on the other hand, did not consider that the circumstances called for the establishment of a panel in the Union of Soviet Socialist Republics.

The meeting adopted the proposal.

(2) *Chairmanship and Procedure*

The Lord Chancellor said that his Government had originally proposed that it should be left to the Commission to settle the question of chairmanship at its first meeting. The Soviet Government, however, had proposed that the chairmanship might suitably be held in rotation by the representatives of the United Kingdom, the United States, the Union of Soviet Socialist Republics and China.

The other members having been invited to express their views on this question, the Norwegian Ambassador said that on purely practical grounds he thought the British representative on the Commission should be appointed Chairman, to begin with.

The Netherlands Ambassador said that, if the principle of rotation were adopted, it should apply also to the smaller States; but he favoured the appointment of the British representative as Chairman as an act of courtesy to the British Government.

The Polish Ambassador thought that if the presidency were held in rotation the practical functioning of the Commission would suffer and the chairmanship would, in practice, be left in the hands of the Secretariat. For this reason he preferred the temporary appointment of a British Chairman.

M. Vienot, representing the French Committee of National Liberation, considered that, if the principle of rotation were adopted, it should apply equally to all the members; he agreed with the principle of a permanent British Chairman.

The Greek Ambassador was also opposed, on practical grounds, to the principle of a rotating chairmanship.

The United States Ambassador said that his Government did not object to the Soviet Government's proposal. On the other hand, he had authority to support the proposal for a British Chairman and personally he would be prepared to support it. He had been instructed to make it clear that if the Commission should wish to elect the United States representatives to be its Chairman, his Government would wish to be consulted first.

The Chinese Ambassador, while not objecting to a British Chairman, felt that, as the Soviet Government had put forward their proposal, and as they were not represented at the meeting, it would be preferable to

leave the matter to be decided by the Commission, as was originally proposed by the Lord Chancellor.

The Czechoslovak Ambassador agreed that the question of chairmanship should be left to the Commission to settle.

When the members had thus expressed their views, the Lord Chancellor said that, although the appointment of a British Chairman, if made, would be temporary and without prejudice to final arrangements, he agreed with Dr. Wellington Koo that, in the absence of a Soviet representative, it would be preferable not to take a decision in conflict with the Soviet proposals. He felt that, if it were left to the Commission to elect its first Chairman at the first meeting, that need not prevent arrangements for the recruitment of a Secretariat from being taken in hand on a preliminary basis forthwith.

It was accordingly agreed that it should be left to the Commission to settle the question of its first Chairman when it met, without prejudice to the question of rotation in office.

It was also agreed that it should be left to the Commission to settle its own procedure.

(3) *Secretariat*

The Lord Chancellor said that his Government were prepared to find a British Secretary-General for the Commission, if this were considered appropriate in view of the headquarters of the Commission being in London. There being no dissent, he put forward the name of Mr. H. McKinnon Wood (who was not, at that time, in England) as Secretary-General, and suggested that he should receive from the other Governments informal suggestions for the appointment of additional staff.

The Norwegian Ambassador thought that the staff should be limited to British subjects, at the outset, as the occupied countries of Europe were short of administrative personnel, and could not, therefore, be adequately represented. The United States Ambassador did not wish to go on record as supporting the proposal for a purely British Secretariat, and felt that the Soviet Government might have views on this question. It was accordingly agreed that the appointment of a British Secretary-General should be approved, but that the question of further appointments to the Secretariat should be left entirely open.

(4) *Expenses*

The meeting agreed that each member of the Commission and his staff, if any, should be paid by the Government appointing him, but that the salary of the Secretary-General and additional secretarial and administrative expenses should be divided equally between the various Governments represented on the Commission. The Luxembourg Chargé d'Affaires said that his Government felt that equal division of expenses would fall heavily on smaller countries and asked whether contributions could not be made proportionate to the resources of the countries represented. It was agreed that the arrangements should be subject to the possibility of future adjustment between the Governments concerned.

(5) *Proposed "Technical Committee"*

In addition to the more or less formal matters, a question of substantial importance arose in connection with the proposal for what was termed a "Technical Committee"—in reality a body of legal experts.

Explaining this project, the Lord Chancellor said that there might be a number of questions relating to the trial and punishment of war criminals which would require to be settled, but would fall outside the competence of the Commission. He accordingly proposed, on behalf of the British Government, the establishment of a committee of legal experts, nominated by those of the Allied Governments participating in the Commission who desired to be represented on the committee. The latter would work concurrently with the Commission and in adequate contact with it; it would be charged with advising the Governments concerned upon matters of a technical nature, such as the sort of tribunals to be employed for the trial of war criminals, the law to be applied, the procedure to be adopted and the rules of evidence to be followed. The function of this committee would be to formulate recommendations for the guidance of Governments. It would not be empowered to take any decisions which would be binding upon the Governments.

The proposal for a Technical Committee of the sort thus indicated was supported on general grounds by the French delegate, who observed that the War Crimes Commission would require guidance as to the general principles which it was to follow in its investigations, and these general principles must be established by agreement between the Governments concerned. A Technical Committee, separate from the Commission, could facilitate this. The proposal was also supported by the British representative who considered that in practice there would be scope for both bodies. An active investigatory Commission, would, he said, be in danger of becoming immersed in detail, and would need the help and guidance of another body, more directly representing the Governments concerned, which would take decisions based also on political considerations. The two bodies must, however, be in close contact, so as to ensure that the principles established by the Technical Committee should be applicable in practice.

The formation of the proposed Technical Committee, at this stage, received, however, only qualified support from the meeting. The United States Ambassador questioned the need of setting it up before the Commission itself had begun its work. The Chinese Ambassador and the Australian High Commissioner also indicated a similar reservation. The Netherlands representative feared that the existence of the two separate bodies might result in friction.

In view of the evident reluctance of the meeting to proceed further, at the moment, with the creation of the Technical Committee, the Lord Chancellor asked the Conference to agree that it would be desirable to set up, in due course, a Technical Committee of the nature and for the purposes already indicated, and that the members should give consideration to the choice of their representatives upon it, though the actual establishment of the Committee would be deferred.

The proposal, in this form, was accepted by the Conference.

The meeting closed after adopting a resolution for communication to the Government of the U.S.S.R., expressing the hope of those present that the Soviet Government would participate in the work of the Commission, and also in that of the Technical Committee when the latter body had been set up.

The subsequent decision to abandon the project of a separate Technical Committee, independent of the Commission, is dealt with in the section dealing with the establishment of Committee III.

(iv) PREMISES OF THE COMMISSION

The Commission was at first installed by courtesy of the United Kingdom authorities in the Royal Courts of Justice, in the Strand, London, W.C.2. In July, 1945, it moved to Church House, Westminster, where it remained until January, 1946, when premises were allotted to it in Lansdowne House, Berkeley Square.

B. ORGANISATION OF THE COMMISSION

(i) THE MEMBERS

The delegates of the participating Powers, who formed the Constituent Meeting of the United Nations War Crimes Commission at the Foreign Office on 20th October, 1943, have been enumerated. The names of the representatives who composed the Commission when it began its regular sittings in 1944 varied somewhat from this list. As recorded in January of that year, the Commissioners and Deputies were:⁽¹⁾

Australia:	France:
The Rt. Hon. Lord Atkin	Professor André Gros.
United Kingdom:	Greece:
Sir Cecil J. B. Hurst	Monsieur C. Stavropoulos
United States:	India:
H.E. Mr. Herbert Pell	Sir Samuel Runganadhan
Belgium:	Luxembourg
Monsieur M. de Baer	Monsieur Victor Bodson
Monsieur F. Dumon	Netherlands:
China:	Dr. J. M. de Moor
H.E. Dr. Wellington Koo,	Norway:
Chinese Ambassador	H.E. Mr. Erik Colban,
Dr. Y. Liang	Norwegian Ambassador
Czechoslovakia:	Poland:
Dr. B. Eéer	Professor Stefan Glaser
Dr. V. Benes,	Yugoslavia:
Czechoslovak Ministry	H.E. Vladimir Milanovitch
of Justice	Dr. Kuhar
	Mr. Milan Ristitch

(1) The changes which subsequently occurred among the Commissioners are noted in Chapter VII, Section A. p. 135.

(ii) THE CHAIRMANSHIP

As mentioned in the previous section the Soviet Government's proposal that the chairmanship should be held in rotation by the Four Powers had not commended itself to the constituent meeting at the Foreign Office on 20th October, 1943, and no decision had been taken on the alternative proposals put forward at that meeting. At the first informal meeting of the Commission it had been agreed to leave the chairmanship in suspense until official meetings began. The chair had been provisionally occupied by Sir Cecil Hurst (United Kingdom) at the first three (unofficial) meetings of the Commission on 26th October, 1943, 1st December, 1943 and 4th January, 1944.

At the first official meeting on 11th January, 1944, Sir Cecil Hurst was formally elected as Chairman. When he retired, for reasons of health, in January, 1945, the Right Hon. Lord Wright of Durley, who was sitting as representative of Australia in the Commission, was asked to act as Chairman, pending the election of a successor. On 31st January, 1945, Lord Wright was formally elected by the Commission as its Chairman.

(iii) THE SECRETARIAT

As previously mentioned the name of Mr. Hugh McKinnon Wood had been put forward for the post of Secretary-General by the Lord Chancellor at the constituent meeting at the Foreign Office on 20th October, 1943. At the first official meeting of the Commission on 11th January, 1944, the Commission confirmed this choice. On 11th September, 1945, Mr. McKinnon Wood's release was requested by the Foreign Office which required him for other work, and on 8th November, 1945, Colonel G. A. Ledingham, D.S.O., M.C., was elected by the Commission as Secretary-General.

During the earlier stages of the development of the United Nations War Crimes Commission, the Secretariat was maintained on an extremely small scale, consisting only of the Secretary-General, and three clerical assistants. As the work progressed, this number was found insufficient. In May, 1944, the establishment was increased by a Research Officer (Lieut.-Colonel H. Wade). To meet the pressing need of further development, the Secretariat was reinforced in March, 1945 by a legal officer, Dr. E. Schwelb (Czechoslovakia), and in May, 1945 by a second legal officer, Dr. J. Litawski (Poland). Dr. Schwelb became secretary to Committee III (Legal), and Dr. Litawski to Committee I (Investigation). When the compilation of the Law Reports was undertaken, under control of Committee III, in the summer of 1946, Mr. G. Brand was appointed to assist Dr. Schwelb in this work. In June, 1945, Mr. E. Lyman, U.S.A., was appointed as Chief Executive Officer and as Secretary of the Executive Committee, but when he resigned in November, 1945, in order to return to America, that post was abolished.

Further changes took place in the spring and summer of 1947 when Dr. Zivkovic (Yugoslavia) and Dr. Mayr-Harting (Czechoslovakia) joined the Secretariat and Dr. Schwelb left to take up an appointment in the United Nations. Meanwhile, the work of the Secretariat had been enlarged

by the preparation of the History of the Commission and the report for the United Nations on Human Rights.

C. STRUCTURE OF THE COMMISSION

(i) PROCEDURE

When the United Nations War Crimes Commission was created, as related above, by the Diplomatic Conference at the Foreign Office on 20th October, 1943, no precise rules were laid down for its organisation or procedure. The regulations of these questions was appropriately left to the Commission. Accordingly, at a first unofficial meeting on 26th October, 1943, the Commission appointed a sub-committee, under Sir Cecil Hurst, to submit plans for its organisation. The discussion of this sub-committee touched on some of the more general problems confronting the Commission; the establishment of lists of war criminals, the machinery for their apprehension and trial, and the signification of the term "war crime." In regard to the latter point it was agreed that no authoritative list of war criminals should be drawn up, for the time being, though the lists compiled at Paris in 1919 might be of illustrative value. At another unofficial meeting of the full Commission on 2nd December, 1943, the plans worked out by the sub-committee were approved.

At the next meeting on 11th January, 1944, it was agreed that the Commission would consider itself organised for business on 18th January, 1944. On the latter date, the Commission formally confirmed all the elections, resolutions, etc., accepted at the meeting on 11th January, 1944, together with the proceedings of the earlier unofficial meetings; and it adopted the rules of procedure which had been drafted by a sub-committee, consisting of Mr. Pell (U.S.A.), Professor Gros (France), Dr. Wellington Koo (China) and Lord Atkin (Australia).

As regards the latter point, among the chief points of procedure agreed upon in this early stage were: that the elected Chairman should have an additional vote, in the case of a tie, and that all members of the Commission, were entitled to attend the meetings of any Committee, but only the members composing the Committee, and the Chairman of the Commission, were entitled to a vote.

(ii) COMMITTEE I

(1) *The Function of Investigation*

At the time of the creation of the Commission the investigation of war crimes had been regarded as its chief function. Lord Simon, in his opening speech at the constituent meeting of the Commission on 20th October, 1943, had described it as a "Commission for the Investigation of War Crimes"; and in stating its terms of reference he had put the duty of investigation as the first of "its two primary purposes."

At the unofficial preliminary meeting of the members of the Commission, referred to above, on 26th October, 1943, the Australian and Czech representatives had proposed that the several Governments should be asked to submit the evidence that they possessed in support of allegations of

war crimes. A little later, at the sixth meeting of the Commission on 25th January, 1944, the Czech representative moved that a Committee should be formed to consider facts and evidence in order to facilitate the examination of individual cases submitted by the various Allied Governments.

The result of these proposals was (a) the creation of Committee I,⁽¹⁾ under the chairmanship of Monsieur de Baer (Belgium), to examine the information submitted by the different Governments; and (b) the constitution by the participating Governments, pursuant to a recommendation by the Commission, of National Offices whose duty it would be to investigate, in the first instance, reports relating to war crimes, and to submit to the Committee, in an approved form, information concerning the offences which they had investigated. These National Offices were affiliated to the Commission, but they continued to be organs of their respective Governments, functioning in most cases, under the respective Ministries of Justice.

A list of these National Offices is given below. Their number was increased in April, 1945, by the creation of a Luxembourg Office; and in June, 1945, by the admission of Denmark as a member of the Commission. The Canadian National Office was abolished on 28th May, 1946. The work of the British National Office was performed at the outset by the Treasury Solicitor's Office; in May, 1946, it was taken over by the Office of the Judge Advocate General in London.

After the liberation of the occupied countries, some of the National Offices were transferred, wholly or in part, to the capitals of their respective countries. Their duties, as regards the presentation of charges to Committee I continued, however, to be discharged by the representatives of their countries on the Commission, or by their deputies.

The following is a list of the National Offices, and their directors shortly after the capitulation of Germany in 1945.

<i>Australia:</i>	Department of External Affairs, Canberra, A.C.T. War Crimes Commissioner: The Hon. Sir William Webb.
<i>Belgium:</i>	President: M. Antoine Delfosse, ex-Minister of Justice, Brussels.
<i>Canada:</i>	Canadian War Crimes Advisory Committee. Secretary: Wing Commander E. R. Hopkins, c/o Department of External Affairs, Ottawa.
<i>China:</i>	Principal Officer: Dr. C. T. Wang, Chungking (afterwards at Nanking).
<i>Czechoslovakia:</i>	Czechoslovakia Ministry of Interior (Section IV). Principal Officer: Colonel J. Bartik.
<i>France:</i>	Service de Recherche des Crimes de Guerre, Paris. Principal Officer: Colonel Chauveau.
<i>Greece:</i>	M. Stavropoulos (London).

(1) Full details in regard to Committee I will be found in Chapter XV.

<i>India:</i>	Defence Department, New Delhi. Chief Officer: Secretary to the Government of India.
<i>Luxembourg:</i>	C/o Ministry of Justice, Luxembourg. President: M. Charles Leon Hammes.
<i>Netherlands:</i>	Principal Officer: Dr. J. van den Bergh, London. From 31st October, 1945, onwards, Dr. J. S. Bijl, head of the War Crimes Investigation Office, Amsterdam.
<i>New Zealand:</i>	Department of External Affairs, Wellington, New Zealand. Principal Officer: Mr. Foss Shanahan.
<i>Norway:</i>	Norwegian Police Investigation Office, London. Principal Officer: Major Finn Palmstrom.
<i>Poland:</i>	Polish War Crimes Office. Principal Officer: Dr. J. Litawski.
<i>United Kingdom:</i>	Treasury Solicitor's Department, London. Principal Officer: The Treasury Solicitor.
<i>United States of America:</i>	Office of the Judge Advocate General of the Army, War Crimes Office, Washington, D.C. Principal Officer: Brigadier-General J. M. Weir.
<i>Yugoslavia:</i>	Yugoslav State Commission for the Investigation of War Crimes, Belgrade. Chairman: Professor Dr. Nedeljkovic.

The functioning of Committee I (sometimes referred to as the "Committee on Facts and Evidence,"⁽¹⁾) and the rules of international law on which it founded itself, are referred to elsewhere in full detail. Here it may briefly be said that the procedure of the Committee was to meet regularly once a week and to examine the charges filed by the National Offices—or, in exceptional cases, by the Commission itself—in the presence of representatives of Governments submitting the charges. When a sufficient number of names had been accepted to justify the printing of a List, the current List would be declared closed and a draft of it would be circulated to the Commission for the latter's approval at a Plenary Meeting. When finally approved, the List was printed, and distributed to the different apprehending authorities in order that they might take the necessary action.

The progressive growth of these tasks is illustrated by the fact that, whereas by the end of March, 1945, the Commission had issued only five Lists, this total had risen by August, 1947, to 60 Lists, comprising over 28,000 persons and units.

Some of the participant Governments created, in their own countries, war crimes commissions which investigated alleged war crimes, and forwarded charges to the Commission, through the intermediary of their own National representatives.

(1) With regard to this expression it should be noted that at the Conference in the Foreign Office on 20.10.43, Lord Atkin observed that the description of the Commission for Investigation of War Crimes as a "fact-finding Commission" was inaccurate and rather dangerous. It must be the tribunal which tried the war criminal which found the facts; the Commission was engaged in collecting material which might be put before the tribunal.

One of the first examples of this sort came from Yugoslavia, where a State Commission for Ascertaining the Crimes of the Occupying Forces drew up regulations as early as 6th May, 1944. The French Government, in November, 1944, instituted a commission, the "Service de crimes de guerre ennemis" in Paris, which was instructed to collect and verify information and to submit files to the Commission; the Netherlands Government, in November, 1946, announced the existence of a Commission for the Investigation of War Crimes; other Governments took similar action. The Soviet Government also created an "Extraordinary State Commission for Ascertaining and Investigating Crimes committed by the German-Fascist Invaders and their Accomplices," but this body was not, at any time, in contact with the United Nations War Crimes Commission.

(2) *Personnel of Committee I*

Chairman and Members. The Chairmanship of the Committee was held from the outset of the Commission's work until August, 1947, by Monsieur de Baer (Belgium). The deputy Chairman for the greater part of that time was Sir Robert Craigie (United Kingdom). After the departure of M. de Baer, Sir Robert Craigie and Mr. E. W. Kintner (U.S.A.) were appointed as joint Chairmen. Mr. Kintner resigned the joint chairmanship early in January, 1948, owing to pressure of work with the Legal Publications Committee.

The other original members were: Mr. Pell and Dr. Lawrence Preuss (U.S.A.) and Dr. Ečer (Czechoslovakia). In addition Sir Cecil Hurst (United Kingdom) attended the meetings, *ex officio*, as Chairman of the Commission. The membership was increased on 21st March, 1944, by the election of the late Dr. de Moor (Netherlands). Subsequently, at different dates, the Committee comprised: Lord Wright (then representative of Australia, with Mr. J. Oldham as deputy); the late Lord Finlay (United Kingdom); and Mr. Justice Mansfield (Australia), who also acted for a time as deputy Chairman; Major Fanderlik and Dr. Mayr-Harting (Czechoslovakia), who replaced Dr. Ečer; Colonel Hodgson (U.S.A.) who was replaced in his absence by Captain Wolff; Colonel Springer and Mr. Kintner (U.S.A.); Dr. Neumann (Czechoslovakia), who succeeded Major Fanderlik and Dr. Mayr-Harting, and was in turn succeeded by Dr. Zeman in August 1947; Mr. Aars Rynning (Norway), who replaced M. de Baer after the latter's departure.

(3) *Secretariat*

In its early existence, owing to the smallness of the Commission's staff, Committee I had no secretariat of its own, and, although its decisions were recorded, no formal minutes of its debates were circulated. Subsequently, after the appointment of a second legal officer, Dr. Litawski, the latter became Secretary of the Committee, the staff of which was more than once enlarged to meet the growing volume of work caused by the constantly increasing number of indictments received from Europe and the Far East.

The Secretariat of Committee I, thus reinforced, besides producing

and indexing the Commission's Lists, issued periodical statistical reports, instructions for National Offices regarding forms and substance of charges, and the processing of charge-files, besides numerous memoranda on questions of law and procedure which were referred to the Legal Committee or to the Plenary Commission itself.

(iii) COMMITTEE II: THE FUNCTION OF ENFORCEMENT

The second main committee of the Commission was concerned with "Enforcement," a term which comprises all measures considered necessary to ensure the detection, apprehension, trial and punishment of persons responsible for war crimes.

At its meeting on 1st February, 1944, the Commission constituted this Committee with the following members: Dr. Wellington Koo (China); Sir Samuel Runganadhan (India); Mr. Erik Colban (Norway); Mr. H. Pell (U.S.A.); Dr. Kukar (Yugoslavia); Lord Atkin (Australia); Professor André Gros (France). The Committee was further reinforced by the appointment of Sir Cecil Hurst (25th April, 1944), Monsieur de Baer (Belgium—8th February, 1944); Monsieur Blum (Luxembourg—23rd May, 1944); and Dr. Eéer (Czechoslovakia); and later by the appointment of Flying Officer Bridgland (Australia); Commander Mouton (Netherlands); and Dr. Zivkovic (Yugoslavia).

Mr. H. Pell (U.S.A.) was elected by the Committee as its Chairman. He was succeeded, after his departure, by Colonel J. Hodgson (U.S.A.).

Committee II met once a week, at the outset, working in close contact with Committee III. In course of time its duties came to be assumed either by Committee I or Committee III; its meetings became less frequent and finally ceased. No separate secretariat was created for this committee.

Details of the deliberations of Committee II will be found in later chapters.⁽¹⁾ Here it will suffice to say that its chief efforts were directed (a) to the elaboration of clauses to be inserted in the expected Armistice with Germany to ensure the apprehension of war criminals; (b) to the provision of draft conventions for the establishment of courts for trial of war criminals in cases where, owing to an inter-allied decision or to other reasons, it was not convenient for them to be tried by national courts; and (c) to projects for the creation of war crimes offices or agencies in the occupied enemy countries to undertake the detection and arrest of war criminals.

As will be shown in Chapter XIV, the recommendations of Committee II referring to tribunals for the trial of war criminals influenced not only the creation of the Nuremberg International Military Tribunal which was instituted by the Four-Power Agreement of 8th August, 1945, but also the establishment of the many other national and inter-allied military tribunals which were invested with jurisdiction over war crimes, including, in the first place, the International Military Tribunal for the Far East.

(iv) COMMITTEE III: THE ADVISORY FUNCTION

(1) *Abandonment of the Technical Committee*

As mentioned above, the appointment of a body of legal experts—

(1) See Chapters XIII and XIV.

styled the Technical Committee—working concurrently with the Commission, had been left open at the constituent meeting held at the Foreign Office on 20th October, 1943. It was a point which called for immediate decision.

At the first unofficial meeting of the Commission at the Law Courts on 26th October, 1943, this question was placed in discussion. It was argued, in the debate, by the Belgian and Norwegian representatives that the Technical Committee ought to be a sub-committee of the Commission and not an independent body; that is to say that its tasks should be prescribed by the Commission itself. The British representative observed that the term "technical committee" was perhaps misleading, and that the idea was to have a body which could discuss large questions of principle and of policy.

At the second informal meeting on 2nd December, 1943, the subject of the Technical Committee was again debated, this time in connection with a discussion on the law which should be applicable to certain classes of war crimes. The question arose how basic legal questions of this kind ought to be dealt with: whether by a sub-committee of the Commission or by the so-called Technical Committee—which did not yet in fact exist—or by some combination of the two.

The Chairman explained that the Technical Committee had been conceived as a body of persons intimately connected with the formation of government policy (e.g., in the case of the United Kingdom, the Law Officers of the Crown). Fear was, however, expressed by some of the members that the work of the Commission would constantly be brought to a standstill if it had to refer legal problems to an independent body. The Commission, it was represented, was itself a body of jurists. Several members wished to have legal questions considered as they arose by a sub-committee of the Commission, which, they suggested, might be strengthened by adding members, as had been contemplated in the plans for the Technical Committee, or by any other method guaranteeing close contact between the Commission and the Committee. It was ultimately decided that each member would ascertain and report the attitude of his own Government on the subject, and the Chairman undertook to take the matter up with the United Kingdom Government.

To pursue this matter to its conclusion: the opposition within the Commission towards the principle of an independent Technical Committee showed no sign of abating. At the fifth meeting on 18th January, 1944, the Chairman informed the Commission that Mr. Eden, the British Secretary of State for Foreign Affairs, was in favour of dropping the project, but desired to be sure that the other Governments represented on the Commission took the same view, as the idea of having a technical committee had originated with some of those Governments. At the next meeting, a week later, it was ascertained that no Government had objected to the abandonment of the Technical Committee.

However, as the debate showed a division of views in regard to the consequences of this step, the Foreign Office was informed that the

question of the transfer to the Commission of the problems originally intended for the Technical Committee was being reserved.

As a result of an inquiry, which was addressed to the British Foreign Office, by request of the Commission, it was ascertained that Mr. Eden did not propose to convene another conference to define more fully the functions of the Commission. It would suffice, in his view, to send a note to that effect to each of the United Nations Governments. The Commission could then proceed with its work on the footing that it was now charged with the functions which would have been exercised by the Technical Committee.

Similar views were expressed in replies received from some of the other Governments. Thus, the United States Government accepted the abandonment of the Technical Committee and the taking over of its duties by the Commission. The Czechoslovak Government considered that the competence of the Commission should be extended to all questions connected with the problem of war crimes and that "the committee of experts should be dropped." The French Committee of National Liberation also agreed that the Technical Committee should be abandoned, adding "at the same time it is understood that all studies of a legal nature, as well as the possibility of making proposals to the Governments will be entrusted to the Commission itself."

The implications of these decisions were of the highest import. The Commission now became empowered to deal, in an advisory capacity, with questions of policy and of law which, under the original plan, would have been decided separately by an independent body. Owing to the significance of many of the legal questions which were subsequently examined, the Commission's advisory function tended, in course of time, to exceed in importance its original task of investigation.

(2) *Creation of the Legal Committee; Personnel*

The next step was the appointment by the Commission of a committee of its own to advise on legal questions. This was done on 1st February, 1944, by the creation of Committee III. The following were nominated as members of the new Committee: Dr. Liang (China); Dr. Eéer (Czechoslovakia); M. Stavropoulos (Greece); Dr. Preuss (U.S.A.); Professor Glaser (Poland). The latter was elected as chairman at the first meeting.

On 25th April, 1944, the strength of the Committee was increased by the election of Sir Cecil Hurst (United Kingdom) and of Mr. Pell (U.S.A.); and on 23rd May, 1944, by the election of M. Blum (Luxembourg).

On 8th August, 1944, the Committee was reconstituted so as to consist of: Dr. Eéer (Chairman); M. Stavropoulos (Greece); Colonel Hodgson (U.S.A.); Dr. Liang (China); Dr. Zivkovic (Yugoslavia); Mr. Terje Wold (Norway); Professor Hurwitz (Denmark); Commander Mouton (Netherlands) and Sir Torick Ameer Ali (India).

Subsequent changes in the Committee resulted in the appointment of: Dr. Szerer (Poland), on 26th September, 1945, in place of Dr. Glaser, who had left; Sir Robert Craigie (United Kingdom) on 3rd October, 1945; Mr. Justice Mansfield (Australia) on 9th January, 1946.

On 20th August, 1945, Mr. Wold (Norway) was elected as acting Chairman during the absence of Dr. E er; and on 12th February, 1946, Dr. Mayr-Harting was elected as acting Chairman. After Dr. Mayr-Harting's departure, Sir Robert Craigie was elected Chairman of Committee III. Mr. Kintner (U.S.A.) was appointed as member of the Committee in June, 1946, and Mr. Aars Rynning (Norway) in September, 1946.

On 22nd August, 1945, Dr. Schwelb, Legal Officer to the Commission, was appointed Secretary to the Committee.

The deliberations of the Legal Committee are related elsewhere in this History.⁽¹⁾ It may be noted, however, in passing that its first concern was to appoint rapporteurs on several important questions: such as definition of a war crime; superior orders; gaps in national legislation; and collective responsibility.

For the rest, Committee III was constantly being called on to examine and advise on a number of questions of substantive law when dealing with particular charges brought before it by National Offices; those questions ranged from the defence of "military necessity" to the implications of "usurpation of sovereignty."

D. THE LEGAL STATUS OF THE COMMISSION

The United Nations War Crimes Commission, as established by the meeting of the Allied and Dominions representatives held in London on 20th October, 1943, was an international body formed and created by its member Governments. The minutes of the inaugural meeting do not contain any detailed provisions regarding the Commission's legal status. Its character as an international organisation or inter-governmental agency, however, has never been doubted. The Diplomatic Protocol of 20th October, 1943, provides that the headquarters of the Commission should be established in London and that the Commission should be empowered to set up panels or arrange otherwise for investigations on its behalf so far as these seem appropriate. The meeting decided that the Commission should have a Secretariat and that while each member of the Commission and his staff, if any, should be paid by the Government appointing him, the salary of the Secretary-General and additional secretarial and administrative expenses should be divided between the various Governments represented on the Commission.

From this it appears that the Governments, when establishing the Commission, endowed it with the legal capacity of owning property and entering into contracts, because otherwise no Secretariat could be established and no staff engaged.

The Commission, although it had its headquarters in the territory of one of its member States (the United Kingdom) and though, in the course of its activities, it set up a Far Eastern Sub-Commission with its site on the territory of another member State (China), it had not been incorporated in the municipal law of any particular country, but was a truly international body not subject to any specific municipal legal order.

(1) See Chapters VIII and XV.

It was decided at the inaugural meeting of the Commission that its headquarters should be in London. This decision was never questioned or altered; it is, therefore, of particular importance how the status of the Commission in international law has been given effect to in the municipal law of the United Kingdom.

In 1944 the legislature of the United Kingdom passed a statute, the Diplomatic Privileges (Extension) Act, 1944, which deals, *inter alia*, with privileges, immunities and capacities of certain international organisations and their staffs.

The relevant provisions of the United Kingdom Act apply to any organisation declared by Order in Council to be an organisation of which His Majesty's Government in the United Kingdom and the Government or Governments of one or more foreign sovereign Powers, are members.

Such declarations have, so far, been made by Order in Council with regard to a considerable number of international organisations, among them one with regard to the United National War Crimes Commission.

The Diplomatic Privileges (Extension) Act of 1944 gave power to His Majesty to confer by Order in Council on the organisation, on representatives of member Governments on it, and on officers and servants of the organisation, certain immunities and privileges. The extent of the immunities and privileges granted to the Commission, to the representatives of the member Governments on it and to its high officers and other officers and servants, have been specified by an Order in Council, S.R.&O. 1945, No. 1211.

The Commission as such had the following immunities and privileges :

- (a) Immunity from suit and legal process.
- (b) The like inviolability of official archives and premises occupied as offices as is accorded in respect of the official archives and premises of any envoy of a foreign sovereign Power accredited to the United Kingdom.
- (c) The like exemption of relief from taxes and rates, other than taxes on the importation of goods, as is accorded to a foreign sovereign Power.
- (d) Exemption from taxes on the importation of goods directly imported by the organisation for its official use in the United Kingdom, or for exportation, such exemption to be subject to compliance with such conditions as the appropriate British authorities (the Commissioners of Customs and Excise) may prescribe for the protection of the Revenue.

It was further provided that the Commission should have the legal capacities of a body corporate.

One representative of each member Government on the Commission had the following immunities and privileges, corresponding to what is generally called " full diplomatic status ":

- (a) The like immunity from suit and legal process as is accorded to an envoy of a foreign sovereign Power accredited to the United Kingdom.
- (b) The like inviolability of residence as is accorded to such an envoy.
- (c) The like exemption or relief from taxes as is accorded to such an envoy.

E. THE FAR EASTERN AND PACIFIC SUB-COMMISSION

As mentioned above it had been resolved at the constituent meeting at the Foreign Office on 20th October, 1943, that the United Nations War Crimes Commission should be empowered to set up panels, and it had been noted that the Chinese Government was in favour of the establishment of one such panel at Chungking, at that time the provisional capital of China.

A Foreign Office memorandum of March, 1943, had indicated that such panels should enjoy the greatest possible degree of autonomous action consistent with the central co-ordinating functions of the Commission. On 10th May, 1944, the Commission adopted a proposal by the Chinese Ambassador establishing a Far Eastern Sub-Commission as a branch of the United Nations War Crimes Commission.

(i) ORGANIZATION OF THE SUB-COMMISSION

The Commission's letter⁽¹⁾ which was despatched in June, 1944, to the Governments, announcing the establishment of this Sub-Commission, declared that the Sub-Commission might sit at other places than Chungking, but that recommendations for modifying the principles and rules adopted by the main Commission, which might be required by local circumstances, should be reported to the main Commission for approval; that recommendations to the Governments must be made through the Commission; that the expenses of the sub-Commission should be met in the same manner as those of the Commission—i.e., that each Government would pay the expenses of its representatives and the cost of preparing and transmitting cases to it and that the expenses incurred in the operation of the Sub-Commission itself would be met out of the budget of the main Commission. The Chinese Government had been good enough to provide the Sub-Commission with premises in China, as was done in London for the main Commission by the United Kingdom Government.

The Far Eastern Sub-Commission held its inaugural meeting on 29th November, 1944. The Governments represented on it were to be those interested in the Far Eastern problems, but no Government not at war with Japan might be a member.

The possibility of a second panel being required, in view of the distance between the theatres of war in the Far East, was raised in the main Commission⁽²⁾ but the proposal never, in fact, took shape.

(1) See C.25. 2.6.44. *Establishment of a Far Eastern and Pacific Sub-Commission*; draft letter to the Governments.

(2) See M.15, 25.4.44.

The Sub-Commission set up two sub-committees: a Finance Committee and a Committee on Facts and Evidence.

(ii) COMPOSITION OF THE SUB-COMMISSION⁽¹⁾

The Governments of eleven United Nations accepted the invitation to participate in the Chungking Sub-Commission, namely: Australia, Belgium, China, Czechoslovakia, France, India, Luxembourg, Netherlands, United Kingdom, United States of America. Poland was subsequently added. Dr. Wang Chung Hui, Secretary-General of the Supreme National Defence Council, the Chinese representative, called an inaugural meeting on 29th November, 1944, and was elected as first Chairman. He was succeeded in June, 1946, by Dr. Liu Chieh, Vice-Minister for Foreign Affairs. Sir Horace Seymour, British Ambassador; M. Jacques Delvaux de Fenffe, Belgian Ambassador, served at different times as acting Chairmen.

The following is a list of the representatives of the participating States, at different times during the life of the Sub-Commission:

The United States of America:

H.E. General P. Hurley; Mr. George Atcheson, Jr.; Mr. Robert Lacy Smith; Mr. Ray Ludden; Colonel E. H. Young, Major W. West, Captain Bailey, Mr. Ralph Clough.

Australia:

H.E. Mr. Douglas Berry Copland; Mr. Keith Officer; Mr. Patrick Shaw; Mr. H. A. Stokes; Mr. Charles Lee.

Belgium:

H.E. Jacques Delvaux de Fenffe; Mr. Robert Rothschild; Mr. Charles Brognicz; Mr. Max Wery.

China:

H.E. Dr. Wang Chung-Hui; H.E. Dr. K. C. Wu; H.E. Dr. Hsieh Kwan Sheng; H.E. Dr. Liu Chieh; Dr. Wang Hua Cheng; Mr. Yang Yun Chu; Dr. Hsu Tuen Chang; Mr. Cha Liang Chien; Dr. Dison Poe; Dr. C. Y. Cheng.

Netherlands:

H.E. Mr. A. H. J. Lovink; Dr. R. H. van Gulik; Mr. J. van den Berg; Mr. C. D. Barkman.

(iii) FUNCTIONING OF THE SUB-COMMISSION

About ninety per cent. of the cases presented to the Sub-Commission came from the Chinese National Office; these were first prepared by the Ministry of Justice and verified by the Ministry of Defence; they were then translated into English by the Ministry of Foreign Affairs and copied on special charge sheets modelled after those in use by the Main Commission. From the Ministry of Foreign Affairs, these cases were transmitted first to the Secretariat and then to the Sub-Committee on Facts

(1) Doc. Misc. 109, 17.9.47. *Final Report of the Far Eastern and Pacific Sub-Commission.*

and Evidence. After careful examination, the Sub-Committee classified them as A-1, A-2, B and C. The findings of the Sub-Committee were reported back to the Sub-Commission for approval. Lists of Japanese war criminals were then printed by the Secretariat. The Sub-Commission also furnished the main Commission regularly with minutes of all meetings, which were usually held every two or three weeks. Up to March, 1947, it had held 38 meetings.

F. MISCELLANEOUS COMMITTEES

(i) THE FAR EASTERN COMMITTEE OF THE MAIN COMMISSION

In connection with the establishment of the Chungking Sub-Commission in the Far East, the main Commission created a small sub-committee of its own, consisting of the representatives of countries specially interested in the Far East, under the chairmanship of the Chinese Ambassador, Dr. Wellington Koo.

(ii) PUBLIC RELATIONS COMMITTEE

The attitude of the Commission towards Press publicity, at the outset of its work, was that the Press should be told that it could best help the Commission by not talking too much about its work. Later on, after the capitulation of Germany, it was recognised that certain indiscreet or misleading statements in the newspapers were due, in part, to the lack of a recognised channel for information. An attempt to meet the difficulty by holding a Press conference in August, 1944, was not wholly successful. On 7th February, 1945, it was decided to create a Public Relations Committee. The engagement of a Public Relations Officer was agreed to on 6th June, 1945, and this post was held successively by Colonel L. Fielden and Mr. D. Gibson. In July 1946, the post was abolished, as it was considered to have become superfluous.

(iii) FINANCE COMMITTEE

To deal with the Commission's expenses, including the appointments of staff and the fixing of salaries, a small standing committee on finance was appointed, at first under the chairmanship of the late Dr. de Moor (Netherlands); subsequently of the late Lord Finlay and, after his death, of Sir Robert Craigie.

The nomination of a financial expert to sit without a vote was approved by the Committee on 12th April, 1945. The United States was asked to nominate a second financial expert, but no one with the necessary qualifications was available.

(iv) EXECUTIVE COMMITTEE

To deal with current affairs it was decided in August, 1945, to create an Executive Committee, under the chairmanship of Lord Wright of Durley, to meet regularly either before or after each weekly meeting of the Commission. This Committee comprised the Chairmen of the chief standing committees, with the temporary addition of other members, when questions arose in which they might be specially interested. After

the abolition of the post of Executive Officer in November, 1945, this committee met less frequently and was finally discontinued.

(v) DOCUMENTS COMMITTEE

In order to examine and report on the question of the disposal of the large numbers of captured German documents which had been collected by the occupying armies at Nuremberg, for the trial of the major criminals, and also at a number of other centres on the Continent, a Documents Committee was created by the Commission on 3rd October, 1945, under the chairmanship of Professor Gros (France). The Commission submitted a report, which was adopted by the Commission on 27th February, 1946, after which it held no further meetings.

(vi) LEGAL PUBLICATIONS COMMITTEE

Until October, 1946, matters relating to the publications of the Commission's War Crime Trial Law Reports were discussed by the Legal Committee (Committee III). On the 23rd of that month, however, the Commission set up a separate committee, entitled the Legal Publications Committee to deal with matters concerning the publication of the Law Reports. This committee originally consisted of M. de Baer (Belgium) as Chairman, and Dr. Mayr-Harting (Czechoslovakia), Mr. Burdekin (New Zealand) and Mr. Kintner (United States) as members. Dr. Schram Nielsen (Denmark) and Mr. Aars Rynning (Norway) subsequently replaced Dr. Mayr Harting and Mr. Burdekin upon their departure from the Commission. On 22nd October, 1947, after the departure of M. de Baer for Geneva, Mr. Kintner was appointed Chairman of the Committee. Lord Wright, as Chairman of the Commission, also took a particularly active part in the activities of this Committee.

G. FINANCE

(i) PRELIMINARY ARRANGEMENTS FOR FINANCE

At the first meeting of the Allied and Dominions representatives held at the Foreign Office, London, on 20th October, 1943, to make arrangements for the United Nations War Crimes Commission for the Investigation of War Crimes the representatives agreed to the following proposal of His Majesty's Government in the United Kingdom.

"That each member of the Commission and his staff, if any, should be paid by the Government appointing him but that the salary of the Secretary General and additional secretarial and administrative expenses should be divided equally between the various Governments represented on the Commission."

The meeting took note of a statement by the Luxembourg Chargé d'Affaires who said that his Government felt that equal division of expenses would fall unduly heavily upon the smaller nations and asked whether some means could not be found of making contributions proportionate to the resources of the various countries represented. It was agreed that the financial arrangements should be subject to the possibility of future adjustments between the Governments concerned.

By an arrangement which the British Foreign Office was good enough to make with the Commission, the latter's early expenses were met by advances from that Department until the Commission was able to assume its own financial responsibilities from the contributions of the member Governments. This arrangement continued until 17th January, 1945.

The British Government also provided to the Commission, free of rental charge, suitable accommodation during the Commission's entire existence, for its staff and for such Commissioners who desired or found it necessary to maintain offices on Commission premises. In addition to office space, the British Government provided office furnishings, and extended to the Commission the printing and supplies facilities of His Majesty's Stationery Office on the same terms as those granted to the various Departments of the British Government.

(ii) APPOINTMENT OF FINANCE COMMITTEE

The Chairman of the Commission was authorized at its fourth meeting on 11th January, 1944, to appoint "a Committee to consider matters of finance having to do with the Commission". The Chairman appointed Dr. de Moor (Belgium), Chairman, Dr. B. Ečer (Czechoslovakia) and Monsieur Bodson (Luxembourg) to constitute this sub-committee.

Lord Finlay (United Kingdom) became Chairman of this Committee in June, 1945, and he was succeeded by Sir Robert Craigie in October, 1945. The Committee, during the concluding stages of the Commission consisted, in addition to Sir Robert Craigie, of Mr. Heydon (Australia), Mr. Dutt (India), Colonel R. M. Springer (U.S.A.), and Dr. Zeman (Czechoslovakia). Lord Wright, as in the case of all other Commission Committees, was an ex-officio member.⁽¹⁾

(iii) CONTRIBUTIONS BY MEMBER NATIONS

By a resolution adopted on 21st March, 1944, the Commission made detailed provision for its financial operation, and set its fiscal year to run from 1st April to 31st March inclusive.

Each Government agreed to make a basic contribution of £400 per year towards the expenses of operating the Commission. It was further provided that any sum required for the year's budget in excess of the amount brought in by the basic and equal contributions should be divided according to a total unit system of 1583 with each Government contributing in proportion to the number of units assigned to it. Units assigned to the member Governments were as follows: Australia 30; Belgium 20; Canada 60; China 100; Czechoslovakia 20; Denmark 6; France 80; Greece 10; India 80; Luxembourg 1; Netherlands 30; New Zealand 6;

By a later financial resolution adopted on 22nd August, 1944, provision was made for the creation of a Working Capital Fund of £400 from each

(1) Other members at various periods were:

Colonel Hodgson (U.S.A.); Mr. Oldham (Australia); Lord Wright (Australia); Dr. Mayr-Harting (Czechoslovakia); Major Fanderlik (Czechoslovakia); Mr. Kintner (U.S.A.); Mr. Bridgland (Australia); and Dr. Neumann (Czechoslovakia).

United Kingdom Foreign Office financial experts who advised the Committee at various times were:

Mr. E. Williams, Mr. Keighley, and Mr. S. G. Yorston.

member Government. This fund of £6,800, according to the provisions of the resolution, was to be utilized to pay budgeted expenses which could not be met from other contributions received from member nations, or for expenses not provided for in the annual budget. A financial regulation provided that upon the dissolution of the Commission its assets should be "divided among the Governments which are or have been members of the Commission, as nearly as possible in the proportion in which they have contributed to create them."

(iv) EXPENDITURES OF THE COMMISSION

Lord Wright, Chairman of the Commission, has frequently stated that he considers the United Nations War Crimes Commission to have been the least expensive International Commission known in history. At any rate the records of the Secretary General indicate the following annual expenditures by the Commission: 20th October, 1943 to 31st March, 1944—£730; 1st April, 1944 to 31st March, 1945—£4,238; 1st April, 1945 to 31st March, 1946—£12,462; 1st April, 1946 to 31st March, 1947—£15,137; and 1st April, 1947 to 31st March, 1948—£15,388.

During 1946 provision was made for the Commission to begin the preparation and publication of a History of the Commission and of volumes of Law Reports of Trials of War Criminals. These expenses were met from the regular budget, and, before its dissolution at a meeting on 25th February, 1948, the sum of £6,600 was appropriated from the funds of the Commission for the completion of approximately 15 additional volumes of Law Reports. Despite this last expenditure it was estimated by the Secretary General that approximately £5,400 would remain of Commission assets for distribution to member Governments.

CHAPTER VII

GENERAL HISTORICAL SURVEY OF THE ACTIVITIES OF THE COMMISSION.

A. PERSONNEL OF THE COMMISSION AND THEIR MOVEMENTS

(i) CHANGES IN PERSONNEL OF THE COMMISSION

In the first year of the Commission's activities, from February, 1944 to February, 1945, there were several changes in its personnel. Dr. L. Preuss (U.S.A.), who played an important part in the proceedings of Committees II and III, particularly in the drafting of the Convention for the Establishment of an International Court, returned to America in April, 1944. The Commission also lost the services of the distinguished French jurist, M. Cassin, who had represented the Provisional French Government at the outset. In June, 1944 Lord Atkin, who had already rendered valuable counsel to the Commission, died after a short illness; he was replaced as the representative of Australia, in the following month, by Lord Wright of Durley. In the same month, the place of M. Blum (Luxembourg), appointed Minister in Moscow, was taken by M. Bodson, who was in turn replaced by M. Clasen in October, 1945. For a few months after September, 1944, the British delegation was reinforced by Lord Schuster of Cerne, while M. Milanovic, who had been recalled to his post in Brussels, was replaced as Yugoslav delegate by Dr. Zivkovic.

On 2nd January, 1945 the Chairman, Sir Cecil Hurst, had to resign on medical advice, owing to ill-health aggravated by his unremitting devotion to his charge; he was replaced as United Kingdom representative by the late Lord Finlay, and on 31st January, 1945 Lord Wright was elected Chairman of the Commission in his place. At the same time the Commission was informed of the resignation of Mr. H. C. Pell (U.S.A.) and of M. Colban, the Norwegian Ambassador, both of whom had taken an active part in the work.

In December, 1944 the Canadian Government asked to be represented by an observer, as a preparatory step towards full membership.

It was intimated to the Commission on 29th February, 1944 that Brazil and Mexico might be disposed to join the Commission. The matter was taken up, but no decision seems to have been reached and no formal application for the admission of these States was made.

During the following phase of the Commission, March, 1945 to June, 1946, it lost, by death, the services of two of its most valued members; Dr. de Moor, Netherlands representative, who died in May, 1945, and Lord Finlay, United Kingdom representative, who died on 4th July, 1945. Dr. de Moor's place was subsequently filled by the appointment of Commander M. W. Mouton; Lord Finlay was temporarily replaced

by Mr. Beaumont of the Foreign Office, until Sir Robert Craigie was appointed as representative of the United Kingdom on 20th September, 1945.

Colonel J. V. Hodgson, designated as full representative of the United States, in place of Mr. H. C. Pell, attended in that capacity until 1st May, 1946 when he returned to the United States. He was replaced in August, 1946 by Colonel R. M. Springer. Mr. Kintner served as Acting Commissioner during the interim period. Mr. Oldham the Australian member left for Washington in October, 1945 and was replaced by Flying Officer Bridland.

Sir Torick Ameer Ali was appointed as colleague to the Indian High Commissioner, who was the official representative for India, on 30th May, 1945. Mr. Terje Wold attended as representative for Norway from 25th July, 1945 until 6th March, 1946, after which he was replaced as an observer, by Major Palmström, head of the Norwegian National Office. Dr. Schram-Nielsen, of the Royal Danish Legation, acted as deputy to Professor Hurwitz, accredited representative for Denmark, during his absence. Dr. Szerer, appointed as Polish Commissioner, attended the Commission from 5th September, 1945. Justice Mansfield attended as temporary representative for Australia from 12th December, 1945 until his departure for Tokyo on 17th January, 1946. Mr. Bell, who had attended meetings as Canadian observer since 1944, became the official representative after the accession of Canada in March, 1945; his place was taken by Mr. Horne on 20th March, 1946. In the absence of M. Clasen (Luxembourg), M. de Baer (Belgium) held a watching brief in the Commission for the interests of Luxembourg.

On the departure of Dr. Wellington Koo, the Chinese Ambassador, his place on the Commission was taken by his successor Dr. Cheng in September, 1946. M. Stavropoulos (Greece) was replaced by M. Dimitzas; Mr. Terje Wold (Norway) by Mr. Aars Rynning; and Dr. Szerer (Poland) by Dr. Muszkat. General Ečer (Czechoslovakia) continued to be absent on official duties in his own country; he was represented in 1946 by Dr. Mayr-Harting and from January, 1947 first by Dr. Neumann and then by Dr. Zeman. Professor Gros (France), who was likewise detained on duties in his own country, was represented by M. Maillard and Mlle. Capiomont. In May, 1947 Dr. Zivkovic (Yugoslavia) was replaced by M. Milenkovic, and Mr. Burdekin, who had represented New Zealand from the beginning, withdrew on 10th June, 1947 on the termination of his appointment.

In September, 1947 M. de Baer (Belgium) having received an appointment in the International Refugee Organisation, was unable to continue as Chairman of Committee I, though he still remained a member of the Commission. He was represented, in his absence, by Miss E. M. Goold-Adams.

(ii) THE SECRETARIAT

Mr. McKinnon Wood, who had been elected as Secretary General at the foundation of the Commission, left in the summer of 1945, as his

release had been asked for by the Foreign Office. In September, 1946 Colonel G. A. Ledingham, D.S.O., M.C., was elected by the Commission to succeed him. In March, 1945 Dr. Egon Schwelb (Czechoslovakia) was appointed as Legal Officer to the Commission, a post which was afterwards combined with that of Secretary to Committee III; and on 3rd May, 1945 Dr. J. Litawski (Poland) was appointed as second Legal Officer and subsequently as Secretary of Committee I. From 29th June, 1945 Mr. E. Lyman (U.S.A.) was Chief Executive Officer until November 1945 when, on his return to the United States, the post was abolished. Dr. Schwelb left the Secretariat in July, 1947, having accepted an appointment as Assistant Director of the Division of Human Rights on the United Nations Secretariat. Meanwhile Dr. Mayr-Harting (Czechoslovakia) had joined the staff in March, 1947 as Historian. Mr. G. Brand was appointed in June, 1946 to write the reports on the trials of war criminals, and Dr. Zivkovic in June, 1947 to assist in compiling the report on Human Rights. Dr. Schwelb's duties were shared between Dr. Litawski, Mr. Brand, Dr. Mayr-Harting and Dr. Zivkovic, Dr. Mayr-Harting becoming Secretary of Committee III and Mr. Brand Secretary of the Legal Publications Committee.

(iii) MOVEMENTS OF MEMBERS OF THE COMMISSION

The entry of the Allied armies into German territory enabled the Chairman and Members of the Commission to visit the scene of some of the war crimes and to attend important trials. Thus, on 26th April, 1945 a delegation of the Commission, headed by the Chairman, visited the newly-liberated concentration camp of Buchenwald, at the invitation of General Eisenhower, and submitted a report to the Commission.⁽¹⁾ In October, 1945 the Chairman and some of the members attended the trial of the Hadamar Asylum staff at Wiesbaden in the American zone, at the invitation of the U.S. Third Army. In the same month the Chairman and some of the members attended the Belsen and "Peelus" trials in the British zone.

On 18th July, 1945 the Commission held a meeting which was attended by Justice Jackson, United States Chief of Counsel, who was preparing the Charter for the establishment of the International Military Tribunal. He was accompanied by Colonel Bernays and Commander Donovan. Sir David Maxwell Fyfe, Attorney General for the United Kingdom, was also present. An informal visit was paid to the Commission, at the Chairman's invitation, by members of the U.S. Congress on 24th May, 1945.

The Chairman attended the opening of the trials of the Major Nazi War Criminals at Nuremberg on 20th November, 1945, and paid a further visit to Nuremberg in September, 1946 when he and the Secretary General were present, by invitation, to hear the delivery of the judgment. On 8th April, 1946 Lord Wright left England for Tokyo by air, via Washington, to attend the trial of the Japanese Major War Criminals in the Far East, returning on 26th June, 1946, having addressed a meeting of the "Far

(1) C. 101., 5.5.45. *Visit of delegation to Buchenwald concentration camp in Germany—Report adopted by the Commission on 3rd May, 1945 and M. 59. 3. 5. 45.*

Eastern Commission" in Washington on the way back. During his absence he was replaced as Chairman by Sir Robert Craigie (United Kingdom).

In January/February, 1946 the Secretary General undertook a complete tour of the occupied zones in Germany and established contact with the Judge Advocate Generals and with war crimes offices. Other members of the Commission attended the trial of K. H. Frank at Prague at the end of March, 1946, and the trials of officials of the Dachau and Mauthausen concentration camps at Dachau in November, 1945 and April, 1946.

During the Christmas recess in 1946, the Chairman and Secretary General paid another visit to Germany; first to Nuremberg in the American zone, where the trial of the medical personnel, charged with carrying out medical experiments on human beings, was in progress; next to Berlin, where they had useful discussions with the officials of C.R.O.W.C.A.S.S.⁽¹⁾ and, lastly, to the British zone where they witnessed part of the Ravensbruck concentration camp trial, and had important discussions with General MacCreery, the Army Commander, and the Judge Advocate General's Department.

In May, 1947 the Chairman, Secretary General and the United States and Belgian representatives were present, by invitation of Brigadier General Telford Taylor, United States Chief of Counsel, at the trial at Nuremberg of the doctors and scientists (Case No. 1); the Ministry of Justice officials (Case No. 3); the Industrialists (Case No. 5) and the officials responsible for the administration of concentration camps (Case No. 4). The party also visited Dachau where other trials were in progress. In September-October, 1947, the Secretary General, together with the British and Norwegian representatives, were present, by invitation, at the Nuremberg trials.

In August, 1947 the Chairman attended the I.G. Farben trial (Case No. 6) at Nuremberg, and in December, 1947 he and the Secretary General attended the opening of the trials of the Directors of the Krupp works (Case No. 10). Other members of the secretariat visited the United States and British zones in connection with war crimes trials in the autumn of that year.

B. OUTLINE OF THE COMMISSION'S ACTIVITIES

The story of the establishment of the Commission by the constituent meeting at the Foreign Office in October, 1943, and of its organisation in committees has already been related.⁽²⁾

The subsequent history of the Commission falls naturally into four principle phases: the first was a preparatory phase, while hostilities were still in progress, during which important questions of principle and procedure were debated and the machinery of retribution was being prepared. This phase may be said to have ended in the spring of 1945, when the German resistance was breaking up.

(1) Central Registry of War Criminals and Security Suspects.

(2) See Chapter VI, Section A. (iii), p. 112 et seq.

In the second phase retribution was begun; a conference of National Offices was held; tribunals were constituted by the Allied Powers and trials were opened. Relations between the Commission and the prosecuting agencies were established and maintained. The end of this phase was marked by the judgment on the Major War Criminals at Nuremberg in October, 1946.

In the third phase, which extended to the latter part of 1947, the listing of accused persons by the Commission and the trials of war criminals by the Allied Powers attained an increased tempo; numerous problems of law, arising out of treaties and charges, were examined and reported on by the Commission, and relations with international organs were developed. The Commission's Law Reports began to appear.

Finally, during the latter part of 1947, and the spring of 1948, the Commission was also occupied in winding up its activities or transferring them to other bodies, and with the writing of its own history.

(i) PREPARATORY PHASE—OCTOBER, 1943 TO JANUARY, 1945

(1). *Preliminary Discussions*

During the first few months, discussions in the Commission turned frequently on the extent of its terms of reference, which were capable of being construed either in a restrictive or in a liberal sense. Thus, the Czechoslovak representative contended that the Commission should regard itself as "authorised to deal with all problems connected with the punishment of war criminals in the widest sense of the word, in accordance with Allied Declarations"⁽¹⁾ This principle was also supported by the Chairman, Sir Cecil Hurst, who considered that, in advising Governments on the problems which arise in regard to war crimes, the Commission should not fear objections on the ground that it was exceeding its competence.⁽²⁾

On the other hand, it must be borne in mind that the policy of retribution, of which the Commission was the expression, had not met with universal approval in official or in lay circles. To certain publicists the punishment of war criminals appeared to be a one-sided and vindictive measure; moreover, some had doubts as to its legality, while others feared that it might lead to a repetition of the fiasco of the Leipzig trials in 1922-23.

With the early abandonment of the proposal to establish a separate Technical Committee, the Commission itself assumed the functions intended for that body, so that its activities developed under three main heads—investigation, enforcement and legal opinions. Committees I, II and III, respectively, were appointed to pursue these aspects of the Commission's work.⁽³⁾

Committee I was the first to get into operation, but the flow of charges from the National Offices was at first disquietingly slow, and throughout

(1) C. 76., 8.2.45. *Memorandum on the present position of the UNWCC, the work already done and its future task*—presented by Dr. Ečer.

(2) M. 8. Minutes of Commission Meeting of 8th February, 1944.

(3) The detailed history of these activities, as dealt with by these Committees is to be found in Chapters VIII to XV.

the year 1944 members of the Commission were concerned with the means for speeding up the listing of war criminals before the termination of hostilities. In the spring of 1945 this situation was beginning to improve, though it still gave grounds for anxiety. A more important problem facing the Commission was that of the Major War Criminals, since it seemed illogical to accept charges against the lesser criminals, while the leading Nazis, in whom the crimes had originated, had not yet been indicted. As a result of these discussions the Commission decided, in the autumn of 1944, to include the names of the Major War Criminals in the first List. In October, 1944, it adopted recommendations for the establishment of a United Nations War Crimes Court for the trial of such persons, and of those charged with crimes outside the competence of the national tribunals. During the discussions on the formation of such an international court it had become apparent that some other inter-allied tribunals should be established during the period of military occupation, for the immediate trial of war criminals; accordingly the Commission drew up, in September, 1944, a recommendation for the establishment, by Supreme Military Commanders, of Mixed Military Tribunals for that purpose.

(2) *Crimes against Humanity*

Another question, which arose early in the Commission's discussions, was whether the competence of the Commission covered the investigations of crimes committed by the Nazis against Jews and stateless persons in Germany—offences which were subsequently defined in the Charter of the Nuremberg Court as crimes against humanity. The British Government, which was approached in June, 1944, took the view that the Commission should not undertake this additional work, though it might collect evidence on the policy of extermination carried out in the occupied territories.

(3) *The Crime of Aggression*

Important discussions were held in the Commission in the autumn of 1944 concerning the crime of aggressive war. In a preliminary report, prepared for Committee III, with academic assistance, it was maintained that the waging of aggressive war could not, in the existing state of the law, be regarded as a war crime. A report in the opposite sense, presented by the Czechoslovak representative, and supported by a strong minority of the Commission, resulted, after debate, in general agreement that the waging of aggressive war constituted a war crime. This view was finally vindicated in the indictment of the Major War Criminals which included the planning of aggressive war among its charges under Count II.

(4) *Detention of Leading officials*

The efforts of the Commission to expedite the listing of war criminals had a necessary counterpart in measures designed to facilitate their tracing and apprehension. A recommendation was made in May, 1944, that all persons who had held responsible positions in the civil or military administration of the occupied countries, or in the military or police organisations, should be available immediately after the Armistice for interrogation. For this purpose National Offices were asked to supply the names of all

enemy persons exercising authority in the occupied territories in their respective countries. A recommendation was also made in May, 1944, that the military authorities should, at the time of the Armistice, detain all members of the S.S. or the Gestapo, above a certain rank, so that these persons and the organisations of which they were members, could be adequately investigated.

(5) *Central Investigating Agency*

A project was considered, in November, 1944, for the creation of an "Investigating Branch" of the Commission, under a Central Investigating Officer, having its headquarters in London and local headquarters in some of the ex-occupied countries, for the collection of evidence. However, this recommendation was never carried out, owing in part to the smallness of the Commission's own staff, and also to doubts as to whether such a scheme might be regarded as an encroachment on national sovereignty.

(6) *Interrogation of Prisoners of War*

During the winter of 1944-45 increasing numbers of German prisoners were being captured and sent to camps in the Allied countries without being first questioned concerning war crimes. To remedy this deficiency, the Commission, after consultations with Allied military authorities, adopted a recommendation proposing a form of interrogation which could be used to secure evidence of this nature, and to ascertain which men were likely, by their membership of particular bodies, to have been guilty of war crimes. The Commission also recommended that prisoners of war should not be released until they had been so interrogated, or until inquiries into incidents in which they had been involved had been completed.

(7) *Transfer Convention*

In August, 1944, the Commission approved a draft convention intended to facilitate the transfer of a war criminal from one Allied nation to another. This project was not, however, approved by the British Government which considered that it already possessed adequate means of a more informal kind and the proposal was not carried further.

(ii) THE BEGINNING OF RETRIBUTIVE ACTION—FEBRUARY 1945 TO JUNE, 1946

(1) *Debate in the House of Lords, 20th March, 1945*

The second phase of the Commission's work may be said to have opened in the spring of 1945. It was marked by a debate in the House of Lords on 20th March, 1945, when the question of the progress of the Commission was raised by Lord Addison. Fear was expressed by some speakers that if the war came to an end the Allies would be found still unprepared in the matter of war crimes. Lord Wright, who had been elected Chairman of the Commission about six weeks previously, explained to the House that the Commission was limited not only by the obligation of secrecy—which was necessary to avoid reprisals—but also for practical reasons, because its sphere of operations was restricted. He outlined briefly the "articulated scheme" by which evidence was collected by Governments, charges were prepared and cases submitted to the Commission, which

selected those in which a *prima facie* case had been made out, placed the names on its Lists and sent them to the military authorities for apprehension of the accused. In regard to the method by which the Major War Criminals were to be punished, he observed that this question was outside the scope of the Commission, though he was able to state that their names had been placed on the Commission's Lists.

(2) *Action by Committee I*

During this stage, Committee I continued to develop its procedure. In addition to listing persons as "accused", it introduced Lists of "suspects" and "witnesses"; with the authorisation of the Commission, it issued certificates, stating that a given individual had been listed as a war criminal, to any Allied Government which was endeavouring to obtain his surrender from a neutral Government. It also decided, in March, 1945, that, in cases where no National Office was in a position to bring a charge, or where the Commission was in possession of specific information, the Commission itself might bring charges before the Committee. The Commission also issued, in May, 1945, two Lists of "key men", regarded as participants in terrorism, in the hope that the National Offices would be encouraged to file charges against them. It was indicated that the detaining authorities were to apply to the Commission for instruction before releasing these persons or otherwise disposing of them. Committee I also proposed and organised a conference of the representatives of National Offices, which met in London on 31st May, 1st and 2nd June, 1945, and concerning which details are given later in this Chapter.

(3) *C.R.O.W.C.A.S.S.*

An organisation known as the Central Registry of War Criminals and Security Suspects (C.R.O.W.C.A.S.S.) had been created in Paris in the spring of 1945, under the British and American armies, and it was hoped that co-operation could be developed between it and the War Crimes Commission, in connection with the centralisation of information about war criminals. Its usefulness to the Commission was restricted by the fact that, at first, it was compelled to devote its chief effort to the registration of prisoners of war. Visits were paid to C.R.O.W.C.A.S.S. by the Chairman and members of the Commission—in particular by the Chairman of Committee I—and representatives of C.R.O.W.C.A.S.S. attended Commission meetings. In June, 1946, after C.R.O.W.C.A.S.S. had been moved from Paris to Berlin, its duties were modified, largely as a result of the Commission's representations, and it was able to devote the major part of its attention to the locating of war criminals.

(4) *Liaison with S.H.A.E.F.*

During this period Committee II—the Committee on Enforcement—was concerned at the want of effective co-ordination with S.H.A.E.F., the need of which was increasingly felt when the Allies were advancing into German territory. A proposal was made in May, 1945, for the setting up of a War Crimes agency at S.H.A.E.F. headquarters. The project, in the form submitted, was not implemented, but contact with S.H.A.E.F. was provided by the attendance of a representative of that body at meetings

of the Commission. In the absence of a War Crimes agency at S.H.A.E.F., many of the National Offices were represented by liaison teams attached to the Allied commands in the respective zones of occupation. At its meeting on 29th August, 1945, the Commission received a report from the Czechoslovak representative concerning the activities of the French, Belgian, Polish, Yugoslav, Norwegian and Czechoslovak liaison teams in the American zone, and after his tour in January-February, 1946, the Secretary General reported to the Commission on the activities of the liaison teams in the British zone. Recommendations were also made in May and June 1945, for the establishment of agencies for the collection of evidence in Italy and in the Far East, but these proposals never materialised, since other arrangements concerning war crimes had been made in the meanwhile by the authorities on the spot.

(5) *Problems of Extradition*

On several occasions complaints were made to the Commission by the representatives of member States, relating to the difficulty of obtaining the surrender of wanted persons from the detaining authorities in Germany. In September, 1945, the United States representative was able to inform the Commission that, subject to certain limitations, United States Commanding Generals had been authorised to comply with requests for the surrender of war criminals. It was also stated that the United States State and War Departments attached great weight to the placing of a war criminal's name on the Commission's Lists.

As mentioned above, the draft convention for the extradition of war criminals, adopted by the Commission in July, 1944, had failed to secure the approval of the British Government. The problem of extradition continued, however, to present difficulties and in July, 1945, the Commission adopted a proposal providing that when a war criminal was wanted by several nations, the Commission should decide, as arbitrator, the order in which the accused should be tried by the nations concerned, or should delegate the task to some other body. This recommendation was approved by some of the member Governments, but it was not, in fact, ever implemented.

(6) *Control Council Law No. 10*

On 24th January, 1946, the Control Council issued its Law No. 10, which related to the treatment of war criminals in Germany. Under this Law the final arbiter in deciding whether or not a person should be surrendered for trial to another Government, or another zone of occupation, was declared to be the zone Commander. No mention of the Commission's Lists was made in the Law. This omission was no doubt inevitable, since Russia was not a member of the Commission, but one result of it was that certain Liaison Officers in the British zone believed that they could obtain the surrender of prisoners of war without reference to the Commission's Lists. In February, 1946, the Commission discussed the matter, and, as a result, the practice was established in the British—as in the American and French zones—that persons wanted as war criminals would normally be handed over only if they had been listed by the Commission.

(7) *The International Military Tribunals*

It was during this period of the Commission's work that Justice Jackson and his colleagues, in conjunction with the British Attorney General and the appropriate French and Russian authorities, drew up the Charter of the International Military Tribunal which was embodied in the London Agreement of 8th August, 1945. The trial of the twenty-one⁽¹⁾ Major War Criminals opened at Nuremberg on 20th November, 1945, and continued until the judgment was delivered on 1st October, 1946.

In the Far East the International Military Tribunal, on which eleven nations were represented, was established by virtue of a proclamation of General MacArthur dated 19th January, 1946. Twenty-six defendants were arraigned on 3rd May of that year, charged with the crime of planning a war of aggression, violations of international law and crimes against peace and humanity. The trial opened at Tokyo on 3rd June, 1946.

Data in regard to other important trials held in Europe and the Far East are given in Appendix V.

(8) *The Far Eastern and Pacific Sub-Committee*

In August, 1945, the *ad hoc* Far Eastern and Pacific Sub-Committee of the Commission which had been instrumental in forming the Far Eastern Sub-Commission at Nanking, was reconstituted, with representatives of the U.S.A., Australia, Canada, China, France, the United Kingdom, India, the Netherlands and New Zealand. On 29th August, 1945, the Chinese Ambassador, as Chairman of this Sub-Committee, submitted recommendations to the Commission for the formation of an International Military Tribunal for the trial of the Japanese responsible for criminal policies; the establishment of a Central War Crimes Agency in Japan, to collect evidence and to register war criminals and of a War Crimes Prosecuting Office; and the making of arrangements for the surrender of war criminals to the countries that had charged them. These recommendations were approved by the Commission.

(9) *Committee III*

During this time Committee III had been considering various questions referred to it for advice on legal points by the Commission or by Committee I. Such, for instance, as the implications of the legal principles contained in the Charters of the International Military Tribunals and the Indictments of the Major War Criminals.

(10) *The War Crimes Exhibition*

The French Government having generously offered to send to England their War Crimes Exhibition—which had been exhibited with great success in Paris—the Commission decided in June, 1945, to sponsor it and to lend the services of the Public Relations Officer to organise it. The Exhibition was opened on 6th December, 1945, in the Prince's Galleries, Piccadilly, by Monsieur Tietgen, the French Minister of Justice, and Lord Wright.

(1) These included Martin Bormann tried *in absentia* and Dr. Ley who committed suicide.

War Crimes films were displayed in an adjoining hall four times a day, Sundays included. The Exhibition had a good reception from the Press and was so well attended—over 100,000 visitors—that it was decided to show it for an additional fortnight. Admission was free but collection boxes were put about and yielded £300 which was handed to U.N.R.R.A.

(iii) RETRIBUTIVE ACTION CONTINUED—JULY, 1946, TO JULY, 1947

(1) *Committee I*

During the spring of 1947 demands began to be heard, particularly in Great Britain, for the cessation of war crimes trials, having in view the time which had elapsed since the capitulation of Germany. Appeals were made in the British Press and in Parliament for the release or respite of certain notable German war criminals, and doubts were sometimes expressed as to the justice of the procedure under which they were tried or detained in custody.

These matters were discussed by the Commission on 24th April, 1947, when the United Kingdom representative suggested that the work of Committee I might be brought to an end on 30th May, 1947, and that the activities of the Commission as a whole might terminate at the end of that year. On the other hand, the Belgian representative, Chairman of Committee I, pointed out that charges were still coming in steadily; that, in the countries which had been occupied, priority had unavoidably been given to the prosecution of quislings; and that the preparation of charges against Germans had consequently been delayed, though trials were about to begin. The Commission reached the conclusion that it was preferable that no time limit should then be fixed, but that the whole question should be re-examined in November, 1947.

During this period the number of charges received by Committee I was increasing in volume. Information given to the Commission on 24th April, 1947, showed that the number of persons listed in the first three and a half months of 1947 had increased 50 per cent. over a similar period in 1946, and 75 per cent. over a similar period in 1945. In June, 1946, the Commission approved the principle that, in certain cases, the names of accused men might be added retrospectively to the Lists, even after they had been tried and convicted by an Allied court. Another change in procedure came about on 31st July, 1946, when it was decided that in future the names in each List were to be arranged in alphabetical order throughout, instead of in alphabetical order of countries as heretofore. The Committee also decided to tighten up its procedure with regard to the listing of "suspects", so as not to overburden the Lists. In December, 1946, it was decided, that, in order to obtain a wider circulation of the Commission's Lists, they should no longer be marked "Secret", as had been done in the beginning for fear of reprisals. During this time protests were occasionally received from the friends or legal advisers of persons listed by the Commission and in each case the Commission examined the particulars in detail and made appropriate decisions.

(2) *Priority Lists*

By 6th March, 1947, about 20,000 persons had been listed by the Com-

mission. It was recognised that it was impossible for the Occupying Authorities to take effective action with regard to the apprehension of all these individuals and the Commission decided to institute " Priority " Lists of persons who had committed really heinous crimes, and whose apprehension was a matter of urgency. Two such " Priority " Lists were issued, but it was found that they had no effective result and the practice was accordingly abandoned.

(3) *Apprehension and Extradition*

In June, 1946, the question of the apprehension of accused persons was raised by the Belgian representative, who observed that the number of persons apprehended was absurdly small compared with the number of persons listed. He suggested that the competence of the Commission should be extended to cover the administrative function of tracing, and surrendering to the respective Governments, persons listed by the Commission. After discussion the project was considered to be impracticable, but the Commission was informed that the occupying authorities were willing to assist national liaison teams in apprehending war criminals in their respective zones.

In May, 1947, the Yugoslav representative protested that for some months the Yugoslav authorities had failed to obtain from the American zone the extradition of persons listed by the Commission. The question was examined at length and it was pointed out that each Occupying Authority reserved the right to inquire into each case and make its own decisions as to whether or not a transfer was to be made.

(4) *Provisions of the Draft Peace Treaties*

In September, 1946, the Commission considered draft provisions concerning war criminals to be inserted in the Peace Treaties with the " satellite " countries, which were to be negotiated in Paris in the autumn of 1946. The Commission, acting in its capacity as an advisory body, put forward draft proposals relating to these provisions, but they reached Paris too late to be given adequate consideration by the peace negotiators.

(5) *" Subsequent Proceedings " of the Nuremberg Judgment*

This period was marked by the delivery of judgment on the Nazi Major War Criminals, at the end of September, 1946, by the Nuremberg Tribunal, with the result that twelve of the defendants were sentenced to death, six to imprisonment and two others acquitted (one defendant, Ley, had committed suicide during the trial). Parts of the judgment entailed, as a necessary consequence, the institution of further prosecutions. To carry out these trials the " Subsequent Proceedings Committee " under General Telford Taylor was instituted at Nuremberg by the United States authorities. The attorneys responsible for preparing the trials were in constant touch with the United Nations War Crimes Commission which provided them with valuable information and documents.

Certain groups, such as the Leadership Corps, the Gestapo, the S.D. and the S.S. had been declared to be criminal organisations. With regard to the prosecution of the members of these bodies, a proposa l

was put forward by the French Minister of Justice and the French National Office⁽¹⁾ that there should be a convention for the standardisation of the procedure, the penalties to be imposed and the burden of the proof, in the trials of such persons throughout the occupation zones of Germany and in the Allied countries. The matter was discussed by the Commission in December, 1946, and January, 1947, but since other Governments were not favourable to the idea and as, moreover, it was outside the scope of the Commission, the proposal was withdrawn.

(6) *International Military Tribunal in Tokyo*

During this period the trial of the Japanese Major War Criminals in Tokyo was continuing. Owing to the difficulties of translation and the difference between Japanese law and the law of the eleven United Nations concerned, this trial progressed much more slowly than the proceedings at Nuremberg, where only four nations were represented on the Tribunal.

(7) *Medical Crimes*

A request had been received in July, 1946, from the Danish General Medical Association, that the Commission should carry out a survey of the medical crimes committed by the Germans. The Commission was, at first, disposed to accede to this request; however, it was ascertained that the French Government had, in June, 1946, proposed the creation of a "Committee of Investigation on Scientific War Crimes" in Paris, which was to work in conjunction with the British and American experts in investigating the use of unwilling human subjects by the Germans for medical experiments. On 27th September, 1946, the Chairman informed the Commission that he had recommended to the Prime Minister the appointment of Lord Moran as Chairman of the British element of the international committee which was to deliberate in Paris. Moreover, the trial of the "twenty three doctors and scientists" (Case No. 1) was in preparation by the "Subsequent Proceedings Committee" at Nuremberg, and was expected to produce valuable evidence. In these circumstances the Commission abandoned for the time being the idea of carrying out such an investigation itself.

(8) *Trials before German Courts*

In the autumn of 1946 there was considerable discussion concerning a trial, held in the British zone of Germany before a German court, of Germans who had been listed by the Commission for ill-treatment of Allied nationals. In the trial the charges mostly concerned the ill-treatment of Germans by the defendants, but since Belgian nationals had been among the victims it was agreed, after consultation between the members of the Commission and the appropriate British Control Commission authorities, that the defendants should be surrendered to Belgium for a further trial in that country.

(1) A. 30., 10.12.45. *Questions which the French Representatives wish to discuss with the UNWCC in London.*

(9) *History of the Commission and Law Reports*

As early as October, 1945, the French representative had emphasized the importance of preparing a record of the Commission's proceedings. Tentative schemes were put forward at different times during 1945-46, but it was not until December, 1946, that the Commission decided to form a committee for the purpose. By March, 1947, a plan for the arrangement of material had been approved by the Commission.

In October, 1945, the Commission had authorised the preparation of reports of war crimes trials, but it was not until October, 1946, that the Legal Publications Committee was created to supervise the preparation of these Law Reports. The first volume appeared in 1947.

(iv) THE CONCLUDING PHASE—JULY, 1947, to MARCH, 1948

(1) *Arrangements for Winding up the Commission*

As mentioned in section (iii) above, this question had been suspended for six months in April, 1947. When it was again examined in October, 1947, the Chairman observed that there was a feeling in some countries that the Commission ought not to continue indefinitely. The closing of the Commission would not, however, imply that individual States could not, in their own countries, arrest and punish persons whom they had charged as war criminals. The fact was that, largely owing to the Commission's efforts, the laws concerning war crimes had now become standardized. The Chairman suggested 31st March, 1948, as an ultimate date, which proposal was finally approved.

(2) *Committee I*

In view of the decision to wind up the Commission on 31st March, 1948, the closing date for examination of cases by Committee I was fixed for the end of February, 1948. As a result, during the last months of the Commission's life, charges poured in at an increasing rate, the numbers rising to as many as one hundred and twenty per week.

During this period further requests were received from various sources for the removal of names from the List, and, as before, each case was given due consideration. In some cases, the Occupying Authorities in Germany also notified the Commission that, although the persons concerned had been listed by the Commission, the evidence submitted by the requesting Governments was not adequate to justify surrender, and that applications for extradition in such cases had been rejected.

(3) *Ethiopian charges*

As early as March, 1946, the Ethiopian Legation had asked if its Government might submit charges against Italians for war crimes committed during the Italo-Ethiopian war of 1935-36, but the Commission had then decided that its competence did not extend to war crimes committed in that war. Following a debate in the House of Commons on 10th July, 1946, the Commission had re-examined the question and accepted the report of Committee III in which it was stated that the participating Governments did not appear to have wished the Commission to deal with

war crimes committed in any other than the present war. However, the matter was raised again by the Ethiopian Minister on 1st May, 1947, when he asked permission to submit charges in respect of alleged war crimes committed in 1935-36 by the Italian ex-Marshals Badoglio and Graziani. The matter was discussed by the Commission during the autumn of 1947 and, in view of the statement made by the Ethiopian Advocate General that the charges would be limited in number and that the accused, if surrendered, would be tried by a court which would include European judges, the Commission agreed to entertain the charges, which reached Committee I in time for examination at its last meeting in February, 1948.

(4) *Requests from the Albanian Government*

An application for assistance in the matter of war criminals was received from the People's Republican Government of Albania. On 29th October, 1947, it requested the surrender of some hundreds of listed persons; one list contained the names of 170 alleged quislings and traitors; in the other two lists there were 63 Germans and 105 Italians named. The Commission declared that, not only was Albania not a member of the United Nations, but that the request was misconceived as the Commission had no competence to order the surrender of persons, particularly of quislings and traitors. The matter was again raised on 25th February, 1948, when the Albanian Government requested that its charges against the Germans and Italians named on the list should be investigated by the Commission. In the debate that followed, the British representative, speaking as Chairman of Committee I, pointed out that in view of the closing of the Commission it was, in any case, too late to examine new charges. On a vote being taken it was decided, by a majority, to reject the Albanian request.

(5) *Inquiries from the Italian Government*

On 24th September, 1947, the Chairman of Committee I reported that the Italian Government had asked whether it could, in future, apply direct to the Commission for information concerning Italians charged with war crimes, whose extradition was requested. The reply having been given in the affirmative, several requests were received from the Italian Government concerning Yugoslav, French and Greek demands for extradition.

(6) *Extradition*

The subject of extradition was also raised in the Commission by various national representatives; for instance, on 16th January, 1947, by the Yugoslav representative, and again, in June, 1947, when the Polish representative raised the matter in Committee I. The matter was again raised in Committee I by the Polish and Yugoslav representatives, in December, 1947, and on 7th January, 1948, the Commission considered a memorandum on the same subject presented by the Polish representative. It was, however, pointed out by the Chairman that the Commission had never claimed that its lists were a complete authority for extradition, and that the final

decision in matters of surrender rested with the zone commanders. This principle was approved by the Commission by a majority vote.

(7) *History and Law Reports*

During this period the production of the Law Reports was continuing. By 31st March, 1948, when the Commission closed, 4 volumes had already been published and 2 others were in preparation. It was decided that the sum of £6,600 of the Commission's funds remaining after the winding up of the main body should be used for the employment of a skeleton staff for a further eleven months to compile a total of 20 volumes which would comprise 122 cases, and to finance their publication.

During the closing months of the Commission the members of the Legal and Research staffs had been engaged in compiling the History of the Commission which was to cover not only the actual work of the Commission, but to give the background of developments in the conception of war crimes prior to its formation in 1943, and also to show how the Commission's recommendations and decisions fitted into the developments in war crimes jurisprudence during the post war period.

(v) CONCLUSION

The Governments participating in the Inter-Allied Declaration of January 13th, 1942, had placed among their principle war aims: "The punishment through the channel of organised justice of those guilty or responsible for these crimes." With this statement must be coupled Mr. Churchill's declaration on 25th October, 1941, that "retribution for these crimes will henceforward take its place among the major purposes of the war." In making these pledges the Allies had, in fact, committed themselves to the creation of an international organisation—the United Nations War Crimes Commission—which would implement their decision.

The course of events, no doubt, shaped the action of the Commission on lines rather different from what had been contemplated at its origin. Its composition, which was mainly legal or diplomatic, was not well adapted for the undertaking of administrative or executive tasks, and these duties devolved naturally on the authorities which exercised direct power in the ex-enemy countries—that is, on the Commanders-in-Chief in the Western zones.

The influence of the Commission came, therefore, to be exercised indirectly, as a counsellor of the governments, as an impulse to their action, and as a forum for international discussion. In one sphere, however—that of investigating charges—the Commission's duties underwent little modification. During the four and a half years of its existence it examined 8,178 charges, involving over 36,000 persons and issued 80 Lists of war criminals. When one compares these totals with those of the trials and convictions they may seem disproportionately small. Swifter progress could not, however, be achieved consistently with the principle of fair trial according to civilized standards.

In this connection a debate may be recalled which took place in the House of Lords on 15th October, 1946. Lord Pakenham, Minister for

German Affairs, had told the House that, up to date, the British Military Courts had tried 495 persons; cases were in preparation against 3,913 others, but only 1,000 of the latter were actually in custody. Lord Maugham, who spoke in the same debate, would have wished the trials to be ended in two years, but he feared that, at this rate, they might go on for five years; however—as he admitted—“one cannot hurry a man who wishes to call witnesses or graduate the speeches of defence counsel.” Lord Maugham gave his opinion that the system of trials evolved in Germany was admirable and “will be absolutely just as far as human justice can be just.”

It may be recalled in this connection that Lord Wright, in his speech in the House of Lords on 20th March, had indicated that if ten per cent. of the war criminals were tried, this would be a satisfactory result. Even if many of the guilty escaped punishment, enough was accomplished to establish the fact that the authors of atrocities, of whatever rank, could not divest themselves of responsibility by simply declaring that they had acted under orders.

In the words of the United States judge, Michael Musmanno, in his concurring opinion⁽¹⁾ in the judgment on ex-Marshal Milch on 16th April, 1947:

“The purpose of these post-war trials obviously is not vengeance. The object aimed at (as in the criminal jurisprudence of all civilised nations) is the truth. When guilt is established the penalty imposed is to serve as a deterrent to all others who might be similarly minded. Albert Speer, convicted in the first trial⁽²⁾ stated here in this court room that had trials such as these followed the first World War the second World War might have been averted.”

C. WAR CRIMES IN THE FAR EAST

(i) THE FAR EASTERN AND PACIFIC SUB-COMMISSION

As has been related earlier⁽³⁾ the Commission had, at its outset, adopted a proposal by the Government of China for the establishment of a Far Eastern Sub-Commission at Chungking to receive cases arising out of the Far Eastern war, especially war crimes committed by the Japanese against the Chinese. This Sub-Commission held its inaugural meeting on 29th November, 1944.

On 6th June, 1945, the main Commission decided to ask the Chungking Sub-Commission for a progress report showing the number of cases dealt with and the names listed to date. This report, dated 15th February, 1946, showed that the Sub-Commission had held twenty-one meetings and had issued nine Lists, containing 1,111 names; a tenth List, with 88 names, was being printed; up to 10th February, 1946, 111 Japanese war criminals listed by the Sub-Commission, had been arrested, and orders

(1) Page 86 of the transcript.

(2) Albert Speer, ex-ammunition minister, was tried by the International Military Tribunal at Nuremberg as a major war criminal, and was sentenced on 1st October, 1946, to twenty years' imprisonment.

(3) See Chapter VI, Section E. p. 129.

for the establishment of tribunals in Nanking, Wu-Han, Peiping and Shanghai had been issued.⁽¹⁾

Writing on 26th January, 1946, a prosecuting officer of the United States War Crimes Branch spoke of the "invaluable aid and co-operation" which his Branch had received from the Chinese authorities, who were making excellent use of the Sub-Commission's List of war criminals. He described the listing of war criminals in the manner in which it had been done by the Sub-Commission as "one of the most valuable aids that could be devised for the apprehension of war criminals."

The Sub-Commission found that its work was drawing to a close by the end of 1946 and at a meeting of the main Commission on 29th January, 1947, the Chinese representative said that his Embassy had been asked to ascertain the Commission's views as to the means whereby the Sub-Commission might be wound up, having in view the decreasing number of charges. The Commission agreed that they should accede to the Sub-Commission's desire to terminate its action, it being understood that the files, transcripts and records, together with a Progress Report, would be transferred to the custody of the Commission. It was also observed that the Far Eastern Sub-Commission had been run on very economical lines.

The Commission was notified on 12th March, 1947 of a formal resolution⁽²⁾ dated 4th March, 1947, in which the Sub-Commission declared that it had now completed its task, and recommended that its work be brought to an end on 31st March, 1947, subject to the above-mentioned requirement. The Commission unanimously approved this declaration.

The Progress Report⁽³⁾ was forwarded in due course and contained the following brief survey of the very considerable work accomplished by the Commission.

From the outset the Far Eastern Sub-Commission had realised that its main task would consist of classifying the charges brought to their notice by the Chinese National Office. At its third meeting it arrived at the following classification :

- A-1, cases against named individuals where evidence is sufficiently complete to charge them as actual perpetrators of war crimes.
- A-2, cases against named military or civilian personnel where evidence is sufficiently complete to charge them as having been concerned in the commission of war crimes, either by having encouraged them, condoned them or in any way shown their responsibility for them.

(1) Data given in the UNWCC Statistical Progress Report (I/65 of 24.6.46) under the heading Chungking Sub-Commission's List showed that, up to April, 1946, 1,196 war criminals and material witnesses had been listed besides 130 war criminals holding key positions.

(2) C. 251., 10.3.47. *Dissolution of the Far Eastern and Pacific Sub-Commission—Resolution adopted by the Sub-Commission on 4th March, 1947.*

(3) Misc. 109., 17.9.47. *Final Report of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission.*

- B, cases not falling under A-1 or A-2, but where there is sufficient evidence to justify any named individual or military or civilian enemy person in authority being held for interrogation as a material witness after the cessation of hostilities.
- C, cases where the evidence is insufficient to justify their classification under A or B.

This classification, which was used with modification throughout the Sub-Commission's work, differed from the one followed by the main Commission in London, which had not been available when the Sub-Commission first met. Altogether 1,234 charges were dealt with, involving the names of approximately 3,000 persons and/or units, of which 1,676 were classified A-1, 255 A-2, 341 B and 162 C.

At the time when the Sub-Commission was established, the Australian representative had raised the question of war crimes committed by the Japanese in China prior to the attack on Pearl harbour. "In the opinion of the Australian Government," he said, "events in China, prior to December, 1941, present a special case which should be made the subject of a special commission concerned with the China incident as a whole and operating separately from the United Nations Commission for the Investigation of War Crimes."⁽¹⁾ The question was referred to the main Commission in London which replied subsequently as follows: "Taking note of the statement made by the Australian representative on the Commission that the Australian Government would see no objection to the Sub-Commission's dealing with war crimes committed by the Japanese before December, 1941, and after, and considering the question in the light of its own practice, the Commission feels that the Sub-Commission should not limit its investigations to war crimes committed after a particular date, and that each case should be considered on its merits."⁽²⁾

At its 36th meeting on 7th January, 1947, the Sub-Commission considered that war crimes committed against Formosans at the time they were still Japanese subjects should not be dealt with by the Sub-Commission.

Altogether the Sub-Commission held 38 meetings, each of them was attended by representatives of America, Great Britain, China and the Netherlands.

According to figures submitted by the Far Eastern Sub-Commission in October, 1946, there were, at that time, about 160,000 complaints of Japanese atrocities in the hands of the Chinese War Crimes Authorities. Of these some 30,000 of a more serious nature had been used for charges; 70,000 of a less serious nature had been dealt with directly by the Chinese authorities. The remaining 60,000 were still under investigation.

(ii) FAR EASTERN CHARGES SUBMITTED TO THE MAIN COMMISSION

Charges concerning Japanese war crimes in the Far East were also presented direct to the main Commission—for instance, by the United States, Australia and India. Thus, at the meeting on 6th May, 1945,

(1) Misc. No. 109, page 3.

(2) Loc. cit. p. 3.

between the United Nations War Crimes Commission and members of the United States Congress Delegation, the Australian representative mentioned, as an example of co-operation between the Commission and the Allied authorities in the Far East, that Sir William Webb, Chief Justice of Queensland, after making investigations in New Guinea, had come to London in January of that year to submit charges to the Commission arising from his investigations; as a result, war criminals had been listed, and the Lists had since been issued to the British and United States Zone Commanders and legal officers in the Pacific.

On 13th February, 1946, Professor Bailey, representing the Australian Government, attended a meeting of the Commission and asked the latter to agree, in principle, to the preparation of a List of Japanese Major War Criminals, for which the first Australian List should serve as a basis. After a debate it was, however, decided to send the Australian List to the Allied Council in Tokyo, having regard to the fact that evidence relating to the charges which it contained was available in Tokyo but not in London.

D. RELATIONS WITH MILITARY, NATIONAL AND INTERNATIONAL BODIES AND WAR CRIMES PROCEEDINGS

(i) CONFERENCE OF NATIONAL OFFICES

In the spring of 1945, a great part of the occupied territories had been liberated, the capitulation of Germany was seen to be imminent, and it was evident that the Commission would soon be faced with new problems. The moment was therefore appropriate for the convening of a Conference of National Offices in London, in order to review the whole position and consider possible improvements in the operation of the system.

(1) *The Situation in the National Offices*

The representatives of the different countries had been asked in February, 1945, to answer a questionnaire, supplying information on the following main points:—the situation and organisation of the National Offices; the methods of contact employed, and the general procedure in carrying out investigations; the number of charges submitted to the main Commission in London, or to the Sub-Commission in Chungking. The answers to this questionnaire revealed a certain variety in the systems adopted.

In *Australia* there was a War Crimes Commissioner in the Department of External Affairs at Canberra, whose duty was to collect evidence of war crimes; about 300 cases had been investigated and 21 charges submitted to the Commission. In *Belgium* the National Office was at Brussels; a Commission of Inquiry had recently been set up for investigating war crimes; 18 charges had been submitted to the Commission. *Canada* had no National Office, but its duties were undertaken by a War Crimes Advisory Committee. In *China* there was a National Office at Chungking. In *Czechoslovakia*, which was still under enemy occupation, the Police Section of the Ministry of the Interior in London carried out the work of a National Office, obtaining its material largely from underground channels. The *French Service for the Detection of War Crimes* was in Paris, working in

conjunction with regional services throughout the country, and having liaison officers attached to the Allied armies. *India* had a National Office in the Defence Department at Delhi; charges concerning crimes against Indians in Europe passed through the British Foreign Office; in the East, S.E.A.C. reports received by the Indian Government, formed the basis of charges sent to the Chungking Sub-Commission. *Luxembourg* had a National Office situated in the Ministry of Justice in Luxembourg. A *Netherlands* National Commission had recently been appointed, but action was retarded owing to the greater part of the country being under enemy occupation. In *New Zealand* the work of the National Office was performed by the Department of External Affairs. *Norway*, being still under enemy occupation, had a National Office in London under the Norwegian Ministry of Justice, acting upon reports received by Norwegian authorities in England and Sweden. *Poland* also had a National Office in London, attached to the Ministry of the Interior, relying for information on military intelligence, the underground movement and statements made by escaped prisoners. The *United States* had a War Crimes Office, established under a Directive of 23rd January, 1944, in the Judge Advocate General's Office in Washington. It was now proposed to have mobile teams to carry out an aggressive investigation programme. In *Yugoslavia* there was a State Commission for Investigating War Crimes, having six federal and two provincial committees; investigations had so far been based chiefly on captured archives; 800 alien war criminals had been identified.

A list of the sixteen National Offices represented at the Conference, and the members of the Commission taking part in it, will be found in Appendix II.

(2) *The Agenda of the Conference*

The Agenda comprised the following six items:—

- (1) General Survey of the present activity of the Commission and National Offices.
- (2) Establishment and maintenance of a central recording office and pooling of information on war crimes.
 - (a) Information actually available in the U.N.W.C.C.
 - (b) Supply of information by the Commission to National Offices.
 - (c) Supply of information by the National Offices to the U.N.W.C.C.
- (3) Establishment of a uniform indexing system and use of uniform machine records.
- (4) Exchange of views and consideration of the way in which persons accused of crimes against nationals of several United Nations should be dealt with.
- (5) Co-operation between National Offices and the U.N.W.C.C. with a view to preparing evidence and charges against enemy key-men who have not yet been indicted by National Offices.
- (6) Establishment of closer connections between the Commission and the National Offices and strengthening and assisting those Offices.

The Conference met on 31st May, 1945, in the Law Courts, where one of the King's Bench Court Rooms had been placed at its disposal. Lord Wright, Chairman of the Commission, presided not representing any of the National Offices.

The debate on the first day was devoted to a general survey, in the course of which data were furnished by the delegates regarding the organisation and functions of their respective National Offices; in addition to the particulars furnished in reply to the earlier questionnaire, the following points were made:

The British and French delegates emphasized the importance of expediting the trials and of pooling information collected by the National Offices; the Belgian delegate asked for more information as to the procedure by which war criminals would be handed over to the national courts; the Chinese delegate attributed the paucity of charges hitherto filed by his Government to fear of reprisals and to the smallness of the area hitherto liberated; the Yugoslav representative feared a repetition of 1919, when there were lists of war criminals and no trials, while the United States delegate said that his Government were interested in three categories of war criminals, namely, the major criminals, the authors of crimes against citizens of occupied countries, and the authors of crimes against prisoners of war in Germany.

(3) Maintenance of a Uniform System of Recording and Pooling of Information

The Conference next discussed the pooling of information and the establishment of a uniform system of indexing and recording. The United States representative on the Commission pointed out that if there were some means of pooling information, the "pattern" of war crimes would be more apparent, and the units concerned in systematic atrocities could be more easily identified. Descriptions were given of the systems of classification employed in the U.S. National Office and in C.R.O.W.C.A.S.S., but it was decided, after discussion, that these systems were too complex for general employment and that it was too late to introduce a uniform system of recording. However, it was considered that either C.R.O.W.C.A.S.S. would serve as a clearing office for information, or else that there should be an information sub-section of the Commission.

(4) Extradition of War Criminals

The question of the extradition of persons charged by more than one country was then discussed. Various opinions were expressed as to the country which should have priority: some held that it was the country in which the gravest crime had been committed; others, the country which provided the heaviest penalty for the offence; others again, the country which first claimed the surrender of the accused. The French representative pointed out that there would be three types of cases, according as the war criminal was situated: (a) in occupied enemy territory, when the occupying authority was likely to be the final arbiter; (b) in one of the Allied countries, when the National Offices concerned could reach agreement between themselves, and (c) in a neutral country, in which case it was desirable that demands for extradition should be supported by the united

body of the Allies. It was finally suggested by the Belgian representative on the U.N.W.C.C. that the Commission itself should be the final arbiter in disputed cases.

(5) *Lists of Key Men*

There had been some misunderstanding concerning Commission Lists Nos. 7 and 9 containing the names of prominent Germans who, though not indicted for any particular crimes, were named as being implicated in "systematic" terrorism, by which was meant the implementation of the general criminal policy of the Nazi regime. Whereas the Commission had issued these Lists to ensure that persons such as Gauleiters, Gestapo chiefs and high officials did not escape, the National Offices had assumed that no further action was necessary on their part. The original purpose of the Lists had, however, been largely anticipated by S.H.A.E.F., which had ordered the detention as "security suspects" of all individuals considered as a danger to the security of the Allied occupation forces. National Offices were asked to collect all possible evidence about these persons and to frame charges against them. A recommendation was also made that similar action should be taken in regard to Japanese Key Men.

(6) *Relations between the Commission and National Offices*

The Yugoslav representative on the Commission presented a memorandum on the subject of closer relation between the Commission and the National Offices—relations which had hitherto been confined chiefly to the submission of charges by the latter to the former. It was suggested that the Commission could collect evidence not available to National Offices, while the latter could act as intermediaries with the military authorities, since there appeared to be a lack of co-ordination between investigating units in occupied enemy territory. It was suggested that the relationship between the Commission and the National Offices needed clarifying in regard to the measures relating to the arrest and surrender of war criminals. Finally, regret was expressed at the serious obstacle caused by the absence of the Soviets. The Czechoslovak representative on the Commission also emphasized the assistance that could be rendered by the Commission to the National Offices, or by one of the National Offices to the others, in circulating reports of detailed investigations made into some matter of general interest, as for instance the Czechoslovak report on the German Standgerichte.

(7) *Tentative Proposals by National Offices*

In the light of the foregoing discussions, the National Offices, at an informal meeting, drew up a series of recommendations, in the form, not of resolutions, but merely of "voeux". They suggested, for instance, that one or more central recording offices should be set up as a part of, or under the supervision of, the Commission, for centralising and pooling information; that accused persons (except those reserved for trial as major criminals) should be surrendered without delay to the Governments demanding them; that the Commission should be informed of such surrenders and that it should ensure that this procedure was carried out; that surrender of accused persons by the military authorities should be

confined to persons figuring in the Commission's Lists; and that when a surrender was demanded by more than one nation, the Commission should arbitrate between them, or else delegate that duty to another body. These "voeux" were, however, accompanied by reservations by a number of delegates who either differed on certain points or were compelled to abstain in the absence of instructions.

When the recommendations were presented at the last session of the Conference, the Chairman observed that his only function was to receive the document and pass it to the Commission, together with any reservations.

(ii) RELATIONS WITH THE U.S.S.R.

From the time the Lord Chancellor announced in the House of Lords, on 7th October, 1942, the proposed formation of a United Nations Commission for the Investigation of War Crimes, it was hoped that the Soviet Government would be a member of this body. In the course of communications with that Government, prior to the establishment of the Commission in October, 1943, Russia expressed her willingness to participate in the Commission's work, provided that the right to be represented were granted to the seven Soviet Republics on whose territory the war had actually been fought, namely, the Ukrainian, Byelo-Russian, Moldavian, Lithuanian, Latvian, Estonian and Karelo-Finnish Republics.

When the inaugural meeting of the Commission was held on 20th October, 1943, the Lord Chancellor stated that the Soviet Government had agreed, in principle, to the establishment of the Commission, but that one or two points of agreement were still outstanding.

As the work of the Commission proceeded, it became increasingly apparent that the participation of the Soviets was desirable, and the Czechoslovak representative was requested, in August, 1944, to inquire unofficially on what lines the Soviet Government was willing to participate in the Commission. After an interview with the Soviet Chargé d'Affaires on 4th October, 1944, the Czechoslovak representative reported that Soviet participation was still dependent on the representation of the seven Republics. However,⁽¹⁾ he had been assured that, so far as the interchange of information was concerned, all appropriate material would be furnished if the Commission asked for it.

When Lord Wright assumed office as Chairman of the Commission, in January, 1945, he expressed the view that close co-operation with the Russian Extraordinary State Commission was very desirable. He also emphasized this point in a debate in the House of Lords on 20th March, 1945, when Lord Simon, the former Lord Chancellor, put forward the same opinion.

In February, 1945, the Czechoslovak representative observed that the Commission had not yet considered the Soviets' offer of exchange of information, and he urged that a delegation from the Commission should be sent to Russia to establish contact with the Soviet State Commission on

(1) C. 76. 8.2.45. *Memorandum on the present position of the UNWCC, the work already done, and its future tasks.* Presented by Dr. Eéer.

War Crimes. This proposal was not adopted, but with regard to the transmission of information, the Commission did everything in its power to promote an interchange. Material which appeared likely to interest the Soviet war crimes authorities was communicated to them from time to time. In April, 1946, the Commission agreed to send a complete set of its Lists to the Soviet representative on the Allied Control Commission, and thereafter to transmit the Lists regularly. These steps did not, however, lead to reciprocal action.

The question of co-operation was raised again in April, 1945, by the Belgian representative,⁽¹⁾ who pointed out that collaboration with the Soviet War Crimes Commission would be of immense service in procuring a co-ordination of methods of apprehension, punishment, etc. During the Conference of National Offices in May/June, 1945, attention was drawn more than once to the "fundamental difficulty" caused by the absence of collaboration with the Soviets.

The matter was again discussed by the Commission in August, 1945, when a draft letter from the Chairman to each of the member Governments was adopted.⁽²⁾ In this, the importance of the participation of the Soviets was urged, and Governments were asked to agree that the United Kingdom should invite them to join the Commission. Favourable answers having been received from all the members, the British Chargé d'Affaires in Moscow delivered the invitation in February, 1946, but the Soviet reply was that participation was dependent on the same conditions as before. When the Commission considered this reply, in May, 1946, a few members were in favour of accepting these conditions, but the majority considered that Soviet representation in the Commission should be on the same basis as in the United Nations, that is by the Soviet Government and the Governments of Byelo-Russia and Ukraine. As a compromise, it was decided that a delegation of the Commission, representing both the majority and minority views, should call on the Soviet Ambassador and present an oral reply expressing the majority and minority points of view. In the absence of the Ambassador, the resolution arrived at by the Commission was transmitted to Moscow, through the Foreign Office. The Soviet reply, which was received by the Commission in January, 1947, maintained, however, the same standpoint as before. In view of the definite character of this reply, no further attempt was made to obtain Soviet participation on the Commission.

(iii) RELATIONS WITH THE MILITARY AND CONTROL COMMISSION AUTHORITIES

As has already been mentioned, the suggestions made in 1945 for the establishment of a War Crimes Agency at S.H.A.E.F. Headquarters, did not materialise, but liaison between S.H.A.E.F. and the National Offices was maintained through liaison teams attached to the military commands, and contact as mentioned above between S.H.A.E.F. and the Commission was maintained by the attendance of a representative of S.H.A.E.F. at the Commission's meetings.

(1) C. 93. 23.4.45. *Memorandum on the question of the co-operation of the UNWCC with the Russian Extraordinary State Commission.*

(2) C. 142(1) 10.8.45. *Co-operation with the U.S.S.R.—Draft letter to the Governments of the United Nations represented on the Commission.*

In the British zone of occupation the trial of war criminals was undertaken by the Judge Advocate General's Department, in which the British National Office was incorporated after April, 1946. Effective liaison with this Department was secured by the attendance of its representative at meetings of the Commission. On various occasions, when the Chairman or the Secretary General visited Germany—for instance in October, 1945, January and September, 1946 and January/February, 1946/47—contacts were made with the war crimes branches and with the law officers concerned in prosecutions in the British zone.

Liaison with the occupation authorities in the American zone in Germany was maintained through the United States representative on the Commission. When the Chairman or members of the Commission visited the American zone they established personal contact with the Chief of Counsel and the judges of the "Subsequent Proceedings" tribunals at Nuremberg, and the members of the U.S. Theatre Judge Advocate General's staff.

From 1946 onwards, when any question affecting specific problems arose in the British zone in Germany, representatives of the appropriate branches of the Control Commission attended meetings of the Commission. For instance, in October, 1946, when the policy of entrusting German Courts with the trial of Germans accused of war crimes against Allied nationals was debated, the Chief of the Legal Division of the Control Commission for Germany (British Element) attended the meeting and gave explanations.

As regards the Control Authorities in other ex-enemy countries, relations were confined chiefly to the transmission of the Commission's Lists, and to occasional replies, on the Secretariat level, to requests for documentary material. For instance, in March, 1945, the Commission approved the despatch of its Lists of Bulgarian, Roumanian and Italian war criminals to the Control Commissions in Sofia, Bucharest and Rome; and in September of that year it authorised the despatch of a complete set of its Lists to the U.S. representative on the Control Commission at Budapest.

(iv) RELATIONS WITH THE UNITED NATIONS

The United Nations, from its inception, concerned itself with questions relating to war criminals. For instance, in a resolution of 13th February, 1946, the General Assembly, basing itself on the Hague Convention No. IV of 1907 (Laws and Usages of War on Land), and on the Charter of the International Military Tribunal, recommended that its members should take steps to arrest war criminals and—borrowing language from the Moscow Declaration of November, 1943—cause them to be sent back to the countries where their abominable deeds were done, in order that they be judged by the laws of those countries.

In another resolution, passed in February, 1946, the Assembly, after emphasising the distinction between genuine refugees and war criminals, deprecated any action likely to interfere with the surrender and punishment of war criminals.

In a report of January, 1947,⁽¹⁾ the Legal Officer of the Commission drew attention to the formation, by the Economic and Social Council in February, 1946, of a "Negotiation Committee" for ensuring co-operation between the United Nations and certain bodies known as "specialised agencies". It was subsequently learned that the Commission was regarded by the United Nations as an "intergovernmental agency" and was thus placed on a special footing, so far as their inter-relationship was concerned. The Legal Officer also mentioned that the Legal Department of the United Nations was taking steps for the development and codification of international law.

In December, 1946, the Assembly directed the Committee on the Codification of International Law "to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the International Military Tribunal and in the judgment of the Tribunal". This decision was noted by the Commission with much interest.

A resolution of 21st June, 1946, passed by the Economic and Social Council, set up a "Commission of Human Rights", to collect and publish information concerning human rights "arising from the trials of war criminals, quislings and traitors, and in particular from the Nuremberg and Tokyo trials". As the result, first of correspondence and then of a meeting between the Chairman and Secretary General of the Commission and the Secretary General of the United Nations, it was agreed that liaison between the two bodies should be maintained. In pursuance of this principle a selection of working papers and preparatory material relating to "human rights" and "crimes against humanity" was forwarded by the Legal Department of the Commission to the United Nations. Further conversations between members of the Human Rights Division and officials of the Commission took place in January and April, 1947, when it was agreed that the two organisations could usefully co-operate in regard to "human rights" and the codification of international law. In May, 1947, the Commission agreed to undertake the collection and publication of a report concerning human rights arising from war crimes trials.⁽²⁾

The Commission, at meetings in June, 1947, decided to limit the report, in the first instance, to the material at its disposal, that is, the trial of the Major War Criminals and other war crimes trials concerning which the Commission had received reports. At the end of November, 1947, the completed report, covering some 500 pages, with a foreword by the Chairman, was delivered to the Human Rights Commission, then in session at Geneva, which set up a special sub-committee to consider it.

Apart from these interchanges, information was supplied by the Commission in reply to occasional inquiries by the United Nations: for instance, in June, 1946, in regard to the alleged presence of Nazi war

(1) Misc. 66. 2.1.47. *Affirmation of the Principles of International Law embodied in the Charter of the International Military Tribunal by the United Nations Assembly* and Misc. 69. 17.1.47. *Recent activities of the United Nations bearing on the work of the UNWCC.*

(2) The Legal Officers concerned in this work were: MM. Litawski, Zivkovic, Mayr Harting and Brand. Sir Robert Craigie (U.K.) undertook to supervise the work.

criminals in Spain, and in regard to the list of countries which had adhered to the Four Power Agreement on 8th August, 1945.

(v) RELATIONS WITH THE INTERNATIONAL MILITARY TRIBUNALS AND THE SUBSEQUENT PROCEEDINGS COMMITTEE

Prior to the opening of the trial of the Major War Criminals at Nuremberg, the Commission was in close touch in London with the staffs of the Chief Prosecutors of the United States and Great Britain. As already mentioned, both Mr. Justice Jackson and Sir David Maxwell Fyfe—then British Attorney General—attended a meeting of the Commission in July, 1945, and subsequently, both before and during the trial, members of the prosecuting staffs came frequently to discuss matters with officials of the Secretariat. Similar visits were received from representatives of the French Prosecuting staff. These interchanges continued throughout the trial of the Major War Criminals, and, on several occasions, the Secretariat was able to supply the Prosecuting Committee with important documents and evidence which they required. Contact with the Far Eastern Tribunal was established by the Chairman's visit to Tokyo in April, 1946.

As has been mentioned, the "Subsequent Proceedings" Committee, under General Telford Taylor as U.S. Chief of Counsel, was placed under the U.S. Military Government of Germany for the prosecutions of "leaders of the European Axis Powers and their principal representatives" and "such members of groups and organisations declared criminal by the International Military Tribunal."

The relationship between the U.S. Theatre Judge Advocate and the Chief of Counsel had been defined as follows:

"The Theatre Judge Advocate, as adviser to the Chief of Staff and the Commanding General, U.S. Forces European Theatre of Operations, is responsible for investigation and trial of war crimes involving 'violations of the laws of war to the prejudice of U.S. nationals, notably prisoners of war'; atrocities committed in concentration camps before seizure by United States armed forces; and other crimes assigned to the Theatre Judge Advocate for action by the Theatre Commander. The Chief of Counsel for War Crimes is responsible for prosecution of 'leaders of the European Axis Powers and their principal agents and accessories' and of 'such of the members of groups and organisations declared criminal by the International Military Tribunal as the Chief of Counsel for War Crimes may determine to prosecute'."

Six tribunals, capable of operating concurrently, were accordingly established at Nuremberg, in the United States zone, under Military Government Order No. 7, and it was found possible to begin trials at the end of 1946.

It was not the object of the prosecution to try all persons suspected of war crimes, but only those who, in each field of activity, bore the chief responsibility of war crimes.

The following were the cases undertaken by the U.S. "Subsequent Proceedings" Tribunals at Nuremberg:—

No. 1. 23 *Doctors and Scientists*: 9.12.46-19.8.47. Sentences: 7 death, 8 imprisonment, the rest acquitted.

- No. 2. *ex-Air Marshal Milch*: 2.1.47-17.4.47. Sentence, life imprisonment.
- No. 3. *Ministry of Justice officials*: 6.3.47-4.12.47 Sentences, 9 imprisonment.
- No. 4. *Oswald Pohl and ex-officials of the Concentration Camp Administration ("WVHA")*. 10.3.47-3.11.47. Sentences, 4 death, 11 imprisonment.
- No. 5. *Flick and a group of leading German Industrialists*: 19.4.47.-22.12.47. Sentences, 3 imprisonment.
- No. 7. *The "Balkan Generals" or "Hostages" Case*: 15.7.47-19.2.48. Sentences, 8 imprisonment.
- No. 8. *The "RKFDV" or "Kidnapping" Case*: 10.10.47-10.3.48. Sentences, 8 imprisonment.

The following cases are still *sub judice* at the time of going to press:

	<i>Opening Date</i>
No. 6. The I.G. Farben trial ....	...28th August, 1947.
No. 9. The Einsatzgruppen Case ⁽¹⁾15th September, 1947.
No. 10. The Krupps' Directors Case ....	...8th December, 1947.
No. 11. The "Wilhelmstrasse" Case ....	...6th January, 1948.
No. 12. The "13 Generals" Case ....	...6th February, 1948.

(vi) RELATIONS WITH THE PRESS

At the outset the Commission had worked in the strictest possible secrecy; no statements were issued; no photographs were allowed to be taken; the Commission's Lists of war criminals were "Secret". This was necessitated by fear of reprisals against Allied prisoners-of-war in German hands. The policy had, however, certain disadvantages; for instance, allusions to the Commission's proceedings found their way into the Press, sometimes in a distorted form and gave rise to suspicion and misunderstandings. With the object of removing misconceptions the Chairman, Sir Cecil Hurst, held a Press Conference at the Law Courts on 30th August, 1944, but this did not entirely put an end to misleading reports in the British and American Press.

Proposals were made in August, 1944, and again in January, 1945, that a statement should be issued by the Commission to the Press to correct reports, which had appeared in some newspapers, that the work of the Commission was in danger. This step was, however, opposed by some of the participating Governments on the ground that the Commission was an advisory body and that publicity was undesirable. A proposal was then made that a statement should be issued by certain of the Governments, instead of by the Commission, but this was finally abandoned as, in the meanwhile, the Press campaign had died away.

(1) Judgment pronounced 10.4.48. Sentences 14 death, 7 imprisonment.

The uneasiness felt in many quarters and reflected in the more serious newspapers, is illustrated by the following extract from the Press of 15th January, 1945:

“Opposition has been raised, it is understood, to the proposal of the United Nations War Crimes Commission, that Hitler, Mussolini and other Axis leaders, be tried by a Court convened by the United Nations.

“It is understood that a letter was sent from the Foreign Office to the Commission, but its contents have not been disclosed. An Allied Government official, in close touch with the Commission, said he understood that British legal experts had found some objection in international law to the competency of the suggested Court to try Hitler, and had suggested alternative procedure. That, it is believed, might result in the trial of Hitler and other Axis principals not as criminals, but as political offenders. There was a general fear among the occupied countries that to treat Hitler in that way would mean that he would escape punishment.”

At a Commission meeting held on 24th January, 1945, the Czechoslovak and Polish representatives urged that their respective Governments should be allowed to tell their people that Hitler had been placed on the List. The British War Office representative, however, maintained the view that the publication of specific names of war criminals might well lead to reprisals, so long as large numbers of Allied nationals were in the hands of the Germans. Lord Wright emphasized the same point in his speech in the House of Lords on 20th March, 1945.

The matter was again raised by the Czechoslovak representative in February, 1945, when he contrasted the policy of the Commission with that of the Soviet War Crimes Commission, which openly published the names of Germans whom it denounced as war criminals.

On assuming the Chairmanship, Lord Wright issued a statement to the Press, saying that his object, which was shared by all members of the Commission, was to carry out their duties so that justice, and not revenge, would be done to war criminals. The *Times* in publishing this statement, quoted the following resolution which had been adopted by the Commission:—

“Reports have appeared in the Press suggesting that the success and even the continuation of the work of the United Nations War Crimes Commission are in danger. There is no question of this Commission's ceasing to discharge the task placed upon it by the Governments of the United Nations. On the contrary, its operations have been placed on a firmer basis by the liberation of Axis-occupied territory and the greatly increased opportunity of obtaining evidence.”

In February, 1945, it was decided to form a Public Relations Committee, and in June, 1945, it was agreed to appoint a Public Relations Officer. This post continued until July, 1946, when it was abolished.

(vii) CRIMINAL LAW CONFERENCES IN BRUSSELS AND PARIS

At a meeting on 21st May, 1947, the Belgian representative conveyed to the Commission his Government's invitation for delegates of the Commission to attend, in July, the Conference of the “International Bureau for the Unification of Criminal Law”, and the “International Commission for the Study of Crimes against International Law and Acts

Committed in the Interest of the Enemy.”⁽¹⁾ It was agreed to reply, thanking the Belgian Government, but regretting that no staff could be spared; the Commission would, however, be glad to see the conclusions of the Conference when they were available, particularly as regards the subject of crimes against humanity, which was to be discussed

At the Commission's meeting of 18th June, 1947, the Chairman suggested that as the Polish representative was going to Brussels in July, he might act as the Commission's observer at these conferences, which he agreed to do, and forwarded to the Commission the conclusions of the Conferences on the subjects of interest to the Commission.

On 2nd February, 1946, the Yugoslav representative drew the attention of the Commission to a resolution adopted by the International Association of Democratic Lawyers, whose inaugural meeting he had attended in Paris, recommending that crimes against humanity should be regarded as a permanent part of the future of international penal law.

E. THE RESEARCH OFFICE

(i) THE WORK OF THE OFFICE

The work of the Research Office may be regarded as another aspect of the task of investigation. In a document⁽²⁾, dated 25th April, 1944, the Chairman of Committee I had pointed out that the few charges presented by the National Offices up to that time related to persons and crimes of relatively small importance and that the superior German authorities, who originated the crimes, were not being indicted. In many cases dossiers had to be constituted on the basis of a single document which furnished proof in itself of the commission of a war crime: for instance, a decree providing the death penalty for acts of sabotage, or the execution of relatives of saboteurs, or a proclamation by a military commander threatening to execute hostages followed by publication of the names of those executed. It was, therefore, advised that research work on these lines should be undertaken.

The Commission approved this proposal and on 16th May, 1944, a Research Officer, Lieut.-Colonel H. Wade, was appointed “to collaborate actively with the National Offices in seeking certain kinds of information.”

Researches undertaken on the lines indicated above confirmed the view that *prima facie* cases against German leading officials could often be established on the basis of a single decree or proclamation published in the German controlled Press in an occupied territory.⁽³⁾ There was thus

(1) Docs. Misc. 90. 2.5.47. *Invitation to the Eighth International Conference for the Unification of Criminal Law* and Misc. 93, 16.5.47. *Permanent International Commission for the study of the punishment of crimes against International Law and of acts committed in the interests of the enemy.*

(2) C. 14. 25.4.4. *Proposal by the Chairman of Committee I regarding the future of the Committee.*

(3) As a typical example: A Belgian German-controlled newspaper had published on 19.9.41, and again on other dates, a proclamation signed by the Military Governor declaring that at least 5 hostages would be shot—and more in grave cases—for every German killed, in case of attacks upon German officers. That this threat was carried into effect was shown by a notice which appeared in the Belgian Press on 28.2.44 over the signature of the Brussels Oberfeldkommandant, announcing that, after an attack on a German detachment, 20 terrorists had been shot “in accordance with the warning issued by the Military Governor.”

material at the disposal of the National Office either for formulating a *prima facie* case against the author of the decree or as a basis for further investigations.

A notice in a newspaper paragraph would not normally be regarded as satisfactory evidence. But, in the circumstances of the German occupation of conquered territories, it would have been impossible for such notices to be printed in the local Press, except by German direction.

Information obtained in this way was embodied in reports, subsequently called Summaries of Information, which were circulated to those entitled to receive the Commission's documents. The principle observed in compiling these Summaries was to trace some of the most notorious forms of war crimes up to their source. First, it would be shown from the documentary evidence that a given war crime was systematised; next, it was ascertained, from German official documents, what German authorities directed the organisations under which the war crimes were committed, and who were the departmental chiefs to whom those authorities were responsible.

The Research Summaries of Information were also communicated to the staffs of the United States and British chief prosecuting counsel, when the latter were beginning to collect material for the trials of the major war criminals at Nuremberg in the summer of 1945. Though necessarily incomplete—owing to their having been compiled from limited sources of information—they served a purpose, during this stage, as an indication of the objectives on which research might profitably be directed in the examination of the documents that were being brought to light in Germany.

Among the principal war crimes dealt with in this way were: deportations for labour and forced labour; the removal of foodstuffs; concentration camp and Gestapo atrocities; extermination of the Jews; crimes against prisoners of war; Germanisation of conquered territories; crimes against foreign workers; the looting of art treasures; medical experiments on prisoners and "mercy-killing".

After the capitulation of Germany, the collection of documents bearing on war crimes and the distribution of this material to the interested governments was undertaken by the Allied occupying armies on so vast a scale that researches carried out among the comparatively small number of documents available in England could be of less service.

Apart from official documents, a good deal of more or less reliable information was obtainable from the Press and radio on such questions as arrests, war crimes legislation, trials in progress, and comments on such matters. News of this kind was circulated in a War Crimes News Digest.

Another part of the Research Office's work consisted in meeting requests for information and the tracing of documents. These requests were frequent and often of great urgency, particularly when they related to trials pending at Nuremberg.

(ii) DISPOSAL OF DOCUMENTS

(1) *Document Centres in Europe*

After the capitulation of Germany large quantities of documents were seized and processed by the Allied Intelligence Services and Investigating Teams. Some of this material was deposited in various collecting centres in Germany; documents of value to the prosecuting staffs were assembled in immense numbers at Nuremberg, and also at other War Crimes Centres.

On 22nd October, 1945, the French representative had written to the Chairman, with reference to the documents collected at Nuremberg, pointing out that many of them had no direct bearing on the prosecution of the Major War Criminals, which was then proceeding, and would therefore not be produced during the Nuremberg trial; they would, however, be of the utmost value in the subsequent prosecutions of other war criminals. He suggested that the Commission might approach the Committee of Chief Prosecutors with a view to obtaining delivery of these documents at the end of the trial.

The collections of documents stored in different centres in Germany had, at that time, reached formidable dimensions. For example, an official report, dated 31st August, 1945, on the " Ministerial Collecting Centre " at Furstenhagen showed that this centre alone contained 750 tons of documents, of which one group of 70 tons might well be connected with war crimes (SS. Race and Settlement Office). In September, 1945, a report by the " Enemy Documents Unit " of the Control Commission for Germany showed that Document Centres were operating in Germany and Austria at the following places:

(a) *Germany* :

- (i) British Zone: Bad Oeynhauscn, Iserlohn, Nienburg, Hamburg.
- (ii) U.S. Zone: Berlin, Oberursel, Fechenheim, Freising, Heidelberg, Bremen.
- (iii) Joint: Kassel.

(b) *Austria* :

- (i) British Zone: Klagenfurt.
- (ii) U.S. Zone: Linz.

The same report mentioned that there was a " Ministerial " Collecting Centre at Kassel; a *Feldwirtschafts Amt* collection at Frankfort; a collection of Krupp documents at the G.S.I. Library of the B.A.O.R., and another of I.G. Farbenindustrie at Heidelberg. The main collection of documents at Kassel on 16th September, 1945, amounted to some 1,300 tons, besides some 400 tons of Foreign Office records which were arriving at Kassel from Marburg on 12th September.

Besides these formidable collections there were many national stores of captured documents in the territories of the United Nations.

An important documentary centre, from the point of view of evidence, was the " B.B.C. " in London, which held many records of speeches, delivered by Nazi ministers during the war, and intercepted by the monitor-

ing services. Copies of these records were readily supplied to the Research Office, on request, and were made available for trials in Germany.

Personnel records of the German Air Force, amounting to some 25 tons, constituted another important source of information. These records were for some time stored in the Air Ministry premises, Monck Street, in London. They comprised the personal dossiers of all German Air Force officers and *Beamte*, living and dead; some 30 card indexes of personnel; seniority lists of officers and *Beamte*; complete files of the *Chef Gruppe* "G", and numerous working files relating to the above items.

The proposal of the French representative was discussed by the Commission on 31st October, 1945,⁽¹⁾ and was referred to a Documentation Committee, which advised that the authorities of the Four Powers should be consulted. This was done, and after considering their answers, the Commission adopted a resolution recommended that the documents in question, or copies thereof, excepting those over which Governments possessing them desired to retain control, should be housed, after the completion of the trials, under the control of an appropriate international authority in a Research Centre, for which purpose London was regarded as the most suitable place.

This resolution was communicated to the Governments concerned, but the plans indicated above were only partly adhered to, and, after the ending of the trial of the Major War Criminals, in October, 1946, a good deal of the material was dispersed. The United States Documents Service, which held the greater part of the material, is understood to have despatched a large part of it to Washington. A considerable body of documents was, however, retained by the United States Chief of Counsel at Nuremberg for the "Subsequent Proceedings," or Second Nuremberg Trials, which were held in that city in the winter of 1946 and in 1947.

The "British War Crimes Executive"—the name given to the British Element of the Prosecuting Committee at the Nuremberg Trial—brought a great part of the documentation in their possession back to London. It is understood that this was mostly deposited with the Research Department of the Foreign Office, which thus obtained a fairly complete set of the documents of the International Military Tribunal, together with microfilms, and became, therefore, the best repository of this material in Great Britain.

(2) *Ultimate Disposal of U.N.W.C.C. Documents*

The subject was discussed between officials of the U.N.W.C.C. Secretariat and a representative of the "Human Rights" Division of the United Nations, in January, 1947, when it was understood that the United Nations would, in principle, be prepared to assume custody of the archives of the Commission when that organisation was dissolved. This was confirmed in a letter dated 15th December, 1947, written by the Secretary General of the United Nations to the Secretary General of the United Nations War Crimes Commission⁽²⁾. The documents held by the Research Office, which had been received from Government departments in London were, in most cases, returned to the respective Ministries.

(1) See M. 83.

(2) Misc. 118. 19.12.47. Letter dated 15.12.47, received by the Secretary General from Mr. Trygve Lie, Secretary General of the United Nations.

CHAPTER VIII

ACTIVITIES ON QUESTIONS OF SUBSTANTIVE LAW

INTRODUCTORY NOTES

As has already been explained, the activities of the Commission developed in three main spheres: investigation of facts and evidence regarding war crimes; enforcement of the law respecting the punishment of war criminals; and legal opinions relating to war crimes and penal liability of perpetrators.⁽¹⁾

Activities in this latter sphere were performed by a Legal Committee, otherwise designated as Committee III, and occasionally by other Committees or *ad hoc* Sub-Committees in co-operation with the Legal Committee. The story of how the Legal Committee came into being and how it was eventually formed as an organ of the Commission, and not as an independent body, has been related in the preceding pages.⁽²⁾

The Legal Committee carried out a very important part of the advisory function of the Commission. It was called upon to give advice on many cases presented by member Governments to the Commission against war criminals, in which the criminal nature of the acts charged or the liability of the persons accused were at stake. It was also entrusted with giving legal advice on the scope of the retributive action of the United Nations in connection with the developments which were taking place in the body of the laws and customs of war. In this manner it took an active part in the clarification of legal issues, the gradual elimination of uncertainties in the sphere of the laws of war, and in the promotion of rules, many of which were to become part of contemporary international penal law. In most instances, where advice on cases dealing with specific war criminals was required, such advice could only be given after legal opinion on the principles of substantive law had been formed and given to the Commission and member Governments. In other cases such opinions were given with a view to recommending action on the part of the Governments in relation to the further development of the laws of war as a whole.

Questions of substantive law studied on all these occasions covered a very wide field. They concerned, on the one hand, specific questions considered in order to make possible decisions upon cases brought before the Committee on Facts and Evidence. These included: the extent to which black market practices, as evidenced by the Nazis in European occupied territories, amounted to war crimes; the criminal nature of acts committed by enemy agents in execution of their duties and assignments; denationalisation as a war crime; the effect of violations committed out of military necessity; the criminal nature of confiscation of property or appropriations by enemy estate administrators; the criminality of acts resulting in discrimination regarding food rationing; penal liability for

(1) See Chapter VII, B., (i), 1, p. 139.

(2) See Chapter VI, C., (iv), p. 124 et seq.

crimes committed in concentration camps; the criminality of scuttling vessels after the armistice; the improper wearing of uniform as a means of deception; the use of civilians in military works; the taking of hostages; the deliberate bombardment of undefended places; denunciation as a war crime; destruction of forests as a war crime. An account of legal opinions given on these questions will be found elsewhere.⁽¹⁾

On the other hand, there were questions of principle which affected the scope of the Commission's activities and, more generally speaking, the development of the main body of the laws of war. These questions were the most important of all and concerned issues such as the concept of war crimes; the criminal nature of aggressive war; and the criminal nature of acts analogous to but technically not falling within the notion of war crimes, which subsequently became known as "crimes against humanity". A detailed account of the developments which took place in this field outside the Commission is described in another Chapter,⁽²⁾ whereas those concerning opinions devised by the Commission and its Legal Committee are embodied here. They passed through several phases and occupied the whole of the Commission on many occasions, particularly in the beginning and towards the end of its functions.

A. THE CONCEPT OF WAR CRIMES

(i) LIST OF WAR CRIMES

The question of defining the concept of war crimes *stricto sensu* arose in the earliest stages of the Commission's activities. It arose in direct connection with its terms of reference and the scope of its competence.

After the decision had been reached in October, 1943, to form the Commission, several informal meetings of members-designate were held before the official constitution of the body. Many questions as to ways and means of carrying out the assignment were discussed, and, among them, the question of what should be considered a war crime. The question was raised by the British member, later the first Chairman of the Commission, Sir Cecil Hurst. He pointed out that there was a choice between two courses. One was to draw up a list of war crimes, as had previously been done by several bodies, and in particular by the 1919 Commission on Responsibilities.⁽³⁾ The alternative was to attempt a general definition of the concept, for example, that it consisted in violations of the laws of war. Opinions in favour of the first course prevailed. It was further observed that many criminal acts had been perpetrated by the enemy which were of a novel nature and did not clearly fall within the hitherto accepted notion of war crimes. To base the Commission's work on narrow and already obsolescent legalisms would defeat the whole object of bringing the criminals to book.

The subject was referred to a Sub-Committee appointed on 26th

(1) See Chapter XV.

(2) See Chapter IX.

(3) *Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties*.

October, 1943.⁽¹⁾ Considering the drawing up of a list of war crimes, the Sub-Committee deprecated the compiling of an extensive and binding list, and suggested that this be done as a general guide only, leaving freedom to effect further developments in the light of facts and evidence. It proposed the adoption of the list prepared by the 1919 Commission on Responsibilities, and suggested that the advantage of doing so consisted in the fact that Italy and Japan had been parties to its preparation, and that Germany had never questioned the inclusion of any particular item in it.⁽²⁾ At the same time it introduced a very general definition by recommending that "the Commission should proceed upon the footing that international law recognises the principle that a war crime is a violation of the laws and customs of war, and that no question can be raised as to the right of the United Nations to put on trial as a war criminal in respect of such violations any hostile offender who may fall into their hands."⁽³⁾

This course has subsequently been adopted and consistently followed up. From 2nd December, 1943, the list of the 1919 Commission on Responsibilities⁽⁴⁾ was implemented as a working instrument, and the fact recognised that it had not the effect of preventing acts lying outside its scope to be treated as war crimes, or of binding Governments to regard as a war crime every act contained therein. In other words, it was recognised that there were or at least might be war crimes not included in the body of the violations of the laws and customs of war as envisaged at the time of the elaboration of the 1919 Commission's list.

Soon after the list was adopted, proposals were submitted to the Legal Committee for its extension to cover other violations.

In April, 1944, the Polish representative suggested that the practice of taking hostages, as exercised by the Nazi authorities, as well as other acts committed with the result of humiliating and degrading inhabitants of occupied territories, should be recognised as separate war crimes.⁽⁵⁾ As to the first question, it was observed that, whereas the killing of hostages was clearly regarded as a war crime, this was not the case with the taking of hostages. Hostages, however, had been taken by tens of thousands as a means of systematic terrorism. This practice was resorted to in all possible circumstances, including cases where there could be no justification whatever under the accepted terms of international law. It was also pointed out that this was not restricted to selecting individuals, but that in fact whole populations were treated as hostages.

As to the second point, examples were cited to the effect that inhabitants of occupied territories were forbidden to use their native language in public places; that Jews were compelled to wear special marks on their clothes; that in all governmental and other offices Germans were given

(1) The Sub-Committee was composed of the British, Belgian, Czechoslovak, Netherlands and Polish representatives.

(2) C.I. *Report of the Sub-Committee as adopted on 2nd December, 1943 (regarding the task of the Commission)*.

(3) *Op. cit.*

(4) See Chapter III, Part I, B.1, pp. 34 and 35.

(5) III (3) 14.4.44, *Addition of items to the List of War Crimes, proposed by the Polish representative*.

preference over the local population; that, in other words, the populations of the invaded countries were being persecuted on racial, political or religious grounds. It was therefore suggested that any such act, "especially the infringement of the fundamental rights of individuals by discriminating decrees, orders and regulations," should be treated as war crimes.

The Legal Committee submitted its opinion to the Commission on 9th May, 1944. In its report⁽¹⁾ it recommended that the following acts should be regarded as a war crime:

- (a) Indiscriminate mass arrests for the purpose of terrorising the population, whether described as taking of hostages or not;
- (b) Acts violating family honour and rights, the lives of individuals, religious convictions and liberty of worship, as provided for in Art. 46 of the Hague Regulations.

It suggested further that this extension be effected on the basis of the Preamble to the 4th Hague Convention of 1907, which reads as follows:

"Until a more complete code of the Laws of 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 civilised peoples, from the laws of humanity, and from the dictates of the public conscience."

This statement was taken as evidence that the field of war crimes was not limited to the violations of the laws of war as embodied in the Hague Conventions, and that extensions had consequently a legal basis whenever required in the light of new facts and circumstances. The Commission accepted the above recommendation of the Legal Committee and added indiscriminate mass arrests to the list of the 1919 Commission on Responsibilities. As regards the second type of offences, it declared that the above quoted Preamble would at any time be taken into account and make possible the extensions suggested.⁽²⁾ As a consequence, the principle was adopted that the Commission was not bound by the said list of war crimes and that it was to proceed in all cases on the basis of general sources of international law and general principles of penal law.⁽³⁾

(ii) WAR CRIMES AGAINST "ENEMY" AND "ALLIED" NATIONALS

On the ground of this ruling, further extensions of the notion of war crimes were proposed and effected. When defining the scope of war crimes, as described in the preceding pages, the Commission had taken the view that the concept applied to victims who were nationals of the United Nations, i.e. to "allied" nationals, and to offences committed since the outbreak of the war in September, 1939.

Doubts as to whether the functions of the Commission should strictly be limited to such a field were expressed as early as 20th October, 1943,

(1) C.15(1), 9.5.44, *Proposal by the Polish representative for adding new items to the List of War Crimes. Amended Report of Committee III.*

(2) M.17, 9.5.44.

(3) See, for instance, opinion expressed in (III/15), 10.9.45, *Notes on the Criminality of Attempts to Denationalise the Inhabitants of Occupied Territory.*

at the diplomatic conference instituting the Commission. The Chinese Ambassador to the United Kingdom observed that China had suffered the consequences of enemy invasion long before 1939, and that therefore offences committed in China before the outbreak of the second World War should also be regarded as war crimes. The question was considered by the Sub-Committee appointed on 26th October, 1943. It recognised that the elements of time and nationality were not to be regarded as strict limitations, but recommended that expansions should be considered at a later stage.

In April, 1944, the Belgian representative, Chairman of the Committee on Facts and Evidence, proposed that certain offences committed against individuals who were not "allied" nationals, including persons who were technically "enemy" nationals, should also be treated as war crimes. He referred to the reported killing of many Italian hostages by the Nazis after the Armistice with Italy, as well as to deportations and other offences perpetrated against inhabitants of Denmark, Hungary, Roumania and other neutral, co-belligerent or enemy countries. He proposed that, in view of such offences, the concept of war crimes should be applied irrespective of the nationality of the victim or of the place of the crime.⁽¹⁾

This proposal was considered by the Commission in May, 1944.⁽²⁾ It was generally agreed that the inclusion of enemy nationals meant an alteration of the Commission's terms of reference, which required the agreement of the Governments. Many members, however, were in favour of the principle that the nationality of victims and the place of crime should not be regarded as decisive for the concept of war crimes. A draft recommendation to the Governments was submitted by the Chairman of the Commission, which favoured the proposal in so far as Danish and Italian victims were concerned, on account of the express terms of the Moscow Declaration of 1st November, 1943.⁽³⁾ Since no unanimity could be achieved, consideration of the matter was adjourned.

The question was to be raised once more in respect of stateless persons and the notion of crimes against humanity, an account of which will be found later. No formal resolutions or recommendations were ever adopted by the Commission. It should, however, be noted that the principle was nevertheless observed in many instances by the Committee on Facts and Evidence, as deriving both from the spirit of the Moscow Declaration and from the terms of the Preamble to the 4th Hague Convention. As a result, offences committed before September, 1939, for instance in China or Czechoslovakia, offences perpetrated against stateless persons or enemy nationals, and offences committed by Allied nationals themselves in conjunction with the activities of the enemy, were treated either as war crimes proper or as acts analogous to war crimes *stricto sensu*, and in any event as part of the notion of war crimes in a wider sense. The

(1) C.12, 21.4.44, *Extension of the Commission's competence to war crimes not committed against United Nations nationals*. Proposal by the Chairman of Committee I.

(2) M.16, 2.5.44 and M.17, 9.5.44.

(3) C.16, 4.5.44, *Extension of the Commission's competence to crimes not committed against United Nations Nationals*. Draft prepared by the Chairman of the Commission. The Moscow Declaration ruled that lists of war criminals should be prepared for offences perpetrated in the U.S.S.R., Poland, Czechoslovakia, Yugoslavia, Greece, Norway, Denmark, the Netherlands, Belgium, Luxembourg, France and Italy.

basis and justification for such expansion lay, concurrently or alternatively, in the heinous nature of the offence, irrespective of whether the victim or the perpetrator was or was not an Allied national, or in the belligerent position of the country whose inhabitants were victimised, irrespective of whether the status of war was recognised or recognisable under the traditional terms of international law.

In its activities connected with other subjects, such as with the Draft Convention for an International Criminal Court or a United Nations Joint Court, or with the Draft Convention on the Trial and Punishment of War Criminals, the Commission maintained its general attitude of avoiding strict and binding definitions of the concept of war crimes. Definitions envisaged usually referred to the "violations of the laws of war", and some were constructed so as to cite *exempli causa* a number of typical offences, as was done by the 1919 Commission on Responsibilities.

B. CRIMES AGAINST HUMANITY

(i) EXTENSION OF COMMISSION'S COMPETENCE

In addition to the development of the concept of war crimes in the narrower sense, the Commission contributed to the elaboration of the notion of crimes against humanity.

This notion was formally recognised in contemporary international law by its insertion in the Charter of the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis, commonly known as the Nuremberg Charter. Information on this point, as well as on other developments outside the Commission, will be found elsewhere.⁽¹⁾

The notion of crimes against humanity, as it evolved in the Commission, was based upon the opinion that many offences committed by the enemy could not technically be regarded as war crimes *stricto sensu* on account of one or several elements, which were of a different nature. In this respect the victims' nationality played a prominent role, as was exemplified in the case of German and Austrian Jews, as well as of Jews of other Axis satellite countries, such as Hungary and Roumania. The victims were subjected to the same treatment as Allied nationals in occupied territories; they were deported and interned under inhuman conditions in concentration camps, systematically ill-treated or exterminated. It was felt that, but for the fact that the victims were technically enemy nationals, such persecutions were otherwise in every respect similar to war crimes.

As a consequence, the rule stressed during the first days of the Commission's activities, that narrow legalisms were to be disregarded and the field of the violations of the laws of war extended so as to meet the requirements of justice, was applied in respect of this class of crimes.

The development of the subject in the Commission took, technically speaking, the course of extending the concept of war crimes to a wider notion than that hitherto restricting it to the laws and customs of war.

(1) See Chapter IX.

Accordingly, along with the notion of war crimes *stricto sensu*, there evolved the concept of war crimes in a wider, non-technical sense, as a common denominator devised so as to include crimes against humanity, and, as will be seen later, also that of crimes against peace.

At one of the first meetings of the Legal Committee, the United States representative drew attention to the atrocities which were committed by the Nazis against German Jews and Catholics, as well as to other offences perpetrated on religious or racial grounds in pursuance of Nazi ideology.⁽¹⁾ He said that such crimes demanded the application of the "laws of humanity", and moved that "crimes committed against stateless persons or against any persons because of their race or religion" represented "crimes against humanity" which were "justiciable by the United Nations or their agencies as war crimes".⁽²⁾ He explained that the reason for which he had designated such offences as "crimes against humanity" did not lie in the fact that they were unknown to criminal codes under other names, but in that they were crimes against the foundations of civilisation, irrespective of place and time, and irrespective of the question as to whether they did or did not represent violations of the laws and customs of war.

The proposal met with objections, the most important of which were raised with regard to the jurisdiction of the Commission. Thus, the British, Greek and Norwegian representatives were of the opinion that crimes committed by Germans against Germans could in no case be construed so as to be included in the concept of war crimes, however compelling the need for their punishment might be. The British delegate accordingly stressed that the question lay outside the Commission's competence until such time as its terms of reference were altered by the Governments. The American motion was, however, strongly supported by the Czechoslovak and Netherlands representatives.⁽³⁾

A report on the matter was prepared by the Czechoslovak delegate.⁽⁴⁾ The report raised the issue of the total range of offences committed by the Axis Powers, with particular regard to persecutions carried out by the Fascists in Italy and the Nazis in Germany against their own nationals. The opinion was expressed that such persecutions should no longer be regarded as the internal affairs of those countries, and that this had been made abundantly clear in the declarations of the responsible Statesmen calling for the punishment of the Axis criminals. The argument was used that the "extermination of whole classes of their (the enemy's) own citizens because of race, religion or political beliefs" had been instrumental in bringing about the gravest international crime, the second World War, and was therefore a matter of international concern.⁽⁵⁾

After further study and debate, the Legal Committee submitted a draft resolution to the Commission.⁽⁶⁾ The draft stressed that the Commission

(1) Notes of 4th Meeting of Committee III, 16.3.44.

(2) III/1, 18.3.44, *Resolution moved by Mr. Pell on 16th March, 1944.*

(3) Notes on 5th Meeting of Committee III, 27.3.44.

(4) III/4, 27.4.44, *Scope of the Retributive Action of the United Nations according to their Official Declarations.*

(5) *Op. cit.*, Chapter II, 3.

(6) C.20, 16.5.44, *Scope of the Retributive Action of the United Nations. Resolution proposed by Committee III.*

had come to the conclusion that its "methods and principles must be brought into line with the principles expressed in the Allied declarations" concerning the punishment of war crimes. It was therefore suggested that the Commission should include within its competence crimes other than those technically designated as war crimes *stricto sensu*. These were described as crimes committed "in violation of the criminal laws of the countries invaded or otherwise affected, of the laws and customs of war, of the general principles of criminal law as recognised by civilised nations, or of the laws of humanity and the dictates of the public conscience as provided in the Hague Preamble". This formula was then applied to crimes against humanity, which, as distinct from war crimes proper, were defined as "crimes committed against any person without regard to nationality, stateless persons included, because of race, nationality, religious or political belief, irrespective of where they have been committed". It should be noted that this definition was to be adopted in substance in Article 6 of the Nuremberg Charter.

In the discussion which took place on this draft in the Commission, doubts were expressed as to whether the Governments would agree to the course suggested in it. These doubts prevailing, the method of a resolution setting out categories or types of crimes to be added to the concept of war crimes *stricto sensu*, was abandoned. Instead, a letter from the Chairman of the Commission to the British Government was prepared and communicated to the Foreign Secretary.⁽¹⁾ The letter asked whether it was the desire of the Governments "that the activities of the Commission should be restricted to the investigation of war crimes *stricto sensu* of which the victims have been allied nationals". Stress was laid on "atrocities committed on racial, political or religious grounds in enemy territory", which did not "fall strictly within the definition of war crimes". It was emphasised that the need for the retribution in such cases was as great as in respect of war crimes proper.

A preliminary reply was received from the British Government in August, 1944, and a final answer in November of the same year.⁽²⁾ The British Government stated that they did not "desire the Commission to place any unnecessary restriction on the evidence tendered to it" regarding persecution on religious, racial or political grounds in enemy territory. They thought, however, that this could be done only within the limits of the notion of war crimes, and should therefore concern Allied nationals only. They agreed, however, that in so far as crimes against enemy nationals were concerned, the perpetrators "would one day have the punishment which their actions deserve".

A definite stand on this problem was not taken until after the signing of the London Agreement of 8th August, 1945, and of the Nuremberg Charter, which recognised the existence of crimes against humanity as a separate type of international offence.

(1) C.23(1), 1.6.44, *Scope of the Retributive Action of the United Nations*. Letter from the Chairman of the Commission to the Rt. Hon. Anthony Eden, His Britannic Majesty's Principal Secretary of State for Foreign Affairs in the United Kingdom.

(2) C.78, 13.2.45, *Correspondence between the War Crimes Commission and H.M. Government in London regarding the punishment of crimes committed on religious, racial or political grounds*. Letters from Mr. Eden of 23rd August and 9th November, 1945.

In the meantime, a few weeks after the Commission's discussions regarding persecutions in enemy territory, it was approached by the World Jewish Congress. This Congress proposed that the Commission should take steps "with a view to a comprehensive investigation of and report on the war crimes perpetrated by Germany, her allies and satellites upon the Jewish community in Europe".⁽¹⁾ After investigation the Commission eventually agreed to entrust outside experts with the preparation of reports on the lines suggested. This, however, did not materialise on account of technical difficulties, and the matter was thus left in abeyance. Much evidence was nevertheless collected by the Commission in the course of time and placed at the disposal of the member Governments.

On 12th November, 1945, the issue was raised once more. In a letter addressed to the Chairman of the Commission, the Norwegian representative referred to the Nuremberg Charter, which had recently been signed, and suggested that the Commission should place on its lists of war criminals not only individuals who had committed "war crimes in the narrower sense", but also those who had perpetrated "crimes against humanity". The matter was carefully considered by the Commission at three consecutive meetings in January, 1946,⁽²⁾ and the proposal was supported by many members, especially by the Chairman of the Committee on Facts and Evidence. After much debate it was agreed that "crimes against humanity, as referred to in the Four Power Agreement of 8th August, 1945, were war crimes within the jurisdiction of the Commission".⁽³⁾ The motion was adopted by a majority vote, with several abstentions and no opposing votes.

(ii) SPECIFIC CHARGES

This general ruling was implemented in connection with a number of specific charges brought by member Governments before the Committee on Facts and Evidence. In these cases the charges were referred to the Legal Committee for opinion as to whether or not the acts alleged represented crimes against humanity.

The first case of this kind to be examined by the Legal Committee was presented by the Czechoslovak Government. It concerned offences committed by the Nazis in Czechoslovak territory prior to the invasion of Czechoslovakia in March, 1939, and consequently prior also to the outbreak of war in September, 1939. In view of these circumstances, the Czechoslovak Government based its charge on Article 6 of the Nuremberg Charter, according to which offences analogous to war crimes, and committed before the war, fell or could fall within the notion of crimes against humanity. The principal accused, Sepp Dietz, an S.S.-Standartenführer and commanding officer of an S.S. Unit in Austria, was charged with having, at the beginning of March, 1939, invaded Czechoslovak territory from Austria, with a group of selected men, and with having provoked clashes, in the Moravian town of Jihlava, with members of the Czechoslovak State police and with the local Czechoslovak population. During these clashes, Czech citizens, as well as members of the Czech

(1) See M.25, 25.7.44.

(2) See M.91, 9.1.46; M.92, 23.1.46; and M.93, 30.1.46.

(3) M.93, 30.1.46, p. 4.

police, were massacred and a number of persons were killed or seriously wounded. The purpose of these armed raids in Czech territory was to stir up conflicts with the Czechoslovak population and authorities in connection with the contemplated invasion of Czechoslovakia.

In its report to the Committee on Facts and Evidence,⁽¹⁾ the Legal Committee came to the conclusion that "the acts of which Sepp Dietz was charged fall under crimes against humanity", namely as "inhumane acts committed against any civilian population, before or during the war". In this connection the Committee also made the following ruling:

"Crimes against humanity, as defined in paragraph (c) of Article 6 of the Charter of the International Military Tribunal, should be considered as war crimes in the same way as violations of the laws and customs of war, as defined in paragraph (b) of that Article."

The Committee thus applied the concept of war crimes in the wider, non-technical sense. The findings of the Legal Committee were adopted by the Committee on Facts and Evidence, and the accused placed on the list of war criminals.⁽²⁾

(iii) FURTHER DEFINITION

A few weeks later, two more Czechoslovak charges gave rise to a general study of the concept of crimes against humanity and to the formulation of an elaborate definition by the Legal Committee. In one case, the accused, Christoph Manner and others, were charged with having on 22nd September, 1938, abducted a man working with the Czechoslovak police from Czechoslovakia to Germany and then handing him to the Gestapo.⁽³⁾ The second case was more involved, but there again the offences were alleged to represent crimes against humanity.⁽⁴⁾

When studying these cases the Legal Committee decided that it should, in the first instance, attempt to define more closely the concept of crimes against humanity. As a result a report was submitted on the subject to the Commission.⁽⁵⁾ Referring to the definitions of the Nuremberg and Tokyo Charters, as well as to that of Law No. 10 of the Control Council for Germany⁽⁶⁾, the legal Committee came to the following conclusions:

- (a) There were two types of crimes against humanity, those of the "murder type" (murder, extermination, enslavement, deportation and the like), and those of the "persecution type" committed on racial, political or religious grounds.
- (b) Crimes against humanity of the murder type were offences committed against the civilian population. Offences committed against members of the armed forces were outside the scope of this type, and probably also outside the scope of the persecution type.

(1) C.156, 15.10.45, *Crime committed on Czechoslovak territory at the beginning of March, 1939*, (Czechoslovak Case No. 26). Report by Committee III.

(2) Committee I Minutes, No. 52, 28.2.46, p. 6.

(3) See III/3, 8.3.46, *The Czechoslovak Case No. 2553 (Christoph Manner)*. Referred to Committee III.

(4) See III/35, 29.3.46, *The Czechoslovak Case No. 2677 (Bressler and others)*.

(5) C.201, 30.5.46, *General Propositions defining the term "Crimes against Humanity"*, under the Charters of the International Military Tribunals and the Control Council Law No. 10.

(6) Details on these provisions will be found in Chapter IX, Section A, (ii), (5), p. 212.

- (c) Isolated offences did not fall within the notion of crimes against humanity. As a rule systematic mass action, particularly if it was authoritative, was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims.
- (d) It was irrelevant whether a crime against humanity had been committed before or during the war.
- (e) The nationality of the victims was likewise irrelevant.
- (f) Not only the ringleaders, but also the actual perpetrators of crimes against humanity were criminally responsible.
- (g) It was irrelevant whether or not a crime against humanity had been committed in violation of the *lex loci*.
- (h) A crime against humanity may be committed by enacting legislation which orders or permits crimes against humanity, e.g. unjustified killing, deportations, racial discrimination, suppression of civil liberties, etc.

This opinion was endorsed by the Commission on the understanding that the final decision on each particular case was to be taken by the Committee on Facts and Evidence, on the merits of each case.⁽¹⁾

The two Czechoslovak cases which gave rise to the above legal opinion could not be finally decided by the Committee on Facts and Evidence owing to lack of sufficient particulars as to the circumstances of the alleged crimes.

(iv) OTHER CHARGES

Charges alleging the commission of crimes against humanity were also brought by the Yugoslav Government. Altogether ten charges were presented,⁽²⁾ dealing with offences committed by Italian Fascists during or before the war against individuals of Yugoslav race living in the Julian March, and comprising Istria and the area of Trieste. The cases were extremely complicated since most of the victims were Italian subjects and since there were some doubts as to the criminal nature of certain acts. Such were, for instance, the charges that Italian judges had committed crimes by condemning a number of Italian subjects of Yugoslav race to various punishments for alleged offences against the Italian State. All these cases were referred to the Legal Committee.

After many weeks of study and discussions, the Legal Committee presented a comprehensive report, in which it divided the charges into two parts: (a) those which it recognised as representing crimes against humanity and (b) those which it did not.⁽³⁾ As to the former, it based its findings upon the elements constructed in its general definition of crimes against humanity.⁽⁴⁾ It took into consideration "the number, magnitude

(1) See M.107, 5.6.46.

(2) Charges Nos. 1323, 1462, 3296, 4031, 4032, 4033, 4034, 4035, 4036, 4037.

(3) C.239, 5.12.1946, *Yugoslav-Italian Charges of Crimes against Humanity. Report by Committee III.*

(4) C.201, 30.5.46, previously referred to.

and savagery of the inhumane acts" involved, the fact "that a similar pattern emerged at different times and places" and that "the systematic mass action was authoritative", that is, that it had been carried out upon governmental orders. Accordingly it reached the conclusion that acts it had recognised as representing criminal offences, were "punishable normally under municipal law" and "should be regarded as crimes against humanity, which thus become the concern of international law".

This report was adopted by the Commission in January, 1947,⁽¹⁾ and the cases accordingly disposed of by the Committee on Facts and Evidence.

C. CRIMES AGAINST PEACE

(i) AGGRESSIVE WAR A CRIME

By far the most important issue of substantive law to be studied by the Commission and its Legal Committee was the question of whether aggressive war amounted to a criminal act.

As in the case of crimes against humanity, those in favour of declaring aggressive war a crime in international law were mainly concerned with including the principle within the Commission's terms of reference. This would enable presentation to the Commission of charges against the leaders of the Axis Powers and their inclusion in the Commission's Lists of war criminals. For this reason, here again the development took the course of qualifying aggressive war and its preliminary and contemporaneous acts as war crimes in the wider sense. The term "crimes against peace" was only to be thought of at a later stage.

The question was raised in March, 1944, during the first meetings of the Legal Committee, by the Czechoslovak representative in conjunction with crimes against humanity. It will be remembered that the Czechoslovak delegate had prepared a report on the subject, in which he had reviewed the whole range of what, in his opinion, amounted to criminal acts perpetrated by the Axis Powers.⁽²⁾ His thesis was that the paramount crime was the launching and waging of the second World War, and that the individuals responsible for it should be held penally liable and tried accordingly. The criminal nature of the last war was found to derive from its aims and methods. The aims were to enslave foreign nations, to destroy their civilisation and physically annihilate a considerable section of the population on racial, political or religious grounds. The methods arose from the fact that this was a "total" war, which disregarded all humanitarian considerations lying at the root of the laws and customs of war, and introduced indiscriminate means of warfare and barbaric methods of occupation.

The first reaction of the Legal Committee was to agree with these considerations and to include them in its draft resolution on the "Scope of the Retributive Action of the United Nations", dealing also with crimes against humanity.⁽³⁾ The Committee suggested that aggressive

(1) See M.121, 22.1.47.

(2) III/4, *Scope of the Retributive Action of the United Nations according to their official declarations*.

(3) C.20, 16.5.44, Resolution under above heading proposed by Committee III.

wars should be treated as crimes within the scope of the Commission's work, that is, as war crimes in the wider sense, and it defined them in the following terms:

"The crimes committed for the purpose of preparing or launching the war, irrespective of the territory where these crimes have been committed."

It also included in this concept "crimes that may be committed in order to prevent the restoration of peace".

This proposal was, however, not adopted by the Commission, the feeling prevailing that the Governments would be reluctant to go so far. The above definitions were, therefore, referred back to the Legal Committee for further consideration.⁽¹⁾

(1) *Majority Report*

The Committee decided to entrust a special sub-committee with the task of effecting a thorough study and submitting a report. The Sub-Committee was composed of British, Czechoslovak, Netherlands and United States representatives or experts. An elaborate note was submitted by the British expert,⁽²⁾ which took the line that aggressive war, however reprehensible, did not represent a crime in international law. It contained the following observations:

The problem was to be approached from the viewpoint of the *lex lata* and not of the *lex ferenda*. It consisted in whether a State can become, under the existing rules of international law, the subject of criminal liability. This approach was required "not because it was proposed to indict and punish any enemy State, but because a State could only act through human agents". Therefore "if it could be shown that a State had committed a criminal act the human agents responsible for it could properly be indicted for having procured that act".

The British expert reached the conclusion that "the State cannot be the subject of criminal liability" and that consequently the launching and waging of a war could not be regarded as a crime. He referred to the absence of any judicial or arbitral decision recognising penal liability of States. All that was recognised when a State made a breach of a rule of international law was the existence of a situation analogous to a breach of contract or to a delict but not a crime. Reference was also made to the precedent created after the first World War in respect of the ex-Kaiser. The report of the 1919 Commission on Responsibilities was not unanimous, and the United States had been unable to agree that heads of State should be treated as criminally responsible and had adopted the view that, in connection with a war, they could be held only "morally" responsible.⁽³⁾ In addition, when applying to the Netherlands for the extradition of the ex-Kaiser, the Allied Powers stated that they did not contemplate "a judicial accusation" but only "an act of high international policy". This position was not altered by the Kellogg-Briand Pact of 1928. Although illegal under the latter's terms, the launching of a war does not "convert a State into a *caput lupinum*" and has not "abolished war as an

(1) See M.21, 6.6.44.

(2) Sir Arnold McNair.

(3) For more details on this point see Chapter X, Section B, (i), p. 263 et. seq.

institution regulated by rules of law" or "enlarged the category of acts which international law permits States to punish as criminal". Finally, even if these views were wrong and the procuring of aggressive war by individuals was a crime, it was certainly not a "war crime".

The majority of the Sub-Committee and of the Legal Committee agreed with these considerations and conclusions, the Czechoslovak delegate dissenting. A majority and a minority report were consequently submitted to the Commission.

The majority report⁽¹⁾ submitted the following opinion:

"Acts committed by individuals merely for the purpose of preparing for and launching aggressive war, are, *lege lata*, not 'war crimes'.

"However, such acts and especially the acts and outrages against the principles of the laws of nations and against international good faith perpetrated by the responsible leaders of the Axis Powers and their satellites in preparing and launching this war are of such gravity that they should be made the subject of a formal condemnation in the peace treaties.

"It is desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law."

The course thus taken was that war was not a crime in positive international law, but that it should be declared criminal for the future.

(2) *Minority Report*

In his minority report⁽²⁾ the Czechoslovak delegate maintained the attitude he had previously taken and opposed the thesis of the Legal Committee. He stressed that, when considering the problem, the Commission should decide only whether the second World War was a crime, and not whether this was the case with any aggressive war in general. He reiterated his previous arguments concerning the aims and methods of the war launched and waged by the Axis Powers, particularly its nature of a "total" war, and repeated that these were criminal events without precedent. In his opinion international law had clearly developed so as to treat aggressive war as a criminal act, entailing individual penal liability. The Geneva Protocol of 1924, although never ratified, was evidence of the "conviction of the whole civilised humanity", and it expressly declared war to be an international crime. Such was the effect of the Kellogg-Briand Pact of 1928. Under its terms, as interpreted by Briand himself and by the United States Secretary of State for Foreign Affairs, Mr. Stimson, wars had become illegal and were outlawed altogether. As a consequence "as soon as international law deprived aggressive war of its legality" the latter automatically resulted in "a chain of crimes punishable by the heaviest penalties". Finally, the Czechoslovak delegate referred to authoritative statements made by the Allied nations and their leaders, and quoted, *inter alia*, a remark by Churchill that those "who set out to subjugate first Europe and then the world must be punished".

Both reports were considered by the Commission at two consecutive

(1) C.55, 27.9.44, *Report of the Sub-Committee appointed to consider whether the preparation and launching of the present war should be considered "war crimes"*.

(2) C.56, 27.9.44, *Minority Report presented by Dr. B. Ečer on the question whether the preparation and launching of the present war should be considered as crimes being within the scope of the United Nations War Crimes Commission*.

meetings in October, 1944.⁽¹⁾ Elaborate discussion took place, in the course of which the minority opinion of the Czechoslovak representative met with the approval of several members. Those in favour were the delegates of Australia, China, New Zealand, Poland and Yugoslavia. The majority opinion was, however, supported by the representatives of France, Greece and the United States, so that, with the nations represented in the majority report, members were divided on the issue in two approximately equal groups.

Agreeing with the Czech view, the Australian representative and future Chairman of the Commission, Lord Wright, could not approve of the majority's interpretation of the nature of *lex lata* in international law. He was accustomed to finding law in the developing principles of the Common Law. In English law, for instance, there was no specific statutory provision making murder a crime, and yet murder has been treated as a crime for centuries. International law had likewise no specific code, and its rules have to be extracted from a number of sources. One of these sources was the Kellogg-Briand Pact of 1928, which was categorical in declaring war as illegal, and consequently a criminal act. The absence of *lex lata* would no doubt prevent a person from being convicted and punished for an act whose criminal nature might in all fairness be regarded as doubtful. This did not apply in the case of aggressive war whose criminal nature, besides being declared by the Kellogg-Briand Pact, was recognised by a general consensus of authoritative opinion.

The Yugoslav delegate concurred with these views and stressed the fact that all members agreed that the launching and waging of a war of aggression was illegal. The difference existed as to whether it was at the same time criminal in the sense of penal law. *Lex lata* in international law was different from the position it has in municipal law. In international law it evolved from such sources as the dictates of public conscience or the laws of humanity. He feared that the majority in the Legal Committee acted too much under the impact of what *lex lata* was in the sphere of municipal law, that is, written, statutory law. He therefore thought that the main argument of the majority, that based upon the nature of *lex lata*, was erroneous, and that on this ground one could argue for ever without finding a clear and definite solution. The position in regard to the issue at stake was the same as in regard to war crimes *stricto sensu*. These were contained in the laws and customs of war as embodied in the Hague and Geneva Conventions, and yet in none of these Conventions was the word "war crime" used, nor any prohibited act accompanied by penal sanctions. This has not prevented everybody from agreeing that such acts were criminal acts entailing penal sanctions. The time had now come to recognise the same in respect of aggressive war, clearly prohibited by the Kellogg-Briand Pact. Similar views were expressed by the Chinese, New Zealand and Polish representatives.

The majority of members reached the conclusion that decision on the issue lay at any event in the hands of the Governments. Consideration of the matter was accordingly adjourned and the representatives requested to approach their Governments and vote according to instructions.

(1) See M.35, 10.10.44; M.36, 17.10.44.

Before re-examination of the matter for the purpose of taking a vote, the Chairman of the Commission intervened by circulating a letter to the members.⁽¹⁾ He drew attention to the fact that the motion concentrated on the concept of "war crimes", in that both those in favour of and those against treating aggressive war as a crime were supposed to decide on the issue whether or not it represented a "war crime". He emphasised that this concept had obviously been used in different meanings by the members, some identifying it with the narrower field of the violations of the laws and customs of war, and some treating it in a far wider sense. In his opinion any vote on such a motion would lead people to think that members voting in the negative, because to them a war crime was limited to the violations of the laws of war, were not in favour of the punishment of the Axis leaders, which was not the case. The Allied leaders and Allied Governments were all in favour of such punishment. Disagreement existed only as to whether such punishment should be imposed also for the launching and waging of the war as a separate act, distinct from "war crimes" *stricto sensu*, for which the Axis leaders bore full responsibility in any case.

(3) *Attitude of Member Governments*

Consideration of the matter was resumed in December, 1944.⁽²⁾ Several members announced that they had received instructions to vote in favour of the motion that aggressive war was an international crime. Thus, the Yugoslav delegate submitted, on behalf of his Government, a written statement, according to which "war in general and aggressive war in particular represents a clear violation of international obligations and an offence against the principles of the laws of nations and international good faith". The Yugoslav Government was of the opinion that "taking into account that peace was indivisible and was a fundamental condition of the very existence of the international community and of each nation and State" and "having regard to the fact that total war exposed to destruction entire populations on an unprecedented scale" aggressive war could no longer "be considered as a mere violation of international obligations". It was "a crime against the international community as a whole and all the nations" subjected to aggression. The statement referred to the Kellogg-Briand Pact of 1928 and the dictates of the public conscience of the world as sources of such a legal conclusion.

The New Zealand representative announced that, under the terms of a cable received from his Government, "it was New Zealand's policy that those responsible for launching the war should be punished on that account". They "were to be regarded as war criminals within the sphere of action of the Commission" and the New Zealand Government was "prepared to accept the Minority Report".

No vote on the final decision was, however, taken, several members stating that they had not yet received instructions.

A similar communication was received at a later date from the Australian

(1) C.64, 30.11.44, *Examination of the question whether the preparation and launching of the present war can be considered as a "war crime"*.

(2) See M.41, 6.12.44.

Government.⁽¹⁾ It considered "that the preparation for and launching of an aggressive war were in their nature criminal acts", and that in the case of the Axis Powers, the war "was a breach of solemn International Treaties, particularly the Pact of Paris, 1928". It therefore held the view that the Commission was "authorised to put those responsible for launching the war on the lists of war criminals for the fundamental crime of 'total' war".

No resolution was adopted as a result of all these activities; neither were discussions resumed.

(ii) RECOMMENDATIONS TO THE UNITED NATIONS

The subject was, however, considered on one more occasion, in connection with other proposals of members of the Commission. In March, 1945, the Czechoslovak representative submitted a memorandum suggesting that the attention of the United Nations Conference at San Francisco should be drawn to problems concerning the punishment of war criminals.⁽²⁾ One of the main points mentioned was the problem of punishment for the preparation, launching and waging of the second World War. It was suggested that the Conference offered the best opportunity for seeking agreement required on the part of the Governments on this point. It was therefore proposed that the United Nations should be approached and their consent obtained for the participation at their Conference of representatives of the Commission.

After much discussion, during which objections of a formal nature were raised, the proposal was rejected and the decision taken to submit, instead, a report on the main problems involved and suggest solutions in the form of a recommendation to member Governments taking part in the San Francisco Conference.⁽³⁾

The matter was referred to the Enforcement Committee for study as to whether penal sanctions should be imposed for the threat or use of force on the part of States against States. In May, 1945, the Committee presented a draft recommendation on the subject,⁽⁴⁾ and took as a basis for its study the following principle declared in Chapter II of the Dumbarton Oaks Proposals:

"All members of the Organisation (i.e. the future United Nations Organisation) shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organisation."

This clearly excluded war as a full expression of the use of force. The Committee referred to the majority and minority opinions of the Legal Committee concerning the criminal nature of war, and emphasised the unanimous opinion as to the need for making aggressive war punishable in the future. In this respect it recommended the adoption of the following rule:

(1) C.129, 25.6.45, *Views of the Governments as to whether the preparation and launching of the war is a war crime. Opinion of the Government of Australia.*

(2) C.81, 5.3.45, *Proposal by Dr. B. Ečer (Czechoslovakia), for the participation of the United Nations War Crimes Commission in the San Francisco Conference.*

(3) See M.51, 7.3.45; M.52, 14.3.45.

(4) C.100, 2.5.45, *Draft Recommendation to the Governments concerning penal sanctions for the threat or use of force.*

“ Any person in the service of any State who has violated any rule of international law forbidding the threat or use of force, or any rule concerning warfare, especially the obligation to respect the generally recognised principles of humanity, shall be held individually responsible for these acts, and may be brought to trial and punishment before the civil or military tribunals of any State which may secure custody of his person.”

At the same time the Committee considered the question of whether the second World War could be regarded as a crime from the viewpoint of existing international law. It found that, having regard to the diversity of views expressed in the Commission on this point, the meaning and effect of the main source at stake, the Kellogg-Briand Pact, was “ ambiguous ”. It therefore recommended that this should be clarified by inserting another provision in the Charter of the United Nations. The formula suggested read as follows:

“ It being the original intent and meaning of the Kellogg-Briand Pact, signed 27th August, 1928, that any person in the service of any Party-State who violated its provisions condemning recourse to war for the solution of international controversies and renouncing war as an instrument of international policy in the relations of the parties to one another should be held individually responsible for these acts, it is declared that the aggressions of the Axis States since the signing of the Pact violated its provisions and that the persons in the service of such Axis States are individually responsible for such acts and may be brought to trial and punishment before any United Nations Court or other tribunal of competent jurisdiction which may secure custody of such persons or any of them.”

These recommendations were considered by the Commission on 2nd and 3rd May, 1945.⁽¹⁾ Several members objected to the recommendation relating to the second World War, repeating the arguments of the majority opinion of the Legal Committee that war was not recognised as yet as a crime. This attitude was taken in particular by the French representative. The Belgian and Chinese representatives were in favour of limiting the recommendation to the future for other reasons. They thought that the San Francisco Conference was not concerned with the past, and could therefore not embody a statement as suggested in the United Nations Charter. Other members supported both recommendations by stressing that the one dealing with the second World War was proposed only in case the Governments agreed with the opinion that the Kellogg-Briand Pact was ambiguous as to the criminal nature of aggressive wars. This left them full freedom of decision.

In the final event, it was decided to submit both recommendations in two separate documents,⁽²⁾ and thus clearly disconnect the problem of the future from that of the past.

The United Nations Charter, as finally adopted, contains a provision only in regard to future international relations. This is, however, limited to a statement of policy and does not deal with the criminal nature of wars

(1) See M.58, 2.5.45; and M.59, 3.5.45.

(2) C.103, 4.5.45, *Recommendations to the Governments concerning penal sanctions for the threat or use of force. Adopted by the Commission on 3rd May, 1945*; C.104, 4.5.45, *Recommendations to the Governments concerning the interpretation of the Kellogg-Briand Pact. Adopted by the Commission on 3rd May, 1945.*

or its consequences in penal law. The provision, Article 1, 1., reads as follows:

“The Purposes of the United Nations are:

“1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.”

The necessity, however, to deal with the problem of the criminal nature of aggressive wars and with that of individual penal liability of those responsible for acts of aggression, was recognised by the United Nations after its formation. In a Resolution adopted on 11th December, 1946, the General Assembly *affirmed* “the principles of international law recognised by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal” and *directed* the Committee on the Codification of International Law “to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognised” in the above Charter and Judgment.⁽¹⁾

Finally, it can be noted that the criminal nature of aggressive wars was formally recognised by the Commission in its Resolution of 30th January, 1946, previously referred to in connection with crimes against humanity. In its full text the Resolution declared that “crimes against peace and against humanity, as referred to in the Four Power Agreement of August 8th, 1945, (i.e. the Nuremberg Charter), were war crimes within the jurisdiction of the Commission”.⁽²⁾

(1) United Nations, *Resolutions adopted by the General Assembly during the Second Part of its First Session from 23rd October to 15th December, 1946*, Lake Success, 1947, Resolution No. 95, p. 188.

(2) See M.93, 30.1.46, p. 4.

CHAPTER IX

DEVELOPMENTS IN THE CONCEPTS OF CRIMES AGAINST HUMANITY, WAR CRIMES AND CRIMES AGAINST PEACE

A. CRIMES AGAINST HUMANITY

(i) DEVELOPMENTS PRECEDING THE CHARTER OF 1945

(1) *Introductory*

ARTICLES 6 and 5 respectively of the Charters of the International Military Tribunals at Nuremberg and Tokyo, and Article II of the Control Council (for Germany) Law No. 10⁽¹⁾ which laid down the jurisdiction of the International Military Tribunals and of the other courts in Germany which were to try war criminals, specify three types of crimes: (a) *crimes against peace*, (b) *war crimes* and (c) *crimes against humanity*.

As will be shown later, the terms "crimes against humanity" and "war crimes", as defined in these documents, and the concepts they represent, are juxtaposed and inter-related to the extent that while all acts enumerated under the heading "war crimes" are also "crimes against humanity", the reverse is not necessarily true. For instance, acts committed on enemy occupied territory or against allied nationals may be war crimes as well as crimes against humanity, whereas acts committed either when a state of war does not exist, or against citizens of neutral states, or against enemy nationals or on enemy territory, are crimes against humanity, but are not violations of the laws and customs of war, and hence not war crimes. It might be added that crimes against peace, namely the planning, preparation, initiation and waging of a war of aggression, which were declared by the Nuremberg Tribunal to be the supreme international crime, constitute also, in a general non-technical sense, a crime against humanity, since in certain circumstances they involve violations of human rights.

The terms "crimes against peace", "war crimes" and "crimes against humanity", although used in the documents as technical terms, do not represent conceptions entirely novel or without precedent. As was pointed out earlier, in connection with the development of the laws of war prior to the First World War,⁽²⁾ all references to "humanity", such as "interests of humanity", "principles of humanity" "and laws of humanity" as appear in the Fourth Hague Convention of 1907 and in the other documents and enactments of that period, have been used in a non-technical

(1) 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.

(2) See Chapter II, p. 26.

sense, and certainly not with the intention of indicating a set of norms different from the "laws and customs of war", which are covered by the term "war crimes" in the documents of 1945 and 1946.

It was also pointed out that the term "crimes against humanity" in a non-technical sense, was used for the first time in the Declaration of 28th May, 1915,⁽¹⁾ which dealt precisely with the category of crimes that the modern conception of the term is intended to cover, namely inhumane acts committed by a Government against its own subjects. Finally, stress was laid on the fact that the two categories of offences with which the Commission of Fifteen was concerned—violations of the laws and customs of war on the one hand, and violations of the laws of humanity on the other—correspond generally speaking to "war crimes" and "crimes against humanity" as they are used in the documents of 1945-1946. It is not, however, known whether the Commission, in using the term "crimes against the laws of humanity", had in mind offences which were not covered by the other expression. It has also been shown what was the outcome of the recommendations put forward by the Commission of Fifteen as concerns the provisions of the Peace Treaties of 1919-1923.⁽²⁾

(2) *The Italo-Abyssinian War of 1935-36*

During the Italo-Abyssinian conflict a number of protests, appeals and declarations were 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 on 9th May, 1936. One category of these crimes was the use of poison gas by the Italian Army and Air Force. This was considered by an *ad hoc* Committee of Thirteen of the League of Nations, which pointed out that both parties had signed the Geneva Convention prohibiting the use of gases in any form or circumstance, and reference was made to the numerous confirmations of gas-poisoning received from impartial sources.⁽³⁾

In his personal address to the Sixteenth Assembly of the League of Nations on 4th July, 1936, the Emperor of Ethiopia described how the Italian Government had made war not only on the armed forces, but had also attacked populations far removed from hostilities. He stated that towards the end of 1935 the Italians had used tear gas and then mustard gas, and later had extended the same technique to vast areas of Ethiopian territory, drenching not only soldiers but also women, children, cattle, rivers, lakes and pastures with this "deadly rain", systematically killing all living creatures.⁽⁴⁾

On 17th March, 1937, the Emperor requested the Secretary General of the League to appoint a Commission of Inquiry to investigate the horrors committed in Ethiopia by the Italian Government. In addition to other

(1) Declaration of the Governments of France, Great Britain and Russia issued in connection with the massacres of the Armenian population in Turkey, see Chapter III.

(2) See Chapter III, p. 41 et seq.

(3) Statement by Mr. Eden on 8th April, 1936, see Keesing's *Contemporary Archives*, Vol. II, 1934-1937, p. 2066.

(4) See Keesing, *op. cit.* pp. 2173-4.

crimes committed, the Emperor denounced the execution of Ras Desta, a prisoner of war, and the massacre of over 6,000 persons in Addis Ababa which occurred in February, 1937.⁽¹⁾ These allegations indicated that crimes coming within different notions had been committed in Ethiopia.

The Peace Treaty with Italy signed in Paris on 10th February, 1947, contains in Article 45 provisions relating to Italy's obligations regarding the apprehension and surrender of war criminals in general. The persons in respect of whom Italy must take all necessary steps to ensure apprehension and surrender, are those accused of having committed, ordered or abetted *war crimes* and *crimes against peace or humanity*. With regard to Ethiopia's right to prosecute Italian nationals 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 3rd, 1935.”

This reference to “all measures and acts of any kind whatsoever” clearly indicates that the provisions of Article 45 relating to war criminals in general apply also to the Italo-Ethiopian war. It may thus be seen that the crimes committed in Ethiopia during the war 1935-36 have been qualified by these provisions as both *war crimes* and *crimes against humanity*.

(3) *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 14th September, 1937, and supplemented three days later by an agreement signed at Geneva in respect of similar acts by surface vessels and aircraft. The agreement declares attacks committed during the Spanish conflict against merchant ships not belonging to either of the conflicting Spanish parties to be violations of the 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”.⁽²⁾

(4) *Other Developments*

During the Second World War innumerable official and semi-official declarations and pronouncements dealing with the problem of crimes against humanity were issued. In 1943 the London International Assembly passed a resolution to the effect that this was one of the crimes for which the major war criminals should be indicted.⁽³⁾

The United Nations War Crimes Commission, as has been shown in the preceding chapter,⁽⁴⁾ recommended early in its existence that crimes against stateless or other persons on account of their race or religion should be considered as war crimes in the wider sense, and were, therefore, within the Commission's terms of reference.

(1) *op. cit.* p. 2499.

(2) *doc. cit.* the Preamble. Italics introduced.

(3) See Chapter V, Section B, p. 103.

(4) See Chapter VIII, Section B. p. 175.

All these documents and recommendations show that the insertion of the provisions concerning "crimes against humanity" in the Charters of the International Military Tribunals at Nuremberg and Tokyo was due to the 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 narrow sense—that is, violations of the laws and customs of war, perpetrated on Allied territory or against Allied citizens—but that atrocities committed on Axis territory and against persons of other than Allied nationality should also be punished.

(ii) CRIMES AGAINST HUMANITY IN THE LIGHT OF INTERNATIONAL ENACTMENTS OF 1945-1947

(1) *The London Charter and the Nuremberg Judgment*

(a) *General Observations*

Part II of the Charter of the International Military Tribunal at Nuremberg⁽¹⁾ 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 Article 6, is the law which the Charter required the Tribunal to administer, and by which the Tribunal was bound.

Article 6 declares that the following acts should be among the "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 populations 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;

"(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."

The above text of sub-paragraph (c) is the English text as amended by the *Berlin Protocol* of 6th October, 1945,⁽²⁾ by virtue of which the semi-colon originally put between "the war" and "or persecutions" was replaced by a comma following the discrepancy which had been found to

(1) *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 8th August, 1945. H. M. Stationery Office Cmd. 6668.

(2) *Protocol Rectifying Discrepancy in Text of Charter*, drawn up by the Governments who had concluded the Agreement of 8th August; published in *Trial of the Major War Criminals before the International Military Tribunal*, Vol. I, Official Documents, Nuremberg 1947.

exist between the originals of Article 6, paragraph (c) of the Charter in the Russian text on the one hand and the originals in the English and French texts on the other, all of which have equal authenticity. In consequence, the Protocol declares that Article 6(c) in the Russian text is correct, and that the meaning and intention of the Agreement and Charter requires that this semi-colon in the English text should be changed to a comma, with appropriate amendment of the French text.

These corrections have an important bearing on the interpretation of the notion of crimes against humanity. Their consequence is 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).

As previously mentioned, the Charter is the law by which the Tribunal was bound, and it was recognised as such in the statement made in the Judgment that "the law of the Charter is decisive, and binding upon the Tribunal".⁽¹⁾ The Tribunal also took the view that the Charter is an expression of international law existing at the time of its creation, and to that extent is itself a contribution to international law.⁽²⁾ The Tribunal considered itself bound by the law of the Charter also in regard to the definition of both "war crimes" and "crimes against humanity".⁽³⁾

(b) *Article 6(c) and the general attitude of the Tribunal*⁽⁴⁾

While the Nuremberg Charter is the first legal enactment to formulate the definition of crimes against humanity, though the concept was not without precedent, 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 to considerable progress in the relationship between the community of nations, its members states and individual citizens of these states, and between international law and municipal law. The following three elements of the definition 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".

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 presupposes the existence of a system of international law under which individuals are responsible to the community of nations for violations

(1) *The Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg 1946*. H. M. Stationery Office Cmd. 6964, p. 38. (Hereafter referred to as *Judgment*.)

(2) *op. cit.* p. 38.

(3) *op. cit.* p. 64.

(4) For a detailed analysis of the notion of crimes against humanity reference is made to the article by *E. Schwelb*, former Legal Officer of the Commission, 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 utilised.

of rules of international criminal law, and according to which attacks on the fundamental liberties and constitutional rights of peoples and individual persons, that is inhuman acts, constitute international crimes not only in time of war, but also, in certain circumstances, in time of peace. The embodiment of this principle in the Charter, taken in conjunction with the principle that it is irrelevant whether or not such crimes are committed in violation of the domestic law of the country where perpetrated, meant that the Tribunal had the competence to override the national sovereignty and municipal law of the States of which the perpetrators are subject, and where the crimes had been committed. This principle was, however, restricted by the special qualification laid down in the provision, as amended in the Berlin Protocol, that in order to constitute crimes against humanity which call for international penal sanction, 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", that is, they must be connected with a crime against peace or a war crime proper. This qualification therefore limited the scope of the concept of crimes against humanity, with a further consequence that their greatest practical importance in peace time is seriously affected.⁽¹⁾

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 is irrelevant. It seems 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 against both allied and enemy nationals.

In particular, it follows that a civilian population remains under the protection of the provisions regarding crimes against humanity irrespective of its status or otherwise of belligerent occupation; whether it is (a) the population of a territory under belligerent occupation, effected with or without resort 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 are stationed (e.g. German forces in Italy); or of countries adjacent to a belligerent (e.g. cases of kidnapping and other violence); or (c) the population of a belligerent itself (e.g. German or Italian nationals of the same or different race as the respective State authorities).

The words "*civilian* population" appear to indicate that "crimes against humanity" are restricted to inhumane acts committed against civilians as opposed to members of the armed forces, while the use of the word *population* appears to indicate that a larger body of victims is visualised, and that single or isolated acts against individuals may be considered to fall outside the scope of the concept.

As already mentioned, the violation of a certain human right, coming within the scope of Article 6(c), may also constitute a violation of the laws and customs of war, as enumerated under Article 6(b). The provision dealing with war crimes (Article 6(b)) expressly states that its enumeration

(1) The position under Law No. 10 of the Control Council for Germany is different.

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 inhuman acts" indicates, however, that the enumeration in Article 6(c) is also not exhaustive, at least so far as substance is concerned.

There are two types of crimes against humanity; crimes of the "murder-type" such as murder, extermination, enslavement, deportation, etc., and "persecutions". With regard to the latter the provision requires that they must have been 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 mentioned as war crimes in Article 6(b). Murder appears under both headings. Extermination, mentioned only in Article 6(c), is apparently to be interpreted as murder on a large scale—mass murder. The inclusion of both "extermination" and "murder" may be taken to mean that implication in the policy of extermination, without any direct connection with actual criminal acts of murder, may be punished as complicity in the crime of extermination.

It is difficult to tell whether there is any difference between "deportation to slave labour and for other purposes" as mentioned under (b), and the two separate items of "enslavement" and "deportation" mentioned under (c). "Ill-treatment" is mentioned under (b), but is omitted in (c). However, this particular crime might fall under the category of "other inhumane acts".

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.

As concerns the attitude of the Tribunal to the law relating to crimes against humanity, its general considerations were given as follows:

"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 cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organised 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 the 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".⁽¹⁾

It may thus be seen that the Tribunal applied the principle of the Berlin Protocol and restricted both crimes, of the murder type and persecutions, by the provision that they must have been committed in connection with crimes coming within the competence of the Tribunal.

This does not imply that no crime committed prior to 1st September, 1939, can be considered as a crime against humanity. Acts committed in connection with crimes against peace, perpetrated before 1st September, 1939, were recognised by the Tribunal as constituting crimes against humanity. On the other hand, in cases where inhumane acts were committed after the beginning of the war and did not constitute war crimes, their connection with the war was presumed 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) *The crime against peace as a crime against humanity*

Crimes against peace, as such, are dealt with in a separate section of this report.⁽²⁾ This particular type of crime, however, has 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."⁽³⁾

The first acts of aggression referred to in the Indictment are the seizure of Czechoslovakia and the first war of aggression is the war against Poland, begun on 1st September, 1939. Having accepted the contention of the Prosecution as to the aggressive character of the seizure of Austria and Czechoslovakia, the Tribunal expressed itself satisfied that the German war against Poland was an aggressive war, and added that it 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".⁽⁴⁾

The Tribunal therefore thought it justifiable and of primary importance

(1) *Judgment*, p. 65.

(2) See Section C. below, p. 232 et seq.

(3) *Judgment*, p. 13.

(4) *op. cit.*, p. 27.

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*.

(d) *Conspiracy to commit crimes against humanity*

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 "conspiracy" to commit war crimes or crimes against humanity. The doctrine of "conspiracy" is one 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.

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 provision 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.⁽¹⁾

(e) *Crimes against humanity in "subjugated" territories*

The Nuremberg Tribunal further dealt with the plea based on the alleged complete subjugation of some of the occupied countries in the following way:

"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 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."⁽²⁾

(f) *Special types of crimes as war crimes and crimes against humanity*

(i) *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

(1) *op. cit.*, p. 44.

(2) *op. cit.*, p. 65.

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"⁽¹⁾ 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⁽²⁾ 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 the disintegration of 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. Genocide has two phases: one, the destruction of the national pattern of the oppressed group, for which the word "denationalisation" was used in the past; the other, the imposition of the national pattern of the oppressor. Lemkin believes, however, that the conception of denationalisation 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) denationalisation 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, that is, in its 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 denationalisation of the inhabitants of occupied territories, were made the subject of a separate charge which, under (J) of Count Three, is described as germanisation of occupied countries.

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 S.I.P.O. and S.D.,

(1) *The Indictment presented to the International Military Tribunal sitting at Berlin on 18th October, 1945*: H.M. Stationery Office Cmd. 6696, p. 14. (Hereafter referred to as *Indictment*). In accordance with Article 22 of the Charter the first meetings of the members of the Tribunal were held in Berlin.

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

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 German 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 colonisation by Germans."⁽¹⁾

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.

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.⁽²⁾ 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:

"The Nazi Party preached these doctrines through its history. 'Der Sturmer' and other publications were allowed to disseminate hatred of the Jews, and in the speeches and public declarations of the Nazi leaders the Jews were held up to public ridicule and contempt.

"With the seizure of power, the persecution of the Jews was intensified. A series of discriminatory laws were passed, which limited the offices and professions permitted to Jews; and restrictions were placed on their family life and their rights to citizenship. 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. Pogroms were organised, which included the burning and demolishing of synagogues, the looting of Jewish businesses, and the arrest of prominent Jewish business men. A collective fine of one billion marks was imposed on the Jews, the seizure of Jewish assets was authorised and the movement of Jews was restricted by regulations to certain specified districts and hours. The creation of ghettos was carried out on an extensive scale, and by an order of the Security Police, Jews were compelled to wear a yellow star to be worn on the breast and back.

"It was contended for the Prosecution that certain aspects of this anti-Semitic policy were connected with the plans for aggressive war. The violent measures taken against the Jews in November, 1938, were nominally in retaliation for the killing of an official of the German Embassy in Paris. But the decision to seize Austria and Czechoslovakia had been made a year before. The imposition of a fine of one billion marks was made, and the confiscation of the financial holdings of the Jews was decreed, at a time when German armament expenditure had put the German treasury in difficulties and when the reduction of expenditure on armaments was being considered. These steps were taken, moreover, with the approval of the defendant Goering, who had been given responsibility for economic matters of this kind, and who was the strongest advocate of an extensive rearmament programme notwithstanding the financial difficulties.

(1) *Judgment*, pp. 50-52. Italics introduced.

(2) *op. cit.* p. 60.

"It was further said that the connection of the anti-Semitic policy with aggressive war was not limited to economic matters."⁽¹⁾

After referring to a German Foreign Office circular of 25th 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 ghettos, 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 this policy.

"The plan for exterminating the Jews was developed shortly after the attack on the Soviet Union. Einsatzgruppen, of the Security Police and S.D., formed for the purpose of breaking the resistance 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 S.D. 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 S.S. Brigadier-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.'⁽²⁾

After describing other atrocities against Jews which were all part 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",⁽³⁾ 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."⁽⁴⁾

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

(1) op. cit., p. 61.

(2) op. cit., p. 62.

(3) op. cit., p. 63.

(4) op. cit., p. 64.

the sphere of the progressive development of international law. On 11th 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 civilised 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.”⁽¹⁾

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.

(ii) *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.”⁽²⁾

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.

(g) *Conclusions*

The conclusions which can be derived from the foregoing analysis

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

(2) *Judgment*, p. 60.

of the Nuremberg Judgment, as contrasted with the provisions of the London Charter, have been most ably presented by Dr. E. Schwelb in his article already referred to.⁽¹⁾ We shall, therefore, simply record here under (i) to (iv), his observations which are the following:

(i) The International Military Tribunal, in interpreting the notion of crimes against humanity, lays particular stress on that provision of its Charter according to which an act, in order to come within the notion of a crime against humanity, must have been committed in execution of or in connection with any crime within the jurisdiction of the Tribunal, which means that it must be closely connected either with a crime against peace or a war crime in the narrower sense. Therefore the Tribunal declined to make a general declaration that acts committed before 1939 were crimes against humanity within the meaning of the Charter. This represents, however, only the general view of the Tribunal and did not prevent it from treating as crimes against humanity acts committed by individual defendants against German nationals before 1st September, 1939, if the particular circumstances of the case appeared to warrant this attitude.⁽²⁾

The restrictive interpretation placed on the term "crimes against humanity" was not so strictly applied by the Tribunal in the case of victims of other than German nationality. With respect to crimes committed before 1st September, 1939, against Austrian nationals, the Tribunal established their connection with the annexation of Austria, which is a crime against peace, and came, therefore, to the conclusion that they were within the terms of Article 6(c) of the Charter.⁽³⁾ The same applies *mutatis mutandis* to crimes committed in Czechoslovakia before 1st September, 1939, as illustrated in the verdicts on the defendants Frick and von Neurath. With regard to the inhumane acts charged in the Indictment and committed after 1st September, 1939, the Tribunal made the far-reaching statement that in so far as they did not constitute war crimes they were all committed in execution of, or in connection with, aggressive war and therefore constituted crimes against humanity. The case of Ribbentrop and his activities with respect to Axis satellites is particularly illustrative of this view.

(ii) The Tribunal treats the notion of crimes against humanity as a kind of subsidiary provision to be applied whenever any particular area where a crime was committed is not governed by the Hague Rules of Land Warfare. Germanization is, therefore, considered as criminal under Article 6(b) in the areas governed by the Hague Regulations and as a crime under Article 6(c) as to all others. The crime against humanity, as defined in the London Charter, is not, therefore, the cornerstone of a system of international criminal law equally applicable in times of war and of peace, protecting the human rights of inhabitants of all countries, "of any civilian population", against anybody, including their own States and

(1) E. Schwelb, *op. cit.*, p. 205-208.

(2) See the verdict against the defendant Streicher who was also found guilty of crimes against humanity committed before 1st September, 1939, in Germany against German nationals, *Judgment*, p. 101.

(3) See the Tribunal's reasoning in the case of Baldur von Schirach and of Seyss-Inquart, *Judgment*, pp. 112 and 120.

governments. As interpreted in the Nuremberg Judgment, the term has a considerably narrower connotation. It is, as it were, a kind of by-product of war, applicable only in time of war or in connection with war and destined primarily, if not exclusively, to protect the inhabitants of foreign countries against crimes committed, in connection with an aggressive war, by the authorities and organs of the aggressor state. It serves to cover cases not covered by norms forming part of the traditional "laws and customs of war". It denotes a particular type of war crime, and is a kind of *clausula generalis*, the purpose of which is to make sure that inhumane acts violating general principles of the laws of all civilised nations committed in connection with war should not go unpunished. As defined in the Nuremberg Judgment, the crime against humanity is an "accompanying" or an "accessory" crime to either crimes against peace or violations of the laws and customs of war.⁽¹⁾

(iii) Before the Nuremberg proceedings and the Judgment were made accessible, it was assumed by many that for the purpose of deciding whether a crime against humanity has been committed, not only the time (peace or war) was irrelevant, but also the territory and the nationality of the victims. Here, again, the proposition remains true in theory, but must, according to the view of the Nuremberg Tribunal, be considerably qualified with regard to acts committed by the German Major War Criminals before the war in Germany against German nationals. Even with regard to revolting and horrible crimes the connection with aggression or with war crimes in the narrower sense must be proved, and where the proof is not satisfactory they are not considered by the International Military Tribunal as crimes against humanity within the meaning of the Charter.

(iv) The propositions asserting a far-reaching nature of the notion of crimes against humanity, as embodied in the Charter, are subject to very considerable qualifications. Concerning the first principle, assumed to be implied in the Charter, according to which international law contains penal sanctions against individuals guilty of inhumane acts, which are applicable not only in time of war but also in time of peace, it is clear that what has been introduced by the Charter are not international criminal provisions of universal application, but provisions concerning a crime which may be described as subsidiary or accessory to the traditional types of war crimes. Nor can the second principle, according to which it should not make any difference where the crimes are committed and what the nationality of the victim is, be said to be part of the law laid down in the London Agreement and applied at Nuremberg. It is, on the contrary, subject to fundamental reservations.

The third principle ascribed to the Charter, namely, the sweeping away of national sovereignty as an obstacle to bringing to justice perpetrators of crimes against humanity, can hardly be deduced from the terms of that document. The one state sovereignty involved, namely, the sovereignty of the German Reich, had been swept away not by the Charter of the International Military Tribunal nor by the Nuremberg proceedings and Judgment, but by the temporary disappearance of Germany as a sovereign

(1) Jacob Robinson, *The Nuremberg Judgment*, *Congress Weekly*, Vol. 13, No. 25, p. 6

State.⁽¹⁾ As far as State sovereignty was concerned, both the draftsmen of the Charter and the Court were operating in a vacuum, as it were, the sovereignty of the German State as the obstacle barring the enforcement of justice having been destroyed by the historic events of May and June, 1945. In view of this fact, it is doubly significant that the Charter and the Tribunal respected German sovereignty to the extent of subjecting to the Court's jurisdiction only such criminal activities as were connected with either crimes against peace or with violations of the laws and customs of war, i.e. only such acts as directly affected the interests of other states. It is by no means a novel principle in international law that the sovereignty of one State does not prevent the punishment of crimes committed against other States and their nationals. The laws and customs of war are not a restriction on state sovereignty. They regulate the relationship between one State and persons who are not subject to its sovereignty. The Hague Regulations, for example, set the limits of what an occupant is permitted to do, and what is forbidden to him; the question of sovereignty is not involved. The Hague Regulations state, as it were, what is *intra vires* and what is *ultra vires* of an occupant *qua* occupant as distinguished from the sovereign. The Nuremberg Tribunal showed itself willing to extend the protection which the laws and customs of war on land afford to the population of territory under belligerent occupation to foreign territory other than under *occupatio bellica* (Austria, parts of Czechoslovakia in 1938), and, in time of war, to any population. As for the consistent extension of this principle so as to safeguard human rights also in time of peace against the victims' own national authorities, the Charter and Tribunal proceed with great caution and reserve.

(v) The preceding observation will become more apparent when the question of the status of the Nuremberg Tribunal is considered. Here, it is sufficient to record only the following:

The Nuremberg Tribunal found its being in the Agreement entered into in London on 8th August, 1945,⁽²⁾ 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 accordance with Article 5 of the Agreement, nineteen Governments of the United Nations⁽³⁾ 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."⁽⁴⁾

In its judgment the Tribunal stated that in creating the Tribunal the signatory Powers "have done together what any one of them might have

(1) The Berlin Declaration of 5th June, 1945, Cmd. 6648; of Kelsen, 'The Legal Status of Germany according to the Declaration of Berlin', *American Journal of International Law*, 39 (1945), p. 518 R. V. Bottrill, *ex parte Kuchenmeister*, (1946) 1 All E.R., p. 635 and note in *American Journal of International Law*, 40 (1946), p. 811.

(2) 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 8th August, 1945, H.M.S.O. Cmd. 6668.

(3) 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.

(4) The preamble to the Agreement, paragraph 4.

done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law."⁽¹⁾ 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 recognised by the civilised world."⁽²⁾

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 Nuremberg Tribunal and its military, international, judicial and *ad hoc* characteristics which are of primary relevance in assessing properly the importance of the Nuremberg Trial and the authority of the Nuremberg 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 tribunals of other United Nations or other countries.

(2) *The Tokyo Charter and Indictment*

The trial against the Japanese Major War Criminals which opened on 29th April, 1946, in Tokyo before the International Military Tribunal for the Far East is still in progress at the time of the writing. This Tribunal was constituted by a Special Proclamation issued on 19th January, 1946, by General D. MacArthur in his capacity as Supreme Commander for the Allied Powers.⁽³⁾ The composition, jurisdiction, powers and rules of procedure of the Tribunal were regulated by a Charter, approved and enacted also by the Supreme Commander in the said Proclamation.⁽⁴⁾

For the reason stated, the following observations are necessarily based only on the Charter and the Indictment submitted to the Far Eastern Tribunal. It is therefore impossible to consider at this stage the manner in which that Tribunal applied the relevant provisions of the Charter and the effect it gave them in the cases brought before it for trial.

(a) *The provisions of the Far Eastern Charter*

The substantive law for the prosecution and punishment of the defendants tried at Tokyo is formulated in Article 5 of the Charter. After listing crimes against peace under (a) this article enumerates the following groups of crimes:

(1) *Judgment*, p. 38.

(2) *op. cit.*, p. 38.

(3) *Special Proclamation of the Supreme Commander for the Allied Powers establishing an International Military Tribunal for the Far East*, Tokyo, 19th January, 1946.

(4) *The Charter* attached to the Proclamation of 19th January, 1946, was subsequently amended by General Orders No. 20 of 26th April, 1946.

(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, organisers, 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.⁽¹⁾

If we compare the provisions of Article 5(b) and (c) of the Far Eastern Charter with those of Article 6(b) and (c) of the Nuremberg Charter, the following differences become apparent:

(i) War crimes in the narrower sense are in the Far Eastern Charter called "conventional war crimes". This description is limited to the general definition that "conventional war crimes" represent "violations of the laws and customs of war". In the Nuremberg Charter a similar definition is followed by an extensive enumeration of specific offences cited *exempli causa*: It is hardly necessary to point out that there is no difference in the substance and that both Article 5(b) and 6(b) of the two Charters cover exactly the same field.

(ii) In the Far Eastern Charter, it is not expressly stated that "crimes against humanity" are crimes committed "against any civilian population"; these terms were inserted in the Nuremberg Charter chiefly with a view to including crimes perpetrated by the Nazi regime against their own citizens. The Indictment presented to the Tokyo Tribunal does not charge, however, the Japanese Major War Criminals with crimes committed against Japanese subjects on Japanese territory, but is restricted to offences committed against persons other than Japanese nationals.

(iii) In the Far Eastern Charter there is no mention of "persecutions on religious grounds", possibly because such violations by the Japanese Major War Criminals had not been committed. On the other hand, the relevant provision covers the same field as the Nuremberg 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 Nuremberg 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.

(iv) 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

(1) The provisions of Article 5 were not affected by the amendments to the Charter introduced by General Orders No. 20 of 26th April, 1946.

"crimes against humanity" in Article 5(c) when such crimes are committed *before* the outbreak of war. The Charter, having been drafted and promulgated after the Berlin Protocol was from the outset clear on the point that, to constitute "crimes against humanity", not only acts representing "persecutions on political or racial 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.

(b) *The Far Eastern Indictment*

(i) *Attempt to introduce new type of international crime.* Apart from the classical types or categories of criminal offences committed in violation of the laws and customs of war, the Tokyo Indictment introduced a special category as to which it can be said that it has no parallel in the Nuremberg 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 Prosecution charged the defendants with the loss of life ("killing" and "murder") of the combatants and civilians of a number of attacked countries, as a direct result of the military operations with which Japan opened the hostilities against those 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 and civilians on the occasion of these treacherously opened hostilities was regarded by the Prosecutors as representing a separate criminal act deriving from the unlawfulness of the attacks themselves.⁽¹⁾

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;⁽²⁾ the killing of British officers and soldiers during the attack on Kota Bahru, Hong Kong and Shanghai on 8th December, 1941;⁽³⁾ the killing of the servicemen of the Philippine forces whilst invading the Philippines territory on 8th December, 1941;⁽⁴⁾ the killing of servicemen of the U.S.S.R. and Mongolia on the occasion of the aggressions waged against them in the summer of 1939 whilst these two countries were neutral.⁽⁵⁾ Jointly with these cases, charges were submitted for atrocities

(1) 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.

(2) See Count 39.

(3) See Counts 40, 41 and 42.

(4) See Count 43.

(5) See Counts 51 and 52.

against the civilian population and prisoners of war ("disarmed soldiers")⁽¹⁾ committed in the course of similar attacks and aggressions, particularly against China.

All these charges were grouped separately 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".⁽²⁾

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⁽³⁾ rather than in the section headed "murder", a prosecution for the loss of the lives of combatants and civilians 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 persons who lost their lives during such military operations as victims of war crimes and crimes against humanity. 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 Nuremberg Tribunal.

It remains to be seen whether the above mentioned charges, 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 and other persons of a nation attacked without a declaration of war would be a crime in itself, presumably on account of the fact that such persons were unprepared to meet a military attack from the adversary. 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 attacked nation is 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 nation was *in fact* 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,

(1) See Counts 45-50.

(2) See Group, Two, Introductory paragraph and Counts 37-52. Italics introduced.

(3) See Group Three, Counts 53-55.

i.e. to the period during which it is justifiable to consider that the armed forces of the attacked nation were taken unaware and could not therefore undertake the requisite operations to engage in regular combat with the aggressor. The killing of combatants and civilians during such operations after the period of surprise and unpreparedness had elapsed would not *prima facie* represent a crime.

(ii) *Crimes committed in the territory of non-belligerent or neutral powers, or against nationals of such countries.* In the Tokyo Indictment the Prosecution also included charges of crimes committed in the territories of Portugal and of the Soviet Union, and/or against nationals of these countries.

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 8th August, 1945, just a few days before Japan's capitulation.⁽¹⁾ Prior to that date, the Soviet Union and Japan were linked by a Pact of Non-Aggression signed on 13th 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 and crimes against humanity the Prosecution indicted 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 . . ." ⁽²⁾ 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.⁽³⁾ The period of time indicated as relevant to the charges is the period between 7th December, 1941, and 2nd September, 1945.⁽⁴⁾

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 territory, or against such nationals outside those territories. 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 7th December, 1941, and 2nd 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

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

(2) See *Indictment*, Counts 53 and 55.

(3) 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, see *Department of State Bulletin*, Vol. XIII, 1945, p. 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.

(4) See *Indictment*, Counts 53 and 55.

the Portuguese part of the island of Timor on 19th February, 1942.⁽¹⁾ 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 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 territory of the Soviet Union, but where members of the Red Army were involved in combats as allies of the Mongolian Republic.⁽²⁾ The main feature of this part of the Indictment is that it extended the provisions of Article 5(b) and (c) of the Charter to acts which were perpetrated against nationals and/or on the territory of countries which at the time of the commission of such crimes were not in a state of war with the Power whose nationals were held criminally responsible for the said acts.

(iii) *Inhumane acts and persecutions which are not considered as "crimes against humanity"*. The Tokyo Indictment made reference to a number of acts, which throw light on the violation of certain human rights of particular interest both in time of war and peace.

(a) One type of these acts 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 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."⁽³⁾

The Indictment 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 organisations.⁽⁴⁾ 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.⁽⁵⁾

These acts could be regarded as representing one of the types 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 acts of the persecution type affect the *political or civic rights* of the citizens of Japan itself. 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:

(1) See *Indictment*, Appendix A, Section 10.

(2) See Appendix A, Section 8.

(3) See Appendix A, Section 4. Italics introduced.

(4) See Appendix A, Section 4.

(5) See Appendix B, under 10, 16, 32 and 35.

" . . . *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 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, aggression, desire for war, cruelty and hatred of potential enemies."⁽¹⁾

Reference was made to breaches of the then binding treaties thereby committed, for instance the reference to Article 22 of the Covenant of the League of Nations.⁽²⁾

(c) Finally, there are in the Indictment references to a number of other breaches of treaties. 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* and the liquor traffic.⁽³⁾ 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.

In regard to most of the acts referred to in the parts of the Indictment quoted above under (a), (b) and (c), one could put forward the question whether offences or abuses such as the illicit traffic in narcotics and liquors or slave trade are to be recognised 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 the suppression of political or civic rights on the part of a State (Government) in regard to its own citizens.

By the provisions of Art. 5(c) and 6(c) respectively of the Tokyo and Nuremberg 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 recognised 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 aggressive war. In its judgment the Nuremberg 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.

As far as the Tokyo Indictment is concerned, it should be pointed out that the offences or abuses mentioned above under (a), (b) and (c) have not been made the subject of any of the charges preferred against the defendants and have not even been mentioned in the charge sheets of

(1) See Appendix A, Section 6. Italics introduced.
 (2) See Appendix B, under 15.
 (3) See Appendix B, under 15.

the Indictment. They have merely been included in Appendix A to the Indictment, which contains summarized particulars showing the principal matters and events upon which the Prosecution will rely in support of the several counts of the Indictment relating to crimes against peace, and in Appendix B which is a list of Articles of Treaties violated by Japan and incorporated in Groups One and Two of the Indictment dealing with crimes against peace and with special types of murder crimes.

(3) *The Peace Treaties of 1947*

The Peace Treaties which, following the Peace Conference of Paris of 1946, were concluded with Italy and the four satellite countries and signed in Paris on 10th February, 1947,⁽¹⁾ were a further step in making the notion of "crimes against humanity" part of the common law of nations.

All these Treaties contain provisions regarding not only persons accused of war crimes in the traditional sense of the term, but also of crimes against humanity (and crimes against peace). Thus Article 45 of the Peace Treaty with Italy provides in paragraph I that "Italy shall take all necessary steps to ensure the apprehension and surrender for trial of:

"(a) Persons accused of having committed, ordered or abetted war crimes and crimes against peace or humanity."

In paragraph 2 it is further stated that "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 in paragraph I of this Article". As already mentioned, the Peace Treaty with Italy provides also for punishment of crimes against peace, war crimes and crimes against humanity committed during the Italo-Abyssinian war of 1935-36.⁽²⁾

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 "crimes against peace", which are not defined in these Treaties, have the same connotation as in the London Charter of 1945.

(4) *Endorsement by the United Nations*

On 13th February, 1946, the General Assembly of the United Nations passed a resolution regarding the surrender of war criminals,⁽³⁾ in the Preamble of which it took note of the definition of war crimes, crimes against peace, and crimes against humanity contained in the Charter of the International Military Tribunal dated 8th August, 1945. In December, 1946, at a time when three States which had been neutral during the Second World War had joined the ranks of the United Nations (Sweden, Iceland, and Afghanistan), the General Assembly again took note "of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European

(1) See *Treaties of Peace with Italy, Roumania, Bulgaria, Hungary and Finland*, H.M.S.O. Misc. No. 1 (1947), Comd. 7022.

(2) See Article 38 and Section A.(1). 2 above. *The Italo-Abyssinian War of 1935-36*.

(3) Resolutions adopted by the General Assembly during the first part of its first session from 10th January to 14th February, 1946 (Doc. A/64), p. 9.

Axis signed in London on 8th August, 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19th January, 1946", and affirmed "the principles of international law recognised by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal"⁽¹⁾

(5) *Occupational and municipal legislation*⁽²⁾

(i) *Crimes against humanity in the Control Council Law No. 10.* On 20th December, 1945, the Control Council for Germany enacted a law regarding the punishment of persons guilty of war crimes, crimes against peace and against humanity which is generally known as "Control Council Law No. 10".⁽³⁾ This law was passed "in order to give effect to the terms of the Moscow Declaration of 30th October, 1943,⁽⁴⁾ and the London Agreement of 8th 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".

Article I of Law No. 10 provides, *inter alia*, that the London Agreement is made an integral part of the law. Article II provides that each of the following acts is recognised as a crime and enumerates under (a) crimes against peace, under (b) war crimes, under (c) crimes against humanity, and under (d) membership in a category of criminal groups or organisations declared criminal by the International Military Tribunal. The provision concerning crimes against humanity reads as follows:

"(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."

If we compare the definition of crimes against humanity under Law No. 10 with the definition of crimes against humanity in the Charter of the International Military Tribunal, we find the following differences:

(1) The definition of Law No. 10 begins with the words "Atrocities and offences, including but not limited to . . .". These words are not contained in the Charter. This means that the enumeration in the Charter is exhaustive, in Law No. 10 exemplative. This difference, however, is not important, because the words used in the Charter, "or other inhumane acts", are so wide that the enumeration is, in practice, also merely exemplative.

(2) Law No. 10 enumerates the following acts which are not contained in the Charter, namely, "imprisonment, torture and rape".

(1) Resolution (9) passed in the 55th plenary meeting, 11th December, 1946. *General Assembly Journal*, No. 75: Supplement A-64, Add. I, p. 945.

(2) For most of this Section, which was included in his article on Crimes against Humanity, the Commission is indebted to Dr. E. Schwelb, *op. cit.*, p. 216-224.

(3) *Official Gazette of the Control Council for Germany*, No. 3, p. 22, *Military Government Gazette, Germany, British Zone of Control*, No. 5, p. 46, *Journal Officiel du Commandement en Chef Français en Allemagne*, No. 12 of 11th January, 1946.

(4) Signed on 30th October 1943, but published on 1st November, 1943.

(3) The word "and" before "other inhumane acts" is replaced in Law No. 10 by the word "or". This again indicates that it was the intention of the makers of Law No. 10 to give it a wider scope, although the practical effect of this alteration should not be too great.

(4) The words "before or during the war" are omitted in Law No. 10. It is submitted that this alteration has no practical importance because from other provisions of Law No. 10 it is quite clear that Law No. 10, too, applies to crimes committed both before and during the war. One of the provisions bearing this out is Article II(5) of Law No. 10 regarding the Statutes of Limitation. It provides: "In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect of the period from 30th January, 1933, to 1st July, 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment".

The implication of this provision is, of course, that crimes committed before 30th January, 1933, can be made the subject of criminal prosecution. In other words, even crimes committed during Hitler's "struggle for power", i.e. before 1933, can be investigated and prosecuted. The words "before or during the war" may have been omitted because the legislators intended the provisions to cover not only acts committed before and during the war, but also acts committed after the war.

(5) Law No. 10 does not contain the words "in execution of or in connection with any crime within the jurisdiction of the Tribunal". This, of course, is the most fundamental and most striking difference between the Charter and Law No. 10, particularly in view of the great importance attributed by the Nuremberg Prosecution and by the International Military Tribunal to these very words. From this difference between the text of the Charter and the text of Law No. 10 it follows that this qualification of the term "crime against humanity", as understood by the International Military Tribunal, is entirely inapplicable in proceedings under Law No. 10. Contrary to what was said by the International Military Tribunal with regard to the law to be applied by it, it is not necessary for an act to come under the notion of crime against humanity within the meaning of Law No. 10 to prove that it was committed in execution of, or in connection with, a crime against peace or a war crime.

Owing to this difference between the Charter on the one hand and Law No. 10 on the other, the whole jurisprudence evolved in the Nuremberg proceedings with a view to restricting crimes against humanity to those closely connected with the war becomes irrelevant for the courts which deal with crimes against humanity under Law No. 10. At first sight it seems rather startling that the law applied to the Major War Criminals, who were tried under the Charter, should be less comprehensive and therefore less severe than the law applied to perpetrators of lesser rank. In reply to this objection, it may be said: (a) that the objection is a theoretical and doctrinal one only, because the Major War Criminals were certain to be caught in the net of the law in spite of the qualification contained in Article 6(c) of the Charter; (b) that the striking difference in the texts of the Charter on the one hand, and of Law No. 10 on the other, does not permit of any other interpretation; (c) that the difference

between the Charter and Law No. 10 probably reflects the difference both in the constitutional nature of the two documents and in the standing of the tribunals called upon to administer the law. As has been pointed out, the International Military Tribunal was, in addition to being an occupation court for Germany, also—to a certain extent—an international judicial organ administering international law, and therefore its jurisdiction in domestic matters of Germany was cautiously circumscribed. The Allied and German courts, applying Law No. 10, are local courts, administering primarily local (municipal) law, which, of course, includes provisions emanating from the occupation authorities.

There remains one difficulty in the interpretation of Law No. 10. Article I makes the London Charter an integral part of that Law. Article II contains, as shown, provisions respecting, *inter alia*, crimes against humanity which differ from the London Charter. Which provision is to prevail? It is submitted that Article II is the operative provision, the quoted part of Article I only incorporating the provisions regarding Major War Criminals in the local law of Germany. The question of the guilt or innocence of persons other than the Major War Criminals, is then, governed by Article II.

In the British zone of Control in Germany, a special Ordinance concerning crimes against humanity was issued in accordance with Control Council Law No. 10⁽¹⁾ which authorised German ordinary courts to exercise jurisdiction in all cases of crimes against humanity committed by persons of German nationality against persons of German nationality or stateless persons. This Ordinance contains a provision pertaining to the relationship between the concept of crimes against humanity and offences under ordinary German law. Article II of the Ordinance provides that if in a given case the facts alleged, in addition to constituting a crime against humanity, also constitute offences under ordinary German law, the charge against the accused may be framed in the alternative and that the above-quoted provision of Law No. 10 regarding the statutes of limitation and the irrelevance of Hitler's amnesties apply *mutatis mutandis* to the offences under ordinary German law. In the United States zone of Occupation, the Control Council Law No. 10 was carried out by the Military Government Ordinance No. 7, which became effective on 18th October, 1946. In the French zone of Occupation, Ordinances of 25th November, 1945, and 8th March, 1946, were promulgated by the French Commander-in-Chief.⁽²⁾ In the Instructions issued by the French Supreme Command in Germany, General Directorate of Justice, for the investigation, prosecution, and trial of war crimes, the term "crime against humanity" is defined as follows: "crimes against humanity are crimes committed against any civilian population of whatever nationality including persecutions on political, racial or religious grounds". In the

(1) Ordinance No. 47, published in *Military Government Gazette, Germany, British Zone of Control*, No. 13, p. 306.

(2) *Journal Officiel du Commandement en Chef français en Allemagne. Ordonnance No. 20 du Commandant en Chef, relative à la répression des crimes de guerre* of 25th November, 1945, and *Ordonnance No. 36 relative à la répression des crimes de guerre, contre la paix et l'humanité et de l'affiliation à des associations criminelles* of 25th February, 1946.

Instructions it was added that where such crimes have been committed against nationals of Axis countries the prosecution and punishment of the offenders may involve considerations affecting the general policy of the Allies; investigations in regard to such matters should therefore only be undertaken in pursuance of instructions from higher quarters.⁽¹⁾

(ii) *Crimes against humanity in trials before American Military Commissions in the Far East.* The United States military authorities issued different sets of Regulations for the United States Military Commissions in the Far Eastern and China Theatres of War, which also contain provisions regarding crimes against humanity, and which, in general, are based on the definition contained in the London Charter of 8th August, 1945.⁽²⁾ Under the Regulations which were issued by General Headquarters of the United States Armed Forces, Pacific, on 24th September, 1945, the Military Commissions were given jurisdiction to try all three types of crimes defined in Article 6 of the London Charter, namely, war crimes, crimes against peace, and crimes against humanity. Crimes against humanity are, though this term is not actually used, defined as follows: "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 connection with any offence within the jurisdiction of the Commission, whether or not in violation of the domestic law of the country where perpetrated".

It will be seen that while the Regulations were, in general, based on Article 6(c) of the London Charter, the following differences occur:

(a) While the London Charter speaks of persecutions on political, racial or religious grounds, the Pacific Regulations add the concept of "national grounds". This is the more remarkable, because, as was already stated, the Charter of the International Military Tribunal for the Far East speaks only of political or racial grounds, omitting one of the grounds contained in the European Charter, namely, religious grounds.

(b) The words "before or during the war" are omitted in the Pacific Regulations of 24th September, 1945.

Both these differences between the Pacific Regulations and the London Charter were removed when the Regulations of 24th September, 1945, were replaced by similar Regulations of 5th December, 1945, in which the definition of crimes against humanity is as follows: "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 defined herein, whether or not in violation of the domestic laws of the country where perpetrated". The "national" grounds have been omitted, and the expression "before or during the war" has been added. The latter phrase has been extended by a further provision, which reads as follows: "The offences need not have been committed after a

(1) *Commandement en Chef Français en Allemagne. Direction Général de la Justice. Crimes de Guerre. Instructions sur la recherche, la poursuite et le jugement des crimes de guerre.* 28th August, 1946.

(2) See *Law Reports of Trials of War Criminals*, selected and prepared by the United Nations War Crimes Commission, English Ed. Vol. I, Annex II, p. 111.

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 18th September, 1931".

Provisions on the same lines as those contained in the Regulations for the Pacific Theatre, dated 24th September, 1945, were made for the China Theatre on 21st January, 1946. Under the Regulations issued for United States Military Commissions in Europe, their jurisdiction is restricted to war crimes in the narrower sense and does not include crimes against humanity.

(iii) *Regulations for British Military Courts.* The instrument under which the trials of persons charged with war crimes by British Military Courts are conducted is the Royal Warrant of 14th June, 1945.⁽¹⁾ This instrument restricts the jurisdiction of the military courts to the trial of "war crimes", and "war crime" is defined as "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 the 2nd September, 1939". Acts committed before the war, and acts which are not violations of the rules of warfare, are, therefore, outside the jurisdiction of British war crimes courts. They cannot, therefore, try crimes against humanity, unless they are simultaneously violations of the laws and customs of war and have been committed after 2nd September, 1939. The Canadian Order in Council, the "War Crimes Regulations (Canada),"⁽²⁾ which came into force on 30th August, 1945, and which was re-enacted in statutory form with effect from 30th August, 1945, by the War Crimes Act of 1946,⁽³⁾ contains a definition based on the same principle:⁽⁴⁾ "War crime" means "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 Commonwealth of Australia War Crimes Act, 1945,⁽⁵⁾ defines "war crime" as meaning: (a) a violation of the laws and usages of war; (b) any war crime within the meaning of a previous instrument of appointment of a Board of Inquiry, committed in any place whatsoever, whether within or beyond Australia, during any war. The Instrument of Appointment referred to in the Act⁽⁶⁾ explains the term "war crime" by adopting the list of thirty-two items drawn up in 1919, by the Commission of Fifteen, with a few modifications and additions, the most important among the latter being the crime against peace as defined in Article 6(a) of the London Charter. There is, however, no item in the enlarged list corresponding to Article 6(c) of the London Charter.

(iv) *Crimes against humanity in municipal legislation.* The legislative instruments so far discussed afford the basis for proceedings against

(1) Army Order 81/1945; amended by Royal Warrants A.O. 127/1945, 8/1946, and 24/1946. Cf *Law Reports of Trials of War Criminals*, selected and prepared by the United Nations War Crimes Commission, English Ed., Vol. I, Annex I, p. 105.

(2) P.C. 5831 of 30th August, 1945, made by the Governor-General in Council under the authority of the War Measures Act of Canada.

(3) An Act, respecting War Crimes: 10 George VI, c. 73, assented to 31st August, 1946.

(4) Regulation 2 (f).

(5) Regulation No. 48 of 1945, assented to 11th October, 1945.

(6) Instrument of Appointment of the Board of Inquiry of 3rd September, 1945, under the National Security (Inquiries) Regulations, Statutory Rules 1941, No. 35, as amended.

alleged perpetrators of crimes against humanity, in military and occupation courts and in courts, such as the German courts, which derive their jurisdiction in this respect from Allied legislation. Where the ordinary municipal courts of a territory, be it Allied or former enemy, are trying similar offences, they do so, as a rule, under pre-existing positive penal law; it is therefore neither necessary nor has it happened frequently that the concept of crimes against humanity has expressly been made part of codified municipal criminal law. The French Ordinance of 28th August, 1944,⁽¹⁾ which was passed at Algiers and forms the basis of the prosecution of war criminals by French courts, is a good illustration of the general attitude of the laws of continental countries to the problem of war crimes in the wider sense. The French Ordinance provides, *inter alia*, that enemy nationals or agents of other than French nationality who are, or have been, 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 17th June, 1940, or a refugee residing in French territory, or against the property of any person enumerated above, or 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 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*. This French provision subjects perpetrators of war crimes (in the wider sense) to the provisions of internal penal law and exempts from their operation acts of legitimate warfare. Similarly, the Netherlands Royal Decree establishing a Commission for the Investigation of War Crimes⁽²⁾ defines war crimes as "facts which constitute crimes considered as such according to Dutch law and which are forbidden by the laws and usages of war".

What, in the London Charter, are called war crimes and crimes against humanity are treated as violations of the pre-1938 provisions of municipal penal law in the Retribution Decree of Czechoslovakia.⁽³⁾ This contains, *inter alia*, provisions relating to membership in criminal organisations (Sections 2 and 3(2)), deportations for forced labour (Section 6), unjustified imprisonment (Section 7) and also refers to "national, political or racial persecution" (Section 10). The following are examples of enactments in the passing of which the legislature has either referred, in a general way, to such conceptions as "laws of humanity" or "obligations of humanity" or has positively embodied the notion of "crimes against humanity" in the respective system of internal penal law.

(a) In Belgium the Decree (Arrêté) of 13th December, 1944, regarding the establishment of a Commission charged with the investigation of violations of international law and of the laws and customs of war⁽⁴⁾

(1) *Codes français et lois usuelles*, (53rd ed., 1946), p. 1195. Cf. Professor Michel de Juglart, *Répertoire méthodique de la jurisprudence militaire*, (1946) p. 232ff.

(2) Decree of 29th May, 1946, No. F.85, Art. 1.

(3) Decree of 19th June, 1945, Collection of Laws and Decrees, No. 16.

(4) Arrêté du 13 décembre 1944. *Commission d'enquête sur les violations des règles du droit des gens, des lois et des coutumes de la guerre*.

in its Preamble recalls that "numerous violations of the rules of international law and of the obligations of humanity (des devoirs d'humanité) have been committed by the invaders". The Commission is described as a commission of inquiry into the violations of the laws and customs of war and the obligations of humanity (Art. I).

(b) Similarly, in Luxembourg the Grand Ducal Decree of 3rd July, 1945, establishing a National Office for the Investigation of War Crimes,⁽¹⁾ in its Preamble refers "to the numerous violations of international law and of the obligations of humanity (des devoirs de l'humanité) which have been committed by the invader", and the National Office, is charged, in particular, to collect evidence concerning violations of the rules of international law, of the laws and customs of war, of the obligations of humanity, and of all crimes and offences committed by the invader.

In both the Belgian and Luxembourg statutes the term "obligations of humanity" (des devoirs de l'humanité) is hardly used in the technical sense in which the expression "crimes against humanity" has been adopted in the (subsequent) London Charter to which both Belgium and Luxembourg eventually adhered.

(c) Vespasien V. Pella draws attention to the Roumanian Decree-Law of April, 1945, regarding the prosecution of war criminals and those responsible for the national disaster.⁽²⁾ According to Pella, this law seems to anticipate the Charter annexed to the London Agreement of 8th August, 1945. It subjects to punishment, in addition to violators of the rules of warfare, *inter alia*, persons "who have ordered or have committed acts of suppression either collective or individual, in accordance with a political or racial plan", or "the removal and transportation of persons in order to exterminate them", or "have imposed inhumane treatment upon those who were in their power", all of which are facts either covered by, or very akin to, crimes against humanity as defined in Article 6(c) of the London Charter.

(d) The Austrian Constitutional Law of 26th July, 1945, concerning war crimes and other National-Socialist misdeeds⁽³⁾ also enacted before the London Four Power Agreement, distinctly juxtaposes war crimes and crimes against humanity in providing⁽⁴⁾ that:

"Any person who, in the course of the war launched by the National Socialists, has intentionally committed or instigated an act repugnant to the natural principles of humanity or to the generally accepted rules of international law or to the laws of war, against the members of the armed forces of an enemy or the civilian population of a state or country at war with the German Reich or occupied by German forces shall be punished as a war criminal.

"Any person who, in the course of this war, acting in the real or assumed interest of the German armed forces or of the National Socialist tyranny, has committed or instigated an act repugnant to the natural principles of humanity against any persons, whether in connection with warlike or military actions or the actions of militarily organised groups, shall be considered guilty of the same crime."

(1) *Mémorial du Grande Duché de Luxembourg*, No. 33, of 7th July, 1945, p. 373.

(2) Vespasien V. Pella, *La Guerre-crime et les criminels de guerre*, (1946), p. 71.

(3) *Staatsgesetzblatt* No. 32, amended 18th October 1945, *Staatsgesetzblatt* No. 199.

(4) Section I(1) and (2).

(e) The Danish Act concerning the punishment of war crimes⁽¹⁾ after stating that a foreigner who has infringed the rules or customs of international law regulating occupation and war and has performed, in Denmark or to the detriment of Danish interests, any deed punishable *per se* in Danish law, can be prosecuted in a Danish court, goes on to provide as follows:

“In addition to the instances cited in paragraph I, persons having committed the following crimes shall be liable to prosecution under this Act: war crimes or crimes against humanity such as murder, ill-treatment of civilians, prisoners or seamen, the killing of hostages, looting of public or private property, requisitioning of money or other valuables, violation of the Constitution, imposition of collective punishments, destruction by explosives or otherwise, in so far as such actions were performed in violation of the rules of international law governing Occupation and War. This Act shall further apply to deportation or other political, racial or religious persecution contrary to the principles of Danish Law, and further to all actions which, though not specifically cited above, are covered by Article 6 of the Charter of the International Military Tribunal.”

Here Article 6 of the London Charter, including its provision concerning crimes against humanity, is expressly embodied in Danish domestic law.

(f) Since the above observations on municipal legislation were written the United Nations War Crimes Commission has made a voluminous collection of enactments regarding the punishment of war crimes in the wider sense, promulgated by all Allied and former enemy countries. The municipal legislation on war crimes constitutes an immense subject for itself and cannot be properly presented in this History. This particular field of interest, however, will be covered in a separate publication prepared by the Commission.⁽²⁾

(6) *Conclusions*

The comparative novelty of certain parts of the law formulated in the Nuremberg and Far Eastern 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 some 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.

This difficulty of drawing a clear line of demarcation between the two categories of crimes was confirmed by the Judgment of the Nuremberg Tribunal. It 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 separated.

Without entering into the question whether the reason for such a close relationship between the two categories lies in the similar nature of the

(1) of 12th July, 1946, Ch. i (1) and (2).

(2) See *Law Reports of Trials of War Criminals*. H.M. Stationery Office, 1947-49.

offences which they are intended to cover, it is evident 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 Nuremberg Judgment, and that they can never reach the point of being entirely absorbed the one by the other.

B. WAR CRIMES IN THE NUREMBERG TRIAL⁽¹⁾

(i) THE LAW RELATING TO WAR CRIMES

At the outset of the preceding Section⁽²⁾ it was explained that the general attitude of the Nuremberg Tribunal to the law of the Charter found its expression in the statement that "the law of the Charter is decisive, and binding upon the Tribunal".⁽³⁾ It was pointed out there that the Tribunal considered itself bound by the Charter also in regard to the definition which it gives of war crimes in the narrower sense of the term. The Tribunal added, however, that the crimes defined by Article 6(b) of the Charter "were already recognised 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".⁽⁴⁾

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 fundamental principle of *nullum crimen sine lege*, 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".⁽⁵⁾

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 of states which gradually obtained universal recognition, and from

(1) For the development of the concept of war crimes proper prior to the Nuremberg Charter, see Chapters II-V and VIII of this History.

(2) See Chapter IX, Section A: *The Development of the Concept of Crimes against Humanity*.

(3) *Judgment*, p. 38.

(4) *op. cit.*, p. 64.

(5) *op. cit.*, p. 40.

the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing".⁽¹⁾

The Tribunal also thought it important to recall that in Article 228 of the Treaty of Versailles, the German Government expressly recognised 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.⁽²⁾

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,⁽³⁾ 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 recognised to be then existing, but by 1939 these rules laid down in the Convention were recognised by all civilised 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".

There being no need to re-state here the view and judgment of the Tribunal on the question of the applicability of the rules of land warfare in the "subjugated" territories, as well as in regard to the charge of conspiracy to commit war crimes, consideration can now be given to the findings of the Tribunal in regard to specific war crimes preferred against the defendants.

Before doing so it is necessary to observe that, without exception, all the crimes specifically enumerated in Article 6(b) of the Charter as constituting war crimes in their technical sense,⁽⁴⁾ are crimes which constitute attacks on the integrity or the physical well-being of individuals or groups of people, and of property. 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 also follows 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

(1) *op. cit.*, p. 40.

(2) *op. cit.*, p. 41.

(3) 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."

(4) Article 6(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.

of whether such crimes might, or might not, violate certain human rights, and whether in the latter case they only constitute purely technical offences.

(ii) SPECIFIC WAR CRIMES

(1) *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 1st September, 1939, and 8th May, 1945, in Germany and in all those countries and territories occupied by the German armed forces since 1st 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 . . ." (1)

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 civilised 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 result of cold and criminal calculation." (2)

The ideas of Nazi Germany, which were contrary to the established principles of all civilised 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 years, to improve human conditions, aims to plunge humanity back into barbarism, no longer the natural and

(1) *Indictment*, p. 13.

(2) *Judgment*, p. 44.

spontaneous barbarism of primitive nations, but a diabolical barbarism, conscious of itself and utilising for its ends all material means put at the disposal of mankind by contemporary science".⁽¹⁾

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 purpose of slave labour upon defence works, armaments 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."⁽²⁾

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 organised 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.

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⁽³⁾ and did not follow the order of charges or the grouping of crimes as presented in the Indictment. The following survey of selected types of war crimes 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.

It is also proposed to limit this investigation to problems and points of particular interest to the question of insufficiency of, or *lacunae* in, the existing laws and usages of war and of other provisions of international law which purport to afford protection against violations of the rights of members of the armed forces and of the civilian population in time of war.

(2) *Crimes against Prisoners of War and other Members of the Armed Forces*⁽⁴⁾

In a general observation the Tribunal established that prisoners of war

(1) See: Opening Speech by M. Francois de Menthon, published in *The Trial of German Major War Criminals. Opening Speeches of the Chief Prosecutors*, H.M. Stationery Office, London, 1946, p. 63.

(2) *Judgment*, p. 45.

(3) *op. cit.*, pp. 44 and 45.

(4) As to crimes of the atrocities-type committed against the civilian population see Chapter IX, Section A on *Crimes against Humanity: Genocide, and Killing of "useless eaters"*, p. 196 et seq.

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 S.I.P.O. and S.D. for execution of recaptured prisoners, and to systematic killing by the civilian population of Allied airmen who were forced to land in Germany.

The Tribunal referred at some length to a directive circulated, with the authorisation of Hitler, by the defendant Keitel on the 18th 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", 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 S.D. 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.⁽¹⁾

The Tribunal devoted special attention to the treatment of Soviet prisoners of war which was characterised by particular inhumanity. This was due not merely to the action of individual guards, or the exigencies of life in the camps, but was 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 U.S.S.R. was not a party to the Geneva Convention, which therefore was not binding in the relationship between Germany and the U.S.S.R. 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 18th 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.⁽²⁾

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

(1) *Judgment*, p. 45.

(2) *op. cit.* p. 48.

it convicted some of the defendants for offences of this kind, are those 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.

(3) *Taking and Killing of Hostages*

The general statement regarding the charge of taking and killing hostages as contained in the Indictment, read 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 civilised nations, the internal penal laws of the countries in which such crimes were committed and to Article 6(b) of the Charter".⁽¹⁾

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 terrorising 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 shooting 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 authorities, against possible hostile acts by the inhabitants of occupied territory. Individuals 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

(1) *Indictment*, p. 22.

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 provided 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".⁽¹⁾ 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 the 16th 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."⁽²⁾

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.⁽³⁾ 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.

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 recognised as war crimes".⁽⁴⁾ It is not clear what particular acts the Tribunal had in mind in referring to Article 50, and it is doubtful whether this 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

(1) *Judgment*, p. 45. Italics introduced.

(2) *op. cit.*, pp. 49-50. Italics introduced.

(3) *op. cit.*, p. 48.

(4) *op. cit.*, p. 64.

not been regarded as preventing the occupant from taking hostages.⁽¹⁾ 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.⁽²⁾

(4) *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) deportation for slave labour and for other purposes,⁽³⁾ and (H) conscription of civilian labour.⁽⁴⁾

Leaving aside the practice of deporting the civilian populations for slave labour or other purposes, which constitutes a clear contravention of Article 46 of the Hague Regulations, we will concentrate on Article 52, which is of primary importance, and to which the Tribunal referred in the part of the Judgment relating to forced labour of 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."

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 has 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

(1) Oppenheim, *International Law*, Vol. II, Sixth Edition, London, 1944, p. 346.

(2) In this connection it will be necessary when the opportunity is available to consider the decision delivered by the U.S. Military Tribunal at Nuremberg in the "Hostages Case".

(3) *Indictment*, p. 19.

(4) *op. cit.*, p. 28.

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 realisation 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, p. 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*.⁽¹⁾ However, 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 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 procedure 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 industrial capacity became inadequate to meet the German requirements, the system of deporting labourers to Germany was put into force".⁽²⁾

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, it is not only inadmissible to compel the inhabitants to render assistance falling within the notion of

(1) Oppenheim, *op. cit.*, p. 345.

(2) *Judgment*, p. 57. Italics introduced.

"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."

(5) *Plunder of Public and Private Property*

The main points in which the Indictment dealt with this type of war crimes are the following:

"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.
- (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 the 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 the 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 U.S.S.R. 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."⁽¹⁾

The Indictment then enumerated, by way of example, 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.

(1) *Indictment*, p. 22-23.

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 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 Nuremberg Judgment summarised the law in respect of these 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 occupation, and these should not be greater than the economy of the country can reasonably be expected to bear."⁽¹⁾

In its general conclusions the Tribunal stated further that the evidence in this case has established, however, that the territories occupied by Germany were 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.⁽²⁾

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 19th 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 organised 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

(1) *Judgment*, p. 53.

(2) *op. cit.*, p. 54.

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."⁽¹⁾

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 Nuremberg Judgment have developed the rules of international law to the extent that not only pillage, which is the unauthorised 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.

(iii) SUMMARY AND CONCLUSIONS

Against the background of the historical events which led to the establishment of the International Military Tribunal at Nuremberg 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.

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 8th 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 surrendered unconditionally. But this merely technical statement cannot be regarded as complete because it leaves open the questions of 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, 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.

(1) *op. cit.*, p. 54- 55.

So far as war crimes in the conventional and narrower sense are concerned, they have for 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 other belligerent. In this regard, and especially in the case of violations of 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 Nuremberg 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 (ii). 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 the laws and customs of law.

In applying the pre-existing law, the Tribunal made two interesting decisions which are of particular importance to the development of international law. 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 application of this law to the protection of the rights of the inhabitants of the occupied territories, who, owing to specific circumstances, found themselves on enemy territory.

C. CRIMES AGAINST PEACE

(i) EARLY ATTEMPTS TO LIMIT THE RIGHT OF WAR

(1) *The Place of War in International Law*

The idea of the elimination of wars as a means of the settlement of inter-

state disputes, and to a certain extent of including the launching of an aggressive war among the offences for which the responsible States should be held liable, can be traced back to ancient times. The centuries-long developments⁽¹⁾ resulted, generally speaking, in the formulation of two mutually inconsistent doctrines: the first, chronologically earlier, which differentiated between just and unjust wars and aimed at establishing the right and duty of States to punish the initiation of the latter, as well as crimes incidental to the war; the second, which proclaimed an absolute sovereignty of States and consequently a freedom from punishment of individuals responsible for offences committed in the name of the State in connection with launching and conducting the war.⁽²⁾ The controversial issues between these doctrines produced a kind of compromise: on the one hand the right to initiate a war was generally accepted as one of the rights of the sovereign States; on the other, the principle was adopted recognising the right to punish crimes committed during the war.

Accordingly, the institution of war fulfilled in international law two contradictory functions. In the absence of an international organ for enforcing the law, war was a means of self-help for giving effect to claims based, or alleged to be based, on international law. This conception of war was intimately connected with the differentiation between just and unjust wars. At the same time, however, this differentiation was clearly rejected in the conception of war as a legally recognised instrument for challenging and changing rights based on the existing state of international law. In the absence of an international legislature war fulfilled the function of adapting the law to changed conditions. Moreover, war was recognised as a legally admissible instrument for attacking and altering existing rights of States independently of the objective merits of the attempted change, and international law did not consider as illegal a war admittedly waged for purposes of gaining political or other advantages. It rejected, to that extent, the distinction between just and unjust war which was in law a natural function of the State and a prerogative of its uncontrolled sovereignty.⁽³⁾

(2) *The Hague Conventions*

The Hague Conferences of 1899 and 1907 and the movement for the pacific settlement of international disputes marked the beginning of the attempts to limit the right of war, both as an instrument of law and as a legally recognised means of changing legal rights.

The contracting Powers of Hague Convention No. I of 1907⁽⁴⁾ agreed, in Article 9, that in the case of disputes arising out of differences of opinion on points of fact and involving neither honour nor vital interests, which the parties could not settle by diplomatic negotiations, they should,

(1) The doctrines of: Plato, Vol. V; St. Augustin; St. Thomas of Aquino; Machiavelli (1469-1527); *Il Principe*; Fr. Victoria (1526-1546), *De iure Belli Hispanorum in barbaros*; Fr. Suarez (1548-1617), *Disputationes*; A. Gentili (1552-1608), *De iure Belli*; Grotius (1583-1645) *De iure belli ac pacis*; S. Puffendorf (1632-1694), *De iure naturae et gentium*; E. Vattel, *Le droit des gens* (1758).

(2) The Peace Treaties of Utrecht (1713), of Aquisgrano (1748), and of Paris (1763), contain explicit provisions regarding amnesty for persons who are considered today as war criminals.

(3) See Oppenheim, *op. cit.* p. 145.

(4) *Convention for the Pacific Settlement of International Disputes*, Cmd. 4175, 1914.

so far as circumstances allow, institute an International Commission of Inquiry to elucidate the facts underlying the difference by an impartial and conscientious investigation. The duty of such a Commission is to investigate the circumstances of the case, and issue a report "limited to a finding of fact" which in no way can have "the character of an Arbitral Award"; the parties are entirely free as to the effect to be given to its finding (Article 35). These stipulations are still in force as between the parties to the Convention, and have also been used as a model in drafting some of the recent conciliation treaties.

The Second Hague Conference also agreed upon Convention No. III. Relative to the Opening of Hostilities. In Article 1 of this Convention "the Contracting Powers recognise that hostilities between them must not commence without a previous and explicit warning, in the form of either a declaration of war, giving reasons, or of an ultimatum with a conditional declaration of war". This Convention had a clearly limited scope. The failure to observe its provisions does not render war illegal; neither does it take away from the hostilities thus commenced the character of war. The value of this Convention has suffered much diminution inasmuch as a number of States, intent upon avoiding the formal appearance of a breach of these obligations, have adopted the practice of opening hostilities, indistinguishable from warlike operations, without actually declaring war.⁽¹⁾ Thus the wars of Italy with Abyssinia in 1935, of Japan with China in 1937, of Germany with Poland in 1939, of Russia with Finland in the same year, and of Japan with the United States in 1941, opened without any formal declaration of war.

At the same time a more direct attempt was made to limit the right of war by Hague Convention No. II.⁽²⁾ This Convention was agreed upon with the intention of preventing armed conflicts between nations originating in a pecuniary dispute respecting contract debts, claimed from the Government of one country by the Government of another, as due to its subjects or citizens.⁽³⁾ Subject to certain exceptions, Article 1 of the Convention prohibited recourse to armed force as a legal remedy for enforcing obligations in respect of contracts of that nature.

A similar attempt at the legal limitations or prohibitions of recourse to war is evidenced by Hague Conventions V and XIII.⁽⁴⁾ The incidents which occurred during the South African and Russo-Japanese Wars gave occasion for the Second Hague Conference of 1907 to bring the question of neutrality within the range of its deliberations. Article 1 of the Convention declares that the territory of neutral Powers is inviolable. When specifying the rights and duties of the neutral Powers and of belligerents (Articles 2-4) the contracting Parties also provided that a neutral Power must not allow any of the acts contrary to the status of

(1) See Oppenheim, *op. cit.*, p. 236.

(2) *Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts*, Cmd. 4175, 1914. H.M. Stationery Office.

(3) See the *Preamble* to the Convention.

(4) *Convention V respecting the Rights and Duties of Neutral Powers and Persons in War on Land*, *op. cit.*

Convention XIII respecting the Rights and Duties of Neutral Powers in Maritime War, *op. cit.*

neutrality and enumerated in Articles 2-4, to occur on its territory,⁽¹⁾ but agreed at the same time that the fact of a neutral Power resisting, even by force, attempts to violate its neutrality cannot be regarded as a hostile act (Article 10).

Moreover, some of the Hague Conventions agreed upon at this Conference, although they do not directly concern neutral Powers, had been of great importance to them, and to the question of the limitation of conducting war. Thus Convention VII, relating to the Conversion of Merchant-ships into Warships, indirectly concerns neutral trade. The same may be said of Convention VIII, relating to the Laying of Automatic Submarine Contact Mines, and Convention XI relating to certain Restrictions on the Exercise of the Right of Capture. By Convention XII the Conference agreed upon the establishment of an International Prize Court to serve as a Court of Appeal from decisions of the Prize Courts of either belligerent which concerned the interests of neutral Powers or their subjects.

(3) *The "Bryan Treaties"*

A further attempt to introduce a check on the right of war was made by the so-called "Bryan Treaties", which imposed upon the parties the duty not to begin hostilities prior to the report of the Permanent Commissions of Inquiry. These Commissions, which are different from the International Commissions envisaged by Hague Convention I, were constituted to deal with differences between the United States of America and a great number of other States, by the series of so-called Bryan Arbitration Treaties signed in Washington in 1914. These treaties were not all identical, but had the following features in common:

The contracting Parties agreed to refer all disputes, which diplomatic methods had failed to adjust, to a Permanent International Commission for investigation and report, and they agreed not to begin hostilities before the report was submitted. The report had to be completed within one year, unless the parties limited or extended the time by mutual agreement. The parties, having received the report, were at liberty to take such action as they thought fit.

Most of these treaties are still in operation, and in 1928-1929 the United States concluded a further number of such treaties. The points in which they mark an advance upon the provisions of Hague Convention I can be summarised as follows: first, that there is no exclusion of disputes affecting honour and vital interests; secondly, that the Permanent Commissions of Inquiry are constituted in advance and are available when disputes arise, whereas the International Commissions under the Hague Convention are constituted *ad hoc* when required; and, thirdly, that the principle of the moratorium appears in the undertaking not to resort to hostilities before the publication of the report.⁽²⁾

It is quite clear that these attempts to limit the right of war as an instrument of law were mainly procedural, and that the Hague Conventions and the "Bryan Treaties" took for granted the legality of war;

(1) See Article 5 of Hague Convention V.

(2) See Oppenheim, *op. cit.*, p. 16.

but from motives both of humanitarianism and mutual prudence, they went so far in the direction of limiting the methods of opening hostilities and conducting war,⁽¹⁾ as to be the signposts on the road towards a growing conviction that aggressive war must one day be abolished.⁽²⁾

A further, though unsuccessful, step in this direction was taken by the Commission of Fifteen appointed by the Preliminary Peace Conference at the end of the First World War in 1919.

(ii) RECOMMENDATIONS OF THE COMMISSION OF FIFTEEN

(1) *Responsibility of the Authors of the First World War*

The Commission of Fifteen, after having examined a number of official documents relating to the origin of the First World War, and to the violations of neutrality and of frontiers which accompanied its inception, determined that the responsibility for it lay wholly upon the Powers which declared war in pursuance of a policy of aggression, the concealment of which gave to the origin of that war the character of a dark conspiracy against the peace of Europe.

This responsibility rested first on Germany and Austria, secondly on Turkey and Bulgaria. The responsibility was made all the graver by reason of the violation by Germany and Austria of the neutrality of Belgium and Luxembourg, which they themselves had guaranteed. It was increased, with regard to both France and Serbia, by the violation of their frontiers before the declaration of war.⁽³⁾

After having recorded all the relevant events relating to the outbreak of the war the Commission came to the following conclusions:

A. *As to the premeditation of the war:*

(a) "The war was premeditated by the Central Powers together with their Allies, Turkey and Bulgaria, and was the result of acts deliberately committed in order to make it unavoidable."

(b) "Germany, in agreement with Austria-Hungary, deliberately worked to defeat all the many conciliatory proposals made by the Entente Powers and their repeated efforts to avoid war."

B. *As to the violation of the neutrality of Belgium and Luxembourg*

(c) "The neutrality of Belgium, guaranteed by the Treaties of the 19th April, 1839, and that of Luxembourg, guaranteed by the Treaty of the 11th May, 1867, were deliberately violated by Germany and Austria-Hungary."⁽⁴⁾

(2) *The Problem of Retribution for Acts which provoked the First World War and accompanied its Inception*

The following were the views expressed by the Commission on this highly important subject:

(1) As already cited in Chapter II care was taken in Hague Convention (IV) to provide that 'until a more complete code of laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience'.

(2) See Sheldon Glueck, *The Nuremberg Trial and Aggressive War*, the Harvard Law Review, Vol. LIX, No. 3, 1946, p. 409.

(3) and (4) See, *Violations of the Laws and Customs of War*, Reports of Majority and Dissenting Reports of American and Japanese members of the Commission on Responsibilities, Conference of Paris, 1919, Carnegie Endowment for International Peace, Pamphlet No. 32, Chapter I.

"The premeditation of a war of aggression dissimulated under a peaceful pretence, then suddenly declared under false pretexts, is conduct which the public conscience reproves and which history will condemn, but by reason of the purely optional character of the Institutions at The Hague for the maintenance of peace (International Commission of Inquiry, Mediation and Arbitration) a war of aggression may not be considered as an act directly contrary to positive law, or one which can be successfully brought before a tribunal such as the Commission is authorised to consider under its Terms of Reference.

"Further, any inquiry into the authorship of the war must, to be exhaustive, extend over events that have happened during many years in different European countries, and must raise many difficult and complex problems which might be more fitly investigated by historians and statesmen than by a tribunal appropriate to the trial of offenders against the laws and customs of war. The need of prompt action is from this point of view important. Any tribunal appropriate to deal with the other offences to which reference is made might hardly be a good court to discuss and deal decisively with such a subject as the authorship of the war. The proceedings and discussions, charges and counter-charges, if adequately and dispassionately examined, might consume much time, and the result might conceivably confuse the simpler issues into which the tribunal will be charged to enquire. While this prolonged investigation was proceeding some witnesses might disappear, the recollection of others would become fainter and less trustworthy, offenders might escape, and the moral effect of tardily imposed punishment would be much less salutary than if punishment were inflicted while the memory of the wrongs done was still fresh and the demand for punishment was insistent.

"We therefore do not advise that the acts which provoked the war should be charged against their authors and made the subject of proceedings before a tribunal.

"There can be no doubt that the invasion of Luxembourg by the Germans was a violation of the Treaty of London of 1867, and also that the invasion of Belgium was a violation of the Treaties of 1839. These Treaties secured neutrality for Luxembourg and Belgium, and in that term were included freedom, independence and security for the population living in those countries. They were contracts made between the High Contracting Parties to them, and involve an obligation which is recognised in international law.

"The Treaty of 1839 with regard to Belgium and that of 1867 with regard to Luxembourg were deliberately violated, not by some outside Power, but by one of the very Powers which had undertaken not merely to respect their neutrality, but to compel its observance by any other Power which might attack it. The neglect of its duty by the guarantor adds to the gravity of the failure to fulfil the undertaking given. It was the transformation of a security into a peril, of a defence into an attack, of a protection into an assault. It constitutes, moreover, the absolute denial of the independence of States too weak to interpose a serious resistance, an assault upon the life of a nation which resists, an assault against its very existence while, before the resistance was made, the aggressor, in the guise of tempter, offered material compensation in return for the sacrifice of honour. The violation of international law was thus an aggravation of the attack upon the independence of States which is the fundamental principle of international right.

"And thus a high-handed outrage was committed upon international engagements, deliberately, and for a purpose which cannot justify the conduct of those who were responsible.

"The Commission is nevertheless of opinion that no criminal charge can be made against the responsible authorities or individuals (and notably the ex-Kaiser) on the special head of these breaches of neutrality, but the gravity of these gross outrages upon the law of nations and international good faith

is such that the Commission thinks they should be the subject of a formal condemnation by the conference."⁽¹⁾

The Commission therefore arrived at the following conclusions:

(a) "The acts which brought about the war should not be charged against their authors or made the subject of proceedings before a tribunal.

(b) "On the special head of the breaches of the neutrality of Luxembourg and Belgium, the gravity of these outrages upon the principles of the law of nations and upon international good faith is such that they should be made the subject of a *formal condemnation* by the Conference.

(c) "On the whole case, including both the acts which brought about the war and those which accompanied its inception, particularly the violation of the neutrality of Belgium and Luxembourg, it would be right for the Peace Conference, in a matter so unprecedented, to adopt special measures, and even to create a special organ in order to deal as they deserve with the authors of such acts.

(d) "It is desirable that for the future *penal sanctions* should be provided for such grave outrages against the elementary principles of international law."⁽²⁾

(3) *The American Reservations*

The American representatives, while concurring in the conclusions of the Commission quoted above under A (a) and (b), and in the process of reasoning by which they were reached and justified, believed, however, that it was not enough to state or to hold with the Commission that "the war was premeditated by the Central Powers", that "Germany, in agreement with Austria-Hungary, deliberately worked to defeat all the many conciliatory proposals made by the *Entente* Powers and their repeated efforts to avoid war", and to declare that the neutrality of Belgium, guaranteed by the Treaty of the 19th of April, 1839, and that of Luxembourg, guaranteed by the Treaty of the 11th of May, 1867, were deliberately violated by Germany and Austria-Hungary. They were of the opinion that these acts should have been condemned in no uncertain terms and that their perpetrators should have been held up to the execration of mankind.⁽³⁾

The American delegation was also in thorough accord with the views expressed, and stated by the Commission in the conclusions quoted above under sub-section 2(a) and (b) regarding the question of retributions for acts which provoked the World War. The Americans accepting each of those statements as sound and unanswerable, were nevertheless unable to agree with the third of the conclusions, that under 2(c), which put forward the proposal to adopt special measures and to create a special organ in order to deal with the authors of the acts which brought about the war and those which accompanied its inception.

The Americans believed that this conclusion (that under 2(c)) was inconsistent both with the reasoning which preceded it and with the first and second conclusions (2(a), (b)). They observed that, if the acts in question were criminal in the sense that they were punishable

(1) and (2) See Reports of the Commission on Responsibilities, *op. cit.* Chapter IV(a). Italics introduced.

(3) *op. cit.*, Annex II, Section I.

under law, they did not understand why the report should not advise that these acts should be punished in accordance with the terms of the law. If, on the other hand, there was no law making them crimes or affixing a penalty for their commission, they were moral, not legal, crimes, and the American representatives failed to see the advisability or indeed the appropriateness of creating a special organ to deal with the authors of such acts. In any event, the organ in question should not have been a judicial tribunal.⁽¹⁾

In order to meet the evident desire of the Commission that a special organ be created, the American delegation proposed that the Commission on Responsibilities should recommend that a Commission of Inquiry be established "to consider generally the relative culpability of the authors of the war". The Commission, however, failed to adopt this proposal.

With the fourth and final conclusion which declared it to be "desirable that for the future *penal sanctions* should be provided", the American representatives found themselves to be in substantial accord. They believed that any nation going to war assumes a grave responsibility, and that "a nation engaging in a war of aggression *commits a crime*". They held "that the neutrality of nations should be observed, especially when it is guaranteed by a treaty to which the nations violating it are parties, and that the plighted word and the good faith of nations should be faithfully observed in this as in all other respects". At the same time, "given the difficulty of determining whether an act is in reality one of aggression or of defence, and given also the difficulty of framing penal sanctions, where the consequences are so great or may be so great as to be incalculable", they hesitated as to the feasibility of this conclusion, from which, however, they were unwilling formally to dissent.⁽²⁾

(iii) THE PARIS PEACE CONFERENCE

(1) *The Versailles Treaty and the Arraignment of the Kaiser*

It is to be remembered that the Commission of Fifteen, while recoiling from the charge of *crime* and from a *trial* before a court, nevertheless recommended that "it would be right for the Peace Conference, in a matter so unprecedented, to adopt *special measures*, and even to create a special organ in order to deal as they deserve with the authors of such acts", and declared it to be "desirable that, *for the future, penal sanctions* should be provided for such grave outrages against the elementary principles of international law".

Around the table of the Paris Peace Conference the controversy was again raised; however, the authors of the Versailles Treaty overruled the American and Japanese objections, and recognised the principle that the head of a State may be arraigned for an offence against international law, namely, for the breach of a treaty. Accordingly the Conference approved an appropriate provision which was inserted in the Peace Treaty as Article 227 which reads as follows:

"The Allied and Associated Powers publicly arraign William II of

(1) *op. cit.*, Annex II, Section IV.

(2) *op. cit.*, Annex II, Section IV. Italics introduced.

Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

"A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.

"In its decision the tribunal will 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 will be its duty to fix the punishment which it considers should be imposed.

"The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the Ex-Emperor in order that he may be put on trial."⁽¹⁾

When the German delegation to the Peace Conference protested, in connection with this and other penal stipulations of the Draft Treaty, that the proposed peace would be a peace of violence and not of justice, the Allied and Associated Powers formally stated that in their view the war, which began on 1st August, 1914, was "the greatest crime against humanity and the freedom of peoples that any nation, calling itself civilised, has ever consciously committed", and "a crime deliberately plotted against the life and liberties of the peoples of Europe". They therefore regarded the punishment of those responsible as essential on the score of justice. At the same time, however, the Allied Powers made it clear that "the public arraignment under Article 227 framed against the German ex-Emperor has not a juridical character as regards its substance, but only in its form. The ex-Emperor is arraigned as a matter of high international policy, as the minimum of what is demanded for a supreme offence against international morality, the sanctity of treaties and the essential rules of justice. The Allied and Associated Powers have desired that judicial forms, a judicial procedure and a regularly constituted tribunal should be set up in order to assure to the accused full rights and liberties in regard to his defence, and in order that the judgment should be of the utmost solemn judicial character".⁽²⁾

Thus, it was made quite clear that the arraignment of the Kaiser was not based on a charge of a violation of the existing law, but that he had been 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. Nevertheless, Article 227 of the Versailles Treaty may be regarded as the precursor of Article 6(a) of the Nuremberg Charter and of Article 5(a) of the Tokyo Charter respecting crimes against peace, with the important distinction that the crimes against peace under these two Charters are not merely contraventions of a moral code, but violations of legal provisions.

(2) Failure to implement Article 227

Article 227 of the Versailles Treaty came into force on 10th January, 1920; in the meantime the ex-Kaiser Wilhelm II sought refuge in Holland.

(1) See *The Treaty of Peace between the Allied and Associated Powers and Germany, signed at Versailles, 28th June, 1919.*

(2) See the *Reply of the Allied and Associated Powers to the Observations of the German Delegation and the Conditions of Peace, Paris, 16th June, 1919, H.M. Stationery Office, Misc. No. 4 (1919).*

On 16th January, 1920, the Secretary-General of the Peace Conference addressed a letter to the Dutch Minister, signed by Clemenceau, asking for the handing over of the ex-Kaiser. The letter enumerated several crimes committed by the Germans during the war, 1914-1918, and added: "De tous ces actes, la responsabilité au moins morale, remonte jusqu'au chef suprême qui les a ordonnés ou qui a abusé de ses pleins pouvoirs pour enfreindre ou laisser enfreindre les règles les plus sacrées de la conscience humaine".

On 24th January, 1920, M. Loudon, Minister of the Dutch Government replied to M. Millerand, the French Prime Minister and Minister for Foreign Affairs in a letter in which he stated:—

- (a) that Holland is not a party to Art. 227 of the Treaty of Versailles;
- (b) that Holland could not accept the international duty "of associating herself with an act of high international politics of the Powers";
- (c) should, however, the League of Nations establish an international body competent to decree in a case of war on facts qualified as crimes and provide sanctions beforehand—Holland will adhere to this;
- (d) the letter invokes the fact that Holland has "de tout temps" been "une terre de refuge pour les vaincus des conflits internationaux".

The legal foundations of the refusal contained in the letter of the Dutch Government were as follows:

(a) Article 4 of the Dutch Constitution provides for equal protection for both Dutch and foreigners on Dutch soil; this was laid down in the Law of 6th April, 1875, revised 15th April, 1886, on which extradition treaties with France (1895), England (1898) and the United States (1887) were concluded.

(b) In view of the above, the request for extradition should have been formulated in accordance with the laws and treaties of Holland.

(c) The crime for which extradition had been sought was qualified: "L'offense suprême contre la morale internationale et l'autorité des traités . . . ne figure pas dans les nomenclatures des infractions pénales insérées dans les lois de Hollande ou les traités par elle conclus". Nor could the Dutch Government have rendered legal help for the repression of an act which was not punishable even according to foreign law.

(d) The political character of the crimes did not qualify the case for extradition.

On 15th February, 1920, a new note was addressed to the Dutch Government. The note used the terms "les droits et les principes de l'humanité", it stressed the fact that the refusal of the Dutch Government would create an unfortunate precedent which would undermine the procedure of international tribunals against "highly placed" culprits. The note called upon Holland to revise its view expressed in the previous letter.

On 6th March, 1920, the Dutch Government sent another reply referring to reasons explained in their previous letter.⁽¹⁾

(1) For the text of these letters, see *Revue du Droit International*, 1920, Vol. 8, p. 40. As to the legal aspects of the case see also M. Lachs, *War Crimes, An Attempt to Define the Issues*, London, 1945, p. 57-58.

The result was that the ex-Kaiser was not handed over, and remained in Holland unaffected by the laws and stipulations of the Versailles Treaty. The decision of the Dutch Government met with strong criticism and was disapproved of by the majority of writers. However, this decision was to a large extent due to the wrong formulas adopted by the Allied and Associated Powers when arraigning the ex-Kaiser, and then requesting his extradition. The Powers claimed him, without qualifying his deeds from a strictly legal point of view, for "moral responsibility" which is not a legal term at all, and for "the laws and principles of humanity" which were not recognised legal terms either. This was a perfect excuse for Holland to refuse his extradition.⁽¹⁾

(iv) THE DEVELOPMENTS DURING THE INTER-WAR PERIOD⁽²⁾

Although throughout the quarter-century between the two World Wars further attempts to limit the right of war were witnessed, to mention for example the provision for a moratorium in regard to all wars, and a definite

(1) As to the historical precedents of the heads of State having been personally visited by punishment for violation of a treaty, and of international trials of persons charged with offences which today would fall within the notion of crimes against peace, the following may be said:

(a) In 1268 Conrad V (Conradin the Boy), the last representative of the third Hohenstauffen dynasty of Holy Roman Emperors (1138-1254), who tried to pursue the policy of his predecessors of submitting other States to his rule, after having been defeated by Charles d'Enghien, was put by the Pope before a Tribunal, charged with the initiation of an unjust war, found guilty and executed in Naples in that year.

(b) On an international scale, the trial of Sir Peter of Hagenbach, henchman of the Duke of Burgundy, at Breisach in 1474 by a Tribunal which was composed of judges delegated by the Allies in the war against Burgundy, may claim to be a forerunner of the proceedings at Nuremberg. Although this was 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, the crimes preferred against Peter of Hagenbach would be called today crimes against humanity. (See article by G. Schwarzenberger, *A Forerunner of Nuremberg, the Breisach War Crimes Trial of 1474*, the *Manchester Guardian*, 28th, September, 1946).

(c) The last memorable occasion on which a head of State was called upon to answer for a violation of an international treaty was in 1815, when, after having been formally declared by the Congress of Vienna to be an international outlaw for having invaded France in violation of the Treaty of Paris of 1814, Napoleon was actually deported to St. Helena.

By the Convention of 11th April, 1814, entered into between Austria, Prussia, Russia and Napoleon, the latter agreed to retire to Elba. After his escape and re-entry into France with an armed force, the Congress of Vienna on 13th March, 1815, issued a declaration that by having violated his agreement Napoleon had "destroyed the sole legal title upon which his existence depended . . . placed himself outside the protection of the law, and manifested to the world that it can have neither peace nor truce with him". The Powers declared that Napoleon had put himself outside "civil and social relations, and that, as Enemy and Perturbator of the World, he has incurred liability to public vengeance". Had the Powers followed the recommendation of Field Marshal Blücher, Napoleon would then have been shot on sight as one who, under the above declaration, was an "outlaw". But after Napoleon's surrender to the British, a Convention was entered into on 2nd August, 1815, by which Napoleon was "considered by the Powers . . . as their Prisoner", his custody to be "specially entrusted to the British Government", the "choice of the Place and of the measures which can best secure the object of the present stipulation" being "reserved to His Britannic Majesty". (Quotation cited by S. Glueck, *op. cit.*, p. 399).

The exile of Napoleon is of course an example of a summary "disposal of the case presented by notorious enemies of international law" by an "execution" or "political" action only, without any trial at all and without any consideration whatsoever of whether the act of the offender had or had not previously been prohibited by some specific provision of international penal law.

(2) For a detailed exposition of the developments of that period and prior to the enactment of the Charters of the International Tribunals see: Chapters IV, V and VIII of this History.

deprivation of members of the League of Nations of the right of war in some cases (Articles 12 and 13 of the Covenant of the League), nothing so specific was done by the nations of the world for the implementation of the recommendations of the Commission of Fifteen as to provide "*penal sanctions*" for acts "provoking" the war. At the same time, however, many determined efforts were made to declare as *illegal* "wars of aggression", as well as to declare them an *international crime*.

The following solemn international pronouncements are evidence of these desires and of some of these efforts.

(1) Article 1 of the abortive Treaty of Mutual Assistance of 1923, solemnly declared "that aggressive war is an *international crime*", and that the Parties would "undertake that no one of them will be *guilty* of its commission".⁽¹⁾ About half of the 29 States who replied to a submission of the draft treaty wrote in favour of accepting the text. A major objection was that it would be difficult to define what act would comprise "aggression", rather than doubt as to the criminality of aggressive war.

(2) The Draft Treaty of Disarmament and Security Prepared by an American group and considered by the Third Committee of the Assembly of the League of Nations, 1924, Article 1 of which provided that "the High Contracting Parties solemnly declare that aggressive war is an *international crime*", and "severally undertake not to be *guilty* of its commission", while Article 2 provided that "a State engaging in war for other than purposes of defence *commits* the international crime described in Article 1".⁽²⁾

(3) Similar terms were used in the Preamble to the abortive Geneva Protocol for the Pacific Settlement of International Disputes of 1924. This Preamble also solemnly asserted that "a war of aggression constitutes a violation of . . . the solidarity of the members of the international community", and "*an international crime*". It went on to say that the Parties were desirous of "*ensuring the repression* of international crimes".⁽³⁾ Giving effect to this desire, Article 6 provided that the sanctions of Article 16 of the Covenant of the League should be applicable to a State resorting to war in disregard of its undertakings under the Protocol. Although it never came into force, it "did express the strong attitude of leading jurists and statesmen of most of the nations of the world regarding both the illegality and the criminality of aggressive war".

(4) In September, 1927, at the instance of the Polish delegation, the Assembly of the League of Nations adopted a resolution expressing the conviction that "a war of aggression can never serve as a means of settling international disputes and is, in consequence, *an international crime*", and declaring that "all wars of aggression are, and shall always be, prohibited", and that "every pacific means must be employed to settle disputes of every description, which may arise between States"⁽⁴⁾. The

(1) *Records of the Fourth Assembly, Plenary Meetings*, League of Nations Official Journal (Special Supp. No. 13, 1923), p. 403.

(2) *Records of the Fifth Assembly, Meetings of the Third Committee*, League of Nations Official Journal (Special Supplement No. 26, 1924), Annex 4.

(3) *Records of the Fifth Assembly*, League of Nations Official Journal (Special Supplement No. 23, 1924), p. 498.

(4) *Records of the Eighth Assembly, Plenary Meetings*, p. 84.

resolution was adopted unanimously, thus showing how strong was the conviction "that the time had arrived, in the affairs of States and their peoples, to call a spade a spade".

(5) An authoritative expression of American opinion on aggressive war was made on 12th December, 1927, when Senator William E. Borah introduced in the Senate a resolution, the last in a long series since 1922, of which a pertinent provision was "that it is the view of the Senate of the United States that war between nations should be outlawed as an institution or means of the settlement of international controversies by making it a "public crime under the law of nations".⁽¹⁾

(6) In February 1928 the Sixth Pan-American Conference of twenty-one American Republics held at Havana adopted a resolution declaring that as "war of aggression constitutes an *international crime against the human species* . . . all aggression is illicit and as such is declared prohibited".⁽²⁾

(7) All these attempts received an authoritative and practically universal expression in the General Treaty for the Renunciation of War (Kellogg-Briand Pact or "Pact of Paris"), signed in Paris on 27th August, 1928⁽³⁾ which is now binding upon over sixty States, and to which Germany was the first signatory. The Pact condemned recourse to war for the solution of *international controversies*, renounced it as an *instrument of national policy*, and bound the signatories to seek the settlement of all disputes or conflicts, of whatever nature or whatever origin they may be, by pacific means only.

Thus, the signatories of the Pact renounced the right of war both as a legal instrument of self-help against an international wrong and as an act of national sovereignty for the purpose of changing the existing rights. However, as the signatories renounced recourse to war only in their mutual relations it follows that resort to war still remained lawful, but only:

- (a) as a means of legally permissible self-defence;
- (b) as a measure of collective action for the enforcement of international obligations by virtue of existing instruments like the Covenant of the League;
- (c) as between signatories of the Pact and non-signatories;
- (d) as against a signatory who has broken the Pact by resorting to war in violation of its provisions. Thus when Great Britain and France declared war upon Germany in September 1939 that declaration was fully in accordance with the obligations of the Pact in view of the invasion of Poland by Germany and the resulting war between these two States.⁽⁴⁾

The conclusion of the Kellogg-Briand Pact created a long-lasting controversy as to its interpretation, namely, whether the contracting Parties have really meant to agree that aggressive war is not only illegal

(1) Quoted by S. Glueck, *op. cit.* p. 412.

(2) Quoted partly by S. Glueck, *op. cit.* p. 411 and partly by Oppenheim, *op. cit.* p. 148.

(3) Treaty Series, No. 29, (1929), Cmd. 3410.

(4) See Oppenheim, *op. cit.*, p. 149-150.

but also and above all an international crime. Whatever may be the views as to the legal effects of this Pact, it is at least evident from the numerous expressions of international opinion and agreements referred to above, that long before the outbreak of the Second World War the time had arrived in the life of civilised nations when an international custom had developed to hold aggressive war to be an international crime. In the words of Article 38 of the Statute of the Permanent Court of International Justice, such a custom, like any other in the international field, may be considered "as evidence of a general practice accepted as law".

All these solemn expressions of the conviction of civilised States regarding the need for conciliation, for the settlement of international disputes by pacific means only, for the renunciation of war as an instrument of national policy, and, logically, for the recognition that aggressive war is an international crime, greatly reinforce whatever inference to that effect is derivable from the Kellogg-Briand Pact itself. They may be regarded as powerful evidence of the existence of a widely prevalent juristic climate which has energised a spreading *custom* among civilised peoples to regard a war of aggression as not simply "unjust" or "illegal" but *downright criminal*.⁽¹⁾

Every recognition of custom as evidence of law must have a beginning some time; and there has never been a more justifiable stage in the history of international law than the present, to recognise that by the common consent of civilised nations as expressed in numerous solemn agreements and public pronouncements the instituting or waging of an aggressive war is an international crime.⁽²⁾

That exactly the same views were prevailing amongst the authorities of the Parties responsible for the enactment of the Charter of the International Military Tribunal at Nuremberg is shown in the report submitted on 7th June, 1945, to the President of the United States by the American Chief of Counsel for the prosecution of the Major War Criminals of the European Axis. Justice Robert H. Jackson there said: "It is high time that we act on the juridical principle that aggressive war-making is illegal and criminal". Speaking of the alleged "retroactive" nature of a trial and punishment for the launching of legally prohibited (i.e., aggressive) warfare, Justice Jackson argued:

"International law is more than a scholarly collection of abstract and immutable principles. It is a outgrowth of treaties or agreements between nations and of accepted customs. But every custom has its origin in some single act, and every agreement has to be initiated by the action of some state. Unless we are prepared to abandon every principle of growth for international law, we cannot deny that our own day has its right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened international law. International law is not capable of development by legislation, for there is no continuously sitting international legislature. Innovations and revisions in international law are brought about by the action of governments designed to meet a change in circumstances. It grows, as did the Common-law, through decisions reached from time to time in adapting settled principles to new situations. Hence

(1) See S. Glueck, *op. cit.*, p. 412.

(2) See S. Glueck, *op. cit.*, p. 418.

I am not disturbed by the lack of precedent for the inquiry we propose to conduct."⁽¹⁾

The Nuremberg Charter is an international act which definitely provided the last link in the developments outlined in the preceding sections, namely, it not only authoritatively rendered aggressive war an international crime, but made it in addition a crime *punishable* by an international tribunal.⁽²⁾

(v) DEFINITION AND INTERPRETATION OF "CRIMES AGAINST PEACE"

(1) *The Nuremberg Charter*

Article 6 of the Charter of the International Military Tribunal at Nuremberg, annexed to the Agreement of the Four Powers of 8th August, 1945⁽³⁾ provides that the Tribunal established for the Prosecution and Punishment of the Major War Criminals of the European Axis:

"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 organisations, committed any of the following crimes:

- (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* . . .
- (c) *Crimes against humanity* . . ."

(a) *Crimes against Peace as Supreme War Crimes*

Thus the authors of the Charter have given a leading place to subparagraph (a) referring to crimes against peace. This was the expression of the firmly held view, that the crimes against peace enumerated in Article 6 of the Charter take precedence before any other international crime to be tried by the Tribunal, and that they constitute "the supreme international crime".

This logically, technically and legally obvious conclusion, derived from the analysis of Article 6, found confirmation in the Nuremberg Judgment. When dealing with Count One of the Indictment (Common Plan or Conspiracy) and Count Two (Aggressive War; Crimes against Peace), the Tribunal stated:

"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."⁽⁴⁾

(1) *Report of 7th June, 1945, by Justice Robert H. Jackson*, reprinted in the American Journal of International Law, Vol. 39, 1945.

(2) As to the contribution of the U.N.W.C.C. to the development of the concept of crimes against peace, see Chapter VIII.

(3) Misc. No. 10/1945, Cmd. 6668., p. 5.

(4) *Judgment*, p. 13.

This statement of the Tribunal, describing crimes against peace as supreme international crimes, and the order in which various forms of war crimes have been enumerated in Article 6 of the Charter are of paramount importance to international law. The Charter contains a comprehensive enumeration of war crimes and together with the Judgment establishes a hierarchy in war crimes, never before attempted by an authoritative international legal body. This seems to be due to the circumstance, that acts contained in Article 6(a) of the Charter have usually in the past been separately discussed, analysed and defined, by mostly *ad hoc* created bodies, guided as much by political as legal considerations, while acts listed under sub-para (b) and (c) of Article 6 of the Charter, have been considered technical and legal problems, firmly embodied in positive international law and requiring only definition, elaboration and adaptation to new circumstances.

The great importance of the form adopted in Article 6 of the Charter and of the above quoted statement of the Tribunal consists *inter alia* in:

- (a) placing the charges contained in sub-para. (a) of Article 6 on a purely legal level;
- (b) establishing the supreme character of crimes against peace, as compared with other war crimes;
- (c) underlining a close *de facto* link between all three forms of war crimes.

(b) *Analysis and definitions of Crimes against Peace*

As already stated, crimes against peace are defined in the Charter as; "... planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances," and also as: "... participation in a common plan or conspiracy for the accomplishment of any of the foregoing".

At first sight it becomes obvious that the authors of the Charter differentiated between planning of a war of aggression and participation in a common plan or conspiracy.

The Indictment presented to the International Military Tribunal on 18th October, 1945,⁽¹⁾ confirms this differentiation. The defendants are first accused under Count One of "a common plan or conspiracy to commit, or which involved the commission of crimes against peace, war crimes, and crimes against humanity, as defined in the Charter . . .", and then under Count Two of "participation in the planning, preparation, initiation and waging of wars of aggression, which were also wars in violation of international treaties . . ."

Before proceeding any further with the analysis of the above mentioned differentiation it seems necessary to remark, that the Tribunal in the Judgment rejected the charges of conspiracy to commit war crimes and crimes against humanity included in Count One of the Indictment and, in accordance with the letter of Article 6 of the Charter, limited the charges

(1) *Indictment*, p. 3.

of conspiracy to the commission of crimes against peace as formulated in sub-para. (a) of Article 6.⁽¹⁾

This decision of the Tribunal makes the distinction between conspiracy and actual planning of a war of aggression of even greater importance. It shows that the Tribunal did not consider the difference to be of a purely technical character applying to all kinds of war crimes. The Tribunal tried the defendants under Counts One and/or Two on the merits of their deeds, within the limitations set down in sub-para. (a) of Article 6 of the Charter, applying to crimes against peace only. It further considered that the difference between conspiracy and actual planning was one of substance and also of degree and that there were two different crimes against peace.

This is particularly obvious from the following text of the Judgment:

“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 by planning, preparing, initiating and waging wars of aggression against a number of other States.”⁽²⁾

Thus the Tribunal considered that the common plan or conspiracy was a general crime against peace, which consisted in conspiring, making long-term plans and arrangements for waging wars of aggression in the future. All ideological, political, economic and military preparations of Nazi Germany, which aimed at the setting up of the political, economic and military might of the State, indispensable for the waging of wars of aggression and deliberately made by the participants in the conspiracy with a view to waging such wars, came under Count One.

For instance, a general plan of rearmament, with a view to conducting an aggressive war in the future comes under Count One. This is best illustrated by the statement made by Hitler at the conference of the Supreme Commanders, of 23rd November, 1939. He declared *inter alia*: “. . . but I wasn't quite clear at that time, whether I should start first against the East and then in the West or vice versa . . . Basically I did not organise the armed forces in order not to strike. The decision to strike was always in me. Earlier or later I wanted to solve the problem”.⁽³⁾

The making of specific plans and preparations, as well as the actual waging of aggressive wars against specific States came under Count Two.

Thus Hitler's declaration at the meeting of the Commanders-in-Chief

(1) “Count One, however, charges not only the conspiracy to commit aggressive war, but also to commit war crimes and crimes against humanity. But the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war. Article 6 of the Charter provides:

“Leaders, organisers, 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 the execution of such plan”.

“In the opinion of the Tribunal these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan. The Tribunal will therefore disregard the charges in Count One that the defendants conspired to commit war crimes and crimes against humanity, and will consider only the common plan to prepare, initiate and wage aggressive war.” (*Judgment*, p. 44).

(2) *op. cit.*, p. 12 and 13.

(3) *op. cit.*, p. 15.

of 22nd August, 1939, announcing his decision to make war on Poland at once and giving final instructions as to the way in which the campaign should be conducted,⁽¹⁾ is a typical example of a specific planning and preparing of an aggressive war against a specific country and constituting a crime against peace under Count Two. The analysis of the sentences pronounced against the individual defendants indicted under Counts One and Two gives an indication of how the Tribunal appraised the difference between common conspiracy and planning or waging of an aggressive war.

Goering was convicted under both counts. The Tribunal stated:

"... he was largely instrumental in bringing the National Socialists to power in 1933 . . ." (Charge under Count One), and further: "Shortly after the Pact of Munich he announced that he would embark on a five-fold expansion of the Luftwaffe and speed rearmament with emphasis on offensive weapons". (Count One). The Tribunal stated further: "he commanded the Luftwaffe in the attack on Poland and throughout the aggressive wars which followed" (Count Two), and further "... was active in preparing and executing the Yugoslav and Greek campaigns" (Count Two).⁽²⁾

The case of Frick is very instructive. He was acquitted under Count One and found guilty under Count Two. The Tribunal thus gave the reasons for his acquittal:

"Before the date of the Austrian aggression Frick was concerned only with domestic administration within the Reich. The evidence does not show that he participated in any of the conferences at which Hitler outlined his aggressive intentions. 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".⁽³⁾

The wording of the following passage of the Judgment clearly shows what the Tribunal considered to be Frick's crime under Count Two:

"... Frick devised an administrative organisation in accordance with wartime standards. According to his own statement, this was actually put into operation after Germany decided to adopt a policy of war".⁽⁴⁾

As further proofs of Frick's guilt the Tribunal mentioned *inter alia* the signing by him of the law uniting Austria with the Reich, the signing of the laws incorporating into the Reich the Sudetenland, Memel, Danzig, the Eastern Territories, Eupen, Malmedy and Moresnet, and the participation in the administration of the territories occupied by Germany in the war.

Streicher was also acquitted under Count One. The Tribunal said:

"There is no evidence to show that he was ever within Hitler's inner circle of advisers; nor during his career was he closely connected with the formation of policies which led to war. He was never present, for example, at any of the important conferences when Hitler explained his decisions to his leaders . . . In the opinion of the Tribunal, the evidence fails to establish his connection with the conspiracy or common plan to wage aggressive war as that conspiracy has been elsewhere defined in this Judgment".⁽⁵⁾

(1) *op. cit.*, p. 24 and 25.

(2) *op. cit.*, p. 84 and 85.

(3) *op. cit.*, p. 99.

(4) *op. cit.*, p. 99.

(5) *op. cit.*, p. 100 and 101.

The Tribunal acquitted Funk under Count One, but recognised his guilt under Count Two. The Tribunal said:

"Funk became active in the economic field after the Nazi plans to wage aggressive war had been clearly defined"⁽¹⁾ and further, gave the following reasons for the verdict on both Counts: "Funk was not one of the leading figures in originating the Nazi plans for aggressive war. His activity in the economic sphere was under the supervision of Goering as Plenipotentiary General of the Four Year Plan. He did, however, participate in the economic preparation for certain of the aggressive wars, notably those against Poland and the Soviet Union, but his guilt can be adequately dealt with under Count Two of the Indictment"⁽²⁾

Schacht was indicted and acquitted under Counts One and Two. The Tribunal brought forward most characteristic and enlightening reasons:

"It is clear that Schacht was a central figure in Germany's rearmament programme, and the steps which he took particularly in the early days of the Nazi regime, were responsible for Nazi Germany's rapid rise as a military power. But rearmament of itself is not criminal under the Charter. To be a crime against peace under Article 6 of the Charter it must be shown that Schacht carried out this rearmament as part of the Nazi plans to wage aggressive wars". And further: "Schacht was not involved in the planning of any of the specific wars of aggression charged in Count Two. His participation in the occupation of Austria and the Sudetenland (neither of which are charged as aggressive wars) was on such a limited basis that it does not amount to participation in the common plan charged in Count One. He was clearly not one of the inner circle around Hitler which was most closely involved with this common plan"⁽³⁾

It has to be mentioned that the Soviet member of the International Military Tribunal in his dissenting opinion on the case of Schacht based on the evidence submitted to the Tribunal, declared: "Therefore, Schacht's leading part in the preparation and execution of the common criminal plan is proved"⁽⁴⁾. He did not make, however, any distinction between charges under Counts One and Two and did not challenge the decision of the Tribunal on any point of law.

Doenitz was acquitted under Count One and declared guilty under Count Two. The Tribunal gave this decision in the following terms:

"Although Doenitz built and trained the German U-boat arm, the evidence does not show he was privy to the conspiracy to wage aggressive wars or that he prepared and initiated such wars. He was a line officer performing strictly tactical duties. He was not present at the important conferences when plans for aggressive wars were announced . . . Doenitz did, however, wage aggressive war within the meaning of that word as used by the Charter . . . It is clear that his U-boats, few in number at the time, were fully prepared to wage war."⁽⁵⁾

Von Schirach was acquitted under Count One. The Tribunal said:

"Despite the warlike nature of the activities of the Hitler Jugend, however, it does not appear that von Schirach was involved in the development of

(1) op. cit., p. 102.

(2) op. cit., p. 103.

(3) op. cit., p. 106.

(4) op. cit., p. 136.

(5) op. cit., p. 107.

Hitler's plan for territorial expansion by means of aggressive war, or that he participated in the planning or preparation of any of the wars of aggression."⁽¹⁾

Von Papen was acquitted under Counts One and Two. The decision of the Tribunal was given, *inter alia*, in the following terms:

"The evidence leaves no doubt that von Papen's primary purpose as Minister to Austria was to undermine the Schuschnigg regime and strengthen the Austrian Nazis for the purpose of bringing about the Anschluss. To carry through this plan he engaged in both intrigue and bullying. But the Charter does not make criminal such offences against political morality, however bad this may be. Under the Charter von Papen can be held guilty only if he was a party to the planning of aggressive war. There is no showing that he was a party to the plans under which the occupation of Austria was a step in the direction of further aggressive action, or even that he participated in plans to occupy Austria by aggressive war if necessary. But it is not established beyond a reasonable doubt that this was the purpose of his activity, and therefore the Tribunal cannot hold that he was a party to the common plan charged in Count One or participated in the planning of the aggressive wars charged under Count Two".⁽²⁾

The Soviet member of the Tribunal again challenged the decision in von Papen's case, but did not support his opinion by any legal consideration. He limited himself to the statement that the defendant supported the Nazi regime in Austria, but did not attempt to prove the only point of legal importance, and namely, whether von Papen participated in the common plan and conspiracy for the bringing about of a war of aggression or whether he participated in the actual planning and waging of such a war.⁽³⁾

The Tribunal's decision in the case of Seyss-Inquart is characteristic. The Tribunal acquitted him under Count One, but declared him guilty under Count Two. The Tribunal did not give reasons for this acquittal and we can only infer the motives from the general statement of the Tribunal. This says that:

"Seyss-Inquart participated in the last stages of the Nazi intrigue, which preceded the occupation of Austria . . ."⁽⁴⁾ "The question of timing and the circumstance that the occupation of Austria is not considered by the Tribunal as an aggressive war within the meaning of the Charter seem to have played the decisive role. Seyss-Inquart has not been considered guilty of common conspiracy or plan for the waging of aggressive wars, because this involves close collaboration over a long period with the close group of Nazi ringleaders, who were making general preparations for the waging of aggressive wars. As the Judgment says, Seyss-Inquart joined the Nazi Party on 13th March, 1938, and even then he remained in Austria and did not participate in any of the conferences at which Hitler's policy for the future was outlined. On the other hand, Seyss-Inquart helped Hitler in his offensive against the independence of Czechoslovakia".⁽⁵⁾

Thus the Tribunal found him guilty under Count Two.

Another interesting argument was brought forward by the Tribunal in support of the decision to acquit Speer under Counts One and Two. The Tribunal said:

- (1) *op. cit.*, p. 113.
- (2) *op. cit.*, p. 120.
- (3) *op. cit.*, p. 138.
- (4) *op. cit.*, p. 120 and 121.
- (5) *op. cit.*, p. 120.

"The Tribunal is of opinion that Speer's activities do not amount to initiating, planning, or preparing wars of aggression, or of conspiring to that end. He became the head of the armament industry well after all the wars had been commenced and were under way. His activities in charge of German Armament Production were in aid of the war effort in the same way that other productive enterprises aid in the waging of war; but the Tribunal is not prepared to find that such activities involve engaging in the common plan to wage aggressive war as charged under Count One or waging aggressive war as charged under Count Two".⁽¹⁾

The Tribunal also acquitted defendants Fritsche and Bormann under Count One and stated that neither of them reached a sufficiently high position to be admitted into the close ring of the Nazi leaders and to take part in the common plan or conspiracy.⁽²⁾ The decision with regard to Fritsche was challenged by the Soviet member of the Tribunal on the ground that Fritsche's position as Head of the German Press was such that he was directly involved in the preparation and conduct of aggressive warfare.⁽³⁾

(c) Wars in Violation of International Treaties

Sub-para. (a) of Article 6 of the Charter enumerates "war of aggression" and "war in violation of international treaties, agreements and assurances". The Indictment says: ". . . the defendants planned, prepared, initiated and waged wars of aggression which were *also* wars in violation of international treaties, agreements and assurances."⁽⁴⁾ Appendix C. to the Indictment enumerates the international agreements violated.

The Nuremberg Judgment does not dwell on the problem of "wars of aggression" and "wars in violation of international treaties". The Tribunal said: "The Charter defines as a crime the planning or waging of war that is a war of aggression *or* a war in violation of international treaties. The Tribunal has decided that certain of the defendants planned and waged aggressive wars against twelve nations, and were therefore guilty of this series of crimes. This makes it unnecessary to discuss the subject in further detail, or even to consider at any length the extent to which these aggressive wars were also 'wars in violation of international treaties, agreements and assurances.' These treaties are set out in Appendix C. of the Indictment".⁽⁵⁾ The Tribunal then quoted as those of principal importance: the two Hague Conventions of 1899 and 1907 relative to the settlement of international disputes, the Versailles Treaty, the Kellogg-Briand Pact and various treaties of mutual guarantee, arbitration and non-aggression entered into by Germany with other powers.

The attitude of the Tribunal seems to have been dictated by purely practical considerations. From the point of view of the task allotted to the Tribunal, it was irrelevant to analyse the question in detail, as it was obvious that all aggressive wars waged by Germany were also wars in violation of international bilateral or multilateral treaties. The con-

(1) *op. cit.*, p. 122.

(2) *op. cit.*, p. 127, 130.

(3) *op. cit.*, p. 138-140.

(4) *Indictment*, p. 3.

(5) *Judgment*, p. 36.

ventional basis of the crimes was considered as established beyond any doubt.

There may be also another reason for such an attitude. The Charter seems to lay all the emphasis on "aggressive wars" as being criminal in themselves and to consider the conventional basis as secondary and subsidiary. The Tribunal seems to have followed the Charter and did not attach too great an importance to the conventional side. In theory it is possible that some country may plan or wage a war of aggression which would not be a war in violation of international treaties. Nevertheless such a war would be, according to the Charter, considered a crime against peace.

According to the Charter and the Judgment of the Tribunal it is considered that a crime against peace consists in planning, preparing, initiating or waging of a war of aggression, *whether or not* it is at the same time a war in violation of international treaties, agreements and assurances, *or* participation in a common plan or conspiracy for the accomplishment of any of the foregoing. The Tribunal seems to have considered as aggressive war all warlike activities, not in justified self-defence or in execution of an order of a supreme world authority punishing an aggressor, directed by the attacking country against the attacked country against her will and meeting with her resistance, whether or not a formal state of war has been declared between the two countries concerned.

(d) Illegality and Criminality of a War of Aggression, and International Character of the Crimes

The legal position created by the Charter in this respect does not leave any room for doubt. Article 6 of the Charter says: "the following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal . . ." (1) The Judgment states: "the Charter makes the planning of a war of aggression or a war in violation of international treaties a crime; . . ." (2) The Tribunal also made it clear on what foundations its power to apply the law of the Charter was based. It said in the Judgment:

"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 recognised by the civilised 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 Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law". (3)

The international character of crimes against peace must be based on the customary recognition among civilised nations in the modern era that aggressive war is illegal and criminal. There is ample proof that civilised

(1) *Indictment*, p. 5.

(2) *Judgment*, p. 38.

(3) *op. cit.*, p. 38.

States have, during the present century, considered that unjustified war (not in self-defence, or in execution of an order of a supreme world authority, demanding punishment of an aggressor), was so dangerous a threat to the survival of mankind that it must be branded and treated as criminal. It has been shown that the States have repeatedly entered into agreements expressing such conviction. In each of those instances a very large number of countries representing the overwhelming majority of all countries of the world and including, in most cases, aggressor countries of the last war signed and adopted those documents. On the criminal character of aggressive war under international customary law in the inter-wars period the Tribunal expressed its view as follows:

“In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing”.⁽¹⁾

Thus the international character of the crime of the war of aggression has been judicially established beyond any doubt. This is also based on the factual changes which occurred during the present century and especially since the First World War. The development of technology in the present epoch assumed such proportions that there is a constant threat that any local conflict may extend into a world conflagration, threatening all countries of the world and even the very survival of mankind.

(e) Various Forms of Crimes against Peace in the Judgment

The Tribunal used in the Judgment various expressions to describe the warlike steps taken by Nazi Germany. The word “invasion” is used with regard to Austria, Denmark, Norway, Belgium, the Netherlands and Luxembourg;⁽²⁾ “seizure” with regard to Czechoslovakia;⁽³⁾ “aggression” with reference to Poland, Yugoslavia and Greece;⁽⁴⁾ “aggressive war” with reference to the U.S.S.R.;⁽⁵⁾ and, finally, “war” with regard to the United States.⁽⁶⁾

It seems obvious that in using those different denominations the Tribunal was guided by different factual and legal circumstances accompanying each aggressive act. The proof is, *inter alia*, provided by the use of the expression “aggressive war”. Only once the Tribunal used this expression, that is with regard to the German attack on the U.S.S.R., but at the same time considered that all the above mentioned aggressive acts of Germany, with the exception of the invasion of Austria and the seizure of Czechoslovakia, were acts of aggressive war in the broader sense of this word and within the meaning of the Charter.

With regard to Austria and Czechoslovakia the Tribunal stated in the Judgment of Schacht that neither the occupation of Austria nor of the

(1) *op. cit.*, p. 39.

(2) *op. cit.*, p. 17, 27, 30.

(3) *op. cit.*, p. 19.

(4) *op. cit.*, p. 22.

(5) *op. cit.*, p. 33.

(6) *op. cit.*, p. 35.

Sudetenland were "charged as aggressive war".⁽¹⁾ The Tribunal has evidently considered in both these cases that, as the occupation of the countries concerned did not meet with any obstacle or any major resistance, and was formally carried out either on the "invitation" of the country concerned, as in the case of Austria,⁽²⁾ or in consequence of international agreements, as in the case of Czechoslovakia,⁽³⁾ it would have been legally impossible to consider those acts of themselves as acts of aggressive wars. That is why those defendants who had taken part in the planning and carrying out of the occupation of both countries were not sentenced, with respect to their participation in those acts, under Count Two, but only under Count One.

As to all other acts of German aggression, the Tribunal considered them as acts of aggressive war, but used different denominations. This seems to be based on technical and legal differences, and in the first place on two circumstances: the extent of armed resistance encountered, and whether or not from the legal point of view a technical state of war existed between the countries concerned. The Tribunal also carefully examined the facts, establishing in each case, that Germany's action was not dictated by self-defence, but by the desire to extend her aggressive bases, and her *Lebensraum* in order to advance her aggressive policy.

The stronger denomination "aggression" seems to have been used in the cases of Poland, Yugoslavia and Greece, because of the extent of armed resistance encountered, and because of the political and diplomatic circumstances which accompanied and preceded those attacks. In the cases of Belgium, the Netherlands, Luxembourg, Denmark and Norway the expression "invasion" seems better to illustrate the more easy progress of German forces. The denomination "aggressive war" in the case of the U.S.S.R. carries a particular emphasis and seems to have been applied because of the well known and unique circumstances in the political, diplomatic and military domain which accompanied Germany's attack on the U.S.S.R.

The expression "war against the United States" deserves particular attention. It is understandable that the Tribunal could not, from the technical point of view, use such terms as "invasion", "aggression", or "aggressive war". The war between Nazi Germany and the United States was the consequence of a formal declaration of war by Germany and was neither preceded nor accompanied by aggressive military acts. Nevertheless the Tribunal justly considered that this was a case of an indirectly aggressive war, in the broader meaning of the term, as it is used in the Charter, and thus stated its opinion: "And when Japan attacked the United States fleet in Pearl Harbour and thus made aggressive war against the United States, the Nazi Government caused Germany to enter that war at once on the side of Japan by declaring war themselves on the United States".⁽⁴⁾

(1) *op. cit.*, p. 106.

(2) With the agreement of Seyss-Inquart, then Chancellor of Austria, *Cmd. 6964*, p. 19.

(3) Pact of Munich and the agreement signed by Hacha in Berlin, *Cmd. 6964*, p. 21.

(4) *Judgment*, p. 36.

(f) *Various forms of Participation in the Crimes*

The first two paragraphs of Article 6 of the Charter affirm the principle of international law as to individual responsibility, a principle which in the past often met with objections. Article 6 declares that for any of the acts enumerated therein, there shall be individual responsibility. This is also applicable to crimes against peace. It further states that the Tribunal shall have the power to try and punish persons who, acting as individuals or as members of organisations, committed any of the crimes coming within the notions of crimes against peace, war crimes and crimes against humanity.⁽¹⁾

Article 6 of the Charter also contains *in fine* the following paragraph:

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

These various forms of participation in the crimes against peace are repeated by the Indictment. They are obviously enumerated in the declining order of importance. The meaning of each term should be appraised in relation to the crimes contained in the Charter, and not in the ordinary meaning of the word. Thus, the important designation is “ leader in the conspiracy ”, and not “ leader of the National Socialists ”. For example, Goering can be considered to be a leader, both in the ordinary meaning of the word, and in the meaning derived from the text of the Charter. On the other hand, von Schirach, who was a leader of the Nazi Youth, was not tried by the Tribunal as leader in the common plan or conspiracy, but the Tribunal examined his role as of an organiser and accomplice.

The Tribunal did not define in the Judgment the forms of participation in the crime of each individual defendant, but in the analysis of the activities of each defendant it is possible to arrive at the right conclusions by applying ordinary standards adopted by municipal penal courts.

For instance, the Tribunal defined Hess' leading position in the common plan in the following manner: “ As Deputy of the Fuhrer, Hess was the top man in the Nazi Party with responsibility for handling all Party matters, and authority to make decisions in Hitler's name on all questions of Nazi leadership ” and further: “ . . . in these positions, Hess was an active supporter of preparations for war ”.⁽²⁾ The description often used by the Tribunal in denoting the activities of an accomplice can be illustrated by the case of Ribbentrop: “ Ribbentrop attended the conference on 20th January, 1941, at which Hitler and Mussolini discussed the proposed attack on Greece, . . . ”⁽³⁾

In a few instances we come across statements defining instigators. So with regard to Raeder the Tribunal said: “ The conception of the invasion of Norway first arose in the mind of Raeder and not that of Hitler ”.⁽⁴⁾

(1) For the presentation of the developments in the doctrines of individual responsibility of ministers, of acts of State, and of immunity of heads of State, see Chapter X, of this History.

(2) *Judgment*, p. 86.

(3) *op. cit.*, p. 89.

(4) *op. cit.*, p. 111.

As to the *mens rea* on the part of the defendants at Nuremberg, some people maintain that it is a bad thing to have held them responsible for acts, of which they did not know in advance that they would be punished as crimes. The question of penalty, however, seems to be irrelevant, but it is certainly essential that they should have realised the illegal and criminal character of the acts at the time of their commission.

The Tribunal thus defined its attitude to this problem:

"Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats and business men. When they, with knowledge of his aims, gave him their co-operation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing".⁽¹⁾

There can be no doubt, that the defendants realised the nature of their activities and that their acts would be considered illegal and criminal by the whole civilised world. Members of the inner circle of the Nazi Government knew that Germany had solemnly assured her neighbours of peaceful and friendly intentions by signing several treaties. They also knew that Germany's unprovoked attacks upon her peaceful neighbours constituted wars of aggression. They knew that such wars had been declared illegal and outlawed by the great majority of civilised States, including Germany. They knew, that numerous international agreements, declarations and pronouncements had declared such actions to be international crimes. They finally knew, that the leaders of the Allied Nations had declared in advance their determination to punish those crimes.

(2) *The Tokyo Charter*

Article 15 of the Charter of the International Military Tribunal at Tokyo⁽²⁾, established for the punishment of the Far Eastern War Criminals, provides that the Tribunal:

"... shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organisations 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* . . . ;
- (c) *Crimes Against Humanity* . . . ;"

In spirit the afore-quoted rules are in harmony with, and a replica of, the corresponding provisions of the Nuremberg 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.

(1) *op. cit.*, p. 43 and 44.

(2) *Special Proclamation of the Supreme Commander for the Allied Powers establishing an International Military Tribunal for the Far East, Tokyo, 19th January, 1946.*

The point raised by the above definition of crimes against peace is that, whereas, the Nuremberg 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 criminal the "waging of a declared or undeclared war of aggression".

The effect of the latter definition is to make it expressly clear that to precede the initiation of war by its formal declaration as required by the Hague Conventions, 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 Article 5(a) of the Far Eastern Charter contains additional specification which is, however, implied in the definition given in the Nuremberg Charter.

While omitting to state that a "declared" war of aggression is criminal in the same way as an "undeclared" war, the Nuremberg 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 Nuremberg Charter the same result is achieved by 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 Nuremberg Tribunal. Prior to the signing of the Kellogg-Briand Pact of 1928 and to the interpretation of its meaning in international law by the Nuremberg Tribunal, no violation of international 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.

It may be observed that the Nuremberg 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 declaration. The Tribunal contented

itself by ascertaining this fact in each case, and proceeded directly on the grounds of such concrete circumstances.

It is thus possible to conclude that the differences appearing in the texts of Articles 5(a) and 6(a) of the two Charters are purely verbal and that they did not affect the substance of the law governing the jurisdiction of the Far Eastern Tribunal over crimes against peace in comparison with the Nuremberg Charter.

It would appear, however, 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 should, whenever possible, be avoided.

(vi) ENDORSEMENT AND AFFIRMATION BY THE UNITED NATIONS

At its forty-sixth Plenary Meeting on 31st October, 1946, the General Assembly of the United Nations referred to the Sixth Committee the question of the implementation by the General Assembly of its obligation "to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law". The Sixth Committee referred the matter to a Sub-Committee, which had also before it a resolution proposed by the delegation of the United States relating to the principles of international law recognised by the Charter of the Nuremberg Tribunal (A/O.6/69).

The majority of the Sub-Committee agreed, not only that a Committee should be appointed to consider the proper methods of implementing the obligation of the General Assembly under Article 13 of the Charter, but that that Committee should give priority to plans for the formulation of the principles of the Charter of the Nuremberg Tribunal, and of the Judgment of that Tribunal, in the context of a general codification of offences against the peace and security of mankind or of an International Criminal Code. The Sub-Committee felt that this view was strengthened by the fact that similar principles had been adopted in respect of the trials of the Major War Criminals in the Far East.

The Sub-Committee's report (A/O.6/116) was adopted by the Sixth Committee⁽¹⁾ which recommended to the General Assembly the adoption of an appropriate resolution.

In implementing the above recommendation, the General Assembly of the United Nations adopted, at its fifty-fifth Plenary Meeting on 11th December, 1946, two resolutions; namely, a general resolution on the Progressive Development of International Law and its Codification, and a resolution on the Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal.

In the latter resolution⁽²⁾ the General Assembly recognised the obligation laid upon it by Article 13, paragraph 1, sub-paragraph (a) of the Charter, to initiate studies and make recommendations for the purpose of en-

(1) See the Report of the Sixth Committee (A/236/ dated 10th December, 1946).

(2) See, *General Assembly Journal* No. 75, Supplement A-64, Add. 1, p. 944-946.

couraging the progressive development of international law and its codification; and took note of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the Major War Criminals of the European Axis signed in London on 8th August, 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the Major War Criminals in the Far East, proclaimed at Tokyo on 19th January, 1946. Therefore the General Assembly:

“AFFIRMS the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal;

“DIRECTS the Committee on the codification of international law established by the resolution of the General Assembly of December, 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognised in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal”.

Following the recommendations contained in the above resolution the problem of formulation of the Nuremberg principles has become the subject of further considerations and studies by the appropriate organs of the United Nations.⁽¹⁾

(vii) CONCLUSIONS

The work done in the field of international law by the victorious United Nations and embodied in the Four Power Agreement for the Prosecution and Punishment of the Major War Criminals, and further developed by the International Military Tribunal is of momentous importance. The Tribunal was fully conscious that its task was not limited to the solution of the problem which it was directly facing, namely, the punishment of the German Major War Criminals, but that its work would be of fundamental importance for the future development of international law. The Tribunal stated in the Judgment that the Charter is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.

Thus the Tribunal made it clear that the law of the Charter was declaratory of existing international customary law and would be applicable to any future transgressor. This means that aggressive war involves personal responsibility of the leaders of the aggressor States, similar to the responsibility for war crimes in the technical meaning of the term.

But the Agreement of 8th August, 1945 entrusted the Tribunal with the trial and punishment of the Major War Criminals of the European Axis. It was an *ad hoc* Tribunal and no second Tribunal has been set up under the Agreement.

It is obvious that much more has to be done, than what has been achieved up till now. It is true that the foundations have been firmly

(1) For, the provisions regarding crimes against peace in the Peace Treaties of 1947, see Section A of this Chapter, dealing with the Development of the Concept of Crimes against Humanity.

laid down, but the erection of the whole building of peace-protecting measures of international law has hardly begun.

This requires further legislative work based on the Charter and the findings of the Tribunal, development of the principles enunciated in those documents, the entrusting of the application of adopted principles to a supreme judicial body, and, finally, the most difficult task of making sure that effective sanctions would be applied to any future transgressor.

CHAPTER X

DEVELOPMENTS IN THE DOCTRINES OF INDIVIDUAL RESPONSIBILITY OF MEMBERS OF GOVERNMENTS AND ADMINISTRATORS, OF ACTS OF STATE, OF IMMUNITY OF HEADS OF STATE, AND OF SUPERIOR ORDERS

INTRODUCTORY NOTES

Developments which took place in respect of the concept of crimes against peace and crimes against humanity, as well as within the sphere of penal liability for war crimes proper, brought about profound alterations in the doctrines of immunity of heads of State, of individual responsibility of members of Governments and high ranking administrators, and of acts of State. If the proposition that aggressive wars or persecutions on racial, political or religious grounds in time of war were criminal acts, was not to be confined to the sphere of moral principles, advocated by learned jurists or philosophers or to that of the wishful thinking of politicians, the only way to deal with it was to recognise that individuals upon whose decisions such acts depended, were to be held penally responsible. This could be done only by dismissing the doctrine of immunity of heads of state, on the one hand, and that of the acts of State legalising deeds of members of Governments and administrators on the other. As a corollary to the theory of national sovereignty, these two denominators served for centuries the purpose of providing a legal cover for a series of acts undertaken by one State against another, or by a Government against its own citizens within the boundaries of a State. There was no international liability for acts such as the launching of a war, but only the bearing of the natural consequences of a military defeat. Constitutional sanctions recognised for mishandling national or international affairs of a State were of a political nature only. A head of State could resign, abdicate or be dismissed, and members of a Government or administrators could similarly be forced into retirement or deprived of political power by other methods—but none could be held penally responsible for acts undertaken in the exercise of their State functions. In this manner the whole system was one of utter official irresponsibility.

The grave consequences of modern warfare for all the nations of the world, and particularly the impact of the last War with its unparalleled human suffering and economic, political and social upheavals, made these doctrines inconsistent with the vital requirements of international peace and the stability and prosperity of nations. By consent of the great majority of nations these doctrines were eventually discarded and replaced by the rule that individuals could no longer shelter behind acts of State, and that the former were consequently to be held answerable for acts amounting to international crimes, in the same manner as any other individual was answerable for common crimes under municipal law.

Another doctrine was closely connected with those affecting heads of State and members of Governments. It is that concerning acts committed upon superior orders. The question requiring answer was to what extent persons pledged by law to obey orders of their superiors, in particular those issued by heads of State and Governments, were to be held personally responsible for acts committed by them in subordinate positions. Was liability to be confined only to those persons who issued the orders, or were the executants to share responsibility with them? If so, what were the limits for holding a subordinate guilty of committing acts upon superior orders?

Developments in all these various fields took a sinuous line of progression. There were hesitations and hindrances, and there were also complete reversals of attitude on the part of Governments within a given period of time. The ultimate result was the elaboration of rules embodied in contemporary international law which provide clear answers to all the main issues at stake, and which will be the law until a further development takes place in the future. Such as it is, this law meets the requirements of the present world in a manner which is designed to act as a deterrent to breaches of peace and to crimes incidental to such breaches, and even to acts committed by Governments and heads of State within their national territory in connection with aggressive wars.⁽¹⁾ One of its principal effects is that it introduces international penal liability for such individuals and makes some of their acts the concern of the community of nations as a whole. In this way, it subjects the real actors in national and international affairs to the rule of law in all matters affecting the maintenance of international peace and of the fundamental human rights of mankind.

A. INDIVIDUAL RESPONSIBILITY OF HEADS OF STATE, MEMBERS OF GOVERNMENTS AND STATE ADMINISTRATORS

The problem of personal responsibility of heads of State, members of Governments and similar high State administrators, and the relevance of the doctrine of acts of State affecting their liability, were the subject of thorough investigation and discussion at several international conferences. After the First World War they were analysed by the 1919 Commission on Responsibilities; during the Second World War they were dealt with by bodies such as the Interallied Commission on the Punishment of War Crimes, the London International Assembly, and the International Commission for Penal Reconstruction and Development; they were also carefully studied by the United Nations War Crimes Commission. These phases ended in the trial of German and Japanese Major War Criminals at Nuremberg and Tokyo after the end of the Second World War, and the adjudications made in their respect by the International Military Tribunal at Nuremberg.⁽²⁾

(i) THE 1919 COMMISSION ON RESPONSIBILITIES

In the report submitted to the Allied Powers sitting at Versailles,

(1) See Chapter IX, Section A, (ii) (i) (c) p. 195 et seq.

(2) The Judgment of the Tokyo Tribunal had not been given at the time of going to press.

members of the 1919 Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties⁽¹⁾ were divided on the main issue.

The majority dismissed the doctrines of immunity of heads of State and of acts of State in the following terms:

“ 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 the case of heads of States. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a sovereign of a State. But 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 ”.

The majority therefore recommended the setting up of a High Tribunal which would try the German Kaiser, and in this connection expressed the following opinion:

“ If the immunity of a sovereign is claimed to extend beyond the limits above stated, it would involve laying down the principle that the greatest outrages against the laws and customs of war and the laws of humanity, if proved against him (a Sovereign) could in no circumstances be punished. Such a conclusion would shock the conscience of civilised mankind ”.

On these grounds the majority came to the following formal conclusion:

“ 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 above views and conclusions were dissented from by the United States and Japanese delegations.

In a Memorandum of Reservations the American delegation drew a distinction between “ two classes of responsibilities ”. They set on the one side “ responsibilities of a legal nature, justiciable and liable for trial and punishment by appropriate tribunals ”, and on the other side “ responsibilities of a moral nature ” and “ moral offences ” which “ however iniquitous and infamous, and however terrible in their results, were beyond the reach of judicial procedure, and subject only to moral sanctions ”. They applied the latter to heads of State, members of Governments and other persons in high authority and advocated that they could, consequently, not be brought to trial. Making special reference to heads of State, the American delegation said that they “ were not hitherto legally responsible for the atrocious acts committed by subordinate authorities ” and that to hold them now responsible was an “ inconsistency ” to which “ the American members of the Commission were unwilling to assent ”. As a consequence they dissented to that extent from the formal conclusion reached by the majority, and reiterated the traditional rule that a head of State could be held responsible only to

(1) See Chapter III.

the "political authority of his country" and not to the judicial authority"⁽¹⁾.

For similar reasons the Japanese delegation made reservations excluding penal liabilities of heads of State.⁽²⁾

The Allied Powers adopted the view of the majority and provided for the trial of the Kaiser in the Versailles Treaty (Art. 227). The Kaiser was held responsible "for a supreme offence against international morality and the sanctity of treaties", and was to be tried by a special interallied tribunal of five powers (U.S.A., Great Britain, France, Italy and Japan).

It will be noted that in its conclusion as to the individual penal responsibility of high State administrators, the majority of the 1919 Commission had declared their liability for violations of the laws and customs of war or of the laws of humanity. It is generally agreed that the former cover the field of war crimes *stricto sensu* and that—in the light of the Nuremberg Trial—the latter comprise what are now called crimes against humanity.

As to the launching and waging of an aggressive war, the 1919 Commission was of the opinion that "by reason of the purely optional character of the institutions at the Hague for the maintenance of peace (International Commissions of Inquiry, Mediation and Arbitration), a war of aggression may not be considered as an act directly contrary to positive law". Consequently, at this stage, penal liability of State administrators, including heads of State, was contemplated primarily for war crimes proper.

(ii) INTERNATIONAL BODIES PRECEDING THE ESTABLISHMENT OF THE UNITED NATIONS WAR CRIMES COMMISSION

(1) *Inter-Allied Commission on the Punishment of War Crimes*

The Nine Powers, signatories to the St. James's Declaration of 13th January, 1942,⁽³⁾ had set up a Commission on the Punishment of War Crimes.

The Commission drafted a questionnaire which was referred to member Governments for answer. One of the questions asked was how were individuals responsible for planning, inciting or ordering violations of international law to be punished. The question was framed in general terms so as to include the responsibility of high State administrators. The collection of governmental views on this subject could not be completed in time, for the Commission ceased its activities on 23rd October, 1943, the date of the establishment of the United Nations War Crimes Commission. A questionnaire, however, of the International Commission for Penal Reconstruction and Development brought answers from many Governments, as will be seen later.

(1) The U.S. delegation made, however, one practical concession. They agreed that the above rule of judicial immunity did not apply to a head of State who had abdicated, as was precisely the case with the ex-Kaiser. Therefore they apparently did not object to his trial, but did so on the grounds that in such case the head of State was "an individual out of office".

(2) It can be noted that in Japan the Emperor was considered to be of divine origin, and that the Japanese delegation had of necessity to be in line with this principle.

(3) See Chapter V, Section A, (iv), p. 89 et seq.

(2) *London International Assembly*

The London International Assembly, which was created in 1941 under the auspices of the League of Nations Union,⁽¹⁾ studied post-war problems and the framing of the future world organisation. Most of its members were designated by the Allied Governments, so that it indirectly reflected their views.

The problem of retribution for war crimes committed during the Second World War held a prominent place on its agenda and gave rise to thorough discussions. Analysing the position of a head of State the Assembly made a distinction, and held the view that heads of State, who constitutionally had not power to order or prevent the framing of a specific policy, could not be held personally responsible for acts of other State administrators or of the Government, as the case might be. As to the principle, they followed the majority of the 1919 Commission and agreed that, with the above exception, rank or position, however high, conferred no immunity in respect of war crimes.

(3) *International Commission for Penal Reconstruction and Development*

A second semi-official body established by the same Nine Powers who signed the St. James's Declaration of 13th January, 1942, was the Cambridge "International Commission for Penal Reconstruction and Development". It started functioning on 14th November, 1941, and studied, among other things, rules and procedure to govern the case of crimes committed against international public order, with particular reference to events of the Second World War. It performed brilliant work and in July, 1943, submitted to the Governments a learned and comprehensive report on this matter.

In a questionnaire submitted to its members, the Commission requested their opinion as to the "immunity of a head of State and of other State officials". Answers were received from eight members of different nationalities. The majority declared that in the field of war crimes no such immunity could be accepted. With particular reference to the Axis powers, the argument was used that in such regimes the head of State had concentrated all powers in his own hands, and that consequently the doctrine of immunity had no justification. Another argument was that immunity was an accepted principle in time of peace, for reasons of expediency and courtesy vital to peaceful intercourse between nations, but that it ceased to exist in time of war and could not be maintained for the benefit of the aggressor. The practice of making and detaining heads of State and other State administrators prisoners, such as in the case of Napoleon I, Napoleon III, King Leopold of Belgium and Rudolf Hess, were also invoked as evidence that immunity did not exist in war time.

The question was also touched upon, though only in a general manner, in the part of the report dealing with superior orders, and prepared by Professor H. Lauterpacht:

"The rules of warfare", said Professor Lauterpacht, "like any other rules of international law, are binding not upon impersonal entities, but

(1) See Chapter V, Section B, (ii), p. 99 et seq.

upon human beings . . . In no other sphere does the view that international law is binding only upon States but not upon individuals lead to more absurd consequences and nowhere has it in practice been rejected more emphatically than in the domain of the laws of war. The direct subjection of individuals to the rules of warfare entails, in the very nature of things, a responsibility of a criminal nature".

(iii) THE UNITED NATIONS WAR CRIMES COMMISSION

In the United Nations War Crimes Commission the problem of individual penal responsibility of State administrators was treated for a considerable period of time in conjunction with two other allied questions: with the preparation of Lists of "major war criminals", "arch criminals" or "key men", as they were alternatively called, and with the question of collective criminality of Governments.⁽¹⁾ Both questions were considered in connection with Axis leaders, and particularly with concrete cases implicating Hitler and members of the Nazi Government.

From March to May, 1944, the Belgian delegate, acting at the same time as Chairman of the Committee on Facts and Evidence, raised several questions in this respect. He pointed out the desirability of supplying the Committee not only with evidence against ordinary war criminals but also against the Axis leaders, and of placing their names on war criminals lists prepared by the Commission. He complained of the fact that member Governments were not communicating such evidence, with the result that "persons in whom the crimes really originated" were not prosecuted.⁽²⁾ Therefore, he suggested that such evidence be obtained from the Governments or else that it be collected by the Commission on its own initiative. As to the alternative method of bringing major war criminals to book, he considered that the proper course was to try them before a court of law, and not to impose penalty by political decision. However, should the latter course be taken, he suggested that it be applied only in respect of the Axis top leaders, such as Hitler, Mussolini and Hirohito, and not in respect of the other Axis high State administrators. The Commission agreed in principle.⁽³⁾

In May of the same year the Czechoslovak Government presented a charge against eight Nazi administrators, including members of the Nazi Government, for the destruction of two Czech villages, Lidice and Lezaky, and the deliberate killing of most of their inhabitants. The accused persons were placed on the Commission's Lists of war criminals wanted for trial.

A few months later, in August and September, 1944, the Netherlands representative stressed that charges brought by member Governments were still very limited in number, and that the Commission should not wait for the Governments to act, but should collect the evidence and place arch-criminals on its Lists without further delay. The Commission agreed.⁽⁴⁾ At this stage, however, the decision of the Commission, as

(1) On this last subject see Chapter XI. Section A, (ii) p. 292.

(2) See Doc. C.14, 25.4.1944.

(3) M.16, 2.5.1944.

(4) M.29, 29.8.1944; M.33, 26.9.1944.

well as the proposals of the Netherlands and Belgian representatives, were admittedly made without prejudice as to whether the Nazi and other high State administrators would be punished as a result of a trial or of a political decision of the Allied Governments. Nevertheless, the principle that such administrators, including heads of States and members of Governments, could not shelter under the cloak of immunity, was clearly established by the majority of the Commission's members.

This principle was confirmed and still further developed in the course of the following months and years, though not without certain difficulties. In November, 1944, the Czechoslovak Government brought a charge for crimes committed by Nazi special courts, and placed primary responsibility on Hitler and members of his Government. The Commission admitted the charges, and placed the accused on its lists of war criminals. On the ground of this decision the Czechoslovak Government extended its previous charge concerning crimes perpetrated in Lidice and Lezaky so as to include Hitler and individual members of his Government. At this juncture some members objected to the procedure. Thus, for instance, the British member thought that, prior to deciding whether the Nazi Government could be held responsible, the German constitution should be consulted and the decision reached according to German constitutional rules for liability of members of the Government. This was unacceptable to other members, including the Czechoslovak representative, who argued that the decision would thus depend entirely on the will of Hitler himself, who had framed the constitution of the Third Reich so that his subordinates should bear no responsibility.

The importance of the issue as raised above, caused the Commission to appoint a special Sub-Committee to study the question in all its details. The Sub-Committee was appointed on 13th December, 1944, under the chairmanship of Lord Wright. The Czechoslovak delegate submitted a memorandum on the individual responsibility of members of the Nazi Government⁽¹⁾ and the Sub-Committee investigated the issue on the basis of this memorandum and of information which it collected from various sources. The question was considered simultaneously from the viewpoint of individual penal liability and from that of responsibility for membership in a criminal group or organisation.⁽²⁾ On the first point the Sub-Committee considered the position of members of the Nazi Cabinet proper, including Hitler, and of other high State administrators. In the light of the information available it came to the conclusion that the main Nazi Cabinet (*Reichsregierung*) had hardly met since the outbreak of the war, and that its legislative power had been delegated to various smaller bodies, to certain ministers, to various plenipotentiaries for certain prescribed spheres, and others, and that a large part of the legislative power had, on the other hand, been assumed by Hitler himself. It found, therefore, that members of the *Reichsregierung* as a whole could not, under the circumstances, be held *prima facie* guilty of crimes without other specific evidence. The Sub-Committee established, however, that most of the legislative and executive powers of the *Reichsregierung* were exercised

(1) Doc. C.88, 13.3.1945, *The Criminal and Personal Responsibility of Members of the Nazi Government*, memorandum by Dr. B. Ecer.

(2) On this last point see Chapter XI, Section A, (ii) p.292.

by an inner Cabinet, called Ministerial Council for the Defence of the Reich (*Ministerrat fur die Reichsverteidigung*), and that, in addition, laws which directed or influenced the Nazi criminal policy, were enacted by individual Ministers. It also established that laws and decrees enacted by the inner Cabinet did not need to be countersigned by Hitler.

Consequently the Sub-Committee arrived at the conclusion that, in view of such powers and of the evidence proving the perpetration of numerous crimes upon the inner Cabinet's orders, its individual members were to be considered *prima facie* criminally responsible for acts committed by their subordinates. On the other hand, it proclaimed similar responsibility of ministers who individually enacted criminal laws, decrees or orders.

The Sub-Committee considered also the position of Nazi State administrators other than members of the Government. In this respect it found that administrators who had conceived, or assisted to frame, legal or administrative measures violating laws and customs of war, could equally not enjoy immunity under the doctrine of acts of State; the same was true of those who had carried out a criminal policy by giving or issuing orders or by actual action.

As a result of these findings, the Commission and its Committee on Facts and Evidence adopted the rule of placing such persons on war criminals lists, and consequently of rejecting as irrelevant the doctrines of immunity of heads of State and members of Government, and of acts of State. Upon charges presented by various nations, Hitler was placed on the Lists of war criminals on several occasions, and so were other high State administrators, such as Mussolini. The number of such accused persons increased in the course of time, and separate Lists of major or arch criminals were issued to deal exclusively with State administrators and other high officials.⁽¹⁾

(iv) TRIALS OF MAJOR WAR CRIMINALS

The irrelevance of the doctrines of acts of States and of immunity of State administrators, and the principle of individual penal responsibility of the latter in contemporary international law, received its highest judicial sanction at the trials of the Nazi war criminals at Nuremberg.

The most important trial was that of the members of the Nazi government and other Nazi high officials, with Goering and Ribbentrop at the head of those tried and convicted.⁽²⁾ Other trials, held by United States courts, also at Nuremberg, included administrators of various ministries of the Nazi government, such as of the Ministry of Justice and of the Ministry for Foreign Affairs. In all these cases criminal procedure was applied to, and penalties of criminal law imposed upon, individual State administrators for acts which, by virtue of the doctrines under review, would have enjoyed immunity.

A similar development took place in the Far East, in the prosecution of the Japanese Major War Criminals before the International Military

(1) See Committee I Minutes No. 3/45, 17.4.45; also M.56, 18.4.45; M.57, 24.4.45; M.62, 23.5.45.

(2) See Chapters IX and XI.

Tribunal sitting at Tokyo. The accused were mainly members of the Japanese Government.

The above trials were held under express provisions of international law, which were preceded by authoritative declarations made by the Allied Governments.

(1) *The Moscow Declaration*

The determination of the United Nations to bring to trial all those responsible for crimes against peace, war crimes and crimes against humanity, irrespective of position and rank, was first formulated in the Moscow Declaration of 1st November, 1943, by the United States, Great Britain and the U.S.S.R. on behalf of all the United Nations. This Declaration drew a distinction between ordinary or lesser war criminals on one hand, and "major" war criminals, on the other. The trial of the latter was to be made in an international procedure, as distinct from the case of lesser war criminals, whose trial devolved to national courts:

"... The major war criminals, whose offences have no particular geographical localization... will be punished by the joint decision of the Governments of the Allies".

This formula left open the choice between an executive and a judicial international procedure, and this was subsequently decided in favour of the latter course.

(2) *Surrender Document regarding Germany and Potsdam Declaration*

The bringing to trial of the Nazi State administrators, including members of the Nazi Government, was prescribed in two international documents related to Germany.

In the "Declaration regarding the Defeat of Germany and the Assumption of Supreme Authority with respect to Germany"—otherwise known as the "Unconditional Surrender of Germany"—issued by Great Britain, the U.S.A., the U.S.S.R. and France on 5th June, 1945, it was declared:

"The principal Nazi leaders as specified by the Allied representatives, and all persons from time to time named or designated by rank, office or employment by the Allied representatives as being suspected of having committed, ordered or abetted war crimes or analogous offences, will be apprehended and surrendered to Allied representatives".

The fact that the obligation to hand over Nazi leaders was laid down for the purpose of bringing them to trial, was stressed in the "Protocol of the Proceedings of the Berlin Conference", known as the Potsdam Declaration, of 2nd August, 1945:

"War criminals and those who have participated in *planning or carrying out* Nazi enterprises involving or resulting in atrocities or war crimes shall be arrested and brought to judgment. Nazi leaders, influential Nazi supporters and high officials of Nazi organisations and institutions, and any other person dangerous to the occupation or its objectors, shall be arrested and interned".⁽¹⁾

Statements with the same effect were made in the terms of surrender for Japan, issued at Potsdam on 26th July, 1945, and appropriate obli-

(1) Paragraph 5. Italics introduced.

tions to hand over Japanese Major War Criminals for trial were undertaken by the Japanese authorities in the instrument of surrender signed at Tokyo Bay on 2nd September, 1945.

(3) *The Nuremberg and Tokyo Charters*

During the preliminary phases for the establishment of the International Military Tribunal at Nuremberg, the United States Chief of Counsel in the prosecution of European Axis war criminals, Justice Robert H. Jackson, defined the main issues at stake. In a report submitted to the President of the United States in June, 1945, he referred to the intended procedure, and stressed that it was conceived so as to secure fair trial and full rights of defence. He then said:

"Nor should such defence be recognised as the obsolete doctrine that a head of State is immune from legal liability. There is more than a suspicion that this idea is a relic of the doctrine of the divine right of Kings. It is, in any event, inconsistent with the position we take towards our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded. We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still 'under God and the law.'"

Justice Robert H. Jackson then stated that the prosecution was to be directed against "a large number of individuals and officials who were in authority in the government".

These preparatory steps culminated in the provisions embodied in the two Charters governing the jurisdiction of the International Military Tribunal at Nuremberg and of that at Tokyo.

In Article 7 of the Nuremberg Charter the following principle was declared:

"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".

Article 6 of the Tokyo Charter provides:

"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".

Both provisions thus proclaimed that, within the sphere of crimes covered by the two Charters, the doctrines of acts of State and of immunity of heads of State and State administrators were no longer relevant or operative as a basis for freeing the individuals concerned from penal responsibility.

The principle was repeated in Law No. 10 of the Allied Control Council for Germany, under whose terms the trials were held of State administrators other than those tried by the International Military Tribunal at Nuremberg. Article II of Law No. 10 reads:

"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 any crime or entitle him to mitigation of punishment."⁽¹⁾

It thus appears that, in the main body of what is taking the shape of international penal law, the doctrines under review have clearly and definitely been discarded.

(4) *The Trials*

At the trial of the German Major War Criminals held before the International Military Tribunal at Nuremberg, 13 of the 21 accused sitting at the bar had been members of the Nazi government. They included Goering, Ribbentrop, Hess, Rosenberg, Frank, Speer, Frick, Schacht, Papen, Neurath, Seyss-Inquart, Keitel and Raeder. They were indicted for crimes against peace, war crimes and crimes against humanity, as leaders, organisers, instigators or accomplices who, under Article 6 of the Nuremberg Charter, bore responsibility "for all acts performed by any persons" in execution of plans and orders issued by them.

When prosecuting the case against them and the other accused, the United States Chief Prosecutor, Justice Robert H. Jackson, referred to the provision of the Charter discarding the doctrines of acts of State and of immunity of State administrators, and stressed that "the idea that a State commits crimes is a fiction". Crimes, said Justice Jackson, "are always committed only by persons. While it is quite proper to employ the fiction of responsibility of a State for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity."⁽²⁾ He referred to certain precedents and requested the punishment of the accused members of Government on the basis of the terms of the Charter and of the evidence submitted.

As was to be expected, the defence invoked both the doctrine of acts of State and that of immunity of State administrators. Replying to this plea, the International Military Tribunal declared in its Judgment the following:

"It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, and 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. In the opinion of the Tribunal, both these submissions must be rejected . . . 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. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings . . . On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorising action moves outside its competence under international law".

(1) It will be noted that, unlike the Nuremberg Charter and Law No. 10, the Tokyo Charter makes possible the admission of the plea of acts of State or of immunity of State administrators in so far as mitigation of punishment is concerned.

(2) *The Trial of German Major War Criminals. Opening Speeches of the Chief Prosecutors* His Majesty's Stationery Office, London, 1946, p. 42.

Of the 13 accused members of the Nazi government only two were acquitted (Papen and Schacht); they were, however, not acquitted on account of the plea of their immunity, but for lack of evidence that they had committed crimes for which they had been prosecuted. The remainder were all sentenced to various punishments, including the death penalty.

A remarkable feature in connection with this judgment is that the irrelevance of the doctrines of heads of State and State administrators was pronounced in regard to the whole field of international crimes covered by the Nuremberg Charter. Unlike the position as it developed after the First World War, this now includes crimes against peace as the paramount international offence, for which nobody but heads of State and members of Governments can conceivably be held responsible.

A similar judgment, though not including crimes against peace, was passed by a United States Military Tribunal at Nuremberg in the case of 16 Nazi high officials, comprising 9 administrators of the German ex-Ministry of Justice and 7 judges or prosecutors of Nazi courts.⁽¹⁾ The trial was held under the terms of Law No. 10 of the Allied Control Council for Germany. The accused were prosecuted for criminal offences committed by misusing legislative or judicial power as part of the criminal policy of the Nazi regime. The evidence submitted was to the effect that the whole of the Nazi legal machinery at governmental level and that of the courts of law was used "for terroristic functions in support of the Nazi regime". Severe punishments, including the death penalty, were prescribed by the Nazis and systematically implemented upon acts which did not represent criminal offences under standards of modern justice or which did not warrant such heavy penalties.

State administrators prosecuted included chiefs of departments of the Reich Ministry of Justice, ministerial counsellors, state secretaries and legal advisers. Judicial officers included senior magistrates and prosecutors. Eleven were found individually responsible for and guilty of war crimes or crimes against humanity under the terms of Law No. 10, and were sentenced to various penalties, including imprisonment for life.

At the time of writing another trial is still in progress which also involves high Nazi State administrators. It is the important trial of 9 leading officials of the Nazi ex-Ministry for Foreign Affairs, including a Minister for Foreign Affairs, and 12 administrators of other governmental agencies connected with the planning and operations of Nazi foreign policy. The former include the short-lived Minister, Schwerin von Krosigk, who succeeded von Ribbentrop in May, 1945, in Doenitz's government, and 8 top-ranking officials of the Ministry, who were in function for a number of years as heads of departments. The latter include the chief of the Nazi Party Foreign Affairs Organisation, the Reich Minister for Food and Agriculture, the chief of the Presidential Chancellery, State Secretaries of other ministries, leading directors of German banks, heads of economic planning agencies and others. They are tried for crimes against peace, war crimes or crimes against humanity.

(1) See also Chapter XI. Section D (2) p. 334.

The trial of all these high officials is conducted on the basis of the rule that they do not enjoy immunity and cannot claim impunity on account of having acted in the course of their official functions.

B. SUPERIOR ORDERS

The question of individual responsibility and punishment in cases in which offences were committed upon the orders of a head of State, a government or any other superior authority by a subordinate pledged by law to obey superior orders, is one of great difficulty. It has been given differing legal solutions from one country to another, and until recently there were in the matter no fixed or precise rulings of principle in international law. In legal systems of certain countries there were even reversals of provisions dealing with the issue in the course of a comparatively brief period of time.

Such a state of things did not assist in solving the problem when it arose acutely during the Second World War. As was judiciously observed by one of the best authorities in the field of international penal law, Justice Robert H. Jackson, the combination of the doctrine of immunity of State administrators, issuing orders, and of the theory according to which a subordinate does not or should not personally bear responsibility for acts conceived and ordered by his superiors, means that nobody can be held responsible.⁽¹⁾ Justice Jackson rightly added: "Society as modernly organised cannot tolerate so broad an arch of official irresponsibility".

The scale on which war crimes and other international offences had been perpetrated during the last war, made it, therefore, necessary to reconsider the question as it stood, and find a just solution in view of the circumstances brought to light during the late war. The ultimate answer found was to the effect that, in the same manner as rank or position could not be used as a ground for automatic exoneration from penal liability, the fact of having acted upon superior orders could equally not provide such ground for the instrumental perpetrators of the offences. The solution thus found did not place any onus or preconceived guilt on the individual concerned. Neither did it preclude acquittals or mitigation of punishments in such cases. It only excluded the possibility of a subordinate escaping liability altogether on the sole ground of having acted upon superior orders.

This solution was based on clear precedents and developments which took place after the First World War.

(i) THE 1919 COMMISSION ON RESPONSIBILITIES

Along with its consideration of the doctrines of immunity of heads of State and State administrators and of acts of State, the 1919 Commission on Responsibilities touched also upon the problem of superior orders. In its report to the Allied Powers it stressed the following:

"... The trial of the offenders might be seriously prejudiced if they attempted

(1) *Report to the President of the United States* by Hon. Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals, June, 1945.

and were able to plead the superior orders of a Sovereign against whom no steps had been or were being taken”.

In connection with its recommendation to put on trial heads of State and other high State administrators, and taking into consideration situations arising out of a conviction of such persons, the Commission added:

“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”.

Unlike the dissension which took place among members of the Commission in regard to heads of State and acts of State, agreement on this issue was reached unanimously.

(ii) LONDON INTERNATIONAL ASSEMBLY

Similar conclusions were arrived at during the discussions of the London International Assembly. Attempts made by the Germans after the first World War to shield subordinates were stressed, and in particular those made by Hindenburg when he publicly accepted responsibility for all orders issued, and thereby sought to relieve all subordinates from liability.

In 1943 the Assembly voted a resolution by which it expressed the following opinion:

- (a) That an order issued by a superior to a subordinate to commit an act violating international law was not in itself a defence, but that the courts were entitled to consider whether the accused was placed in a “state of compulsion” to act as ordered, and acquit him or mitigate the punishment accordingly.
- (b) That such exculpating or extenuating circumstances should in all cases be disregarded in two types of cases: when the act was so obviously heinous that it could not be committed without revolting the conscience of an average human being; and when the accused was, at the time of the offence, a member of an organisation whose membership implied the execution of criminal orders.

(iii) THE INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

A very thorough and detailed study of the question was pursued by the International Commission for Penal Reconstruction and Development. Its findings were summed up in a memorandum prepared by Professor H. Lauterpacht and embodied in the report which the Commission submitted to the Governments.

In this memorandum⁽¹⁾ Professor Lauterpacht underlined in the first instance the necessity of rejecting the rule that superior orders were a sufficient justification for relieving the subordinate from penal liability:

“A rule of this nature”, he said, “unless reduced to legitimate proportions, would in most cases result in almost automatic impunity in consequence of

(1) The memorandum was subsequently published by Professor H. Lauterpacht as an article in the *British Year Book of International Law*, 1944, under the title *The Law of Nations and the Punishment of War Crimes*.

responsibility being shifted from one organ to another in the hierarchy of the State or its armed forces. If the rule . . . actually represented the existing position in international law, the prospect of bringing to justice any substantial portion of offenders would indeed be slender . . . It is clear that in many cases no one but the head of State, especially in a regime of absolutism or dictatorship, could be held responsible for decisions of major importance involving a breach of international law—a solution the futility of which is enhanced by the international irresponsibility, asserted by many, of the head of State”.

Whilst recommending the rejection of such a rule, Professor Lauterpacht referred to the complexity of the issue both in international and municipal law, particularly in so far as clear and just solution was concerned of all individual cases:

“How intricate it is may be gauged from the fact that the solution adopted in recent British and American military manuals with regard to war crimes is at variance with that in force in both countries in the domain of constitutional and criminal law. Moreover, the law on the subject in these and in other countries in the field of municipal law is not free of ambiguities and apparent inconsistencies. In Great Britain and in the United States a soldier cannot validly 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.⁽¹⁾ The difficulties resulting from the possible conflict between the duty of the soldier to obey orders and his subjection to the general law of the land are appreciated by judges and writers, and sympathy is occasionally expressed with the predicament of the soldier who is thus subject to two possibly conflicting jurisdictions. But the major rule, although qualified in some decisions and although mitigated by the admitted right of executive remedial action, has remained intact. The fact is that the law—even military law—does not reduce the soldier to the status of a mere mechanism. While enjoining upon him obedience to orders, it adds the substantial qualification to the effect that obedience is due only to lawful orders . . . 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. We say “in theory”, for in fact the law does not ignore altogether the resulting difficulty. 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, relieves the soldier of liability. Some State laws go even further in that direction. In England, where the courts have been loth to depart from the logical rigour of the established rule, it is generally recognised that the exercise of the right of pardon by the Executive is in such cases a proper remedy . . . Conversely, countries which, in the interest of the efficiency of their armed forces, 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 obviousness of the illegality. The German Code of Military Criminal Law provided that the soldier must execute all orders without fear of legal consequences, but added that this does not apply to orders of which the soldier knew *with certainty* that they aimed at the commission of a crime. 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 to the rule that 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 the violation of the municipal law of these countries or of international law even if that foreign country

(1) As will be seen later, after Professor Lauterpacht's memorandum was written and considered, changes took place in both the British and American military manuals, which reversed the rule referred to and fell into line with the course recommended in the memorandum.

itself has adopted an identical rule. 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. It is an interesting gloss on the complexity of the problem that in Great Britain and in the United States the plea of superior orders is, on the whole, without decisive effect in internal criminal or constitutional law, although it is apparently treated as a full justification in relation to war crimes, while in France, where the plea of superior orders is an absolute defence in the municipal sphere, it is disregarded in the matter of war crimes. There is no international judicial authority on the subject, but writers on international law have almost universally rejected the doctrine of superior orders as an absolute justification of war crimes."

In view of this complexity and diversity in the judicial and legislative practice of States, Professor Lauterpacht recommended that every case, as it would arise in war crimes trials, be solved on the basis of general principles of penal law, and that individual responsibility be determined in ascertaining the existence of *mens rea* of the accused. The rules suggested by him are the following:

There can be no liability, or there must be only diminished liability, if the accused had acted in the legitimate belief of having behaved in accordance with law, both municipal and international. In this connection, the fact that he had received orders should be regarded as creating in the accused the conviction of the lawfulness of the action as ordered. By the same criterion, the clearly illegal nature of the orders as intelligible to any person of ordinary understanding by reference to generally acknowledged principles of international law, should render the fact of superior orders irrelevant. On the other hand, such a degree of compulsion as must be deemed to exist in the case of a soldier or officer exposing himself to danger of death as the result of a refusal to obey an order, should exclude *pro tanto* the accused's responsibility. "The result of the combination of those two principles", concluded Professor Lauterpacht, "will be, at the one end, that a person obeying an obviously unlawful order the refusal to obey which would not put him in immediate jeopardy, will not be able to shield himself behind the excuse of superior orders. At the other end, a person obeying an illegal order which is not on the face of it unlawful and disobedience to which would expose him to the full rigours of military discipline, may fully rely on the plea of superior orders. There will be a variety of intermediate situations between those two extremes."

The above considerations met with the general approval of the Commission and of various Governments.⁽¹⁾

(iv) THE UNITED NATIONS WAR CRIMES COMMISSION

It is at this stage of the development regarding the effect of superior orders that the United Nations War Crimes Commission undertook consideration of the subject.

(1) The report of the Commission contains a survey of the position of the defence of superior orders under the municipal law of Belgium, United States of America, Norway, Luxembourg, Czechoslovakia, Great Britain, France, Greece, Holland—as it stood at the time and as was communicated to the Commission by the members concerned.

The issue was raised during the first meetings of the Commission, at the time when members were defining the main problems requiring study and solutions. In January, 1944, the Czechoslovak representative submitted suggestions as to the working machinery of the Commission and legal questions deserving early attention. He laid stress on the issue of superior orders.⁽¹⁾ When the study of legal questions was referred to the newly formed Legal Committee, the latter appointed a special Sub-Committee to deal with the problem of superior orders.⁽²⁾ The United States representative proposed that a solution of the problem be found with a view to insuring the application of the same rule by all courts charged with the trial of war criminals.

At about the same time the issue also arose in the Committee on Enforcement, which had undertaken consideration of a Draft Convention on the Trial and Punishment of War Criminals. It was contemplated that, in addition to national courts, war crime trials would also be held by an Inter-Allied Court competent to function in specific cases. A draft was submitted by the United States representative and the insertion of the following provisions was recommended (Article 30):

- " 1. The plea of superior orders shall not constitute a defence . . . if the order was so manifestly contrary to the laws of war that a person of ordinary sense and understanding would know or should know, given his rank or position and the circumstances of the case, that such an order was illegal.
- " 2. It shall be for the Tribunal and its Divisions to consider to what extent irresistible compulsion shall be a ground for mitigation of the penalty or for acquittal."⁽³⁾

By the time the above draft was under discussion in the Enforcement Committee, the Legal Committee proceeded to the examination of a report prepared by the Chinese representative.⁽⁴⁾

The report stressed the complexity of the problem and the diversity in the practice and laws of various nations. Stress was also laid on the experiences of the past, and the opinion expressed that "it would be futile to attempt to formulate, by means of an agreement among the United Nations, an absolute rule in regard to the plea of superior orders." It was, therefore, thought advisable for the United Nations War Crimes Commission "to recommend that the validity of the plea of superior orders be left to be determined by the national courts of the United Nations according to their own views of the merits and limits of the plea". It was, however, suggested at the same time that the Commission "could recommend some guiding principle which, without trying to reconcile the divergent national practices and to formulate an absolute rule, would represent the consensus of opinion among the United Nations".

The report elaborated on this last point. Reference was made to the German Military Penal Code according to which a subaltern executing

(1) M.6, 25.1.44.

(2) M.12, 7.3.44.

(3) II/11, 14.4.44, *Draft Convention on the Trial and Punishment of War Criminals.*

(4) III/8, 28.8.44, *Report on the plea of obedience to superior orders, submitted by Dr. Yien-li Liang.*

a criminal order was punishable as accomplice if he had gone beyond the order or if he knew that the order was related to a criminal offence. The rapporteur suggested an alternative course in setting forth a guiding principle for the courts. The German rules should be applied by the Inter-Allied Court contemplated by the Enforcement Committee, and a recommendation that the same rules be applied also by the national courts should be made to the Governments. Alternatively, one should adopt the rules suggested in the Draft Convention on the Trial and Punishment of War Criminals.

The Committee agreed with the latter course and on the motion of the Chairman of the Commission, submitted a report in which it recommended the adoption of the rule formulated in the first paragraph of the text quoted from the above Draft Convention. The recommendation read:

"Some general understanding is desirable between the Governments of the United Nations as to the principle to be followed in cases where a war criminal puts in a plea of superior orders. Such understanding is desirable because it will be useful for the guidance of any Inter-Allied tribunal which may be set up.

"The Commission is satisfied that the following rule is in accordance with general international practice and is consistent with international law:

"The defence of obedience to superior orders shall not constitute a justification for the commission of an offence against the laws and customs of war, if the order was so manifestly contrary to those laws or customs that, taking into account his rank or position and the circumstances surrounding the commission of the offence, an individual of ordinary understanding should have known that such an order was illegal."

This recommendation was, however, not unanimous. The Czech representative argued that, if adopted by the courts, it would place individuals, such as those who were members of the S.A., S.S. and Gestapo, in a better position than that prescribed in the law already in existence in some Allied countries. He suggested the course followed by the London International Assembly and submitted a draft recommendation which read:

- "1. An order given by a superior to an inferior to commit a crime is not in itself a defence;
2. The court may consider in individual cases whether the accused was placed in a state of irresistible compulsion and acquit him or mitigate the punishment accordingly;
3. The defence that the accused was placed in a state of compulsion is excluded:
 - (a) if the crime was of a revolting nature,
 - (b) if the accused was, at the time when the alleged crime was committed, a member of an organisation, the membership of which implied the execution of criminal orders".

Both majority and minority motions were referred to the Commission and the Enforcement Committee for further consideration.

After much debate in the Enforcement Committee, the view prevailed that it was more advisable to refrain from recommending a guiding principle which would go beyond the mere statement that the plea of superior orders should not of itself exonerate the offender. Accordingly

it suggested that, in connection with its separate Draft Convention for the Establishment of a United Nations War Crimes Court, the following statement should be transmitted to the Governments:

"The Commission has considered the question of 'superior orders'. It finally decided to leave out any provision on the subject. . . The Commission considers that it is better to leave it to the court itself in each case to decide what weight should be attached to a plea of superior orders. But the Commission wants to make it clear that its members unanimously agree that in principle this plea does not of itself exonerate the offenders".⁽¹⁾

In February and March, 1945, the Czech and French representatives, respectively, re-opened the question in so far as the majority and minority recommendations of the Legal Committee were concerned, upon whom no formal vote had been taken in the Commission.⁽²⁾ After discussion which developed at two consecutive meetings in March, 1945,⁽³⁾ the Commission adopted the course taken by the Committee on Enforcement and, by a majority vote, agreed on a formal report to the Governments. This report, which represents the final attitude of the Commission on the subject,⁽⁴⁾ referred to the decision formulated by the Enforcement Committee in the Explanatory Memorandum to its Draft Convention for the Establishment of a United Nations War Crimes Court. It confirmed this decision in the following terms:

"Having regard to the fact that many, if not most, of the member States have legal rules on the subject, some of which have been adopted very recently, and that in most cases these rules differ from one another, and to the further consideration that the question how far obedience to the orders of a superior exonerates an offender or mitigates the punishment must depend on the circumstances of the particular case, the Commission does not consider that it can usefully propound any principle or rule.

"The Commission unanimously maintains the view which it expressed in connection with the United Nations War Crimes Court that the mere fact of having acted in obedience to the orders of a superior does not of itself relieve a person who has committed a war crime from responsibility."

(V) PROVISIONS OF MUNICIPAL AND INTERNATIONAL LAW

The effect of superior orders upon the personal liability of subordinates is prescribed in the municipal law of many nations. There are in this respect provisions which regulate the issue with regard to State officials and military personnel in time of peace, and which are, therefore, not specifically related to war crimes and other offences connected with a war. A brief survey of this law and the differing practices of individual nations has been made by Professor Lauterpacht in the memorandum previously quoted. It does not come within the purview of this account.

There are, on the other hand, provisions embodied in the municipal law of some nations which form part of international law as understood and practiced by these nations. Such are the rules of warfare prescribed

(1) C.58, 6.10.44, *Explanatory Memorandum to accompany the Draft Convention for the Establishment of a United Nations War Crimes Court*.

(2) C.76, 8.2.45, *Memorandum on the present position of the United Nations War Crimes Commission, the work already done, and future tasks*, presented by Dr. B. Eéer, p. 12; also M.52, 14.3.45.

(3) M.53, 21.3.45; and M.54, 28.3.45.

(4) C.56, 29.3.45, *Report to the Governments on the plea of superior orders*.

in military manuals, codes or other documents of a similar nature. Developments which took place in this domain were followed by the introduction of rules in multilateral international instruments, such as in the Nuremberg and Tokyo Charters, which are, generally speaking, declaratory of international law as understood by the community of nations as a whole, in the present stage of its history.

It is with this second type of rules that we are here more particularly concerned. Important developments of the rules governing the effect of superior orders took place within their sphere. The most striking development was that which occurred within the British and American military rules, where it resulted in the adoption of the principle under review, at the cost of a complete reversal of the provisions hitherto in force. In the law of other countries, where such provisions did not exist or were not deemed to be applicable to war criminals, special provisions to this effect were introduced.

The following account is only illustrative, and is not, consequently, intended to be exhaustive. It embraces, however, the most typical legislation.

(1) *British and American Rules of Warfare*

At the outbreak of the First World War, in 1914, parts of the British Military Manual were revised and amplified. In Chapter XIV, relating to the *Laws and Usages of War on Land*, the principle was declared that military personnel acting upon superior orders were not penally liable for offences committed under such orders, and that liability lay only on the superior. It was couched in the following terms (para. 443):

“ . . . Members of the armed forces who commit such violations of the recognised rules of warfare as are ordered by their Government, or 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 his hands, but otherwise he may only resort to other means of obtaining redress . . . ”

The same principle was proclaimed at the same time and in similar terms in the United States *Rules of Land Warfare* (para. 347):

“ Individuals of the armed forces will not be punished for these offences (i.e., violations of the laws of war) in case they are committed under the orders or sanction of their governments or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall ”.

During the Second World War opinion developed strongly against these rules, and criticism was repeatedly expressed in the international bodies whose activities have been recorded in the preceding pages. English writers, such as Professor Lauterpacht, observed that the British Military Manual had no statutory force and could, therefore, be amended in the face of new developments. They emphasised that its rule was at variance both with the principle proclaimed by the 1919 Commission on Responsibilities and with the corresponding principles of English Criminal and Constitutional Law.

Radical revisions of the above provisions took place in 1944. Paragraph 443 of the British Military Manual was amended to read:

“ 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 the 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 ”.

In the United States *Rules of Land Warfare*, the provision previously quoted was deleted from para. 347 and a new rule added to para. 345:

“ Individuals and organisations who violate the accepted laws and customs of war may be punished therefore. 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 ”.

As will be noticed, both rules are similar in that they reject the principle of immunity from penal responsibility, as declared in their previous texts, and both have the effect of holding responsible in principle not only the superior but also the subordinate. Both stress that the subordinate's responsibility is involved when “ accepted ” or “ unchallenged ” rules of warfare were violated, thus excluding those rules which do not possess sufficient authority or certainty within the laws and customs of war. The British provision is more explicit than its American counterpart in that it gives guidance to the court as to the general tests under which the subordinate's guilt is to be assessed. Thus, it emphasises the relevance of the latter's *mens rea* by pointing out that he “ cannot be expected to weigh scrupulously the legal merits of the order received ”, although he is deemed to be bound to obey only “ lawful orders ”. The same subjective element is stressed by the test of acts which “ outrage the general sentiment of humanity ”, and which thus provide a ground for judging the state of the accused's mind. Finally, it can be observed that, while the American provision expressly defines the consequences of the decision of the plea of superior orders by declaring that it can lead to acquittal or to mitigation of punishment, the same consequences are implied in the British provision.

This important development was followed by the appearance of similar rules in other texts of law, thus bringing to light the evidence that the principle involved represented the common consensus of nations.

(2) *Rules relating to the Trial of War Criminals*

(a) *The Nuremberg and Tokyo Charters*

Article 8 of the Nuremberg Charter provides as follows:

“ 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 ”.

It will be observed that acquittal is not mentioned, but only mitigation of punishment. The same appears in the Tokyo Charter, whose rule, already quoted in connection with the doctrine of immunity of State administrators, reads (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 from 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 ”.

(b) Other provisions

The same principle, with varying consequences as to adjudication, appears in the war crimes legislation of many countries, as well as in that enacted for the ex-enemy occupied territory.

Law No. 10 of the Allied Control Council for Germany contains a provision similar to that of the Nuremberg Charter (Article II, (b)):

“ The fact that the 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 ”.

A provision identical even in terms to that of the Nuremberg Charter appears in the American Regulations for the Trial of War Crimes, issued on 23rd September, 1945, Circular No. 114, by Headquarters, Mediterranean Theatre of Operations, U.S. Army. With regard to the jurisdiction of U.S. Military Commissions, entrusted with conducting war crimes trials, para. 9 of the said Regulations reads:

“ 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 American Regulations Governing the Trial of War Criminals in the Pacific Area, issued on 24th September, 1945, by General Headquarters, United States Armed Forces, Pacific, repeats the above rule in the following terms (para. 16):

“ . . . 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 ”.

The Canadian War Crimes Regulations of 30th August, 1945, which acquired statutory force on 6th August, 1946, provide (para. 15):

“ 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 ”.

The French “ Ordinance of 28th August, 1944, concerning the Suppression of War Crimes ”, provides:

Article 3

"Laws, decrees or regulations 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 penal code, but can only, in certain circumstances, be admitted as extenuating or exculpatory circumstances.

Article 4

"Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as accomplices, they shall be considered as accessories in so far as they have organised or tolerated the criminal acts of their subordinates."

The Norwegian "Law on the Punishment of Foreign War Criminals" of 12th December, 1946, contains the following provision:

"*Para. 5.* Necessity and superior order cannot be pleaded in exculpation of any crime referred to in para. 1 of the present law (i.e., acts which, by reason of their character, come within the scope of Norwegian criminal legislation . . . if they were committed in violation of the laws and customs of war by enemy citizens or other aliens who were in enemy service . . . if the said acts were committed in Norway . . .). 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."

Elaborate rules are prescribed in the Czechoslovak "Law concerning the Punishment of Nazi Criminals, Traitors and their Accomplices" of 24th January, 1946:

Article 13

- (1) Actions 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 stipulations as justified.
- (2) Nor is the guilty person justified by the fact that he was carrying out his prescribed duty if he behaved with especial zeal, thus notably exceeding the normal limits of his duty, or if he acted with the intention of helping the war effort of the Germans (or their Allies), injuring or thwarting the war effort of Czechoslovakia (or her Allies), or if he acted from other obviously reprehensible motives.
- (3) The irresistible compulsion of an order from his superior does not release any person from guilt who voluntarily became a member of an organisation whose members undertook to carry out all, even criminal, orders."

The Polish "Decree concerning the Punishment of Fascist-Hitlerite Criminals guilty of Murder and Ill-treatment of the Civilian Population and of Prisoners of War, and the Punishment of Traitors to the Polish Nation", of 11th December, 1946, provides:

Article 5

- (1) The fact that an act or omission was caused by a threat, order or command does not exempt from criminal responsibility.
- (2) In such a case the court may mitigate the sentence taking into consideration the circumstances of the perpetrator and the deed."

The Austrian "Constitutional Law of 26th June, 1945, concerning

War Crimes and other National Socialist Misdeeds (War Crimes Law)" contains the following provisions:

Article 1

"The fact that the same act (i.e., an act 'repugnant to the natural principles of humanity or to the generally accepted rules of international law or the laws of war') was committed in obedience to an order shall not constitute a defence".

Article 5

- (1) The fact that the acts mentioned in Articles 3 and 4 (i.e., acts of torture and ill-treatment, violations of the principles of humanity and offences against human dignity) were carried out in obedience to orders shall not constitute a defence. Persons who issued such orders shall be punished more severely than those who executed them.
- (2) Any person who habitually issued such orders shall be punished by penal servitude for life, except in cases where the death penalty is applicable under the present law; if, however, he has instigated acts of the kind mentioned in Articles 3 and 4 on a considerable scale the death penalty shall be imposed".

It will be noted that, whereas under some of the above laws the plea of superior orders may lead to mitigation of punishment only, under other laws it may, in addition, have the effect of acquitting the accused.

Finally, it is worth noting that there are countries in which the effect of superior orders is regulated within the general system of penal law. The legislators in some of these countries did not wish to depart from the existing general rules, holding the view that these were sufficient to meet the requirements in respect of war criminals.

Such is the case with the Netherlands law. As in the case of the original texts of the British and American rules of warfare, the Dutch Penal Code lays down the principle of immunity from punishment of subordinates. It does so, however, on condition that the orders were given by the competent authority, within the limits of its competence. In this case liability for the offence committed is restricted to the superior issuing the orders. The subordinate's liability is introduced if the order was issued "without competence", which refers both to the case of an authority other than that under whose direct orders the subordinate is bound to exercise his functions, and to the case of the proper authority acting beyond the limits set by the law in regard to its competence. In such cases, however, the subordinate is exonerated from liability if he had acted in good faith as to the competence of the authority concerned, and if his obedience to the orders received was within his province as a subordinate.

The relevant provision of the Dutch Penal Code, Article 43, reads:

"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 rule that, in the sphere of war crimes, subordinates are answerable

appears from the context of the following provisions of the Netherlands Extraordinary Penal Law Decree of 22nd December, 1943⁽¹⁾:

"1. He who (i.e. any person, including subordinates) 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, (i.e. the Nuremberg Charter) . . . 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.

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 paragraph 1 and 2 (above)."⁽²⁾

The text of paragraph 3, when read in the context of the two preceding provisions, makes it clear that the superior is held responsible *in addition* to the actual perpetrator. The latter's guilt and punishment are presumably decided according to the rule of the Penal Code.

(vi) JURISPRUDENCE IN WAR CRIME TRIALS

An important jurisprudence on the effect of superior orders took shape as a result of trials of war criminals held pursuant to the law declared after the last war. Further jurisprudence may be expected from trials still due to be completed. As a matter of course, this jurisprudence confirms the main principle as we saw it. It will not be possible to enter into any detail in this respect, the more so that the most important and illustrative cases are being reported upon by the United Nations War Crimes Commission in a series of Law Reports published as the trials are being completed. Several instances may, however, briefly be mentioned here.

Prior to the jurisprudence which developed as a result of the Second World War, the effect of superior orders was the subject of judicial decisions at the Leipzig Trials, which were the only war crimes trials to be held after the First World War. They will, briefly, be reminded of for the sake of comparison.

(1) *First World War*

The determination of the Allied Powers in 1919 to punish all Germans responsible for violations of the laws and customs of war ended in their eventually acceding to the German demand that cases be tried by German courts. The trials took place in Leipzig before the German Supreme Court, the *Reichsgericht*, in 1921⁽³⁾.

In one of the trials, which remained known as the "Llandovery Castle" case, two officers of a U-Boat were charged with having sunk a hospital ship and deliberately killed some of the survivors in order to conceal their

(1) New Article 27a, introduced by a law of July, 1947, Statute Book H.233.

(2) Italics introduced.

(3) See Chapter III, Section B. p. 46 et seq.

criminal act. They pleaded not guilty on the ground of superior orders, received from the German high command, that submarine warfare was to be carried out without restriction. The Court delivered a statement of principle which remained famous and according to which "the order does not free the accused from guilt . . . if such an order is universally known to be against the Law". Applying the test of knowledge, the court found both accused guilty, deciding that, although acting upon specific orders, they were aware of their illegality in international law.

In another trial, the "Dover Castle" case, a ship was sunk by a U-Boat allegedly in reprisals for similar acts of the Allies. When the order was given, the accused were explicitly told that the sinking was to be done as a reprisal. Applying the same ruling and test as in the preceding case, the Court admitted the plea of superior orders by deciding that the accused had no knowledge that the alleged reprisals were illegal.

In the trial of Grand Admiral Tirpitz, who was charged with having originated and issued the orders for unrestricted submarine warfare, the Court decided that responsibility for these orders did not lie with him or other admirals of the German Fleet, but on the head of the Supreme Command of naval operations—presumably the ex-Kaiser himself. All the accused were consequently acquitted.

(2) *Second World War*

The most authoritative judgment pronounced after the Second World War, was that of the International Military Tribunal at Nuremberg. Most of the accused pleaded not guilty on the ground of superior orders emanating from Hitler himself. Referring to the relevant Article of the Nuremberg Charter, the Tribunal dismissed the plea in the following terms:

"The provisions of this Article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognised as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. 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."

The plea was introduced and dismissed in many other trials, particularly in those conducted by British and American courts. They include the so-called "Pelus Trial" and "Scuttled U-Boat Case" in which the German submarine fleet was once more involved; the "Dostler Trial", the "Almelo Trial" and the "Jaluit Atoll Case", the first two implicating German offenders and the second Japanese officers in the killing of prisoners of war; and the "Belsen Trial" concerning atrocities committed by Germans in the ill-famed Belsen concentration camp.⁽¹⁾ In all these cases the courts applied the principle that superior orders do not exonerate subordinates from penal responsibility.

(1) For full details see *Law Reports of Trials of War Criminals*, selected and prepared by the United Nations War Crimes Commission, English Edition, Volumes I and II, London, His Majesty's Stationery Office, 1947; in particular, Volume I, pp. 4, 9-12, 16-20, 27-29, 31-33, 38-40, 44, 54, 62-65 and 74-76; also Volume II, pp. 77-78, 95, 103-104, 107-108, 117-118, 122, 148 and 152.

The principle was once more confirmed in the "Einsatzgruppen Case", tried by an American Military Tribunal at Nuremberg. The accused were charged with planned, deliberate and systematic extermination of about 1 million inhabitants of occupied territories, in pursuance of Nazi racial political and religious doctrines. In its judgment, delivered on 8th-9th April, 1948, the court declared:

"The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. It is a fallacy of widespread consumption that a soldier is required to do everything his superior officer orders him to do . . . An officer may not demand of a soldier that he steal for him. The subordinate is bound only to obey lawful orders of his superior".

Of the 21 defendants, most of whom pleaded not guilty on the ground of superior orders, 14 were sentenced to death, and the rest to severe terms of imprisonment, including life sentences.

It is interesting to note that during the war one of the top-ranking Nazi leaders, Goebbels, who was personally responsible for many crimes, explicitly condemned the plea of superior orders as inadmissible in contemporary international law. He did so, naturally, in regard to the Allies, and with the intention of justifying the Nazi practice of shooting captured Allied airmen. Although his opinion is irrelevant for the body of international law, it is nevertheless a clear recognition coming from the enemy himself, who had thus unwittingly turned the principle against his own crimes. In an article published in the German press on 28th May, 1944, Goebbels said:

"No international law of warfare is in existence which provides that a soldier who has committed a mean crime can escape punishment by pleading as his defence that he followed the commands of his superiors. This holds particularly true if those commands are contrary to all human ethics and opposed to the well-established international usage of warfare."⁽¹⁾

(1) *Deutsche Allgemeine Zeitung*, 28th May, 1947.

CHAPTER XI

DEVELOPMENT OF THE LAW RESPECTING CRIMINAL GROUPS AND ORGANISATIONS.

INTRODUCTORY NOTES

One of the most important developments of international law in the field of war crimes, is that which took place in respect of so-called "criminal groups or organisations".

The term was introduced in the course of the preparatory work undertaken by the Allied Governments in order to bring major war criminals to trial. It was inserted in the Charter instituting the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis (hereinafter called the Nuremberg Charter). It was used in the indictment submitted to this Tribunal and confirmed as part of contemporary international law by the Judgment of the Nuremberg Tribunal. Finally, it was made part of a number of laws enacted by the Allied authorities after the occupation of the enemy countries, such as of Law No. 10 of the Allied Control Council for Germany, in force in all four zones of occupation.

As was often the case in its history, international law developed in this field under hard pressure of circumstances. It grew out of the necessity to meet a new type of criminality which had never before faced human society so directly or on so vast a scale.

The pattern was furnished by the Nazis. Groups and organisations such as the Gestapo and the S.S. had proved to have perpetrated, and to have been created with the specific purpose of committing an endless series of mass crimes: killing of millions of people in extermination camps (Dachau, Belsen, Auschwitz, etc.); murder of the entire population of inhabited places (Lidice); systematic tortures and massacres, killing of hostages and other atrocities against defenceless men, women and children in all countries under the Nazi domination. Such immeasurable human suffering, imposed upon the victims, the total number of whom equalled the entire population of many a country, had been effected by large bodies of individuals, specially organised and trained for the purpose by the Nazi Government. Often members of such bodies had joined on a voluntary basis, and in the great majority of cases, irrespective of whether they had volunteered or been conscripted, they knowingly and willingly carried out the criminal policy of their group or organisation.

As a consequence, the *prima facie* evidence collected in respect of such organisations indicated that their individual composition mattered less than the fact that the bodies were as a whole engaged in criminal activities. From that it followed that, as far as their members were concerned, the mere fact of having belonged to them provided, if not a definite proof, then at least a serious suspicion that any of the members had actually

taken part in the commission of crimes systematically carried out by the group as a whole.

This fundamental fact led to the following considerations. It was thought both justified and necessary to admit a presumption of guilt against all members of such bodies until proof was found to the contrary. The justification lay in the criminal nature itself of the organisations, as proved by facts establishing beyond doubt that they had actually and systematically perpetrated innumerable crimes. The necessity sprang from the large number of both the individual perpetrators and the victims. This would have made it impracticable to complete judicial proceedings against the accused within a reasonable period of time, were their trials to be conducted on an individual basis. The collection of evidence against hundreds of thousands of such accused persons, whose guilt would have to be established individually, would have required all the processes of a huge judicial machinery spread over many years of intensive work. In addition, there was a danger that, even if such a vast enterprise were to be undertaken, many accused would escape justice for the simple reason that, beyond their membership at the time of the crimes, and evidence proving the crimes of their respective groups, no further evidence of their individual complicity could be obtained. This would apply particularly in cases where the sole witnesses of the crimes were the victims, who had died and whose testimony was lost for ever. Such was precisely the case with the most despicable crimes, those which took place in the secrecy of extermination camps and caused the death of the largest number of victims.

It was to meet such circumstances and considerations that measures were undertaken in order to enable the arm of justice to reach the culprits. This Chapter contains information as to how the subject was treated and what final solution was found in the body of the law. As will be seen, although the question seems at first sight to be comparatively simple and to warrant an easy answer, it has from beginning to end been far from following such a smooth path. The main obstacle consisted in finding a solution which would not result in automatic collective responsibility and which would not blindly hit innocent as well as guilty individuals. Politically the issue was a major one. The Allied nations had fought the war in order to eradicate regimes which had been founded on such an indiscriminate basis, and which had persecuted whole communities of people only on account of collective denominations, such as race, political creed or religion. Consequently, no solution could be accepted which would or could amount to the persecution of Germans on account of their having belonged to Nazi organisations.

The difficulties in finding such a solution proved so serious that they necessitated a precise definition of the effects of the law which was laid down in respect of criminal groups or organisations. This was done by the International Military Tribunal at Nuremberg in its Judgment. It will be seen that, without such definition, the law could have been interpreted, even unwittingly, so as to be diverted from its real and single goal, which was to bring to justice persons guilty of war crimes, who would otherwise have escaped punishment.

A. ACTIVITIES OF THE COMMISSION

The question of criminal organisations was one of the subjects which attracted the attention of the Commission from the earliest stages of its work. It gave rise to several proposals and elaborate discussions which resulted in a recommendation made to member Governments well before the Nuremberg Charter was signed and the Nuremberg Trial started.

(i) PROPOSAL OF THE LEGAL COMMITTEE

During the first months of the Committee's activities consideration was given to the question of what kind of evidence was required for drawing up lists of war criminals. At that time some members were doubtful as to whether the whole scheme of making such lists was feasible and necessary. Thus, in March, 1944, the French representative, objecting to the scheme and to proposals requiring evidence in all cases against the accused, expressed the view that, in the case of the Gestapo, the evidence was unnecessary. He said that under the laws of certain countries, including France, in such cases "the real crime consisted in the mere fact of being a Gestapo member operating in an oppressed territory". He concluded that, if the listing of such persons was to be declined unless specific evidence was submitted, the Commission would "refuse to put on its Lists men who, for the national judge, were already by operation of the law accused persons".⁽¹⁾ This opinion was not shared by other members.

In view of such division of opinion between members of the Commission, the Legal Committee studied the question in July and August, 1944. It agreed that in the case of certain groups or organisations, such as the Gestapo, mere membership could be regarded as sufficient *prima facie* evidence against the accused for the purpose both of his being listed and of being tried by the competent court. As a result of its deliberations, the Committee prepared a draft recommendation which it suggested should be adopted by the Commission as a guiding rule for its Committee on Facts and Evidence, in charge of preparing the Lists, and as legal advice and recommendation to member Governments.

The draft was limited to three Nazi organisations, known to have been engaged in continuous criminal activities: the S.A., S.S., and Gestapo.⁽²⁾ The draft declared the right of each nation to punish its own nationals who joined the ranks of the S.A., S.S. or Gestapo, irrespective of the territory in which they served, as well as those German or foreign members of the same organisations who served in its territory. Nations were declared entitled to impose punishment "either on the basis of their present criminal law or on the basis of new legislation". No further qualifications were taken into account, so that the right declared was constructed on the premise that membership represented a crime in itself. In addition, the draft declared the right of the Allied occupying authorities in Germany to disband the S.A., S.S. and Gestapo, intern its members,

(1) See M.13, 21.3.1944, p. 2.

(2) See Doc. C.35, 24.7.1944, *Draft Recommendation regarding the Sturmabteilungen (S.A.), Schutzstaffeln (S.S.), and Geheime Staatspolizei (Gestapo)*". See also Doc. C.35 (1), 4.8.1944, containing verbal amendments to para. 1 of the original draft.

and " make membership in them henceforth a crime and punish it as such ".

The draft was considered by the Commission on 1st and 8th August, 1944.⁽¹⁾ Some members thought it only duplicated what had already been recommended in respect of the apprehension and the detention of S.A., S.S. and Gestapo members. Other members were of the opinion that by mentioning a " new legislation ", the Commission would be taking a stand on the controversial subject of *ex post facto* or retroactive legislation. It was observed that some countries could and had enacted such legislation, whereas in others there was a constitutional bar. Further members thought that certain passages had or might be interpreted as having an undesirable restrictive effect. Such was, in their opinion, the recommendation that membership of the organisations should be regarded as representing " henceforth " a crime, whereas there were opinions that it was a crime already.

As a result, the feeling prevailed that further study of the subject was required and decision at this stage was postponed.

When studying the subject, the Committee and the Commission had at their disposal a report prepared by the Czechoslovak representative.⁽²⁾ The report contained a detailed account of the origin, organisation, purpose and activity of these organisations.

(ii) PROPOSAL REGARDING THE NAZI GOVERNMENT

In September, 1944, the Commission was engaged in the preparation of a special list regarding " major war criminals " or " arch criminals ", as they were alternately called at the time. Under the Moscow Declaration, such criminals were to be punished on an international level, and it was felt that the Commission should collect the evidence against them without waiting for the Governments to present it. The Committee on Facts and Evidence was concerned with this matter.

At this stage the Netherlands representative suggested that the Commission should declare the whole German Government responsible for the atrocities committed by their subordinates.⁽³⁾ He was supported by the delegates of Australia, Belgium, China, India, Norway, Poland and Yugoslavia. No formal decision or recommendation was made declaring the Nazi Government a criminal group, but this was implied in the decision taken by the Commission to collect evidence in respect of the Nazi Government and similar " arch-criminals " and to open a special list for them.

By the end of the year feelings steadily developed in this direction, and on 13th December, 1944, a Sub-Committee was appointed, under the Chairmanship of Lord Wright, to advise on the question how far criminal responsibility for war crimes extended to " subordinate members or officials of the guilty Government ".⁽⁴⁾ At its first meeting (6th February,

(1) See M.26, 1.8.1944, p. 2-3, and M.27, 8.8.1944, p. 3-4.

(2) Doc. C.32, 22.6.1944, *Report on the German Sturmabteilungen (S.A.), Schutzstaffeln (S.S.) and Geheime Staatspolizei (Gestapo)*.

(3) See M.33, 26.9.1944, p. 3-6.

(4) See M.42, 13.12.1944, p. 2.

1945), the Sub-Committee defined the scope of its inquiries as being "whether membership of enemy Governments may involve criminal responsibility for the criminal policy followed by such Governments". In the course of its proceedings the Sub-Committee studied a report prepared by the Czechoslovak representative.⁽¹⁾ The author submitted and reviewed a number of facts, such as: the aims and conceptions of Nazism; their realisation by the Nazi Government through suppression of personal liberty and a series of crimes (slave labour, torture, starvation, mass murder); the position and relationship between the members of the Nazi Government. He then considered the issues in the light of penal law and came to the conclusion that "membership of the German Government during a period in the course of which war crimes were either committed or prepared by members of the State apparatus, was a sufficient *prima facie* proof of their guilt and justified the decision to put them on the list of war criminals".

The above conclusion of the Czech representative met with the general approval of the Sub-Committee.⁽²⁾ Together with the Sub-Committee's findings, it was to be considered at a later stage by the Commission in connection with other proposals and reports, which completed as a whole the study of criminal groups or organisations.

(iii) PROPOSAL OF THE FRENCH DELEGATION

On the day of the appointment of the above mentioned Sub-Committee, the French representative re-opened the question of membership of the S.S. and Gestapo. He informed the Commission that, by an ordinance of August, 1944, the French Government had decided to assimilate crimes committed by the S.S. and Gestapo to those of an "*association de mal-faiteurs*" covered by the French Penal Code.

He suggested that this might be a proper ground for reaching a unanimous decision on similar lines between all member Governments, and proposed that such a possibility be considered in a full debate of the Commission.

The debate took place on 20th December, 1944. The French delegate added to his previous statements that his proposal was not limited to the Gestapo and the S.S. It concerned any other group or organisation which, although externally a military formation, really existed for the purpose of committing crimes, such as the "liquidation" of persons obnoxious to the Nazis. After much discussion, during which several members supported and others objected to the French proposal, the matter was referred for legal opinion to Lord Wright's Sub-Committee.⁽³⁾

In the Sub-Committee no progress could be made on account of divergencies which arose around the concept and the effects of "collective responsibility", and the matter was referred back to the Commission.

To meet the legal objections raised by some members and to clarify

(1) Doc. C.88, 13.3.1945, *The Criminal and personal responsibility of the members of the German Nazi Government*.

(2) See M.61, p. 4.

(3) See M.43, 20.12.1944, p. 4-5.

the issue as he saw it, the French representative submitted a memorandum at the end of March, 1945.⁽¹⁾ He stated that a large number of war criminals would escape punishment solely on account of the difficulty of proving their individual guilt. To require such evidence in the case of large groups of criminals would place upon any prosecutor an impossible task. On the other hand, the well established principle of individual guilt could not be applied to the entirely new phenomenon of mass crime. Hitherto the legislator was not concerned with the repression of this kind of crime, for it could not develop in civilised countries. Therefore, no formal provisions intended to punish such crimes could be found in municipal law. The solution was to be a novel one in view of the novelty of mass criminality. French law provided two methods of solving the problem. One was the presumption of guilt which reversed the onus of proof. In such cases it sufficed to establish that the accused was in a position in which the presumption applied. Where this was so, the accused was held guilty unless he could succeed in demonstrating his innocence. Thus, in a French village, Oradour sur Glane, the entire locality was destroyed and nearly all its inhabitants massacred by units of the German Division "Das Reich". It would be impossible to attempt to prove what part every individual took in the massacres, so that, if the general principles of criminal law were to be applied in a strict sense, most of the perpetrators would have to be acquitted. They had themselves taken care that this should be so, by killing all the possible witnesses. The only solution was to apply a presumption of guilt in respect of all members of the units involved. The second method was to hold individuals guilty of membership in an "association" of criminals, as provided for in the French Penal Code (Art. 265-267). French law required only two conditions: that membership should be voluntary, and that the object of the "association" should be to commit crimes. By an Ordinance of 28th August, 1944, this law was extended to all "organisations or enterprises having systematic terrorism for their object". To what extent this would affect Nazi groups or organisations was a matter for the courts to decide on the basis of facts, but there was no doubt that the Gestapo and similar groups would be implicated. The main thing was that, wherever a group was identified as criminal in its purposes and/or activities, every member was liable to punishment for the mere fact of having belonged to the group.

The French representative moved that a recommendation on the above lines be made by the Commission to all member Governments. He pointed out that, regarding both methods cited from the French law, new legislation would be required in countries lacking similar provisions.

In the discussion which took place regarding the memorandum, the French delegate limited his motion to establishing a presumption of guilt for the Gestapo and certain formations of the S.S. He did not insist that membership in these organisations be declared a war crime.

The majority of members agreed in principle with the proposal. However, some of them, such as the Belgian delegate, thought that no special legislation regarding the presumption of guilt was practicable or necessary.

(1) Doc. C.85, 28.3.1945, *Memorandum by Professor André Gros on the problem of collective responsibility for war crimes.*

In the case of the Gestapo and similar bodies, the presumption could be applied under the general principles of penal law without having recourse to special legislation. To do the latter might give too much prominence to a method admittedly recommended for limited purposes and not as a general principle. He thought the task of defining the presumption would be impossible, and submitted a memorandum on those lines.⁽¹⁾

Other members, such as the Netherlands delegate, did not agree that what was to be decided upon was "collective" responsibility. The latter meant that all members of a group were held responsible for crimes for which only a specific number of them were in fact guilty. This could not be accepted, since it would mean condemning innocent as well as guilty persons. The Polish representative was of the opinion that the concept of "association of criminals" could not be applied to the Nazi organisations. The former referred to criminal groups being illegal under the laws of the country where they operated. This was not the case with the Gestapo, S.S. or S.A., which were all legal organisations under German law. The Czech representative was not satisfied with establishing only a presumption of guilt. In line with the report previously prepared by him, he thought that the facts already collected warranted an outright declaration that membership in the Gestapo, S.S. and similar bodies was a war crime in itself.

On the suggestion of the United States representative, it was agreed that, before considering a specific recommendation, more facts were required concerning the criminal nature of the Nazi organisations. The United States delegate drew attention to the fact that, for instance, the S.S. had several branches, and for some of them there was no evidence that they were engaged in criminal activities. The Polish delegate stressed the fact that the total membership of the Gestapo, S.S. and S.A. amounted to about 4 million individuals and that it would hardly be possible to hold them all guilty for the crimes perpetrated by their respective organisations.

The Commission decided that a full report on the facts and legal conclusions deriving from them should be prepared by its Legal Secretariat, and adjourned the matter until the submission of such report.⁽²⁾

(IV) REPORT OF THE COMMISSION'S LEGAL SECRETARIAT

The report was submitted in May, 1945.⁽³⁾ It contained a review of facts collected from various sources, including German ones, and dealt on the one hand with the internal structure and functions of the Gestapo, S.S. and S.A., and on the other with the most typical crimes committed by them, such as atrocities in concentration camps; massacres of the type committed in Lidice and Oradour sur Glane; persecution and extermination of the Jews; forced labour and deportations; and ill-treatment of

(1) Doc. C.89, 10.4.1945, *Collective responsibility for war crimes—observations on Professor Gros' memorandum.*

(2) For the debate in the Commission see M.55, 11.4.1945, p. 6-9 and M.57, 24.4.1945, p. 5-6. For the views of the Polish delegate see also Doc. C.92, 23.4.1945, *Observations of Dr. T. Cyprian concerning collective responsibility for war crimes.*

(3) Doc. C.106, 7.5.1945, *History, constitution and operation of the Gestapo, S.S. and S.A.*

prisoners of war. Each of the organisations was considered in its various ramifications and in relationship to its assignments in regard to the crimes committed. The study of these facts brought about the following conclusions:

(a) *Gestapo*—Its activities in connection with concentration camps, massacres, persecutions of the Jews, forced labour and deportation, were such as to make every person in its service suspect of being criminally responsible for the commission of these crimes.

(b) *S.S.*—Members of the Death Head Formation (*Totenkopfverbaende*) of the *S.S.* were suspected of being responsible for the actual perpetration of these crimes, particularly in concentration and extermination camps.

Members of the formations called "*S.S. Verfuegungstruppen*" and "*Allgemeine S.S.*" were also suspect, with the proviso that a number served only in "welfare" departments of the *Allgemeine S.S.*

Members of the "*Waffen S.S.*" comprised units independent of other *S.S.* formations. They were mostly members of the regular army and bore no *prima facie* guilt of crimes.

(c) *S.A.*—Individuals who were members before 30th June, 1934, were suspect of crimes committed against the opponents of the Nazi regime in Germany itself. After that date no more circumstantial evidence could be found to establish a specific presumption of guilt of its members than for members of any other organisation of the Nazi movement in general.

(v) RECOMMENDATION OF 16TH MAY, 1945

With the presentation of this report, the whole field of criminal organisations as far as the Nazis were concerned, had been exhaustively explored and nothing more stood in the way of taking a decision.

On 4th May, 1945, the French representative submitted a draft recommendation,⁽¹⁾ which was adopted by the Commission on 16th May with a few verbal amendments. The recommendation, as adopted, read:⁽²⁾

"The United Nations War Crimes Commission, having ascertained that countless crimes have been committed during the war by organised gangs, *Gestapo* groups, *S.S.* or military units, sometimes entire formations, in order to secure the punishment of all the guilty, makes the following recommendation to the member Governments:

- (a) to seek out the leading criminals responsible for the organisation of criminal enterprises including systematic terrorism, planned looting and the general policy of atrocities against the peoples of the occupied States, in order to punish all the organisers of such crimes;
- (b) to commit for trial, either jointly or individually all those who, as members of these criminal gangs, have taken part in any way in the carrying out of crimes committed collectively by groups, formations or units."

The recommendation under (a) met to a certain extent the proposal submitted by the Netherlands delegate and developed by the Czech representative in regard to the criminal nature of the Nazi Government and the responsibility of all its members. It met it to the extent to which it recognised that responsibility for war crimes committed by Nazi

(1) Doc. C.105, 4.5.1945, *Collective responsibility for war crimes—draft recommendation to the Governments proposed by Professor Gros.*

(2) Doc. C.105 (1), 17.5.45. For discussion preceding the adoption of this recommendation see M.61, 16.5.45, p. 3-4.

organisations or groups lay not only on members of such organisations or groups, but on other "leading criminals" as well, who had formed and directed such collective bodies in the commission of crimes. The recommendation did not go so far as to mention members of the Nazi Government in particular, or to proclaim the Nazi Government a criminal group as a whole. However, the formula clearly included the Government and came very near to such a result.

The recommendation under (b) was of a similar nature. While not explicitly declaring criminal either of the Nazi organisations, it recognised that such bodies existed, that they represented "criminal groups" and that their members should be tried "jointly or individually" for having "taken part in any way" in the crimes of the group or organisation. This implied the possibility of holding such individuals guilty of membership as such.

On 23rd May the Commission completed its activities in this field by considering the effect which two of the reports prepared should have on the listing of war criminals in the Committee on Facts and Evidence. It considered the Czech representative's report on the criminal nature of the Nazi Government. The United States representative agreed with the conclusion that membership in the Nazi Government was sufficient *prima facie* evidence for putting any of its members on the Lists, and proposed that this be approved by the Commission. It was noted that this was already being done by the Committee on Facts and Evidence. The conclusions in the report of the Legal Secretariat concerning the Gestapo, S.S. and S.A. were likewise endorsed and both subjects were referred to the Legal Committee for the purpose of finding suitable formulae for the guidance of the Committee on Facts and Evidence.⁽¹⁾

B. THE NUREMBERG TRIAL

In dealing with the problem of criminal organisations and collective penal responsibility the Commission had only raised the main issue. Issues regarding details, particularly the specific legal questions which required solution in order to enable the erection of a logically consistent and juridically justifiable theory, were all left untouched. These were the subject of full development on the occasion of the Nuremberg Trial.

The first, and for the time being, the only authoritative pronouncement on criminal groups or organisations, on the basis of international law, was made during the trial of the German Major War Criminals by the International Military Tribunal at Nuremberg. The pronouncement was made by the Tribunal on the basis of specific provisions of the Charter, which defined its jurisdiction and procedure, and after considering specific charges brought by the Prosecutors. The latter played a very prominent part in defining the boundaries of the concept of collective penal responsibility and contributed largely to the final decision of the Tribunal. Both the law of the Charter and the Judgment of the Tribunal introduce a novel method of dealing with organised mass criminality of a type which is itself new in many respects. The Judgment can be regarded as a judicial

(1) See M.62, 23.5.1945, p. 5-6.

precedent with far reaching effect. One of its legal effects was that the decision of an international court had, to a certain extent, become binding upon other national or local courts, and that it had introduced an effective judicial means of combating mass criminality organised by States against other States and nations.

(i) THE LAW OF THE CHARTER

The defendants at the Nuremberg Trial were all members of one or more Nazi groups or organisations, and it will be seen that, in addition to bodies such as the Gestapo, S.S. or S.A. and the Nazi Government, which were all mentioned in the preceding pages, the prosecutors included in their Indictment bodies such as the General Staff and the High Command. The relevant provisions which are embodied in the Nuremberg Charter are at the present time the only source of international law concerning criminal groups or organisations. These provisions are the following:

Article 9

“ At the trial of any individual member of any group or organisation the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organisation of which the individual was a member was a criminal organisation.

“ After receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organisation will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organisation. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

Article 10

“ In cases where a group or organisation 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 organisation 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 organisation 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 organisation ”.

The criminal acts for which a group or organisation may be declared criminal are those covered by the Charter in its Art. 6, i.e. crimes against peace, war crimes and crimes against humanity.

It will be noted that the Charter does not define a “ group ” or “ organisation ”. The matter is left to the appreciation of the Tribunal as a question of fact. The above provisions lay down the following rules or principles:

(a) A declaration of criminality in respect of a group or organisation can be made by the Tribunal on condition that any of the defendants before it is a member of such group or organisation.

(b) The declaration is an act within the discretionary power of the Tribunal,

which is not bound to adjudicate on the issue if it does not deem it appropriate to do so.

(c) The declaration is confined to establishing the criminal nature of the group or organisation, and no punishment is pronounced against the individuals involved. This is left to the subsequent courts.

(d) Once a group or organisation is declared criminal by the Tribunal, the bringing of its members to trial is within the discretionary power of the signatories to the Charter. The declaration does not bind them to prosecute such members.

(e) An individual brought to trial as a consequence of the declaration is prosecuted for the crime of "membership" in the group or organisation. This is particularly emphasised in the wording of Art. 11.

(f) The legal effect of the declaration is that in the subsequent proceedings of the court before which a member is brought to trial, the criminal nature of the group or organisation is considered proved and cannot be questioned.

The most important provision is undoubtedly the last, quoted under (f). A narrow, literal interpretation of its terms could lead to the conclusion that the mere fact of having belonged to an organisation declared criminal is in itself a crime without further qualifications, and that the subsequent court has no choice but to condemn the accused once he is brought before it. Such far-reaching conclusion was, however, not arrived at by the Tribunal, neither was it meant in the Charter or advocated by the majority of the prosecutors. Both the latter, and the Tribunal in its Judgment, laid down certain conditions in which a member should be regarded as personally guilty. The only dissenting opinion was voiced by the Russian prosecutor. While admitting that a declaration by the Tribunal does not bind the subsequent court to pronounce an automatic sentence of guilt, he thought that the Tribunal was not asked to enter into the question of the conditions under which a member should or should not be considered guilty. This, in his opinion, was a matter for the subsequent court to decide, so that he dissented from any ruling being made by the Tribunal on this subject. More details of these two different approaches will be found later.

It is worth noting that criminal organisations are also mentioned in the Charter of the International Military Tribunal for the Far East, enacted by the Supreme Commander for the Allied Powers, General MacArthur, on 19th January, 1946. There are, however, no provisions corresponding to those of the Nuremberg Charter. The only reference is in Art. 5 of the Far Eastern Charter, which defines the jurisdiction of the Far Eastern Tribunal. It says that the "Tribunal shall have the power to try and punish war criminals who as individuals or as *members of organisations*" are prosecuted for offences falling within the Tribunal's competence. In the absence of provisions similar to those of the Nuremberg Charter, it is not clear, and it will at any rate not be clear until the Tribunal pronounces its Judgment, whether the Tribunal is entitled to make declarations such as those made by the Nuremberg Tribunal. This question will probably remain unanswered in view of the fact that the prosecutors have not indicted any of the groups or organisations to which the Japanese defendants belonged.

(ii) THE PROCEEDINGS

(1) *Groups or Organisations Indicted*

In their Indictment the prosecutors for the U.S.A., France, United Kingdom and U.S.S.R. charged the following Nazi groups or organisations as being criminal:

(a) *The Cabinet of the Nazi Government (Reichsregierung or Reich Cabinet)*, consisting of members of the ordinary cabinet after the accession of Hitler to power on 30th January, 1933. This comprised Reich Ministers who were heads of departments of the Central Government or without portfolio; State Ministers acting as Reich Ministers; and other officials entitled to take part in meetings of the Cabinet. In addition to members of the ordinary Cabinet, the Indictment charged members of the Council of Ministers for the Defence of the Reich (Ministerrat fuer die Reichsverteidigung) and members of the Secret Cabinet Council (Geheimer Kabinettsrat).⁽¹⁾

The following defendants were prosecuted as members of the Reich Cabinet: Goering, Ribbentrop, Hess, Rosenberg, Frank, Bormann, Speer, Frick, Schacht, Papen, Neurath, Seyss-Inquart, Keitel, Raeder.⁽²⁾

(b) *The Leadership Corps of the Nazi Party (Das Korps der Politischen Leiter der Nationalsozialistischen Deutschen Arbeiterpartei)*, comprising the leaders of the various functional offices of the Nazi party, such as the Reichsleitung (Party Reich Directorate) and the Gauleitung (Party Gau Directorate), as well as the territorial leaders, such as Gauleiters. The prosecution reserved the right to exclude from their charge leaders of subordinate ranks or of other types or classes.⁽³⁾

The following defendants were prosecuted as members of the Leadership Corps: Rosenberg, Bormann, Frick, Ley, Sauckel, Speer, Schirach, Streicher.

(c) *The S.S. (Schutzstaffeln)* of the Nazi Party, including different formations such as "Allgemeine S.S.", "Waffen S.S.", "S.S. Totenkopfverbaende", "S.S. Polizei Regimemente", and the S.D. (Sicherheitsdienst des Reichsfuehrers-S.S.).⁽⁴⁾

The following defendants were prosecuted as members of the S.S.: Goering, Ribbentrop, Hess, Kaltenbrunner, Rosenberg, Frank, Bormann, Frick, Sauckel, Neurath, Seyss-Inquart.

(d) *The Gestapo (Geheime Staatspolizei or Secret State Police)*, comprising all its members without distinction.⁽⁵⁾ The defendants involved included Goering and Kaltenbrunner.

(1) See *Indictment*, text published by the International Military Tribunal at Nuremberg as document No. 1, Appendix B, p. 35.

(2) For more details regarding these defendants and their positions in the Cabinet, see *op. cit.*, p. 28-34.

(3) See *op. cit.*, Appendix B., p. 35.

(4) See *op. cit.*, Appendix B., p. 36.

(5) See *op. cit.*, Appendix B., p. 36.

(e) *The S.A. (Sturmabteilungen)* of the Nazi Party, which represented the earliest formations of the party and were used particularly throughout the years preceding the accession of Hitler to power and during the first years of the Nazi regime in the suppression of the opposition by force.⁽¹⁾

It counted among its members the following defendants: Hess, Rosenberg, Bormann, Ley, Sauckel, Schirach, Streicher.

(f) *The General Staff and High Command*, of the German armed forces, comprising the highest commanders of the different services (Wehrmacht, Army, Navy, Air Force).⁽²⁾

The following defendants belonged to the group: Goering, Keitel, Jodl, Raeder and Doenitz.

(2) *Charges laid against Groups or Organisations*

Each of the above Nazi bodies was charged on all counts under the Charter, that is, with crimes against peace—including, as a separate crime, conspiracy to prepare, initiate or wage aggressive wars—with war crimes and crimes against humanity. However, each body was more specifically charged for certain types of crimes or degrees of penal responsibility.

The *Reich Cabinet* and the *Leadership Corps* of the Nazi Party were charged with planning, organising, directing or instigating the commission of all three types of crimes. "Every crime charged in the Indictment", said the prosecution, "was a crime committed by a regime controlled by the Party, and it was the Leadership Corps which controlled the Party and made it function".⁽³⁾ The part played by the Cabinet was described as follows: "While the Party, through the political leaders, gave orders to the State, it was the Reich Cabinet . . . that transformed those orders into law. Just as the Leadership Corps made the Party function, so the Cabinet made the State function. Every crime which we have proved was a crime of the Nazi State, and the Reich Cabinet was the highest agency for political control and direction within the Nazi State"⁽⁴⁾.

The two bodies were, thus, held responsible for originating and leading the whole series of violations of international law, of laws and customs of war and of laws of humanity which materialised in the military aggressions of Nazi Germany against other nations and in the innumerable atrocities perpetrated by members of the German forces and authorities against civilians, prisoners of war and combatants.

The Gestapo, S.S. and S.A., the General Staff and High Command were more particularly charged as the instruments of the criminal policy directed by the Reich Cabinet and the Leadership Corps. The first two were chiefly charged in connection with crimes committed in implementing Nazi racial, biological and resettlement policies, both before and during

(1) See op. cit., Appendix B., p. 37.

(2) See op. cit., Appendix B., p. 38.

(3) See *The Trial of German Major War Criminals—Speeches of the Prosecutors at the Close of the Case against the Indicted Organisations*, published by H.M. Stationery Office, London, 1946, p. 69. (Hereafter referred to as *Speeches of the Prosecutors*).

(4) Op. cit., pp. 69-70.

the war of 1939-1945, in which atrocities perpetrated in concentration camps occupy a prominent place. The S.A. was charged as the main instrument in similar atrocities during the early years of Nazism. The General Staff and High Command were charged particularly for their part in the preparation, initiation and waging of aggressive wars, and also for war crimes and crimes against humanity ordered or abetted by them during the war.⁽¹⁾

The Prosecution laid emphasis on the fact that all these groups or organisations were interdependent and inter-related as branches in fact of a single apparatus:

“ It would be a mistake ”, said one of the prosecutors, “ to consider these organisations named in the Indictment, as isolated, independently functioning aggregations of persons, each pursuing separate tasks and objectives. They were all a part of, and essential to, the Police State planned by Hitler and perfected by his clique into the most absolute tyranny of modern times. That Police State was the political Frankenstein of our era, which brought fear and terror to Germany and spread horror and death throughout the world. The Leadership Corps of the Nazi Party was its body, the Reich Cabinet its head, its powerful arms were the Gestapo and the S.A., and when it strode over Europe its legs were the armed forces and the S.S. It was Hitler and his cohorts who created this Police-State-monster, and it brought Germany to shame and the nations of Europe to ruin ”.⁽²⁾

(3) *Exclusion of Certain Classes of Members*

The organisations were, in principle, indicted as a whole, and the charges were submitted against all their members. The Prosecution, however, conceded on its own initiative certain distinctions and excluded from the Indictment certain classes of members. These concessions were made in respect of the Gestapo, the Leadership Corps and the S.A.

Thus, the Prosecution excluded persons employed by the Gestapo “ in purely clerical, stenographic or similar unofficial routine tasks ”. Charges against the Leadership Corps were limited to “ the Fuhrer, the Reichsleiters, the main department and office holders ” down to the “ Gauleiters and their staff officers; the Kreisleiters and their Staff officers; the Ortsgruppenleiters, the Zellenleiters and the Blockleiters, but not members of the staff of the last three classes of officials ”. All other members were excluded.⁽³⁾ The following classes of members of the S.A. were excluded: “ Wearers of the S.A. Sports Badge; the S.A. controlled Home Guard Units (S.A. Wehrmannschaften), which were not strictly speaking a part of the S.A.; the National Socialist League for Disabled Veterans and the S.A. Reserve ”.⁽⁴⁾

No such concessions were made in respect of the other indicted organisations.

(1) For detailed charges see op. cit., p. 1-142; also *The Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg*, Part 3, H.M. Stationery Office, London, 1946, p. 13-339, and Part 4, p. 1-58. (Hereafter referred to as *Proceedings*).

(2) Op. cit., p. 61.

(3) For full particulars regarding the organisation and structure of the Leadership Corps, see *Proceedings*, Part 3, p. 15-29.

(4) *Proceedings*, Part 8, p. 48. Also p. 56. At a later stage the Prosecution suggested further exclusions from the S.A. See *Speeches of the Prosecutors*, p. 33.

(4) *The Theory of Collective Criminality*

As has previously been stressed, a narrow interpretation of the relevant provisions of the Nuremberg Charter could have led to the conclusion that, once a group or organisation is declared criminal, all its members are to be regarded as automatically guilty, and that no choice is left to the subsequent courts but to punish any member brought to trial before them. It has also been stressed that this did not represent the views of the Nuremberg Tribunal and was never intended to be so by the authors of the Nuremberg Charter nor advocated at any time by the prosecutors themselves.

Judicial declarations of the criminal nature of given groups or organisations, as were envisaged by the Nuremberg Charter, are based upon the concept of collective criminality and liability as distinct from individual criminality and liability. The Charter left only partially answered the question of just what this concept meant in the sphere of penal law, and what consequences were implied as a result of the rule that a declaration made by the Nuremberg Tribunal could not be overruled by other courts.

The prosecutors undertook to provide the answers, and in doing so they constructed a precise and complete theory. The theory was evolved by the United States Chief Prosecutor, Justice Robert H. Jackson, one of the promoters and principal authors of the Nuremberg Charter and the leading figure at the Trial. It was endorsed by the other prosecutors, with certain not unimportant reservations expressed by the Russian prosecutor, and was accepted and confirmed by the Tribunal in its Judgment. This development took place in response to a decision of the Tribunal requesting the prosecution and the defence to clarify in particular the tests of criminality which were to be applied, in view of the fact that the Charter did not define a criminal group or organisation.⁽¹⁾ The theory can conveniently be described under three main items: the concept of collective criminality; the legal nature of a declaration of criminality; and the effects of such declaration.

(a) *The Concept of Collective Criminality.* When presenting the case against criminal groups or organisations to the Tribunal, Justice Jackson made reference in the first place to the fact that the Charter did not introduce an entirely new legal concept. He referred to the legislation of different countries in which membership in certain collective bodies, as well as the bodies themselves, were considered criminal and their members prosecuted as such. More details on this subject will be found in a later part of this Chapter where provisions of municipal law are reviewed. Reference will be made here only to the legislation mentioned by the United States Chief Prosecutor. It is the following:

A United States Law of 28th June, 1940⁽²⁾, provides that it is unlawful for any person to organise or help to organise any society, group or assembly of persons to teach, advocate or encourage the overthrow or destruction of any Government in the United States by force or violence, or to be or become the member of, or affiliate with, any such society, group or assembly of persons knowing its purposes.

(1) *Proceedings*, Part 4, announcement made on 14th January, 1946, p. 244-245.

(2) So-called Smith Act.

In Great Britain there were in the past laws of a similar nature, such as the British India Act No. 30 of 1836. It provided that "whoever was proved to have belonged to a gang of thugs" was to be punished with "imprisonment for life with hard labour".⁽¹⁾

The French Penal Code provides that any organised "association or understanding" made with the object of preparing or committing crimes against persons or property, constitutes a crime against public peace.⁽²⁾

The Soviet Penal Code contains provisions similar to those of the French Code, around the concept of the "crime of banditry".⁽³⁾

The most striking references were those made to the German laws themselves. The German Penal Code of 1871 punished by imprisonment the "participation in an organisation, the existence, constitution, or purposes of which are to be kept secret from the Government, or in which obedience to unknown superiors or unconditional obedience to known superiors is pledged". In 1927 and 1928 German Courts treated the entire German Communist Party as criminal, and pronounced sentences against its Leadership Corps. Judgment against members of the Communist Party included every cashier, employee, delivery boy and messenger, and every district leader. In 1924 German courts declared the entire Nazi Party to be a criminal organisation. The German Supreme Court laid down general principles for any organisation liable to a declaration of criminality and stated that it was "a matter of indifference whether all the members pursued the forbidden aims". It was "enough if a part exercised the forbidden activity". It also considered irrelevant whether "members of the group or association agreed with the aim, tasks, means of working and means of fighting" and what their "real attitude of mind" was. In all such cases they were held guilty.⁽⁴⁾

While referring to these precedents, Justice Jackson introduced the essence of the concept of collective criminality, through the notion of "conspiracy" as it evolved more particularly in English and American law. The criteria provided by the latter, for determining whether the ends of the indicted organisations were guilty ends, lay in establishing whether the organisations contemplated "illegal methods" or purposed "illegal ends". If so, the responsibility of each member for the acts of every other member was not essentially different from the liability for conspiracy. The principles of the latter were that no formal meeting or agreement was necessary; that no member was bound to know who the other members were and what part they were to take or what acts they had committed; that members were liable for acts of other members, although particular acts were not intended or anticipated, if they were committed in execution of the common plan; and, finally, that it was

(1) *Proceedings*, Part 8, p. 42. Other laws cited as precedents in English legislation were the Unlawful Societies Act of 1799; the Seditious Meetings Acts of 1817 and 1846; the Public Order Act of 1936, and the Defence Regulation (18b), of 1939.

(2) *Op. cit.*, p. 42 and 57.

(3) *Op. cit.*, p. 42 and 59.

(4) *Op. cit.*, p. 42-43.

not essential to be a member of the conspiracy at the same time as the others or at the time of the criminal acts.⁽¹⁾

It was in connection with these firmly established precedents that the United States Chief Prosecutor submitted to the Tribunal the principles which, in his opinion and in that of his colleagues, should govern the concept of collective criminality. "We think," said Justice Jackson, "that on ordinary legal principles the burden of proof to justify a declaration of criminality is, of course, upon the prosecution". He then declared that this burden was discharged by answering the following four essential tests of criminality, which represent at the same time the fundamental elements of the concept of collective criminality:

(1) The group or organisation must be "some aggregation of persons associated in identifiable relationship with a collective, general purpose", or, as this was put by another United States prosecuting officer, with "a common plan of action".⁽²⁾ The notions of "group" or "organisation" are non-technical. They "mean in the context of the Charter what they mean in the ordinary speech of the people". The term "group" is used "as a broader term, implying a looser or less formal structure or relationship than is implied in the term organisation".⁽³⁾

(2) Membership in such group or organisation "must be generally voluntary"⁽⁴⁾, that is "the membership as a whole, irrespective of particular cases of compulsion against individuals or groups of individuals within the organisation must not have been due to legal compulsion".⁽⁵⁾

(3) The aims of the organisation "must have been criminal in that it was designed to perform acts denounced as crimes in Art. 6 of the Charter", that is crimes against peace, war crimes or crimes against humanity.⁽⁶⁾ The organisation "must have participated directly and effectively in the accomplishment" of these criminal aims and "must have committed" crimes from Art. 6.⁽⁷⁾

(4) The criminal "aims or methods of the organisation must have been of such character that its membership in general may properly be charged with knowledge of them".⁽⁸⁾

As a fifth and last condition, required only for the purpose of enabling the Nuremberg Tribunal to make a declaration of criminality under the Charter, the United States Chief Prosecutor referred to the necessity of establishing that some individual defendant tried by the Tribunal had been a member of the organisation, and was guilty of some act on the basis of which the organisation was to be declared criminal.⁽⁹⁾

Such were the elements of the concept of collective criminality as defined by the Prosecution and as lying at the root of the concept of "criminal organisation" and of a declaration under the Nuremberg Charter. It will be noted that with qualifications, such as voluntary membership and knowledge of the criminal purposes or acts, they are far

(1) *Op. cit.*, p. 44.

(2) On this last formula see *Speeches of the Prosecutors* p. 62.

(3) *Proceedings*, Part 8, p. 47.

(4) *Loc. cit.*, also p. 40-41.

(5) *Speeches of the Prosecutors* p. 62.

(6) Justice Jackson in *op. cit.*, p. 46.

(7) *Op. cit.*, p. 62.

(8) Justice Jackson in *op. cit.*, p. 46.

(9) *Loc. cit.* For concurring views of the British and French Prosecutions that the above five points were to be treated as conclusive on the occasion of the Tribunal's final decision, see *op. cit.*, p. 53 and 57.

from operating on the basis of automatic and indiscriminate collective guilt. What they do is to circumscribe a sphere of undisputed criminal activity conducted by a multitude of individuals who have, as a whole, willingly and knowingly taken part in it. On the other hand, as defined, they relate to a specific judicial act which, although denouncing the whole group as criminal, does not prejudice the issue of guilt and punishment of the individual members. This, as we will see, is only partly and in principle solved in a declaration of criminality, whereas the actual decision is left to the competent courts and fully allows for acquittals, as the case may be.

The elaborate qualifications submitted by the United States Chief Prosecutor in respect of the concept of collective criminality and that of a criminal group or organisation, were presented to the Tribunal from a view to serving as a direct basis for its decision on the main issue involved. This method did not meet with the approval of the Russian Chief Prosecutor. In his opinion, the "absence in the Charter of any detailed definition of a criminal organisation was not an omission in the Charter, but its basic position following the fact" that such definition was left to the competence of the national or local courts. He, therefore, disagreed with the method of his other colleagues of introducing qualifications for consideration by the Nuremberg Tribunal. "Attempts to demand", he said, "some kind of definite indication (voluntary membership, mutual information, etc.) are not only unsupported by the Charter but differ from it by their entire structure. The main and sole task presenting itself to the Tribunal does not consist in similar investigations" but only in establishing whether or not "the organisations participated in the realisation of the plan of Hitler's conspirators".⁽¹⁾ It will be seen that these views did not meet with the Tribunal's agreement. While advocating such a course the Russian Prosecutor agreed with the substance of the United States Chief Prosecutor's views, that the declaration would and could not bind subsequent courts to pass automatic sentences against every member. He did not specify, however, what should, in his opinion, be the tests to be applied, but insisted that these should be entirely determined by the national courts.⁽²⁾

(b) *Legal Nature of the Declaration of Criminality.* The declaration of criminality, as provided in the Nuremberg Charter, is a specific judicial act. The indicted organisations, said the United States Chief Prosecutor, were "not on trial in the conventional sense of that term". They were "more nearly under investigation as they might have been before a Grand Jury in Anglo-American practice". The competence of the Tribunal was limited to try "persons", which meant only "natural persons" and not entities or bodies. As a consequence the Tribunal was not "empowered to impose any sentence" upon the indicted groups and organisations. "The only issue," he added, concerned "the collective criminality of the organisation or group, and it was to be adjudicated by what amounts to a declaratory judgment".⁽³⁾ The declaration, said the British Prosecutor

(1) *Op. cit.*, p. 96-97.

(2) *Proceedings*, Part 8, p. 114.

(3) *Op. cit.*, p. 39-40.

Sir David Maxwell-Fyfe, was in the nature of a "*res adjudicata*" or of a "*judgment in rem*" as distinct from a "*judgment in personam*".⁽¹⁾

No statements could have more accurately defined the legal nature of the declaration of criminality provided for by the Nuremberg Charter. The Tribunal decides only on the issue as to whether a group or organisation is criminal under the tests or elements described in the preceding pages. It reaches its decision primarily on the basis of the aims and acts committed by the entity as such, and does not enter into the question as to whether *all* of its members joined it voluntarily, or acted knowingly and willingly, or whether *some* of them were personally innocent of any crime or charge. For the purposes of the declaration it suffices to establish the latter tests in respect of a *portion* of its members.⁽²⁾

The adjudication is, thus, entirely of a "declaratory" nature, and leaves open all questions of individual guilt and punishment. These, as has been mentioned on several occasions, are left to the national or local courts competent to try individual members on the basis of the "declaratory judgment" of the Nuremberg Tribunal.

In connection with such a type of declaration of collective criminality, it is worth noting that, in strict law, the Tribunal was not bound, but only empowered, to adjudicate on the issue. This rule derives from the fact, stressed by the United States Chief Prosecutor, that the indicted groups and organisations "were not on trial in the conventional sense of the term". Consequently, it was neither imperative nor legally inconsistent to free the Tribunal from applying the traditional rule of obligatory adjudication, positive or negative, on the issue submitted to it for judgment.

(c) *Effects of the Declaration of Criminality.* The chief effect of a declaration of collective criminality is that the criminal nature of the group or organisation in question "is considered proved" and cannot be "questioned" (Art. 10 of the Charter). But, as will now be seen, this does not prejudice the question as to whether *all* the individual members are to be regarded as guilty and punished, and consequently does not result in automatic and mandatory convictions.

The prosecution made this point clear when advocating that, from the view point of the individual members, the consequence of the declaration was that it created a rebuttable *presumption* of guilt, and thus reversed the burden of proof. Members, when tried, were not allowed to disprove that their organisation or group was criminal at the time of their membership, but they were entitled to disprove the tests made against them individually as members of the body declared criminal. "Nothing precludes him (a member) from denying that his participation was involuntary", said Justice Jackson, "and proving that he acted under duress; he may prove that he was deceived or tricked into membership; he may show that he had withdrawn, or he may prove that his name on the rolls is a case of mistaken identity. Actual fraud or trick" of which a member is a victim, "has never thought to be the victim's crime". As

(1) *Op. cit.*, p. 105.

(2) For more details on these points see statement of Justice Jackson in *op. cit.*, p. 46-47.

regards the member's knowledge of the criminal nature of the organisation, "he may not have known on the day he joined, but may have remained a member after learning the facts. And he is chargeable not only with what he knew, but with all which he was reasonably indicted".⁽¹⁾

It will be seen later that the Tribunal did not wish to answer the thesis of presumption of guilt either way, but that it decided that, apart from cases where a member was proved guilty of specific crimes, the tests of voluntary membership, and of actual or reasonably presumed knowledge represented the main issues upon which the subsequent courts were to decide each individual case of guilt.⁽²⁾

It thus appears that a declaration has a binding effect in the subsequent proceedings insofar as it finally decides upon the question of criminality of a given group or organisation. This is a novelty in international law in that the judgment of a Tribunal which has not tried individual members has effect in the proceedings of courts trying them.

(5) *The Case for the Defence*

The Defence made, as could be expected, every attempt to disqualify the right of the Tribunal to declare the indicted organisations criminal. Their arguments were numerous and they tackled the issue from all sides and aspects. The most important can be summed up as follows:

The proposed declarations were peculiar to the Anglo-American law and were unknown and "unheard of" in the jurisprudence of other countries.

In the precedents referred to by the prosecution, including those from Germany, the defendants convicted as criminals were always individual persons, never organisations as such.

The indicted organisations had been dissolved by the Allied authorities, they no longer existed and therefore could not be the object of a declaration of criminality.

(1) *Op. cit.*, p. 40-41.

(2) It is interesting to note that, during the proceedings, some of the judges expressed opinions to the effect that a declaration of criminality could or even should be understood to result in obligatory and automatic convictions. Thus, the French judge, M. Donnedieu de Vabres, questioned the legal basis for introducing the tests submitted by Justice Jackson. According to these tests, emphasised the French judge, a member could be acquitted by proving that his membership was not voluntary or that he never knew of the criminal purpose of the organisation. "However", he said, "I suppose that this Tribunal has a different conception. I suppose that it considers the condemnation of the individual who was a member of the criminal organisation, obligatory and automatic. Strictly speaking, the interpretation which has been advocated by Mr. Jackson is not written in any text. It does not appear in the Charter. Consequently, by virtue of what texts would the Tribunal in question (meaning the subsequent court) be obliged to conform to this interpretation?" To this Justice Jackson replied that "there could be no such thing as automatic condemnations, because the authority given in the Charter is to bring persons to trial for membership." "But," added Justice Jackson, "the points could be raised by the defendant that he had defences, such as duress, force against his person, or threats of force, and would have to be tried". See *Proceedings*, Part 8, p. 103-104. Doubts such as those expressed by the French judge are an illustration of how terms of the Charter could have, however unwittingly, been misinterpreted, had there not been a theory to explain their real purpose and meaning. It is also worth noting that, before making final decisions in its Judgment, all judges debated at length the theory of the United States Chief Prosecutor in the course of the proceedings and manifested their anxiety to clarify in every detail the issues involved. For full data, see *op. cit.*, p. 97-113.

To declare an organisation criminal meant the outlawing and branding as criminal not only of the organisation as such, but of each individual member. It, therefore, meant a final sentencing of every one of them to a "general loss of honour".

The laws already issued by the Allied authorities for the subsequent trial of members of organisations declared criminal, rendered every member liable to the death penalty⁽¹⁾ which bore no proportion to the alleged guilt of all members.

Membership of the indicted organisations comprised many millions of individuals so that declarations of criminality would unavoidably strike innocent individuals.

The Charter did not define the concept of criminal organisations, so that, according to the general principle of *lex loci*, the gap was to be filled on the ground of German law in the first place. In German law the concept was unknown and contrary to its spirit.

In any case a declaration could not be founded on the tests of the prosecution. It could be made only on condition that the "original purpose" of an organisation "was directed to the commission of crimes in the sense of Art. 6 of the Charter" and that it "was known to all members". Or else, if the original purpose was not criminal, "all members" must have participated "during a certain period of time" in the planning and perpetration of such crimes.⁽²⁾

The task of declaring an organisation criminal was that of a legislator and not of a tribunal. The declaration amounted in fact to a law for the subsequent courts and this was contrary to the principles of modern justice.⁽³⁾

It was not correct to say that members could exculpate themselves in the subsequent trials. Any declaration was founded on the principle that membership was a crime in itself, so that the only real ground for dismissing the charge was that the defendant was not a member. It was highly improbable that acquittals could be achieved under the tests submitted by the prosecutors.⁽⁴⁾

Needless to say that in addition to these arguments the defence contested that the indicted organisations were criminal in the sense of the Charter⁽⁵⁾ and denied that some of them, such as the General Staff and High Command

(1) The reference made here concerned the Allied Control Council for Germany, Law No. 10, an account of which will be found later.

(2) For more details on all the above points see *Proceedings*, Part 8, p. 61-63 and 91-92.

(3) *Op. cit.*, p. 66-68. During the proceedings the French judge raised the issue by asking the United States Chief Prosecutor whether, by defining and qualifying the concept of collective criminality and that of criminal organisations, with a view to giving directives to the subsequent courts, the Tribunal would not in fact assume the role of a legislator. The United States Chief Prosecutor answered that "there was in this something in the nature of legislation", but that there was "nothing in that matter which controlled the Tribunal itself or could invalidate its findings". See *op. cit.*, p. 104.

(4) *Op. cit.*, p. 89.

(5) For fuller particulars regarding the case of the defence in respect of each of the indicted organisations, see *op. cit.*, p. 61-93, 117-126.

were "groups" or "organisations" within the terms of the Charter.⁽¹⁾ It was also argued at length that, in the indicted organisations, membership was not generally voluntary and that the great majority of members did not even think of the aims and purposes of the organisations.

The Prosecution rebutted all these points. It emphasised that the evidence submitted fully proved the criminal nature of the indicted bodies and that the Tribunal had more than sufficient ground to pass its verdict. It referred to the fact that the killing of millions by the Nazi regime, as proved by the evidence, could not have been done without "disciplined, organised, systematic manpower to do it".⁽²⁾ It refuted that such mass murder could have been a secret to members, and dismissed arguments such as those complaining of the "dishonour" which would fall upon millions of members by stressing that the latter were already dishonoured by the evidence produced.⁽³⁾ As to the legal points raised in order to disqualify the right of the Tribunal to make declarations of criminality, the Prosecution maintained its position on the lines described in connection with the law of the Charter and the precedents referred to.⁽⁴⁾

Pursuant to Art. 9 of the Charter, the Defence made applications for the hearing of members of the indicted organisations, and a separate procedure was devised to this effect. A total of 102 witnesses for the defence gave oral testimony, and an unusually large number of affidavits containing statements of the witnesses was admitted. A total of 310,213 affidavits was received, out of which 136,213 were for the S.S.; 155,000 for the Leadership Corps; 2,000 for the Gestapo; 10,000 for the S.A.; and 7,000 for the S.D.⁽⁵⁾

(iii) THE JUDGMENT

In its Judgment the Nuremberg Tribunal made, on the one hand, a general ruling regarding the legal basis, the meaning and the effects of a declaration of criminality under the terms of the Charter, and, on the other, it delivered a verdict of guilt in respect of three of the six indicted organisations.

(1) *General Ruling*

The general ruling was made with particular regard to the effects of a declaration of criminality upon the punishment of individual members by the competent courts. Referring to the provisions of the Charter, as well as to provisions of other laws enacted in anticipation of declarations by the Tribunal in this field,⁽⁶⁾ the Tribunal established in the first place that, under these rules, there was a "crime of membership" for individuals who belonged to organisations declared criminal. It said:

"A member of an organisation which the Tribunal has declared to be

(1) Op. cit., p. 64 and 92.

(2) Op. cit., p. 94.

(3) Op. cit., p. 93. Also *Speeches of the Prosecutors*, p. 4.

(4) For detailed information on replies of the prosecution, see *Proceedings*, Part 8, p. 93-117.

(5) *Speeches of the Prosecutors*, p. 5.

(6) This concerns the Allied Control Council for Germany, Law No. 10, an account of which will be found under C.(i).(1), below p. 318 et seq.

criminal may be subsequently convicted of the *crime of membership* and be punished *for that crime* by death."⁽¹⁾

However, added the Tribunal:

"This is not to assume that international or military courts which will try these individuals will not exercise appropriate standards of justice. This is a far-reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice."⁽²⁾

The Tribunal, thus, agreed with the basic thesis of the prosecution that the rules of the Charter and the concept of collective criminality involved in a declaration within the Tribunal's jurisdiction, should not be construed so as to result in an unqualified, indiscriminate and automatic collective penal responsibility of all members. The Tribunal emphasised this point with reference to its discretionary power in making declarations of criminality:

"This discretion is a judicial one and does not permit arbitrary action, but should be exercised in accordance with well settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishment should be avoided. If satisfied of the criminal guilt of any organisation or group, this Tribunal should not hesitate to declare it to be criminal because the theory of "group criminality" is new, or because it might be unjustly applied by some subsequent tribunals. On the other hand, the Tribunal should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished."⁽³⁾

In this manner the Tribunal severed categorically the link of cause and effect which could have been made between the notion of a group held collectively criminal and that of the guilt of its individual members: even though the declaration is founded on the premise that the group was criminal as a whole, the guilt of all or any of its members remains on the traditional ground of "personal" guilt.

In order to determine the field of "personal criminal guilt" within the scope of an organisation declared criminal as a whole, the Tribunal delivered a definition of the "criminal organisation" and while doing so, it fully accepted the tests submitted by the prosecution:

"A criminal organisation is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes. There must be a group bound together and organised for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organisations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organisation. Membership alone is not enough to come within the scope of these declarations."⁽⁴⁾

(1) *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, H.M. Stationery Office, London, 1946. Italics are introduced. (Hereafter referred to as *Judgment*).

(2) *Op. cit.*, p. 66.

(3) *Op. cit.*, p. 66-67.

(4) *Op. cit.*, p. 67.

Two distinct consequences appear from this statement—first the concept of and the tests regarding the criminality of a group or organisation, and secondly, the tests for establishing the guilt of individual members of the group. With regard to the first, the concept is reached when there is a “group bound and organised for a common purpose” and when such a group “is formed or used in connection with the commission of crimes”. When these two elements are fulfilled, a declaration that an organisation is criminal as a whole is justified. Since the Tribunal stressed that the organisation had to “be formed or used” in connection with the commission of criminal acts, this meant that it is not essential for the group to have actually committed crimes; it is sufficient if it was set up for this purpose. With regard to the second, the tests are those of elimination, and two classes of members are excluded. First, those “who had no knowledge of the criminal purpose or acts of the organisation” and secondly, those “who were drafted by the State unless they were personally implicated in the commission” of criminal acts. The second proviso means that persons who were compulsorily drafted, even if they had knowledge of the criminal purpose of the organisation, are not guilty unless they personally were implicated in the commission of crimes.

The tests used to make the above elimination furnish, at the same time, those regarded by the Tribunal as representing the basis for convicting individual members on the part of the competent courts. As already stressed, under Article 10 of the Charter a declaration delivered by the Tribunal makes possible the bringing to trial of individuals for the “crime of membership”, in which case the criminal nature of the organisation cannot be challenged. The Tribunal did not specify who is to bear the onus of proof regarding tests of personal guilt, when a member is brought to trial, but the wording used by the Tribunal in respect of each of the organisations it declared criminal, tends to indicate that it wished the burden to lie on the prosecution. It would, therefore, appear that two alternative courses are open to the competent courts. The first would be to hold the view, and this course was advocated by the United States Chief Prosecutor and was eventually prescribed for the courts in the United States zone of Germany, that the declaration made by the Nuremberg Tribunal creates a presumption of guilt against every member, and that consequently all the prosecution is required to do is to establish that the accused was a member of the organisation. In this case it is to be presumed, until proof to the contrary is established by the defendant, that he knew of the criminal purposes or acts of the organisation or that he was personally implicated in the commission of crimes, although he did not join the organisation on a voluntary basis. The second course is to hold the view that no presumption of individual guilt derives from the declaration of the Nuremberg Tribunal, and that consequently, the prosecution is called to prove not only that the accused was a member of the organisation declared criminal, but also that he knew the relevant facts or was personally implicated in the commission of crimes.

The Nuremberg Tribunal left untouched the question of how such evidence can be made good by either the prosecution or the defence. Competent courts have, however, full latitude in admitting circumstantial

evidence, and the question of whether it is reasonable to believe that the accused had or had not knowledge of the criminal purpose or acts of his organisation can, and will in most cases have to be, solved on the basis of the accused's rank and position, his duties and assignments while serving in the organisation, and the like. With regard to the second test, that of the implication of persons who joined the organisation on a non-voluntary basis, the Tribunal's word "unless" following the description of a member compulsorily enlisted, seems to indicate that, whenever the accused has established his compulsory enlistment, the burden of proof that he had actually committed crimes lies on the prosecution.

It would thus appear that, by omitting to give an explicit answer to the issue of the burden of proof, the Nuremberg Tribunal has in fact delegated this task to the competent courts and has shunned interfering with their jurisdiction beyond the points mentioned in the Judgment. It also appears that a great responsibility has thus been put on the subsequent courts, and that differing jurisprudence may take place.

The Tribunal concluded its statement of principle by making certain recommendations to the courts competent for the subsequent trials. They will be recorded when dealing with the laws governing such trials.

(2) *The Verdict*

As previously mentioned, the Tribunal made declarations of criminality in respect of three of the six indicted organisations. By a majority decision only, the judges found no grounds for pronouncing the other three to be criminal, though the Soviet judge dissented from the opinion of his colleagues in respect of two of these three organisations.

(a) *Organisations declared criminal.* The Tribunal declared criminal the Leadership Corps of the Nazi Party, the Gestapo and S.D., and the S.S.

The declaration concerning the *Leadership Corps* was made in the following terms:

"The Leadership Corps was used for purposes which were criminal under the Charter and involved the Germanisation of incorporated territory, the persecution of the Jews, the administration of the slave labour programme, and the mistreatment of prisoners of war. The defendants Bormann and Sauckel, who were members of this organisation, were among those who used it for these purposes. The Gauleiters, the Kreisleiters, and the Ortsgruppenleiters participated, to one degree or another, in these criminal programmes. The Reichsleitung as the staff organisation of the party is also responsible for these criminal programmes as well as the heads of the various staff organisations of the Gauleiters and Kreisleiters. The decision of the Tribunal on these staff organisations includes only the Amtsleiters who were heads of offices on the staffs of the Reichsleitung, Gauleitung and Kreisleitung. With respect to other staff officers and party organisations attached to the Leadership Corps other than the Amtsleiters referred to above, the Tribunal will follow the suggestion of the Prosecution in excluding them from the declaration.

"The Tribunal declares to be criminal within the meaning of the Charter the group composed of those members of the Leadership Corps holding the positions enumerated in the preceding paragraph who became or remained members of the organisation with knowledge that it was being used for the

commission of acts declared criminal by Article 6 of the Charter, or who were personally implicated as members of the organisation in the commission of such crimes. The basis of this finding is the participation of the organisation in war crimes and crimes against humanity connected with the war; the group declared criminal cannot include, therefore, persons who had ceased to hold the positions enumerated in the preceding paragraph prior to 1st September, 1939".⁽¹⁾

Thus, the Tribunal limited the effect of the declaration to specific classes of members, as proposed by the prosecution. In addition, following the principle contained in Art. 6 of the Charter, that crimes falling within its jurisdiction had to be connected with an aggressive war, the Tribunal limited their responsibility to the time of the late war, i.e. from 1st September, 1939, onwards. It also qualified the "personal guilt" of members by applying the tests previously described. In this respect, however, the Tribunal was satisfied that membership in the Leadership Corps was "voluntary at all levels",⁽²⁾ and omitted this test from the declaration as irrelevant, thus precluding the accused from using compulsory enlistment in their defence.

The declaration regarding the *Gestapo and S.D.* was made in similar terms and with the same effect as to the voluntary basis of membership:

"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, the administration of the slave labour programme and the mistreatment and murder of prisoners of war. The defendant Kaltenbrunner, who was a member of this organisation was among those who used it for these purposes. In dealing with the Gestapo the Tribunal includes all executive and administrative officials of Amt IV of the R.S.H.A.⁽³⁾ or concerned with Gestapo administration in other departments of the R.S.H.A. and all local Gestapo officials serving both inside and outside of Germany, including the members of the Frontier Police, but not including the members of the Border and Customs Protection or the Secret Field Police, except such members as have been specified above. At the suggestion of the Prosecution the Tribunal does not include persons employed by the Gestapo for purely clerical, stenographic, janitorial or similar unofficial routine tasks. In dealing with the S.D. the Tribunal includes Amts III, VI and VII of the R.S.H.A. and all other members of the S.D., including all local representatives and agents, honorary or otherwise, whether they were technically members of the S.S. or not.

"The Tribunal declares to be criminal within the meaning of the Charter the group composed of those members of the Gestapo and S.D. holding the positions enumerated in the preceding paragraph who became or remained members of the organisation with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter, or who were personally implicated as members of the organisation in the commission of such crimes. The basis of this finding is the participation of the organisation in war crimes and crimes against humanity connected with the war; this group declared criminal cannot include, therefore, persons who had ceased to

(1) *Judgment*, p. 70-71. For the reasons on which the Tribunal based their declaration see *op. cit.*, p. 67-71.

(2) *Op. cit.*, p. 68.

(3) The R.S.H.A. was the Reich Security Head Office (Reichssicherheitshauptamt) which controlled the whole of the Gestapo and S.D. under Himmler. The various "Amts" (III, IV, VI, and VII) mentioned were departments of the R.H.S.A. responsible for particular types or fields of crimes.

hold positions enumerated in the preceding paragraph prior to 1st September, 1939."⁽¹⁾

Finally, the declaration in respect of the S.S. reads:

"The S.S. was utilised 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, the administration of the slave labour programme and the mistreatment and murder of prisoners of war. The defendant Kaltenbrunner was a member of the S.S. implicated in these activities. In dealing with the S.S. the Tribunal includes all persons who had been officially accepted as members of the S.S. including the members of the Allgemeine S.S., members of the Waffen S.S., members of the S.S. Totenkopf Verbände and the members of any of the different police forces who were members of the S.S. The Tribunal does not include the so-called S.S. riding units. The Sicherheitsdienst des Reichsführer S.S. (commonly called the S.D.) is dealt with in the Tribunal's Judgment on the Gestapo and S.D.

"The Tribunal declares to be criminal within the meaning of the Charter the group composed of those persons who had been officially accepted as members of the S.S. as enumerated in the preceding paragraph who became or remained members of the organisation with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter, or who were personally implicated as members of the organisation in the commission of such crimes, excluding, however, those who were drafted into membership by the State in such a way as to give them no choice in the matter, and who had committed no such crimes. The basis of this finding is the participation of the organisation in war crimes and crimes against humanity connected with the war; this group declared criminal cannot include, therefore, persons who had ceased to belong to the organisation enumerated in the preceding paragraph prior to 1st September, 1939."⁽²⁾

Unlike the Leadership Corps and the Gestapo and S.D., for this organisation the Tribunal recognised that membership was not always voluntary, and therefore included the test required in this respect.

(b) *Organisations not declared criminal.* The majority of the judges came to the conclusion that declarations should not be made in respect of the S.A., the Reich Cabinet, and the General Staff and High Command.

For the S.A. the Tribunal gave the following reasons:

"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 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. After the purge, the S.A. was reduced to the status of a group of unimportant Nazi hangers-on. Although in specific instances some units of the S.A. were used for the commission of war crimes and crimes against humanity, it cannot be said that its members generally participated in or even knew of the criminal acts. For these reasons the Tribunal does not declare the S.A. to be a criminal organisation within the meaning of Article 9 of the Charter."⁽³⁾

The above findings were, thus, chiefly based upon the fact that crimes perpetrated by the S.A. were not "part of a specific plan to wage aggressive war", which the Tribunal held to represent the essential prerequisite for being within the scope of its jurisdiction.

(1) *Op. cit.*, p. 75. For full details concerning the ground on which the Tribunal founded its declaration see *op. cit.*, p. 71-75.

(2) *Op. cit.*, p. 79. For details see p. 75-79.

(3) *Op. cit.*, p. 80.

Two reasons were given for withholding a declaration with regard to the *Reich Cabinet* :

“ The Tribunal is of the opinion that no declaration of criminality should be made with respect to the Reich Cabinet for two reasons: (1) because it is not shown that after 1937 it ever really acted as a group or organisation; (2) because the group of persons here charged is so small that members could be conveniently tried in proper cases without resort to a declaration that the Cabinet of which they were members was criminal.”⁽¹⁾

The first reason was based upon the finding that “ from the time that it can be said that a conspiracy to make aggressive war existed the Reich Cabinet did not constitute a governing body, but was merely an aggregation of administrative offices subject to the absolute control of Hitler ”. The Tribunal established that not a single meeting of the Reich Cabinet was held after 1937, and the “ Secret Cabinet Council never met at all ”. It concluded that members of the Reich Cabinet were involved only individually, and that no evidence was to hand to prove that the Cabinet took part in crimes as a group or organisation.⁽²⁾

As to the second reason, the Tribunal ascertained that there were altogether 48 members of the Reich Cabinet, that 8 of them were dead and 17 were on trial before it. It accordingly found that the remaining 23 could all be brought to trial individually, and that by a declaration “ nothing would be accomplished to expedite or facilitate their trials ”.⁽³⁾

Finally, the following statement was made in respect of the *General Staff and High Command* ’

“ The number of persons charged, while larger than that of the Reich Cabinet, is still so small that individual trials of these officers would accomplish the purpose here sought better than a declaration such as is requested. But a more compelling reason is that in the opinion of the Tribunal the General Staff and High Command is neither an “ organisation ” nor a “ group ” within the meaning of those terms as used in Article 9 of the Charter . . . According to the evidence, their planning at staff level, the constant conferences between staff officers and field commanders, their operational technique in the field and at headquarters was much the same as that of the armies, navies and air forces of all other countries . . . To derive from this pattern of their activities, the existence of an association or group does not, in the opinion of the Tribunal, logically follow. On such a theory the top commanders of every other nation are just such an association rather than what they actually are, an aggregation of military men, a number of individuals who happen at a given period of time to hold the high-ranking military positions.”⁽⁴⁾

While expressing the above opinion, the Tribunal ascertained that the evidence submitted against the General Staff and High Command was, in respect of many members “ clear and convincing ” and reached the same conclusions as that expressed for members of the Reich Cabinet,

(1) Op. cit., p. 80-81.

(2) Op. cit., p. 81.

(3) Op. cit., p. 81.

(4) Op. cit., pp. 81-82.

namely that members who were not already being tried by it could and should be brought to trial on an individual basis.⁽¹⁾

It thus appears that in respect of the Reich Cabinet and the General Staff and High Command, the Tribunal used also reasons of judicial expediency, by finding that the comparatively small number of members and the evidence regarding their individual guilt represented a good ground for making unnecessary a declaration against the body as a whole.

The Soviet judge dissented from the opinion of his American, British and French colleagues in respect of the Reich Cabinet and the General Staff and High Command. In his opinion both organisations or groups ought to have been declared criminal, as the leading factors in the commission of crimes against peace, war crimes and crimes against humanity. His arguments were entirely founded on a different estimate of the relevant facts and were thus debatable. He did not enter into the second reason invoked by the majority, that of procedural expediency, apparently because he did not agree that such ground could justify withholding a declaration of criminality. As a consequence he limited his arguments to a number of facts which, in his view, warranted considering the Reich Cabinet and the General Staff and High Command as criminal organisations. It is not possible nor necessary to reproduce these arguments. It suffices to say that, regarding the Reich Cabinet, the Soviet judge's views were that it had "a direct and active role in the working out of the criminal enterprises" of the Nazis, and that it was "particularly untenable and rationally incorrect" to refuse to declare it criminal.⁽²⁾ As to the fact that it did not meet after 1937, the Soviet judge dismissed the argument by stating that these and similar circumstances only proved that the Nazi Government was "not an ordinary rank and file Cabinet but a criminal organisation".⁽³⁾ As to the General Staff and High Command he thought that it "represented the most important agency in preparing and realising the Nazi aggressive and man-hunting programme",⁽⁴⁾ and that refusal to declare it criminal "contradicted both the actual situation and the evidence sub-

(1) This passage of the Judgment reads:

"Although the Tribunal is of the opinion that the term "group" in Article 9 must mean something more than this collection of military officers, it has heard much evidence as to the participation of these officers in planning and waging aggressive war, and in committing war crimes and crimes against humanity. This evidence is, as to many of them, clear and convincing.

"They have been responsible in large measure for the miseries and suffering that have fallen on millions of men, women and children. They have been a disgrace to the honourable profession of arms. Without their military guidance the aggressive ambitions of Hitler and his fellow Nazis would have been academic and sterile. Although they were not a group falling within the words of the Charter, they were certainly a ruthless military caste. The contemporary German militarism flourished briefly with its recent ally, National Socialism, as well as or better than it had in the generations of the past.

"Many of these men have made a mockery of the soldier's oath of obedience to military orders. When it suits their defence they say they had to obey; when confronted with Hitler's brutal crimes, which are shown to have been within their general knowledge, they say they disobeyed. The truth is they actively participated in all these crimes, or sat silent and acquiescent, witnessing the commission of crimes on a scale larger and more shocking than the world has ever had the misfortune to know. This must be said.

"Where the facts warrant it, these men should be brought to trial so that those among them who are guilty of these crimes should not escape punishment." See op. cit., p. 83.

(2) Op. cit., p. 143.

(3) Op. cit., p. 144.

(4) Op. cit., p. 145.

mitted".⁽¹⁾ He disagreed that members of the Nazi General Staff and High Command could be compared to those of Supreme Commands in Allied countries, because of their relationship with the Nazi party and other Nazi organisations.⁽²⁾

C. RULES IN MUNICIPAL LAW

In addition to the rules of international law contained in the Nuremberg Charter, criminal organisations are covered by rules of municipal law. It has already been seen that the prosecutors at the Nuremberg Trial made reference to such rules with a view to demonstrating that the provisions of the Charter were not an entirely novel legal phenomenon. It has also been mentioned that certain rules had been enacted in connection with those of the Nuremberg Charter, and that they were promulgated in order to regulate the trial of members of criminal organisations prosecuted on the basis of the declarations made by the Nuremberg Tribunal. It thus appears that the field is covered by two sets of rules. On the one hand, there are rules which form part of the national law of various Allied countries and which existed before the Nuremberg Charter and Trial. In some of these countries they were supplemented after the end of the war against Germany, in order to clarify the legal issues raised by the type of collective criminality furnished by the Nazis. On the other hand, there are rules specifically enacted in the ex-territories of the III Reich (Germany and Austria) and insuring the trial of members of the criminal organisations tried by the Nuremberg Tribunal. In Germany they were enacted in direct connection with the Nuremberg Charter and Judgment, and in Austria, although not directly linked, they cover a similar field.

An account will first be given of the rules in the occupied territories, as they relate to the most numerous trials of this type and since the most important of them are implemented on the basis of the Nuremberg Judgment.

(i) RULES IN OCCUPIED TERRITORY

(1) *Germany*

(a) *Law No. 10.* The trial of members of criminal organisations is regulated by Law No. 10 of the Allied Control Council for Germany of 20th December, 1945. This law was enacted for the whole of occupied Germany so that its provisions are in force in all four zones of occupation. The reason for promulgating these provisions in German territory was that members to be tried all belonged to Nazi organisations, and that the Allied authorities decided that they should consequently be tried as a rule in Germany.

Among the acts enumerated as crimes in Art. II of Law No. 10 is the following:

"Membership in categories of a criminal group or organisation declared criminal by the International Military Tribunal."

(1) *Op. cit.*, p. 144.

(2) For details on the Soviet judge's dissenting opinion see *op. cit.*, p. 142-149.

This crime is liable to the same penalties as those provided for the other crimes enumerated, namely crimes against peace, war crimes and crimes against humanity.

These penalties are:

- " (a) Death.
- (b) Imprisonment for life or a term of years, with or without hard labour.
- (c) Fine, and imprisonment with or without hard labour, in lieu thereof.
- (d) Forfeiture of property.
- (e) Restitution of property wrongfully acquired.⁽¹⁾
- (f) Deprivation of some or all civil rights.

" Any property declared to be forfeited or the restitution of which is ordered by the Tribunal shall be delivered to the Control Council for Germany, which shall decide on its disposal."⁽²⁾

As can be seen the range of punishments is very wide and the Courts are at liberty to impose any of them, including the death penalty. A notable feature, however, is that the law does not say that " punishments will consist of one or more " of the penalties enumerated, but only that they " may ". This wording made possible a re-adjustment of penalties for the " crime of membership " by subsequent legislation, as distinct from punishment for other crimes covered by Law No. 10. Further reference to this will be made later.

Law No. 10 does not specify which courts in Germany are competent for the trial of members of criminal organisations. It simply states:

" 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."⁽³⁾

Such tribunals and rules were determined in several zones and they will be recorded separately. The above provision contains yet another rule which is relevant in respect of the power of the Nuremberg Tribunal's Judgment for the courts functioning under Law No. 10. This rule reads:

" 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 zone by the Commander thereof, or of the *International Military Tribunal established by the London Agreement of 8th August, 1945.*"⁽⁴⁾

This rule is significant in that, by confirming that the power and jurisdiction of the Nuremberg Tribunal are left unimpaired by Law No. 10, it sanctions the legal effects of such powers and jurisdiction in respect of the courts functioning under its terms. It is in the light of this proviso that the general ruling made by the Nuremberg Tribunal in regard to criminal organisations and membership therein, should be understood as having a binding effect upon the subsequent courts.

As mentioned above, tribunals, rules and procedure for the trial of members of criminal organisations were determined in the British and

(1) This is improperly included among punishments. Such restitution is not and cannot represent a penalty, but only a redress of the damage inflicted.

(2) Art. II, (3).

(3) Art III, (2).

(4) Italics introduced.

United States zones of occupation. Certain rules of substantive law were prescribed pursuant to recommendations made by the Nuremberg Tribunal in its Judgment. These recommendations will now be recorded and followed by the existing zonal rules.

(b) *Recommendations of the Nuremberg Tribunal.* The Nuremberg Tribunal ended its general ruling in the following terms:

“Since declarations of criminality which the Tribunal makes will be used by other courts in the trial of persons on account of their membership in the organisations found to be criminal, the Tribunal feels it appropriate to make the following recommendations:

1. That so far as possible throughout the four zones of occupation in Germany the classifications, sanctions and penalties be standardised. Uniformity of treatment so far as practical should be a basic principle. This does not, of course, mean that discretion in sentencing should not be vested in the court; but the discretion should be within fixed limits appropriate to the nature of the crime.

2. Law No. 10, to which reference has already been made, leaves punishment entirely in the discretion of the trial court even to the extent of inflicting the death penalty.

The De-Nazification Law of 5th March, 1946, however, passed for Bavaria, Greater-Hesse and Wurttemberg-Baden, provides definite sentences for punishment in each type of offence. The Tribunal recommends that in no case should punishment imposed under Law No. 10 upon any members of an organisation or group declared by the Tribunal to be criminal exceed the punishment fixed by the De-Nazification Law. No person should be punished under both laws.

3. The Tribunal recommends to the Control Council that Law No. 10 be amended to prescribe limitations on the punishment which may be imposed for membership in a criminal group or organisation so that such punishment shall not exceed the punishment prescribed by the De-Nazification Law.”⁽¹⁾

The De-Nazification Law of 5th March, 1946, referred to by the Tribunal, is in force in the United States zone and will be dealt with in the analysis of the United States zone rules. The Nuremberg Tribunal, thus, made a strong point of the necessity of reducing the punishments as provided by Law No. 10 in order to fit “the nature of the crime”. The Tribunal found that the “crime of membership” in itself⁽²⁾ did in no case deserve a more severe punishment than that prescribed in the De-Nazification Law of March, 1946, that is, as will be seen, 10 years imprisonment.

It will be noted that, in order to achieve such a result, the Tribunal found it necessary to recommend the amendment of Law No. 10. No such amendment took place, probably for the reason previously mentioned. The rule of Art. II, (3) of Law No. 10 is that the punishments “may” consist of the penalties enumerated. This may be interpreted to mean not only that the courts are always at liberty to apply lesser penalties, but that it is within the competence of the zonal authorities to make re-adjustments

(1) *Judgment*, p. 67.

(2) This distinction is important, for a defendant prosecuted for membership can at the same time be found guilty of either of the other specific crimes covered by Law No. 10, i.e. crimes against peace, war crimes or crimes against humanity. In such cases the punishments applicable are those from Art. II of Law No. 10 without restriction.

binding upon the courts in connection with their powers determined under the terms of Art. III (2).

(c) *Rules in the British Zone.* To implement the above recommendations, the British Military Government in Germany issued on 1st November, 1946, a set of rules regulating all trials of members of criminal organisations.⁽¹⁾

The rules were enacted with express reference to Art. 10 of the Nuremberg Charter and to the declarations made by the Nuremberg Tribunal. Competence to try members of criminal organisations was conferred upon German courts.

The main rule of substantive law contained in the ordinance reads:

"The accused persons will be charged with having been a member of a criminal organisation with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter of the International Military Tribunal."⁽²⁾

This rule leaves unanswered the question of whether the "knowledge" referred to is to be proved by the prosecution or whether it is to be presumed and rebutted by the accused. As previously pointed out, this leaves either course open according to the estimate of the court.

The jurisdiction over persons to be tried as members of criminal organisations is limited to the categories or classes defined by the Nuremberg Tribunal in its Judgment in respect of each of the organisations declared criminal, and does not, as a matter of course, comprise members of organisations which were not declared criminal.⁽³⁾

Finally, the recommendations of the Nuremberg Tribunal regarding the punishments were fully applied. Art. V of Ordinance No. 69 specifies:

"Any person found guilty will be liable to any or all of the following penalties:

- (a) Imprisonment (Gefaengnisstrafe) for a term not exceeding 10 years;
- (b) Forfeiture of property;
- (c) Fine."

This leaves out the death penalty and imprisonment for life, as well as hard labour. In addition, the courts are entitled to take into account mitigating circumstances when passing sentence.⁽⁴⁾ Finally, further prescriptions regarding the way of imposing penalties, as well as any other matter connected with the carrying out of Ordinance No. 69, are reserved and delegated to the Central Legal Office of the British Military Government.⁽⁵⁾

(1) Ordinance No. 69 of the British Military Government, published in *Military Government Gazette*, No. 16, pp. 405-407.

(2) Art. IV, 9.

(3) A full list of such categories or classes is contained in an appendix to Ordinance No. 69 under the heading "First Schedule".

(4) Art. VI.

(5) Article VII, which reads: "The Central Legal Office shall issue such regulations or orders as may be necessary or expedient for carrying this Ordinance into effect, including directions as to the maximum sentences to be imposed in relation to any rank or appointment held in any of the said criminal organisations, provided that in no cases shall any sentence of imprisonment exceed the maximum laid down in Article V hereof."

(d) *Rules in the United States Zone.* In the American zone of Germany, rules were issued by the United States Military Government in a letter dated 9th April, 1947, and circulated to the Directors of the local Military Governments for Bavaria, Wurttemberg-Baden, Greater Hesse and Bremen.⁽¹⁾

The letter contains, in the first place, an account of the Nuremberg Judgment and specifies which organisations were declared criminal as well as which categories of members were determined as liable to be brought to trial. Special care was taken to exclude categories not comprised in the Nuremberg declarations.⁽²⁾

Following the Nuremberg Tribunal's recommendations, the trial of such members was entrusted to the German courts established by the De-Nazification Law of 5th March, 1946.⁽³⁾ Substantive and procedural provisions of this law were declared applicable "to the extent to which this was consistent with the finding of the International Military Tribunal."⁽⁴⁾ This includes in particular the types and degrees of punishments recommended by the Nuremberg Tribunal.

Under the rules of the De-Nazification Law, whose official title is "Law for Liberation from National Socialism and Militarism",⁽⁵⁾ there are four groups of "offenders" and penalties are specified for each particular group.⁽⁶⁾ The severest penalty is 10 years detention in a labour camp, whereas other penalties include the loss of a great variety of rights, such as of political rights, the right to exercise a professional vocation, to hold public office and the like.⁽⁷⁾ Under the rules of the United States Military Government the courts can apply any of these punishments, and the accused against whom such punishments can be pronounced are only those defined in the Nuremberg Judgment.

Unlike the British rules, those of the United States Military Government contain a specific answer to the question of who is to bear the burden of proof in respect of the tests of individual guilt. In line with the attitude consistently held by the United States Chief Prosecutor in Nuremberg, it introduced the principle of presumption of guilt in the following terms:

"Upon proof of membership within any of the incriminated groups of the organisations found criminal, a *presumption* shall arise that the member joined or remained a member with knowledge of the criminal acts and purposes of the organisation. This presumption is rebuttable and may be overcome by evidence to the contrary in accordance with Article 34 of the

(1) Letter of the Office of the Military Government for Germany (U.S.), AG 010.6 (IA), of 9th April, 1947.

(2) Para. 1-6 of above Letter.

(3) These courts comprise tribunals in the first instance, at the rate of one for each urban and rural district, and of "appellate" tribunals competent for the revision of their judgments. See Art. 24 of the above Law.

(4) Para. 7 of above Letter.

(5) The above law was enacted by the local German Governments for Bavaria, Greater Hesse and Wurttemberg-Baden upon approval of the United States Military Government. Its provisions are cited from the official English translation.

(6) These groups are named as follows (Art. 4); major offenders; offenders (activists, militarists and profiteers); lesser offenders (probationers)) and followers.

(7) For fuller details see the above Law, Art. 15-18.

Law.⁽¹⁾ A similar presumption shall arise with reference to the voluntary nature of a respondent's membership in the Waffen S.S.;⁽²⁾ those who claim that they were drafted into membership by the State in such a way as to give them no choice in the matter, have the burden of proving such a defence."⁽³⁾

It thus appears that in the United States zone the presumption of guilt is introduced to a full extent and that it relates to all cases and all tests of individual criminality. As previously explained, this means that the prosecution is bound to prove only the fact of "membership" in each particular case, and that, failing evidence submitted by the defendant regarding the presumptions determined against him, he is to be punished. This, however, as has also been explained, does not mean automatic punishment. The courts have wide powers to admit direct or circumstantial evidence in defence of the accused, and to dismiss the presumption on the basis of such evidence.

(2) *Austria*

Punishment of members of criminal organisations is dealt with in a "Constitutional Law concerning War Crimes and other National Socialist Misdeeds" enacted on 26th June, 1945, by the Austrian Provisional Government. The Law was promulgated before the enactment of the Nuremberg Charter and has, consequently, no link with the Nuremberg Trial. It regulates the trial of war criminals by Austrian courts, under the penal jurisdiction of the Austrian administration as allowed by the occupying powers,⁽⁴⁾ and contains rules approaching those deriving from the Nuremberg Charter and Judgment in respect of criminal organisations.

Article 1, para. 6, of this Law contains the following provision:

"Any person who, during the National Socialist tyranny in Austria, acted, even temporarily, as a member of the Reich Government, or as a leading official of the N.S.D.A.P., with the rank of Gauleiter or similar grade and upwards, or with the rank of Reichsleiter or similar grade and upwards, or as Reichsstatthalter, Reich Defence Commissioner or Leader of the S.S.—including the Waffen S.S.—with the rank of Standartenfuhrer and upwards, will be deemed to be a war criminal within the meaning of paragraphs 1 and 2 above. Such persons, being regarded as instigators and contrivers of the above-mentioned crime shall be sentenced to death."⁽⁵⁾

(1) This Article regulates the rebuttal of presumptions of guilt declared by the De-Nazification Law in respect of "major offenders" and "offenders". In lists attached to the Law there is an extensive enumeration of those who are regarded as falling within these two groups and who are held guilty until proof to the contrary. See Art. 5-6 and 7-10 of the De-Nazification Law.

(2) It will be remembered that the Nuremberg Tribunal found that voluntary membership existed in all cases regarding the Leadership Corps of the Nazi Party and the Gestapo and S.D.

(3) Para. 8 of the above letter.

(4) Although a former territory of the III Reich, Austria had from the outset a separate status from Germany. In the Moscow declaration of November, 1943, the Allied Powers decided to re-establish its independence, and an Austrian Provisional Government was set up before the completion of the occupation of Austrian territory by the Allied Powers, in May, 1945. The setting up of this Government gave rise to certain differences between the Western Powers and Russia, but these were soon dispelled and the Austrian Government recognised by all Powers.

(5) The above text is quoted from an English translation prepared by the U.N.W.C.C. See Document Series, No. 23, February, 1946, *Constitutional Law of 26th June, 1945, concerning War Crimes and other National Socialist Misdeeds (War Crimes Law)*.

Para. 1 and 2 of Art. 1, referred to in the above text, define the notion of war crimes and war criminals.⁽¹⁾ Penalties provided by this Law are very severe. In numerous cases no lesser punishment can be imposed than 10 years' penal servitude, and in many other cases the death penalty is the only punishment.⁽²⁾

From the above quoted provision it appears that the classification of members held guilty on account of their membership in the groups or organisations described is similar to that of the Nuremberg Judgment as far as the Nazi Party and the S.S. are concerned. A major difference appears in respect of members of the Reichs Cabinet, who are included on an equal footing, and an entirely different solution is given to the question of the personal guilt of the members involved. All such members are regarded individually guilty on account of their membership taken in itself and have to be punished automatically on this ground. This amounts to the solution which was carefully avoided during the Nuremberg Trial and which had always given rise to apprehension in the Commission before the Trial.

(ii) RULES IN ALLIED COUNTRIES

In the national law of various Allied countries, provisions dealing with criminal groups or organisations were either already in existence for a varying length of time preceding the enactment of the Nuremberg Charter and of the rules that followed it, or were introduced in order to cover the type of collective criminality evidenced by Nazi activities. In most cases such subsequent rules were prescribed in addition to those already existing, as a further development of the laws in this field.

Provisions which were in force prior to the Nuremberg Charter form part of the common penal law systems of the countries concerned and most of them are, in a sense, wider in scope than those prescribed in respect of the Nazi organisations. They are wider in that they concern any type of criminal group, aiming at the commission of a greater variety of crimes than those covered by the Nuremberg Charter. On the other hand, they are, in connection with such a feature, general in nature and wide enough to embrace the cases covered by the Nuremberg Charter. In view of the procedure and legal effects prescribed in this Charter, the question of their implementation in the case of groups or organisations declared criminal by the Nuremberg Tribunal, does not arise in making another declaration under the terms of domestic law. They serve only the purpose of trying members of criminal organisations as a result of the declarations made by

(1) These definitions are as follows: "(1) Any person who, in the course of the war launched by the National Socialists, has intentionally committed or instigated an act repugnant to the natural principles of humanity or to the generally accepted rules of international law or to the laws of war, against the members of the armed forces of an enemy or the civilian population of a state or country at war with the German Reich or occupied by German forces shall be punished as a war criminal. (2) Any person who, in the course of this war, acting in the real or assumed interest of the German armed forces or of the National Socialist tyranny, has committed or instigated an act repugnant to the natural principles of humanity against other persons, whether in connection with war-like or military actions or the actions of militarily organised groups, shall be considered guilty of the same crime."

(2) See Art. 1, para. 3-5 and Art. 2-8 of the above Law.

the Nuremberg Tribunal. In this manner, whenever such members are brought to trial before courts in Allied territory,⁽¹⁾ provisions of municipal law play the same role as those in force in occupied territory.

As to the provisions which were prescribed with the specific purpose of rendering possible the trial of members of organisations declared criminal by the Nuremberg Tribunal, whenever enacted without direct previous support or link with the common law, they were introduced as a development of the laws and customs of war as embodied in or observed under the terms of municipal law.

The following account is not exhaustive but only illustrative. Selection has been made of various types of legislation demonstrating different ways in which the trial of members of criminal organisations is covered by the legislation.⁽²⁾

(1) Canada

The Canadian War Crimes Regulations which came into force on 30th August, 1945,⁽³⁾ contain the following provision (para, 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; in any such case all or any members of any such formation, unit, body, or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the court."⁽⁴⁾

The above provision is limited to the field of war crimes, but as such it is general in nature and not specifically related to members of organisations prosecuted before the Nuremberg Tribunal. It covers any other group (formation, unit, body) of persons and establishes a *prima facie* case of guilt for all or any of its members. This effect does not depend on a declaration of criminality, and it is consequently not necessary that the group had repeatedly committed crimes and thus proved its criminal nature. Presumption of guilt is established as soon as evidence is to hand that "a war crime has been the result of concerted action" of the group.

This provision furnishes a sufficient legal basis for the trial of members of organisations declared criminal by the Nuremberg Tribunal on the part of Canadian military courts. It should be noted that Canada was not a signatory to the Nuremberg Charter and is accordingly not entitled

(1) The bringing to trial of members of organisations declared criminal by the Nuremberg Tribunal before national courts and not only before military, occupation or other courts in Germany, is explicitly provided for in Art. 10 of the Nuremberg Charter. As a rule such trials may take place whenever a member had served in Allied territory and the Power entitled to prosecute him wants to try him within its own jurisdiction.

(2) This legislation is reviewed in alphabetical order of countries.

(3) On 6th August, 1946, the Canadian House of Commons adopted a Bill (No. 309, Second Session, Twentieth Parliament, 10 George VI, 1946), by which it reenacted the War Crimes Regulations prescribed by the Governor in Council on 30th August, 1945. The Regulations thus acquired statutory effect. In connection with the Bill they became "the Canadian War Crimes Act (An Act respecting War Crimes)" in 1946.

(4) See Misc. No. 48, 25.9.1946, *Canadian War Crimes Legislation*, p.4.

to claim such trials under Art. 10 of the Charter. However, whenever a member of such organisations is detained by Canadian authorities, as prisoner of war or otherwise, and whenever such member is guilty of war crimes falling within the jurisdiction of Canadian courts, nothing prevents such trials from taking place. In such cases it should also be noted that, not being a signatory, Canada is also not bound, in strict law, by the decisions of the Nuremberg Tribunal. It is, however, safe to assume that these decisions would have great weight.

(2) *Czechoslovakia*

In a law of 24th January, 1946,⁽¹⁾ the Czechoslovak Provisional National Assembly included provisions for the punishment of members of a number of Nazi or Nazi-sponsored organisations which committed crimes against the State or Czechoslovak citizens. The relevant provisions were devised in a similar manner to those in force in Austria and proclaimed automatic punishment for mere membership. These provisions read:

" Paragraph 2

" Any person who during the period of imminent danger to the Republic (Para. 18)⁽²⁾ was a member of one of the following organisations: Die Schutz-Staffeln der Nationalsozialistischen Deutschen Arbeiterpartei (S.S.), or Freiwillige Schutzstaffeln,⁽³⁾ or Rodobraný, or Szabadcsapatok⁽⁴⁾ or of any other organisation of a similar character, shall, if he did not commit any offence incurring a severer penalty, be punished for his crime by penal servitude for a period varying from five to twenty years and in presence of especially aggravating circumstances by penal servitude for a period varying from twenty years to a life sentence."

" Paragraph 3

.....
 "(2) Anyone who during the same period was an agent or leader in one of the following organisations: Nationalsozialistische Deutsche Arbeiterpartei (N.S.D.A.P.)⁽⁵⁾ Sudetendeutsche Partei (SdP),⁽⁶⁾ Ulajka,⁽⁷⁾ Hlinkeva Garda,⁽⁸⁾ Svatoplukova Garda,⁽⁹⁾ or in any other Fascist organisation of the same character, shall if he has not committed an offence incurring a severer penalty, be sentenced to penal servitude for from five to twenty years."

The effect of both provisions is that, once a member of the above organisations is brought to trial, the courts are bound to impose penalties

(1) Law No. 22 of 24th January, 1946, as amended and promulgated. See translated text in Misc. No. 112, 27.11.1947, *Czechoslovak War Crimes Legislation*, pp. 3-4.

(2) The period of imminent danger, as distinct from the period of war, was declared to have started on 21st May, 1938, i.e. nearly a year before the invasion of Czechoslovakia by the Nazis in breach of the Munich agreement. No date was fixed for the end of this period, but it is to be taken that it goes in any case until the Nazi invasion in March, 1939, and that it links up with the date on which Czechoslovakia considers that a state of war started between her and Germany.

(3) This was a Nazi organisation composed mostly of Sudeten Germans from Czechoslovakia, who volunteered as shock troops and operated from Germany in Czech territory at the time when the Nazis were creating disturbances prior to the Munich agreement in order to acquire the Sudetenland.

(4) "Rodobran" was a Czech Fascist organisation composed of fifth columnists who co-operated with the Nazis in their scheme to incorporate Czechoslovakia into the III Reich. "Szabadcsapatok" was a similar organisation of the Hungarian minority in Czechoslovakia. Both ceased to be active after the Nazi invasion in March, 1939.

(5) The German Nazi Party.

(6) The Nazi Party of the Czech Sudeten.

(7) A Czech Fascist organisation.

(8) A Slovak Fascist organisation corresponding to the German S.S.

(9) The principal Czech Fascist organisation.

for mere membership and, consequently, without further evidence than that concerning membership. The difference between them is that all members of the organisations enumerated in para. 2 are to be punished without distinction of rank or category, whereas in the case of organisations enumerated in para. 3(2), penal responsibility is limited to "agents and leaders" and apparently does not extend to other members.

(3) *France*

By an Ordinance of 24th August, 1944, the then Provisional French Government prescribed rules for the trial of war criminals in pursuance of the laws and customs of war and of the French penal laws, civil and military. Article 2 of this Ordinance extended, by way of interpretation,⁽¹⁾ certain provisions of the French Penal Code to enemy or quisling criminal groups or organisations. The relevant passages of this Article read:

"By interpretation of the provisions of the Penal Code and of the Code of Military Justice:

.....
 "(2) Organisations or undertakings of systematic terrorism are regarded as representing an "association of malefactors" as provided in Article 265 and subsequent articles of the Penal Code."⁽²⁾

This includes organisations declared criminal by the Nuremberg Tribunal. Punishments to be inflicted are those from the Penal Code. The relevant provisions of the said Code are the following:

"Art 265. Any association formed, for whatever period of time and irrespective of the number of its members, or any understanding made with the aim of preparing or committing crimes against persons or property, constitutes a crime against public peace.

"Art 266. Any person affiliated with an association formed or taking part in an understanding made with the aim specified in the preceding Article, shall be punished with hard labour.

"Art 267. Any person who knowingly and willingly favours the authors of crimes provided in Art. 265 by furnishing instruments of the crimes, means of communication, accommodation, or place of meeting shall be punished with imprisonment."⁽³⁾

France being one of the signatories to the Nuremberg Charter, is entitled to bring to trial members of organisations declared criminal

(1) This method is known in continental law as "legislative interpretation" and often serves to amend or extend the existing law.

(2) The original text reads:

"Art. 2.—Par interprétation des dispositions du code pénal et du code de justice militaire, sont considérés comme:

.....
 (2)—L'Association de malfaiteurs prévue par les articles 265 et suivants du code pénal: les organisations ou entreprises de terrorisme systématique."

(3) Similar provisions exist in the Belgian Penal Code, as well as in the Czechoslovak Penal Code: The original French text reads:

"Art. 265. Toute association formée, quelle que soit sa durée, ou le nombre de ses membres, toute entente établie dans le but de préparer ou de commettre des crimes contre les personnes ou les propriétés, constituent un crime contre la paix publique.

"Art. 266. Sera puni de la peine de travaux forcés à temps, quiconque se sera affilié à une association formée ou aura participé à une entente établie dans le but spécifié à l'article précédent . . .

"Art. 267. Sera puni de la réclusion quiconque aura sciemment et volontairement favorisé les auteurs des crimes prévus à l'article 265, en leur fournissant des instruments de crime, moyens de correspondance, logement ou lieu de réunion . . ."

by the Nuremberg Tribunal, and the above provisions are those under which such trials are to be conducted. The effect of the provisions of the Penal Code is that, providing the affiliation is voluntary, the crime of membership is punishable in itself and it would appear that the punishment is automatic. However, as a signatory to the Nuremberg Charter and a participant to the Nuremberg Trial, both in the prosecution and the judgment, France is to be regarded as bound by the general ruling of the Nuremberg Tribunal and its verdict. When trying members of Nazi organisations French courts would, therefore, be expected to apply the Penal Code to the extent to which this is consistent with the Nuremberg Judgment.

(4) *Great Britain*

It has been seen that the prosecution in Nuremberg had referred to certain British laws with a view to demonstrating that the provisions of the Nuremberg Charter were not entirely a legal novelty.

It should be recorded that, apart and in addition to such laws, new provisions were inserted in contemporary British legislation. The British Regulations for the Trial of War Criminals, issued by Royal Warrant of 14th June, 1945, contain a provision similar to that in the Canadian war crimes laws. Regulation 8 says:

“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.”

An amendment of 4th August, 1945, added the following provision:

“In any such case all or any members of any such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the court.”⁽¹⁾

The effects are the same as those mentioned in respect of Canadian legislation, with the important difference that, insofar as organisations declared criminal by the Nuremberg Tribunal are concerned, their members are tried under the rules prescribed for the British zone in Germany. The above provisions are applicable to members of other “units or groups of men”, particularly in purely military formations. On the other hand, in view of the fact that Great Britain is bound by the Nuremberg Judgment as a signatory to the Charter, they are equally not applicable to members of the Reich Cabinet, General Staff and High Command.

(5) *Norway*

The Norwegian legislator did not find it necessary to operate by means of new legislation in respect of criminal organisations. The view was taken that existing provisions of common penal law were sufficient to secure the trial and punishment of members of such organisations.

A general provision is contained in Art. 330 of the Norwegian Penal Code (1902), which reads:⁽²⁾

(1) Amendment No. 1, *Royal Warrant*, A.O. 127-1945.

(2) The translation was provided by the Norwegian representative on the United Nations War Crimes Commission.

"He who founds or participates in an organisation which has by law been declared illegal or whose aim it is to commit or encourage punishable acts or whose members pledge themselves to unconditional obedience towards anybody, shall be fined or imprisoned for a period not exceeding 3 months. If the aim of the organisation is to encourage crimes,⁽¹⁾ imprisonment for a period not exceeding 6 months may be imposed."

The Norwegian Penal Code contains, in addition, provisions dealing with "conspiracy" to commit certain specific crimes, and prescribing punishment for persons taking part in such conspiracy. They include crimes against the State, against persons and property.

So, for instance, Art. 94, para. 1 of the Penal Code reads:

"He who enters into a conspiracy with one or more persons with the intention of committing any such crime which has been described in Art. 83, 84, 86 and 90 shall be punished with imprisonment for a period up to 10 years. In no case, however, shall the penalty exceed $\frac{2}{3}$ of the maximum punishment prescribed for the specific crime concerned."

Acts covered by Art. 83, 84, 86 and 90 concern crimes against the State and include conspiracies to commit the following crimes: subjection of the State or part of its territory to foreign domination; involving the State in war or hostilities; unlawful bearing of arms or assistance to the enemy; disclosure of State secrets to a foreign power.

Art. 159 punishes in similar terms conspiracy to commit crimes against property and public security by: arson; explosions; floods; railway accidents; pollution of drinking water; introduction of poison into objects of general use; causing introduction of dangerous contagious diseases. Special punishments are provided for conspiracy to commit larceny or robbery (Art. 259, 268, 269). The maximum penalty for some of these crimes is life imprisonment.

It thus appears that the Norwegian Penal Code makes punishable two types of the "crime of membership" in an organisation or conspiracy. One is general in the sense that it is not qualified by any specific crime. It entails only minor punishments (Art. 330). The other is specific in that it is qualified by particular crimes of a serious character, and consequently entails severer punishments. The general test for any such membership is voluntary affiliation with the group or conspiracy, as it is in the French Penal Code. Other tests intervene according to the type of organisation or conspiracy.

As it stands, the Norwegian Penal Code makes possible the punishment of any member of the organisations declared criminal by the Nuremberg Tribunal for the general crime of membership provided in Art. 330 and in addition, for that provided in the other Articles to the extent to which such members were parties to one of the specific conspiracies covered by the Penal Code. The striking feature is that, failing some such specific crime of membership, persons belonging to Nazi organisations are liable only to minor punishments, not exceeding 6 months imprisonment. No more severe penalty can be imposed on the basis of the criminality of the group in itself.

(1) The term "crimes" is used in a technical sense, meaning acts which, according to Norwegian law, are punishable with imprisonment exceeding three months.

(6) *Poland*

In a Decree issued by the Minister of Justice of 11th December, 1946, and consolidating previous Polish war crimes enactments, special provisions were included for making possible the trial and punishment of members of Nazi or Nazi-sponsored organisations whose activities were connected with Poland during the late war. These provisions introduced the "crime of membership" as a separate offence and, like the laws in Austria and Czechoslovakia, made the punishment of this offence automatic and obligatory upon the courts. Criminal organisations were defined in connection with the crimes covered by the Nuremberg Charter, and membership in any organisation, not only in those declared criminal by the Nuremberg Tribunal, was made a crime. Likewise, any member of such organisations was made liable to punishment, irrespective of classes or categories, and membership in certain organisations was declared to be a crime in itself and in every case.

The relevant provisions of the above Decree read:

" Article 4

"(1) Any person who was a member of a criminal organisation established or recognised 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.

(2) A criminal organisation in the meaning of Para. 1 is a group or organisation:

- (a) which has as its aims 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).

(3) Membership of the following organisations especially is considered criminal:

- (a) the German National Socialist Workers' Party (National Sozialistische Deutsche Arbeiter Partei—N.S.D.A.P.) 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.)".

It is thus apparent that, even though connected with the same types of crimes as those tried by the Nuremberg Tribunal and with some of the organisations which were declared criminal by it, the Polish legislator follows a legal line entirely different from that adopted in the Nuremberg Judgment. Membership in the Gestapo, S.S. and S.D. entails automatic punishment irrespective of rank. The only exception concerns members of the Nazi Party, which are indicated as comprising only those occupying "leading positions". In addition liability to punishment extends to members of any other organisation defined in Art. 4, para. 1, including those not declared criminal by the Nuremberg Tribunal.

It should be noted that Poland was not a signatory but only an adherent to the Nuremberg Charter, and that consequently, in strict law, she is not bound by the Nuremberg Judgment. Her legislation furnishes an illustration of cases where the said Judgment did not exercise its influence in this field.

(7) *United States*

It has already been seen that penal retribution for membership in certain groups or organisations formed part of the United States municipal law before the Nuremberg Trial. The United States Chief Prosecutor in Nuremberg quoted a law of 28th June, 1940, making membership in such bodies a crime, and he referred, in addition, to the concept of "conspiracy", which occupies an important place in the Anglo-American legal system.⁽¹⁾ It has also been seen that special rules were prescribed for the United States zone in Germany concerning the trial of members of organisations declared criminal by the Nuremberg Tribunal.

In addition to all these laws or rules it should be noted that provisions similar to those of the British and Canadian war crimes regulations were incorporated in certain local American military regulations. They were for instance embodied in the "Regulations governing the Trial of War Criminals" by United States military commissions in the "China Theater" of operations.⁽²⁾ Whereas rules for the zone in Germany were enacted only pursuant to the Allied Control Council Law No. 10 and to the Nuremberg Charter and Judgment, and were limited to the trial of members of organisations declared criminal by the Nuremberg Tribunal, the Chinese regulations form part of American military law in general. It is true that they are not embodied in the American *Rules of Land Warfare*, which comprise the laws and customs of war as understood and observed by the United States. But it is also true that they are the first of their kind in American war crimes legislation and can be regarded as a nucleus which may in time be developed in the main body of American military law.

Like other United States rules, the Chinese regulations reflect the concern of the American lawmakers to operate by means of rebuttable presumption of guilt. Art. 16, d. and e. provide:

d. If the accused is charged with an offence involving concerted criminal action upon the part of a military or naval unit, or any group or organisation, evidence which has been given previously at a trial of any other member of that unit, group or organisation, relative to that concerted offence, may be received as *prima facie* evidence that the accused likewise is guilty of that offence.

e. The findings and judgment of a commission in any trial of a unit, group or organisation 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 organisation. Upon proof of membership in such unit, group or organisation 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.

The first rule is that whenever a "concerted criminal action"—which is only one way of describing the same concept of collective criminality as that covered by the Nuremberg Charter—is established by one court in respect of a unit, group or organisation, courts trying other members of such bodies may regard the accused as *prima facie* guilty of the same concerted offence as that for which the first accused were tried. This is more or less the equivalent of the effect of a declaration of criminality

(1) *Proceedings*, Part. 8. p. 44-45.

(2) These Regulations were issued by the H.Q., United States Forces, China Theater, on 21st January, 1946, as document A.G. 000.5. JA.

under the Nuremberg Charter for bringing members to trial before other courts. The second rule is still more similar to the Charter in that it gives force to the judgment of one court before the other courts, in respect of the criminal nature of the body concerned. Where the "criminal nature, purpose or act" of a unit, group or organisation is established on the occasion of the trial of one member, it is to be "given full faith and credit in any subsequent trial" of other members. This is the equivalent of the binding effect of a declaration of criminality prescribed by the Nuremberg Charter. The third rule is the one with which we are already familiar when dealing with the American attitude. Members of a body whose "character, purpose or acts" are found to be criminal by one court, are presumed guilty until they can establish "any mitigating circumstances relating to their membership or participation" in such body. The regulations do not mention the tests of voluntary membership or of knowledge of the criminal nature of the body, but in the light of what has previously been seen in relation to American prosecution and laws, they are to be regarded as also relevant under the Chinese regulations.

D. TRIALS OF MEMBERS OF CRIMINAL GROUPS AND ORGANISATIONS

Before closing this study of the law regarding criminal groups or organisations, it is worth noting a number of illustrative trials which took place under the appropriate laws as a consequence of the Judgment delivered by the International Military Tribunal at Nuremberg. A great many trials of this kind have been held or are still in progress in Germany, and others took place before national courts of certain Allied countries. It would not serve a useful purpose, nor would it be possible at this stage, to attempt to make a complete survey of such trials.

Among the most important war crime trials in general, stand those which were and are still being held by United States Military Tribunals at Nuremberg. They are commonly known as "subsequent Nuremberg trials" or "subsequent Nuremberg proceedings". They deal exclusively with outstanding cases, either on account of the calibre of the accused who are next to the Major War Criminals tried by the International Military Tribunal, or on account of the types of crimes tried, or both. Their total number does not exceed 12 cases. At the time of writing about half have been completed, and the rest are still in progress. In most of these trials the accused were charged separately with the crime of membership in organisations declared criminal by the International Military Tribunal, in addition to other offences falling within the notion of crimes against peace, war crimes or crimes against humanity. The judgments pronounced included both convictions and acquittals on the charge of membership, and contain opinions of the subsequent tribunals which throw light on how the general ruling and verdicts of the International Military Tribunal were carried out.

All these trials were and are being held under the terms of the Allied Control Council Law No. 10. It is now proposed to review them very briefly, within the space allowed in this document.

(i) JUDGMENTS OF THE SUBSEQUENT MILITARY TRIBUNALS AT NUREMBERG

(1) *Trial of Karl Brandt et al. (Medical case)*

In the first trial held by United States Military Tribunals at Nuremberg, 23 German doctors and scientists were prosecuted for carrying out criminal medical experiments.⁽¹⁾ The trial opened on 9th December, 1946, and was commonly known as the "Medical Case". The judgment was delivered on 19th and 20th August, 1947. The chief defendant, Karl Brandt, was personal physician to Hitler, Gruppenfuhrer in the S.S. and Major General in the Waffen S.S., Reich Commissioner for Health and Sanitation, and member of the Reich Research Council. He was charged with the other defendants for medical experiments amounting to war crimes and crimes against humanity as defined in the Allied Control Council Law No. 10.

All experiments were conducted in concentration camps (Dachau, Sachsenhausen, Natzweiler, Ravensbruck, Buchenwald, etc.), and caused inhumane suffering, torture or death of many inmates. They consisted in high altitude experiments to investigate the limits of human endurance and existence at extremely high altitudes (up to 68,000 feet); freezing experiments to investigate means of treating persons severely chilled or frozen; malaria experiments to investigate immunisation and treatment of malaria; lost (mustard) gas experiments to investigate treatment caused by that gas; sulfanilamide experiments to investigate the effectiveness of the drug; bone, muscle and nerve regeneration and bone transplantation experiments; seawater experiments to study methods of making seawater drinkable; epidemic jaundice experiments to establish the cause of and discover inoculations against that disease; sterilization experiments to develop a method best suited for sterilising millions of people; spotted fever experiments to investigate the effectiveness of vaccines; experiments with poison to investigate the effect of various poisons. In addition to this, several defendants were charged with activities involving murder, torture and ill-treatment not connected with medical experiments. In all cases inmates of concentration camps were used as "guinea-pigs", and were as a rule healthy subjects.

Karl Brandt and nine other accused were indicted for having committed such criminal acts as members of the S.S. and were, accordingly, also prosecuted as "guilty of membership in an organisation declared to be criminal by the International Military Tribunal" at Nuremberg.⁽²⁾

When deciding upon this particular charge, the United States Military Tribunal referred to the general ruling of the International Military Tribunal and applied in each case the tests of individual guilt defined by the latter. On the face of the evidence submitted, Karl Brandt and eight other defendants were found guilty of membership on the ground that they had been in the S.S. until the end of the war and that, as such, they were actually and personally "implicated in the commission of war crimes and

(1) Case 1, tried by United States Military Tribunal No. 1.

(2) *Official Transcripts* by the American Military Tribunal in the matter of the United States of America against Karl Brandt et al., p. 11372.

crimes against humanity".⁽¹⁾ One defendant was found guilty of having "remained in the S.S. voluntarily throughout the war, with actual knowledge of the fact that that organisation was being used for the commission of acts declared criminal by Control Council Law No. 10".⁽²⁾

(2) *Trial of Joseph Altstoetter et al. (Justice Case)*

In one of the most outstanding subsequent trials at Nuremberg, 16 German high officials of the Reich Ministry of Justice, judges and prosecutors of Nazi courts were prosecuted for the commission of criminal offences by means of legislative or judicial acts.⁽³⁾ It should be emphasised that it is the first time in recorded history that individuals were tried for such criminal offences. The presumed integrity and high standards of members of the legislative and judicial machinery had to be scrutinised and tested under general principles of penal law and justice in face of Nazi practices through the legislative and judicial machinery.

The trial opened on 17th February, 1947, and was commonly designated as the "Justice Case". The judgment was delivered on 3rd and 4th December, 1947.

The principal defendant Joseph Altstoetter, was Chief (Ministerialdirektor) of the Civil law and Procedure Division of the Reich Ministry of Justice, and Oberfuhrer in the S.S. Together with the other defendants he was charged with misusing legislative or judicial power in such a manner as actually to commit crimes against persons subjected to Nazi laws and/or courts of justice. The evidence submitted was to the effect that Nazi legal machinery was used as one of the means "for the terroristic functions in support of the Nazi regime".⁽⁴⁾ Death sentence and other severe penalties were prescribed for acts which either did not represent criminal offences under standards of modern justice or did in no case warrant such heavy punishments. Sentences were pronounced by Nazi courts in pursuance of such criminal laws in a very large number of cases. The accused were indicted for being implicated in such acts, which, under the terms of the Control Council Law No. 10, amounted to war crimes or crimes against humanity.

Seven defendants, including Altstoetter, were accused of having committed such crimes as members of organisations declared criminal by the International Military Tribunal. The organisations involved were the S.S., S.D. and Leadership Corps of the Nazi Party. Some of the defendants were members of two organisations simultaneously. They were accordingly charged separately with the crime of membership in such organisations.⁽⁵⁾ As in the previous case the Tribunal applied the tests of criminality defined by the International Military Tribunal⁽⁶⁾ and found the accused individuals guilty of membership on different grounds. Altstoetter was found guilty as a member of the S.S. falling within the groups declared

(1) *Op. cit.*, p. 11396; 11430-11431; 11439; 11455-11456; 11487-11509, 11520-11521; 11530-11531.

(2) *Op. cit.*, 11472.

(3) Case No. 3, tried by United States Military Tribunal No. 3.

(4) *Official Transcripts* of the American Military Tribunal III in the matter of the United States of America against Josef Altstoetter et al., defendants, p. 10654.

(5) *Indictment of the above trial*, p. 18.

(6) *Official Transcripts*, Announcement, p. 10713.

criminal by the International Military Tribunal, on the grounds that he had knowledge of the criminal purposes and acts of the S.S. and remained voluntarily in the organisation.⁽¹⁾ The test of knowledge was likewise positively established against two other defendants. In one case the Tribunal was satisfied by the evidence that the accused actually knew of the execution of political prisoners and that he personally took part in the misdeeds. It also arrived at such conclusion on the basis of circumstantial evidence deriving from the accused's official position and duties. "No man who had his intimate contacts with the Reich Security Main Office, the S.S., the S.D., and the Gestapo could possibly have been in ignorance of the general character of those organisations".⁽²⁾ In the second case the evidence regarding the *mens rea* of the accused was entirely of a circumstantial nature. The crimes, said the Tribunal, "were of such wide scope and so intimately connected with the activities of the Gauleitung (the accused's organisation) that it would be impossible for a man of the defendant's intelligence not to have known of the commission of these crimes, at least in part if not entirely".⁽³⁾ It is interesting to note that the chief defendant, Altstoetter, was found guilty only on the count of membership and freed from other charges. He was sentenced to 5 years imprisonment.

Two defendants were acquitted. In one case the defendant was charged as a member of the Leadership Corps of the Nazi Party, and the Tribunal established that his group did not in fact belong to the Leadership Corps, nor to any other organisation declared criminal.⁽⁴⁾ In the second case the accused was charged as a member of the Leadership Corps Staff and a "sponsoring" member of the S.S. The Tribunal found that in none of these cases did the accused belong to the classes of members included in the declarations made by the International Military Tribunal.⁽⁵⁾

(3) *Trial of Oswald Pohl et al*

One of the most interesting trials in this field is the so-called "Pohl Case", which opened on 10th March and closed on 3rd November, 1947.⁽⁶⁾ The Tribunal dealt with 18 defendants, all of whom but one were members of the S.S. They were top ranking officials in the "S.S. Economic and Administrative Main Office", known as "W.V.H.A." (Wirtschafts-und Verwaltungshauptamt), which was one of the twelve main departments of the S.S. and to which was added the main office of the Inspector of Concentration Camps. The principal accused, Pohl, was Chief of the W.V.H.A. and, as such, the administrative head of the entire S.S. organisation. Himmler was his only superior. The other accused were heads of the various branches of the W.V.H.A.

The S.S. Economic and Administrative Main Office was in charge of running concentration camps and a large number of industrial, manufacturing and service enterprises in Germany and occupied countries. It was responsible for all financial matters of the S.S., for the supply of food,

(1) Op. cit., p. 10927-10931.

(2) Op. cit., p. 10880-10881.

(3) Op. cit., p. 10922-10923.

(4) Op. cit., p. 10884.

(5) Op. cit., p. 10904-10906.

(6) Case 4, tried by United States Military Tribunal No. 2.

clothing, housing, sanitation and medical care of inmates and S.S. personnel of concentration camps; for the construction and maintenance of houses, buildings and structures of the S.S., the German police and of the concentration and prisoners of war camps; and for the order, discipline and regulation of the lives of the concentration camps inmates. In addition, it was charged with the supply of slave labour of the concentration camp inmates to public and private employers throughout Germany and the occupied countries, as well as to enterprises under its own management.

On account of such relationship with concentration camps and slave labour, all the accused were charged with taking part in the commission of "atrocities and offences against persons and property, including plunder of public and private property, murder, extermination, enslavement, deportation, unlawful imprisonment, torture, persecutions on political, racial and religious grounds, ill-treatment of, and other inhumane and unlawful acts against thousands of persons, including German civilians, nationals of other countries, and prisoners of war."⁽¹⁾ The accused were thus tried as leading instruments of the criminal policy conducted by the heads of the Nazi Party and State against the millions who were ill-treated or perished in concentration camps or as slave labour.

In addition to the above offences, all the accused except one were charged under a separate count for the crime of membership in an organisation declared criminal by the International Military Tribunal, and were all indicted as falling within the categories covered by the Tribunal's declaration.

When summing up the various counts of the indictment, including that of membership, the United States Military Tribunal made a general ruling regarding the evidence and discarded entirely the principle of the presumption of guilt in the following terms:

"Under the American concept of liberty, and under the Anglo-Saxon system of jurisprudence, every defendant in a criminal case is presumed to be innocent until the prosecution by credible and competent proof has shown his guilt to the exclusion of every reasonable doubt. This presumption of innocence follows him throughout the trial until such degree of proof has been adduced. Beyond a reasonable doubt, does not mean beyond a vain, imaginary or fanciful doubt, but means that the defendant's guilt must be fully proved to a moral certainty, before he is condemned."⁽²⁾

It will be seen that the Tribunal applied this ruling to all individual cases of membership and lay the burden of proof concerning tests of personal guilt on the prosecution. This illustrates the fact previously mentioned that the International Military Tribunal did not decide the question of the burden of proof, and thus made possible the elaboration of a differing jurisprudence in this respect. The striking feature in this trial is that the above ruling was applied by an American court, notwithstanding the attitude of the United States Chief Prosecutor at the main Nuremberg Trial and the rules issued by the American authorities for other courts, which are all founded on the principle that a declaration of criminality reverses the onus of proof and frees the prosecution from submitting

(1) *Official Transcript* of the American Military Tribunal in the matter of the United States of America, against Oswald Pohl et al., p. 8057.

(2) *Op. cit.*, p. 8059.

evidence in respect of the personal guilt of the members. In view of the fact that no rules to this effect were issued with particular regard to the United States Military Tribunal at Nuremberg, and that the International Military Tribunal had left the field clear, the above ruling was within the powers of the United States Tribunal and the legal basis of its jurisprudence cannot be challenged.

The ruling was applied with particular clearness in respect of two defendants whom the Tribunal acquitted from all charges.

In one case the accused, Rudolf Scheide, was Chief of a department of the W.V.H.A. as technical expert in the field of motor transport, and was in charge of all the transport service of the W.V.H.A. The prosecution contended that, in connection with his office and the large field of tasks carried out by him with the various branches of the W.V.H.A. the accused "gained knowledge of how the concentration camps were operated, how the prisoners were treated, who they were, and what happened to them". It also contended that he "knew that the concentration camps were engaged in the slave labour programme, and that he furnished transportation in this programme with knowledge of its use". And finally, that he "knew of the mass extermination programme carried out by the concentration camps" and provided the department concerned in this programme "with transportation, spare parts, tyres, gasoline, and other necessary commodities for carrying out this programme".⁽¹⁾ The accused denied knowledge of all these crimes and the Tribunal came to the following conclusion:

"After weighing all the evidence in the case, and bearing in mind the presumption of innocence of the defendant, and the burden of proof on the part of the prosecution, the Tribunal must agree with the contentions of the defendant."⁽²⁾

The Tribunal then dismissed all the tests of individual guilt in the following terms:

"The defendant admits membership in the S.S., an organisation declared criminal by the Judgment of the International Military Tribunal, but the prosecution has offered no evidence that the defendant had knowledge of the criminal activities of the S.S., or that he remained in the said organisation after September, 1939, with such knowledge or that he engaged in criminal activities while a member of such organisation."⁽³⁾

According to the ruling of the International Military Tribunal, it will be remembered that proof in respect of the last test (personal commission of crimes) would appear always to lie on the prosecution, whereas nothing stands in the way of deciding upon the test of knowledge on the ground of a reversal of the burden of proof as advocated by the United States Chief Prosecutor and as followed up in a number of United States rules.

In the second case the accused, Leo Volk, was head of a legal department of the W.V.H.A. Like in the preceding case the prosecution contended that he had knowledge of the criminal purposes and acts of the W.V.H.A. on account of his office and duties. The accused's defence was that he

(1) Op. cit., pp. 8130-8131.

(2) Op. cit., p. 8131. Italics introduced.

(3) Op. cit., p. 8132. Italics introduced.

had no such knowledge, but merely prepared notarial documents, carried on law suits and generally gave legal advice. The Tribunal was satisfied that the accused was a "vital figure" in his department and refuted the defence thesis that, in order to convict him, proof should be submitted that, if he knew of the criminal purposes or acts of his organisation, he must have had the power to prevent crimes from being committed. The Tribunal declared:

"It is enough if the accused took a *consenting part* in the commission of a crime against humanity. If he was part of an organisation actively engaged in crimes against humanity, was aware of those crimes and yet voluntarily remained a part of the organisation, lending his own professional efforts to the continuance and furtherance of those crimes, he is responsible under the law."

However, continued the Tribunal, the defence contends that the accused "was not aware of any crimes and *it is this which the prosecution must establish* before it can ask for a conviction",⁽¹⁾ meaning that the accused had knowledge of the crimes.

The Tribunal found that no such evidence had been submitted, and that the accused did not voluntarily join the organisation but was drafted from a private firm he personally did not want to leave for the W.V.H.A. It also established that, in the W.V.H.A., he had a special status in that he was employed under special contract. In view of these facts the Tribunal decided that the accused's guilt for membership had not been established "beyond reasonable doubt" and while convicting him on other counts, it acquitted him from this particular charge.⁽²⁾

Two more defendants were acquitted from the charge of membership. One of them was head of the Office of Audits in the W.V.H.A. from 1942 until the end of the war. Here again the Tribunal established lack of evidence on the part of the prosecution regarding the relevant tests and concluded in the following terms:

"Perhaps in the case of a person who had power or authority to either start or stop a criminal act, knowledge of the fact coupled with silence could be interpreted as consent. But Vogt was not such a person. His office in W.V.H.A. carried no such authority, even by the most strained implication. He did not furnish men, money, materials or victims for the concentration camps. He had no part in determining what the inmates should eat or wear, or how hard they *did* work or how they *were* treated. The most that can be said is that he knew that there were concentration camps and that there were inmates. His work cannot be considered any more criminal than that of the bookkeeper who made up the reports which he audited, the typist who transcribed the audit report or the mail clerk who forwarded the audit to the Supreme Auditing Court."⁽³⁾

As a consequence the accused was acquitted on all counts.⁽⁴⁾ In the second case the accused was acquitted for not belonging to any of the classes or categories of S.S. members included in the declaration of the International Military Tribunal.⁽⁵⁾

(1) Op. cit., pp. 8174-8175. Italics in the last quotation introduced.

(2) Op. cit., p. 8179.

(3) Op. cit., p. 8111.

(4) Op. cit., p. 8113.

(5) Op. cit., pp. 8191-8195.

In other cases the Tribunal applied extensively circumstantial evidence to admit proof of guilty knowledge as charged by the prosecution.

Defendant August Frank was Chief Supply Officer of the Waffen-S.S. and Death Head Units under the defendant Pohl, and became Pohl's Chief Deputy of the W.V.H.A. In view of his position and the field of his competence and duties the Tribunal came to the following conclusions:

"... anyone who worked, as Frank did, for eight years in the higher councils of that agency cannot successfully claim that he was separated from its political activities and purposes."⁽¹⁾

From that the Tribunal further concluded that he "could not have been ignorant" or that he "must have known" of the purposes as well as of a series of criminal acts described by the Tribunal.⁽²⁾ He was found guilty of "participating and taking a consenting part" in the "slave labour programme . . . and in the looting of property of Jewish civilians for the eastern occupied territories". In this connection he was also convicted for the crime of membership.⁽³⁾

Another defendant, Erwin Tschentscher, was chief of a department of W.V.H.A. dealing with supplies of food for the Waffen-S.S. and the police in Germany. He contended, in defence, that his only link with concentration camps was to furnish food for the guards, and declined any knowledge of concentration camp crimes and slave labour practices. On the face of his position and duties, as well as of the evidence that he paid visits to several concentration camps, the Tribunal expressed its findings in the following terms :

"The Tribunal concludes that the defendant Tschentscher was not a mere employee of the W.V.H.A., but held a responsible and authoritative position in this organisation. He was Chief of Amt-B-I, and in this position had large tasks in the procurement and allocation of food. Conceding that he was not directly responsible for furnishing food to the inmates of concentration camps, he was responsible for furnishing the food to those charged with guarding these unfortunate people.

"The Tribunal is fully convinced that he knew of the desperate condition of the inmates, under what conditions they were forced to work, the insufficiency of their food and clothing, the malnutrition and exhaustion that ensued, and that thousands of deaths resulted from such treatment. His many visits to the various concentration camps gave him a full insight into these matters.

"The Tribunal finds without hesitation that Tschentscher was thoroughly familiar with the slave labor program in the concentration camps, and took an important part in promoting and administering it."⁽⁴⁾

For these reasons the accused was found guilty both of actual participation in war crimes and crimes against humanity and of the crime of membership.⁽⁵⁾

In all other cases the Tribunal had either clear evidence of the actual participation of the accused in specific criminal acts, such as in the case

(1) Op. cit., p. 8101.
 (2) Op. cit., pp. 8100-8103.
 (3) Op. cit., p. 8104.
 (4) Op. cit., p. 8128.
 (5) Op. cit., p. 8129.

of Pohl himself, or else sufficient evidence to draw conclusions as to their guilty knowledge, and on this basis pronounced sentences of guilt for the crime of membership.⁽¹⁾

(4) *Trial of Friedrich Flick et al.*

The last completed subsequent trial at Nuremberg which included the crime of membership, was that of Friedrich Flick and five other defendants. It opened on 20th April and closed on 22nd December, 1947.⁽²⁾ It was one of several trials commonly designated as "industrial cases", for the defendants were not officials of the Nazi State, but private citizens engaged as business men in German heavy industry. Flick owned a steel corporation controlling or affiliated with iron and coal mining companies. The other defendants were his assistants and associates. They were charged, *inter alia*, with taking part in, and being members of, groups or organisations connected: *Count I*: with "enslavement and deportation to slave labour" of concentration camp inmates and other civilians, as well as with the "use of prisoners of war" in work prohibited by international law (armament production, etc.), *Count II*: with "plunder of public and private property, spoliation, and other offences against property" in occupied territories; *Count III*: with "persecutions on racial, religious and political grounds"; *Count IV*: with "murders, brutalities, cruelties, tortures, atrocities and other inhumane acts committed principally by the S.S."

Although in the majority of counts the defendants were described as members of organisations "connected" with criminal activities, only one accused, Steinbrinck, was a member of an organisation declared criminal by the International Military Tribunal (the S.S.); he was consequently the only defendant specifically indicted for the crime of membership. In addition, under Count IV, both he and the chief defendant, Flick, were accused of offences closely connected with membership of the S.S. They were charged with having contributed, as members of a private group called the "Keppler Circle" or "Friends of Himmler", large sums to the financing of the S.S. "with knowledge of its criminal activities", and to have thereby been accomplices in war crimes and crimes against humanity perpetrated by the S.S. It is important to note that the charge was not, and could not be, that they were guilty of membership in the "Keppler Circle", for this circle was not included in the organisations declared criminal by the International Military Tribunal. Neither was "knowledge" of the S.S. criminal activities mentioned in this instance as a test for the crime of membership, but only as a basis for charging the two defendants as accomplices or accessories to the crimes committed by the S.S. This part of the indictment proved, however, to be relevant for deciding the case of Steinbrinck, as it contained facts furnishing evidence regarding his guilty knowledge as a member of the S.S.

As in the "Pohl Case", the United States Military Tribunal which tried Flick, Steinbrinck and others rejected the thesis of presumption of guilt and took the view that the burden of proof concerning the tests of crimin-

(1) *Op. cit.*, pp. 8080-8097; 8104-8109; 8113-8121; 8133-8173; 8179-8191.

(2) Case 5, tried by United States Military Tribunal No. 4.

ality for membership lay on the prosecution. So, in the case of Steinbrinck it declared the following:

"Relying upon the International Military Tribunal's findings . . . the prosecution took the position that it devolved upon Steinbrinck to show that he remained a member without knowledge of such criminal activities. As we have stated in the beginning the burden was all the time upon the prosecution."⁽¹⁾

The Tribunal decided the case on the basis of this rule.

In assessing the tests relevant for determining Steinbrinck's individual guilt, the Tribunal declared that there was no evidence showing that he was personally implicated in the commission of crimes perpetrated by the S.S. and that no contention had been made to the effect that he was drafted on a compulsory basis. It therefore determined that his personal guilt was to be established solely on the basis of the test of knowledge of the criminal nature of the S.S.

As mentioned above, the Tribunal's findings on this test were made on the basis of the accused's activities as member of the "Keppler Circle". This circle was composed of about 30-40 bankers, industrialists and S.S. leaders, including the S.S. Reichsführer Himmler himself. Steinbrinck was a member from the beginning, which dated as far back as 1932. The circle was originally formed by Hitler's economic adviser Keppler, who gave it his name, with a view to inducing industrialists and other top business men to support the Nazi programme and regime. The circle had regular informal meetings and its members made regular donations upon Himmler's request, amounting to a total of 1 million Reichsmarks annually. Himmler's explanation for such requests was that he needed funds for "his cultural hobbies and for emergencies for which he had no appropriations". Steinbrinck contributed very large sums of money every year. The Tribunal was satisfied that the meetings of the group did not have "the sinister purposes ascribed to them by the prosecution", and found "nothing criminal or immoral in the defendant's attendance at these meetings". It was also satisfied that, in the beginning and particularly before the war, "the criminal character of the S.S. was not generally known". It came, however, to the conclusion that "later" it "must have been known"; "that during the war and particularly after the beginning of the Russian campaign" there was not "much cultural activity in Germany"; and that consequently members of the group could not "reasonably believe" Himmler was spending their money for other purposes than to maintain the S.S. The Tribunal found "no doubt" that "some of this money" went to the S.S., and declared "immaterial whether it was spent on salaries or for lethal gas". From this it concluded that Steinbrinck was guilty of the crime of membership.⁽²⁾ The Tribunal's findings in this respect were, thus, entirely based on circum-

(1) *Official Transcript* of the American Military Tribunal IV in the Matter of the U.S.A. against Friedrich Flick, et al., pp. 11015-11016. The reference made to the statement delivered "in the beginning" of the judgment, concerns a general statement, made without particular regard to the crime of membership, whereby the Tribunal stressed, among the rules of fair trial, that of the presumption of innocence until proof to the contrary is established by the prosecution. See op. cit., p. 10975.

(2) For details on Tribunal's findings see op. cit., pp. 11014-11022.

stantial evidence and were, from a practical point of view, founded on premises equivalent to that of a presumption of guilt.

The trial ended in the conviction of Flick, Steinbrinck and one more defendant, whereas the other three were acquitted. In passing sentence upon Flick and Steinbrinck the Tribunal admitted circumstances in mitigation of the punishments, and pronounced sentences not exceeding 7 years imprisonment.

(ii) TRIALS IN PROGRESS AT THE SUBSEQUENT PROCEEDINGS IN NUREMBERG

As has been pointed out, several more trials are, at the time of writing, still in progress before the United States Military Tribunals at Nuremberg. One concerning members of a group involved in crimes committed against children and adults on racial grounds, has just ended but the text of the judgment has not been made available for inclusion in this account.

In four of these trials defendants were charged with membership of organisations declared criminal by the International Military Tribunal. One is the "racial" case just mentioned, otherwise designated as "Case 8", involving Ulrich Greifelt and 13 other accused. All defendants but one were members of the S.S. and were prosecuted for the crime of membership in addition to other charges. Another is the trial of Otto Ohlendorf and 23 other defendants, otherwise known as the "Einsatzgruppen Case" or "Case 9". All defendants were members of the S.S. falling within the categories defined by the International Military Tribunal. As such they filled the ranks of special units called "Einsatzgruppen", whose chief tasks were to carry out exterminations in occupied territories, and were all charged with the crime of membership. Yet another trial is that of the board of directors and other leading officials of the world-wide German chemical concern "I.G. Farbenindustrie", commonly designated as the "I.G. Farben Case" or "Case 6". It comprises 24 defendants, three of whom were charged with membership in the S.S. The last trial is that of 21 leading officials of the German Foreign Office (Case 11), with Baron von Weizsacker at the head of the list. 14 defendants were charged with membership in the S.S., four of whom were in addition prosecuted as members of the Leadership Corps of the Nazi Party and one as member of the S.D.

The judgments already delivered indicate that important verdicts can be expected in the above trials as well.

(iii) CONCLUSIONS

It would be premature to draw definite and detailed conclusions from the above trials at this stage. One issue is, however, clear and should be emphasised. The findings of the courts, as well as the various laws and regulations issued for the trial of members of criminal organisations, make it abundantly clear that the rules of evidence permit two different and as a matter of fact opposite ways of determining members' individual or personal guilt. As has often been pointed out, the International Military Tribunal refrained from solving the question of whether this should be done on the basis of presumption of guilt or of presumption

of innocence, and accordingly whether the onus of proof should lie on the prosecution or on the defence. Local American rules, such as those issued for Germany and China, answer the question in favour of presumption of guilt, whereas proceedings of the United States Military Tribunals at Nuremberg answer it in favour of the traditional rule of presumption of innocence.

This question has not failed to attract attention even before the subsequent proceedings started. A few weeks after the Judgment of the International Military Tribunal was delivered, the French Government, realising that the Judgment did not secure uniformity of jurisprudence in this respect, made attempts at achieving such an end by diplomatic action. It proposed to several United Nations, including the United States of America, Great Britain and the U.S.S.R., the convening of a conference with a view to arriving at an agreement regarding a uniform procedure to be devised upon the Nuremberg Judgment's general ruling and recommendations, particularly concerning the rules of evidence. It approached the War Crimes Commission on the same subject and submitted memoranda defining the issues which ought to be solved.⁽¹⁾ Special French representatives held meetings with the Commission and discussed the problem with its members.⁽²⁾ These attempts did not bear fruit. The conference was not convened, and the Commission did not feel that it could do much in the matter in view of its limited terms of reference. As a consequence the French proposals were withdrawn.

(1) A.30, 10th December, 1946, *Questions which the French representatives wish to discuss with the United Nations War Crimes Commission in London*. Also A.31, 13th December, 1946; and C.242, 22nd January, 1947, *French proposals regarding the prosecution of members of Criminal Organisations and of concentration camp personnel*.

(2) Meetings of 11th December, 1946, (M.119) and 29th January, 1947, (M.122).

CHAPTER XII

MACHINERY FOR THE TRACING AND APPREHENSION OF WAR CRIMINALS

INTRODUCTORY NOTES

FROM its establishment until nearly the very end of its existence, the United Nations War Crimes Commission attached great importance to devising practical ways and means for use by the Allied Governments in the field of identifying, tracing and apprehending the individuals guilty of war crimes. It examined this question periodically, and submitted to member Governments a series of proposals and recommendations which would best fit the requirements, closely following the development of actual measures undertaken by the Governments to secure the arrest of war criminals.

On many occasions the Commission's recommendations directly influenced governmental action, and on many others they served as a general guide to the Allied authorities as to what action should be undertaken at the appropriate time. These activities are recorded in the first part of this Chapter.

The second part contains a comprehensive survey of the actual machinery set up by the Allied authorities. This concerns the machinery established by the military authorities, who have from the outset been entrusted by the Governments with the task of discovering and arresting war criminals, as being the authorities best placed to carry out this task. It will be seen that this machinery gradually became a very active and important part of the general Allied military organisation, and that it grew into a vast system all over the world. It was the first of its kind to be created in history, and for this reason it had to be put on its feet without any previous experience to guide it. Considering the difficulties, one can only pay tribute to the military personnel for the efficiency which rendered possible the just punishment of thousands of war criminals.

A. PROPOSALS AND RECOMMENDATIONS OF THE COMMISSION

(i) TRACING AND APPREHENSION OF PERSONS IN AUTHORITY IN OCCUPIED TERRITORIES

On 25th April, 1944, the Belgian representative and Chairman of the Committee on Facts and Evidence, submitted a proposal⁽¹⁾ for improving the methods of collecting evidence regarding war crimes, in view of the difficulties existing at that time in obtaining particulars of crimes from the territories where they were being perpetrated. At the same time stress was laid on the importance of devising means for identifying the individuals responsible. Since it was "impossible that major crimes were perpetrated

(1) C.14. 25.4.44. *Proposal by the Chairman of Committee I regarding the future programme of the Committee.*

without the knowledge and consent of responsible persons who were in charge or in command" in the occupied countries, it was suggested that all individuals, civil or military, who were susceptible of carrying some responsibility in the commission of crimes be placed in custody immediately after the armistice. These should include officers in command of larger units, from army groups down to regiments. After their arrest, particulars regarding their identity should be made known to the populations concerned, which would in turn make possible the collection of facts to provide or dismiss legal grounds for their trial.

Discussions on this recommendation were held in the Enforcement Committee. In its first draft⁽¹⁾ the Committee attempted to draw up a specific list of individuals who should be detained and suggested the apprehension of all members of the Gestapo, all commanding and senior officers of the German army and of German military organisations, above the rank of major, and of all civil servants who had held a position in the occupied territories at a salary above a given amount. It also recommended that the various Allied authorities should compile and have ready lists of all enemy civil and military persons in authority in each occupied country, since 1939, such as Gauleiters, Governors, Chiefs of the S.S. and Gestapo, with particulars regarding their identity. This latter recommendation was made following a resolution to this effect, adopted by the Commission on 4th April, 1944,⁽²⁾ on a motion submitted by the French representative. In an alternative draft⁽³⁾ the Belgian representative, recommended that the civil servants to be included should be those who had an annual salary of above 4,000 RM, or who were assimilated to a rank corresponding at least to that of a major.

After debate in the Commission, a final draft was discussed and on its basis formal recommendations were adopted for transmission to member Governments on 16th May, 1944.⁽⁴⁾ In these recommendations it was first recognised that the mere preparation of lists of persons presumably guilty of war crimes could not suffice for the purpose of bringing all war criminals to book. This was especially recognised with reference to the fact that at that time Governments whose territories were occupied lacked the machinery, personnel and the necessary information. The following two measures to ensure the apprehension of war criminals were, therefore, recommended:

- (a) That "all persons, who have held a responsible position in the occupied countries or in the army or military or political organisations should be available, immediately after the armistice, to be examined upon any crimes which may have been committed in their sector or command".
- (b) That, for this purpose, the Allied Governments "should compile and communicate to the Commission lists of all enemy civil and military

(1) C.17. 6.5.44. *Measures proposed by M. de Baer to ensure capture of war criminals—draft recommendations to the Governments prepared by Committee II.*

(2) See M.14, 4.4.44., p. 3.

(3) C.17(1). 9.5.44. *Measures proposed by M. de Baer to ensure capture of war criminals—draft recommendations to the Governments proposed by M. de Baer in place of those contained in Document C.17.*

(4) C.17(2). 12.5.44. *Second draft prepared by Committee II; also C.21, 18.5.44. Measures to ensure capture of war criminals—recommendations to the Governments adopted by the UNWCC on 16th May, 1944.*

persons in authority in each occupied district, including Gauleiters, Governors, chiefs of the S.S., chiefs of the Gestapo, etc., with as complete particulars as possible regarding these persons' identity and some of the more important crimes committed in the provinces, districts, towns or camps where they are or were in authority".

- (c) That it was "particularly necessary that on the conclusion of the armistice the military authorities should put and keep under control all persons whom they find to have been members of the S.S. or the the Gestapo".

Finally, it was recommended that analogous measures be taken as regards "other Axis Powers and satellites".

(ii) PROPOSALS TO ESTABLISH AGENCIES IN EX-ENEMY COUNTRIES

During the period from May, 1944, to June, 1945, various suggestions regarding the establishment of special war crimes agencies in ex-enemy countries were considered by the Commission. All the proposals envisaged, as one of the major tasks of such agencies, the tracing and apprehension of war criminals who would be located in ex-enemy countries, after these countries had been occupied by the Allied Forces.

(1) *Proposal for an Agency in Germany*

When submitting his proposals mentioned above concerning the apprehension of persons in authority,⁽¹⁾ the Chairman of the Committee on Facts and Evidence suggested the creation of a United Nations body in Germany, whose tasks would include the finding of war criminals located in Germany after the allied invasion, and their subsequent arrest and detention in preventive custody. The proposed body should carry out interrogations of the arrested persons, possibly making a summary investigation of the statements thus collected, with a view to turning them over to the authorities of the country where their trial was to be held. Stress was laid on the importance of establishing such a body in order to prevent a state of chaos following the collapse of Germany, thus assisting most criminals to escape.

After these recommendations had been examined by the Committee on Enforcement, the Belgian Office submitted a further proposal.⁽²⁾ This recommended the creation of an international or United Nations agency to deal with the tracing and apprehension of war criminals, not only in Germany but in any of the ex-enemy countries. It was pointed out that in the absence of such an agency the whole burden of tracing and apprehension would fall on the military occupation authorities. The only possibility of relieving them would be to utilise the judicial machinery of the enemy countries themselves, a course which was most undesirable.

The agency was to be vested with the following powers :—

- (a) to locate the whereabouts and to find within enemy territory the accused whose names and other particulars would be provided by the U.N.W.C.C. or National Offices;

(1) See C.14 of 25.4.44.

(2) Doc. II/14. 17.5.44. *Proposals made by M. Dumon on the lines suggested by M. de Baer in his report of 9th May (Doc. II/13) and concerning the institution of a War Crimes Office in enemy countries after the Armistice.*

- (b) to hear and examine any witnesses or experts;
- (c) to ascertain the identity of all persons guilty of war crimes;
- (d) to issue search warrants;
- (e) to place and keep in custody the accused persons;
- (f) to make, on the spot, such surveys as could not conveniently be carried out in other countries;
- (g) to ensure the conveyance of the accused and witnesses to their place of destination;
- (h) eventually to ask, at the special request of an allied nation, for the extradition of war criminals from neutral countries;
- (i) to collect information which might lead to the discovery of other crimes or of further evidence.

It was suggested that the agency should be composed of twenty members, vested with functions similar to those of investigating judges (*juges d'instruction*) and assisted by an appropriate number of clerks, C.I.D. officers or constables, having at their disposal a modern laboratory of criminology and scientific police, as well as the assistance, for enforcement, of the Allied military authorities. The various interested Allied Governments could provide the agency with the assistance of their judicial machinery and police, while a term to be inserted in the Armistice should bind the enemy Governments to assist its operations.

The agency should be created by means of an international convention, which could, if necessary, be incorporated into the national legislation of the Allied Governments. It might, eventually, be the nucleus of a post-war international institution, whose role would be to investigate offences against international criminal law.

In the course of discussions in the Enforcement Committee, it was agreed in principle that the establishment of such a body or agency should be recommended to the member Governments, but it was pointed out that it could not be established without the consent of the military authorities. As to its actual status, there were differences of opinion, some maintaining that it should be an independent, judicial body, cooperating with the Commission but having a separate status; others considering that it should be an organ of the Commission, attached to or forming part of Army Headquarters, and operating through the occupying forces. In regard to its actual constitution, some preferred to see it established by an order of the Commander-in-Chief or by a clause in the armistice terms, without having recourse to a special treaty.

In the draft report submitted to the Commission on 30th May, 1944,⁽¹⁾ it was recommended that there should be an agency "attached to or established as part of the Commander-in-Chief's Headquarters in each enemy territory", and that it should be established by "an Order of the Commander-in-Chief or a clause in the armistice terms." It was also recommended that such an agency should be an organ of the War Crimes Commission, "attached to or forming part of Army Headquarters and operating as part of and through the occupying forces". Its functions

(1) C.24. 30.5.44. *Establishment in enemy territory of War Crimes Offices—Draft report by the Commission, submitted by Committee II.*

were suggested on the same lines as previously recommended in the Committee, except that the agency was to be vested with the power to approach neutral Governments, with a view to obtaining the surrender (extradition) of war criminals. This proposal was, however, omitted from the draft recommendations of the Commission. All suggestions were made "subject to their being found to be practicable by the United Nations military authorities".

A note by the Chairman of the Commission was circulated to members on 9th June, 1944.⁽¹⁾ After having made reference to the principle that no agency could be established without the concurrence of the military authorities, the Chairman reported that he had discussed the matter at an informal and unofficial meeting with some members of the staff of the Commander-in-Chief (S.H.A.E.F.), and that it seemed probable that the military authorities would agree to the appointment of the proposed agency. He submitted a text giving the conclusions reached at the meeting and suggested that it be used as the basis for a formal recommendation by the Commission and for a "directive" by the Combined Chiefs of Staff. At its meeting held on 13th June, 1944, the Commission adopted the text proposed by the Chairman as a recommendation to be made to member Governments.⁽²⁾

This recommendation was couched in general terms only, as it was considered that specific questions regarding the composition, functions and nature of the agency were more suited for decision by the military authorities themselves. The first premise was that "it will be of great assistance to the War Crimes Commission if a group or agency could be attached to, or form part of, the appropriate section of the Supreme Allied Commander, in order to help the Commission in the task with which it has been entrusted". The assistance requested was for the identification and location of individuals wanted for trial as war criminals, their arrest, custody and surrender to the competent courts; the collection of evidence in a form which could be used at the trials and of information in cases where perpetrators of war crimes had not yet been identified. The question of the connections of such an agency or group was limited to expressing the desire that it "should be in touch with the War Crimes Commission".

This recommendation was communicated to member Governments for action. As will be seen later, it led to the creation of an elaborate machinery which was to be set up entirely as part of the Allied military authorities, and which subsequently established permanent connection with the Commission.

In a letter sent to the Chairman of the Commission on 24th July, 1944, the Belgian representative, as one of the promoters of the project, expressed dissatisfaction at the absence of information concerning the action of the Governments upon the Commission's recommendation. He particularly

(1) C.28. 9.6.44. *Establishment in enemy territory of a War Crimes Office—Note by the Chairman of the Commission.*

(2) See M. 22 and C.30. 15.6.44. *Recommendations regarding the establishment in enemy territory of an appropriate agency to assist the Commission in its work, adopted by the Commission on June 13th, 1944.*

stressed the fact that information showed that, while suppressing as much evidence of their crimes as possible, the Germans were making large scale preparations to escape the consequences of their guilt. He therefore repeated the need for setting up in Germany a body such as the one proposed, without further delay.

He underlined the need for the members of that body to be familiar with the continental practice in interrogating the suspected war criminals, and therefore suggested that it should be directed by a member of the Commission, or else that it be in constant and close liaison with the Commission. Lack of liaison with organs which would be charged with carrying out the duties required in Germany, and lack of knowledge as to whether there even were any such organs, were to be deplored.

Several months later, the Commission received information regarding a highly secret document from the Supreme Headquarters of the Allied Expeditionary Force (S.H.A.E.F.), bringing the first news of the steps taken by the military authorities in this matter. The document, whose code-name was "Eclipse Memorandum No. 18" and was dated 16th January, 1945, laid down that during the operational phase of the Allied Forces in Europe, which was still in progress at the time of the communication, "particulars of war crimes committed against other Allied civilians (other than British and United States) or members of the resistance movements which come to the notice of Commanders, will be forwarded to the G-1 Division S.H.A.E.F., for transmission to the Allied authorities concerned who will carry out the final investigation."

This communication was received at the time when S.H.A.E.F. was organising its own Anglo-American military war crimes branches and was calling upon Allied nations to send liaison teams or, as they were alternatively called, war crimes investigation detachments, to be attached to these branches, an account of which will be found later. The document contained, in a condensed form, the description of the machinery which was to be set up, namely, that the forces under S.H.A.E.F. would collect evidence in operational areas, and that the Allied nations would be called on to carry out any further investigations, including the tracing and apprehension of war criminals wanted by them for trial. All these preparations were related in the first place to Germany, and were subsequently extended to Austria.

There was considerable criticism in the Commission, particularly from the Chairman of the Committee on Facts and Evidence, that instead of the body originally envisaged by the Commission, machinery was being created as a component part of the regular military organisation. On 23rd April, 1945,⁽¹⁾ he renewed his previous recommendation for an international body in Germany, expressing the opinion that evidence collected by S.H.A.E.F. officers, with a view to tracing and apprehending war criminals, would represent an "amateur recording haphazardly taken down by officers who, unlike lawyers and continental investigating magistrates, were not specialists trained for that kind of work". He

(1) C.97. 23.4.55. *Renewal of the proposal made by M. de Baer on April 7th to institute in Germany an agency for the investigation of war crimes. Memorandum by M. de Baer.*

referred to the current rumour that S.S.-men and even war criminals listed by the Commission were being left in charge of concentration camps, and that not even their names were being taken down. He also stressed that there was, so far, no evidence of qualified Allied representatives having been called upon to collect evidence in camps liberated by the Allied forces, such as Belsen and Buchenwald, where their own nationals had been interned and tortured. He concluded that with such a state of things the evidence was rapidly disappearing, and that, on the other hand, many prisoners of war, who were war criminals, might be released on account of the impossibility for the Allied nations concerned to bring charges against them owing to lack of means of collecting the evidence required.

Shortly after this, however, it was learned that the Allied military authorities in Germany had called for the assistance of the Allied liaison teams. It had been decided that the military occupation authorities should set up their own war crimes branches, to carry out duties similar to those proposed in regard to the Commission's agency.

In a report submitted on 9th July, 1945,⁽¹⁾ regarding the initial stages of this machinery, the Czechoslovak representative drew the attention of the Commission to the fact that the machinery in question lacked a central war crimes office for the whole of Germany. He expressed the opinion that such an office should be set up in order to co-ordinate the work of the various zonal military agencies, and that it should be attached either to the Allied Military Government or to the Allied Control Council in Berlin. He also stressed the importance of setting up such an office with a view to obtaining the co-operation of the U.S.S.R., which was not represented on the Commission. In practice, however, such a body was never established.

(2) *Proposal for an Agency in Italy*

At the Commission's meeting of 10th May, 1945, the Yugoslav representative raised the question of establishing in Italy an agency of the Commission which would perform the same tasks as the agency proposed for Germany. He was supported by the Czechoslovak delegate.

On 14th May, 1945, the Yugoslav representative submitted a formal motion on the matter.⁽²⁾ He referred to a memorandum which the Enforcement Committee had presented to the Commission a few days earlier⁽³⁾, and in which it had recommended immediate negotiations with the Supreme Allied Commanders in the various theatres of operation, with a view to making arrangements for co-ordinating their activities in the collection of evidence and the tracing of war criminals with those of the Commission. In this connection he also referred to steps being undertaken with the Allied Command for Germany (S.H.A.E.F.) in regard to the proposed agency for Germany and asked that similar steps be taken with the command in Italy. He stated that crimes perpetrated by

(1) C.134. 9.7.45. *Work of the Czechoslovak investigating team attached to the H.Q. 12th Army Group in Wiesbaden. Report by Dr. Eéer.*

(2) C.110. 14.5.45. *Establishment of an agency attached to the Allied Control Commission in Italy. Proposal by Dr. Zivkovic.*

(3) C.99. 2.5.45. *Memorandum on the integration of agencies concerned with war criminals. Submitted by Committee II.*

Italians against nationals of the United Nations, namely in Yugoslavia, France, Greece and Albania, did not, in any respect, fall short of those committed by the Germans. He therefore thought that the time had come to enforce the provision inserted two years before in the Italian terms of surrender (Art. 29), according to which Italy was under an obligation to surrender war criminals. So far as he was aware, while the Allied command in Germany had started apprehending war criminals, this was not being done in Italy, and there was no indication that such action was contemplated in the near future. He therefore proposed that the Commission should make an approach to the Allied Control Commission in Italy, with a view to attaching an agency of its own to the Control Commission. This agency should act both as an advisory body and an executive organ in carrying out the terms of surrender regarding the tracing and handing over of Italian war criminals. He recommended that it be composed of five to six members, four of whom should represent France, Yugoslavia, Greece and Albania, the countries directly affected. In conclusion, he expressed the fear that if such machinery for the apprehension of war criminals in Italy were not established without delay, the Governments and public opinion in the countries directly concerned might feel that the Commission was not acting uniformly with regard to all war criminals, and that many of them would not be brought to justice.

The motion was discussed by the Commission on 25th May, 1945,⁽¹⁾ and referred to the Enforcement Committee. At the latter's first meeting on the subject, the United Kingdom delegate reminded members of the views expressed by the Chairman of the Commission on 25th May, that the Commission was not acquainted with the activities of the Allied military authorities in Italy concerning the apprehension of war criminals and suggested that, prior to adopting a recommendation on the Yugoslav motion, he should endeavour to obtain the necessary information.⁽²⁾

On 19th June, 1945, the United Kingdom delegate communicated to the Committee the substance of a telegram received from the Minister in Caserta to the Foreign Office, dated 16th June, and containing the information requested.⁽³⁾ From this it appeared that arrangements had already been made by the Allied Command in Italy to meet the requirements regarding the tracing and apprehension of war criminals. A Committee had been appointed by the Supreme Allied Commander and had held a meeting on 27th March, 1945. The Committee had decided upon the following:

- (a) That national missions should be called to come to Italy to investigate for themselves all cases relating to wanted war criminals and their whereabouts, and that they should do so under Allied control.
- (b) That the agency to supervise these missions should be the Allied Commander in Italy, and in the case of Cefalonia (Greece) the representatives of the British forces in Greece, acting under directives from the Committee.

(1) See M.62., 25.5.45.

(2) See M.63., 30.5.45.

(3) II/51. 22.6.45. *Establishment of an agency in Italy: communication from the Minister at Caserta to the Foreign Office.*

- (c) That the Governments concerned should be asked to communicate detailed proposals concerning the scope of their missions.
- (d) That, upon reception of these proposals, a new meeting should be held of the Committee, with the Allied Control Commission representative attending, in order to decide conditions under which the national missions would be admitted.

It was stated that the Yugoslav and Greek delegates to the Advisory Council for Italy had been requested to submit the above detailed proposals, and that no reply had yet been received from them. In view of this, the Enforcement Committee decided to postpone the Yugoslav motion until such time as the Yugoslav Government should wish to place it on the Committee's agenda for further consideration.⁽¹⁾

The motion, however, was not renewed.

(3) *Proposal for an Agency in Japan*

In June, 1945, a proposal was submitted for recommending the setting up of a war crimes agency in Japan. The proposal was made with reference to the recommendation previously adopted by the Commission in connection with the establishment of an agency in Germany, which had accepted the principle of having war crimes agencies set up in enemy territory.

The proposal was studied by the Enforcement Committee, who entrusted the Chinese representative with the duty of preparing a draft recommendation. After some discussion a final draft was submitted to the Commission,⁽²⁾ which was unanimously adopted at its session of 15th August, 1945,⁽³⁾

In this latter recommendation notice was taken of the recommendation of 13th June, 1944,⁽⁴⁾ and the opinion was expressed that events which had taken place during the occupation of Germany had fully justified the proposal to create machinery for tracing and apprehending war criminals in Germany. Now it was thought desirable to create similar machinery for apprehending war criminals in Japanese territory. Making use of the experience acquired in the past year regarding the most practical means of achieving this goal, it was suggested that the machinery required for Japanese territory be set up on military level and be run by the military authorities concerned. The following was therefore recommended:

- (a) That the various Supreme Allied Commands operating in Japanese territory be invited to create special military branches for the purpose of collecting evidence, apprehending Japanese war criminals, putting them into custody and handing them over to the competent courts for trial.
- (b) That a representative from each of the National Offices concerned be attached as liaison officer to each of the Supreme Allied Commands

(1) See M.66., 20.6.45.

(2) II/48, 12.6.45, *Draft Recommendation regarding the establishment of an agency or agencies inside Japanese territory to investigate war crimes.*

(3) C.122(1), 12.6.45, *Recommendation regarding the establishment of an agency or agencies inside Japanese territory to investigate war crimes—adopted on 15th August, 1945.*

(4) C.30, 15.6.44, *Recommendations regarding the establishment in enemy territory of an appropriate agency to assist the Commission in its work—adopted by the Commission on 13th June, 1944.*

concerned. He would be invited to take charge with his own team of the investigation of crimes concerning nationals of his country, and would co-operate with the command in all other related matters.

- (c) That the U.N.W.C.C. or its Sub-Commission in the Far East transmit lists of war criminals direct to the military commands concerned, and that the fullest co-ordination of activities and exchange of information regarding the evidence and the tracing and apprehension of war criminals be established between the U.N.W.C.C. and the various Commands concerned.

Since no final action on this recommendation could be taken until the views of the Far-Eastern Sub-Commission were obtained, the matter was referred to the Sub-Commission and was considered at its meetings held in Chungking in July and August, 1945. On 15th August it was learnt that the proposal had been endorsed by the Sub-Commission without amendment and the recommendation was consequently finally adopted by the Commission,⁽¹⁾ and communicated to the Governments for action.

Such an agency was established by the military authorities within the machinery of the Allied Commands in the Far East, a description of which will be found later in this Chapter.

(iii) PROPOSAL FOR CLAUSES IN ACTS OF ARMISTICE AND PEACE TREATIES

During the first half of 1944 the Enforcement Committee was concerned with drafting provisions to be inserted in the armistices and peace treaties regarding the apprehension and surrender of war criminals, and the Commission approved a text of such draft provisions in June, 1944. Full details, however, of the discussions in the Committee and the recommendations of the Commission on this matter are given in a later chapter.⁽²⁾

(iv) PROPOSAL FOR A CENTRAL INVESTIGATING BRANCH OF THE COMMISSION

During the year that followed the establishment of the Commission, dissatisfaction had been expressed from time to time by various members at the comparatively small number of cases submitted to it by member Governments, and at the small amount of evidence concerning the identity of the perpetrators of war crimes reaching the Commission as a result. It was felt more and more strongly that the system hitherto in use ought to be modified to remedy this situation. All complaints expressed were to the effect that the offices of the various member Governments—National Offices as they were called—were failing, for one reason or another, to cope adequately with the mass of information regarding the crimes perpetrated in their countries by the enemy. At that time (1944) it was realised that there were obstacles beyond the control of the National Offices, particularly the material difficulty of collecting evidence in the occupied territories, and transmitting it to the Commission in London. The principal result of such difficulties, it was felt, was to impede the attainment of the main object of the Commission's work—the identification and apprehension of war criminals due for trial.

(1) See M.75., 15.8.45.

(2) See Chapter XIII, section A(iii), p. 400 et seq.

In the proposals submitted by the Chairman of the Committee on Facts and Evidence early in 1944⁽¹⁾—which were mentioned previously in this Chapter and made with a view to improving the methods of collecting such evidence—special emphasis was laid upon this situation. The Chairman of the Committee had proposed that the Commission should itself undertake to collect the evidence which the National Offices were unable to communicate. His views were approved by the Commission as early as May, 1944.

However, it was not until a comprehensive proposal was presented by Lord Wright—then representing the Australian Government—that the matter was fully debated and action taken upon it.

In a document submitted on 6th November, 1944,⁽²⁾ Lord Wright made concrete proposals, the chief object of which was, as he put it, "to apprehend every available war criminal", and the specific object "to obtain particulars of every war crime in order to supply military authorities with details to enable them to take every war criminal into custody".

In this document stress was laid on the fact that an enormous amount of information was waiting to be gathered in numerous places, such as in the offices of the member Governments; the offices of the various Service Departments and their offshoots (prisoners of war departments; historical sections, etc.); in the U.S.S.R. War Crimes Commission; and in all the localities where the crimes were committed, in the liberated and unliberated countries.

It was pointed out that, according to the experience acquired by that time, the gathering of such information should be carried out not by the National Offices, but by the Commission itself. It was proposed that this task be entrusted to a special "investigating" or "investigation" officer, civilian or military, who would be placed at the head of a new branch, the "Investigating Branch of the United Nations War Crimes Commission". The main headquarters would be in London, with local headquarters in each of the capitals of the countries concerned. Local headquarters or agencies of the Investigating Branch would have travelling investigatory groups, moving on circuit from place to place. In addition to collecting particulars on the spot in the various countries, the Branch would at the same time assemble data in the main headquarters concerning the identity of the perpetrators and would transmit them to the apprehending military authorities. The scheme was accompanied by details concerning the actual shape and function of the proposed Branch.

In this manner an issue of principle, which affected the whole system then in operation for collecting and dealing with the evidence concerning war crimes and their perpetrators, was brought before the Commission. The main question was whether the Commission was to remain in the position of a receiver of information, to the extent to which this information was being submitted to it by the Offices of the National Governments, or whether it was to take initiative parallel to the governmental action in this

(1) C.14, 25.4.44.

(2) C.62, 6.11.44, *Apprehension of war criminals*.

respect. This involved the question of the Commission's competence and terms of reference and that of its relationship with the National Offices.

In his proposal, Lord Wright answered these questions by saying that, under its terms of reference, the Commission had been specifically charged by the Governments with the duty of obtaining all possible data which the military authorities would need to apprehend war criminals. It was, therefore, entitled to carry out direct investigation. When presenting his proposal to the Commission on 7th November, 1944,⁽¹⁾ he met objections which he anticipated would be raised that the operation of investing agencies of the Commission in the national territories concerned was a derogation of national sovereignty, by stating that a scheme could be devised to achieve the purpose without infringing the sovereign rights of member nations. However, it was precisely these objections which were raised in the Commission. All members agreed with the main object and purposes of the proposal, but many were doubtful whether they could be achieved in the manner suggested.

The French representative stated that National Offices of the invaded countries did not deserve the criticism levelled against them. He referred to the practical impossibility of such countries compiling and presenting the information before their territories had been completely liberated, and stated that such information would no doubt be effectively collected and submitted when the time came. He announced the establishment of a special French war crimes department in the liberated parts of France, and considered that no external organisation could take the place of National Offices in carrying out tasks which actually fell within their own competence.

A similar attitude was taken by the Norwegian, Czechoslovak, Dutch, Greek, Yugoslav, Polish and Chinese delegates. They pointed out that National Offices were, or soon would be, operating in their respective countries, and that they would and could carry out their duty only after complete liberation. In their opinion no better results would be achieved by instituting investigating agencies of the Commission, for the reason that no such agency could operate without the consent of the Governments concerned and without the assistance of their own investigating organs. Therefore, the real issue was to impress upon the National Offices the need to speed up their work and to improve their links with the Commission, and not to substitute the activities of the former by those of the latter. The Chinese, Yugoslav and Polish delegates advocated the sending out of liaison officers from the Commission to the various National Offices, in order to assist them in an advisory capacity with full particulars as to what was being required by the Commission. The Indian representative suggested that the National Offices should send liaison officers to the Commission, to learn the Commission's method of work and requirements, and return to their National Offices to transmit the experience acquired. Several members were of the opinion that the Branch and agencies proposed would be needed only for enemy territory, such as the agency proposed for Germany.

(1) See M.38., 7.11.44.

At its meetings of 7th and 15th November, 1944, the Commission decided to refer the scheme to the Enforcement Committee. The Yugoslav representative submitted to that body a comprehensive report on the matter on 29th November, 1944.⁽¹⁾

The report recommended that a Central Investigating Branch or Bureau at the Commission's headquarters would be required for collecting the evidence not available to the National Offices, including that available only in enemy territory, and that agencies should be set up in enemy territory for that purpose. As to the collection of evidence in Allied territory, it was recommended that this should be carried out by the National Offices, as being best fitted for the task, and that liaison officers from the Commission should be attached to them.

The matter was fully debated in the Committee and formal conclusions⁽²⁾ were submitted to the Commission for adoption and action. These reflected the opinion prevailing in the Commission that it should not unduly infringe the competence of the National Governments. It was recognised that the National Offices were the bodies primarily concerned with collecting evidence regarding war crimes. It was, however, recommended that "close contacts between the Commission and the National Offices should be maintained", where necessary by means of liaison officers, which the Governments would appoint and attach to the Commission. The proposal to have a Central Investigation Officer appointed by the Commission at its headquarters was accepted. However, his functions were reduced to "assisting the National Offices at their request in the investigation of war crimes; to collecting evidence which was available to the Commission in order to transmit it to the National Offices; and to co-ordinating the evidence". Finally, a modification of the internal organisation of the Commission was suggested in that it was recommended that an official should be appointed, whose duty it would be to examine all charges of the National Offices, and to draw the attention of the National Offices to all additional information in the possession of the Commission.

These conclusions were adopted by the Commission at its meeting of 20th December, 1944, with some verbal amendments.⁽³⁾

The rapid improvement in the work of the National Offices and of their liaison with the Commission from the beginning of 1945, and the gradual reorganisation of the Commission's internal machinery, made it unnecessary to appoint the investigation officer. For the same reason no Government felt the need to appoint, in addition to their representatives, special liaison officers. A mass of information began to flow in from the National Offices at regular intervals, with an ever increasing amount of data regarding the identity of the perpetrators of war crimes. On the

(1) II/36, 29.11.44, *Report of Dr. R. Zivkovic on the modification of the system now in operation for collection of evidence in respect of war crimes as proposed by the Australian delegation.*

(2) C.66, 20.11.44, *Australian proposal for a modification of the system now in use for the collection of evidence in respect of war crimes.*

(3) See M.43 and C.66(1), 21.12.44, *Australian proposal for a modification of the system now in use for the collection of evidence in respect of war crimes. Decisions and recommendations adopted by the Commission on 20th December, 1944.*

other hand the Commission's Research Office proved to be sufficient for the purpose of gathering and circulating information and evidence not available to the National Offices. It carried out on many occasions inquiries at the request of the National Offices and thus assisted them in obtaining the evidence sought for.

(V) PROPOSALS FOR CO-OPERATION WITH S.H.A.E.F.

In connection with its activities concerning the question of securing the arrest of war criminals, the Enforcement Committee submitted in July, 1944, suggestions regarding the co-operation between the Commission and General Eisenhower's Headquarters.⁽¹⁾ Referring to its previous suggestions relating to the establishment of a War Crimes Agency attached to the Supreme Headquarters of the Allied Expeditionary Force (S.H.A.E.F.) in Europe, and to the internment of Gestapo and S.S. members, the Committee stressed the fact that the only body capable of action in Europe was S.H.A.E.F. It expressed the conviction that "without direct and close collaboration" between the Commission and S.H.A.E.F., the work of the Commission would be a "failure". The Committee, therefore, suggested that the Chairman of the Commission should undertake the necessary steps to tighten the contacts already made with S.H.A.E.F.'s representatives concerning:

- (a) The establishment of the War Crimes Agency proposed in connection with the apprehension of war criminals;
- (b) The apprehension more particularly of S.A., S.S. and Gestapo members;
- (c) And the appointment of liaison officers between the Commission and S.H.A.E.F.

These suggestions having been approved by the Commission on 8th August, 1944,⁽²⁾ a meeting was held on 30th November, 1944, between the Enforcement Committee and S.H.A.E.F.'s chief representative, Brigadier Foster, and his staff. Brigadier Foster informed the Committee that the general policy of S.H.A.E.F. in apprehending war criminals in Germany was to keep in custody all individuals suspected of endangering the security of the Allied occupation forces (so-called security suspects). This would automatically include a large number of war criminals, though special investigations would have to be started, since the arrests were not being made from the war crimes point of view. He explained, however, that this task would be met by another action soon to be undertaken by S.H.A.E.F., that is, by the arrest of all members of the Gestapo and all S.S. officers and non-commissioned officers above certain ranks. This would include about 185,000 individuals. He said that, in addition, all Germans who were in charge of concentration and P.O.W. camps would also automatically be apprehended and kept in custody. On the other hand, measures were being taken to set up a permanent machinery for the systematic collection of evidence regarding war crimes, but many questions still remained to be decided by the Combined Chiefs of Staff.

After this meeting, difficulties arising out of the many duties with which

(1) C.36, 24.7.44, *Suggestions by Committee II regarding co-operation with General Eisenhower's Headquarters.*

(2) See M.27., 8.8.44.

S.H.A.E.F. was entrusted in conducting its operational and occupation tasks, prevented a close and regular liaison from being established as early as was desired. From 2nd May, 1945, however, this liaison was maintained by an officer from S.H.A.E.F. regularly attending the meetings of the Commission.

(vi) PROPOSAL FOR DETAINING PRISONERS OF WAR PENDING INVESTIGATIONS

In February, 1945, the Committee on Facts and Evidence proposed to the Commission that a recommendation should be sent to the member Governments inviting them to detain in custody all prisoners of war under their control, until full investigations as to whether they were guilty of war crimes were completed.⁽¹⁾

The Committee pointed out that among prisoners of war there were individuals who had themselves committed war crimes or who had knowledge of such crimes. For this reason many prisoners would try to avoid disclosing their true identity and divulging the information in their possession. It was therefore suggested that appropriate measures should be taken to identify the prisoners and to secure the information which they might possess before their release and/or repatriation. It was pointed out that, unless this was done, the ultimate apprehension of war criminals would be "rendered extremely and unnecessarily difficult", and that many released war criminals might never be re-apprehended.

The proposal was considered by the Commission on 14th February, 1944. It was unanimously adopted⁽²⁾ and submitted to the Governments for action.

(vii) PROPOSAL FOR IDENTIFICATION OF WAR CRIMINALS BY MEANS OF FILMS

In June, 1946, the United States representative brought to the attention of the Commission an article published by Professor Raphael Lemkin, and proposed that the subject matter be discussed by the Commission. According to a condensed version of the article, which was circulated to members,⁽³⁾ the author suggested that movie pictures should be used as a means of discovering and identifying war criminals. In normal conditions the identification of a criminal was easily achieved by confronting him with the victim or the witnesses of the crime, but in the case of war criminals this was not possible, because of the great number of individuals involved, both on the side of the criminals and on the side of the victims and witnesses. In such circumstances only notorious criminals were sought after and the discovery of the lesser ones was largely left to chance.

To remedy this situation the author suggested the production and use of international war criminals' films. He proposed the following method: inmates of all camps in which civilian internees or ex-enemy prisoners of war were held should be filmed and such films displayed in camps of

(1) C.77, 14.2.45, *Draft Recommendations to the Governments to detain prisoners of war pending war crime investigations. Text proposed by Committee I.*

(2) C.77(1), 14.2.45, *Recommendations to the Governments to detain prisoners of war pending war crime investigation. Adopted 14th February, 1945.*

(3) Misc. 35, 21.6.46, *International film for the discovery and identification of war criminals.*

displaced persons and in all ex-occupied countries. These films could also be shown in other places and countries in which victims of war crimes were residing, such as in New York, Shanghai, Palestine, Sweden and Portugal. The filming would be made in a manner permitting easy identification, and the pictures displayed several times to the same audience. The author suggested that this task be undertaken by the United Nations War Crimes Commission.

The Commission considered the matter on 27th September, 1946. The United States representative said that, since he brought the question before the Commission, he had explored its practical possibilities with persons in charge of war crimes prosecutions in Germany. He had so far obtained discouraging answers. The authorities concerned had serious fears that the scheme would be impracticable, because of the shortage of trained personnel available to operate the plan. He therefore did not feel prepared to give unreserved support to the proposal.

The Chairman of the Commission, Lord Wright, expressed the same apprehensions and was of the opinion that the scheme could be operated only if a new organisation were set up for the purpose, with sufficient funds and personnel.

Similar views were expressed by the United Kingdom, Canadian, Australian, New Zealand, Dutch, Polish and other representatives, while the Chinese delegate considered that the task lay outside the Commission's competence. The Czechoslovak representative suggested that, if anything were done on the lines proposed, films should not be shown to large audiences, since this could bring more confusion than clarification in identifying war criminals. The Yugoslav and Belgian delegates suggested the use of photographs instead of films.

As a result the proposal was rejected as impracticable, though the object was appreciated and supported by all members.⁽¹⁾

B. MACHINERY SET UP BY THE ALLIED AUTHORITIES

(i) GENERAL DESCRIPTION

As has been stressed, the task of locating and arresting war criminals was entrusted to the military authorities. It was felt, with good reason, that they would be in the best position to carry out the assignment in view of the direct control to be exercised by them over prisoners of war and over the population in ex-enemy territories, as well as of the fact that the main bulk of war criminals was to be found within these two large bodies of individuals.

Consequently it was left to the military authorities to devise proper machinery with their regular services or branches. The proposal originally advocated by some members of the Commission to create an independent agency was thus abandoned in favour of the course suggested in the Commission's recommendation of 13th June, 1944.

(1) See M.113. 27.9.46.

The main burden fell upon the authorities charged with occupation duties in enemy territory, and it is with their machinery that we are here concerned. Apart from their main agencies, there were those of the Governments of the ex-occupied Allied countries, which operated in their respective national territories with similar objectives and means of action. As, however, the largest number of war criminals were to be found outside Allied countries, in the ranks of enemy units gradually retreating towards their homelands or else located in enemy territory at the time of the Allied advance, the national agencies' field of action was more concerned with uncovering crimes committed in their territory and establishing the perpetrators' identity, than in effecting the arrest of war criminals. They took, however, an active part in the work of the Allied commands in enemy countries by means of liaison teams and officers.

The Allied commands controlling enemy territory created appropriate organs to meet the assignment. These organs formed part of a general machinery which was erected to deal with war crimes in all their aspects, and not only regarding the tracing and apprehension of war criminals. The bringing of war criminals to trial before military or occupation courts, their surrender to various countries and their national courts, as well as the investigation of war crimes perpetrated in enemy territory or elsewhere by individuals located or domiciled in areas controlled by the Allied occupying authorities, fell also within their field of action. This vast machinery developed within the body of the individual commands concerned and attained large proportions in various parts of the world. In territories which remained occupied, such as in Germany, this purely military machinery was connected with that dealing with civil affairs, that is with military government. The link concerned policy matters of a general or more important nature, as well as questions involving the interests of several nations. In all cases the specific task of tracing and apprehending war criminals remained in the hands of the commands in the field charged with occupation duties.

Such organs and machinery were set up both in Europe and in the Far East. In Europe they operated in Germany, Austria and Italy, and in the Far East there were two centres, one in Japan (Tokyo) and the other in Malaya (Singapore). Information relative to Austria will be found in the parts dealing with Germany and Italy, as the Austrian agency came under centres operating or otherwise located in Germany or Italy. The machinery in Germany and Japan is still in operation (March 1948) but is expected to terminate its functions in the near future.

The information is grouped around two types of agencies: the central agencies of each of the powers concerned, and the local agencies of such central bodies distributed in various parts of the world.

The latter comprise still further types of offices engaged in the location and arrest of war criminals. One type consisted in the war crimes branches or groups organised by each command and directing all activities in the respective areas. Another type existed in the form of liaison teams attached to the said war crimes branches by Allied nations claiming war criminals for trial. Such liaison teams were detached particularly by

nations who did not provide occupation forces in enemy territory. These two types of agencies worked in close co-operation so that it was convenient to treat them together. A third type is exemplified in the work of the Central Registry for War Criminals and Security Suspects, commonly known as "C.R.O.W.C.A.S.S.". This agency was created for Europe, and particularly for Germany. It pooled all data concerning the identity and whereabouts of war criminals and distributed them to the interested parties. It had a counter-part in some Far Eastern areas.

(i) CENTRAL AGENCIES

War crimes agencies set up in the various parts of Europe and the Far East were organised by the United States, British and French authorities, the largest being those of the United States and Great Britain. In the areas controlled by each of these powers the agencies formed part of a network directed by and supervised by a central body.

The United States agencies came under the War Crimes Office of the Judge Advocate General's Office in Washington, formed in October, 1944, by instruction of the Secretary of War. The functions and duties of this office were subsequently (4th March, 1946), transferred to the Civil Affairs Division. It was a joint central agency of all the services of the United States forces. By agreement between the State, Navy and War Departments⁽¹⁾ it was established as a branch of the War Department to act on behalf of the three departments in war crimes matters. In December, 1944, the War Crimes Office instructed the United States commanders in the various theatres of operations to establish in each of their respective commands a war crimes branch. Such branches were established in the Judge Advocate Section of the following United States commands: South West Pacific Area under General MacArthur; European Theatre of Operations, covering Germany; Mediterranean Theatre of Operations, covering Italy; Pacific Ocean Areas; India-Burma Theatre; and China Theatre. Each war crimes branch operated under the supervision of the central War Crimes Office in Washington.

The British machinery was set up on a similar footing. The central agency was the Judge Advocate General's Office of the War Office, and the officer in charge was the Military Deputy of the Judge Advocate General. No particular name was given to the organisation, but it was a replica of the American central War Crimes Office. It controlled the operations of a number of war crimes branches or groups, such as those of the British Army of the Rhine, covering Germany; of the Central Mediterranean Forces, covering Italy; of the British Troops in Austria, and of the Allied Land Forces, South East Asia.

The French war crimes agencies came under the Directorate of the Office for the Investigation of War Crimes of the Ministry of Justice (*Direction du Service de Recherches des Crimes de Guerre*). It supervised the operations of French war crimes branches in Germany and Austria, and in French Far Eastern possessions.

(1) The latter controls the American land and air forces.

It will now be seen how these central bodies ramified in the field and how their local agencies functioned in their respective areas.⁽¹⁾

(iii) LOCAL AGENCIES

1. EUROPEAN WAR CRIMES BRANCHES AND LIAISON TEAMS

(a) Germany

(1) *Initial Inter-Allied Command* (S.H.A.E.F.)*

The first war crimes agency for Germany was established by the Supreme Headquarters, Allied Expeditionary Force (S.H.A.E.F.) under General D. Eisenhower. S.H.A.E.F. was a combined, inter-allied command composed of United States, British and French units. There were two United States Army Groups (6th and 12th), one British Army Group (21st), and a French Army (First Army). The staff of the Supreme Headquarters was composed of American and British officers, and was consequently an Anglo-American unit. One section of S.H.A.E.F. was charged with planning the occupation and military government of Germany, and was called the "German Country Unit". It was organised in England in 1943, and was subsequently moved to France and to Germany. This Unit had its Legal Division, and the Division was entrusted with making plans and devising measures for the tracing and apprehension of war criminals.

The German Country Unit was, however, only a planning agency, without operational responsibility. Therefore, prior to the close of military operations, all matters relating to the military government and to war crimes were carried out by the commands in the field. During this period the American and British units were organised on the same footing. Headquarters of each Group, Army, Corps and Division had a Judge Advocate Section and this was in charge of all war crimes matters, including the arrest of war criminals. At that time it did not appear to the military authorities that the war crimes problem would have much relation to the civilian population, so that the Judge Advocate Sections were held to be the most appropriate agencies.

It was soon realised, however, that these Sections were not sufficient or adequate. In addition, the close of hostilities and the division of occupation territories into the various zones made it necessary to re-organise the existing machinery. It is at this juncture that the machinery split up between the various national commands.

(2) *United States Authorities**

Initial Stages. After the surrender of Germany, the United States 12th Army Group was assigned the duty of remaining in Germany for occupation purposes, and became the main war crimes agency of the American forces in Europe. It had its own Judge Advocate Section and four Army War Crimes Branches as its sub-sections in each Army. Each War Crimes

(1) The information has been compiled from official sources made available to the Commission. Some of the information regarding the United States authorities was compiled from data published by W. E. Fletcher in *American Organisation for Prosecution of German War Criminals*. The author was at one time Chief of the War Crimes Branch, Legal Division, Office of Military Government for Germany (U.S.).

Branch had field investigating officers and war crimes investigating teams. The primary function of the investigating officers was to make preliminary reports of suspected war crimes to the Army Judge Advocate. The latter determined whether such cases should be referred to the investigating teams for complete investigation and eventual location and arrest of the criminals.

This machinery remained in operation until the dissolution of S.H.A.E.F., which took place in July, 1945.

U.S.F.E.T. At that time the United States 12th Army Group Headquarters was dissolved and the command of the American forces in Germany was assumed by a new agency, the Headquarters, United States Forces, European Theatre, (U.S.F.E.T.).

A reorganisation took place which resulted in the appointment of a Deputy Theatre Judge Advocate for War Crimes and the setting up of a War Crimes Branch of the Office of the Theatre Judge Advocate. The latter was placed under the Deputy Theatre Judge Advocate for War Crimes. Subsequently the Branch was renamed "War Crimes Group", and continued until July 1948, when it was due to be disbanded.

The internal machinery of this War Crimes Branch or Group remained on a similar footing to that of its predecessor in the 12th Army Group. The work was carried out by investigating officers and investigating teams.

The work of the Group extended to Austria through appropriate local organs.

United States Military Government agency. Together with the War Crimes Branch created within the American field command in Germany (U.S.F.E.T.), an agency was set up within the machinery of the United States Military Government for Germany.

It derived from the original German Country Unit. The latter's functions were temporarily taken over by U.S.F.E.T. at the time of S.H.A.E.F.'s dissolution, and were eventually assumed by the United States Group, Control Council, (Germany). This Group became the American element of the Allied Control Council for Germany, which is the higher quadripartite authority for civil affairs in Germany. In the beginning the United States Group was not responsible for the military government in the United States zone. By the end of 1945, however, all the military government functions hitherto carried out by U.S.F.E.T. (Civil Affairs Division) were transferred to the United States element of the Control Council. On this occasion the name of the United States Group, Control Council (Germany) was changed to "Office of Military Government for Germany (U.S.)", commonly known as O.M.G.U.S.

It was within this machinery that the United States Military Government formed an agency for war crimes. The agency was the Legal Division of O.M.G.U.S. It had four branches, one of which was a War Crimes Branch. The Branch was formed to meet problems arising between the four occupying powers in the field of war crimes and was placed under a Deputy Director. This post was occupied by U.S.F.E.T.'s Theatre Judge

Advocate, General Betts, who performed this duty in addition to that of the Theatre Judge Advocate, and who, in this manner, controlled simultaneously both the machinery of the military government and that of the field forces under U.S.F.E.T.

Functions and Achievements. The burden of tracing, apprehending and detaining war criminals in the United States zone of Germany fell on the War Crimes Branch of U.S.F.E.T.

As already mentioned, its main instruments of action were the investigating teams. They normally consisted of two officers and an interpreter, and were spread out in a great network all over Western Germany, in order to trace and arrest war criminals. In addition to the United States zone they operated, with the consent of the appropriate authorities, also in the British and French zones. Apart from these American units, there were liaison investigating teams of various Allied nations. They came into being as a result of an invitation given by General Eisenhower in May, 1945.⁽¹⁾ A very large number of nations sent such teams and they were attached to U.S.F.E.T.'s War Crimes Branch, as well as to the British machinery in Germany. They dealt with all cases concerning war criminals wanted for trial by their respective countries, and were entrusted by the United States War Crimes Branch with carrying out personal searches and arrests of such criminals.

Liaison investigating teams of some nations were headed by their representatives on the Commission, such as in the case of Czechoslovakia, whose team in the United States zone was led by Dr. B. Ečer.

Once located and arrested, war criminals were detained in so-called "enclosures" (camps) under the direct supervision of U.S.F.E.T. They were handed over for trial to other nations only after careful examination of each case and upon special decision of the War Crimes Branch.

In addition to its own and Allied investigating teams, the War Crimes Branch had at its disposal an extensive war crimes library, a document centre and a translation bureau, in which all the information required for tracing war criminals was concentrated.

The initial stage in starting an investigation, in order to arrest a war criminal, consisted in determining the name and/or other identification data of the criminal. Such information was obtained from the Commission's Lists and from other sources, including those submitted by the various governments through their liaison teams. The process which developed as a consequence of identification data consisted in a multitude of operations, organised and carried out in close co-operation with other agencies, in particular with the Central Registry of War Criminals and Security Suspects (C.R.O.W.C.A.S.S.).⁽²⁾

One of the basic steps was to file a Wanted Report on all war criminal suspects and witnesses to war crimes with C.R.O.W.C.A.S.S. The Wanted Lists published by the Commission and C.R.O.W.C.A.S.S. were distributed to all field agencies involved in detention, intelligence and security work.

(1) See M.60, 10.5.1945, p. 2.

(2) See below p. 376 et seq.

Another initial step was to send a copy of the Wanted Reports filed with C.R.O.W.C.A.S.S. to the Prisoner of War Information Bureau, at Theatre level, the objective of which agency was to collect data and establish a complete file on all prisoners of war captured by the American armed forces.

In connection with the distribution of the Commission. Wanted Lists and the Wanted Lists published by C.R.O.W.C.A.S.S., special emphasis was placed upon distribution to the Counter Intelligence Corps, and assuring that appropriate distribution was made to all the field agencies. That Corps established and maintained a central registry of all individuals in automatic arrest categories.

When such operations revealed the information concerning the suspected criminal's whereabouts, the investigation was from the start entrusted to, and carried out by, the investigating teams.

It is impossible to put on record all the achievements of the United States War Crimes Branch and the investigating teams in Germany. It should, however, be stressed that they functioned with great efficiency and were responsible for the location and arrest of thousands of war criminals, many of whom ranked high in the Commission's Lists. It identified and apprehended numerous criminals involved in atrocities perpetrated in the concentration camps of Buchenwald, Mauthausen and Dachau, and thus made their trial and punishment possible. The following two specific cases can conveniently be mentioned as an illustration of the efficiency of the United States investigating teams.

One case concerned war criminals responsible for the so-called Malmedy Massacre, where many Belgian civilians and American prisoners of war were slaughtered by the Germans. After overrunning the area involved in the Ardennes Counter Offensive, a considerable period of time spent on investigating the case failed to reveal the whereabouts or even the identity of the perpetrators. Repeated inquiries in the area finally uncovered a slip of paper in the possession of a Belgian civilian in the area, which gave the name and home address of a German tank commander who participated in that Offensive. It appeared that the Belgian civilian had told the tank commander that he was a German collaborator and that his home had been needlessly fired upon. The tank commander then jotted down his name and address and suggested that the matter be reported to the appropriate German authorities. This lead indicated that the 1st S.S. Panzer Regiment, 1st S.S. Panzer Division, I S.S. Panzer Corps, Sixth S.S. Panzer Army, had operated in the vicinity of some of these killings. The remnant of that regiment was captured in Austria. However, a hurried examination of the list of the members of the unit present did not disclose the name of the man who delivered the slip of paper, nor did it provide any lead which would permit the interrogation of members of the unit on an effective basis.

A war crimes investigator was dispatched to Berlin. The house at the address in question had been completely demolished. Inquiry in the area revealed that the man wanted had been a baker's assistant, but it appeared that he had not recently been in the area. Nevertheless, all

bakeries in the area were combed. When the investigator had almost decided to give up the search as futile, he noticed a bakery which he had not checked. Without disclosing his purpose, he entered and visited the manager and gathered that a former member of an S.S. unit was working in the bakery. Further visits to the manager and his assistant revealed that the assistant was the man in question.

A start in the development of the case had thus been made, but the baker's assistant did not seem to be in possession of much information and cared less about revealing it. However, sufficient of the names as to battalion, company, platoon leaders, etc., were gathered to give many leads, but an examination of the names of prisoners of war in detention failed to reveal most of those wanted. At this stage in the development of the case, a command directive was sent to all detention installations in the zone requiring that they send all individuals in their custody known to have been, or who probably had been, members of the 1st S.S. Panzer Regiment to Civilian Internment Enclosure, No. 78, located in the vicinity of Ludwigsburg. As a consequence, over 1,000 were sent there. Enlisted men disclosed the identity of officers and vice-versa. The 1,000 were screened down to below 300 and the real interrogation then commenced, permitting of a successful trial, commonly known as the Malmedy Massacre Case.

The second case related to an important war criminal, Von Posern, implicated in crimes committed in a concentration camp (Mauthausen). A War Crimes Enclosure was established in the Dachau concentration camp, where all individuals, who appeared to be of war crimes interest to the United States and other United Nations, were segregated. As an incident of such segregation, Hans Karl Von Posern was moved to the War Crimes Enclosure. Notwithstanding the intensive screening and interrogation which was conducted there, it seemed impossible to obtain satisfactory proof against Von Posern. Consequently, he was released from detention. Later he made an effort to appear as defence counsel in the trials at Dachau. Soon thereafter, military government agencies charged him with practicing law without a license, and upon inquiry in the vicinity of his home in Ulm, Germany, an individual charged him with participating in the operation of the Mauthausen concentration camp. Von Posern was again moved to Dachau and with this lead his guilt was eventually established and his case tried. He was convicted and sentenced to life imprisonment.

(3) *British Authorities*

The setting up of the British war crimes agency in Germany followed similar lines to that of the American agency in that it passed through several stages before it reached its final shape.

Initial Stage. The British unit under S.H.A.E.F., which corresponded to the United States 12th Army Group and its war crimes assignment, was 21st Army Group. It was commanded by Field Marshal Montgomery, and at the close of military operations in Germany early in 1945, it organized its own war crimes agency.

This first took the shape of a War Crimes Section of the Judge Advocate General's Branch of 21st Army Group Headquarters. The Section had under it, as instruments of action, three investigating teams. Each of these teams was charged simultaneously with establishing the crimes in its field of operation and after that with locating and apprehending the criminals.

At that time the scope of the field investigation of war crimes was not appreciated. The extent and nature of the atrocities in concentration camps were only half realised and a few isolated crimes only, such as the murder of 50 R.A.F. officers from a prisoner of war camp (Stalag Luft III), were known. The systematic murder of pilots and commandos all over Germany, and the appalling atrocities in the minor concentration camps such as Arbeitserziehungslagern (Work Education Camps) attached to factories, etc., were not even guessed at. The idea was that the war crimes investigation teams would be moved on to the site of a war crime, pursue their investigations and record details of the wanted men, with the reasonable certainty that they would turn up sooner or later, or collect the wanted men as a result of the comparison on the C.R.O.W.C.A.S.S. Wanted Lists with the C.R.O.W.C.A.S.S. list of detained Germans.

By September, 1945, it became clear that this planning would not produce the desired results. In the British zone, operations "Barley-corn", "Coalscuttle", etc., had the effect of releasing immediately a large number of Germans who were wanted for work with the harvest and in the mines, and who claimed to be farmers and miners. Some of these persons never appeared in any Detention Lists at all and they therefore went in and out of British hands without being recorded in the C.R.O.W.C.A.S.S. lists of detained persons. It also became clear that many of the crimes were crimes of comparatively limited scope, which would not require the attention of an entire war crimes investigation team, and that the organisation must be more flexible, so as to cover both the complicated and simple types of investigation. Another defect of the system of war crimes investigation teams was soon revealed. The investigator's first duty was to establish the facts and details of the commission of a war crime. Having done so, the next task was to locate the criminal. Skill at ascertaining the location of the criminal required quite different qualities from those required of an investigator. What was happening was that investigators, having established the facts and details of a war crime, were then required to undertake a long search for the criminals during which period their services were not available to carry out further investigations.

Transitional or Experimental Stage. Accordingly, it was considered that a special team employed only on searches would probably relieve the investigators of the task of searching for the actual criminals, and that searchers would soon become specialists in the task of what amounted to looking for a needle in a haystack. As an experiment two corporals from the Royal Air Force Police, were instructed, on the information available, to locate the murderers of a party of R.A.F. personnel at Hopsten aerodrome. Neither of these non-commissioned officers spoke German; both of them, however, were experienced service policemen. Armed with maps, equipped with a jeep and information on all clues

as to the perpetrators in the possession of the investigators, they set out. Three days later they returned with one of the principal criminals and clues to the others, with the result that what was known as the Dreierwalde trial led to the conviction of 8 people for the murder of these R.A.F. officers.⁽¹⁾

As a result of this test a special Section, which operated under the name of "Haystack" was formed, composed of officers with a talent for this type of work. They were equipped with the known details of the alleged war criminals and their instructions were to find them. The experiment was a success from the beginning and at the time of writing "Haystack" have made 496 arrests.

By the end of the year all three war crimes investigations teams were equipped with personnel and transport. But the lack of flexibility of the organisation had already been sufficiently demonstrated and the teams were no longer employed on a one-team-one-case basis. Each team was given a number of cases to work on, but even that was unsatisfactory. As a consequence, at the end of the year all three teams were merged into one team, known as the "War Crimes Investigation Unit", which included the Search Section, the official name for "Haystack". The method of investigation adopted was that the Commanding Officer of the team was provided with a brief on each case, with all the facts available which the War Crimes Section of J.A.G.'s Branch decided indicated the commission of a war crime. On this brief he conducted the investigation, allotting thereto as many officers and non-commissioned officers as the case merited, and referring the case back to the War Crimes Section of J.A.G.'s Branch from time to time. Some cases occupied the attention of a body of officers and non-commissioned officers for a long period. Others were dealt with by one officer who completed the investigation and wrote the report on that case, which was then considered by the War Crimes Section of J.A.G.'s Branch. If that Section agreed with the conclusion of the investigator, "Haystack" were instructed to search for those criminals not yet in custody. In due course the case was submitted to J.A.G.'s Office, London, for decision on the charges and advice on the evidence to be given at the trial.

B.A.O.R. By this time 21st Army Group Headquarters had been dissolved and the command assumed by a new agency, the British Army of the Rhine (*B.A.O.R.*). The activities of the War Crimes Section of the Judge Advocate General's Branch and its relations with other branches of *B.A.O.R.*, as well as with other agencies, had developed into a vast operation, so that there soon appeared a need for administrative re-organisation.

In January, 1947, the War Crimes Section, the War Crimes Investigating Unit and various other offices were all merged into a single unit known as "War Crimes Group, North West Europe". The structure of the Group remained substantially the same as before. It included a Legal Section which was the former War Crimes Section of the J.A.G.'s Branch;

(1) See *UNWCC, Law Reports of Trials of War Criminals*, Vol. I, London, H.M.S.O., 1947.

an Executive Section whose duties were previously performed by the Branch of the staff of B.A.O.R.; and a Field Investigation Section which replaced the transitional War Crimes Investigation Unit, and which included "Haystack".

The Group came under the Judge Advocate General in the War Office for matter affecting war crimes policy, and under the Deputy Adjutant General of B.A.O.R. for executive action.

Functions and Achievements. The British War Crimes Agency in Germany functioned on lines similar to those of the American agency. One of its chief tasks was to trace and arrest war criminals. It obtained data regarding the identity of war criminals to be apprehended from its own investigating teams, from Allied liaison teams attached to it and from the Lists of the Commission. All information collected by the teams was referred to C.R.O.W.C.A.S.S. for registration and further investigation as to the wanted person's whereabouts. On the other hand, names and other identification data of prisoners of war, suspected war criminals and security suspects detained in the British zone were also communicated to C.R.O.W.C.A.S.S. in order to make such information available to other parties engaged in the tracing of war criminals.

From September, 1945, when the machinery started functioning on a regular and systematic basis, to the time of writing, several thousand war criminals have been traced and arrested, and as a result brought to trial in the British zone or handed over for trial to other nations. Some 500 cases were investigated, and in the British zone 684 war criminals were tried, in addition to those at present being tried, out of which 487 were convicted. This includes criminals tried for atrocities in the notorious Belsen concentration camp. Nearly 500 arrests were made by "Haystack" who operated not only for the British but for the Allies as well. 3,697 war criminals were apprehended and handed over to Allied nations for trial, and in March, 1948 another 832 were being held in custody awaiting trial or surrender. 58 further cases were awaiting investigation.

The investigations in the field were carried out by specially selected teams, which worked exclusively on these cases. Some cases occupied their attention for a long period, and some required in addition a large team. So, for instance, the investigation of crimes perpetrated in Ravensbrück, another ill-famed concentration camp, took a full year. The investigation of the so-called "Stalag Luft III Case" concerning the murder of R.A.F. officers detained by the Germans as prisoners of war, engaged a team of 21 R.A.F. officers and warrant officers and 16 interpreters. The investigation was carried out by the R.A.F. Special Investigation Branch which was in continuous operation for more than two years. 18 accused had been traced, arrested and brought to trial, and the investigation continued.

From 1945 onwards all the Allies (except the Russians) maintained war crimes liaison groups and investigation teams operating in the British zone, and up to May, 1947, they effected such arrests in the zone as they wished to do, but extradition from the zone was controlled by B.A.O.R. As from the end of May, 1947, their power to arrest was taken

away from them by the order of the Commander-in-Chief and arrests on their behalf were effected either by officers of War Crimes Group or Public Safety Officers operating under a warrant issued from the Legal Division of the Control Commission for Germany. Up to this date all the arrests on behalf of the Russians had been made by the War Crimes Group and thereafter they were made by Public Safety Officers on evidence supplied by the Russians to War Crimes Group and transmitted by them to the Legal Division of the Control Council for Germany.

The following three cases are illustrative of how the British machinery actually operated in the field and what difficulties its investigating personnel had to overcome.

Shortly after Christmas, 1945, an investigation officer was instructed to search for and arrest Ludwig Heinemann, a chief of the German Security Police (S.D.). He was wanted for trial by the Netherlands for the murder of 2 Englishmen and 3 Dutchmen, as well as for other crimes perpetrated in Holland. In the course of inquiries in Holland the British investigating officer came across evidence in a counter intelligence report, emanating from the 1st Canadian Corps, indicating that Heinemann was believed to be in custody somewhere in the 1st Canadian Corps area. Records of persons arrested were, however, at that time, practically non-existent. Systematic inquiries at every internment camp in Holland produced no result, but the officer learned that Heinemann was well-known in police circles in Dusseldorf and therefore directed his enquiries to that quarter. He was informed by the chief of police in Dusseldorf that Heinemann had in pre-war days been sentenced to imprisonment for brutality.

Other information obtained from ex-members of the S.D. in Holland was that Heinemann was last seen under arrest somewhere near Amersfoort towards the end of the war. It was also suggested that he might be masquerading as an ordinary policeman under the name of Schmitz, which was the name of his parents in law. In the Iserlohn area it was ascertained that Heinemann at one time lived in Neuss. The investigating officer, therefore, made a search in that town and discovered that a Mrs. Heinemann and her children were living in Neuss. He proceeded to the address indicated, only to find the place in ruins and uninhabited. He then referred to the food office, the records of which indicated that this particular Heinemann family had moved to an address at Section G 92 Neuss/Rhein. The officer found Section G to be a large area. The buildings were not numbered in sequence and it seemed that inquiries amongst local residents would be the only means whereby he would trace No. 92. The investigating officer approached a bus queue and called a woman forward who, on being questioned, informed him that No. 92 was about 1½ kilometres further along the road on the right. He followed these directions but they proved fruitless. He next questioned a policeman and reached the house under the latter's directions. There he found his woman informant of the bus queue. She proved to be the wife of Heinemann. She insisted that she had not seen her husband since some time before the end of the war and that he was dead. The officer arrested her and she was sentenced

to three months imprisonment for contravening Military Government regulations by misleading a British officer in the course of his duty.

Early in March the investigating officer received information that a man by the name of Schmitz had been arrested in Hamm whilst applying for food ration cards. He was found to be in possession of numerous rubber stamps by means of which he could have provided himself with forged documents. These stamps were handed over to the investigating officer by the Intelligence Section, to whom, on interrogation, the prisoner admitted his name was Heinemann. At the time of his arrest he had grown a moustache and he bore no resemblance whatsoever to the photograph which had been obtained of him and which depicted him in Obersturmführer's uniform. On interrogation he admitted that he had at the end of the war adopted the name of Schmitz and been since living at Munster. He added that he had contacted his wife on one or two occasions and in January, 1946, had taken the risk of visiting her in Neuss. He was in fact at the house when his wife returned after the investigating officer had asked her for directions. He was warned by her and on seeing the officer approaching the house had hidden in the woods nearby.

The second case concerned an S.S. officer, Walter Albath, wanted for trial by Great Britain for the shooting without trial of 30 Russian prisoners, including 4 women. The investigation started at Dusseldorf, and the services of a German civilian who had known the Albath family were secured. The investigating team moved by motor car and had to visit many places before it located the wanted man. Some papers found at Herschied, among belongings Albath's wife had left behind with a family where she and her husband used to stay during the war, disclosed her address at Dortmund. Before going there the team made checks at the local telephone exchange to make sure that no long distance calls had been made to Frau Albath to advise her of the team's arrival and search. In Dortmund the team found Frau Albath's parents at the address. They contended that she had not been home for two or three months and denied any knowledge of her whereabouts. Frau Albath's mother mentioned, however, a family by the name of Kracke living near Hoya, where Frau Albath occasionally left her children. Her parents were taken into custody pending completion of the investigation. The inquiries made disclosed that no less than six large farm houses in the area were each occupied by one or more persons of the name of Kracke. The team called in the assistance of an R.A.F. station located in the neighbourhood, and at 10.30 in the evening raided with six search parties all the farm houses simultaneously. Six German policemen were also used. The man and his wife were not found, but it was ascertained that Albath had visited one of the families two weeks before, that he had left by train in the direction of Hanover, and that he had carried in his suitcase a bottle of petrol for cleaning his hands, because he was employed, as a witness put it, on "dirty work". One witness vaguely mentioned that Albath had some connection with the manufacture of artificial limbs. The team moved to Hanover and made inquiries at the German police headquarters, the authorities dealing with accommodation and labour licences, and at every factory or workshop connected with the

manufacture of orthopaedic equipment. It also visited the refugee organisations and showed Albath's photograph to dozens of directors, managers and employees, but no one recognised him. Finally, the team visited an oil and petroleum factory, remembering Albath's bottle of petrol and the fact that petrol was very scarce and difficult to obtain. The manager was ordered to gather all his foremen in the office block and to call them in one by one. One of these foremen recognised Albath from a photograph as being one of the workers in the boiler rooms at the refinery. He knew him well under the assumed name of Wiegand and remembered that he had left three weeks previously to seek employment in an artificial limb factory. Albath was registered at the factory as living with a family called by the name of Gems, at Hanover. The foreman was made to visit the family one evening and brought back the information that Albath was due to arrive the following night. A trap was set and the man arrested while he was entering the house.

The third case concerned the arrest of Oswald Pohl, one of the principal heads of the S.S., who shared responsibility as a leading figure for atrocities committed in concentration camps and for other crimes.

Shortly after the cessation of hostilities in Germany, it was learned from S.S. prisoners that Pohl had formed a "South Group" which had left Berlin on 15th April, 1945, for Dachau. After two months of work and some 5,000 miles travelling following this clue, it was established that Pohl had decided that the Group could not hold its emergency headquarters at Dachau, and had ordered a general withdrawal before the arrival of the Allied troops. He directed the Group to split up, and himself disappeared with two adjutants, Schiller and Witt. The two adjutants were seen from time to time, whereas Pohl was never seen again. Pohl's wife had been held in custody by the American authorities for a few weeks at the end of 1945. She had been interrogated by them, but the results were not very helpful. She declared that her husband left her in May, 1945, bound for Austria. She insisted that she had heard nothing more of him and stated emphatically that she would not, even if she possessed the information, disclose his present whereabouts—not even if she had to face a firing squad. It was obvious that Pohl was somewhere in hiding and under such conditions would be bound to have some outside contacts. It was found that one of his adjutants, Witt, had given himself up at Lubeck in March, 1946. He was interrogated by the camp authorities when he surrendered and made a statement to the effect that he parted company with Pohl in May, 1945, at Bruningsau, since when he had heard nothing more. The war crimes investigating team decided to re-interrogate Witt thoroughly. On this occasion the latter appeared dejected and voluntarily withdrew his original statement. He said that he had accompanied Pohl from Bruningsau in May, 1945, when the pair of them made their way across Germany on foot arriving in Hamburg in June, 1945. They obtained food during the journey by doing odd jobs for farmers and arrived in Hamburg under assumed names. Witt was unable to remember the exact name adopted by Pohl, but thought it was something like "Gries" or "Knie". Pohl, apparently to reduce the possibility of recognition, had grown a moustache. Witt went on to

say that he eventually left Hamburg and joined his wife in Lubeck. After that he saw Pohl once, when Pohl informed him that he was living somewhere in the country near Hamburg. At the same time Pohl produced a passport photograph of himself which he said had been taken to enable him to procure a new identity card. Finally, Witt mentioned that he had once received a postcard from Pohl, after which he had lost all trace of him. It was signed "Ludwig" and was post-marked Verden. The investigation was thus transferred to Verden. Verden is a small town south-east of Hamburg. It was found that not only the post office in Verden but all the other post offices in the Kreis of Verden used the same type of post mark. A Kreis being a rural district of about 400 villages, the post mark was clearly not going to afford much help. However, every village had its own register of inhabitants. A search of these returns gave disappointing results. No name such as Gries or Knie appeared, and another line of inquiry had to be sought. In his statement Witt had mentioned the name of Werner Westphal, Pohl's son-in-law, and quoted his Hamburg address. Investigation disclosed that a certain Werner Westphal had been registered at the address quoted, but that he had left Hamburg in October, 1945. When leaving he gave his destination as Verden. It seemed likely therefore that Pohl would now be living with Werner Westphal in Verden. The register of residents established that Werner Westphal was residing at an address with a certain Mrs. Topp. The register also indicated that this Mrs. Topp was Westphal's sister and that their father, a retired policeman, was living in the neighbouring village of Ottersberg. It was found that the house where Mrs. Topp and Werner Westphal were supposed to be living was situated opposite some barracks occupied by a British unit. A corporal in charge of the Intelligence Section of this unit was a very capable little Irishman, keen on his job and possessing some knowledge of the German language. In a short time the Section had constructed on the roof of the barracks an exceedingly well camouflaged observation post, from which, with field glasses, it was possible to keep the Topp house under observation. The men keeping observation maintained a detailed record of everything that took place near the house, and in due course they were soon able to recognise Werner Westphal. Numerous visitors called and cars also stopped at the house from time to time. While all this was going on yet another line of inquiry was started. As already mentioned it was learned from Witt that Pohl had had a passport photograph taken. It was learned that there was a dealer specialising in identity photographs who was established in the village of Ottersberg, the village where Werner Westphal's father was supposed to be living. The Public Safety Officer loaned the services of one of his German police officials who was dispatched to Ottersberg to collect such plates as he could from the photographer there. A plate was found bearing two portraits. It was neatly marked Karl Westphal and Ludwig Gniss, the latter being Pohl's assumed name. Meanwhile the man keeping observation on the Topp house reported the presence of a strange visitor. He was an elderly man, dressed in gardening clothes and he had a moustache. It was impossible to say, however, whether this individual was Pohl or whether he was Mrs. Topp's father Karl Westphal on a visit from Ottersberg. Examination of the resident's lists of all the villages in the vicinity disclosed the name

mitted".⁽¹⁾ He disagreed that members of the Nazi General Staff and High Command could be compared to those of Supreme Commands in Allied countries, because of their relationship with the Nazi party and other Nazi organisations.⁽²⁾

C. RULES IN MUNICIPAL LAW

In addition to the rules of international law contained in the Nuremberg Charter, criminal organisations are covered by rules of municipal law. It has already been seen that the prosecutors at the Nuremberg Trial made reference to such rules with a view to demonstrating that the provisions of the Charter were not an entirely novel legal phenomenon. It has also been mentioned that certain rules had been enacted in connection with those of the Nuremberg Charter, and that they were promulgated in order to regulate the trial of members of criminal organisations prosecuted on the basis of the declarations made by the Nuremberg Tribunal. It thus appears that the field is covered by two sets of rules. On the one hand, there are rules which form part of the national law of various Allied countries and which existed before the Nuremberg Charter and Trial. In some of these countries they were supplemented after the end of the war against Germany, in order to clarify the legal issues raised by the type of collective criminality furnished by the Nazis. On the other hand, there are rules specifically enacted in the ex-territories of the III Reich (Germany and Austria) and insuring the trial of members of the criminal organisations tried by the Nuremberg Tribunal. In Germany they were enacted in direct connection with the Nuremberg Charter and Judgment, and in Austria, although not directly linked, they cover a similar field.

An account will first be given of the rules in the occupied territories, as they relate to the most numerous trials of this type and since the most important of them are implemented on the basis of the Nuremberg Judgment.

(i) RULES IN OCCUPIED TERRITORY

(1) *Germany*

(a) *Law No. 10.* The trial of members of criminal organisations is regulated by Law No. 10 of the Allied Control Council for Germany of 20th December, 1945. This law was enacted for the whole of occupied Germany so that its provisions are in force in all four zones of occupation. The reason for promulgating these provisions in German territory was that members to be tried all belonged to Nazi organisations, and that the Allied authorities decided that they should consequently be tried as a rule in Germany.

Among the acts enumerated as crimes in Art. II of Law No. 10 is the following:

"Membership in categories of a criminal group or organisation declared criminal by the International Military Tribunal."

(1) *Op. cit.*, p. 144.

(2) For details on the Soviet judge's dissenting opinion see *op. cit.*, p. 142-149.

This crime is liable to the same penalties as those provided for the other crimes enumerated, namely crimes against peace, war crimes and crimes against humanity.

These penalties are:

- " (a) Death.
- (b) Imprisonment for life or a term of years, with or without hard labour.
- (c) Fine, and imprisonment with or without hard labour, in lieu thereof.
- (d) Forfeiture of property.
- (e) Restitution of property wrongfully acquired.⁽¹⁾
- (f) Deprivation of some or all civil rights.

" Any property declared to be forfeited or the restitution of which is ordered by the Tribunal shall be delivered to the Control Council for Germany, which shall decide on its disposal."⁽²⁾

As can be seen the range of punishments is very wide and the Courts are at liberty to impose any of them, including the death penalty. A notable feature, however, is that the law does not say that " punishments will consist of one or more " of the penalties enumerated, but only that they " may ". This wording made possible a re-adjustment of penalties for the " crime of membership " by subsequent legislation, as distinct from punishment for other crimes covered by Law No. 10. Further reference to this will be made later.

Law No. 10 does not specify which courts in Germany are competent for the trial of members of criminal organisations. It simply states:

" 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."⁽³⁾

Such tribunals and rules were determined in several zones and they will be recorded separately. The above provision contains yet another rule which is relevant in respect of the power of the Nuremberg Tribunal's Judgment for the courts functioning under Law No. 10. This rule reads:

" 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 zone by the Commander thereof, or of the *International Military Tribunal established by the London Agreement of 8th August, 1945.*"⁽⁴⁾

This rule is significant in that, by confirming that the power and jurisdiction of the Nuremberg Tribunal are left unimpaired by Law No. 10, it sanctions the legal effects of such powers and jurisdiction in respect of the courts functioning under its terms. It is in the light of this proviso that the general ruling made by the Nuremberg Tribunal in regard to criminal organisations and membership therein, should be understood as having a binding effect upon the subsequent courts.

As mentioned above, tribunals, rules and procedure for the trial of members of criminal organisations were determined in the British and

(1) This is improperly included among punishments. Such restitution is not and cannot represent a penalty, but only a redress of the damage inflicted.

(2) Art. II, (3).

(3) Art III, (2).

(4) Italics introduced.

United States zones of occupation. Certain rules of substantive law were prescribed pursuant to recommendations made by the Nuremberg Tribunal in its Judgment. These recommendations will now be recorded and followed by the existing zonal rules.

(b) *Recommendations of the Nuremberg Tribunal.* The Nuremberg Tribunal ended its general ruling in the following terms:

“Since declarations of criminality which the Tribunal makes will be used by other courts in the trial of persons on account of their membership in the organisations found to be criminal, the Tribunal feels it appropriate to make the following recommendations:

1. That so far as possible throughout the four zones of occupation in Germany the classifications, sanctions and penalties be standardised. Uniformity of treatment so far as practical should be a basic principle. This does not, of course, mean that discretion in sentencing should not be vested in the court; but the discretion should be within fixed limits appropriate to the nature of the crime.

2. Law No. 10, to which reference has already been made, leaves punishment entirely in the discretion of the trial court even to the extent of inflicting the death penalty.

The De-Nazification Law of 5th March, 1946, however, passed for Bavaria, Greater-Hesse and Wurttemberg-Baden, provides definite sentences for punishment in each type of offence. The Tribunal recommends that in no case should punishment imposed under Law No. 10 upon any members of an organisation or group declared by the Tribunal to be criminal exceed the punishment fixed by the De-Nazification Law. No person should be punished under both laws.

3. The Tribunal recommends to the Control Council that Law No. 10 be amended to prescribe limitations on the punishment which may be imposed for membership in a criminal group or organisation so that such punishment shall not exceed the punishment prescribed by the De-Nazification Law.”⁽¹⁾

The De-Nazification Law of 5th March, 1946, referred to by the Tribunal, is in force in the United States zone and will be dealt with in the analysis of the United States zone rules. The Nuremberg Tribunal, thus, made a strong point of the necessity of reducing the punishments as provided by Law No. 10 in order to fit “the nature of the crime”. The Tribunal found that the “crime of membership” in itself⁽²⁾ did in no case deserve a more severe punishment than that prescribed in the De-Nazification Law of March, 1946, that is, as will be seen, 10 years imprisonment.

It will be noted that, in order to achieve such a result, the Tribunal found it necessary to recommend the amendment of Law No. 10. No such amendment took place, probably for the reason previously mentioned. The rule of Art. II, (3) of Law No. 10 is that the punishments “may” consist of the penalties enumerated. This may be interpreted to mean not only that the courts are always at liberty to apply lesser penalties, but that it is within the competence of the zonal authorities to make re-adjustments

(1) *Judgment*, p. 67.

(2) This distinction is important, for a defendant prosecuted for membership can at the same time be found guilty of either of the other specific crimes covered by Law No. 10, i.e. crimes against peace, war crimes or crimes against humanity. In such cases the punishments applicable are those from Art. II of Law No. 10 without restriction.

binding upon the courts in connection with their powers determined under the terms of Art. III (2).

(c) *Rules in the British Zone.* To implement the above recommendations, the British Military Government in Germany issued on 1st November, 1946, a set of rules regulating all trials of members of criminal organisations.⁽¹⁾

The rules were enacted with express reference to Art. 10 of the Nuremberg Charter and to the declarations made by the Nuremberg Tribunal. Competence to try members of criminal organisations was conferred upon German courts.

The main rule of substantive law contained in the ordinance reads:

"The accused persons will be charged with having been a member of a criminal organisation with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter of the International Military Tribunal."⁽²⁾

This rule leaves unanswered the question of whether the "knowledge" referred to is to be proved by the prosecution or whether it is to be presumed and rebutted by the accused. As previously pointed out, this leaves either course open according to the estimate of the court.

The jurisdiction over persons to be tried as members of criminal organisations is limited to the categories or classes defined by the Nuremberg Tribunal in its Judgment in respect of each of the organisations declared criminal, and does not, as a matter of course, comprise members of organisations which were not declared criminal.⁽³⁾

Finally, the recommendations of the Nuremberg Tribunal regarding the punishments were fully applied. Art. V of Ordinance No. 69 specifies:

"Any person found guilty will be liable to any or all of the following penalties:

- (a) Imprisonment (Gefaengnisstrafe) for a term not exceeding 10 years;
- (b) Forfeiture of property;
- (c) Fine."

This leaves out the death penalty and imprisonment for life, as well as hard labour. In addition, the courts are entitled to take into account mitigating circumstances when passing sentence.⁽⁴⁾ Finally, further prescriptions regarding the way of imposing penalties, as well as any other matter connected with the carrying out of Ordinance No. 69, are reserved and delegated to the Central Legal Office of the British Military Government.⁽⁵⁾

(1) Ordinance No. 69 of the British Military Government, published in *Military Government Gazette*, No. 16, pp. 405-407.

(2) Art. IV, 9.

(3) A full list of such categories or classes is contained in an appendix to Ordinance No. 69 under the heading "First Schedule".

(4) Art. VI.

(5) Article VII, which reads: "The Central Legal Office shall issue such regulations or orders as may be necessary or expedient for carrying this Ordinance into effect, including directions as to the maximum sentences to be imposed in relation to any rank or appointment held in any of the said criminal organisations, provided that in no cases shall any sentence of imprisonment exceed the maximum laid down in Article V hereof."

(d) *Rules in the United States Zone.* In the American zone of Germany, rules were issued by the United States Military Government in a letter dated 9th April, 1947, and circulated to the Directors of the local Military Governments for Bavaria, Wurttemberg-Baden, Greater Hesse and Bremen.⁽¹⁾

The letter contains, in the first place, an account of the Nuremberg Judgment and specifies which organisations were declared criminal as well as which categories of members were determined as liable to be brought to trial. Special care was taken to exclude categories not comprised in the Nuremberg declarations.⁽²⁾

Following the Nuremberg Tribunal's recommendations, the trial of such members was entrusted to the German courts established by the De-Nazification Law of 5th March, 1946.⁽³⁾ Substantive and procedural provisions of this law were declared applicable "to the extent to which this was consistent with the finding of the International Military Tribunal."⁽⁴⁾ This includes in particular the types and degrees of punishments recommended by the Nuremberg Tribunal.

Under the rules of the De-Nazification Law, whose official title is "Law for Liberation from National Socialism and Militarism",⁽⁵⁾ there are four groups of "offenders" and penalties are specified for each particular group.⁽⁶⁾ The severest penalty is 10 years detention in a labour camp, whereas other penalties include the loss of a great variety of rights, such as of political rights, the right to exercise a professional vocation, to hold public office and the like.⁽⁷⁾ Under the rules of the United States Military Government the courts can apply any of these punishments, and the accused against whom such punishments can be pronounced are only those defined in the Nuremberg Judgment.

Unlike the British rules, those of the United States Military Government contain a specific answer to the question of who is to bear the burden of proof in respect of the tests of individual guilt. In line with the attitude consistently held by the United States Chief Prosecutor in Nuremberg, it introduced the principle of presumption of guilt in the following terms:

"Upon proof of membership within any of the incriminated groups of the organisations found criminal, a *presumption* shall arise that the member joined or remained a member with knowledge of the criminal acts and purposes of the organisation. This presumption is rebuttable and may be overcome by evidence to the contrary in accordance with Article 34 of the

(1) Letter of the Office of the Military Government for Germany (U.S.), AG 010.6 (IA), of 9th April, 1947.

(2) Para. 1-6 of above Letter.

(3) These courts comprise tribunals in the first instance, at the rate of one for each urban and rural district, and of "appellate" tribunals competent for the revision of their judgments. See Art. 24 of the above Law.

(4) Para. 7 of above Letter.

(5) The above law was enacted by the local German Governments for Bavaria, Greater Hesse and Wurttemberg-Baden upon approval of the United States Military Government. Its provisions are cited from the official English translation.

(6) These groups are named as follows (Art. 4); major offenders; offenders (activists, militarists and profiteers); lesser offenders (probationers)) and followers.

(7) For fuller details see the above Law, Art. 15-18.

Law.⁽¹⁾ A similar presumption shall arise with reference to the voluntary nature of a respondent's membership in the Waffen S.S.;⁽²⁾ those who claim that they were drafted into membership by the State in such a way as to give them no choice in the matter, have the burden of proving such a defence."⁽³⁾

It thus appears that in the United States zone the presumption of guilt is introduced to a full extent and that it relates to all cases and all tests of individual criminality. As previously explained, this means that the prosecution is bound to prove only the fact of "membership" in each particular case, and that, failing evidence submitted by the defendant regarding the presumptions determined against him, he is to be punished. This, however, as has also been explained, does not mean automatic punishment. The courts have wide powers to admit direct or circumstantial evidence in defence of the accused, and to dismiss the presumption on the basis of such evidence.

(2) *Austria*

Punishment of members of criminal organisations is dealt with in a "Constitutional Law concerning War Crimes and other National Socialist Misdeeds" enacted on 26th June, 1945, by the Austrian Provisional Government. The Law was promulgated before the enactment of the Nuremberg Charter and has, consequently, no link with the Nuremberg Trial. It regulates the trial of war criminals by Austrian courts, under the penal jurisdiction of the Austrian administration as allowed by the occupying powers,⁽⁴⁾ and contains rules approaching those deriving from the Nuremberg Charter and Judgment in respect of criminal organisations.

Article 1, para. 6, of this Law contains the following provision:

"Any person who, during the National Socialist tyranny in Austria, acted, even temporarily, as a member of the Reich Government, or as a leading official of the N.S.D.A.P., with the rank of Gauleiter or similar grade and upwards, or with the rank of Reichsleiter or similar grade and upwards, or as Reichsstatthalter, Reich Defence Commissioner or Leader of the S.S.—including the Waffen S.S.—with the rank of Standartenfuhrer and upwards, will be deemed to be a war criminal within the meaning of paragraphs 1 and 2 above. Such persons, being regarded as instigators and contrivers of the above-mentioned crime shall be sentenced to death."⁽⁵⁾

(1) This Article regulates the rebuttal of presumptions of guilt declared by the De-Nazification Law in respect of "major offenders" and "offenders". In lists attached to the Law there is an extensive enumeration of those who are regarded as falling within these two groups and who are held guilty until proof to the contrary. See Art. 5-6 and 7-10 of the De-Nazification Law.

(2) It will be remembered that the Nuremberg Tribunal found that voluntary membership existed in all cases regarding the Leadership Corps of the Nazi Party and the Gestapo and S.D.

(3) Para. 8 of the above letter.

(4) Although a former territory of the III Reich, Austria had from the outset a separate status from Germany. In the Moscow declaration of November, 1943, the Allied Powers decided to re-establish its independence, and an Austrian Provisional Government was set up before the completion of the occupation of Austrian territory by the Allied Powers, in May, 1945. The setting up of this Government gave rise to certain differences between the Western Powers and Russia, but these were soon dispelled and the Austrian Government recognised by all Powers.

(5) The above text is quoted from an English translation prepared by the U.N.W.C.C. See Document Series, No. 23, February, 1946, *Constitutional Law of 26th June, 1945, concerning War Crimes and other National Socialist Misdeeds (War Crimes Law)*.

Para. 1 and 2 of Art. 1, referred to in the above text, define the notion of war crimes and war criminals.⁽¹⁾ Penalties provided by this Law are very severe. In numerous cases no lesser punishment can be imposed than 10 years' penal servitude, and in many other cases the death penalty is the only punishment.⁽²⁾

From the above quoted provision it appears that the classification of members held guilty on account of their membership in the groups or organisations described is similar to that of the Nuremberg Judgment as far as the Nazi Party and the S.S. are concerned. A major difference appears in respect of members of the Reichs Cabinet, who are included on an equal footing, and an entirely different solution is given to the question of the personal guilt of the members involved. All such members are regarded individually guilty on account of their membership taken in itself and have to be punished automatically on this ground. This amounts to the solution which was carefully avoided during the Nuremberg Trial and which had always given rise to apprehension in the Commission before the Trial.

(ii) RULES IN ALLIED COUNTRIES

In the national law of various Allied countries, provisions dealing with criminal groups or organisations were either already in existence for a varying length of time preceding the enactment of the Nuremberg Charter and of the rules that followed it, or were introduced in order to cover the type of collective criminality evidenced by Nazi activities. In most cases such subsequent rules were prescribed in addition to those already existing, as a further development of the laws in this field.

Provisions which were in force prior to the Nuremberg Charter form part of the common penal law systems of the countries concerned and most of them are, in a sense, wider in scope than those prescribed in respect of the Nazi organisations. They are wider in that they concern any type of criminal group, aiming at the commission of a greater variety of crimes than those covered by the Nuremberg Charter. On the other hand, they are, in connection with such a feature, general in nature and wide enough to embrace the cases covered by the Nuremberg Charter. In view of the procedure and legal effects prescribed in this Charter, the question of their implementation in the case of groups or organisations declared criminal by the Nuremberg Tribunal, does not arise in making another declaration under the terms of domestic law. They serve only the purpose of trying members of criminal organisations as a result of the declarations made by

(1) These definitions are as follows: "(1) Any person who, in the course of the war launched by the National Socialists, has intentionally committed or instigated an act repugnant to the natural principles of humanity or to the generally accepted rules of international law or to the laws of war, against the members of the armed forces of an enemy or the civilian population of a state or country at war with the German Reich or occupied by German forces shall be punished as a war criminal. (2) Any person who, in the course of this war, acting in the real or assumed interest of the German armed forces or of the National Socialist tyranny, has committed or instigated an act repugnant to the natural principles of humanity against other persons, whether in connection with war-like or military actions or the actions of militarily organised groups, shall be considered guilty of the same crime."

(2) See Art. 1, para. 3-5 and Art. 2-8 of the above Law.

the Nuremberg Tribunal. In this manner, whenever such members are brought to trial before courts in Allied territory,⁽¹⁾ provisions of municipal law play the same role as those in force in occupied territory.

As to the provisions which were prescribed with the specific purpose of rendering possible the trial of members of organisations declared criminal by the Nuremberg Tribunal, whenever enacted without direct previous support or link with the common law, they were introduced as a development of the laws and customs of war as embodied in or observed under the terms of municipal law.

The following account is not exhaustive but only illustrative. Selection has been made of various types of legislation demonstrating different ways in which the trial of members of criminal organisations is covered by the legislation.⁽²⁾

(1) *Canada*

The Canadian War Crimes Regulations which came into force on 30th August, 1945,⁽³⁾ contain the following provision (para, 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; in any such case all or any members of any such formation, unit, body, or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the court."⁽⁴⁾

The above provision is limited to the field of war crimes, but as such it is general in nature and not specifically related to members of organisations prosecuted before the Nuremberg Tribunal. It covers any other group (formation, unit, body) of persons and establishes a *prima facie* case of guilt for all or any of its members. This effect does not depend on a declaration of criminality, and it is consequently not necessary that the group had repeatedly committed crimes and thus proved its criminal nature. Presumption of guilt is established as soon as evidence is to hand that "a war crime has been the result of concerted action" of the group.

This provision furnishes a sufficient legal basis for the trial of members of organisations declared criminal by the Nuremberg Tribunal on the part of Canadian military courts. It should be noted that Canada was not a signatory to the Nuremberg Charter and is accordingly not entitled

(1) The bringing to trial of members of organisations declared criminal by the Nuremberg Tribunal before national courts and not only before military, occupation or other courts in Germany, is explicitly provided for in Art. 10 of the Nuremberg Charter. As a rule such trials may take place whenever a member had served in Allied territory and the Power entitled to prosecute him wants to try him within its own jurisdiction.

(2) This legislation is reviewed in alphabetical order of countries.

(3) On 6th August, 1946, the Canadian House of Commons adopted a Bill (No. 309, Second Session, Twentieth Parliament, 10 George VI, 1946), by which it reenacted the War Crimes Regulations prescribed by the Governor in Council on 30th August, 1945. The Regulations thus acquired statutory effect. In connection with the Bill they became "the Canadian War Crimes Act (An Act respecting War Crimes)" in 1946.

(4) See Misc. No. 48, 25.9.1946, *Canadian War Crimes Legislation*, p.4.

to claim such trials under Art. 10 of the Charter. However, whenever a member of such organisations is detained by Canadian authorities, as prisoner of war or otherwise, and whenever such member is guilty of war crimes falling within the jurisdiction of Canadian courts, nothing prevents such trials from taking place. In such cases it should also be noted that, not being a signatory, Canada is also not bound, in strict law, by the decisions of the Nuremberg Tribunal. It is, however, safe to assume that these decisions would have great weight.

(2) *Czechoslovakia*

In a law of 24th January, 1946,⁽¹⁾ the Czechoslovak Provisional National Assembly included provisions for the punishment of members of a number of Nazi or Nazi-sponsored organisations which committed crimes against the State or Czechoslovak citizens. The relevant provisions were devised in a similar manner to those in force in Austria and proclaimed automatic punishment for mere membership. These provisions read:

" Paragraph 2

" Any person who during the period of imminent danger to the Republic (Para. 18)⁽²⁾ was a member of one of the following organisations: Die Schutz-Staffeln der Nationalsozialistischen Deutschen Arbeiterpartei (S.S.), or Freiwillige Schutzstaffeln,⁽³⁾ or Rodobrany, or Szabadcsapatok⁽⁴⁾ or of any other organisation of a similar character, shall, if he did not commit any offence incurring a severer penalty, be punished for his crime by penal servitude for a period varying from five to twenty years and in presence of especially aggravating circumstances by penal servitude for a period varying from twenty years to a life sentence."

" Paragraph 3

" (2) Anyone who during the same period was an agent or leader in one of the following organisations: Nationalsozialistische Deutsche Arbeiterpartei (N.S.D.A.P.)⁽⁵⁾ Sudetendeutsche Partei (SdP),⁽⁶⁾ Ulajka,⁽⁷⁾ Hlinkeva Garda,⁽⁸⁾ Svatoplukova Garda,⁽⁹⁾ or in any other Fascist organisation of the same character, shall if he has not committed an offence incurring a severer penalty, be sentenced to penal servitude for from five to twenty years."

The effect of both provisions is that, once a member of the above organisations is brought to trial, the courts are bound to impose penalties

(1) Law No. 22 of 24th January, 1946, as amended and promulgated. See translated text in Misc. No. 112, 27.11.1947, *Czechoslovak War Crimes Legislation*, pp. 3-4.

(2) The period of imminent danger, as distinct from the period of war, was declared to have started on 21st May, 1938, i.e. nearly a year before the invasion of Czechoslovakia by the Nazis in breach of the Munich agreement. No date was fixed for the end of this period, but it is to be taken that it goes in any case until the Nazi invasion in March, 1939, and that it links up with the date on which Czechoslovakia considers that a state of war started between her and Germany.

(3) This was a Nazi organisation composed mostly of Sudeten Germans from Czechoslovakia, who volunteered as shock troops and operated from Germany in Czech territory at the time when the Nazis were creating disturbances prior to the Munich agreement in order to acquire the Sudetenland.

(4) "Rodobran" was a Czech Fascist organisation composed of fifth columnists who co-operated with the Nazis in their scheme to incorporate Czechoslovakia into the III Reich. "Szabadcsapatok" was a similar organisation of the Hungarian minority in Czechoslovakia. Both ceased to be active after the Nazi invasion in March, 1939.

(5) The German Nazi Party.

(6) The Nazi Party of the Czech Sudeten.

(7) A Czech Fascist organisation.

(8) A Slovak Fascist organisation corresponding to the German S.S.

(9) The principal Czech Fascist organisation.

for mere membership and, consequently, without further evidence than that concerning membership. The difference between them is that all members of the organisations enumerated in para. 2 are to be punished without distinction of rank or category, whereas in the case of organisations enumerated in para. 3(2), penal responsibility is limited to "agents and leaders" and apparently does not extend to other members.

(3) *France*

By an Ordinance of 24th August, 1944, the then Provisional French Government prescribed rules for the trial of war criminals in pursuance of the laws and customs of war and of the French penal laws, civil and military. Article 2 of this Ordinance extended, by way of interpretation,⁽¹⁾ certain provisions of the French Penal Code to enemy or quisling criminal groups or organisations. The relevant passages of this Article read:

"By interpretation of the provisions of the Penal Code and of the Code of Military Justice:

.....
 "(2) Organisations or undertakings of systematic terrorism are regarded as representing an "association of malefactors" as provided in Article 265 and subsequent articles of the Penal Code."⁽²⁾

This includes organisations declared criminal by the Nuremberg Tribunal. Punishments to be inflicted are those from the Penal Code. The relevant provisions of the said Code are the following:

"Art 265. Any association formed, for whatever period of time and irrespective of the number of its members, or any understanding made with the aim of preparing or committing crimes against persons or property, constitutes a crime against public peace.

"Art 266. Any person affiliated with an association formed or taking part in an understanding made with the aim specified in the preceding Article, shall be punished with hard labour.

"Art 267. Any person who knowingly and willingly favours the authors of crimes provided in Art. 265 by furnishing instruments of the crimes, means of communication, accommodation, or place of meeting shall be punished with imprisonment."⁽³⁾

France being one of the signatories to the Nuremberg Charter, is entitled to bring to trial members of organisations declared criminal

(1) This method is known in continental law as "legislative interpretation" and often serves to amend or extend the existing law.

(2) The original text reads:

"Art. 2.—Par interprétation des dispositions du code pénal et du code de justice militaire, sont considérés comme:

.....
 (2)—L'Association de malfaiteurs prévue par les articles 265 et suivants du code pénal: les organisations ou entreprises de terrorisme systématique."

(3) Similar provisions exist in the Belgian Penal Code, as well as in the Czechoslovak Penal Code: The original French text reads:

"Art. 265. Toute association formée, quelle que soit sa durée, ou le nombre de ses membres, toute entente établie dans le but de préparer ou de commettre des crimes contre les personnes ou les propriétés, constituent un crime contre la paix publique.

"Art. 266. Sera puni de la peine de travaux forcés à temps, quiconque se sera affilié à une association formée ou aura participé à une entente établie dans le but spécifié à l'article précédent . . .

"Art. 267. Sera puni de la réclusion quiconque aura sciemment et volontairement favorisé les auteurs des crimes prévus à l'article 265, en leur fournissant des instruments de crime, moyens de correspondance, logement ou lieu de réunion . . ."

by the Nuremberg Tribunal, and the above provisions are those under which such trials are to be conducted. The effect of the provisions of the Penal Code is that, providing the affiliation is voluntary, the crime of membership is punishable in itself and it would appear that the punishment is automatic. However, as a signatory to the Nuremberg Charter and a participant to the Nuremberg Trial, both in the prosecution and the judgment, France is to be regarded as bound by the general ruling of the Nuremberg Tribunal and its verdict. When trying members of Nazi organisations French courts would, therefore, be expected to apply the Penal Code to the extent to which this is consistent with the Nuremberg Judgment.

(4) *Great Britain*

It has been seen that the prosecution in Nuremberg had referred to certain British laws with a view to demonstrating that the provisions of the Nuremberg Charter were not entirely a legal novelty.

It should be recorded that, apart and in addition to such laws, new provisions were inserted in contemporary British legislation. The British Regulations for the Trial of War Criminals, issued by Royal Warrant of 14th June, 1945, contain a provision similar to that in the Canadian war crimes laws. Regulation 8 says:

"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."

An amendment of 4th August, 1945, added the following provision:

"In any such case all or any members of any such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the court."⁽¹⁾

The effects are the same as those mentioned in respect of Canadian legislation, with the important difference that, insofar as organisations declared criminal by the Nuremberg Tribunal are concerned, their members are tried under the rules prescribed for the British zone in Germany. The above provisions are applicable to members of other "units or groups of men", particularly in purely military formations. On the other hand, in view of the fact that Great Britain is bound by the Nuremberg Judgment as a signatory to the Charter, they are equally not applicable to members of the Reich Cabinet, General Staff and High Command.

(5) *Norway*

The Norwegian legislator did not find it necessary to operate by means of new legislation in respect of criminal organisations. The view was taken that existing provisions of common penal law were sufficient to secure the trial and punishment of members of such organisations.

A general provision is contained in Art. 330 of the Norwegian Penal Code (1902), which reads:⁽²⁾

(1) Amendment No. 1, *Royal Warrant*, A.O. 127-1945.

(2) The translation was provided by the Norwegian representative on the United Nations War Crimes Commission.

"He who founds or participates in an organisation which has by law been declared illegal or whose aim it is to commit or encourage punishable acts or whose members pledge themselves to unconditional obedience towards anybody, shall be fined or imprisoned for a period not exceeding 3 months. If the aim of the organisation is to encourage crimes,⁽¹⁾ imprisonment for a period not exceeding 6 months may be imposed."

The Norwegian Penal Code contains, in addition, provisions dealing with "conspiracy" to commit certain specific crimes, and prescribing punishment for persons taking part in such conspiracy. They include crimes against the State, against persons and property.

So, for instance, Art. 94, para. 1 of the Penal Code reads:

"He who enters into a conspiracy with one or more persons with the intention of committing any such crime which has been described in Art. 83, 84, 86 and 90 shall be punished with imprisonment for a period up to 10 years. In no case, however, shall the penalty exceed $\frac{2}{3}$ of the maximum punishment prescribed for the specific crime concerned."

Acts covered by Art. 83, 84, 86 and 90 concern crimes against the State and include conspiracies to commit the following crimes: subjection of the State or part of its territory to foreign domination; involving the State in war or hostilities; unlawful bearing of arms or assistance to the enemy; disclosure of State secrets to a foreign power.

Art. 159 punishes in similar terms conspiracy to commit crimes against property and public security by: arson; explosions; floods; railway accidents; pollution of drinking water; introduction of poison into objects of general use; causing introduction of dangerous contagious diseases. Special punishments are provided for conspiracy to commit larceny or robbery (Art. 259, 268, 269). The maximum penalty for some of these crimes is life imprisonment.

It thus appears that the Norwegian Penal Code makes punishable two types of the "crime of membership" in an organisation or conspiracy. One is general in the sense that it is not qualified by any specific crime. It entails only minor punishments (Art. 330). The other is specific in that it is qualified by particular crimes of a serious character, and consequently entails severer punishments. The general test for any such membership is voluntary affiliation with the group or conspiracy, as it is in the French Penal Code. Other tests intervene according to the type of organisation or conspiracy.

As it stands, the Norwegian Penal Code makes possible the punishment of any member of the organisations declared criminal by the Nuremberg Tribunal for the general crime of membership provided in Art. 330 and in addition, for that provided in the other Articles to the extent to which such members were parties to one of the specific conspiracies covered by the Penal Code. The striking feature is that, failing some such specific crime of membership, persons belonging to Nazi organisations are liable only to minor punishments, not exceeding 6 months imprisonment. No more severe penalty can be imposed on the basis of the criminality of the group in itself.

(1) The term "crimes" is used in a technical sense, meaning acts which, according to Norwegian law, are punishable with imprisonment exceeding three months.

(6) *Poland*

In a Decree issued by the Minister of Justice of 11th December, 1946, and consolidating previous Polish war crimes enactments, special provisions were included for making possible the trial and punishment of members of Nazi or Nazi-sponsored organisations whose activities were connected with Poland during the late war. These provisions introduced the "crime of membership" as a separate offence and, like the laws in Austria and Czechoslovakia, made the punishment of this offence automatic and obligatory upon the courts. Criminal organisations were defined in connection with the crimes covered by the Nuremberg Charter, and membership in any organisation, not only in those declared criminal by the Nuremberg Tribunal, was made a crime. Likewise, any member of such organisations was made liable to punishment, irrespective of classes or categories, and membership in certain organisations was declared to be a crime in itself and in every case.

The relevant provisions of the above Decree read:

" Article 4

"(1) Any person who was a member of a criminal organisation established or recognised 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.

(2) A criminal organisation in the meaning of Para. 1 is a group or organisation:

- (a) which has as its aims 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).

(3) Membership of the following organisations especially is considered criminal:

- (a) the German National Socialist Workers' Party (National Sozialistische Deutsche Arbeiter Partei—N.S.D.A.P.) 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.)".

It is thus apparent that, even though connected with the same types of crimes as those tried by the Nuremberg Tribunal and with some of the organisations which were declared criminal by it, the Polish legislator follows a legal line entirely different from that adopted in the Nuremberg Judgment. Membership in the Gestapo, S.S. and S.D. entails automatic punishment irrespective of rank. The only exception concerns members of the Nazi Party, which are indicated as comprising only those occupying "leading positions". In addition liability to punishment extends to members of any other organisation defined in Art. 4, para. 1, including those not declared criminal by the Nuremberg Tribunal.

It should be noted that Poland was not a signatory but only an adherent to the Nuremberg Charter, and that consequently, in strict law, she is not bound by the Nuremberg Judgment. Her legislation furnishes an illustration of cases where the said Judgment did not exercise its influence in this field.

(7) *United States*

It has already been seen that penal retribution for membership in certain groups or organisations formed part of the United States municipal law before the Nuremberg Trial. The United States Chief Prosecutor in Nuremberg quoted a law of 28th June, 1940, making membership in such bodies a crime, and he referred, in addition, to the concept of "conspiracy", which occupies an important place in the Anglo-American legal system.⁽¹⁾ It has also been seen that special rules were prescribed for the United States zone in Germany concerning the trial of members of organisations declared criminal by the Nuremberg Tribunal.

In addition to all these laws or rules it should be noted that provisions similar to those of the British and Canadian war crimes regulations were incorporated in certain local American military regulations. They were for instance embodied in the "Regulations governing the Trial of War Criminals" by United States military commissions in the "China Theater" of operations.⁽²⁾ Whereas rules for the zone in Germany were enacted only pursuant to the Allied Control Council Law No. 10 and to the Nuremberg Charter and Judgment, and were limited to the trial of members of organisations declared criminal by the Nuremberg Tribunal, the Chinese regulations form part of American military law in general. It is true that they are not embodied in the American *Rules of Land Warfare*, which comprise the laws and customs of war as understood and observed by the United States. But it is also true that they are the first of their kind in American war crimes legislation and can be regarded as a nucleus which may in time be developed in the main body of American military law.

Like other United States rules, the Chinese regulations reflect the concern of the American lawmakers to operate by means of rebuttable presumption of guilt. Art. 16, d. and e. provide:

d. If the accused is charged with an offence involving concerted criminal action upon the part of a military or naval unit, or any group or organisation, evidence which has been given previously at a trial of any other member of that unit, group or organisation, relative to that concerted offence, may be received as *prima facie* evidence that the accused likewise is guilty of that offence.

e. The findings and judgment of a commission in any trial of a unit, group or organisation 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 organisation. Upon proof of membership in such unit, group or organisation 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.

The first rule is that whenever a "concerted criminal action"—which is only one way of describing the same concept of collective criminality as that covered by the Nuremberg Charter—is established by one court in respect of a unit, group or organisation, courts trying other members of such bodies may regard the accused as *prima facie* guilty of the same concerted offence as that for which the first accused were tried. This is more or less the equivalent of the effect of a declaration of criminality

(1) *Proceedings*, Part. 8. p. 44-45.

(2) These Regulations were issued by the H.Q., United States Forces, China Theater, on 21st January, 1946, as document A.G. 000.5. JA.

under the Nuremberg Charter for bringing members to trial before other courts. The second rule is still more similar to the Charter in that it gives force to the judgment of one court before the other courts, in respect of the criminal nature of the body concerned. Where the "criminal nature, purpose or act" of a unit, group or organisation is established on the occasion of the trial of one member, it is to be "given full faith and credit in any subsequent trial" of other members. This is the equivalent of the binding effect of a declaration of criminality prescribed by the Nuremberg Charter. The third rule is the one with which we are already familiar when dealing with the American attitude. Members of a body whose "character, purpose or acts" are found to be criminal by one court, are presumed guilty until they can establish "any mitigating circumstances relating to their membership or participation" in such body. The regulations do not mention the tests of voluntary membership or of knowledge of the criminal nature of the body, but in the light of what has previously been seen in relation to American prosecution and laws, they are to be regarded as also relevant under the Chinese regulations.

D. TRIALS OF MEMBERS OF CRIMINAL GROUPS AND ORGANISATIONS

Before closing this study of the law regarding criminal groups or organisations, it is worth noting a number of illustrative trials which took place under the appropriate laws as a consequence of the Judgment delivered by the International Military Tribunal at Nuremberg. A great many trials of this kind have been held or are still in progress in Germany, and others took place before national courts of certain Allied countries. It would not serve a useful purpose, nor would it be possible at this stage, to attempt to make a complete survey of such trials.

Among the most important war crime trials in general, stand those which were and are still being held by United States Military Tribunals at Nuremberg. They are commonly known as "subsequent Nuremberg trials" or "subsequent Nuremberg proceedings". They deal exclusively with outstanding cases, either on account of the calibre of the accused who are next to the Major War Criminals tried by the International Military Tribunal, or on account of the types of crimes tried, or both. Their total number does not exceed 12 cases. At the time of writing about half have been completed, and the rest are still in progress. In most of these trials the accused were charged separately with the crime of membership in organisations declared criminal by the International Military Tribunal, in addition to other offences falling within the notion of crimes against peace, war crimes or crimes against humanity. The judgments pronounced included both convictions and acquittals on the charge of membership, and contain opinions of the subsequent tribunals which throw light on how the general ruling and verdicts of the International Military Tribunal were carried out.

All these trials were and are being held under the terms of the Allied Control Council Law No. 10. It is now proposed to review them very briefly, within the space allowed in this document.

(i) JUDGMENTS OF THE SUBSEQUENT MILITARY TRIBUNALS AT NUREMBERG

(1) *Trial of Karl Brandt et al. (Medical case)*

In the first trial held by United States Military Tribunals at Nuremberg, 23 German doctors and scientists were prosecuted for carrying out criminal medical experiments.⁽¹⁾ The trial opened on 9th December, 1946, and was commonly known as the "Medical Case". The judgment was delivered on 19th and 20th August, 1947. The chief defendant, Karl Brandt, was personal physician to Hitler, Gruppenfuhrer in the S.S. and Major General in the Waffen S.S., Reich Commissioner for Health and Sanitation, and member of the Reich Research Council. He was charged with the other defendants for medical experiments amounting to war crimes and crimes against humanity as defined in the Allied Control Council Law No. 10.

All experiments were conducted in concentration camps (Dachau, Sachsenhausen, Natzweiler, Ravensbruck, Buchenwald, etc.), and caused inhumane suffering, torture or death of many inmates. They consisted in high altitude experiments to investigate the limits of human endurance and existence at extremely high altitudes (up to 68,000 feet); freezing experiments to investigate means of treating persons severely chilled or frozen; malaria experiments to investigate immunisation and treatment of malaria; lost (mustard) gas experiments to investigate treatment caused by that gas; sulfanilamide experiments to investigate the effectiveness of the drug; bone, muscle and nerve regeneration and bone transplantation experiments; seawater experiments to study methods of making seawater drinkable; epidemic jaundice experiments to establish the cause of and discover inoculations against that disease; sterilization experiments to develop a method best suited for sterilising millions of people; spotted fever experiments to investigate the effectiveness of vaccines; experiments with poison to investigate the effect of various poisons. In addition to this, several defendants were charged with activities involving murder, torture and ill-treatment not connected with medical experiments. In all cases inmates of concentration camps were used as "guinea-pigs", and were as a rule healthy subjects.

Karl Brandt and nine other accused were indicted for having committed such criminal acts as members of the S.S. and were, accordingly, also prosecuted as "guilty of membership in an organisation declared to be criminal by the International Military Tribunal" at Nuremberg.⁽²⁾

When deciding upon this particular charge, the United States Military Tribunal referred to the general ruling of the International Military Tribunal and applied in each case the tests of individual guilt defined by the latter. On the face of the evidence submitted, Karl Brandt and eight other defendants were found guilty of membership on the ground that they had been in the S.S. until the end of the war and that, as such, they were actually and personally "implicated in the commission of war crimes and

(1) Case 1, tried by United States Military Tribunal No. 1.

(2) *Official Transcripts* by the American Military Tribunal in the matter of the United States of America against Karl Brandt et al., p. 11372.

crimes against humanity".⁽¹⁾ One defendant was found guilty of having "remained in the S.S. voluntarily throughout the war, with actual knowledge of the fact that that organisation was being used for the commission of acts declared criminal by Control Council Law No. 10".⁽²⁾

(2) *Trial of Joseph Altstoetter et al. (Justice Case)*

In one of the most outstanding subsequent trials at Nuremberg, 16 German high officials of the Reich Ministry of Justice, judges and prosecutors of Nazi courts were prosecuted for the commission of criminal offences by means of legislative or judicial acts.⁽³⁾ It should be emphasised that it is the first time in recorded history that individuals were tried for such criminal offences. The presumed integrity and high standards of members of the legislative and judicial machinery had to be scrutinised and tested under general principles of penal law and justice in face of Nazi practices through the legislative and judicial machinery.

The trial opened on 17th February, 1947, and was commonly designated as the "Justice Case". The judgment was delivered on 3rd and 4th December, 1947.

The principal defendant Joseph Altstoetter, was Chief (Ministerialdirektor) of the Civil law and Procedure Division of the Reich Ministry of Justice, and Oberfuhrer in the S.S. Together with the other defendants he was charged with misusing legislative or judicial power in such a manner as actually to commit crimes against persons subjected to Nazi laws and/or courts of justice. The evidence submitted was to the effect that Nazi legal machinery was used as one of the means "for the terroristic functions in support of the Nazi regime".⁽⁴⁾ Death sentence and other severe penalties were prescribed for acts which either did not represent criminal offences under standards of modern justice or did in no case warrant such heavy punishments. Sentences were pronounced by Nazi courts in pursuance of such criminal laws in a very large number of cases. The accused were indicted for being implicated in such acts, which, under the terms of the Control Council Law No. 10, amounted to war crimes or crimes against humanity.

Seven defendants, including Altstoetter, were accused of having committed such crimes as members of organisations declared criminal by the International Military Tribunal. The organisations involved were the S.S., S.D. and Leadership Corps of the Nazi Party. Some of the defendants were members of two organisations simultaneously. They were accordingly charged separately with the crime of membership in such organisations.⁽⁵⁾ As in the previous case the Tribunal applied the tests of criminality defined by the International Military Tribunal⁽⁶⁾ and found the accused individuals guilty of membership on different grounds. Altstoetter was found guilty as a member of the S.S. falling within the groups declared

(1) *Op. cit.*, p. 11396; 11430-11431; 11439; 11455-11456; 11487-11509, 11520-11521; 11530-11531.

(2) *Op. cit.*, 11472.

(3) Case No. 3, tried by United States Military Tribunal No. 3.

(4) *Official Transcripts* of the American Military Tribunal III in the matter of the United States of America against Josef Altstoetter et al., defendants, p. 10654.

(5) *Indictment of the above trial*, p. 18.

(6) *Official Transcripts*, Announcement, p. 10713.

criminal by the International Military Tribunal, on the grounds that he had knowledge of the criminal purposes and acts of the S.S. and remained voluntarily in the organisation.⁽¹⁾ The test of knowledge was likewise positively established against two other defendants. In one case the Tribunal was satisfied by the evidence that the accused actually knew of the execution of political prisoners and that he personally took part in the misdeeds. It also arrived at such conclusion on the basis of circumstantial evidence deriving from the accused's official position and duties. "No man who had his intimate contacts with the Reich Security Main Office, the S.S., the S.D., and the Gestapo could possibly have been in ignorance of the general character of those organisations".⁽²⁾ In the second case the evidence regarding the *mens rea* of the accused was entirely of a circumstantial nature. The crimes, said the Tribunal, "were of such wide scope and so intimately connected with the activities of the Gauleitung (the accused's organisation) that it would be impossible for a man of the defendant's intelligence not to have known of the commission of these crimes, at least in part if not entirely".⁽³⁾ It is interesting to note that the chief defendant, Altstoetter, was found guilty only on the count of membership and freed from other charges. He was sentenced to 5 years imprisonment.

Two defendants were acquitted. In one case the defendant was charged as a member of the Leadership Corps of the Nazi Party, and the Tribunal established that his group did not in fact belong to the Leadership Corps, nor to any other organisation declared criminal.⁽⁴⁾ In the second case the accused was charged as a member of the Leadership Corps Staff and a "sponsoring" member of the S.S. The Tribunal found that in none of these cases did the accused belong to the classes of members included in the declarations made by the International Military Tribunal.⁽⁵⁾

(3) *Trial of Oswald Pohl et al*

One of the most interesting trials in this field is the so-called "Pohl Case", which opened on 10th March and closed on 3rd November, 1947.⁽⁶⁾ The Tribunal dealt with 18 defendants, all of whom but one were members of the S.S. They were top ranking officials in the "S.S. Economic and Administrative Main Office", known as "W.V.H.A." (Wirtschafts-und Verwaltungshauptamt), which was one of the twelve main departments of the S.S. and to which was added the main office of the Inspector of Concentration Camps. The principal accused, Pohl, was Chief of the W.V.H.A. and, as such, the administrative head of the entire S.S. organisation. Himmler was his only superior. The other accused were heads of the various branches of the W.V.H.A.

The S.S. Economic and Administrative Main Office was in charge of running concentration camps and a large number of industrial, manufacturing and service enterprises in Germany and occupied countries. It was responsible for all financial matters of the S.S., for the supply of food,

(1) Op. cit., p. 10927-10931.

(2) Op. cit., p. 10880-10881.

(3) Op. cit., p. 10922-10923.

(4) Op. cit., p. 10884.

(5) Op. cit., p. 10904-10906.

(6) Case 4, tried by United States Military Tribunal No. 2.

clothing, housing, sanitation and medical care of inmates and S.S. personnel of concentration camps; for the construction and maintenance of houses, buildings and structures of the S.S., the German police and of the concentration and prisoners of war camps; and for the order, discipline and regulation of the lives of the concentration camps inmates. In addition, it was charged with the supply of slave labour of the concentration camp inmates to public and private employers throughout Germany and the occupied countries, as well as to enterprises under its own management.

On account of such relationship with concentration camps and slave labour, all the accused were charged with taking part in the commission of "atrocities and offences against persons and property, including plunder of public and private property, murder, extermination, enslavement, deportation, unlawful imprisonment, torture, persecutions on political, racial and religious grounds, ill-treatment of, and other inhumane and unlawful acts against thousands of persons, including German civilians, nationals of other countries, and prisoners of war."⁽¹⁾ The accused were thus tried as leading instruments of the criminal policy conducted by the heads of the Nazi Party and State against the millions who were ill-treated or perished in concentration camps or as slave labour.

In addition to the above offences, all the accused except one were charged under a separate count for the crime of membership in an organisation declared criminal by the International Military Tribunal, and were all indicted as falling within the categories covered by the Tribunal's declaration.

When summing up the various counts of the indictment, including that of membership, the United States Military Tribunal made a general ruling regarding the evidence and discarded entirely the principle of the presumption of guilt in the following terms:

"Under the American concept of liberty, and under the Anglo-Saxon system of jurisprudence, every defendant in a criminal case is presumed to be innocent until the prosecution by credible and competent proof has shown his guilt to the exclusion of every reasonable doubt. This presumption of innocence follows him throughout the trial until such degree of proof has been adduced. Beyond a reasonable doubt, does not mean beyond a vain, imaginary or fanciful doubt, but means that the defendant's guilt must be fully proved to a moral certainty, before he is condemned."⁽²⁾

It will be seen that the Tribunal applied this ruling to all individual cases of membership and lay the burden of proof concerning tests of personal guilt on the prosecution. This illustrates the fact previously mentioned that the International Military Tribunal did not decide the question of the burden of proof, and thus made possible the elaboration of a differing jurisprudence in this respect. The striking feature in this trial is that the above ruling was applied by an American court, notwithstanding the attitude of the United States Chief Prosecutor at the main Nuremberg Trial and the rules issued by the American authorities for other courts, which are all founded on the principle that a declaration of criminality reverses the onus of proof and frees the prosecution from submitting

(1) *Official Transcript* of the American Military Tribunal in the matter of the United States of America, against Oswald Pohl et al., p. 8057.

(2) *Op. cit.*, p. 8059.

evidence in respect of the personal guilt of the members. In view of the fact that no rules to this effect were issued with particular regard to the United States Military Tribunal at Nuremberg, and that the International Military Tribunal had left the field clear, the above ruling was within the powers of the United States Tribunal and the legal basis of its jurisprudence cannot be challenged.

The ruling was applied with particular clearness in respect of two defendants whom the Tribunal acquitted from all charges.

In one case the accused, Rudolf Scheide, was Chief of a department of the W.V.H.A. as technical expert in the field of motor transport, and was in charge of all the transport service of the W.V.H.A. The prosecution contended that, in connection with his office and the large field of tasks carried out by him with the various branches of the W.V.H.A. the accused "gained knowledge of how the concentration camps were operated, how the prisoners were treated, who they were, and what happened to them". It also contended that he "knew that the concentration camps were engaged in the slave labour programme, and that he furnished transportation in this programme with knowledge of its use". And finally, that he "knew of the mass extermination programme carried out by the concentration camps" and provided the department concerned in this programme "with transportation, spare parts, tyres, gasoline, and other necessary commodities for carrying out this programme".⁽¹⁾ The accused denied knowledge of all these crimes and the Tribunal came to the following conclusion:

"After weighing all the evidence in the case, and bearing in mind the presumption of innocence of the defendant, and the burden of proof on the part of the prosecution, the Tribunal must agree with the contentions of the defendant."⁽²⁾

The Tribunal then dismissed all the tests of individual guilt in the following terms:

"The defendant admits membership in the S.S., an organisation declared criminal by the Judgment of the International Military Tribunal, but the prosecution has offered no evidence that the defendant had knowledge of the criminal activities of the S.S., or that he remained in the said organisation after September, 1939, with such knowledge or that he engaged in criminal activities while a member of such organisation."⁽³⁾

According to the ruling of the International Military Tribunal, it will be remembered that proof in respect of the last test (personal commission of crimes) would appear always to lie on the prosecution, whereas nothing stands in the way of deciding upon the test of knowledge on the ground of a reversal of the burden of proof as advocated by the United States Chief Prosecutor and as followed up in a number of United States rules.

In the second case the accused, Leo Volk, was head of a legal department of the W.V.H.A. Like in the preceding case the prosecution contended that he had knowledge of the criminal purposes and acts of the W.V.H.A. on account of his office and duties. The accused's defence was that he

(1) Op. cit., pp. 8130-8131.

(2) Op. cit., p. 8131. Italics introduced.

(3) Op. cit., p. 8132. Italics introduced.

had no such knowledge, but merely prepared notarial documents, carried on law suits and generally gave legal advice. The Tribunal was satisfied that the accused was a "vital figure" in his department and refuted the defence thesis that, in order to convict him, proof should be submitted that, if he knew of the criminal purposes or acts of his organisation, he must have had the power to prevent crimes from being committed. The Tribunal declared:

"It is enough if the accused took a *consenting part* in the commission of a crime against humanity. If he was part of an organisation actively engaged in crimes against humanity, was aware of those crimes and yet voluntarily remained a part of the organisation, lending his own professional efforts to the continuance and furtherance of those crimes, he is responsible under the law."

However, continued the Tribunal, the defence contends that the accused "was not aware of any crimes and *it is this which the prosecution must establish* before it can ask for a conviction",⁽¹⁾ meaning that the accused had knowledge of the crimes.

The Tribunal found that no such evidence had been submitted, and that the accused did not voluntarily join the organisation but was drafted from a private firm he personally did not want to leave for the W.V.H.A. It also established that, in the W.V.H.A., he had a special status in that he was employed under special contract. In view of these facts the Tribunal decided that the accused's guilt for membership had not been established "beyond reasonable doubt" and while convicting him on other counts, it acquitted him from this particular charge.⁽²⁾

Two more defendants were acquitted from the charge of membership. One of them was head of the Office of Audits in the W.V.H.A. from 1942 until the end of the war. Here again the Tribunal established lack of evidence on the part of the prosecution regarding the relevant tests and concluded in the following terms:

"Perhaps in the case of a person who had power or authority to either start or stop a criminal act, knowledge of the fact coupled with silence could be interpreted as consent. But Vogt was not such a person. His office in W.V.H.A. carried no such authority, even by the most strained implication. He did not furnish men, money, materials or victims for the concentration camps. He had no part in determining what the inmates should eat or wear, or how hard they *did* work or how they *were* treated. The most that can be said is that he knew that there were concentration camps and that there were inmates. His work cannot be considered any more criminal than that of the bookkeeper who made up the reports which he audited, the typist who transcribed the audit report or the mail clerk who forwarded the audit to the Supreme Auditing Court."⁽³⁾

As a consequence the accused was acquitted on all counts.⁽⁴⁾ In the second case the accused was acquitted for not belonging to any of the classes or categories of S.S. members included in the declaration of the International Military Tribunal.⁽⁵⁾

(1) Op. cit., pp. 8174-8175. Italics in the last quotation introduced.

(2) Op. cit., p. 8179.

(3) Op. cit., p. 8111.

(4) Op. cit., p. 8113.

(5) Op. cit., pp. 8191-8195.

In other cases the Tribunal applied extensively circumstantial evidence to admit proof of guilty knowledge as charged by the prosecution.

Defendant August Frank was Chief Supply Officer of the Waffen-S.S. and Death Head Units under the defendant Pohl, and became Pohl's Chief Deputy of the W.V.H.A. In view of his position and the field of his competence and duties the Tribunal came to the following conclusions:

"... anyone who worked, as Frank did, for eight years in the higher councils of that agency cannot successfully claim that he was separated from its political activities and purposes."⁽¹⁾

From that the Tribunal further concluded that he "could not have been ignorant" or that he "must have known" of the purposes as well as of a series of criminal acts described by the Tribunal.⁽²⁾ He was found guilty of "participating and taking a consenting part" in the "slave labour programme . . . and in the looting of property of Jewish civilians for the eastern occupied territories". In this connection he was also convicted for the crime of membership.⁽³⁾

Another defendant, Erwin Tschentscher, was chief of a department of W.V.H.A. dealing with supplies of food for the Waffen-S.S. and the police in Germany. He contended, in defence, that his only link with concentration camps was to furnish food for the guards, and declined any knowledge of concentration camp crimes and slave labour practices. On the face of his position and duties, as well as of the evidence that he paid visits to several concentration camps, the Tribunal expressed its findings in the following terms :

"The Tribunal concludes that the defendant Tschentscher was not a mere employee of the W.V.H.A., but held a responsible and authoritative position in this organisation. He was Chief of Amt-B-I, and in this position had large tasks in the procurement and allocation of food. Conceding that he was not directly responsible for furnishing food to the inmates of concentration camps, he was responsible for furnishing the food to those charged with guarding these unfortunate people.

"The Tribunal is fully convinced that he knew of the desperate condition of the inmates, under what conditions they were forced to work, the insufficiency of their food and clothing, the malnutrition and exhaustion that ensued, and that thousands of deaths resulted from such treatment. His many visits to the various concentration camps gave him a full insight into these matters.

"The Tribunal finds without hesitation that Tschentscher was thoroughly familiar with the slave labor program in the concentration camps, and took an important part in promoting and administering it."⁽⁴⁾

For these reasons the accused was found guilty both of actual participation in war crimes and crimes against humanity and of the crime of membership.⁽⁵⁾

In all other cases the Tribunal had either clear evidence of the actual participation of the accused in specific criminal acts, such as in the case

(1) Op. cit., p. 8101.
 (2) Op. cit., pp. 8100-8103.
 (3) Op. cit., p. 8104.
 (4) Op. cit., p. 8128.
 (5) Op. cit., p. 8129.

of Pohl himself, or else sufficient evidence to draw conclusions as to their guilty knowledge, and on this basis pronounced sentences of guilt for the crime of membership.⁽¹⁾

(4) *Trial of Friedrich Flick et al.*

The last completed subsequent trial at Nuremberg which included the crime of membership, was that of Friedrich Flick and five other defendants. It opened on 20th April and closed on 22nd December, 1947.⁽²⁾ It was one of several trials commonly designated as "industrial cases", for the defendants were not officials of the Nazi State, but private citizens engaged as business men in German heavy industry. Flick owned a steel corporation controlling or affiliated with iron and coal mining companies. The other defendants were his assistants and associates. They were charged, *inter alia*, with taking part in, and being members of, groups or organisations connected: *Count I*: with "enslavement and deportation to slave labour" of concentration camp inmates and other civilians, as well as with the "use of prisoners of war" in work prohibited by international law (armament production, etc.), *Count II*: with "plunder of public and private property, spoliation, and other offences against property" in occupied territories; *Count III*: with "persecutions on racial, religious and political grounds"; *Count IV*: with "murders, brutalities, cruelties, tortures, atrocities and other inhumane acts committed principally by the S.S."

Although in the majority of counts the defendants were described as members of organisations "connected" with criminal activities, only one accused, Steinbrinck, was a member of an organisation declared criminal by the International Military Tribunal (the S.S.); he was consequently the only defendant specifically indicted for the crime of membership. In addition, under Count IV, both he and the chief defendant, Flick, were accused of offences closely connected with membership of the S.S. They were charged with having contributed, as members of a private group called the "Keppler Circle" or "Friends of Himmler", large sums to the financing of the S.S. "with knowledge of its criminal activities", and to have thereby been accomplices in war crimes and crimes against humanity perpetrated by the S.S. It is important to note that the charge was not, and could not be, that they were guilty of membership in the "Keppler Circle", for this circle was not included in the organisations declared criminal by the International Military Tribunal. Neither was "knowledge" of the S.S. criminal activities mentioned in this instance as a test for the crime of membership, but only as a basis for charging the two defendants as accomplices or accessories to the crimes committed by the S.S. This part of the indictment proved, however, to be relevant for deciding the case of Steinbrinck, as it contained facts furnishing evidence regarding his guilty knowledge as a member of the S.S.

As in the "Pohl Case", the United States Military Tribunal which tried Flick, Steinbrinck and others rejected the thesis of presumption of guilt and took the view that the burden of proof concerning the tests of crimin-

(1) *Op. cit.*, pp. 8080-8097; 8104-8109; 8113-8121; 8133-8173; 8179-8191.

(2) Case 5, tried by United States Military Tribunal No. 4.

ality for membership lay on the prosecution. So, in the case of Steinbrinck it declared the following:

"Relying upon the International Military Tribunal's findings . . . the prosecution took the position that it devolved upon Steinbrinck to show that he remained a member without knowledge of such criminal activities. As we have stated in the beginning the burden was all the time upon the prosecution."⁽¹⁾

The Tribunal decided the case on the basis of this rule.

In assessing the tests relevant for determining Steinbrinck's individual guilt, the Tribunal declared that there was no evidence showing that he was personally implicated in the commission of crimes perpetrated by the S.S. and that no contention had been made to the effect that he was drafted on a compulsory basis. It therefore determined that his personal guilt was to be established solely on the basis of the test of knowledge of the criminal nature of the S.S.

As mentioned above, the Tribunal's findings on this test were made on the basis of the accused's activities as member of the "Keppler Circle". This circle was composed of about 30-40 bankers, industrialists and S.S. leaders, including the S.S. Reichsführer Himmler himself. Steinbrinck was a member from the beginning, which dated as far back as 1932. The circle was originally formed by Hitler's economic adviser Keppler, who gave it his name, with a view to inducing industrialists and other top business men to support the Nazi programme and regime. The circle had regular informal meetings and its members made regular donations upon Himmler's request, amounting to a total of 1 million Reichsmarks annually. Himmler's explanation for such requests was that he needed funds for "his cultural hobbies and for emergencies for which he had no appropriations". Steinbrinck contributed very large sums of money every year. The Tribunal was satisfied that the meetings of the group did not have "the sinister purposes ascribed to them by the prosecution", and found "nothing criminal or immoral in the defendant's attendance at these meetings". It was also satisfied that, in the beginning and particularly before the war, "the criminal character of the S.S. was not generally known". It came, however, to the conclusion that "later" it "must have been known"; "that during the war and particularly after the beginning of the Russian campaign" there was not "much cultural activity in Germany"; and that consequently members of the group could not "reasonably believe" Himmler was spending their money for other purposes than to maintain the S.S. The Tribunal found "no doubt" that "some of this money" went to the S.S., and declared "immaterial whether it was spent on salaries or for lethal gas". From this it concluded that Steinbrinck was guilty of the crime of membership.⁽²⁾ The Tribunal's findings in this respect were, thus, entirely based on circum-

(1) *Official Transcript* of the American Military Tribunal IV in the Matter of the U.S.A. against Friedrich Flick, et al., pp. 11015-11016. The reference made to the statement delivered "in the beginning" of the judgment, concerns a general statement, made without particular regard to the crime of membership, whereby the Tribunal stressed, among the rules of fair trial, that of the presumption of innocence until proof to the contrary is established by the prosecution. See op. cit., p. 10975.

(2) For details on Tribunal's findings see op. cit., pp. 11014-11022.

stantial evidence and were, from a practical point of view, founded on premises equivalent to that of a presumption of guilt.

The trial ended in the conviction of Flick, Steinbrinck and one more defendant, whereas the other three were acquitted. In passing sentence upon Flick and Steinbrinck the Tribunal admitted circumstances in mitigation of the punishments, and pronounced sentences not exceeding 7 years imprisonment.

(ii) TRIALS IN PROGRESS AT THE SUBSEQUENT PROCEEDINGS IN NUREMBERG

As has been pointed out, several more trials are, at the time of writing, still in progress before the United States Military Tribunals at Nuremberg. One concerning members of a group involved in crimes committed against children and adults on racial grounds, has just ended but the text of the judgment has not been made available for inclusion in this account.

In four of these trials defendants were charged with membership of organisations declared criminal by the International Military Tribunal. One is the "racial" case just mentioned, otherwise designated as "Case 8", involving Ulrich Greifelt and 13 other accused. All defendants but one were members of the S.S. and were prosecuted for the crime of membership in addition to other charges. Another is the trial of Otto Ohlendorf and 23 other defendants, otherwise known as the "Einsatzgruppen Case" or "Case 9". All defendants were members of the S.S. falling within the categories defined by the International Military Tribunal. As such they filled the ranks of special units called "Einsatzgruppen", whose chief tasks were to carry out exterminations in occupied territories, and were all charged with the crime of membership. Yet another trial is that of the board of directors and other leading officials of the world-wide German chemical concern "I.G. Farbenindustrie", commonly designated as the "I.G. Farben Case" or "Case 6". It comprises 24 defendants, three of whom were charged with membership in the S.S. The last trial is that of 21 leading officials of the German Foreign Office (Case 11), with Baron von Weizsaecker at the head of the list. 14 defendants were charged with membership in the S.S., four of whom were in addition prosecuted as members of the Leadership Corps of the Nazi Party and one as member of the S.D.

The judgments already delivered indicate that important verdicts can be expected in the above trials as well.

(iii) CONCLUSIONS

It would be premature to draw definite and detailed conclusions from the above trials at this stage. One issue is, however, clear and should be emphasised. The findings of the courts, as well as the various laws and regulations issued for the trial of members of criminal organisations, make it abundantly clear that the rules of evidence permit two different and as a matter of fact opposite ways of determining members' individual or personal guilt. As has often been pointed out, the International Military Tribunal refrained from solving the question of whether this should be done on the basis of presumption of guilt or of presumption

of innocence, and accordingly whether the onus of proof should lie on the prosecution or on the defence. Local American rules, such as those issued for Germany and China, answer the question in favour of presumption of guilt, whereas proceedings of the United States Military Tribunals at Nuremberg answer it in favour of the traditional rule of presumption of innocence.

This question has not failed to attract attention even before the subsequent proceedings started. A few weeks after the Judgment of the International Military Tribunal was delivered, the French Government, realising that the Judgment did not secure uniformity of jurisprudence in this respect, made attempts at achieving such an end by diplomatic action. It proposed to several United Nations, including the United States of America, Great Britain and the U.S.S.R., the convening of a conference with a view to arriving at an agreement regarding a uniform procedure to be devised upon the Nuremberg Judgment's general ruling and recommendations, particularly concerning the rules of evidence. It approached the War Crimes Commission on the same subject and submitted memoranda defining the issues which ought to be solved.⁽¹⁾ Special French representatives held meetings with the Commission and discussed the problem with its members.⁽²⁾ These attempts did not bear fruit. The conference was not convened, and the Commission did not feel that it could do much in the matter in view of its limited terms of reference. As a consequence the French proposals were withdrawn.

(1) A.30, 10th December, 1946, *Questions which the French representatives wish to discuss with the United Nations War Crimes Commission in London*. Also A.31, 13th December, 1946; and C.242, 22nd January, 1947, *French proposals regarding the prosecution of members of Criminal Organisations and of concentration camp personnel*.

(2) Meetings of 11th December, 1946, (M.119) and 29th January, 1947, (M.122).

CHAPTER XIII

ARRANGEMENTS FOR THE SURRENDER OF WAR CRIMINALS

INTRODUCTORY NOTES

Whereas procedure for apprehension involved practical difficulties in locating individuals guilty of war crimes, the procedure of surrender raised legal problems, in that it was an operation of limited duration and for a specific purpose for which there were no precedents. The nearest rules and machinery were those relating to the extradition of criminals in time of peace. These were, however, never considered to be suited to the case of war criminals. The laws of extradition were designed to *protect* individuals wanted for trial by one country and residing in another, either from unfair trial, or from prosecution for acts whose criminality was disputable. In particular, they were devised with a view to protecting individuals from being prosecuted for so-called "political" crimes, which were in most cases the result of exercising in their own country fundamental political freedoms, considered to be inalienable rights in democratic countries. For these reasons the procedure of extradition, as it developed during the last century and a half, implied the sovereign right of a state to grant asylum to refugees or immigrants with whose judicial record it was satisfied, and the erection of a complicated and slow moving machinery for examining each case on its merits.

None of these factors applied to the case of war criminals. Their crimes were of such a heinous nature that there was no doubt as to their degree of criminality, and it was, therefore, even necessary to ensure that the normal procedure of extradition was not unwittingly applied in their case, and surrender refused on the grounds that the crime was of a political nature. This applied particularly to those countries which had a firmly established tradition of giving asylum to foreigners deemed to be *bona fide* "political" refugees. Consequently the rules, procedure and machinery advocated by the Commission, and those eventually developed by Allied Governments and military authorities, were from the outset divorced from the peace time notion of extradition. A technical distinction came to be drawn between *extradition* proper and the *surrender* of war criminals. This distinction enabled a practical scheme to be established, though its application was fraught with difficulties and obstacles of all kinds.

The right of any nation to bring captured criminals before its own courts for crimes committed on its territory or against its nationals was a firmly established practice of states, and was never disputed. Difficulties arose when the accused were apprehended by the authorities of one nation and were wanted for trial by another. These became still more complicated when a war criminal was apprehended by one nation and was claimed for trial by two or more nations.

This Chapter deals with discussions on the problems involved in determining conditions under which surrender was to be effected and the practical solutions found by the authorities concerned. One section deals with the proposals and recommendations of the Commission, and another with the actual arrangements made for surrendering war criminals to competent courts. Such activities of the Commission which were directly connected with these arrangements are included in the latter section. Two more sections deal respectively with the activities of other international bodies, and with the attitude of neutral governments.

A. PROPOSALS AND RECOMMENDATIONS OF THE COMMISSION

(I) DRAFT CONVENTION FOR THE SURRENDER OF WAR CRIMINALS

(1) *Antecedents*

During the first months of the Commission's activities much attention was paid to the question of how far existing rules of international law were adequate to cover the various phases of the procedure required for bringing war criminals to book, starting from their detection and arrest to their trial by the competent court. One of the phases considered from this viewpoint was that concerning the surrender of war criminals to the appropriate courts once they were apprehended.

(a) *Reports of the London International Assembly*

On this subject the Commission had the benefit of two reports made by members of the London International Assembly and studied by the latter in 1943, before the Commission had been formed by the Allied Governments concerned. One was a report submitted by the Czechoslovak member,⁽¹⁾ to one of the Commissions of the Assembly (Commission for Questions concerned with the Liquidation of War). The other was a report of the said Commission to the Assembly, which was prepared by the Belgian member, who was Chairman of the Commission.⁽²⁾ Both reports agreed in substance that there were no fixed rules regarding the surrender of war criminals in particular, apart from the practice and treaties concerning the "extradition" of criminals in general. They also agreed that, so far as war criminals were concerned, the rules of extradition proper were "defective" and that there was a danger that many war criminals might escape punishment. The weakest point in the procedure for extradition was considered to be the lack of obligation on the part of the Governments to extradite criminals, deriving from the basic principle of the sovereign right of the requested State to decide upon each case with unfettered powers. To meet this situation both reports advocated in substance the following twofold course of action:

- (a) The imposition of an obligation upon enemy powers to hand over war criminals under their jurisdiction to the power entitled to bring them to trial, by means of special clauses to be inserted in the terms of surrender (armistice) and/or peace treaties. Breaches of such obligation should be sanctioned by penalties.

(1) II/5. *The extradition of war criminals, report by Dr. V. Benes, dated 5.6.1943.*

(2) II/4. *Report of the Commission on some questions connected with the handing over of war criminals for trial (drawn up by M. de Baer).*

(b) The conclusion of a special convention relating to the surrender of war criminals between the Allied nations to be eventually signed or adhered to by the neutral powers. Alternatively, the signing of a separate and temporary agreement with neutral powers, failing which concerted action should be undertaken by the Allied nations, with full pressure if need be, to induce neutrals to hand over war criminals without difficulty.

The above course was, thus, to cover all types of cases where a war criminal was to be handed over by one country to another, that is:

- (a) The surrender of a war criminal by an enemy power to the Allied power concerned;
- (b) The surrender of a war criminal by one Allied power to another;
- (c) The surrender of a war criminal by a neutral state to an Allied nation.

In presenting their suggestions the authors of the reports made reference to the failure to secure the surrender of war criminals after the First World War and emphasised the importance of building up the legal machinery on time and with efficient means of enforcement. They both underlined the advisability of creating a purely executive procedure, thus departing from the judicial one governing the "extradition" proper, with a view to facilitating and expediting the trials of war criminals. They developed in detail numerous questions which they suggested should be dealt with in the proposed inter-allied convention, including those relating to conflicting claims for trial of the same criminal.

(b) Draft Convention of the Ministers of Justice

In addition to the above two reports, the Commission had also the benefit of a formal Draft Convention prepared by the Ministers of Justice of five Allied Governments in exile in London—those of Belgium, France, Luxembourg, the Netherlands and Norway.

The Draft was substantially prepared on the lines of the two reports of the London International Assembly, with the additional feature that it was constructed so as to include the handing over of traitors (quislings) in addition to war criminals proper. It was also conceived to include the surrender of a war criminal already tried and condemned by one nation, and wanted for trial by another nation, for other war crimes falling under its own jurisdiction. The Draft excluded, from the procedure devised in it, war criminals guilty of minor offences entailing a punishment of less than 3 years imprisonment. It stressed specifically that the procedure embodied constituted "an exceptional measure which did not prejudice the existing extradition treaties in any way", thus underlining the fact that the procedure to be applied to war criminals was different from that concerning the "extradition" of criminals in general.

Regarding this different procedure, the Draft contained, in the first place, an enumeration of the conditions to be fulfilled when applying for the surrender of war criminals or traitors. These were separately laid down for individuals wanted for trial and not yet convicted by any nation, and for those already tried and convicted by a nation. In the former case the requesting State had to communicate particulars regarding the identity of the wanted individual, his crime and the maximum penalty which it entailed; a copy of the indictment or warrant for arrest; a summary

of the evidence in support; and a reference to the court before which the individual was to be tried. The request was to be accompanied by written assurances that there would be a fair trial, securing fundamental rights to the accused. In the case of an individual already convicted, the request had to contain a copy of the judgment with a summary of the evidence proving the guilt of the individual condemned.

A provision was inserted declaring the right of the requested State not to hand over its own nationals in certain cases. These were: when the accused had already been found guilty or not guilty by its national court for the offence in respect of which the surrender was requested (*res judicata*); when criminal proceedings against the accused were instituted for the same offence in his own country within six months of the date the request for his surrender was received; and, finally, when the requested State had found that the evidence submitted would be insufficient under its national laws to obtain a conviction, had the offence been committed within its jurisdiction.

In the case of an individual wanted for trial by several countries, the Draft provided that he should be handed over first to the country whose legislation contained the heaviest penalty. In case of equal penalties, the surrender was to be effected to the country having first requested it.

Rules were set forth for the disposal of individuals in specific cases. The surrender of an individual already under investigation or trial by the requested State was to be suspended. Where an individual was sentenced to detention in a penal institution in the requested country and was to be surrendered for another trial, the execution of the sentence was to be postponed. Whenever the sentence consisted of the death penalty, this was to be carried out without suspension, the assumption being that this would satisfy any requesting country that justice had been done.

Throughout the Draft the competent authorities to deal with the surrender of war criminals and traitors were considered to be the judicial authorities, thus making the procedure envisaged very similar to that of "extradition".

Drafted as it was, the Ministers of Justice blueprint was intended to operate both between the Allied nations themselves and between them and neutral states. This was expressed in a provision declaring that the Convention would "remain open to the signature of all Allied and Associated Powers of the United Nations and of Neutral States".

(2) *Work of the Commission*

(a) *Enforcement Committee's Draft*

The above Draft was introduced at the first meeting of the Enforcement Committee, held on 11th February, 1944, by the Dutch delegate, who suggested that it be taken as a basis for recommending a convention to the member Governments. The Draft was accordingly circulated to members of the Committee.⁽¹⁾

(1) SC 2/1 14.2.44. *Draft Convention for the surrender of war criminals (drawn up by the Ministers of Justice of certain of the occupied countries).*

At the Committee's second meeting, held on 22nd February, 1944, a discussion took place as to whether such a convention was required or not. The view prevailing that it was required, the Committee started to consider the matter in substance. Members opposed to a convention criticised the Draft from the following points of view:—

(a) That it covered acts which were not war crimes in the proper sense, namely acts of traitors and quislings;

(b) That it required formalities and safeguards analogous to those of normal extradition treaties, and therefore did not meet the main requirement in the case of war criminals, namely, to make their surrender easy and speedy.

It was at this early stage that the suggestion was made that for war criminals a simplified administrative procedure was sufficient. The critics were of the opinion that the insertion of the criminals' names on the Commission's Lists should be sufficient justification to obtain their surrender from one Allied country to another, and that clauses in the terms of armistice and/or peace treaties would likewise provide a sufficient means for securing their surrender from enemy countries. The only concession was made in regard to neutral countries, for which it was recognised that a convention might be needed.

However, those in favour of solving the questions involved by means of a convention maintained a majority, and the Committee worked on the matter from February until August, 1944. After much discussion and consideration of many drafts and memoranda,⁽¹⁾ the Committee reached a compromise. It maintained the proposal of recommending a convention and prepared a draft of its own,⁽²⁾ but it departed from the Ministers of Justice Draft in two important aspects. Firstly, it recommended a purely administrative procedure, and not a judicial one such as in the Ministers' Draft. Secondly, it came to the conclusion that it would not be wise to attempt to obtain adherence of neutrals to any formal agreement, and consequently limited its draft to the surrender of persons wanted for trial between Allied nations only. As to the enemy countries, it endorsed the views that their obligations should be settled in the respective terms of armistice and/or peace treaties. On the other hand, it retained the original suggestion to cover, by the convention, the surrender of traitors or quislings, and made special provision to this effect.

All these points were underlined in a draft Explanatory Memorandum,⁽³⁾ which was to be attached to the draft Convention, and in which the general purpose of the Committee's draft was formulated in the following terms:

“The purpose in view is to make it certain that the United Nations will reciprocally transfer to one another, persons in their power who are wanted for trial as war criminals or quislings, or have already been convicted on such charges, and to secure this result in the simplest possible way, avoiding the complications and delays of normal extradition procedure, and, in particular, excluding the possibility of refusing surrender on the ground that the acts charged have the character of political offences.”

(1) See docs. II/12 of 30.3.44; II/18 of 13.6.44; II/19 of 15.6.44; II/20 of 20.6.44; II/22 of 29.6.44; II/25 of 18.7.44.

(2) C.37. 25.7.44. *Convention for the surrender of war criminals and other war offenders. Draft presented by Committee II.*

(3) C.44 25.8.44. *Convention for the surrender of war criminals and other war offenders. Draft explanatory memorandum prepared by Dr. Liang and the Secretary General.*

This last point was expressly inserted in a provision following those in which war criminals and traitors or quislings were respectively defined for the purpose of their surrender. The provision said that the surrender of both categories would be carried out "notwithstanding any contention that the offence was of a political character". The rather complicated definition of the Ministers' Draft, covering both war criminals and traitors in a single formula, was split into two separate parts in order to draw a clear line between the two classes of individuals involved. War criminals were defined as:

"Persons charged with or convicted of war crimes, including offences against the laws and customs of war, which were committed either within the jurisdiction of the requesting State or against that State or its nationals or the armed forces of the State".

The main point in this definition was that it gave a wide scope to the notion of war crimes, by conveying that there were, or at least could be, war crimes which technically did not represent offences against the laws and customs of war. The definition of traitors and quislings was likewise constructed on a very wide scale, particularly in order to cover cases of collaboration with the enemy which technically did not fall within the concept of "treason". They were defined as:

"Persons, nationals, or former nationals, of the requesting State who are charged with or convicted of giving aid or comfort to the enemy or of an offence committed with the intent to further the cause of the enemy or of an offence committed by means of the power or opportunity afforded by a state of war or armed hostilities or by hostile occupation of territory of the requesting State".

The procedure itself, as previously pointed out, was made an executive or administrative one, and the conditions for applying for and obtaining surrender were reduced to a minimum. They were restricted to the submission of identification data of the criminal and of an ordinary description of his crime, with a reference to the maximum penalty in the requesting State. In addition, the provision of written assurances for a fair trial was retained, as was the requirement to present a copy of the judgment for those tried and sentenced *in absentia*. As a safeguard that the "extradition" procedure would never be used instead, it was explicitly stated that "the person whose surrender was requested would in no case have recourse to any form of judicial procedure provided in the extradition treaties, laws or regulations of the requested State".

The rest of the Committee's text followed the same lines as the Minister's Draft, providing similar solutions for the disposal of individuals wanted by more than one country; of nationals of the requested country; of persons under criminal proceedings in the requested State; and of persons already condemned to death or to other punishments.

(b) Commission's Recommendations

The Draft Convention with its Explanatory Memorandum was considered and approved by the Commission on 29th August, 1944, with a few verbal amendments in the Memorandum.⁽¹⁾

(1) See M.29. 29.8.44.

Several members made reservations regarding the attitude of their Governments. They were not satisfied that the executive procedure, as distinct from the judicial one, would adequately cover all possible cases or meet all requirements. The United States representative thought that the article providing that in no case would the surrendered individual have the benefit of a judicial recourse under the extradition treaties, laws or regulations, of the requesting State, was incompatible with the United States Constitution and might compel his Government to reject the Convention or to make a reservation when signing it. The Belgian delegate stated that his Government wished to retain all the safeguards originally envisaged in the Ministers of Justice Draft and dropped in the Committee's text, concerning the submission of judicial evidence against the wanted person to the requested State, and not merely of an ordinary description of the alleged crime. He also wished the retention of the clause requiring the requesting State to describe the court due to try the wanted person.

Hope was expressed for an early convening of the diplomatic conference necessary for negotiating and signing the Convention, under the auspices of the United Kingdom Government.

The Draft Convention was submitted to all member Governments for consideration on 4th September, 1944.⁽¹⁾

(c) *Attitude of Member Governments*

In January, 1945, a communication was received from the Yugoslav Government that they approved, in principle, the Draft Convention. Similar communications were received from the Governments of Czechoslovakia, and of Australia,⁽²⁾ the latter suggesting certain additional arrangements.

In April, 1945, the tenor of a letter sent by the Foreign Office on 29th March, to all member Governments, excepting the Dominions and India, was communicated to the Commission for information.⁽³⁾ It contained a full statement on the views of the United Kingdom Government, which subsequently proved to be decisive for the ultimate attitude which was to be adopted by all Allied Governments and for the arrangements finally made by them in this field.

The British Government stated that "the powers they possessed were sufficient to enable this matter to be dealt with rapidly and satisfactorily by executive action, provided that it was kept on an informal basis and not made the subject of a formal treaty". They declared that, under the existing national law, they were empowered to repatriate by way of deportation any undesirable alien, and that they were prepared to do so in the case of aliens against whom there was a *prima facie* case that they were war criminals, or were guilty of treachery involving active assistance to the enemy. They further declared that, in respect of war criminals, they

(1) C.47. 4.9.44. *Convention for the surrender of war criminals and other offenders, Draft explanatory memorandum.*

(2) See M.45 24.1.45, M.50 28.2.45 and M.71 19.7.45.

(3) C.91. 16.4.45. *Convention for the surrender of war criminals and other offenders. Letter from the United Kingdom Government to certain member Governments.*

would "attach all due importance" to the Commission's Lists of war criminals when deciding upon requests for their surrender to Allied Governments. As regards traitors or quislings they would be satisfied with only two conditions before turning them over to the requesting State: that the wanted persons were nationals of the requesting State, and that there was *prima facie* evidence "that they had actively assisted a State at war with their own country". They specified that, in the case of prisoners of war wanted as war criminals or traitors, the military authorities had also sufficient powers to ensure their surrender, under the same administrative procedure and conditions.

As a consequence, the United Kingdom Government rejected the recommendation to sign a convention as unnecessary to achieve the object proposed. The lead it gave in this matter did have a decisive effect on the final settlement between the Allied Governments. They all, in the end, followed the lines of the United Kingdom procedure and established an informal administrative machinery, devoid of all the impediments deriving from the strict judicial procedure in the case of extradition proper. This machinery is described in another part of this Chapter.

Consequently, the recommended convention never came into being. An attempt was made by the Belgian Government to sign a convention on this subject with a number of countries, particularly with those of continental Europe, which, in the opinion of the Belgian Government, were restricted by national legislation and had no powers similar to those possessed by the United Kingdom Government.⁽¹⁾ This attempt did not materialise, all other Governments, including the continental ones, having found a way to proceed by executive action.

(ii) PROVISIONS IN THE DRAFT CONVENTION FOR THE TRIAL AND PUNISHMENT OF WAR CRIMINALS

At the same time as it was deliberating on the subject of the Draft Convention for the surrender of war criminals, the Committee on Enforcement had been studying a Draft Convention for the trial and punishment of war criminals, which resulted in the Convention for the Establishment of a United Nations War Crimes Court.⁽²⁾ During early discussion on this Court, it had been advocated that the handing over of an accused person to the prosecuting authority of the International Court should not be regarded as extradition. In the final draft the Tribunal was vested with the power to require the surrender of war criminals from enemy countries, neutral states and Allied Governments as a result of an executive procedure. It was empowered to lodge such requests both in cases where it was competent to try the wanted individual and where the latter was to be delivered to a national court. Though this Convention was never signed, the principle that war criminals were to be handed over for trial in a summary, executive procedure was put into practice in regard to the defendants of the International Military Tribunals at Nuremberg and Tokyo.

(1) See M.68. 4.7.45.

(2) For more details see Chapter XIV Section B, p. 443.

(iii) RECOMMENDATIONS FOR THE INSERTION OF CLAUSES IN THE ARMISTICES AND PEACE TREATIES

(1) *Armistice Terms*

As has already been indicated, the question of inserting provisions in the armistice for the apprehension and surrender of war criminals had recurred frequently during discussion in the Enforcement Committee on the Draft Convention for the Surrender of War Criminals.

In March, 1944,⁽¹⁾ it was announced that the Belgian representative had agreed to act as rapporteur to draft provisions for insertion in the armistice terms. The matter was again raised at a meeting held on 2nd May, 1944,⁽²⁾ which was attended by the British Attorney General, Sir Donald Somervell, when the recommendations made by the Belgian representative⁽³⁾ were discussed; these were to the effect that immediately after the armistice all persons suspected of having any responsibility for war crimes should be taken into custody. The Attorney General remarked that such a measure would be facilitated if the names of the persons to be arrested were available, but that such a proposal would have to be referred to the Combined Chiefs of Staff for consideration.

By 12th May, 1944, the Committee on Enforcement, had agreed on the draft of an article for insertion in the armistice terms.⁽⁴⁾ While enunciating the general principle that the United Nations may bring to trial before any tribunal, national or international, persons accused of committing war crimes, the article laid down that the German Reich should be under an obligation to hand over persons within fifteen days of the demand for surrender, and must co-operate with the United Nations authorities by keeping the required persons in custody. Any United Nations' agency, or authority of the United Nations in control of German territory, might exercise the rights under the armistice provisions, while the Germans must co-operate, by complying with any request for identification, apprehension, arrest and delivery of wanted persons, without the right to examine each case on its merits, and must also assist in providing evidence and witnesses. Penalties, up to a term of 20 years imprisonment, were laid down for Germans who failed to comply with these provisions, who aided or abetted the escape of wanted persons, or the destruction of evidence; penalties were also provided for Germans who victimised their fellow-citizens for co-operating with the Allies in this matter. These penalties were only to be exercised by the courts of the United Nations.

This draft was considered by the Commission at its meeting on 30th May, 1944,⁽⁵⁾ when certain modifications were suggested, and the Chairman produced a redraft of the text on 8th June.⁽⁶⁾

This latter draft included, among the obligations of the German

(1) See M.12. 7.3.44.

(2) See M.16. 2.5.44.

(3) C.14. 25.4.44. *Proposal by the Chairman of Committee I*, p. 4.

(4) C.18. 12.5.44. *Article on Surrender of War Criminals to be inserted in Terms of Armistice with Germany*.

(5) See M.20. 30.5.44.

(6) C.27. 8.6.44. *Article to be inserted in Armistice terms with Germany for surrender of persons to be placed on trial by the United Nations*.

authorities immediately after the armistice, the duty to intern, and keep in custody until required, any or all members of the Gestapo and the S.S. Rather than laying down penalties for non-compliance with its provisions, the article demanded that the German authorities should surrender for trial before any United Nations tribunal, persons obstructing the execution of the provisions, or Germans who had punished others for co-operating with the Allies in their execution.

The draft was considered by the Commission at its meeting held on 13th June, 1944.⁽¹⁾ It was decided to add a further clause to the effect that the German Government should undertake to:

“take and keep under control all property—both movable and immovable—belonging to persons whose surrender is demanded, and hold it at the disposal of the authorities of the United Nations”.

This amendment was added in accordance with the practice in central European States, whereby confiscation of property is a normal form of criminal punishment; such a step, moreover, would allow for compensation to be made to the victims of war crimes.

The Yugoslav representative proposed that an article similar to that concerning the surrender of German war criminals should also be inserted in the armistices with the European satellites of Germany, and that reference should expressly be made to the forces which, in these satellite countries, corresponded to the Gestapo and the S.S.

The final text of the article was accepted, with certain minor amendments, by the Commission on 13th June, 1944,⁽²⁾ together with a covering note by the Chairman to the member Governments.⁽³⁾ The article was worded so as to apply to Germany, and the principles contained therein were recommended for use in the armistices with each of Germany's satellites. It was pointed out, however, that different provisions might be necessary in the case of Japan.

The text of the draft article for insertion in the armistice with Germany⁽⁴⁾ ran as follows:—

“1 The United Nations may, if they so decide, bring to trial before any Tribunal, national or international, any persons accused of crimes connected with, or incidental to, hostilities conducted by Germany against any one or more of the United Nations. This provision shall apply notwithstanding any procedure or prosecution before a court, military or civil, of Germany or of any State or political entity acting in alliance or in concert with Germany, irrespective of whether such proceedings have ended in a conviction or in an acquittal, provided that if a sentence has been imposed the penalty already undergone shall be taken into account in fixing any sentence which may be imposed:—

“2 To this effect Germany shall:

- (a) take all necessary steps to hand over forthwith to the authorities of the United Nations any persons whose surrender is demanded either at the time when this instrument becomes effective or at some subsequent date;

(1) See M.22. 13.6.44.

(2) Loc. cit.

(3) C.31. 16.6.44 *Surrender by the Axis Powers of persons wanted for trial as war criminals.*

(4) Loc. cit.

- (b) give such assistance as may be required to the authorities of the United Nations in all measures necessary to give effect to the obligations recognised in Section 1;
- (c) forthwith take and keep under control all property, both movable and immovable, belonging to persons whose surrender is demanded, and hold it at the disposal of the authorities of the United Nations;
- (d) give such assistance as may be required to the authorities of the United Nations in interning forthwith and keeping in custody until such time as the authorities of the United Nations may otherwise direct, any or all members and former members of the Gestapo and the S.S.;

“ 3 The right to apprehend the persons referred to in Section 2 may be exercised by any Agency, military or civil, acting on behalf of some or all of the United Nations which may be in control of German territory, or which may be appointed to give effect to the present provisions.

“ 4 Such German authorities as may be allowed by the United Nations to continue or to exercise their functions shall take all necessary steps:

- (a) to comply forthwith with all requests of the said agencies and authorities relating to the identification, discovery, apprehension, arrest and delivery of accused persons without regard to their nationality and without any right to examine the case upon its merits. Such agencies and authorities shall be given every facility to supervise the way in which their orders are carried out;
- (b) to disclose and produce any records or documents or any other things the production of which may be considered necessary to ensure the full knowledge of the acts with which the accused are charged and the just appreciation of responsibility, to obtain the presence of witnesses and to assist in any other way in which such assistance may be required.

“ 5 Germany will on demand surrender to the civil or military authorities of the United Nations for trial before such tribunal as the United Nations may appoint for the purpose:

- (a) any person accused of obstructing the execution of the foregoing provisions or failing to comply with any direction relating thereto. For this purpose the German authorities shall, when requested to do so, provide the United Nations with the names of the officials who are responsible for the execution of the provisions of this instrument;
- (b) any person accused of aiding and abetting a person whose surrender has been demanded, in evading apprehension, arrest or surrender;
- (c) any person accused of destroying or concealing documentary evidence, impeding or obstructing the calling or the examination of witnesses, or of attempting to do so;
- (d) any person inciting another to resist in any way the provisions concerning the surrender and the punishment of criminals covered by these provisions;
- (e) any German official accused of prosecuting or punishing or any individual accused of molesting anyone in any way for having reported to the authorities or agencies of the United Nations any evasion of— or resistance to—the foregoing provisions concerning the surrender or punishment of persons accused of crimes covered by these provisions;

“ 6 The offences enumerated in Section 5 shall not be subject to the jurisdiction of German courts ”.

At the Commission's meeting of 11th July, 1944,⁽¹⁾ the Chairman stated that he had made inquiries as to the organisations analogous to the German Gestapo and S.S., which should be mentioned in the armistices

(1) See M.24. 11.7.44.

with Germany's satellites. All information appeared to show that, while the German Gestapo had itself operated to some extent in those states, there were no native organisations analogous to the Gestapo and S.S. in Roumania, Bulgaria and Hungary. The Yugoslav delegate pointed out that the state and military police in those satellite states had, in the countries they had occupied, committed much the same crimes as the S.S. and Gestapo. He therefore repeated his previous proposal and specified that the reference to be made in the armistices with these satellites should concern the members of the state police who had occupied the positions of district chiefs of civil or military police in any of the occupied countries. This was approved and a recommendation to this effect was sent to members of the Commission on 18th July, 1944⁽¹⁾.

In a letter to the Chairman of the Commission dated 4th January, 1945,⁽²⁾ Mr. Eden, the British Foreign Secretary, stated that the Commission's recommendations with regard to the provisions to be inserted in any armistice with Germany and other enemy powers with the object of securing the apprehension of alleged war criminals had been forwarded to the European Advisory Commission. This body would no doubt take full account of the recommendations of the Commission.

When the terms of Unconditional Surrender with Germany came to be signed, Article 11, which dealt with the matter of war criminals, ran as follows:⁽³⁾

"(a) The principal Nazi leaders as specified by the Allied Representatives, and all persons from time to time named or designated by rank, office or employment by the Allied Representatives as being suspected of having committed, ordered or abetted war crimes or analogous offences, will be apprehended and surrendered to the Allied Representatives.

"(b) The same will apply in the case of any national of any of the United Nations who is alleged to have committed an offence against his national law, and who may at any time be named or designated by rank, office or employment by the Allied Representatives.

"(c) The German authorities and people will comply with any instructions given by the Allied Representatives for the apprehension and surrender of such persons."

The surrender document with Italy was signed at Malta on 29th September, 1943, and amended at Brindisi on 9th November, 1943. Article 29 of this document—the section dealing with war criminals—read as follows⁽⁴⁾:—

"Benito Mussolini, his chief Fascist associates, and all persons suspected of having committed war crimes or analogous offences whose names appear on lists to be communicated by the United Nations and who now or in the future are on territory controlled by the Allied Military Command or by the Italian Government, will forthwith be apprehended and surrendered into the hands of the United Nations. Any instruction given by the United Nations to this purpose will be complied with."

(1) C.34. 18.7.44. *Surrender by the Axis Powers of persons wanted for trial as war criminals.*

(2) C.68. 10.1.1945. *Letter dated 4th January, 1945, from Mr. Eden to Sir Cecil Hurst dealing with certain proposals submitted by the Commission to the Governments.*

(3) H.M.S.O. *Unconditional Surrender of Germany Declaration and other Documents.* Germany No. 1 (1945) Cmd. 5648.

(4) Misc. No. 43. 27.8.43. *The Provisions of the Draft Peace Treaties concerning war criminals. Note by the Legal Officer.*

In the case of the armistices signed with the satellite powers at Moscow,⁽¹⁾ the respective countries undertook to collaborate with the Allied Powers or Allied High Command in the apprehension and trial of persons accused of war crimes.

The Four Power Agreement of 4th July, 1945, signed in London, regarding the Allied control machinery in Austria, extended to that country the provisions of Article 11 of the Unconditional Surrender of Germany. A further Four Power Agreement, signed in Vienna on 28th June, 1946, empowered the Allied Commission to act directly in all matters connected with the surrender of war criminals to Allied nations, or to international tribunals. A notable feature was that this Agreement made express reference to the Commission's Lists, when it laid down that the Allied Commission was required to secure the surrender of war criminals "included in the lists of the United Nations War Crimes Commission"⁽²⁾.

The position with regard to the surrender of Japan was not quite so straightforward. During the Potsdam Conference, on 26th July, 1945, the President of the United States and the Prime Minister of Great Britain, with the concurrence of the President of China, issued a proclamation defining the terms of Japanese surrender.⁽³⁾ Under item 10 of this Proclamation, the statesmen announced their intention that "stern justice shall be meted out to all war criminals including those who have visited cruelties upon our prisoners". In the actual terms of surrender, signed in Tokyo Bay on 2nd September, 1945, the Japanese agreed to accept the terms of the Potsdam Declaration and to obey any orders or regulations to this purpose issued by the Supreme Commander or his deputies.

(2) Draft Peace Treaties

By August, 1946, the Paris Peace Conference had drawn up the terms of the Draft Peace Treaties with Italy, Roumania, Bulgaria, Hungary and Finland, and the texts were communicated to the United Nations War Crimes Commission, through the British Foreign Office.

Article 38 of the Draft Peace Treaty with Italy ran as follows⁽⁴⁾:-

"(1) Italy will take the necessary steps to ensure the apprehension and surrender for trial of:

- (a) Persons accused of having committed, ordered and abetted war crimes and crimes against humanity.
- (b) Nationals of the Allied and Associated Powers accused of having violated their national law by treason or collaboration with the enemy during the war.

"(2) At the request of the United Nations Government concerned, Italy

(1) *Conditions of Armistice with Roumania* H.M.S.O. Miscellaneous No. 1 (1945), Cmd. 6585; with *Bulgaria*, Miscellaneous No. 3 (1945), Cmd. 6587; with *Hungary*, *Department of State Bulletin* Vol. XII No. 291 (21 Jan. 45), p. 83; with *Finland*, H.M.S.O. Miscellaneous No. 2 (1945), Cmd. 6586. See also *American Journal of International Law*, Vol. 39, Supplement p. 85 *et seq.*

(2) Art. 5 (vii) (b).

(3) *Department of State Bulletin* Vol. XIII, No. 318 (29.7.45).

(4) Misc. 43. 27.8.46. *The Provisions of the Draft Peace Treaties concerning war criminals. Note by Egon Schwelb, Legal Officer.*

will likewise make available as witnesses persons within its jurisdiction, whose evidence is required for the trial of the persons referred to in paragraph (1) of this Article.

“(3) A disagreement concerning the application of the provisions of paragraphs (1) and (2) of this Article shall be referred by any of the Governments concerned to the Ambassadors in Rome of the Union of Soviet Socialist Republics, United Kingdom, United States of America and France, who will reach agreement with regard to the difficulty”.

Similar provisions were inserted in the Draft Peace Treaties with Roumania (Article 6), Bulgaria (Article 5) Hungary (Article 5) and Finland (Article 9). In the case of the first three, disagreements regarding the application of the Peace Treaty were to be referred to the heads of diplomatic missions of the Soviet Union, the United States, Great Britain and France, while in the Draft Peace Treaty with Finland they were to refer to the heads of the British and Russian diplomatic missions in that country.

On 31st August, 1946, the Greek representative raised the question of the provisions relating to war criminals in the Draft Peace Treaties.⁽¹⁾ He stated that, when he had attended the Paris Peace Conference, he had gained the impression that the terms of the above provisions were too general, the task of apprehension and surrender being left completely to the discretion of the enemy Governments. No consideration appeared to have been given to the recommendations made by the Commission regarding the article on war crimes to be inserted in the armistice terms. He therefore suggested that the Commission should examine the draft provisions prepared by the Paris Conference and submit new recommendations through the member Governments. He proposed in particular the retention in substance of the specific obligations to be imposed upon the enemy States as recommended by the Commission on 13th June, 1944, for Germany, namely:

- (a) The obligation to surrender war criminals notwithstanding any previous trial or proceedings held in the enemy State;
- (b) The obligation to comply with apprehension and surrender requests without the right to enter into the merits of the case, and to give the United Nations all facilities to supervise the way in which their requests were being complied with;
- (c) The obligation to produce records and documents required as evidence of war crimes ;
- (d) The obligation to surrender for punishment persons who had obstructed or hindered the operation of the peace treaty, or who had victimised those who had co-operated with the United Nations in the execution of the treaty.

Along with the above proposal, a draft was submitted by the Chairman of the Commission⁽²⁾ which differed from the Greek draft in respect of two items only. The obligation of the enemy State to surrender persons preventing or otherwise harming the operation of the peace treaty, was altered to consist in the obligation to “ pass and enforce legislation making it a penal offence ” to commit such detrimental acts,—thus leaving retribu-

(1) A.14. 2.9.46. *Provisions of the Draft Peace Treaties. Letter from the Greek Representative to the Chairman of the Commission dated 31st August, 1946.*

(2) A.16. 4.9.46. *Suggested amendment of the articles on war criminals contained in the Draft Peace Treaties with Italy and other countries.*

tion in such cases to the enemy State itself under Allied supervision. An additional provision was inserted regarding matters to be referred to the ambassadors in the respective enemy countries. In such cases the war criminals concerned were to be kept in custody until decision was reached by the ambassadors.

Both drafts were considered by the Commission on 4th September, 1946. Most of the members were of the opinion that it would be more appropriate to submit the recommendation in the form of a general resolution, expressing only the principles involved, and to leave it to the negotiating Powers to formulate the actual provisions as they thought fit.

After examination of two further drafts prepared in order to comply with the above opinion,⁽¹⁾ a resolution of principle was finally adopted by the Commission on 18th September by 9 votes to 1, with 3 abstentions.⁽²⁾ The resolution expressed the opinion of the Commission that, as formulated in the Draft Peace Treaties, the relevant provisions left the task of "apprehension and surrender of the war criminals in practice to the discretion of the ex-enemy governments". It, therefore, suggested the insertion of stricter obligations, and recommended the adoption of the principles proposed by the Greek representative and the Chairman of the Commission. The majority approved the latter's draft as regards the procedure for the punishment of persons preventing the carrying into effect of the peace treaties.

On 16th October, 1946,⁽³⁾ information was received from the Greek representative that the resolution had reached the Peace Conference too late to be taken into consideration. It was, therefore, suggested that it should be referred to the next conference of the four Foreign Ministers, due to take place in November, 1946. Such a step was, however, not undertaken, the majority of members holding the view that the submission made to the Paris Conference was sufficient to enable the Governments, including the four Powers, to take the resolution into account before the signing of the peace treaties.

In the final event, the provisions as prepared by the Paris Conference in the Draft Peace Treaties were embodied in the final texts of the Treaties with only small verbal amendments,⁽⁴⁾ the Commission's resolution producing no effect.

In March, 1947, the French representative raised the question of the bearing of the Italian Peace Treaty on the continued listing by the Commission of Italian war criminals, and on the machinery for their surrender.⁽⁵⁾ A joint meeting of the Committee on Facts and Evidence and the Legal Committee considered this matter on 20th March, 1947, and put forward certain recommendations, which were adopted by the Commission at its

(1) A.17. 6.9.46. *The Provisions of the Draft Peace Treaties regarding war criminals. Alternative Text for Draft Resolution*; also A.18. 17.9.46, same heading, containing certain verbal amendments to A.17.

(2) C.227. 19.9.46. *Provisions of the Draft Treaties regarding war criminals. Suggestions adopted by the Commission on 18th September, 1946.*

(3) See M.114. 16.10.46.

(4) See M.115. 23.10.46.

(5) Doc. I/84. 13.3.47. *Note by the Secretary to Committee III on a Conference with Monsieur Maillard.*

meeting on 26th March, 1947.⁽¹⁾ It was decided that the Commission should continue to list Italian war criminals, but that it should not communicate such Lists to the Italian Government until it received a request to do so. Continued listing would assist the ambassadors in Rome to establish whether or not a *prima facie* case existed, and also it would facilitate the transfer of Italians wanted for war crimes from one United Nation to another. As to how far war criminals were exempt from the provisions of Article 71 of the Peace Treaty, by which Italian prisoners of war in Allied hands were to be repatriated, it was decided that these could be detained by the Allies in accordance with Article 75 of the Geneva Prisoners of War Convention of 1929, whereby prisoners of war who are subject to criminal proceedings may be detained until the end of the proceedings or the expiration of the sentence. In the matter of the transfer of Italian war criminals between one United Nation and another, it was considered that the same provisions would apply. A report on the discussion was forwarded by the Chairman of the Commission to the four ambassadors in Rome, through the British Foreign Office.⁽²⁾ It was also agreed that applications for the surrender of Italian war criminals should be addressed direct to the Italian Government.

A similar decision was reached with regard to a Greek request for advice on procedure to be adopted in respect of Bulgarian war criminals. Since the Bulgarian Peace Treaty had laid the onus of apprehension and surrender of war criminals on the Bulgarian Government, it was to that Government that applications for surrender should be addressed.

(3) *Peace Treaties with Germany and Austria*

The Yugoslav representative brought a further recommendation before the Commission on 26th March, 1947, with a view to avoiding a repetition of the conditions in which the Commission's recommendations concerning the Draft Peace Treaties had arrived too late to influence the decisions of the drafters of those Treaties. It was suggested that the Commission should make recommendations without delay to its member Governments concerning the provisions relating to war criminals to be inserted in the treaties with Austria and Germany.

Since it was the German and Austrian war criminals who had committed the most heinous crimes, it would be necessary to incorporate in the treaties with those countries more strongly-worded provisions concerning the degree of compulsion to which they should be subjected in the matter of apprehension and surrender of such persons. It was therefore suggested that the principles previously agreed to in respect of the satellite countries should again be recommended for insertion in the peace treaties with Germany and Austria, namely:

(a) Apprehension and surrender of war criminals was to be applicable notwithstanding any proceedings or prosecution before a German or Austrian court;

(b) The ex-enemy Government was not to have the right to examine the

(1) See M.125. 26.3.47.

(2) C.252. 24.3.47. *Bearing of the Italian Peace Treaty on the position of Italian war criminals.* Joint report by Committees I and III.

merits of the case whenever the names of the accused appeared on the lists of the U.N.W.C.C.;

(c) Special provisions were to ensure that documents and evidence should be produced and not suppressed or destroyed;

(d) The ex-enemy Governments were to pass and enforce legislation making it a penal offence to obstruct the execution of these provisions;

(e) A distinction was to be made between apprehension and surrender; the first should be automatic on request, while in the case of disagreement, the question should be referred to the controlling power.

The Commission adopted this recommendation on 26th March, 1947,⁽¹⁾ and circulated it in the form of suggestions to the member Governments.

At the time of writing no draft peace treaties with Germany and Austria have been published, so it is not possible to tell how far the recommendations of the Commission have been adopted by the member Governments.

(4) *Recommendation for the order of surrender of war criminals required for trial by several nations*

At the Conference of the Commission with representatives of the National Offices, which took place in London in May-June, 1945,⁽²⁾ proposals were made for the adoption of a recommendation regarding the order in which war criminals wanted for trial by several countries should be handed over to the requesting States.

It will be remembered that this question was considered both by the five Ministers of Justice and by the Commission's Enforcement Committee in their respective Draft Conventions for the surrender of war criminals. Both drafts laid down the rule that in such cases the wanted person was to be handed over first to the Government of the State whose national legislation contained the heaviest maximum penalty in respect of the crime for which the surrender was requested. Where the maximum penalties were the same, the surrender was to be made to the Government having first submitted the request for surrender.

At the Conference with the National Offices the Belgian delegate on the Commission raised the question of giving the Commission the authority of an arbitrator. He suggested the following recommendation:

"When an accused has been placed on the list of war criminals at the request of several of the United Nations, the War Crimes Commission shall act as arbitrator to decide to which Government he shall be surrendered".⁽³⁾

This principle was approved at a separate meeting held during the Conference by representatives of the National Offices, and was incorporated in a formal statement submitted by them to the Conference as representing their conclusions and suggestions to the Commission on the subjects considered during the Conference.⁽⁴⁾

Upon the termination of the Conference the Belgian delegate brought the matter before the Commission, and proposed that it should recommend to member Governments a procedure of arbitration to solve all conflicting

(1) See M.125. 26.3.47.

(2) For further details of this Conference see Chapter VII, Section D(i), p. 154 et seq.

(3) *National Offices Conference. Minutes and Documents*, p. 28.

(4) *Loc. cit.*, Appendix IX, Noc. 10.

claims for the trial of the same criminal. He submitted a written proposal⁽¹⁾ and explained that, apart from the debates at the National Offices Conference, he had had discussions with representatives of Supreme Headquarters, Allied Expeditionary Force (S.H.A.E.F.), who asked for assistance in determining to whom a war criminal wanted for trial by several nations should first be delivered. He declared that in some cases an agreement between the countries concerned could be expected, but in others not. He noted that there were several criteria which could be applied when making an arbitral decision in case of conflict. Criminals could be handed over first to the country where they committed the worst crimes, or to that which had first submitted its claim, or on any other grounds. He suggested that the authority to be vested with arbitral powers should be the Commission, as recommended by the National Offices, or else the chief officer of the S.H.A.E.F. Recording Office in Paris (C.R.O.W.C.A.S.S.), who would make decisions after consulting the Commission.⁽²⁾

The proposal was considered by the Commission on 13th June, 1945, and met with its general approval. A recommendation was adopted⁽³⁾ that, where the delivery of a war criminal was requested by several countries, member Governments should charge the Commission with the duty of deciding as arbitrator the order in which the accused should be tried by the said countries, or to delegate its task to some other body. The latter point was adopted with a view to entrusting the military authorities with this task, since they might prove to be in a better position to make such decisions. Member Governments were requested to state whether they agreed or not with the proposed procedure.

Favourable replies were received from Australia, Belgium, Czechoslovakia, the Netherlands, New Zealand and Yugoslavia.⁽⁴⁾

However, at a subsequent meeting, the Chairman and some other members informed the Commission that there were reports to the effect that Governments were considering entrusting either C.R.O.W.C.A.S.S. or the Allied Control Council for Germany with making the decisions.⁽⁵⁾ This information proved later to be substantially correct. As will be seen, the Governments decided to entrust their military authorities with making such decisions and they laid down rules to this effect, in a special law enacted by the Allied Control Council for Germany.

No cases were ever brought for arbitration before the Commission, and by the time it wound up there were no reports of cases which aroused unsurmountable difficulties between the Governments concerned.

(5) Proposal for notification of the surrender of war criminals

In September, 1946, the Netherlands delegate, addressed a letter to the Chairman⁽⁶⁾ in which he stated the following:

(1) C.123. 13.6.45. *Order of trial of war criminals whose delivery is asked for by more than one of the United Nations. Proposal that the Commission should arbitrate. Presented by M. de Baer.*

(2) See M.65. 13.6.45.

(3) C.123(1). 18.6.45. *Order of trial of war criminals whose delivery is asked for by more than one of the United Nations. Recommendation adopted on 13th June, 1945.*

(4) See M.73 10.8.45, M.80 3.10.45, M.82 24.10.45 and M.85 8.11.45.

(5) See M.82 24.10.45 and M.85 8.11.45.

(6) C.225. 10.9.46. *Letter to Lord Wright from Commander Mouton.*

There was no indication that, once a war criminal was surrendered to the requesting country, this was notified to all other countries. It therefore appeared that, in the absence of such notification, other countries searching for the same criminal were wasting valuable time in continuing their investigations. He, therefore, proposed that all cases of surrender should be notified by the National Offices to the Commission, which should issue lists of names of criminals handed over to one country, and distribute them to other member Governments, as well as to all detaining authorities. This would enable Allied investigating teams to stop investigation in all such cases.

The proposal was considered on 2nd October, 1946.⁽¹⁾ The Dutch representative amplified his proposal by suggesting that notification should be made not only when a criminal was surrendered, but also when he was found and arrested.

The Chairman and some members thought this matter would probably be better solved between the Governments or their investigating and liaison teams, in conjunction with the detaining military authorities, than by the Commission making a recommendation. The proposal was, therefore, adjourned and the Dutch delegate advised to approach the appropriate authorities. The British representative stated he would explore the field with the British authorities, and ask them to meet the point raised as far as practicable. The United States representative stated that C.R.O.W.C.A.S.S. was regularly preparing Detention Lists, containing the information required and being circulated to all concerned, and that a consolidated list would soon be distributed.

The question was not raised again. Before it terminated its functions the Commission received lists from several Governments, which it circulated to all its members.

B. RESOLUTIONS OF OTHER INTERNATIONAL BODIES

Ever since it was taken up by the Great Powers and their Allies, and made the object of special declarations, such as the St. James's Declaration of 13th January, 1942, and the Moscow Declaration of 1st November, 1943,⁽²⁾ the question of ensuring swift delivery of war criminals to competent courts had periodically been considered at international conferences. This resulted in the adoption of a number of resolutions stressing the importance of speeding up the procedure and effectuating the principle that every war criminal should be brought to trial.

(i) RESOLUTION OF THE INTER-AMERICAN CONFERENCE ON PROBLEMS OF WAR AND PEACE

At the Pan-American Conference held in Mexico in February-March,

(1) See M.113. 2.10.46.

(2) The Moscow Declaration was signed on 30th October, 1943, and published on 1st November, 1943. For text see Chapter V, D (iv), p. 107.

1945, a motion was carried on the adoption of the following resolution:(1)

“ WHEREAS:

During the present world war the leaders, as well as numerous officials and military and civilian agents of the Axis powers and their satellites, have committed heinous crimes, in violation of the laws of war, and in violation of existing treaties, of the rules of international law, or of the penal codes of civilised nations, or of the concepts of civilised life;

Individuals who have committed such crimes may have taken refuge in, or may seek refuge in, the territories of the American Republics,

Arrangements should be made to distinguish such criminals from ordinary political refugees.

The Inter-American Conference on problems of war and peace declares:

That the American Republics, faithful to the principles of humanity and law on which their civilisation is founded, repudiate war crimes and adhere to the Declaration of October 1943 by Great Britain, the United States of America and the Soviet Union in the sense that persons guilty of, responsible for, and accomplices in the commission of such crimes, shall be tried and sentenced; and, therefore;

RESOLVES:

(1) To recommend that the Governments of the American Republics do not give refuge to individuals guilty of, responsible for, or accomplices in, the commission of such crimes.

(2) To recommend that the Governments of the American Republics shall, upon the demand of any of the United Nations, and in accordance with the procedure set forth in the following paragraph, *surrender* individuals charged with the commission of such crimes to the United Nations making the request, or to the custody of the agency of the United Nations which may be established for the trial and punishment of such criminals.

(3) To request that the Inter-American Juridical Committee, having in mind the pertinent national legislation on the subject, prepare and submit for adoption by the Governments of the American Republics, appropriate rules for determining the status of individuals as war criminals, as well as the procedure to be followed for the return or delivery of such criminals”.

The above resolution was communicated by all representatives to their respective Governments.

(ii) RESOLUTIONS OF THE UNITED NATIONS GENERAL ASSEMBLY

(1) *Resolutions of 12th-13th February, 1946*

During the First Part of the First Session of the United Nations General Assembly, held in London in January-February, 1946, a motion was introduced by the Byelorussian Republic. After study in Committees, and amendments proposed by the United Kingdom delegation, the following resolution was unanimously adopted by the General Assembly on 13th February, 1946:(2)

“ THE GENERAL ASSEMBLY

Taking note of the Moscow Declaration of 1st November, 1943, by President Roosevelt, Marshal Stalin and Prime Minister Churchill concerning enemy

(1) C.95. 25.4.45. *Resolution adopted at the Inter-American Conference on problems of war and peace.*

(2) C.179 February, 1946. *Problems of war crimes on the agenda of the first session of the United Nations General Assembly.*

atrocities in the course of the war, and of the declaration by certain Allied Governments of 13th January and 18th December, 1942, concerning the same matter; and

Taking note of the laws and usages of warfare established by Fourth Hague Convention of 1907; and

Taking note of the definition of war crimes and crimes against peace and against humanity contained in the Charter of the International Military Tribunal dated 8th August, 1945; and

Believing that certain war criminals continue to evade justice in the territories of certain states,

RECOMMENDS

That Members of the United Nations forthwith take all necessary measures to cause the arrest of those war criminals who have been responsible for or have taken a consenting part in the above crimes, and to cause them to be sent back to the countries in which their abominable deeds were done, in order that they may be judged and punished according to the laws of those countries; and

CALLS UPON

The Governments of States which are not Members of the United Nations also to take all necessary measures for the apprehension of such criminals in their respective territories with a view to their immediate removal to the countries in which the crimes were committed for the purpose of trial and punishment according to the laws of those countries".

The matter was at the same time considered in connection with the question of refugees and displaced persons. The United Kingdom delegation had submitted a proposal for settling the status and fate of those refugees and displaced persons who were unwilling to be repatriated, particularly on political grounds. The delegations of the East-European countries, led by the U.S.S.R., objected to any scheme allowing for the re-settlement of displaced persons in countries other than those of their origin, on the grounds that most of them were war criminals or traitors. After much controversy on this point, a resolution providing for a procedure to regularise the status of *bona fide* refugees and displaced persons, and assist them in re-settling in countries willing to admit them, was adopted by the General Assembly on 12th February, 1946. It contained the following proviso:⁽¹⁾

" THE GENERAL ASSEMBLY

recognising that the problem of refugees and displaced persons of all categories is one of immediate urgency and recognising the necessity of clearly distinguishing between genuine refugees and displaced persons, on the one hand, and the war criminals, quislings, and traitors . . . on the other;

(d) CONSIDERS that no action taken as a result of this resolution shall be of such a character as to interfere in any way with the surrender and punishment of war criminals, quislings and traitors, in conformity with present or future international arrangements or agreements".

The surrender of war criminals from among refugees and displaced persons was further studied by a Special Committee appointed by the United Nations Economic and Social Council in pursuance of the above resolution. This Committee, after sitting from April to June, 1946,

(1) Loc. cit., p. 2.

submitted to the Economic and Social Council a recommendation on the measures to be undertaken to solve the problems raised by refugees and displaced persons. In this connection it recommended measures to ensure that war criminals would effectively be separated from *bona fide* refugees and surrendered to competent courts.⁽¹⁾

These recommendations were incorporated in a resolution adopted by the General Assembly on 15th December, 1946, calling upon the Governments to take "urgent and adequate measures to effect a careful screening of all displaced persons, refugees, prisoners of war and persons of similar status, with a view to identifying all war criminals, quislings and traitors".

(2) *Resolution of 31st October, 1947*

During the Second Regular Session of the General Assembly, held in New York from September to November, 1947, the question of the surrender of war criminals was raised again by the Yugoslav delegation, which submitted a draft resolution. Yugoslavia wanted the Assembly to record, in the proposed resolution, that certain member States and States applying for membership, were not surrendering war criminals as recommended in the Assembly's resolution of 13th February, 1946. She, therefore, moved that the Assembly call upon member States to "take immediate steps to apprehend and extradite war criminals"; to "proceed immediately against any war criminal who could be traced in their territory", and to "conclude and implement adequate bilateral conventions on extradition."

This proposal was rejected at committee level as containing unjustified charges against the other Governments. The committee produced a new draft based upon a United Kingdom proposal and submitted it to the General Assembly for adoption. In the Assembly, Yugoslavia re-introduced her resolution and was supported by the U.S.S.R. and all other Eastern European countries. They laid charges against Great Britain and the United States that they had "gone back on previous international agreements", and were declining to hand over war criminals according to these agreements. All charges were rebutted by the United Kingdom and United States delegations, and the two draft resolutions were put to the vote. The draft proposed by the United Kingdom and supported by the committee was adopted by a majority vote (42 against 7) on 31st October. It contained the following points:

(a) The Assembly recommended that Member Governments should continue with unabated energy to carry out their responsibilities regarding the surrender of war criminals.

(b) It also recommended that Member States desiring the surrender of alleged war criminals or traitors by other Members, in whose jurisdiction they were believed to be, should request their surrender as soon as possible, and should support their request with sufficient evidence to establish that a reasonable *prima facie* case existed as to identity and guilt.

(c) The Assembly noted what had so far been done in the matter of the surrender and punishment, after due trial, of the war criminals referred to in its resolution adopted on 13th February, 1946, which it reaffirmed.

(1) C.296. June, 1946. *Report by the Special Committee on Refugees and Displaced Persons submitted to the Economic and Social Council of the United Nations. Provisions regarding war criminals.*

(d) The Assembly also reaffirmed the resolutions on refugees adopted in 1946.⁽¹⁾

The main point in the above resolution is that, of all the other resolutions of the General Assembly, it is the first to confirm and recognise that, in the field of war crimes, *prima facie* evidence is needed, but is at the same time sufficient for handing over war criminals to requesting States. The United Nations, thus, sanctioned the administrative procedure devised by the Allied military authorities after the war, and implicitly required that the *prima facie* evidence be submitted to them as a condition for obtaining the surrender. This point was relevant for the question of the validity of the United Nations War Crimes Commission's Lists in matters of surrender,—a question which was to arise in the Commission and give ground to contentions that the Commission's Lists were binding upon the military authorities and warranting automatic surrender. An account on this issue will be found later.

(iii) RESOLUTION OF THE PERMANENT INTERNATIONAL COMMISSION FOR THE STUDY OF THE PUNISHMENT OF CRIMES AGAINST INTERNATIONAL LAW

A resolution was adopted by the "*Commission Internationale Permanente pour l'étude de la répression des crimes contre le droit des gens et des faits commis dans l'intérêt de l'ennemi*", during its session held in Brussels on 15th July, 1947. The said Commission considered that the right of asylum should not be extended to war criminals, and that all matters of extradition should be ruled, not by bilateral treaties, but by general convention, drafted by the United Nations. Its resolution was phrased in the following terms:

"La COMMISSION réunie à Bruxelles, le 15 juillet 1947, sous la présidence de Monsieur Léon Cornil, Procureur Général à la Cour de Cassation de Belgique, formule, à l'unanimité, la recommandation suivante:

(1) Considérant, d'une part, le caractère odieux des crimes contre l'humanité et des crimes de guerre;

La COMMISSION estime

Que le droit d'asile doit être refusé aux individus coupables de ces actes.

(2) Considérant, d'autre part, les nécessités de l'entraide internationale, dans la répression de la criminalité;

La COMMISSION émet le vœu:

que l'extradition, en toutes matières, ne soit plus réglée par des traités bilatéraux, mais par une convention générale élaborée à l'initiative de l'ORGANISATION DES NATIONS UNIES qui en contrôlerait l'exécution, par la Juridiction Pénale Internationale".

C. EXECUTIVE PROCEDURE DEvised BY THE ALLIED AUTHORITIES

The administrative or executive procedure which was established by the Allied Governments in respect of the handing over of war criminals from one country to another, was devised and carried out by the military authorities within their own machinery. It functioned on the basis of

(1) See *United Nations Weekly Bulletin*, Vol. III, No. 20, pp. 624-626; also Vol. III, No. 24, p. 783.

certain general rules laid down by the Governments. The surrender of war criminals from the ex-enemy countries was secured in the various documents regulating the obligations of ex-enemy countries in the field of war crimes and war criminals.

(i) GENERAL RULES

(1) *Territories under United Kingdom Jurisdiction*

Following the decision of the United Kingdom Government to proceed with the surrender of war criminals on an executive basis, the Foreign Office, in a letter dated 20th August, 1945, communicated to the Commission the conditions under which war criminals in British custody would be surrendered for trial.⁽¹⁾ It informed the Commission that, on 11th July, 1945, the Combined (Anglo-American) Chiefs of Staff had taken a decision regarding the handing over of *German* war criminals. This decision authorised the Headquarters of the Supreme Commander, Allied Expeditionary Force (S.H.A.E.F.), covering the respective zones in Germany, and the Headquarters of the Supreme Allied Commander in the Mediterranean (S.A.C.M.E.D.), covering Italy and the respective zones in Austria, to hand over German war criminals held by the forces under their command to the Allied countries in which the crimes were committed, under the following conditions:

- (a) That the criminals were not required as defendants or witnesses for trials before British Military Courts or for trials before the International Military Tribunal at Nuremberg;
- (b) That the detaining authorities had no reason to doubt the *bona fides* of each particular request and that there were no special circumstances making the surrender undesirable;
- (c) That the criminals were not wanted for trial or as witnesses by several countries.

No statements were made as to the ultimate disposal of war criminals in the above cases, but the implications were as follows:

- (a) Where a war criminal was wanted for trial by a British court, or the International Military Tribunal at Nuremberg, these had a priority over other nations. The eventual disposal of witnesses wanted by other Allied courts in the same capacity or as war criminals, and that of war criminals tried under the above priority rule, was to be decided subsequently.
- (b) Where there were reasons to doubt the *bona fides* of the Allied request, or where special circumstances made the surrender undesirable, discretionary power was retained to refuse the handing over. Such war criminals were liable to be tried by the British courts, though no obligation existed to do so.
- (c) Where a war criminal was wanted for trial by several nations at the same time, special decision was to be taken as to the order in which he would be surrendered to the requesting countries. This question was subsequently decided upon in Law No. 10 of the Allied Control Council for Germany, an account of which will be found later.

Where none of the above cases stood in the way of handing over German war criminals, the following rules were to be applied:

- (a) War criminals whose names appeared in the Commission's lists were to be handed over "without question";

(1) C.143. 22.8.45. *Surrender of war criminals by S.H.A.E.F. and S.A.C.M.E.D. Copy of letter dated 20th August, 1945, from the United Kingdom Foreign Office to the Chairman.*

(b) Other war criminals were to be surrendered upon submission by the requesting authority to the detaining authority of a "plain statement" concerning a "specified crime committed on a specified date" and either at a specified place in the national territory or against nationals of the requesting State.

The above rules were subsequently extended to the surrender of Italian war criminals, and similar rules were applied by the British Commands in the Far East in respect of Japanese and other Far Eastern war criminals. In this latter part of the world, they were applied by the South-East Asia Command (S.E.A.C.), which had its headquarters in Singapore and which, as previously described,⁽¹⁾ controlled an enormous area, including Burma, Siam, Malaya, the Andaman Islands, French Indo-China, Netherlands East Indies, Hong-Kong, Shanghai, Borneo and the islands stretching eastwards from Singapore to Morotai. S.E.A.C. maintained close liaison with the Dominions, and with the United States Dutch and French authorities in all matters regarding the surrender of war criminals⁽²⁾.

In Europe, the British military authorities in charge of the procedure were the same as those described with regard to the tracing and apprehension of war criminals, i.e. for Germany the H.Q. of the British Army of the Rhine (B.A.O.R.), for Austria the H.Q. of the British troops in Austria (B.T.A.), and for Italy the H.Q. of the Central Mediterranean Forces (C.M.F.), with their war crimes branches or groups. The highest authority supervising their activities was the Judge Advocate General's Department of the War Office.

(2) Territories under United States Jurisdiction

On 3rd September, 1945, the United States representative on the Commission communicated the conditions prescribed by the United States military authorities.⁽³⁾ They were similar to those set up by the British authorities, and were likewise established in the first place for the surrender of German war criminals. There were, however, certain notable differences as regards the discretionary power of the detaining authorities, on the one hand, and some additional arrangements, on the other.

The procedure concerned the territory controlled by the Headquarters, United States Forces, European Theatre (U.S.F.E.T.), that is the American zone in Germany. It was operated by U.S.F.E.T.'S War Crimes Branch, which subsequently extended its competence to the American zone in Austria. The rules were contained in a Directive of the Commanding General, and, as explained by the United States representative, they superseded those originally issued by the Combined Chiefs of Staff on 11th July, 1945, in certain details falling within the authority of U.S.F.E.T.

The main rule was that "the Commanding General would promptly comply with requests" for the surrender of war criminals, except in

(1) See Chapter XII, Section B (iii) 3. (1), p. 381 et seq.

(2) See Chapter XII, Section B (iii) 1. (a) (2), p. 362 et seq.

(3) C.146. 8.9.45. *Surrender of War Criminals; effect given at present by U.S.F.E.T. to a person's having been put on the Commission's Lists. Letter from Colonel Hodgson to the Chairman.*

cases which were similar to those provided for in the British rules, that is:

- (a) Where the individual concerned was wanted for trial or as a witness by "an International Military Tribunal". This formula differed from the British in that it included, in addition to the Nuremberg Tribunal, the one established in Tokyo, as well as any other International Tribunal which could be set up.
- (b) Where the individual concerned was wanted by more than one nation. In this case the American rule was that the order of priority was to be referred to and decided by the Allied Control Council in Berlin.
- (c) Where the Commanding General "had doubts whether he should deliver" a war criminal. In that case he had again to refer the matter to the Control Council for decision.

Where there were no such cases, the surrender was to be effected under the following rules:

- (a) When deciding upon the case of an individual whose name appeared in the Commission's lists "great weight" would be given to these lists, and "in the absence of extraordinary circumstances" this would be taken as a sufficient justification for surrendering war criminals.
- (b) In the case of individuals not listed by the Commission, these could be handed over if an "adequately supported request" was made by the demanding Government.

Though identical in spirit, the above two rules were worded so as to secure greater discretion for the detaining authorities than those formulated in the letter of the Foreign Office. The main difference lay in that, whereas the British rules provided that a listed war criminal would be handed over "without question," on the sole basis of his name appearing in the Commission's Lists, no such strict pledge was undertaken by the American authorities. It will be seen later that this very point was to arouse great concern on the part of certain Governments, and that the British authorities eventually fell in line with the American.

The machinery to implement the above rules was determined by another Directive of U.S.F.E.T.,⁽¹⁾ issued soon after the one already mentioned, which provided further elaboration of certain rules. The procedure was placed in the hands of the Theatre Judge Advocate General, U.S.F.E.T. The authority to be consulted in the Control Council in Berlin, was, so far as the American authorities were concerned, the Legal Division, United States Group, Control Council. All requests for the surrender of war criminals held by U.S.F.E.T. were to be submitted to the War Crimes Branch of the Theatre Judge Advocate, and made on appropriate forms.

On 6th February, 1946, the United States representative informed the Commission that, on 8th December, 1945, the Combined Chiefs of Staff had authorised the surrender of Italian war criminals and war criminals of all the other satellite ex-enemy States on the same terms as those prescribed for German war criminals.⁽²⁾

Finally, as in the case of the British authorities, similar rules were applied by the American authorities in the Far East, regarding the

(1) C.163. 1.1.46. *Delivery of alleged war criminals and witnesses. Directive issued by H.Q., U.S.F.E.T.*

(2) See M.94. 6.2.46.

surrender of Japanese and other Far Eastern war criminals. The main authority in the field was the Headquarters of the Supreme Commander for the Allied Powers (S.C.A.P.) under General MacArthur, in Tokyo. The procedure was operated by a Legal Section and there was a branch in the Philippines (Manila). Apart from that there were United States War Crimes agencies in China, India and Burma, as well as in some islands of the Pacific.⁽¹⁾

All United States war crimes services were controlled by the Central War Crimes Branch of the United States Judge Advocate General, in Washington.

(ii) PROCEDURE UNDER ALLIED CONTROL COUNCIL LAW NO. 10

On 20th December, 1945, the Allied Control Council for Germany in Berlin issued a Special Law No. 10 regulating all matters concerning the punishment of war criminals in Germany. This Law unified the procedure of surrender in all four zones of occupation, and thus introduced the same rules for the occupying authorities of the United Kingdom, United States, U.S.S.R. and France.

Under these rules requests for surrender were to be submitted to the zonal Commander concerned. This procedure operated between the various zones, as well as between any one of them and the Governments making requests. Conditions for surrender were similar to those previously made by the British and American authorities, in that they related to similar cases in which the surrender was to be declined. Thus, the surrender could not be effected if the individual concerned was wanted for trial or as a witness by an International Military Tribunal or by a court in Germany; if he was wanted by more than one nation, or if the Commander was not satisfied that the handing over should be made. In all these cases, the Commander had the right, but not the obligation, to refer the request for decision to the Legal Directorate of the Allied Control Council.

Rules were prescribed as to how the Legal Directorate was to dispose of the above cases. They were as follows:⁽²⁾

(a) A person wanted for trial or as a witness by an International Military Tribunal was not to be delivered for trial or required to give evidence outside Germany, as the case might be, except upon approval by the Committee of Chief Prosecutors acting under the London Agreement of 8th August, 1945. This rule ceased to be applicable after the dissolution of the International Military Tribunal at Nuremberg.

(b) A person wanted for trial by several authorities (other than an International Military Tribunal) was to be disposed of in accordance with the following priorities:

- (1) If wanted for trial in the zone in which he was located, the accused was not to be delivered elsewhere unless arrangements were made for his return after trial;
- (2) If wanted for trial in a zone other than that in which he was located, the accused was to be delivered to that zone in preference to delivery outside Germany, unless arrangements were made for his return to that zone after trial elsewhere;

(1) See Chapter XII, Section B (iii) 3 (2), p. 383 et seq.

(2) Art. IV(2). See Document Series No. 15 (bis) of January, 1946.

- (3) If wanted for trial outside Germany by two or more of the United Nations, of one of which the accused was a citizen, that one had priority;
- (4) If wanted for trial outside Germany by several countries, not all of which were United Nations, the United Nations had priority;
- (5) If wanted for trial outside Germany by two or more of the United Nations, that which had the most serious charges against the accused, which were moreover supported by evidence, had priority.

In all other cases the zonal Commander had to comply with the request. No provisions were made as to what justification for the surrender was required, and no reference was made either to the Commission's Lists or to the *prima facie* evidence required for criminals not listed by the Commission. However, the practice of the zonal Commanders, at least so far as the British, American and French zones were concerned, was the one already described. Normally the Commission's Lists were considered sufficient for every criminal whose name appeared on them. In other cases, the requesting Government was expected to furnish sufficient data regarding the crime and the date and place of its commission, as well as regarding the identity of the criminal. The zonal Commanders, however, retained full discretionary power to decide each case on its merits.

When making his decision, the Commander was called to see to it that the delivery did not "become the means of defeating or unnecessarily delaying the carrying out of justice in another place". (Art. V). In this connection provision was made to the effect that "if within six months the delivered person had not been convicted" he had to be "returned upon demand of the Commander of the zone where he was located prior to delivery".

(iii) SURRENDER OF WAR CRIMINALS NOT APPEARING ON THE COMMISSION'S LISTS

(1) *First Difficulties*

(a) *The Netherlands motion*

In connection with the executive procedure for the surrender of war criminals as we saw it, a major issue arose in the Commission. It concerned the handing over of war criminals whose names did not appear in the Commission's Lists.

It will be remembered that under the rules devised by the British and United States military authorities, and later confirmed by the Allied Control Council Law No. 10, binding upon all four occupying powers in Germany, the military authorities were authorised to hand over criminals not listed by the Commission. On the other hand, the British and American authorities communicated their readiness to accept the Commission's Lists, except in special cases, as a sufficient ground for effecting the surrender. The British ruling in such cases was that war criminals would be surrendered "without question", and both British and Americans required in general practice that a war criminal be listed by the Commission before being surrendered. This ruling and practice were not superseded by Law No. 10, but on the contrary were supposed to be the actual procedure to be applied by the zonal Commander, in

cases in which he had called to comply with the requests under Art. IV of this Law.

In February, 1946, the Netherlands delegate informed the Commission of a letter sent by the Dutch War Crimes Commission in the British zone of Germany to the Dutch Minister of Justice. The Mission advised the Minister that, in order to obtain the surrender of a war criminal, it was not at all necessary to have the criminal's case examined by the Commission and his name entered in its Lists. The military authorities, the Mission said, practised direct delivery of any war criminal to the requesting country, on the basis of the same *prima facie* evidence as that submitted to the Commission. It, therefore, suggested that, in order to speed up the whole procedure, the submission of charges and evidence to the Commission be discontinued, and that all relevant material be sent direct to the military authorities.

This information brought to a head the very purpose of the Commission's work in drawing up Lists of war criminals, upon careful examination of the charges and evidence.

In a memorandum,⁽¹⁾ in which he communicated the content of the above letter, the Dutch delegate disagreed with the attitude both of his Government's Mission and of the detaining authorities. He submitted that a complete by-passing of the Commission was contrary to its terms of reference, and to the general rules communicated by the British and United States authorities. He stressed that the Commission's work, in drawing up lists of those to be surrendered for trial, guaranteed a uniformity in decision, which could not be secured if the various detaining authorities were to supersede it in their respective local spheres of action. Supported by the Czech representative, he moved a resolution in which the Commission would express its protest and re-assert its authority under its terms of reference and the rules laid down by the British and American authorities.

The question was fully debated by the Commission at three consecutive meetings.⁽²⁾ One matter of principle was agreed upon, namely that Law No. 10 gave the right to any Government to apply direct to the military authorities and to obtain surrender irrespective of whether a war criminal was or was not listed by the Commission. This point was particularly stressed by the French delegate, who insisted that any restriction in this respect would infringe upon the sovereign rights of States. It was, however, unanimously recognised that, should the proposal of the Dutch War Crimes Mission become a rule, there would be no further reason for the Commission to proceed with the drawing up of lists, which represented one of its main tasks. All members agreed that such a consequence would be unacceptable, and that this was obviously not desired by the Governments nor by their military authorities. The Belgian delegate was of the opinion that the omission of the Commission's Lists in Law No. 10 was due to the fact that Russia was not a member of the Commission, so that no reference to its Lists could be made in a legal document prescribing a proce-

(1) Misc. 8, 7.2.46, Translation of letter from Netherlands War Crimes Mission in Germany, Bad Oeynhausen, to the Netherlands Minister of Justice.

(2) Meetings on 6th, 13th and 20th February, 1946. See M.94, M.95 and M.96.

ture also binding upon Russia. The majority of members agreed that, taking into consideration all elements, the procedure as it stood under Law No. 10 and under the rules made by the military authorities, was in fact devised to allow the surrender of war criminals not listed by the Commission as an exceptional measure only, where certain factors, such as time, required that the handing over be effected without waiting for the criminal to be listed. The normal procedure should require that war criminals be listed before being handed over.

The conclusion was reached that a communication to this effect should be made to the Governments in the form of a resolution.

(b) *Resolution of 20th February, 1946*

After further discussion and consideration of several drafts, the Commission adopted on 20th February, 1946, the following resolution.⁽¹⁾

“The United Nations War Crimes Commission is unable to accept the view which has been suggested by the authorities of one of its member States that it is unnecessary for a case to be referred to the Commission before a request is made to the Military authorities for the surrender of a war criminal for trial. Such a view would not be in accordance either with the International Resolution defining the duties of the Commission or with the practice of the American authorities as explained by Colonel Hodgson in his letter of 3rd September, 1945, or with the practice of the British authorities, as stated in a letter from the Foreign Office dated 20th August, 1945. The normal procedure is for the Commission after due investigation to put the accused on their List and it follows that it is departed from when an accused person is handed over without being listed by the Commission. Such a departure under existing directives, is only justified as an exceptional measure and after careful examination of each case on its merits by the Commanding Officer of the forces by whom the accused is held. It is the hope of the Commission that in any such cases the member Governments will at the same time forward a copy of the dossier to the United Nations War Crimes Commission”.

The Commission thus recommended that the powers retained by the military authorities in their original communication, and those conferred on them by Law No. 10 with regard to the surrender of war criminals not listed by the Commission, should be used only in exceptional cases, and that even then war criminals thus surrendered should subsequently be listed by the Commission.

(c) *Action of the British Government*

In view of the fact that the communication of the Netherlands representative was related to the practice of the British military authorities in Germany, the United Kingdom delegate made special representations to the Foreign Office. The latter was requested to agree with the Commission's resolution and to issue instructions to the military authorities.

On 22nd June, 1946 the Foreign Office informed the Commission that the United Kingdom Government had endorsed the resolution and that instructions were being sent to all British Commands in Europe. The contents of the following instructions sent to the Headquarters of the British Army of the Rhine (B.A.O.R.) were communicated:⁽²⁾

(1) C.177, 22.2.46, *Procedure for surrender of war criminals; resolution adopted by the Commission on 20th February, 1946.*

(2) Misc. 35, 27.6.46, *Handing over of war criminals; exchange of correspondence.*

“Instructions for handing over alleged war criminals to allied countries

(1) A person wanted by an Allied country for a war crime committed against its nationals should normally be handed over to that country for trial only when he has been listed by the U.N.W.C.C. as a war criminal on a charge brought by that country. Unlisted persons should only be handed over in cases of exceptional urgency and then only after satisfactory *prima facie* evidence of guilt has been produced. In such cases the country to whom the accused is handed over should be requested to make an immediate application to the U.N.W.C.C. for his listing as a war criminal.

(2) In the event of any country requesting the handing-over of a person whose case has been considered and rejected by the U.N.W.C.C., the case should, in view of the possible political implications, be referred to the War Office for consideration.

(3) The above instruments apply only to handovers *for trial*. There is no objection to the temporary loan, at your discretion, of unlisted persons for interrogation or to give evidence in other cases.”

Confirmation was subsequently received that the British authorities were strictly complying with the above instructions, and that a similar procedure was also being carried out by the American authorities within the terms of their own regulations.

(2) Further Developments

In May, 1946, the Yugoslav delegate made a written communication to members of the Commission.⁽¹⁾ He declared that, according to information received from the Yugoslav War Crimes Commission, the resolution of 20th February had been “misinterpreted by the military authorities in Austria and Germany”. These authorities, he said, were now taking the opposite attitude to that indicated by the Dutch representatives, by declining to hand over in all cases war criminals not listed by the Commission. He thought this was at variance with the resolution which recognised the surrender of such individuals “as an exceptional measure”. After the resolution was adopted the military authorities did not make any exception. He referred to specific cases where unlisted war criminals were discovered by the Yugoslav investigating teams, and stressed that the refusal to hand them over, on the sole ground that they were not listed by the Commission, caused considerable delay in bringing them to trial, during which time the accused could escape. In his opinion such cases were precisely those envisaged in the resolution as “exceptional”. He therefore moved that a letter be circulated to all detaining authorities making it clear that wherever the listing was only a matter of time, or wherever the accused was likely to escape and to be released, if in custody, he should be surrendered on the basis of the *prima facie* evidence directly presented to the military authorities, without waiting for the Commission to list him.

The Chairman of the Commission and the majority of members, while appreciating the difficulties of the Yugoslav authorities, disagreed with the proposal.⁽²⁾ They were of the opinion that any new approach to the

(1) C.203, June, 1946, *Procedure for surrender of war criminals. Communication made by Dr. R. Zivkovic regarding the inappropriate interpretation of the U.N.W.C.C.'s resolution adopted on 20th February, 1946, (Doc. C. 177) by the military authorities.*

(2) See M.107 5.6.46 and M.108 19.6.46.

military authorities after the resolution of 20th February had been accepted by them and carried out, would endanger the principle involved, i.e. that normally a man could not be surrendered before having been listed by the Commission. The Yugoslav proposal was, therefore, rejected. However, to meet the main point raised by the Yugoslav delegate—that concerning the time factor—the Commission decided, on the suggestion of the Belgian delegate, to give priority to the examination of cases implicating war criminals located by the investigating authorities and not yet listed. For criminals listed in such urgent cases a special certificate was to be delivered to the Government concerned, thus making the surrender possible before the printing and distribution of regular lists of war criminals. A note to this effect was communicated to all member Governments⁽¹⁾ and the procedure applied henceforth.

(iv) SURRENDER OF WAR CRIMINALS LISTED BY THE COMMISSION

(1) *Cases involving United States Authorities*

In May, 1947, the Yugoslav delegate made the following communication:⁽²⁾

The Yugoslav investigating team with the United States Forces, European Theatre (U.S.F.E.T.), had reported that, since October, 1946, the American authorities in Germany were declining to hand over war criminals who had been listed by the Commission, and were asking that in all such cases the same facts and evidence as those presented to the Commission be submitted to them as well. This meant that these authorities did not feel bound by the Commission's decisions, and that they were thus invalidating its procedure and ignoring its Lists. The Yugoslav delegate quoted a letter received from U.S.F.E.T. in one of the specific cases involved, requiring that the request for surrender be "accompanied by a clear statement of the law violated, the acts charged as violation, and evidence affording a reasonable support to the charge". The Yugoslav delegate asked the Commission to "find a way in which to remedy this very unsatisfactory position".

The issue thus raised was whether the Lists of the Commission had a binding effect upon the military authorities, so as to result in an automatic surrender of all individuals listed by the Commission.

The matter was considered by the Commission on 21st May, 1947.⁽³⁾ The United States representative stated that, under the existing rules, the Commission's Lists were not necessarily regarded as conclusive and surrender was therefore not automatic. The American authorities, as well as the authorities of other Governments represented on the Commission, had always reserved the right to inquire into each case, including those where the Commission had listed a war criminal and thereby decided that he should be surrendered for trial to the country concerned.

(1) C.205, 14.6.46, *Listing of Urgent Charges. Communication to members and National Offices regarding the procedure.*

(2) C.156, 16.5.47, *Surrender of war criminals by the American authorities—letter and enclosure received from Dr. R. Zivkovic, Yugoslav representative.*

(3) See M.127. 21.5.47.

The Chairman agreed with this view, and added that there was nothing to prevent the detaining authorities from questioning the Commission's Lists. The matter was adjourned *sine die*.

(2) *Attitude of the British Authorities*

The above attitude of the United States authorities towards the Lists of the Commission was confirmed to be also that of the British authorities. In a memorandum concerning the handing over of war criminals from the British zone of Germany, the United Kingdom representative informed the Commission of the following:⁽¹⁾

By requiring in some cases that *prima facie* evidence be submitted even when a war criminal was listed by the Commission, the British Government had not changed their policy. They had always accepted the Commission's Lists "as normally constituting" a sufficient justification for automatic surrender, but at the same time they had from the outset reserved "the right to make further investigations in any particular case where that appeared necessary". The British authorities had no intention of minimising the value of the Commission's Lists, and they regarded them in themselves as "evidence", though not necessarily as *prima facie* evidence warranting automatic surrender. This procedure was fully in accord with the existing rules, particularly with those provided by the Allied Control Council Law No. 10.

The above attitude of the British and American authorities met with the approval of the Committee on Facts and Evidence in particular, in connection with a number of cases which it had to revise in the light of additional facts.

(3) *Release of war criminals listed by the Commission after a certain date*

In July, 1947, the Commission received information from the British and American authorities in Germany that, in view of the need to terminate war crimes trials within a reasonable period of time, the following measure had been decided:⁽²⁾

If war criminals detained by the above authorities were not taken over by the countries claiming them for trial by a certain date, those detained would be released from custody. The information stressed that this would automatically include all such detained persons as were listed by the Commission. The measure concerned a total of 1,211 persons wanted for trial by 11 nations, and the date limits were 1st October for the British and 1st November, 1947, for the American zones. By those dates it was intended to clear all pending cases of surrender.

The information was put on the agenda of the meeting on 24th September, 1947,⁽³⁾ at the request of the Belgian and Netherlands representa-

(1) A.60; 24.11.47, *Extradition of war criminals from the British zone. Memorandum by Sir Robert Craigie.*

(2) Misc. 108, 12.9.47, *Extradition and release of war criminals under arrest in the British and American zones.*

(3) See M.130. 24.9.47.

tives, who expressed their concern at what they considered to be an unjustified measure restricting the surrender of war criminals. Consideration of the matter was, however, adjourned in order to enable the British and United States representatives to obtain details as to what was proposed to be done in respect of war criminals after they had been released.

The question was again brought before the Commission in January, 1948, at the request of the Polish delegate. In a detailed letter, addressed to the Chairman on 16th December, 1947,⁽¹⁾ the Polish delegate stated that, since 1st November, 1947, the American authorities in Germany no longer accepted surrender requests, even concerning war criminals listed by the Commission. He complained that this "nullified the work of the Commission as regards its value in the province of extradition from the American zone". In all cases which the American authorities deemed it appropriate, the same facts and evidence submitted to the Commission for the listing of war criminals, had to be produced in support of an application for surrender.

The Polish representative repeated the point previously made by the Yugoslav representative and contended that, once a war criminal was listed by the Commission, his automatic surrender "constituted a duty which could not be unilaterally altered". He conceded, however, that surrender could be withheld in case of additional facts or evidence, requiring re-examination of the whole case. He illustrated his argument by reference to a number of specific cases where, in his opinion, the submission of further evidence to the United States authorities was not justified. Finally, he asked the Commission to make a recommendation in which it would re-assert the validity of its Lists for the automatic surrender of war criminals; request that no date limits be made for the acceptance of further surrender requests; and take urgent action for the surrender of war criminals "residing or hiding in different zones".

The above proposal was considered by the Commission on 7th January, 1948.⁽²⁾ Opening the discussion, the Chairman said the main point to be examined was once again the effect of the Allied Control Council Law No. 10 for Germany. This Law was "obligatory and definite". Quoting the relevant provisions, he pointed out that the detaining authorities had full discretion in deciding any request for surrender. They could consult any one and adopt any method of proceeding, but in all cases the final decision was theirs. As to the Commission's Lists, they were not and could not be conclusive from the point of view of surrender. The Commission's task was only to establish, on the evidence submitted, whether a *prima facie* case existed against the accused. The question of the accused's surrender was different, and in many cases a higher standard of evidence was required to this effect. Therefore he could not agree with those criticising the powers of the military authorities. In view of these powers as they stood under the existing laws, the Commission could and should not make a recommendation which would be at variance with them, as well as with the considered opinion of the majority of its members.

(1) A.61, 16.12.47, Letter from Colonel Muszkat to Lord Wright.

(2) See M.132. 7.1.48.

The Polish delegate maintained his attitude and moved the adoption of a resolution on the following lines:

(a) That the United Nations War Crimes Commission should appeal to member States to take urgent action for the surrender of war criminals in all pending cases.

(b) That wherever there was no further evidence to be considered, war criminals whose names appeared in the Commission's Lists should be handed over automatically.

(c) That any limitation of date regarding the surrender should be considered as contrary to the existing declarations and agreements concerning the punishment of war criminals.

It will be noted that the above motion was in line with the proposals which had previously been submitted to the United Nations General Assembly, at its Second Session, by the Yugoslav delegation and supported by the U.S.S.R. and the other Eastern European countries, and which were all rejected as laying unjustified charges against the other nations.⁽¹⁾

The Polish motion was supported by the Yugoslav and Czech delegates.

Replying to the criticism addressed to the American authorities, the United States representative stated that the American authorities had not taken a strict attitude in respect of the date limit, and that in practice they had resumed admitting surrender requests in individual cases. According to instructions issued on 17th November, 1947, such requests were being admitted by the Legal Division, United States Military Government in Berlin, and these instructions were communicated to all Allied nations concerned. They did not constitute any unilateral alteration of the normal procedure, but only a change of the authority to deal with surrender requests after 1st November, 1947.

He then denied the accuracy of the information given by the Polish delegate regarding specific cases referred to by him. In one case, part of the additional evidence required was submitted by the Polish authorities, and the one unanswered was that concerning the designation of the law violated. In this case the accused subsequently committed suicide and, therefore, could not be cited as a case in which surrender had been declined. The United States representative then referred to the resolution of the United Nations of 31st October, 1947, which the Polish delegate had quoted to strengthen his motion. This resolution, he stressed, explicitly required the submission by the requesting State to the requested authorities of *prima facie* evidence as to the identity and guilt of the accused. The American authorities had done nothing other than act on the lines of this rule. He underlined the fact that the Polish delegate had submitted questions and cases which had all been thoroughly examined several months before in one of the United Nations Committees, during the Second Regular Session of the General Assembly, and in respect of which the majority decided that no reproach could be made to Governments that they were not carrying out their responsibilities in the matter of surrender. Finally, he mentioned that Poland had been one of the most favoured countries in obtaining delivery of war criminals from the United States zone—she

(1) See Section B (ii) (2), p. 413 above.

obtained 1,200 criminals—more than any other Allied country, except France.

When a vote was taken on the Polish motion it was rejected by 7 votes against, 3 in favour and 5 abstentions.

In this last stage of the Commission's activities it was, thus, definitely established that, in respect of the executive procedure which had been devised by the Allied Governments in order to secure the surrender of war criminals, Governments holding war criminals in their custody reserved the right to decide all requests with unfettered powers in all cases, including those in which the Commission had found that a *prima facie* case of guilt existed. The ultimate decision in all such cases was given to the military authorities, which were left free to determine whether they would consult any other authority before making decision, or whether they would proceed without consultation.

D. ATTITUDE OF NEUTRAL STATES

(i) ACTION BY THE ALLIED GOVERNMENTS

The determination of the Allied Governments to bring war criminals to book after the failure experienced at the end of World War I, caused them to display great concern about the attitude of the neutral governments comparatively long before the end of World War II was in sight. The abortive attempt at securing the surrender of the ex-Kaiser, in connection with the Versailles Treaty (Art. 227), from the then neutral Government of the Netherlands, and the lack of arrangements to obtain the surrender of many war criminals who had sought refuge in the territory of other neutral countries during or after World War I, were, no doubt, vivid in the minds of those responsible in the Allied Governments during the late World War.

As early as 1943 consultations took place between the United Kingdom, the United States and Soviet Governments. As a result, the representatives of the United Kingdom in Turkey, Switzerland, the Argentine, Portugal, Spain and Sweden were instructed, in July, 1943, to make the following communication to the Government to which they were accredited:

"In view of the developments in Italy and the possibility that Mussolini and other prominent Fascists and persons guilty of war crimes may attempt to take refuge in neutral territory, His Majesty's Government in the United Kingdom feel obliged to call upon all neutral countries to refuse asylum to any such persons and to declare that they would regard any shelter, assistance or protection given to such persons as a violation of the principles for which the United Nations are fighting, and which they are determined to carry into effect by every means in their power".⁽¹⁾

The United States Government instructed their diplomatic representatives to give a similar official notice. The Soviet Government instructed their representatives at Stockholm and Ankara, which were presumably the principal places affected as far as they were concerned, to make a similar communication.

(1) United Nations Information Office, Information Paper No. 1, *War Crimes and the Punishment of War Criminals*, London, 1945, p. 8.

In the summer of 1944 a warning on similar lines was repeated by the United States Government, which transmitted to the neutral Governments a public statement made by President Roosevelt in Washington. The statement declared that it was difficult to believe that asylum or protection to war criminals would be granted by any neutral Government, and that the United States Government would consider the harbouring of any of the Axis leaders, or their henchmen by a neutral Government as contrary to the principles for which the United Nations were waging war. The United Kingdom Government adopted and countersigned the declaration.⁽¹⁾

(ii) REACTION OF NEUTRAL COUNTRIES

Soon after these steps were undertaken favourable replies were reported from the neutral Governments.

In September, 1944, the Secretary of State of the United States, Mr. Cordell Hull, announced that "Sweden, Turkey, Switzerland and Spain had assured the State Department that they would not help Axis and Fascist fugitives to escape just punishment". By the end of the month the State Department also received assurances from the Argentine Government. These were to the effect that in no event would persons accused of war crimes be allowed into Argentine territory or permitted to create capital deposits or acquire property of any kind. At about the same time press reports quoted statements made by members of the Swedish Cabinet. On 6th September, the Swedish Minister of Social Welfare, Hr. Gustav Moeller, was reported to have declared, with reference to war criminals, that "it could be taken for granted that Sweden would close its frontiers in the face of an invasion of such refugees, and should anyone slip through he would be returned to his own country"⁽²⁾. This statement was subsequently confirmed by the Swedish Minister for Foreign Affairs and by the Minister of Justice who, in October, 1944 and March, 1945, declared that their country would not become "an asylum for war criminals". The Minister of Justice stressed that the Government would reserve the right to examine each individual case, but that it would at the same time "urge" that war criminals be "legally tried in the countries to which they return"⁽³⁾.

In October, 1944, Mr. Richard Law, Under-Secretary of State, declared in the House of Commons that the Portuguese Government had informed the United Kingdom that "it would not, by granting asylum in its territory, permit war criminals to escape the decisions of the national or international tribunals competent to try them."⁽⁴⁾ A few days later Mr. Anthony Eden, the Foreign Secretary, made a similar statement to the House, concerning assurances received from the Spanish Government.⁽⁵⁾ On 15th November, 1944, the Swiss Government made its attitude known in a statement delivered in the Parliament in Berne. While declaring that it "intended to exercise the unquestionable right of a sovereign State to give asylum to a fugitive whom it considered worthy thereof", the Swiss Government

(1) Loc. cit.

(2) *The Daily Telegraph*, 6.9.1944.

(3) *News Digest*, 24.3.1945.

(4) *The Times*, 12.10.1944.

(5) *The Times*, 15.10.1944.

made it clear that "asylum could not be granted to persons who had committed acts contrary to the laws of war or whose past gave evidence of conceptions incompatible with the fundamental traditions of law and humanity".⁽¹⁾ At about the same time the Government of Eire made its views known to the United Kingdom Government. On 14th November, 1944, a spokesman of the United Kingdom Government declared, in the House of Commons, that the Government of Eire had stated that they could not give assurances which would preclude them from exercising the right to grant asylum "should justice, charity, or the honour or interest of the nation so require". However, the Irish Government stated at the same time that, since the present war began, it had been their "uniform practice to deny admission to all aliens whose presence would be at variance with the policy of neutrality or detrimental to the interests of the Irish people, or inconsistent with the desire of the Irish people to avoid injury to the interests of friendly States, and that when such aliens landed they were deported to their countries of origin as soon as possible". The United Kingdom's spokesman then stated that, in the view of the British Government, it would be "detrimental to the interests of the Irish people" were war criminals to be harboured in Eire.⁽²⁾

On 7th February, 1945, the Lord Chancellor, Viscount Simon, made a general statement in the House of Lords to the effect that assurances had been received from the Governments of Portugal, Spain, Sweden, the Argentine and Switzerland.⁽³⁾

(iii) FURTHER DEVELOPMENTS ON GOVERNMENTAL LEVEL

Soon after the reception of such assurances it appeared that the major Allied Governments were not entirely satisfied that in no case would a war criminal find refuge in neutral countries. In February, 1945, the Acting Secretary of State of the United States Government, Mr. Joseph Grew, declared that the United States Government "were not satisfied with the attitude of a number of neutral Governments, and would not be until it had unequivocal assurances from all neutral Governments that they would refuse entry to any war criminals who might enter illegally."⁽⁴⁾ In March, 1945, the British Foreign Secretary, Mr. Eden, said in the House of Commons that assurances received were "broadly speaking not satisfactory".⁽⁵⁾ In April of the same year, in the United States, the Foreign Affairs Committee of the House of Representatives adopted a resolution insisting that the United States Government should pursue war criminals taking refuge in neutral countries.⁽⁶⁾

As could be expected, the question of obtaining satisfactory assurances from neutral states without infringing their sovereign rights, had from the outset been a delicate matter. Some of these states displayed great concern in making it clear that this was the limit for complying with the requests of the belligerent Powers, such as the Swiss and Irish Governments did in

(1) See M.125. 26.3.47. p. 4. Text communicated by the U.S representative at the War Crimes Commission's meeting of 26th March, 1947.

(2) *The Times*, 15.11.1944.

(3) *The Times*, 8.2.1945.

(4) *The Times*, 10.2.1945.

(5) *Hansard*, 28.3.1945.

(6) *The Daily Telegraph*, 25.4.1945.

their declarations. Some showed resentment when the belligerent Powers became too insistent. This can be illustrated by quoting a passage from one of the articles which appeared in the Swedish press at the time. Replying to the above-mentioned resolution of the United States House of Representatives, the *Aftonbladet* of 26th April, 1945, stated that "the Swedes felt no solidarity with those responsible for these deeds (i.e. war crimes) and therefore needed no warnings from the U.S.A."⁽¹⁾

On the other hand, the true attitude of the belligerent Powers towards this delicate question can best be illustrated by a statement made by the Lord Chancellor of the United Kingdom Government in the House of Lords on 7th February, 1945. Opposing a motion that the House should adopt a resolution declaring that "the rights of neutrality" do not extend to the granting of asylum to Axis war criminals, the Lord Chancellor, Viscount Simon, found the motion inappropriate to achieve the end, and raised the question whether a sovereign State could be compelled to surrender any portion of its sovereignty to give up a foreign fugitive. He then declared that it was not by the method of a resolution, which would deny one of the matters hitherto regarded in international and constitutional law as representing an attribute of sovereignty, that satisfactory results could be secured. He expressly stated that this was the attitude of both the United Kingdom and the United States Governments, which had contented themselves only in communicating their views to the neutral Governments, without touching upon the question of the rights of neutral states. As a consequence, the motion was withdrawn.⁽²⁾

(iv) ACTIVITIES OF THE COMMISSION

At the meetings of the Commission,⁽³⁾ there were cases in which various member Governments reported that war criminals listed by the Commission upon their requests had taken refuge in neutral countries. In submitting such reports member Governments requested the Commission to issue certificates confirming that the Commission had examined the *prima facie* evidence presented against such war criminals, and that they had been inscribed in the Commission's Lists as individuals who ought to be brought for trial before the competent national court. These certificates were requested with the purpose of being submitted to the neutral Governments, in order to obtain the surrender of the individuals concerned.

The Commission issued several such certificates, all of which concerned individuals alleged to have taken refuge in Switzerland. On 4th June, 1945, a certificate was issued to the Yugoslav Government regarding Giuseppe Bastianini, an Italian alleged war criminal; on 13th November, 1945, a certificate was issued to the same Government regarding another Italian alleged war criminal, Franco Scasselati; on 26th June, 1946, a certificate was issued to the Czechoslovak Government concerning a German alleged war criminal, Wilhelm Bruening; on 15th August, 1946,

(1) *News Digest*, 28.4.1945.

(2) *The Times*, 8.2.1945.

(3) The subject was discussed in several international bodies prior to the establishment of the U.N.W.C.C., in particular by the Cambridge "International Commission for Penal Reconstruction and Development", formed in 1941, where it was studied in a memorandum prepared by Professor H. Lauterpacht.

a certificate was issued to the Czechoslovak Government concerning a Hungarian alleged war criminal, Nandor Batisfalvy; and, finally, at the request of the Yugoslav Government, on 19th September, 1946, a certificate was issued regarding a German alleged war criminal, Stoecker.

While this was being done in the Commission, the question of securing the surrender of war criminals from neutral countries in cases still pending at the time, was considered by the United Nations during the first part of the First Session of the General Assembly, held in London in January-February, 1946. In the resolution adopted by the General Assembly on 13th February, 1946 and previously quoted, the latter, while recommending to member nations to take all measures required for the arrest and delivery of war criminals, called upon *non-member States* "to take all necessary measures for the apprehension of such criminals in their respective territories with a view to their immediate removal to the countries in which the crimes were committed for the purpose of trial and punishment according to the laws of those countries".

A year and a half later, on 31st October, 1947, the General Assembly reaffirmed the above principle in a new resolution adopted in regard to member nations, thus affecting those neutral states which had become members in the meantime (e.g. Sweden).⁽¹⁾

Reports received by the Commission from member Governments on the results of their requests made to the neutral Governments for the surrender of war criminals, including those for whom certificates had been issued, were to the effect that no surrender had been obtained from such Governments.

On 24th February, 1947, the Czechoslovak representative informed the Commission that, in the case of Wilhelm Bruening, the Swiss Government had declined even to disclose whether the accused was actually in Swiss territory. The Czech representative stated that, after the request for the surrender of Bruening was lodged, no answer had been received. The Czech Legation in Berne thereafter approached the Swiss Government with a view to obtaining more information as to the accused's whereabouts. The Swiss Government replied that they did not feel authorised to give information to foreign authorities on foreign nationals who were not subjects of the inquiring Government. They further declared that they were bound by the laws of the country, and that giving the information sought for would represent an exceptional case which would require a special decision of the Swiss Government. The Czech representative asked the Commission to adopt a resolution in order to remedy the position created by such an attitude on the part of neutral states, and to approach the Swiss Government with a view to inducing them to change their policy.

The question was thoroughly discussed by members of the Commission at their meetings held on 12th March, 26th March, 24th April and 21st May, 1947.⁽²⁾

(1) Sweden was admitted on 19th November, 1946.

(2) See M.124, 125, 126 and 127 of the same dates respectively.

Members were divided on the preliminary question as to whether such a resolution should be adopted at all. They agreed that, were a resolution to be passed, it would have to convey, expressly or implicitly, the contention that the Swiss Government were failing in their duty to deny asylum to war criminals. Those in favour of such a resolution were, apart from the delegate of Czechoslovakia, the representatives of Belgium, France, Poland and Yugoslavia. They expressed the opinion that, in view of the refusal of the Swiss Government to give even information on the whereabouts of war criminals believed to be in Swiss territory, a resolution on the lines proposed could perhaps influence the Swiss Government and other neutral Governments to revise their attitude. The Yugoslav delegate declared that none of the applications made by his Government to the Swiss Government had been complied with, and none of the war criminals listed by the Commission and applied for from the Swiss Government had been surrendered. Those opposed to this course of action were the representatives of the United Kingdom and of the United States. The British delegate declared that the resolution, particularly if it were to be communicated direct to the Swiss Government, would only do more harm than good. He suggested instead an approach through diplomatic channels, stating that if the Czechoslovak Government submitted a request to the United Kingdom Government to make representations to the Swiss Government on the particular case involved, his Government would undertake to do it; the more so that they had previously been in communication with the Swiss Government on the subject of the surrender of war criminals. He felt that it should be possible for the Swiss Government to answer inquiries as to whether a given individual was or was not in Switzerland, which was one of the main objects of the Czechoslovak request. He stated, however, that if the Commission felt that a resolution should be adopted he would not object. The United States delegate stated that he had instructions from his Government to vote against any resolution, for the reasons that any such resolution could be regarded as a direct affront in the eyes of the Swiss or any other neutral government; in addition, it might prejudice future discussion with the neutral Governments on a diplomatic level, because such Governments would be able to argue justifiably that a resolution of this nature, passed without a hearing of specific cases on their part, could be regarded as unfair. Finally, he stated that it seemed hardly appropriate to use the Commission as an instrument of pressure, forcing action which another country might not like to take or might like to be more deliberate in taking. The Chairman declared that, in face of the arguments raised against adopting a resolution, he would hesitate to ask the Commission to do so. At the meeting of 26th March, 1947, a vote was taken on this issue: 5 countries voted in favour of a resolution; 2 countries voted against; and 4 countries abstained. Delegates of 6 countries were absent. Later, Belgium joined those favouring the resolution. The motion to draft a resolution was thus carried.

Discussing the tenor of the resolution, those in favour agreed that it should be drafted in general terms and should make reference to all neutral Governments, without naming Switzerland or any other neutral country in particular. A point of divergence arose as to whether the resolution, when adopted, should be communicated direct to the neutral Governments,

or whether it should be communicated only to the Governments members of the Commission, with the suggestion that they should approach the neutral Governments if they felt it appropriate to do so. The latter course was adopted by a majority vote.

A draft resolution was discussed.⁽¹⁾ The draft contained a reference to communications received by the Commission that Governments of "certain neutral countries" had "shown disinclination to hand over for trial, before a court of one of the United Nations, persons accused of having committed war crimes", and that they have done so "even in cases where the names of the wanted persons appeared on the Lists issued by the Commission". The draft further contained an express statement regarding the care with which the Commission was examining charges and evidence brought before it, prior to placing names of war criminals on its Lists.

In this connection it was stated that the presence of a person's name on the Commission's Lists "indicated that, in the opinion of an important international body, a *prima facie* case had been established against the accused justifying his being brought to trial before the appropriate court", and that by failing "to hand over the accused for trial, the neutral Government concerned would be impeding, however unwittingly, the performance of the task for which the United Nations War Crimes Commission was created." It was further stated that "in cases where the presence of a war criminal in a particular neutral country was suspected, but not known for certain", the Commission "would greatly appreciate it if the inquiring United Nations Government could be informed whether or not the accused person was in fact residing in that country". Failure to give such information, it was stated, "might impede the prosecution of inquiries elsewhere, with the result that the perpetrator of some heinous crime may escape detection and trial". The draft also stressed the fact that, in the majority of cases, persons appearing on the Commission's Lists were accused "of crimes of a revolting and inhuman character" and that such persons had "no valid claim to the protection normally accorded to political refugees". It also contained a reference to the resolution adopted by the General Assembly of the United Nations on 13th February, 1946. In conclusion the draft resolution declared that the Commission recommended to member Governments to bring the above considerations "to the attention of the Governments of those neutral countries in which war criminals were believed to be sheltering, in the hope that the early surrender of such persons, in response to a request from a Government of the United Nations, may thereby be facilitated".

During the discussion several amendments were proposed, the most important of which was submitted by the Czech delegate. He suggested the insertion of an additional paragraph in which the Commission would declare it "its duty to report all cases where a neutral country failed to give a satisfactory reply to a member State with regard to a listed war criminal, to the Secretary-General of the United Nations". A deadlock reached on this subject by 5 votes in favour of the amendment, and 5 votes

(1) A.43, 22.4.47.

against, was solved by the casting vote of the Chairman against the amendment.

Eventually, on 21st May, 1947, the resolution was adopted without amendments, as proposed in the draft, by a majority vote.⁽¹⁾

(1) C.257, 29.5.47, *Handing over of war criminals by neutral countries.*

CHAPTER XIV

DEVELOPMENTS IN THE CONCEPT AND PROCEDURE OF TRYING WAR CRIMINALS

A. DEVELOPMENTS RESPECTING THE IDEA OF INTERNATIONAL CRIMINAL ADJUDICATION, 1918-1943

(i) DEVELOPMENTS ARISING OUT OF THE FIRST WORLD WAR

The Netherlands Government replied to the Allied request for surrender of the Kaiser by saying: "If, in the future, it was in the intention of nations to establish an International Court competent in the event of war to judge acts alleged to be crimes and liable to be punished by Statutes passed previous to the commission of the acts, it would be for Holland to associate herself with the new regime."⁽¹⁾ At that time Holland found herself unable to surrender the Kaiser for trial before the tribunal which was to be set up under Article 227 of the Versailles Treaty. This court was to have five judges appointed respectively by the United States, Great Britain, France, Italy and Japan, and 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."⁽²⁾

Prior to the conclusion of the Peace Conference there had, however, been three separate proposals put forward for the establishment of some form of international tribunal for the trial of war criminals.

(1) *The MacDonnell Committee*

The first plan was proposed in December, 1918, by the British Committee of Inquiry into the Breaches of the Laws of War, with Sir John MacDonnell as Chairman.⁽³⁾ This body, composed of leading British lawyers and representatives of the Service Departments, recommended that "an International Tribunal should be established, composed of representatives of the chief Allied States and the United States for the trial and punishment of the ex-Kaiser as well as other offenders against the laws and customs of war and the laws of humanity."⁽⁴⁾ The Committee recommended that the British Government should appoint to such Tribunal six members, four of whom should be of judicial or legal experience, one a naval and one a military representative; that the chief Allied States and the United States should have like representation; that an opportunity should also be given to such other of the Allied States, as in the opinion

(1) A. Merignac *De la responsabilité pénale des actes criminels commis au cours de la guerre 1914-18*—Revue de Droit Internationale et de la Législation Comparée—Tome I, p. 39.

(2) *Treaty of Peace between the Allied and Associated Powers and Germany and other Treaty Engagements signed at Versailles 28th June, 1919*, H.M.S.O. Art. 227 of Treaty, p. 97.

(3) *First Interim Report from the Committee of Inquiry into Breaches of the Laws of War, presented to His Majesty's Attorney General 13th January, 1919*, pp. 95-99.

(4) *op. cit.*, page 95.

of the chief Allied States and the United States should be represented, to appoint a member or members to the Tribunal.

It was recommended that the Tribunal should apply the laws and customs of war, as laid down in the Hague Conventions and, so far as naval warfare was concerned, in the Naval Codes and Prize Law of the chief maritime states, and the opinions of authoritative text-writers. The procedure of the tribunal should be as simple as possible, consistent with justice to the accused; the proceedings should be public and mainly oral; witnesses should be liable for cross-examination and the accused should have the assistance of counsel.

(2) *The Commission on Responsibilities*

In March, 1919, the Inter-Allied Commission on the Responsibility of the Authors of the War, comprising fifteen members, set up by the Peace Conference,⁽¹⁾ recommended the constitution of a "High Tribunal" to be composed of 22 members; three members each were to be appointed by the Great Powers (Great Britain, the United States, France, Italy and Japan) and one member each by the small Powers (Belgium, Czechoslovakia, Greece, Poland, Portugal, Roumania and Serbia). The law to be applied was "the principles of the law of nations as they result from the usages established among the civilised peoples, from the laws of humanity and from the dictates of public conscience". The Court was empowered to sentence the guilty to any punishment as might be imposed for such an offence by any court in any country. The Court was to determine its own procedure, while the duty of selecting cases for trial was to belong to the Prosecuting Commission of five members appointed by the five Great Powers.

The Court was to have jurisdiction over cases outside the competence of national courts such as:

- (1) outrages performed by civilians or soldiers in camps where prisoners of war of different nationalities were congregated;
- (2) high officials giving orders affecting more than one area or battlefield;
- (3) civil and military authorities, irrespective of rank and including heads of State, who had ordered or had failed to take action to prevent, the violation of the laws and customs of war;
- (4) instances where, having regard to the nature of the offence and the law of any belligerent country, it was considered inadvisable to proceed before any court other than the "high tribunal".

Though this scheme was a sensible, workable proposition, it had one fault from the angle of the Continental or American lawyer, namely, that it was to apply the "law of nations". This law had never been drafted and enacted and therefore it lacked precision. A British lawyer, accustomed to the administration of Common Law would have no difficulty in applying it, but it did not conform with either Continental or with American criminal doctrine. Objections to the scheme were raised by both the American and Japanese representatives and it was never adopted.

(1) *Conférence de la Paix 1919-20. Commission des Responsabilités des Auteurs de la Guerre.* Further details of the Commission have been set out in Chapter III.

(3) *The American Proposal and Article 229 of the Versailles Treaty*

The American delegates, Lansing and Scott, proposed an alternative plan to that recommended by the Commission of Fifteen, and this was eventually embodied in Article 229 of the Treaty. By this plan, Germans who were accused of crimes against nationals of two or more allied nations were to be brought before an international court. The Treaty gave no precision as to the composition of this Tribunal, but according to the memorandum drawn up by the originators of the scheme,⁽¹⁾ the Court was to be formed by the simple process of uniting the military courts of all the countries concerned so that "the Tribunal would be formed by the mere assemblage of the members". Moreover, each member of the Court was to "bring with him the law to be applied", which the authors of the scheme described as "the laws of war". Since the phrase "laws of war" was a very vague term, and the acts which it made criminal were few, none of which had specific penalties attached, nor had any court been given competence to try them, it followed that the law which each member was to bring with him was his own national military law, different in the case of each nation. The confusion which would have resulted from such a system is obvious.

The scheme designed in Article 229 of the Versailles Treaty was imperfectly framed and the Allies were so convinced that it would not or could not be carried out that they did not even trouble to give their military courts the necessary power to judge these cases.

(ii) DEVELOPMENTS DURING THE INTER-WAR YEARS

During the years following the Treaty of Versailles, with the establishment of the Permanent Court of International Justice at the Hague, and with the development of the idea of international co-operation through the League of Nations, various official and semi-official bodies were concerned with the question of establishing an international criminal court, and various schemes were suggested with a view to setting up such a court.

(1) *Baron Descamps' Suggestion in 1920*

The first of these was in 1920 when Baron Descamps, the Belgian President of the Committee of Jurists appointed to draw up a scheme for the establishment of the Permanent Court of International Justice, proposed the formation of a High Court of International Justice, to deal with crimes against public order and the general law of nations.⁽²⁾ The Court should be composed of one member from each State, to be chosen by the group of delegates of each State on the Court of Arbitration. It should be competent to try crimes constituting a breach of international public order or against the universal law of nations, referred to it by the Assembly or Council of the League. It should have the power to define the nature of the crime, to fix the penalty and to decide on the appropriate means of carrying out the sentence.

The recommendation was put before the Assembly of the League in

(1) *op. cit.*, pp. 219-231.

(2) See article by Lord Phillimore in *British Year Book of International Law*, 1922-23, p. 79

December, 1920, but it adopted a motion⁽¹⁾ in which it expressed the opinion that the scheme would be "most desirable but premature", since it was considered useless to constitute a Criminal Court alongside the Court of International Justice, but left open the possibility of establishing at some future date a criminal department in the Court of International Justice.

(2) *The International Law Association*

At the Conference of the International Law Association, held in Buenos Aires in 1922, a resolution was passed advocating the creation of an International Criminal Court. In consequence, Dr. Hugh H. L. Bellot, who had been secretary to the MacDonnell Committee, presented a draft Statute for a Permanent International Criminal Court to the Conference which met in Stockholm in 1924. This draft Statute was modelled largely on that of the Permanent Court of International Justice, and incorporated certain provisions taken from the British Criminal Appeal Act of 1907.⁽²⁾ In the course of the discussion, which was led by Lord Phillimore, the draft Statute was criticised on the grounds that (a) under its provisions proceedings could be instituted at the instance of private individuals; (b) that it limited the jurisdiction of the Court to war crimes; and (c) that it lacked provision as to how sentences pronounced by the Court would be executed. It was also held that the Court lacked what constituted in municipal law the prerogative of mercy. In view of these criticisms the draft was submitted to a special committee for further consideration.

An amended draft Statute was presented to the 34th Conference which met in Vienna in 1926. After sharp discussion as to whether the Court would be competent to try charges, until a code defining offences and specific penalties for them had been accepted, it was finally resolved that the jurisdiction of the Court should extend to all charges of:

- (1) violations of international obligations of a penal character committed by the subjects of one State or by a stateless person against another State or its subjects;
- (2) violations of any treaty, convention or declaration binding on States, which regulates the methods and conduct of warfare;
- (3) violations of the laws and customs of war generally accepted as binding by civilised nations.⁽³⁾

These three categories covered crimes committed either by a State or the subjects of a State. When the charge was against a State, the Court could sentence the accused State to pay to the injured State a pecuniary penalty and/or indemnity for the damage done. When the charge was against a citizen, the Court could order any suitable punishment, from a fine to capital punishment.

The judges to try the case were to be members of the nations concerned, and they were to apply: international treaties, conventions and declarations recognised by the States before the Court; international custom; the general principles of law recognised by civilised nations and judicial decisions, as a subsidiary means of determining the rules of law.

(1) *Assembly*, 1920, Report of 3rd Committee, p. 764.

(2) *International Law Association*, Report of the 33rd Conference at Stockholm, 1924, p. xiii.

(3) *International Law Association*. 34th Conference, Vienna, 1926, p. 118.

(3) *The Inter-Parliamentary Union*

This Union, which consisted of European and American members of Parliament, raised the question of an International Court in 1923. In 1925 it adopted the principle that all international crimes should come before an International Court, and in 1927 it insisted that the principles of International Criminal Law should be agreed upon. This Union was, however, an advisory not an executive body, and its recommendations were not taken up in official quarters.

(4) *The International Congress of Penal Law*

In 1924 this semi-official body began to study the question of whether the institution of a Permanent International Criminal Court was a practical proposition, and at the annual Conference at Brussels in 1926 decided in the affirmative. It also possessed no executive power and was not in a position to implement its resolutions.

(5) *The Pan-American Court of International Justice*

The Costa-Rican delegation to the Fifth Pan-American Conference which met at Santiago in 1923⁽¹⁾ presented a plan for the creation of a Permanent American Court of International Justice, but the idea was shelved by being referred to a Committee of Jurists. At the Seventh Pan-American Conference, which met in Montevideo in 1933, the matter was again raised, when the Mexican delegation presented a Peace Code for consideration.⁽²⁾ Chapter 5 of this Code concerned the creation of an American Court of International Justice, which was based largely on the recommendations made to the League of Nations by Baron Descamps in 1920. The Court was to be composed of one member from each of the contracting parties, the members to be of the highest judicial standing. The panel was to be divided into a Tribunal of First Instance and a Court of Appeal. Judges would not be permitted to hold any other post during their five years term of office. Each section of the Tribunal should meet in full, with a quorum of two-thirds of its members; the expenses of the tribunal should be defrayed in proper proportion by the contracting parties; it should have jurisdiction to settle disputes between the American republics and in the following cases its jurisdiction should be obligatory :—

- (1) the interpretation of a treaty;
- (2) the determination of a fact which if confirmed, would constitute a violation of an international obligation;
- (3) the determination of the nature and extent of the reparation to be given for a violation of an international obligation.

The Tribunal was to apply international conventions recognised by the parties to the dispute, international custom proved by general practice and the general principles of law, recognised by civilised nations.

This proposal for a Peace Code was too extensive to be adopted by the Conference. It was discussed again at the Inter-American Conference

(1) For further details of Pan-American Conferences, see Chap. IV, Section M, p. 77.

(2) *The International Conferences of American States First Supplement, 1933-40*, edited by James Brown Scott, pp. 50-65.

for the Maintenance of Peace which met at Buenos Aires in December, 1936, and was referred to the Seventh Pan-American Conference. When this met at Lima in December, 1938, it passed a resolution to the effect that :

“ It is the firm purpose of the States of the American Continent to establish an Inter-American Court of International Justice, whenever these States may recognise the possibility of doing so with complete assurance of success, and that in the meantime the study of an adequate statute on which international justice in America may rest should be encouraged ”.⁽¹⁾

In spite of this pious aspiration nothing further developed in the question of establishing such a court.

(6) *The League of Nations Convention for the Repression of Terrorism*

Following the murder of King Alexander of Yugoslavia in 1934, a Committee of Experts was set up by the Council of the League⁽²⁾ to prepare a convention for the repression of terrorist outrages. In November, 1937, an international conference drew up and signed a Convention for the Repression of Terrorism, attached to which was a Convention for the Creation of an International Criminal Court.⁽³⁾

The intention was that there might be occasions when a State, having in its hands a person accused of committing terrorist offences in another country which it would normally extradite or prosecute in its own courts, might prefer to surrender that person to an international court of undoubted impartiality.

The Court, to be established under the Convention, was to consist of a permanent body of five regular and five deputy judges, appointed by the Permanent Court of International Justice from among members of the States party to the Convention. The Court, which would consist of five members, would only sit when there were cases to be tried.

The jurisdiction of the Court was to extend to wilful acts against heads of State or other senior functionaries; wilful destruction of public property of another State, or calculated to endanger the lives of the public and the manufacture of arms, explosives, etc., destined to commit offences of a terrorist nature.

The conduct of the prosecution would lie with the State committing the accused for trial, unless the State against whom the offence was committed wished to undertake it. The law to be applied was that of the State on which the crime had been committed, or of the State bringing the charge, whichever was the less severe. The State in whose territory the Court was sitting should be responsible for detention and execution of the sentence, unless the Court should direct otherwise. The decisions of the Court should be by majority vote.

Although the scope of the Court was narrow, once instituted it could have been expanded, especially in time of war, to dealing with war crimes,

(1) Brown Scott, *op. cit.*, p. 253.

(2) *League Monthly Summary*, Vol. XV, p. 107.

(3) *Proceedings of the International Conference on the Repression of Terrorism*, C. 94, M. 47, 1938V. (League of Nations.)

and this was perhaps in the minds of its originators. However, owing to the deterioration of the international situation in 1938 the Convention never came into force.

(7) *Mixed Courts*

Experiments of international courts had actually been made and had proved successful. The Mixed Courts of Egypt, which had jurisdiction in criminal as well as in civil cases, were an excellent example of a fruitful collaboration of jurists. Others, such as the International Court of Tangiers and the various Arbitral Mixed Courts, which functioned during the 1920's, proved that it was possible to achieve international co-operation in the judicial field.

(iii) DEVELOPMENTS BETWEEN 1939-1943

In view of the outrages perpetrated by the Germans both before and during the war, and especially in the occupied countries, the question of the establishment of some form of international tribunal had been under discussion in certain unofficial bodies, such as the London International Assembly and the Cambridge International Commission for Penal Reconstruction and Development as early as 1942, and as the war progressed the principle received recognition not only in the pronouncements of statesmen, but also in the institution of official bodies.

(1) *The London International Assembly*

The first of the semi-official bodies to consider the problem was the London International Assembly, which set up a Commission under the Chairmanship of Monsieur de Baer of Belgium in April, 1942.⁽¹⁾ The Assembly, having adopted the principle that an International Criminal Court should be instituted, the Chairman of the Commission submitted a draft Convention for the establishment of such a court. This Convention formed the basis of discussion and was accepted by the Assembly.⁽²⁾

Under it, the Court was to have jurisdiction over cases which were not within the competence of the national courts, namely, crimes against Jews and stateless persons in Germany; crimes which had been committed or taken effect in several countries or against the nationals of several countries and crimes committed by heads of State. The law to be applied by the Court was: international custom, international treaties, conventions and declarations; the generally accepted principles of criminal law and judicial decisions and doctrines of highly qualified publicists. A Procurator General should be the prosecuting authority accredited to the Court, and should act on behalf of the United Nations as a whole. An International Constabulary should be established to act towards the Court in the same way as the U.S. Marshals operate in the U.S. Federal Courts.

(2) *The International Commission on Penal Reconstruction and Development*

The Cambridge Commission,⁽³⁾ which was deliberating at the same time

(1) For further details of the work of the London International Assembly, see Chapter V, Section B (ii), p. 99.

(2) *London International Assembly Reports on the Punishment of War Crimes*, pp. 225-339. Pamphlet *The Punishment of War Criminals—Recommendations of the L.I.A.* Appendix II.

(3) *Confidential Report of the International Commission for Penal Reconstruction and Reform*. This subject is dealt with in more detail in Chapter V, Section B (i), p. 94.

as the London International Assembly, with several members of one body also serving as members of the other, had a majority of members in favour of the institution of an International Criminal Court to judge certain categories of war crimes. However, in his report of July, 1943, the Chairman, Sir Arnold McNair, while admitting that the time was ripe for the institution of such a Court for peacetime purposes, considered it impracticable for the purpose of trying war criminals.

(3) *The Debate in the House of Lords 7th October, 1942*

In the debate on war crimes in the House of Lords on 7th October, 1942,⁽¹⁾ Lord Maugham raised the question of establishing an International Criminal Court. He pointed out that there would be certain crimes which could not be tried by national courts, for instance:—crimes against persons deprived of their nationality; cases of mass murder as the consequence of an order, such as the drastic removal of foodstuffs ordered by a German officer or by some sort of German tribunal, resulting in wide-spread starvation of the population; similar acts causing death by exposure; orders for the removal of young women to unknown destinations, obviously for the purpose of prostitution; cases where two or more courts of different Allied States have jurisdiction; cases where it is uncertain which of two or more such courts have the necessary jurisdiction; and, finally, cases where, owing to political unrest in the country where the crime was committed, it might be difficult to hold a proper trial. It was recommended that the crimes to be tried by such a Court should be limited to those which were so serious as to shock the conscience of mankind; it should also only undertake to try a limited number of accused.

Replying for the Government, the Lord Chancellor, Lord Simon, expressed the view that while military tribunals were possibly more effective and prompt-working tribunals for the trial of war crimes, he did not rule out the possibility of establishing an International Criminal Court. Some of the difficulties which were likely to be raised by such a court were, that of including any but members of the United Nations as judges; that of deciding on the code of law to be applied, and above all, the question of procedure to be adopted, since legal procedure varies from one country to another.

(4) *The Moscow Declaration*

In the Moscow Declaration of 1st November, 1943,⁽²⁾ it was stated that the major war criminals, "whose offences have no particular geographical location" would be punished by a joint decision of the Governments of the Allies. Although the question of some international trial of the major war criminals was raised at Moscow, no machinery was suggested for the implementation of this promise.

B. RECOMMENDATIONS OF THE UNITED NATIONS WAR CRIMES COMMISSION

The United Nations War Crimes Commission, from its earliest stages

(1) *Parliamentary Debates (Hansard) House of Lords*, Vol. 1124, No. 86, 7th October, 1942, pp. 556-567. For more details see Chapter VI, Section A (i), p. 109.

(2) See *The Times* of 3rd November, 1943. For further details see Chapter V, Section D.(iv).

was concerned with the question of establishing an International Criminal (or War Crimes) Court, to carry out the trial of the war criminals described in the Moscow Declaration as having committed crimes " without particular geographical location ".

There was some opposition to this proposal, since the British Government did not favour the creation of such a court, and some British authorities visualised the punishment of leading Axis war criminals by " political action ", as had been done in the case of Napoleon. However, the delegates in favour of the proposal, led by the American and Australian representatives, pressed so strongly for its consideration that at its meeting on 22nd February, 1944,⁽¹⁾ the Commission gave authority to Committee II, the Committee on Enforcement, under the Chairmanship of Mr. Herbert C. Pell the United States representative, to begin discussions on the subject without delay.

The question of the establishment of an international court for the trial of war criminals was consequently considered in detail at weekly meetings of Committee II between February and the end of September, 1944. As an original basis for the discussions, the Draft Convention for the Creation of an International Criminal Court adopted by the London International Assembly was used,⁽²⁾ together with the report of the Netherlands representative made to the same Assembly on the question, in which the author reviewed the precedents and previous attempts to set up such a court, and reached the conclusion that its creation should be a practical proposition.⁽³⁾

(i) CREATION OF A UNITED NATIONS WAR CRIMES COURT

The United States office presented another draft convention for the creation of the international court, which had been compiled by the State Department of the United States, taking into account the London International Assembly Draft Convention.⁽⁴⁾ It was on this latter document that the discussion of the Committee during the next few months was based.

When this draft was first discussed on 14th April, 1944, some members raised practical objections; for instance the British and Norwegian representatives considered that it was too late for the organisation of such a court, and it would be better to punish by political action war criminals in respect of whom no one State had exclusive jurisdiction. This was opposed by the representatives of Belgium, China, Czechoslovakia and the United States, while the French delegate agreed, in principle, but had some objections as to the law to be applied. However, it was agreed that discussion as to the constitution of the court should continue.

Rather than follow the actual development of the discussion chrono-

(1) See M.10. 22.2.44.

(2) II/2. 14.2.44. *Draft Convention for the Creation of an International Criminal Court, submitted to the London International Assembly (drafted by M. de Baer and amended by Commission I of the London International Assembly).*

(3) II/3. 25.2.44. *Report on the Constitution and the Jurisdiction to be conferred on an International Criminal Court (submitted to the London International Assembly by Dr. J. M. de Moor).*

(4) II/11. 14.4.44. *Draft Convention on the Trial and Punishment of War Criminals.*

logically, it has been found more convenient to follow up the development of the respective points, such as the definition of war crimes; the jurisdiction of the court; the sources of law to be applied; the establishment of a prosecuting authority; the custody of the criminal and execution of sentence; the judges; the seat of the court; the language of the court and miscellaneous matters.

(1) *Definition of War Crimes*

In the London International Assembly draft,⁽¹⁾ war crimes were defined as:—

“any grave outrages violating the general principles of criminal law as recognised by civilised nations and committed in war time or connected with the preparation, the waging or the prosecution of war or perpetrated with a view to preventing the restoration of peace.”

Anyone committing, by direct action, participation or by inciting others to commit such a crime, would be regarded as a war criminal, whether as a principal or an accessory to the crime and irrespective of rank or position, including heads of State.

The United States draft⁽²⁾ listed 15 specific war crimes, based on the list drawn up in 1919. It also stated that all persons, irrespective of rank or position, who had committed or incited a crime should be considered to be guilty, whether as principals or accessories. An alternative article with a wider scope was suggested whereby war crimes were to be considered “acts committed in violation of the laws of war”. Neither of these definitions, however, included crimes against humanity or crimes against peace, which were covered in the London International Assembly definition.

There was some discussion as to how far the definition of war crimes should be limited *stricto sensu* or whether it should include a broader meaning in respect of crimes against stateless persons, but finally the conclusion was reached that it must be limited. The definition of war crimes was given as⁽³⁾ “offences against the laws and customs of war, which have been committed by members of the armed forces, the civilian authorities or other persons acting under the authority of, or in concert with, a state or other political entity, engaged in war or armed hostilities with, or in hostile occupation of territory of the United Nations”. Although a suggestion was made that other offences might be brought under the provisions of this Convention by a decision of the High Contracting Parties, the final draft⁽⁴⁾ simply defined a war crime as “an offence against the laws and customs of war”.

(2) *Jurisdiction of the Court*

In the London International Assembly draft⁽⁵⁾ the Court should not have jurisdiction in cases coming within the competence of

(1) II/2 Article 2.

(2) Doc. II/11 Article 1.

(3) II/21. 22.6.44. *Establishment of an International Court, articles adopted by the Committee.*

(4) C. 50(1) 30.9.44. *Draft Convention for the Establishment of a United Nations War Crimes Court, Article 1(1).*

(5) II/2, Article 3.

any of the domestic courts of the United Nations, where those courts were willing and able to exercise such jurisdiction, but it should have competence in cases where two or more domestic courts have jurisdiction and the parties concerned agree to bring the case before the Court, and any other cases of war crimes brought by the High Contracting Parties. The United States draft⁽¹⁾ also specified that the Court should have jurisdiction over persons surrendered by the ex-enemy states, or extradited from neutral states. However, this latter draft did not make it sufficiently clear as to which persons should be subject to the Court's jurisdiction, though the indication was that it was to be offenders whom there was some reason not to bring to trial in national courts.

The Belgian representative produced a memorandum on this subject,⁽²⁾ setting out the categories of offences which would have to be tried, namely: the leaders of Nazi Germany; cases where no national court has jurisdiction; cases where the detaining authority has no jurisdiction, such as Germans, who have committed crimes against Italians, detained by the United States authorities; cases where a national court prefers not to exercise jurisdiction; and crimes against the restoration of peace, such as the Fehme murders after 1919, clandestine rearmament in violation of peace treaties, etc.

On 29th June, 1944,⁽³⁾ the sub-committee specially appointed to redraft the appropriate article made the following recommendations:—

- (1) The Court should have jurisdiction in cases where crimes have been committed in two countries and the national authorities cannot agree that one country should try the case.
- (2) In cases where national courts have jurisdiction, the Government concerned would have discretion to bring the case before the International Court.
- (3) States should have sole jurisdiction in trying their own nationals.
- (4) The Court should try cases where no national court has jurisdiction.
- (5) The Court should try persons surrendered by the neutrals.
- (6) The Court should try the arch-criminals.

Article I of the final Draft Convention⁽⁴⁾ contained the following subparagraphs:—

“The jurisdiction of the Court should extend to the trial and punishment of any person—irrespective of rank or position—who has committed, or attempted to commit, or has ordered, caused, aided, abetted or incited another person to commit, or by his failure to fulfil a duty incumbent upon him has himself committed, an offence against the laws and customs of war.

“The jurisdiction of the Court as defined above shall extend to offences committed by the members of the armed forces, the civilian authorities, or other persons acting under the authority of, or claim or colour of authority of, or in concert with a state or other political entity engaged in war or armed hostilities with any of the High Contracting Parties, or in hostile occupation of territory of any of the High Contracting Parties.”

(1) II/11, Article 27.

(2) II/13 1.5.44. *Note by M. de Baer on the categories of crimes which would come before the International Court.*

(3) II/23 29.6.44. *Questions as to the Jurisdiction of the proposed Court prepared by the sub-committee.*

(4) C. 50(1) Article 1.

(3) *Sources of Law to be Applied*

Article 29 of the United States draft⁽¹⁾ originally laid down that the sources of law to be applied were general international treaties and conventions, international custom, the general principles of criminal law recognised by civilised nations and the judicial decisions and teaching of the most highly qualified publicists of the various nations, as a subsidiary means of determining the rules of the laws of war. After discussion in the Committee, it was decided to drop the clause concerning the principles of criminal law recognised by civilised nations and to insert instead the phrase "the principles of the law of nations, derived from the usages established among civilised peoples, from the laws of humanity and from the dictates of public conscience", which was taken from the eighth consideration set out in the Preamble of the 1907 Convention concerning the Laws and Customs of War on Land. From the last phrase also the words "and the teachings of the most highly qualified publicists of the various nations" were deleted, leaving only judicial decisions as a subsidiary means of determining rules of war.

There was not unanimous agreement on the substitution of the phrase from the Hague Convention in place of the more general expression of the principles of criminal law recognised by civilised nations. At the meeting of the Committee held on 7th September, 1944, it was re-incorporated among the sources of law to be applied so that in the final Draft Convention⁽²⁾ the sources of law to be applied were shown as:—

- (1) conventional and treaty law;
- (2) international customs of war;
- (3) the principles of the law of nations derived from the usages established among civilised peoples, from the laws of humanity and from the dictates of the public conscience;
- (4) the principles of criminal law generally recognised by civilised nations;
- (5) judicial decisions as a subsidiary means of determining the rules of the laws of war.

(4) *The Prosecuting Authority*

When the question of the punishment of stateless persons in Germany was raised in the first meetings of Committee I, the Committee on Facts and Evidence, in February, 1944, the French representative recommended that such cases should be prosecuted on behalf of the United Nations as a whole, and for this purpose a "United Nations Public Prosecutor" should be appointed. The matter, however, was not pursued further in view of the plans for the creation of an international court.

The recommendation of the United States draft⁽³⁾ was that the United Nations War Crimes Commission should continue in existence until such time as it could be merged with the United Nations Commission for the Prosecution of War Crimes. It was suggested that a conference of representatives of the United Nations should elect a Commission for the Prosecution of War Crimes, to consist of seven members, who would be chosen

(1) II/11, Article 29.

(2) C. 50(1), Article 18.

(3) II/11, Articles 21 and 22.

for a term of three years, any vacancies to be filled by the Tribunal. The duties of the Commission should be: to receive evidence of crimes submitted to it by the United Nations War Crimes Commission; to select and prepare for trial cases brought before the Tribunal and its divisions; to conduct the prosecutions and to ensure that the judgments and orders of the Tribunal were carried out.

Under a separate recommendation the Chairman of Committee I⁽¹⁾ developing the ideas put forward earlier by the French representative, recommended that to prevent war criminals escaping at the time of the Armistice, a United Nations Criminal Justice Office or a Prosecuting Office should be established, charged with the duty of finding the war criminals, arresting and detaining them, taking down their statements and eventually making a summary investigation of the statements; the accused, with his dossier, would then be sent to the place or country where the trial was to be held. This office would act as a sort of judicial agency to which the courts of all Allied countries could apply to obtain accused persons, witnesses, evidence or information on war crimes. This suggestion aroused some criticism when it was discussed by the Commission at its meeting on 2nd May, 1944.⁽²⁾

The Committee itself could not agree on the prosecuting authority, and it was the last important question to be settled. There was much discussion as to whether the prosecution should be conducted by an organ of the Court, or of the United Nations, or individually by each United Nation. Moreover, if there was such an organ, whether it should have the power to select persons for trial before the Court.

After circulating a questionnaire, the Belgian representative reported that there was great divergence of opinion on this matter. Some held that there should be a Chief Prosecutor, whose salary and expenses should be shared by the High Contracting Parties. Others held that it was not necessary to have such an official, but that each Government bringing a case to the Court should provide the prosecuting staff.

Finally, the following four articles were agreed upon⁽³⁾:—

- (1) Responsibility for the prosecution would in general rest with the Government of the United Nation bringing the case before the Court.
- (2) A diplomatic conference should be summoned to appoint an officer to whom could be entrusted the prosecution in any case where a Government of one of the United Nations prefers that its own representative should not undertake the prosecution.
- (3) This officer should be assisted by such staff as the Court might consider necessary.
- (4) The expenses of the prosecution should be borne by the State transmitting the case to the Court.

These provisions were incorporated in Article 11 of the final Draft Convention.

(1) C. 14 25.4.44. *Proposal by M. de Baer, Chairman of Committee I.*

(2) M.16. 2.5.44.

(3) II/35 9.9.44. *Amendments to Draft Articles as a result of the Meeting of 7th September, 1944.*

(5) *The Detaining Authority*

According to the provisions of the London International Assembly draft,⁽¹⁾ an International Constabulary was to be set up, charged with the execution of orders of the Court and of the Prosecutor General. Members should be chosen by the Court from candidates of different nationalities, and it should have the power to call on the assistance of the local police when necessary. In the United States draft,⁽²⁾ however, it was laid down that the State on whose territory the tribunal or its division was sitting should supply suitable facilities for detention. The execution of the sentence should be performed by the United Nation designated, with its own approval, by the Court which imposed the sentence. In the final Draft Convention,⁽³⁾ the whole matter was simplified when it was laid down that the Court should have power to adjudge appropriate punishment, including death, and that sentences should be executed as directed by the Court.

(6) *Judges of the Court*

The judges were to be nationals of the High Contracting Parties and must possess the highest legal qualifications. They should be conversant with one of the official languages of the Court.

The method of electing judges should be that, within 30 days of the entry into force of the Convention, each High Contracting Party should appoint three qualified persons, notifying their names to the British Foreign Secretary. Within fifteen days of such notification, the British Foreign Secretary should call a conference of the heads of diplomatic missions to the Court of St. James's. At this conference the judges were to be elected by secret ballot from among the members of the Panel. A provision was also made whereby a State adhering later to the Convention, would be able to appoint members of the Panel.

Further provisions concerning the judges were, that in the event of a vacancy the Court should elect another judge from among its members; that each judge should make a solemn declaration in open court that he would exercise his functions impartially and conscientiously; that the judges and registrar of the Court should enjoy diplomatic privileges; that no judge should exercise any political and administrative function or engage in any activity of a professional nature during his tenure of office, and that the Court could retire a judge with the concurrence of not less than three-quarters of the judges. These provisions were incorporated with small amendments in the final Draft Convention.⁽⁴⁾

(7) *The Seat of the Court and Date of Meeting*

The Court was to sit in Divisions, each Division to consist of not less than five judges, who should be designated by the President of the Court. The Divisions should sit at such places and for such periods as the President might determine. It was also agreed that the first meeting of the Court should be in London, and after that it should not only decide its permanent

(1) II/2, Article 25.

(2) II/11, Articles 39 and 41.

(3) C. 50(1), Articles 20 and 21.

(4) C. 50(1), Articles 2, 3, 5, 6, 8, 9 and 13.

seat, but also whether it would meet elsewhere than at its seat. In the final Draft Convention⁽¹⁾ provision was made for the date of the first meeting of the Court to be settled by the Diplomatic Conference.

(8) *The Plea of Superior Order*

According to the United States draft⁽²⁾ it was laid down that this should not constitute a defence if the order was patently illegal, but the extent to which it could be considered as a ground for mitigation of penalty would be for the Court to decide. It was, however, decided that no reference to this defence was to be included in the Draft Convention, but that reference to it should be made in the General Recommendations to the Court. When these General Recommendations⁽³⁾ were framed, the following was included among them:

“The Commission considers that it is better to leave it to the Court itself in each case to decide what weight should be attached to the plea of superior orders. But the Commission wants to make it perfectly clear that its members unanimously agree that in principle this plea of itself does not exonerate the offender.”

(9) *The Language of the Court*

The United States draft⁽⁴⁾ had recommended that the official languages of the Court should be French and English, but that the Tribunal might direct that the proceedings were to be conducted in another language. When the final Draft Convention⁽⁵⁾ was adopted, the only reference to language was that members of the Court should be conversant with either English or French, but in the Recommendations to the Court⁽⁶⁾ it was stated that in view of the fact that divisions of the Court might sit in the Far East or Eastern Europe “the Commission . . . has considered it desirable that the Court itself should be left free to establish . . . the necessary rules with regard to the language or languages in the sense that the official languages of the Court shall be English and French and/or any other language of the country in which the Court may sit.”

(10) *Miscellaneous Points*

The Court was to establish its own rules regulating its administration, procedure, etc., and was to select its President, Vice-President, etc. All expenses involved in the execution of the Convention, including costs arising from trial proceedings and from the execution of sentences imposed, should be defrayed as the Court might decide. The Draft Convention also contained articles laying down that the Court should have power to take adequate measures for securing witnesses and evidence; that the accused should have all reasonable rights of defence, as recognised in civilised countries; that the hearings should be public unless for some special reason; that no one should be tried if he had previously been tried and acquitted for the same offence by a United Nations court; that the Court should sit in private to consider its judgment, but that the judgment was to be pro-

(1) C. 50(1), Articles 4 and 12.

(2) II/11, Article 30.

(3) C. 58 6.10.44. *Explanatory Memorandum to accompany the Draft Convention for the Establishment of a United Nations War Crimes Court.*

(4) II/11, Article 31.

(5) C. 50(1), Article 3.

(6) C. 58, paragraph (c)

nounced in public session, the decisions to be by a majority of the judges participating.⁽¹⁾

The final draft of the Convention for the Establishment of a United Nations Joint Court was circulated as a Commission document on 20th September, 1944.⁽²⁾ This document was considered by the Commission at its meeting on 26th September, 1944, and accepted with small amendments.⁽³⁾ The Chinese representative raised the question of the language of the Court, and the recommendation subsequently incorporated in the explanatory memorandum (as set out under paragraph 9 above) was agreed upon.

(ii) CREATION OF INTER-ALLIED MILITARY TRIBUNALS

While the Enforcement Committee was discussing the establishment of an international or treaty court, it had become clear that the creation of such a court would be subject to long delays and it was advisable that some other interim courts should be set up, which could operate immediately, during the period of military control.

The representatives of the United States and India proposed that the military commissions or courts of the occupying powers should also be entrusted with trials of war criminals. They should not have priority either in relation to the national courts or to the International Criminal Court. The intention was to have an efficient additional instrument of repression of mass crimes, such as those committed in the concentration camps. The perpetrators were not leading war criminals and would not, therefore, come within the jurisdiction of the international court. They had, however, committed crimes against the citizens of many nations and it would be most convenient to try them on the spot. The Committee on Enforcement considered the idea favourably and appointed a sub-committee to prepare a draft scheme.

The draft proposal presented by the Indian representative⁽⁴⁾ started with the premises that Supreme Commanders have the right to set up military tribunals and prescribe their composition, powers and procedure; that these courts have competence to try all persons, military and civilian, who are within the custody of the convening authority and charged with violations of the laws and customs of war, or similar persons transferred for trial to the Supreme Commander by one of the United Nations. The paper, therefore, recommended that United Nations Governments should request the Supreme Commander to convene such courts, as an expeditious means of trying war criminals.

The text of this paper was subject to some discussion and a new draft was produced.⁽⁵⁾ In this paper the proposal was given much more fully. It started with a preamble to the effect that, whereas in accordance with

(1) C. 50(1), Articles 7, 10 and 22.

(2) C. 50 20.9.44. *Convention for the Establishment of a United Nations Joint Court. Draft presented by Committee II.*

(3) M. 33 and the document subsequently promulgated as C. 50(1).

(4) II/26 1.8.44. *Proposal for a United Nations Military Tribunal (Mr. Dut's proposal as amended by a drafting committee).*

(5) II/26(1) 16.8.44. *New text submitted by the drafting committee.*

the Moscow Declaration of 1st November, 1943, war criminals were to be tried by the national courts wherever possible, there would, however, be some crimes which would not come within the competence of those courts; that the Supreme Commander has the right to try cases arising out of military operations or involving the safety of his army; that the United Nations War Crimes Commission would be recommending the creation of a United Nations War Crimes Court, but that as an interim measure it was considered necessary that some military tribunals should be established to try war criminals. It was, therefore, recommended that: United Nations Governments should make use of such courts; that they should surrender the defendant to the convening authority; that they should supply evidence of guilt and should co-operate in providing evidence, witnesses, etc. It was further recommended that the courts should not sit within the territory of a United Nation, unless it was of the nation bringing the charge and that if the final sentence was one of imprisonment, this should be served in the manner directed by the Supreme Commander.

On 31st August, 1944, a paper⁽¹⁾ was circulated to the members of the Commission containing a memorandum from the Office of the United States representative. This memorandum dealt with two questions. The first was:—whether an Allied commander may on his own authority empower mixed allied tribunals to try war criminals who fall into the hands of the Allied Forces. After reviewing the practice in this connection under American law and also under Articles 228 and 229 of the Versailles Treaty, which stipulated that certain German war criminals might be brought to trial before courts “composed of members of the military tribunals of the Powers concerned”, the opinion was given that Supreme Commanders would possess such competence. The second question was whether this power extended to the trial and punishment of war criminals irrespective of where the crime had been committed. After reviewing the opinion of jurists and considering legal precedents, the view was given that the violation of the laws of war is a violation of the law of nations and is a matter of general interest and concern, so that all civilised belligerents have an interest in the punishment of such offences.

These two papers were discussed by the Commission at its meeting on 5th September, 1944.⁽²⁾ After the recommendation had been moved by the Chairman and seconded by the Australian representative, the Norwegian representative put forward the view that Governments would prefer to know more of the nature and conditions of the military court and its work. He also stated that he considered that the schemes for the establishment of military courts and the United Nations War Crimes Court should go forward together. In this he was supported by the Belgian and Netherlands representatives.

At the next meeting of the Commission,⁽³⁾ the United States representative expressed the view that there were in the scheme safeguards for any

(1) C. 46 31.8.44. *Trial of War Criminals by Mixed Inter-Allied Military Tribunals. Memorandum by the Office of the U.S. representative.*

(2) See. M.30. 5.9.44.

(3) See. M.31. 12.9.44.

Government not wishing to avail itself of the services of such courts. The French representative pointed out that the Supreme Commander had not yet been consulted as to the setting up of such courts, and that Governments need to know the rules which will govern the appointment of the judges, the law to be applied, penalties to be imposed, etc. The Australian representative strongly supported the proposal to establish military courts as the most practical way of dealing with the cases. The Netherlands representative stated that his Government recognised the need for such courts, but that the Netherlands legislation rendered it difficult for his country to use them. He also stressed the need to know more about the composition of the court, whether the judges were to be civil or military and the rules of evidence to be applied. After further discussion the plan was generally agreed upon and it was decided that the suggested reservations should be dealt with in a covering letter.

Discussion continued at the Commission meeting on 19th September, 1944,⁽¹⁾ when the Chairman stressed the importance of the two schemes going forward together. Voting was taken on the existing draft and after some amendments it was approved. A covering letter was to take into account the suggestions which had been made concerning the composition and competence of the court, the law to be applied and the systems of prosecution and execution.

On 10th October, 1944,⁽²⁾ the question was again discussed. The Commission had before it the proposal incorporating amendments previously made to the draft and the explanatory memorandum.⁽³⁾ This latter document was voted on paragraph by paragraph and its amended form⁽⁴⁾ was approved by 8 votes to 4. This explanatory memorandum suggested that the judges of such tribunals should be nationals of the United Nations; that the tribunals should be composed of mixed personnel; that they should have jurisdiction to try enemy nationals accused of having committed war crimes; that each tribunal should consist of not less than five members; that the rules of procedure should be consistent with practices which are usual in civilised countries and should be framed by the appointing authority; that the prosecution should be left to the United Nation concerned, but if necessary the convening authority should have power to oblige persons to give evidence and produce documents; that trial before an enemy court should not bar proceedings before an inter-Allied tribunal. With regard to the plea of superior order, reference was made to the recommendation contained in the explanatory memorandum to accompany the Draft Convention for the Establishment of a United Nations War Crimes Court, where it was stated that the Commission considered it better to leave the Court to decide the validity of this plea, while stating the general principle that it does not of itself exonerate the offender.

On 6th October, 1944, the Chairman of the Commission sent to the

(1) See. M.32. 19.9.44.

(2) See. M.34. 10.10.44.

(3) C. 52(1) 26.9.44. *Recommendation for the Establishment by Supreme Commanders of Mixed Military Tribunals for the Trial of War Criminals* and C.51 29.9.44 *Draft memorandum prepared by the Committee appointed on September 19th.*

(4) Subsequently circulated as Doc. C. 59 6.10.44 *Suggestions to accompany the Recommendation for the Establishment of Mixed Military Tribunals.*

British Foreign Secretary a letter⁽¹⁾ forwarding copies of the Draft Convention for the Establishment of a United Nations War Crimes Court, together with the explanatory memorandum,⁽²⁾ as well as the recommendation for the Establishment by Supreme Military Commanders of Mixed Military Tribunals for the trial of war criminals, together with the memorandum embodying suggestions to accompany the recommendation⁽³⁾. The Chairman also conveyed to the British Foreign Secretary the unanimous request of the Commission that he should take such steps as he deemed fit in the near future to convene a diplomatic conference to consider, and if thought fit to conclude, a Convention for the Establishment of a United Nations Court.

While the Commission was awaiting a reply from the British Foreign Office, the Canadian Government, hitherto not represented on the Commission, approached the Chairman in December, 1944, stating that it was interested in the establishment of a United Nations War Crimes Court. The Canadian High Commissioner in a memorandum to the Chairman of the Commission⁽⁴⁾ stated that:

"The Canadian authorities are anxious that the proposal for the mixed military tribunals should be such that the trial of war criminals may begin immediately Germany collapses. . . . It may not, in the view of the Canadian Government, be desirable that these tribunals should be too hedged round with legal restrictions and it might be useful to give them a wider discretion in order that justice may be meted out without delay."

In a letter dated 4th January, 1945, the British Foreign Secretary stated as follows:—⁽⁵⁾

"On the 6th October last you forwarded to His Majesty's Government and to the other Governments represented on the Commission certain proposals, to which your Commission had devoted a great deal of time and labour for

- (a) the establishment by treaty of an Inter-Allied Court for the trial of war criminals
- (b) the setting up of Mixed Inter-Allied Military Courts for the same purpose.

I think that both you and the other members of your Commission are well aware that His Majesty's Government have throughout doubted the desirability and the practicability, especially in view of the time factor, of the formal establishment of an Inter-Allied Court by Treaty for this purpose. On the other hand His Majesty's Government fully appreciate that some Allied countries feel that for constitutional and other reasons it would be difficult for them to ensure in a satisfactory manner the trial of at any rate all cases in which they were concerned in their national courts, as contemplated in the Moscow Declaration. In such cases the proposal made by your Commission for the establishment of mixed military courts might well afford a satisfactory solution of this difficulty. It should be plain, however, that this is not a matter in which His Majesty's Government would desire, even if it were

(1) C. 60 6.10.44. *Letter from the Chairman of the Commission to the Rt. Hon. Anthony Eden, His Britannic Majesty's Principal Secretary of State for Foreign Affairs.*

(2) Docs. C. 50(1) and C. 58.

(3) Docs. C. 52(1) and C. 59.

(4) Document circulated with an Aide-Memoire written by the Canadian High Commissioner on 19th December, 1944.

(5) C. 68 10.1.45. *Letter dated 4th January, 1945, from Mr. Eden to Sir Cecil Hurst dealing with certain proposals submitted by the Commission to the Governments.*

possible, to adopt a definite position without previous consultation with the Government of the United States, particularly as the military operations in Western Europe are on a joint basis, and the Supreme Command is now in the hands of an American general. Moreover, until the two Governments had reached, at any rate in principle, some conclusion as to the desirability of establishing an Inter-Allied Court by treaty it was obviously impossible to pursue the suggestion made in your letter for the convocation of a conference to negotiate such a treaty. The matter has accordingly been the subject of full consultation with the Government of the United States, and as soon as the views of the two Governments have been definitely formed it is the desire of His Majesty's Government that the other Allied Governments concerned should be approached with a view to consultation as to the measures to be adopted."

C. THE INTERNATIONAL MILITARY TRIBUNALS

(i) THE NUREMBERG TRIBUNAL

In the United States, however, the plan to establish some tribunal before which to try the Major War Criminals was already under consideration at the beginning of 1945. In a document circulated to the Commission by the United States representative in February, 1945,⁽¹⁾ the U.S. Acting Secretary of State was reported to have declared:

"Over the past months officers of the Department of State, in consultation with other departments, have worked out proposals for the realisation of the objectives stated by the President (relating to war crimes). Pending the outcome of current discussions with our allies on this subject, these proposals cannot be published. I wish, however, to state categorically, that these proposals are as forthright and far-reaching as the objectives announced by the President, which they are intended to implement. They provide for the punishment of German leaders and their associates for their responsibility for the whole broad criminal enterprise decided and executed with ruthless disregard of the very foundation of law and morality, including offences, wherever committed, against the rules of war and against minority elements, Jewish and other groups and individuals."

As time was to show these proposals concerned the establishment of the International Military Tribunal, which was constituted by the London Agreement of 8th August, 1945. The establishment of this tribunal was due to the initiative of the United States Government. The United Nations War Crimes Commission only played an indirect part in the drawing up of the Agreement, though its member Governments, through the Commission, contributed information and evidence used by the Prosecution.

On 2nd May, 1945, at a Press Conference in Washington, President Truman announced that Justice Robert H. Jackson had accepted the appointment of Chief of Counsel for the United States "in preparing and prosecuting the charges of atrocities and war crimes against such of the leaders of the European Axis Powers, and their principal agents and accessories, as the United States may agree with any of the United Nations to bring to trial before an international military tribunal".⁽²⁾ The

(1) Radio Bulletin 28, Washington D.C., 1st February, 1945—circulated to members of the Commission in annex to document M. 47.

(2) *Establishment of an International Military Tribunal—Statement by President Truman at a Press Conference at Washington on 2nd May, 1945.* Circulated to members of the Commission as document C. 108.

statement made by the President in appointing the Chief of Counsel included the words:

"Justice Jackson . . . and his staff will examine the evidence already gathered and being gathered by the United Nations War Crimes Commission in London and by the various Allied Armies and other agencies;"⁽¹⁾

Mr. Dwight Whitney, assistant to Justice Jackson, attended the meeting of the Commission held on 20th May, 1945, and at the following meeting held on 6th June, 1945,⁽²⁾ the Chairman read a letter from the British Foreign Office announcing the appointment of Sir David Maxwell Fyfe, K.C., Attorney General, as the British representative to join Justice Jackson, and the Soviet and French representatives when they were appointed, in bringing the Major War Criminals to trial before an Inter-Allied Tribunal.

In his report in June to the President of the United States⁽³⁾ Justice Jackson stated that, among other work, he had "arranged co-operation and mutual assistance with the United Nations War Crimes Commission and with Counsel appointed to represent the United Kingdom in the joint prosecution".

Whereas the Inter-Allied Tribunal was to deal with the major criminals, all other offenders remained within the field of the War Crimes Commission, and Justice Jackson wrote to the President:

"A second class of offender, the prosecution of which will not interfere with the major case, consists of those who, under the Moscow Declaration are to be sent back to the scene of their crimes for trial by local authorities . . . The United Nations War Crimes Commission is especially concerned with cases of this kind. It represents many of the United Nations with the exception of Russia. It has been usefully engaged as a body with which the aggrieved of all the United Nations have recorded their accusations and evidence. Lord Wright, representing Australia, is the Chairman and Lt. Colonel J. V. Hodgson is the United States representative. In London I conferred with Lord Wright and Colonel Hodgson in an effort to co-ordinate our work with that of the Commission wherever there might be danger of conflict or duplication. There was no difficulty in arriving at an understanding for mutual exchange of information. We undertook to respond to requests for any evidence in our possession against those listed with the Commission as criminals and to co-operate with each of the United Nations in efforts to bring this class of offenders to justice."

On 5th July, 1945, Justice Jackson, in a letter to the Chairman of the Commission, reviewed the plans which he was formulating for the trial of the Major War Criminals, namely:—that the defendants would be charged with the crime of aggression, crimes against peace, crimes against the laws and customs of war and crimes against humanity and that not only should individuals such as Goering, Hess and Ribbentrop be charged, but also groups and organisations such as the S.S., the Gestapo, the Nazi Party leaders, the Reich Government and groups within the military establishment. The prosecution hoped to demonstrate the plan, and the defendants' purposes and objectives in connection with it, by establishing the common

(1) Executive Order No. 9547. Circulated to the Commission as document C. 112 of 22nd May, 1945.

(2) See. M.63 and M.64.

(3) Radio Bulletin No. 136, Washington D.C., 7th June, 1945. U.N.W.C.C. document C. 127.

pattern of the defendants' conduct at different times, in different places and against a variety of victims. This common pattern included, with regard to the countries represented on the Commission, the pre-war infiltration and subversion of the fifth column, in addition to utilising economic devices for subjecting nations to the economic domination of the German Reich, the entering into of treaties without intention to observe them for further plans of domination, the launching of a war of aggression, often treacherously and without warning, and, after invasion, the common pattern of terrorisation.

It was in regard to this latter question that the countries represented on the Commission could make a valuable contribution in compiling a document containing details of the experiences suffered as a result of German aggression and occupation. These countries could also help in the search for orders and other evidence supporting a direct tracing of responsibility to the highest authorities. Justice Jackson also stated that he was aware that these facts had been noted and discussed by the Commission.

The following day, 6th July, 1945, Justice Jackson wrote a further letter to the Chairman of the Commission giving suggestions as to the form that these reports from the respective countries should take, instancing the report of the "U.S. Congressional Delegation upon Atrocities and other conditions in Concentration Camps in Germany" and of the comparable report of the British Parliamentary Commission.

At the meeting of the Commission held on 11th July, 1945,⁽¹⁾ the Chairman drew the attention of the meeting to the two letters from Justice Jackson, stating that since it had been decided to hold a trial, he had considered it advisable to obtain a statement as to the assistance required from the members of the Commission, and the result was the two letters which had been circulated to members. The Chairman appealed to members to do all they could to assist Justice Jackson and his colleagues to build up a picture of the total pattern of war crimes perpetrated throughout the length and breadth of Europe, from the first-hand experiences of member Governments.

The next meeting of the Commission, held on 18th July, 1945,⁽²⁾ was attended by Justice Jackson, Sir David Maxwell Fyfe, Colonel Bernays and Commander Donovan; the latter two accompanying Justice Jackson. The Chairman in introducing them referred to the correspondence already circulated and the discussion at the last meeting.

Justice Jackson pointed out that, whereas the Commission was principally interested in the atrocities committed against nationals of those countries represented in it, he and his colleagues were mainly concerned with finding the designers of those atrocities and the men who, by the organisation and conduct of the German State, made those things happen. One of the first things discussed between the four Allied prosecutors was the problem of utilising the great mass of experience and information accumulated by the Commission.

(1) See. M.69.

(2) See. M.70.

The Governments, members of the Commission, did subsequently comply with the request and submitted to the Chief Prosecutors many reports and copies of documents which were utilised in the prosecution.

The work of Justice Jackson and his colleagues, with the Prosecutors of Great Britain, France and Soviet Russia, resulted in the London Agreement of 8th August, 1945.⁽¹⁾

The text of this Agreement ran as follows:

(1) " There shall be established after consultation with the Control Council for Germany an international military tribunal for the trial of war criminals whose offences have no particular geographical location, whether they be accused individually or in their capacity as members of organisations of groups, or in both capacities.

(2) " The Constitution, jurisdiction and functions of the international military tribunal shall be those set out in the Charter annexed to this agreement, which Charter shall form an integral part of this agreement.

(3) " Each of the signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the international military tribunal. The signatories shall also use their best endeavours to make available for investigation of the charges against them, and the trial before the international military tribunal, such of the major war criminals as are not in the territories of any of the signatories.

(4) " Nothing in this agreement shall prejudice the provisions established by the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes.

(5) " Any Government of the United Nations may adhere to this Agreement by notice given through the diplomatic channel to the Government of the United Kingdom, who shall inform the other signatory and adhering Governments of each such adherence.

(6) " Nothing in this agreement shall prejudice the jurisdiction or the powers of any national or occupation court, established or to be established, in any allied territory or in Germany for the trial of war criminals.

(7) " This agreement shall come into force on the day of its signature and shall remain in force for the period of one year; and shall continue thereafter, subject to the right of any signatory to give, through the diplomatic channel, one month's notice of intention to terminate it. Such termination shall not prejudice any proceedings already taken or any findings already made in pursuance of this agreement."

According to the Charter attached to the Convention, the Tribunal was to consist of four members, each with an alternate, one member and one alternate being appointed by each of the signatories. The presence of all four members or their alternates was to constitute a quorum, and the President was to be elected by the members from among their own number. The decisions of the Tribunal were to be taken by majority vote, and in case of an even division of opinion, the President was to have the casting vote.

The Court was to have jurisdiction to try and punish persons, whether as individuals or as members of organisations who had committed either: crimes against peace, war crimes or crimes against humanity.

(1) Command Paper 6903. H.M. Stationery Office, London, 1945.

The Tribunal was to draw up its own rules of procedure, in accordance with the provisions of the Charter. Each signatory was to appoint a Chief Prosecutor, to be responsible for the prosecution. Provisions were made in the Charter for ensuring a fair trial for each defendant; for instance, he was to be provided with a copy of the terms of the indictment in a language which he could understand at a reasonable time before the trial and the defendant could either conduct his own defence, or have the assistance of counsel. The Tribunal should have the right to impose a sentence of death or such other punishment as it should be determined by it to be just; the judgment of the Court was final and not subject to review. The sentences were to be carried out in accordance with the orders of the Control Council for Germany and the expenses of the Tribunal and the trial were to be charged by the signatories against the funds allotted for the maintenance of the Control Council in Germany.

The Legal Committee of the United Nations War Crimes Commission—Committee III—examined the provisions of the Agreement in so far as they effected the position of the adhering as opposed to the signatory powers,⁽¹⁾ as a result of which they put forward a report and recommendation to the Commission.⁽²⁾ In this report they recognised the Agreement and the Charter annexed to it as being documents which gave effect to far-reaching principles which had already been well and fully discussed in the Commission and had been embodied in recommendations made by it, and assented to by a number of its member Governments. The report continued:

“The adherence to the Agreement of all the States invited to adhere, which (as the Committee has ascertained) include all States entitled to sign the Charter of the United Nations, would greatly add to the authority not of the International Military Tribunal only, but still more of the principles of law embodied in the Charter. The Committee feels that the Four Powers in so clearly enunciating these principles, and in setting up a court to apply them, have strengthened the protection against aggression which international law should give to all States and their populations and have reinforced the provisions for the prevention of war contained in the Charter of the United Nations. It seems more desirable that they should receive all possible support from the other United Nations.”

This report was considered by the Commission at its meeting on 29th August, 1945,⁽³⁾ when it was introduced by the Norwegian delegate, as Chairman of the Legal Committee. He recommended that the Commission should endorse the Agreement and the Charter; although the Commission's endorsement might not have a very practical effect, it would have a great moral and perhaps political effect. Secondly, the Commission should recommend that all the United Nations, or at least the Governments represented on it, should accept the invitation to adhere to the agreement. Thirdly, member Governments should be encouraged to give the signatory Governments any assistance in the way of reports and evidence for which they might ask. The Commission unanimously accepted the report and the recommendation.

(1) Docs. III/13 and III/13a.

(2) Doc. C.144(1) 29.8.45. *Agreement between the U.K., U.S., France and the U.S.S.R. for the prosecution and punishment of the Major War Criminals of the European Axis.*

(3) See M.77. 29.8.45.

The appointment of Sir Hartley Shawcross, the new Attorney-General, as British Chief Prosecutor with Sir David Maxwell Fyfe as his deputy, and the appointment of the Hon. Francis Biddle as U.S. member of the Tribunal, with the Hon. John J. Parker as his alternate, were notified to the Commission at its meetings held on 26th September and 19th October⁽¹⁾ respectively. At the latter meeting the Chairman reported on a visit which he and the U.S. representative had paid to Nuremberg during the preparations for the trial.

The Chairman of the Commission attended the opening of the Nuremberg trial. He reported to the Commission, at its meeting on 28th November, 1945,⁽²⁾ that he had found it a very impressive scene. A great feature of the proceedings had been the fine and historic speech of the U.S. Chief Prosecutor, Justice Jackson, which had set the trial on the proper plane of elevation. A great mass of material assembled for the trial—the United States Counsel for their part of the case for the prosecution alone would use 1,000 tons of captured and other documents—was treated in a precise and concentrated way. It had been a great experience to see the twenty defendants in a court-room of law, facing their judges and the case being presented against them in a formal businesslike way—possibly the first time in history that anything similar had occurred.

Later in the trial the Chairman again visited Nuremberg and reported on his visit at the Commission meeting held on 31st July, 1946.⁽³⁾ He had only paid a short visit, and had heard the speech of Sir Hartley Shawcross. He had been unable to hear the speeches of the American, French and Russian prosecutors. From his seat at the British Prosecuting table, he had been able to observe the criminals at close quarters. He was much struck by the extraordinary change that had occurred in them. Formerly they were jaunty, cheerful and somewhat insolent, but none of these qualities seemed to be obvious in their expressions or their manners now. They listened intently to the catalogue of their crimes and short-comings. Whether they were merely annoyed, conscience-stricken or suffering from the effects of about ten months in the prison precincts was difficult to tell. Ribbentrop seemed to be the most overcome. Everything in the court-room went smoothly and with dignity and the presiding judge seemed to have the whole of the Court well under his hand and prepared to abide by the rulings. The whole atmosphere struck the observer as though all was proceeding in the most dignified and businesslike manner.

(ii) THE TOKYO TRIBUNAL

The Tribunal to try the Major War Criminals in the Far East was established by Special Proclamation of the Supreme Commander for the Allied Powers, signed on 19th January 1946.⁽⁴⁾ After a preamble setting forth the authority possessed by the Supreme Commander to punish "all war criminals including those who have visited cruelties upon our prisoners" the proclamation laid down:—

(1) See M.79 and M.81. 26.9.45 and 19.10.45.

(2) See M.87. 28.11.45.

(3) See M.110. 31.7.46.

(4) *Proclamation and Charter of the International Tribunal for the Far East* circulated to members of the Commission as C. 182.

Article 1

"There shall be established an International Military Tribunal for the Far East for the trial of those persons charged individually, or as members of organisations, or in both capacities, with offences which include crimes against peace.

Article 2.

"The constitution, jurisdiction and functions of this Tribunal are those set forth in the Charter of the International Military Tribunal for the Far East, approved by me this day.

Article 3

"Nothing in this Order shall prejudice the jurisdiction of any other international, national or occupation court, commission or other tribunal established or to be established in Japan or in any territory of a United Nation with which Japan has been at war, for the trial of war criminals."

The Charter attached to this proclamation, which was amended by General Orders No. 20 dated 26th April, 1946,⁽¹⁾ dealt with the constitution of the Court. Under this, the Tribunal was to consist of not less than six members and not more than eleven, appointed by the Supreme Commander from the names submitted by the signatories of the Instrument of Surrender, India and the Philippines. The Supreme Commander was to appoint a member to be President of the Tribunal. The presence of a majority of members was to constitute a quorum, and voting was to be by majority vote, with the President having the casting vote if necessary. The jurisdiction of the Court, as with that of the Nuremberg Tribunal, was to cover crimes against peace, conventional war crimes and crimes against humanity. The Tribunal was to draft its own rules of procedure, consistent with the fundamental provisions of the Charter. The Chief of Counsel, to be responsible for the investigation and prosecution of charges against war criminals within the jurisdiction of the Tribunal, was to be designated by the Supreme Commander; any nation with whom Japan had been at war might appoint an Associate Counsel to assist the Chief of Counsel. Provisions were included in the Charter for a fair trial of the defendants and for the admissibility of evidence. The Tribunal was declared to have power to impose upon an accused, on conviction, death or such other punishment deemed by the Tribunal to be just. The judgment should be announced in open court and the records of the trial transmitted direct to the Supreme Commander for his action. Sentence should be carried out in accordance with the orders of the Supreme Commander, who might at any time reduce or otherwise alter the sentence, except to increase its severity.

The main differences between the Tokyo and Nuremberg Charters were that: at Nuremberg the members of the Court were appointed by their respective Governments and elected the President from among their own numbers, while at Tokyo they were to be appointed by the Supreme Commander from a list of names submitted, and he alone was responsible for appointing the President; at Nuremberg the Chief Prosecutors were appointed by their respective Governments and were to be responsible for their part of the prosecution, while at Tokyo, the Chief of

(1) Text of General Orders No. 20 dated 26th April, 1946, circulated to members of the Commission as document C. 198.

Counsel was to be appointed by the Supreme Commander, with Associate Counsels appointed to assist him, by any nation that had been at war with Japan. Whereas in the case of the German war criminals the sentence was to be carried out as required by the Control Council for Germany, in Tokyo, the sentence was to be carried out in accordance with the order of the Supreme Commander.

The Chairman of the Commission visited Tokyo in the late spring of 1946 and, on his return to London, reported to the Commission, at its meeting held on 31st July, 1946,⁽¹⁾ on his visit to the Far Eastern Tribunal. He had been there after the indictment had been read and the defendants had pleaded not guilty. The courtroom, which he thought was slightly bigger than at Nuremberg, was modelled on the same arrangements. There were eleven judges, but as one of them had retired they had appointed another, General Kraemer; there had been some slight objection raised to his appointment, but this was overruled by a majority vote. The President of the Court, Sir William Webb, had expressed the view that the trial would not be completed before the end of the year, but a lot would depend on the extent to which the particular defendants wished to give evidence. The Supreme Commander was taking a great personal interest in everything and was most able and sympathetic.

(iii) CONCLUSIONS

Although there were many recommendations made from 1918 onwards, by both official and semi-official bodies, for the establishment of some form of international tribunal to judge cases outside the normal competence of municipal courts, it was due to the initiative taken by the United States Government that the International Military Tribunals of Nuremberg and Tokyo came to be constituted. These Courts embodied in their Charters the conceptions of both the International Criminal Court to be established by International Convention and the Mixed Military Tribunal to be established by Supreme Commanders, as recommended by the United Nations War Crimes Commission in 1944. Whereas the Nuremberg Tribunal was more of the nature of a Court established by International Convention, though having a military flavour, that of Tokyo was established by a proclamation of the Supreme Commander.

D. MILITARY AND NATIONAL TRIBUNALS ESTABLISHED FOR THE TRIAL OF WAR CRIMINALS

(i) TRIBUNALS IN GERMANY

Once the Unconditional Surrender of Germany had been accepted, a Military Government of the territory was constituted by the Supreme Commander of the Allied Forces. Under his Proclamation No. 1⁽²⁾ the Supreme Commander declared, by virtue of the supreme legislative, judicial and executive authority vested in him, that all persons within the

(1) See M.110. 31.7.46.

(2) Military Government Gazette—Germany—21 Army Group Area of Control No. 2. U.N.W.C.C. Doc. C.132, 28.6.45. *Courts and Criminal Procedure in Germany under Allied Military Government. Note by the Legal Officer.*

occupied territory must obey immediately and without question the enactments of the Military Government. To enforce these orders, Military Government Courts would be established for the punishment of offenders. Under Ordinance No. 2⁽¹⁾ three types of Military Government Courts were established, namely; General Military Courts, Intermediate Military Courts and Summary Military Courts. Their jurisdiction was to cover, in addition to offences against Military Government laws and ordinances and offences against German law, all offences against the laws and usages of war. The General Military Courts had the power to impose any lawful sentence, including the death sentence, while the other two courts had respectively a lesser jurisdiction. All the members of these courts were to be officers of the Allied forces; the General Military Courts were to consist of not less than three members, while the Summary and Intermediate Courts could consist of one or more members. Advisers might be appointed to sit with the Court to give advice and assistance as might be required, but they could have no vote. The judgment in each case was subject to review by the convening authority, and in the case of the death sentence, confirmation had to be obtained from the Supreme Commander or his deputy.

The jurisdiction of these courts to try war criminals operated under the authority of this Ordinance No. 2 until 20th December, 1945, when Control Council Law No. 10 was issued.⁽²⁾ According to this Law—which was to regulate the apprehension, surrender and trial of war criminals throughout Germany—each occupying authority within its own zone had the right to bring to trial before an appropriate tribunal all persons accused of committing a crime, including those charged with crimes by one of the United Nations. In the case of crimes committed by Germans against Germans or stateless persons, such a court might be a German court, if the occupying authorities so authorised. Each zone Commander was to regulate the offences to be tried and the rules and procedure to be adopted by the courts in each respective zone. Under Article II of this Law, the acts to be recognised as war crimes were crimes against peace, war crimes proper, crimes against humanity and the membership of organisations declared to be criminal. The jurisdiction of the courts to be established by the respective zone Commanders therefore extended far beyond those of the earlier Military Government Courts in the matter of war crimes.

(1) *Tribunals established in the British Zone*

The Royal Warrant of 14th June, 1944,⁽³⁾ laid down regulations for the trial of war criminals by British Military Courts. These Courts had jurisdiction to try “violations of the laws and usages of war committed during any war in which His Majesty has been engaged at any time after 2nd September, 1939”. The scope of these Courts was therefore narrower than that conferred upon Military Government Courts by General Eisenhower’s Proclamation No. 1 and Ordinance No. 2. The Military Courts were to be convened by a competent officer and were to consist

(1) *loc. cit.*

(2) U.N.W.C.C. Documents Series No. 15 (bis) of January, 1946, also Misc. No. 9, 7.2.46. *Note on the Control Council Law No. 10 by the Legal Officer.*

(3) Army Order 81/1945, U.N.W.C.C. Doc. C.131 of 27.6.45.

of not less than two officers in addition to the President. The convening officer might, if he considered it desirable, appoint as a member of the Court, but not as President, one or more officers of the Allied forces serving under his command or at his disposal, provided that the number of non-British officers was not more than half that of the Court, excluding the President. The jurisdiction of the Court was to extend to persons within the limits of the command of the convening officer, no matter *where* or *when* the crime had been committed, whether before or after the promulgation of the Royal Warrant. The rules of procedure applicable to ordinary field courts-martial were to apply with certain modifications; for instance, rules of evidence might be relaxed and the Court might consider any oral statement or any document, provided it appeared to be of assistance in proving or disproving the charge. A Court consisting of not more than three members including the President could pass sentence of death by unanimous agreement only; a Court consisting of more than three members could pass a death sentence only with the concurrence of two-thirds of its members. There was no right of appeal from the Court, but the accused could notify his intention, within 48 hours, of submitting a petition to the confirming officer.

There were two amendments issued to the Royal Warrant. The first, on 4th August, 1945,⁽¹⁾ concerned the case where a group was indicted for a crime, and the second, issued on 30th January, 1946,⁽²⁾ altered the customary rule in laying down that the proceedings of such courts need not be held up owing to the absence of the accused, provided the Court was satisfied that by so doing it involved no injustice to the accused. This amendment arose from difficulties which had occurred during the Belsen trial, owing to the illness of one of the defendants.

British Ordinance No. 47 concerning crimes against humanity, which came into effect on 30th August, 1946,⁽³⁾ made applicable to the British zone the provisions of Control Council Law No. 10, whereby German courts could exercise jurisdiction in cases of crimes against humanity committed by Germans against other Germans and stateless persons.

When, on 14th July, 1945, the Commander-in-Chief of the British zone assumed all authority and power previously held by the Supreme Commander, Ordinance No. 4 of that date confirmed all enactments and orders already in force. Thus the Military Government Courts established under Ordinance No. 2 of the Supreme Commander, and—according to British law—by the Royal Warrant of 14th June, 1945, continued in force. However, Ordinance No. 68 which came into force on 1st January, 1947,⁽⁴⁾ dealt with the establishment of Control Commission Courts. These were to consist of Summary Courts and a Supreme Court consisting of a High Court and Court of Appeal. Any judge of the Supreme Court, that is to say, the Chief Judge, the Judges of the Court of Appeal and the Judges of the High Court, must be qualified to practise as an advocate

(1) *Army Order* 127/1945, U.N.W.C.C. Doc. Misc. 13, 22.2.46.

(2) *Army Order* 8/1946, U.N.W.C.C. Doc. Misc. 13.

(3) *Military Government Gazette*, No. 13, p. 306, U.N.W.C.C. Doc. Misc. No. 59, 19.11.46.

(4) *Military Government Gazette—Germany—British Zone of Control* No. 15; U.N.W.C.C. Doc. Misc. No. 114, 9.12.47.

in any court in the British Empire having unlimited jurisdiction in either civil or criminal affairs, and must have practised as an advocate or solicitor or held judicial office there. The Summary Courts were to consist of single magistrates, for whom no legal qualifications were laid down.

In addition to trying offences against the laws and customs of war, and offences against German law, these Courts had jurisdiction over all offences under any proclamation, law, etc., issued by the authority of the Allied Control Council, the Supreme Commander of the Allied forces or of the Commander-in-Chief. They, therefore, had jurisdiction to try all war crimes in the wider sense of the law, as laid down in Control Council Law No. 10, namely crimes against peace, crimes against humanity and membership of criminal organisations. Their jurisdiction over war crimes was therefore concurrent with that of the British Military Courts, though it extended beyond them, and was also concurrent with the German courts in so far as the crimes committed were by Germans against Germans or stateless persons. For instance, it was a Control Commission Court which tried members of the staff of the Esterwegen penal camp, where many of the political prisoners had been Belgians, and where the charge included crimes against humanity. The Control Commission Courts also varied from the Military Courts in that their rules of procedure allowed for an extensive review of the decisions of both the High Court and the Summary Courts.

Ordinance No. 69, which became effective on 31st December, 1946,⁽¹⁾ established two grades of German courts to try members of the organisations declared criminal by the International Military Tribunal at Nuremberg. These were the Courts of First Instance (*Spruchkammern*) and the Courts of Second Instance (*Spruchsenate*). The *Spruchkammern* were to consist of a President, who must be qualified to hold judicial office, and two law assessors. The *Spruchsenate* were to consist of a President, who must be a judge, and two other members qualified to hold judicial office. The Chairman of the *Spruchkammern* and all the members of the *Spruchsenate* were to be nominated by the Central Legal Office, in consultation with the highest legal administrative authority in each German *Land*. The law assessors of the *Spruchkammern* were to be nominated by the appropriate *land* authorities. The Courts of First Instance would be responsible for the trial and punishment of members of these organisations, with the right of appeal on questions of law to the Courts of Second Instance. The most severe sentence which could be imposed by such Courts was 10 years imprisonment

(2) *United States Tribunals in the European Theatre*

The first United States tribunals to be established in Europe for the trial of war criminals were in Italy, where Circular No. 114 from Headquarters Mediterranean Theatre of Operations U.S. Army, dated 23rd September, 1945,⁽²⁾ set out the regulations for such trials. Military Commissions, to consist of not less than three officers, with a judge advocate and defence

(1) *Military Government Gazette—Germany—British Zone of Control* No. 16 U.N.W.C.C. Doc. Misc. No. 79 of 4.3.47.

(2) Misc. No. 16 of 1.3.46.

counsel, should be appointed to try war crimes, which were defined as violations of the laws and customs of war. According to the circular, technical rules of evidence were not to be applied, but any evidence might be admitted which, in the opinion of the President of the Commission, "has any probative value to a reasonable man".

In Germany, the United States authorities, carrying into effect the provisions of Ordinance No. 2 of the Supreme Commander, issued instructions by means of a letter from Headquarters European Theatre dated 16th July, 1945,⁽¹⁾ for the setting up of Military Government Courts which were to deal with "cases involving offences against the laws and usages of war or the laws of the occupied territory commonly known as war crimes". The Courts were to be appointed by the Army or Military District Commanders and the personnel was to be selected from the officer personnel of the military organisation under command of the appointing authority. The General Military Courts and Intermediate Military Courts were to consist of not less than five members and not less than three members respectively, and at least one officer with legal training was to be detailed as a member of the Court. No persons could be convicted except by concurrence of two-thirds of all the members present at the time the vote was taken. The appointing authority should also be the confirming authority and no sentence of death could be carried out without confirmation from the Commander-in-Chief. On 25th August, 1945,⁽²⁾ further instructions were issued for the establishment of Military Commissions to be composed of not less than three commissioned officers of the United States Army, to try cases coming within the application of the Articles of War of the United States Army.

On 26th June, 1946,⁽³⁾ additional instructions were issued by Headquarters United States Forces European Theatre, by which the right to appoint Military Government Courts, which had been delegated to Army Commanders, was abrogated and appointment was to be made in future by Headquarters European Theatre. The formation of the General Military Government Courts and Intermediate Military Government Courts was to continue on the lines laid down by the former edict, and the Courts were to deal with "cases involving American nationals as victims and mass atrocities committed in the American zone of occupation". The novel feature in this set of instructions was as follows: in certain atrocity cases which had already been tried, such as those of Hadamar, Dachau and Mauthausen, the Court, in pronouncing sentence against the individual accused, had also found that the "mass atrocity operation involved in each was criminal in nature". It was now ruled that, following on the judgment of the "parent" trial, Intermediate Military Courts would be appointed to try other persons associated with such criminal operations. These Courts were to take judicial notice of the decision given in the parent case, and after examining the evidence showing the nature and participation of the accused in the mass atrocity operation, they should pronounce appropriate sentence. Thus, as the Nuremberg judgment pronounced certain organisations to be criminal in character

(1) Misc. No. 23 of 26.3.46.

(2) Misc. No. 23 of 26.3.46.

(3) Misc. No. 51 of 22.10.46.

and the trial of members of them was delegated to lesser courts, so in the case of the major atrocities committed in the United States zone, the judgment of the lesser participants was delegated to a lower court, which would take official cognizance of the judgment in the patent case.

It was to implement the judgment of the International Military Tribunal of Nuremberg that the United States Military Government Ordinance No. 7 of 18th October, 1946,⁽¹⁾ laid down regulations for the organisation of certain additional Military Tribunals. These were to have the power "to try and punish persons charged with offences recognised as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes". This meant that the Tribunals were to deal, other than with war crimes proper, with offences such as the design to wage aggressive war, or the design and commission of crimes against humanity. In the case of these Tribunals, the Bench was to take official cognizance of the judgment given in the parent case, namely by the International Military Tribunal. The body which organised these trials was the Subsequent Proceedings Committee and the cases tried included, for instance, that of twenty-three doctors charged with performing medical experiments on human beings, and the officials of the W.V.H.A., the body responsible for the organisation and administration of the concentration camps.⁽²⁾

Whereas, in the British zone, authority was given by means of Ordinance No. 47 for German courts to try cases of crimes against humanity committed by Germans against Germans or stateless persons, in the American zone similar authority was given by means of a letter dated 23rd August, 1947, from the Office of Military Government (U.S.) to the offices of Military Government for the respective *Lands* of Bavaria, Wurttemberg-Baden and Greater Hesse.⁽³⁾ According to these instructions the German courts were empowered to apply the provisions of Control Council Law No. 10 in all cases "where the alleged crime against humanity was 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."

Moreover, from 9th April, 1947,⁽⁴⁾ the Office of the Military Government for Germany (U.S.) decided to entrust to the local German courts the trials of members of criminal organisations, consistent with the findings of the International Military Tribunal.

(3) *French Tribunals in Germany*

According to an instruction issued by the General Directorate of Justice of the War Crimes section of the French Supreme Command in Germany on 28th August, 1946,⁽⁵⁾ for the trial of war crimes, among other offences, the permanent Military Tribunals of the French Military Districts were given jurisdiction to try war crimes committed in French territory or in territory which was under the authority of France at the time when

(1) Misc. No. 62 of 12.12.46. *Military Tribunals in the United States Zone of Germany.*

(2) For further details concerning the trial of members of the Criminal Organisations see Chapter X, Section D, p.332 et seq.

(3) Misc. No. 116 of 9.12.47.

(4) Misc. No. 115 of 9.12.47.

(5) Misc. No. 63 of 17.12.46.

the crimes were committed. Other crimes, such as those committed in the French zone of occupation, fell within the jurisdiction of the Military Government Tribunals established in that zone.

(ii) UNITED STATES TRIBUNALS IN THE FAR EAST

By a regulation dated 24th September, 1945,⁽¹⁾ issued by the General Headquarters of the United States Army Forces in the Pacific, rules were laid down governing the trial of persons, units and organisations within the theatre accused of war crimes. These trials were to be held before Military Commissions to be convened by the Commander-in-Chief of the United States Army Forces in the Pacific, or his deputy. The number and types of tribunals to be established would depend on the number and nature of the offences involved and the offenders to be tried. Some might include international commissions consisting of representatives of several nations, appointed to try cases where the nationals of more than one nation had been the victims. Others might consist of members of any one branch or several branches of the armed forces of one or more nations, depending on whether the offences were committed against one or more service branches of one or more States. In the case of persons whose offences had a particular geographical location outside Japan, their trial might be held by competent military or civil tribunals of local jurisdiction, held on or near the scene of the offence.

The members of the Military Commissions were to be appointed by the Commander-in-Chief or under authority delegated by him. Each Commission was to consist of not less than three members, and if possible at least one member should have had legal training. A Commission might be of either service or civilian personnel, or be composed of both service and civilian personnel. The convening authority should appoint one or more persons to conduct the prosecution, and in the case of offences involving more than one nation, each nation concerned should be represented among the prosecutors. The sentence of each tribunal was subject to confirmation by the convening authority, and in the case of the death sentence, by the Commander-in-Chief. The jurisdiction of these tribunals was to extend to Japan and other areas occupied by the armed forces commanded by the Commander-in-Chief of the United States Army Forces in the Pacific, and was to cover certain specified crimes, which included not only war crimes proper but also the crime of waging aggressive war and crimes against humanity.

On 5th December, 1945, with the establishment of a Supreme Commander for the Allied Forces in Japan, a new regulation was issued from the General Headquarters of the Supreme Commander⁽²⁾ which covered substantially the same provisions as those contained in the regulations issued by the Commander-in-Chief of the U.S. Army Forces in the Pacific, except that, whereas the earlier regulation limited the jurisdiction of the Commissions to "Japan and other areas occupied by the armed forces under the command of the Commander-in-Chief U.S. Army Forces in the Pacific", the new regulation gave them jurisdiction "over all persons

(1) Misc. No. 41 of 19.8.46.

(2) Misc. No. 51 of 22.12.46.

charged with war crimes who are in the custody of the convening authority at the time of the trial". The new regulation added the point that "the offences 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 18th September, 1931".

On 21st January, 1946, the Headquarters of the United States Forces in the China Theatre issued regulations governing the trial of war criminals in that Theatre.⁽¹⁾ These regulations followed much the same lines as those issued by the United States Army Forces in the Pacific; the jurisdiction of the Commissions was to cover: "all of China, co-extensive with the China Theatre of Operations and territory now or formerly belonging to China, including Formosa, Manchuria and Hainan Island, and other areas wherein the armed forces commanded by the Commanding General, U.S. Army Forces China Theatre are or have been stationed".

(iii) AUSTRALIAN TRIBUNALS

By the Commonwealth of Australia War Crimes Act, 1945,⁽²⁾ the Governor-General was declared to have authority to constitute Military Courts for the trial of war criminals. The principles on which this Act was based, were similar to those of the British Royal Warrant of 14th June, 1945. For instance, the convening authority might appoint as a member of the Court, other than as President, one or more officers of the naval, military or air forces of any Power allied or associated with His Majesty during the war, but the number of such officers must not comprise more than half the members of the Court, excluding the President. The procedure of the Courts should be as laid down in the Army Acts and Rules of Procedure relating to field general courts-martial. The provisions of the Act were to apply to war crimes committed anywhere, whether within or beyond Australia, against British subjects or allied nationals.

Instructions issued by the Headquarters of the Australian Military Forces⁽³⁾ dated 26th November, 1945, gave more detailed instructions to Army commanders concerning the establishment of the Courts. In order to facilitate administration, it divided war criminals into three categories:

Category A. Those charged with committing a war crime solely against Australian nationals.

Category B. Those charged with committing a war crime against both Australian and Allied nationals.

Category C. Those charged with committing a war crime solely against Allied nationals.

Suspects in Category A were to be brought before a Court consisting solely of officers of the Australian Defence Forces. Those in Category B were to be brought to trial before a Court consisting of two officers of the Australian Defence Forces, and, if practicable, members to represent each of the Allied Powers whose nationals had been victims of the crime.

(1) loc. cit.

(2) Assented to 11th October, 1945. C.196 of 22.5.46. *Australian War Crimes Legislation.*

(3) C.196 of 22.5.46.

In the case of Category C, suspects were to be detained until suitable arrangements had been made with the Allied Governments concerned.

(iv) CANADIAN TRIBUNALS

By an Order in Council of 30th August, 1945, the Governor-General issued regulations for the trial of war criminals.⁽¹⁾ These regulations were confirmed by an Act of Parliament passed on 6th August, 1946,⁽²⁾ which was made retrospective and deemed to have come into force on 30th August, 1945.

The Military Tribunals established for the trial of war criminals were much on the same lines as those established by the British Royal Warrant of 14th June, 1945, and the Australian tribunals. As in the British and Australian courts, officers of the British and Allied Forces could be invited to sit as members of the Court if the crime concerned had affected their respective nationals. Whereas, in the case of the British and Australian courts, there was no limit to the number of members of the Court, the Canadian tribunals were to consist of not less than two and not more than six officers. There was also a provision by which, if the accused was an officer of the enemy forces, the convening officer should so far as was practicable, but was under no compulsion to do so, appoint as many officers as possible of equal or superior relative rank of the same branch of service as the accused. As in both the British and Australian courts, the procedure was to be that of general field courts-martial, but the rules of evidence need not be so severe, and the Court might take into consideration any oral statement, or any document appearing to be authentic, provided it was relevant to proving or disproving the case.

(v) NATIONAL TRIBUNALS CONSTITUTED BY UNITED NATIONS GOVERNMENTS

(1) *Existing Courts to be used for the Trial of War Criminals*

(a) *French Courts.* While the French Government was still in Algiers, on 28th August, 1944, it issued an ordinance concerning the prosecution of war criminals.⁽³⁾ Under this ordinance war criminals were to be prosecuted by French Military Tribunals and judged in accordance with the French laws in force where such offences, even if committed under the pretext of the existing state of war, were not justified by the laws and customs of war. These Military Tribunals were to be constituted in the manner laid down in the Military Code. This meant, in effect, that war crimes trials could commence in occupied France, provided the appropriate courts could be constitutionally appointed.

(b) *Norwegian Courts.* The Norwegian Law on the punishment of foreign war criminals was passed by the Storting on 12th December, 1946, and given the Royal assent on the following day.⁽⁴⁾ This law superseded the corresponding Provisional Decree passed by the Norwegian Govern-

(1) Misc. No. 48 of 25.9.46. *Canadian War Crimes Regulations.*

(2) No. 309 Second Session, Twentieth Parliament, 10 George VI, 1946. U.N.W.C.C. Doc. Misc. No. 48.

(3) Documents Series No. 26 of February, 1946.

(4) Law No. 14 of 13th December, 1946, promulgated on 31st December, 1946, in the *Norwegian Law Gazette* No. 44/1946, U.N.W.C.C. Doc. Misc. No. 82 of 19.13.1947.

ment in London on 4th May, 1945. Its effect was to incorporate into the Norwegian National Law the already existing provisions of international law so far as war crimes were concerned, and these were made applicable to war crimes committed in Norway since the outbreak of hostilities on 9th April, 1940.

In Norway no special courts, military or otherwise, were set up to try cases of war crimes. Such proceedings are brought before the ordinary courts of the land. The procedure followed in trials of war criminals was governed by the terms of Law No. 2 of 21st February, 1947,⁽¹⁾ which superseded the provisional Decree of 5th February, 1945, passed by the Norwegian Government in London. This law, while intended primarily to apply to trials of traitors, contained rules of procedure which were applicable to cases dealing with crimes committed by foreign war criminals. The law aimed, *inter alia*, at expediting and simplifying procedure, and contained special provisions for the composition of courts when dealing with cases against war criminals. Subject to the special provisions laid down in this Law, the General Law on Criminal Procedure⁽²⁾ was also applicable to cases against war criminals.

The following are the courts which were concerned with cases against war criminals:

- (1) *Hereds-og Byrettene* (the County and Town Courts) which are composed of a judge by profession, appointed by the King, and two lay judges chosen by ballot for the individual trial. The judge by profession acts as President of the Court.
- (2) *Lagmannsrettene* (the five Courts of Appeal—each covering their respective part of the country), which are composed of three judges by profession appointed by the King and four lay judges chosen by ballot for each individual trial, the senior judge of profession acting as President of the Court.
- (3) *Hoyesteretts Kjaeremaalsutvalg* (the Judicial Committee of the Supreme Court) which is a judicial body composed of three judges of the Supreme Court appointed by rota by the President of the Supreme Court to serve on this body for a certain period.
- (4) *Hoyesterett* (the Supreme Court). For the time being two parallel sections of the Supreme Court are in operation. As a rule each section is composed of 5 judges, the senior being the Chairman. However, in cases of a death sentence both sections of the Supreme Court must take part in the judgment. The same applies regardless of these conditions if a majority of judges of the section in question consider that a death sentence is applicable or in cases where legal questions of a particularly doubtful character are raised.

Because of the severity of the penalties imposed for the more heinous

(1) Reference is made to the more detailed summary of the substantive and procedural law relating to trials of alleged war criminals, published as annex to Vol. III of *Law Reports of Trials of War Criminals* (H.M.S.O.) and U.N.W.C.C. Doc. Trial and Law Reports Series No. 42 of 6.8.1947.

(2) Law No. 5 of 1st July, 1887, and Law No. 5 of 13th August, 1915, relating to general rules of procedure common to all court proceedings.

type of war crime, all such cases would be, as a rule, tried by the Lagmannsrett in the first instance. The defendant would have the normal right of appeal to a superior court.

(c) *Yugoslav Courts.* The Yugoslav Law No. 619 concerning Criminal Acts against the People and the State, issued on 25th August, 1945,⁽¹⁾ dealt with the trials of war criminals among those of traitors and persons guilty of "acts against the people". Criminal acts, of the nature dealt with by the Law, were to be tried in the first instance in the People's County Courts and, in the case of military persons, in the Military Courts. Important cases might be tried by the Supreme Courts of the federative units.

(d) *Belgian and Danish Courts.* The Belgian Law of 20th June, 1947, relating to the Competence of Military Tribunals in the Matter of War Crimes⁽²⁾ gave the Military Tribunals jurisdiction over both military personnel and civilians in the matter of war crimes. The Danish Act on the Punishment of War Crimes, assented to by the King of Denmark on 12th July, 1946,⁽³⁾ dealt with the crimes which were justifiable as war crimes; in all cases the jurisdiction of the ordinary courts was to apply, with the normal right of appeal to a superior court.

(2) *Special Tribunals appointed for the trial of War Criminals*

(a) *Polish Tribunals.* A Decree of 31st August, 1944,⁽⁴⁾ issued by the Polish Government in exile, laid down procedure for the trial of war crimes before Special Criminal Courts. The members of these Courts were to be, one professional judge and two lay judges. They were to be appointed by the Presidium of the National Council, on the recommendation of the Minister of Justice and their judgments were to be final.

This Decree was followed on 22nd January, 1946, by a Decree⁽⁵⁾ which established a Supreme National Tribunal to try war criminals and traitors. This Tribunal, and the Prosecutor attached to it, was to exercise supervisory authority over the Special Criminal Courts and the Prosecutors attached to them. Authority was given to the Supreme National Tribunal to review the judgments given in the lower courts, if necessary. The Supreme National Tribunal was to consist of a President, who was to be the First President of the Supreme Court, two other judges and four laymen. The judges and prosecutors of the Tribunal were to be appointed by the Presidium of the National Council, on the recommendation of the Minister of Justice, while the lay judges were to be appointed from among the members of the National Council. The defendant would have the right to appeal for mercy to the President of the National Council, who could, if thought desirable, commute the penalty. The Minister of Justice in a Proclamation dated 31st October, 1946,⁽⁶⁾ issued the necessary regulations for the establishment of the Supreme National Tribunal.

(1) Misc. No. 60 of 9.12.46.

(2) *Moniteur Belge* No. 177-178 of 26th June, 1947, U.N.W.C.C. Doc. Misc. No. 101 of 22.7.47.

(3) Misc. No. 47 of 10.9.46.

(4) *Polish Official Gazette* No. 4/1944. U.N.W.C.C. Doc. C.218 of 6.8.46.

(5) *Polish Official Gazette* No. 5/1945. U.N.W.C.C. Doc. C.218 of 6.8.46.

(6) *Polish Official Gazette*, 17th November, 1946, No. 59, item 327, U.N.W.C.C. Doc. Misc. No. 87 of 14.4.47.

The jurisdiction of the Tribunal was to cover crimes concerning responsibility for the defeat of Poland in September, 1939, for Fascist activities in public life, and for crimes committed by persons surrendered to Poland under the Moscow Declaration, excepting cases which the Prosecutor of the Supreme National Tribunal would transfer to the District Courts. This was amended by a Decree of 11th April, 1947,⁽¹⁾ by which the Court had jurisdiction over the same persons, though the Prosecutor might transfer some cases to the District Courts. Whereas previously any records taken during the preliminary investigation and any public and private documents could be read in court, the new decree confined this to "any records taken within or without the country, by the Polish authorities or by any allied authorities, or by any private persons . . . during the preliminary investigation" which might be read at the trial.

Owing to the stabilisation of political, economic and moral conditions in Poland and the decline of the emotional climax as regards war crimes, two years after liberation it was no longer necessary to maintain special courts for war criminals, and the cases were transferred, by a Decree of 17th November, 1946,⁽²⁾ to the ordinary provincial courts and the special penal courts were abolished.

(b) *Czechoslovak Tribunals.* Decree No. 16 of 1945,⁽³⁾ established Extraordinary People's Courts to try war crimes in Czechoslovakia. These Courts were to consist of one professional judge and four jurors. The legal force of this decree was limited to one year.

Decree No. 17 of 1945⁽⁴⁾ set up the Court of the Nation for the trial of the State President of the so-called Protectorate, but in actual fact Dr. Hacha died before his trial could be arranged. This Court was also to be used to try other leading personalities of the occupation period, which would, naturally, include traitors as well as war criminals.

Law No. 22 of 24th January, 1946,⁽⁵⁾ established the Extraordinary People's Courts on a more permanent basis. The jurisdiction of these Courts covered Nazi criminals, traitors and their accomplices, so that the bulk of their cases would concern treachery rather than war crimes. As instituted under Decree No. 16, they were to consist of five members, with a President, who must be a professional judge and four lay members. The Chairmen, their deputies and professional judges were to be appointed by the President of the Republic on the proposal of the Government, from lists drawn up for this purpose by the District National Committees. The Government should appoint the lay judges from other lists of persons drawn up by the District National Committees. The Courts were to be

(1) *Polish Official Gazette* No. 32, 16th April, 1947, U.N.W.C.C. Doc. Misc. 117 of 11.12.47.

(2) *Polish Official Gazette* No. 59, para 324.

(3) III/14 of 3.8.45.

(4) *op. cit.*

(5) Misc. No. 112 of 27.11.47.

set up at the seats of the District Courts of Second Instance. As is customary in the proceedings of Czech general courts-martial, the proceedings of these Courts were to be concluded within three days, though experience in the trial of Karl Hermann Frank proved that this was not long enough, and an additional clause was added under which the proceedings might be extended beyond this period if the Public Prosecutor so proposed. There was to be no appeal against the decisions of these Courts, though an appeal for mercy might be made to the President of the Republic.

(c) *Netherlands Tribunals.* By Decrees of 22nd December, 1943, and of 12th June, 1945,⁽¹⁾ the Netherlands Government established five special Courts and a special Court of Cassation, which were to have jurisdiction over the crimes set out in the Special Penal Law Decree of 22nd December, 1943.⁽²⁾ In the amendment of this latter by the Special Law Decree of 10th July, 1947,⁽³⁾ provisions were laid down to cover war crimes committed both within the Kingdom and outside it. The Courts were composed of both military and civilian judges.

(d) *Luxembourg Tribunals.* By a Law of 3rd August, 1947,⁽⁴⁾ a Special Court for War Crimes was established. This Court was to consist of the ordinary Military Court, composed of a Supreme Court judge and two senior officers, with the addition of two professional judges. The procedure was to be that of Military Courts, with benefit to the war criminals of all the privileges accorded to defendants in normal criminal jurisdiction. Sentences might be subjected to the Court of Cassation and appeals for clemency to the Sovereign might be allowed.

(e) *Greek Tribunals.* A Special Court Martial for War Criminals was established under the Greek Constitutional Act No. 90 of 1945. The Court so established was to sit in Athens, although the law provided for courts to be set up elsewhere if necessary.

The Court was to consist of five members; the President was to be a General from the legal branch of the Army; two members were to be officers of the regular army of the rank of Lieutenant Colonel or upwards, without legal qualifications, while the last two members were to be Judges of Appeal. The Prosecutor was to be from the legal branches of either the Army or the Navy. The law to be applied by the Court was the national criminal code, applicable in respect of crimes committed in Greece, or against Greek subjects abroad. The President would appoint two or three lawyers to defend the accused, who had the right to obtain a lawyer of his own nationality if he so wished, and as many additional Greek lawyers as he might choose. The Court had competence to impose all sentences from a fine to the death penalty. There was no appeal against its decisions, but the accused might appeal for clemency to a special council of the Ministry of Justice, and if that was rejected, to the King.

(1) *Statute Book* D.62 and *Statute Book* F. 91 respectively; U.N.W.C.C. Misc. No. 107 of 12.9.47.

(2) *Statute Book* D.61.

(3) *Statute Book* H.233.

(4) *Mémorial du Grand-Duché de Luxembourg*, 1947, p. 755.

(f) *Netherlands East Indies Tribunals.* On 1st June, 1946, the Lieutenant-Governor-General of the Netherlands Indies signed four Decrees⁽¹⁾ in which the substantive and procedural law for the trial of war criminals was laid down. War criminals were to be tried by Courts-Martial and, in accordance with the discussion at Singapore in December, 1945, Allied officers can be invited to sit in these Courts-Martial and Dutch officers to sit in British Military Courts.

(g) *Chinese Tribunals.* The Chinese Law of 24th October, 1946, governing the trial of war criminals,⁽²⁾ laid down that war crimes cases should come within the jurisdiction of the Military Tribunals for the Trial of War Criminals, attached to the various Military Organisations, which were to be constituted by order of the Ministry of Defence. These special Tribunals were to consist of five military judges and one to three military prosecutors. Three of the military judges were to be selected from the Military Organisation concerned and two were to be appointed by the Ministry of Justice from among members of the Provincial and Municipal Higher Courts. One or two of the Military prosecutors were to be selected by the Ministry of Justice from among the prosecutors of the Provincial or Municipal Higher Courts and one from the Military Organisation concerned. In case of necessity, the Military Tribunal for the Trial of War Criminals might appoint three military judges and one military prosecutor to carry out the trial of war criminals at the place where the crime was committed. The judgments of the Tribunals should be submitted for confirmation to the Ministry of Defence, through the appropriate Military Organisations. Sentences of death or life imprisonment were to be subject to confirmation by the President.

(vi) NATIONAL TRIBUNALS CONSTITUTED BY THE EX-ENEMY GOVERNMENTS FOR THE TRIAL OF WAR CRIMINALS

(1) *Austrian Tribunals.* Under the Constitutional Law of 26th June, 1945, passed by the Provisional Government of Austria, concerning War Crimes and other National Socialist Misdeeds,⁽³⁾ the cases of war criminals were to be tried by the People's Courts.

(2) *Italian Tribunals.* An explanatory memorandum compiled by the Italian Ministry of Foreign Affairs was distributed to the Allied Governments on 10th March, 1947;⁽⁴⁾ this explained the treatment of war crimes under Italian law. According to this memorandum, cases of war crimes were to be tried by Italian Military Tribunals and the rules of the Italian Penal Military Code concerning offences against the laws and usages of war were to apply to civilian as well as military personnel belonging to the armed forces of the enemy.

(3) *Roumanian Tribunals.* There was a preliminary Law No. 50 for the prosecution of War Criminals and Profiteers passed in January, 1945,⁽⁵⁾

(1) *Statute Book*, 1946, Nos. 44, 45, 46 and 47(74).

(2) Misc. No. 105 of 26.8.47 and Misc. No. 120 of 6.2.48.

(3) Documents Series No. 23 of February, 1946.

(4) Misc. No. 91 of 9.5.47.

(5) Published in *Monitorul Oficial* of 21.1.45. Misc. No. 70 of 24.1.47.

but this was superseded by the Decree-Law on the Punishment of those Responsible for the Country's Disaster or Guilty of War Crimes⁽¹⁾ which incorporated not only the former law on the punishment of war criminals, but also an earlier law for the prosecution of those responsible for the national disaster. The Courts thus constituted dealt, therefore, with traitors more than with war criminals. Under this law such cases were to be tried by a People's Tribunal. These Tribunals were to consist of nine members, two of them to be judges appointed by the Minister of Justice, having judicial experience and qualifications, and the senior of them was to be President of the Court. The other seven were to be lay judges, Roumanian subjects of either sex chosen from among the members of the 7 political groups forming the Government. Within 15 days of the publication of this law, each of these political groups was to appoint five members, and if one group failed to appoint its representative, the members of the Court would be chosen from among the representatives of the other parties. The lay judges would be drawn by lots by the Minister of Justice, from names on the lists submitted by the political parties. The Minister of Justice could form groups of judges in towns with other resident Courts of Appeal, but where the offence had been committed outside the country, the case was to be tried by the Bucharest People's Tribunal.

(4) *Hungarian Tribunals.* Under the Orders in Council Nos. 81/M.E. and 1440/M.E. ex 1945 of the Hungarian Provisional National Government,⁽²⁾ the People's Courts were given jurisdiction over persons who had committed not only war crimes proper, but had also been guilty of treachery and of crimes against the people. These People's Courts were to consist of six members; the head judge, who was the judicially qualified member, was to be appointed by the Minister of Justice and each of the five political parties should appoint one member and two supernumerary members, one of whom would serve on the Court. If one of the political parties failed to produce candidates, the members of the Court would be chosen from those nominated by other parties. The head judge was to sum up the results of the trial to the other judges and advise them as to what forms of penalties were suitable for the acts committed. There was also to be a Supreme Council of People's Courts, constituted in the same way, to form a Court of Appeal.

(5) *Bulgarian Tribunals.* Decree Law No. 22 of 6th October, 1944,⁽³⁾ dealt with the trial by a People's Court of those who were guilty in involving Bulgaria in the World War against the Allied Nations and of the Crimes Connected with the War. The number of war crimes cases brought before these courts were, therefore, likely to be in a minority. The Central Court for the trial of ministers and deputies was to consist of 13 members, four of whom were to be judges legally qualified and the others were to be drawn by lot from the lists of 30 names submitted by each district committee of the Fatherland Front. There were also to be District Courts, which were to consist of one appointed judge and four judges chosen from persons nominated by the respective district committees.

(1) Published in *Monitorial Official* of 23.4.45. Misc. 70.

(2) Misc. 75 of 21.2.47.

(3) Misc. No. 76 of 3.3.47.

CHAPTER XV

COMMITTEE I—THE EXAMINATION OF CASES AND THE LISTING OF WAR CRIMINALS

A. THE CREATION OF THE COMMITTEE

(i) COMMISSION'S TASK UNDER THE MOSCOW DECLARATION

On 31st March, 1948, when the United Nations War Crimes Commission terminated its existence, the Committee on Facts and Evidence (Committee I) of the Commission held its final meeting to consider the last of 8,178 cases involving 36,810 accused or suspected war criminals, and witnesses to their alleged crimes. Committee I's secretariat was authorised to prepare the 80th and final list of the Commission's "Lists of War Criminals, Suspects and Witnesses". Thereby ended an unrelenting four-year effort to record and investigate the story of Axis war criminality preceding and during World War II, and to assist in bringing to justice the perpetrators of that criminality.

When the Lord Chancellor in the House of Lords on 7th October, 1942, announced, simultaneously with President Roosevelt, the formation of a United Nations Commission for the Investigation of War Crimes, and actually brought it into being on 20th October, 1943, as the United Nations War Crimes Commission, he indicated that the armistice should contain provisions for the handing over of named war criminals. One of the purposes of the proposed Commission was therefore to identify wherever possible the individuals responsible for the commission of war crimes.

While the United Nations War Crimes Commission was being organised in London, a conference of the foreign ministers of the United States, the United Kingdom and the Soviet Union was in progress in Moscow. The Moscow Declaration of the three statesmen, signed on 30th October, 1943, in the name of their three Governments and in the interests of all the United Nations, became, as one authority described it, "a charter and guide for the United Nations War Crimes Commission".⁽¹⁾

After reciting that Hitler's forces had committed atrocities, massacres and cold-blooded executions in many occupied countries, the Declaration pronounced the solemn warning that on the conclusion of the armistice with Germany:

"those German officers and men and members of the Nazi Party who have been responsible for or taken a consenting part in the above atrocities, massacres, and executions, will be sent back to the countries in which their abominable deeds were done, so that they may be judged and punished according to the laws of those liberated countries and of the free Governments which will be erected in them.

"Lists will be compiled in all possible detail from all those countries, especially the invaded parts of the Soviet Union, Poland, Czechoslovakia, Yugoslavia, Greece, including Crete and other islands, Denmark, Norway, the Netherlands, Belgium, Luxembourg, France and Italy . . ."

(1) William F. Fratcher, *American Organisation for Prosecution of German War Criminals*, Missouri Law Review, January, 1948, (pp. 45-70).

Quite properly, therefore, the Lord Chancellor, who presided at the meeting on 20th October, 1943, proposed that the Commission should serve two primary purposes:

- (1) It should investigate and record the evidence of war crimes, identifying where possible the individuals responsible.
- (2) It should report to the Governments concerned cases in which it appeared that adequate evidence might be expected to be forthcoming.

The statesmen present at the inaugural meeting of the Commission were aware of the abortive efforts of the Allied leaders to punish the German war criminals after 1919, when, after peace was attained, a long list of German war criminals, including many military and naval leaders of high rank, was prepared. Following representations from the German Government this list of about 5,000 names was reduced to 892 persons whose surrender was demanded—97 by Great Britain, 334 by Belgium, 334 by France, 29 by Italy, 57 by Poland and 41 by Roumania. It was from among these lists that twelve persons were subsequently tried at Leipzig and but six convicted—a fiasco which undoubtedly sowed the seeds for ruthless disregard by the Nazis, two decades later, of accepted principles of international law governing the conduct of war.⁽¹⁾

(ii) DEFINITION OF ACTS CONSTITUTING WAR CRIMES

The initial problem facing the Commission was that of defining those acts which would constitute war crimes and for which the Commission would receive and examine cases. After a discussion on 2nd December, 1943, the list of war crimes drawn up by the Commission on Responsibilities of the Paris Peace Conference in 1919, was adopted for an immediate and practical working basis. This list was as follows:

- (i) Murder and massacres—systematic terrorism.
- (ii) Putting hostages to death.
- (iii) Torture of civilians.
- (iv) Deliberate starvation of civilians.
- (v) Rape.
- (vi) Abduction of girls and women for the purposes of enforced prostitution.
- (vii) Deportation of civilians.
- (viii) Internment of civilians under inhuman conditions.
- (ix) Forced labour of civilians in connection with the military operations of the enemy.
- (x) Usurpation of sovereignty during military occupation.
- (xi) Compulsory enlistment of soldiers among the inhabitants of occupied territory.
- (xii) Attempts to denationalise the inhabitants of occupied territory.
- (xiii) Pillage.
- (xiv) Confiscation of property.
- (xv) Exaction of illegitimate or of exorbitant contributions and requisitions.
- (xvi) Debasement of the currency and issue of spurious currency.
- (xvii) Imposition of collective penalties.
- (xviii) Wanton devastation and destruction of property.

(1) For particulars of the Leipzig Trials see Chapter III.

- (xix) Deliberate bombardment of undefended places.
- (xx) Wanton destruction of religious, charitable, educational and historic buildings and monuments.
- (xxi) Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers and crew.
- (xxii) Destruction of fishing boats and of relief ships.
- (xxiii) Deliberate bombardment of hospitals.
- (xxiv) Attack and destruction of hospital ships.
- (xxv) Breach of other rules relating to the Red Cross.
- (xxvi) Use of deleterious and asphyxiating gases.
- (xxvii) Use of explosive or expanding bullets and other inhuman appliances.
- (xxviii) Directions to give no quarter.
- (xxix) Ill-treatment of wounded and prisoners of war.
- (xxx) Employment of prisoners of war on unauthorised works.
- (xxxi) Misuse of flags of truce.
- (xxxii) Poisoning of wells.
- (xxxiii) Indiscriminate mass arrests (added by the United Nations War Crimes Commission).

(iii) FILING OF CHARGES BY GOVERNMENTS

On 13th December, 1943, the Secretary General circulated a letter stating that the Commission's Secretariat was now ready to receive particulars of alleged war crimes which the respective member Governments desired to submit to the Commission. For the purpose of filing, National Offices were asked to submit their cases on a prescribed form, and the following points were laid down as being relevant to each case:

- (i) What is the offence alleged?
- (ii) Can the offender be identified?
- (iii) What was the degree of responsibility of the offender, having regard to his position?
- (iv) Was the offence committed on the offender's own initiative, or in obedience to orders, or in carrying out a system of legal disposition?
- (v) What evidence is available in support of the charge?
- (vi) What will be the probable defence?
- (vii) Can the offender be put on trial with a reasonable probability of conviction?

Concerning the offence alleged, it was pointed out that the Commission had provisionally adopted the list agreed upon by the Commission on Responsibilities of the Paris Peace Conference in 1919, and in doing so had been influenced by the fact that both Italy and Japan were parties to the preparation of the list and no objection was made to it by Germany. Also, the Commission reserved the right to make such modifications to the list as might appear necessary and there was no suggestion that the war crimes, on whose perpetrators punishment was to be inflicted, should be restricted to the offences mentioned on the list. In actual practice the Commission applied all known sources, written and unwritten, of international law respecting the conduct of war, including, particularly, the various Hague and Geneva Conventions, and rules adopted by individual nations for the guidance of their own armed forces in the conduct of war.

(IV) APPOINTMENT OF SUB-COMMITTEE ON FACTS AND EVIDENCE

At a meeting of the Commission of 4th January, 1944, the Netherlands representative suggested that a sub-committee be constituted to assume responsibility for the placing of the names of war criminals on the Commission's Lists and the examination of the great influx of cases expected. At a subsequent meeting of 25th January, 1944, the Czechoslovak representative moved that three sub-committees should be instituted, the first of which was to consider facts and evidence, thereby discharging the "fact finding" functions of the Commission. He recommended the establishment of this sub-committee to facilitate the examination of individual cases submitted by the various Allied Governments and the compilation of lists of war criminals. The work of the sub-committee should be subject to confirmation by the Commission, but it would undertake the preparatory work in connection with the cases submitted. This recommendation was approved by the Commission and the Committee on Facts and Evidence (commonly called Committee I) was constituted at a meeting of the Commission held on 1st February, 1944. The Committee first consisted of representatives of Belgium, Czechoslovakia and the United States of America. Shortly thereafter the United Kingdom and Australian representatives were added to it. Australia later ceased to be an active member of the Committee, except for the Chairman of the Commission, Lord Wright, who served as *ex officio* member of this as well as all other committees of the Commission. During the latter stages of the Committee's work the Norwegian representative replaced the Belgian representative upon the Committee, which thereafter consisted of representatives of Czechoslovakia, Norway, the United States of America and the United Kingdom.

At its first meeting the Committee had before it 20 cases submitted by France and 12 submitted by the United Kingdom. By 18th February, 1944, as a result of examining these and other cases, Committee I issued recommendations to the National Offices stating that in transmitting charges it appeared to be desirable that National Offices should, in addition to specifying the heading in the list of war crimes under which the charges fell, indicate what provisions, if any, of the national criminal law (whether civil or military) had been infringed by the accused.

It was also recommended that if, in the interests of security, the identity of the witnesses could not be given, some statement in general terms should be sent to the Commission, giving the information on which the charge was based. In view of the possible death or disappearance of witnesses, or the destruction of evidence, National Offices were asked to record at once, while still available, evidence of war crimes in an authentic form, with a view not merely to the work of the Commission, but also to prosecution for such crimes before the competent tribunal. This report was accepted by the Commission at its meeting on 22nd February, 1944, when the Chairman also announced the offer of the British Government to make available facilities for obtaining evidence on oath if any of the United Nations did not possess the requisite machinery.

By the end of February, 1944, Committee I had examined sufficient cases to warrant the inclusion of certain names in the Commission's Lists.

In many cases it was found that the evidence presented was so complete that the Committee could recommend the listing of the person accused as one wanted for trial for war crimes. In some cases, however, the particulars available either as to the accused or the evidence in support of the charge were incomplete. In this case two possibilities might arise: either that the evidence, though incomplete, might furnish good reason for believing the accused guilty of a war crime, and for such cases the Committee had already established a provisional list, though it had not defined exactly the effect of inclusion in this list. In other cases the particulars were so incomplete that the case had to be adjourned pending the submission of further information. At the meeting of Committee I on 1st March, 1944, it was decided that charges would, for the time being, be classified under three headings:

“ A.” Charges to be proposed to the Commission for inclusion in the Commission’s List or Lists.

But it was also stated that until more experience in the examination of cases had been acquired, the Committee did not contemplate placing persons on List “ A.”

“ B.” Charges placed on the Committee’s Provisional List.

This list was further divided into two sub-divisions:

1. Charges in which the evidence was reasonably complete.
2. Charges in which the evidence was incomplete and further information was required.

“ C.” Charges consideration of which was adjourned.

Charges placed on the Committee’s Provisional List were later re-examined and largely classified “ A.”

At the meeting of the Commission held on 7th March, 1944, during a discussion about the proceedings of Committee I, the French representative stated that he had objections to the Committee’s procedure, but, in view of the importance of its work, he would submit them in writing.

On 21st March, 1944, the promised statement was made by the French representative, protesting against the very high standards required by Committee I before accepting charges. It was pointed out that after five months existence barely 60 cases had been submitted, most of which were incomplete and were placed on Class “ C.” This was entirely out of proportion with the real facts of German atrocities in Europe. He stated that Committee I insisted on having witnesses to prove acts attributed to a Gestapo chief, although under some legal systems the real crime would consist in the mere fact of being a Gestapo member operating in an oppressed territory. Moreover, under this system Committee I prevented charges being brought against the persons who bore the gravest responsibility, because there were no witnesses to the crimes which these persons had committed in the form of general orders or decrees. In the case of crimes against prisoners of war it was not possible to identify the culprits until German operational orders could be studied. It was maintained that, whereas in 1918 war crimes had not passed the limits within which individuals could be held responsible, in 1944, when hundreds and thousands

of persons had put to death or terrorised millions of other persons, crimes had assumed a collective character to which no list of individual criminals could do justice. The French representative therefore considered that Committee I might reconsider whether or not the aim of listing individuals would achieve a solution to the problem of suppressing crime. Moreover, since the Germans had exterminated too many witnesses and destroyed too much evidence, it was doubtful if such listing was a practical proposition. In view of the fact that Committee III was concurrently putting forward a proposal that at the time of the armistice all Gestapo and S.S. members should be interned, the attitude adopted by Committee I appeared rather illogical.

The Belgian representative, as Chairman of Committee I, pointed out that the conception of collective responsibility, put forward by the French representative, was outside the competence of Committee I. It was decided that Committee I should continue its work as hitherto, and various members expressed the hope that cases against the leading war criminals would be transmitted to the Commission. It was also agreed that National Offices should be encouraged to submit cases involving key men who had signed their names to public proclamations, ordered that hostages should be shot, civilians deported, etc.

This proposal was discussed at the next meeting of the Commission on 4th April, 1944, when the Chairman and other members expressed the view that it might be necessary to alter the limits which the Commission had fixed for itself in connection with listing war criminals. A resolution was moved and carried, by which the Legal Committee (Committee III) was asked to consider the recommendations made by the French representative and to submit suggestions for overcoming the difficulties.⁽¹⁾ A further resolution was also adopted requesting the Governments of enemy-occupied countries to submit to the Commission lists of all enemy civil and military persons in authority in each occupied district since 1939, such as Gauleiters, Governors, Chiefs of the S.S. and Gestapo, with as complete particulars as possible about these persons. The Commission subsequently issued on its own initiative two lists of key Nazi war criminals on the basis of information compiled by its Research Office.

Largely as a result of the French proposal, warmly supported, in particular, by the Belgian representative, Committee I adopted the practice of listing all members of a military unit for war crimes where it appeared that crimes were committed on such a scale that it could be presumed that all members of the unit could be suspected of taking part in them. The murders at the little French village of Oradour sur Glane, for which the S.S. Panzer Grenadier Regiment No. 4 ("Der Fuehrer") of the Division "Das Reich" of the Nazi forces were held responsible, was an example of such listing. On other cases all members of certain Gestapo units known to have operated in a restricted territory were listed. In general the Committee was extremely cautious in utilising this form of listing. The obvious advantage of such listing was that members of a

(1) For details of discussions in the Legal Committee on the subject of collective criminality, see Chapter XI, Section A (i).

unit guilty of war crimes of multiple character would be kept in custody until the actual perpetrators could be found.

B. FUNCTIONS AND PROCEDURE OF COMMITTEE I

Committee I, although termed a fact finding body, performed such functions only in the sense that it determined whether *ex parte* material submitted to the Commission by its member Governments was sufficient to disclose a *prima facie* case. Its functions did not go beyond the determination of a *prima facie* case and were therefore not judicial. It could consequently be compared in Anglo-American law to those of a Committing Magistrate or Grand Jury. From the beginning its decisions were based entirely upon information submitted by member Governments. Possessing no information in refutation to that submitted by the member Governments and having no facilities for securing evidence from the accused or from those representing the accused, the Committee had to rely entirely upon the good faith, accuracy, and diligence, of the various member Governments in presenting cases involving *bona fide* war crimes. It relied upon the various Governments first to satisfy themselves that a war crime of reasonable importance had been committed and then adequately to present the facts to the Committee. Only during the latter stages of its existence did the Committee begin to receive evidence submitted on behalf of persons previously listed. This occurred in only a few cases and in each case the Committee carefully examined the new evidence before deciding whether or not the name of an accused should remain upon the Commission's lists or should be removed. The fact that the Committee's decisions were questioned in only a few instances may be taken both as a measure of the Committee's close scrutiny of submitted cases and of the careful manner in which the various National Offices had prepared the cases.

Following a principle frequently reiterated and approved by the Commission itself, the Committee held that its competence extended to war criminals only and did not include quislings or traitors or those individuals who had committed atrocities against nationals of their own country, unless acts were in fact war crimes in the strict sense and not of a traitorous nature.

When determining whether or not a *prima facie* case existed in each instance, it may be broadly said that charges were examined for (1) the violation of an accepted law of war crimes and (2) the sufficiency of the facts to constitute a violation of the law. Or, expressed in another way, the Committee attempted to answer three questions with respect to each charge:

- (a) do the charges made disclose the existence of a war crime or crimes?
- (b) is there sufficient material to identify the alleged offender?
- (c) is there good reason to assume that if put on trial, the alleged offender would be convicted?

It has been pointed out that Committee I used as a working basis the list of war crimes drawn up by the Commission on Responsibilities of 1919. In actual practice the Committee, throughout its four years of

existence, found itself constantly being called upon to revise the concepts and notions of war crimes as outlined in this list. Several of the war crimes therein listed were never applied by the Committee and others were extended to embrace the concepts of war crimes, as they had developed since World War I. Some of the practical problems met and solved by Committee I, in examining individual cases submitted by member Governments, will be discussed in subsequent pages. In this connection it may be noted that with one exception, that of Ethiopia, the Committee examined no cases other than those submitted by member Governments. In one instance an organisation known as the Association of German Democratic Lawyers submitted a number of cases largely arising out of murder and other atrocities committed against Jews in Germany prior to the beginning of the war. Committee I recommended, and the Commission approved its action, that these charges should more properly be submitted to the Allied Authorities in Germany for prosecution under the Allied Control Council Law No. 10, as they essentially involved crimes against humanity. Similar action was taken with respect to charges submitted by the Legal Commission of the Free German Movement in Great Britain. The Commission did recognise crimes against humanity as being within its terms of reference at a meeting held on 30th January, 1946. However, apart from a small number of Czechoslovak cases, Committee I did not engage in the listing of crimes against humanity, but confined itself to war crimes *stricto sensu*. In the few Czechoslovak cases in which crimes against humanity were raised, listing was approved only in instances where the crimes committed, prior to the outbreak of war, formed a part of a definite pattern of many similar acts. Similarly only a few United States cases were submitted to the Committee with charges of crimes against peace.

The Jewish Agency for Palestine prepared and attempted to file with the Commission, about 500 cases involving atrocities committed by the Nazis against the Jewish population in Poland. Here again Committee I regretfully refused to assume jurisdiction and suggested to the Jewish Agency that these cases be submitted by one of the member Governments. Many of these cases were later submitted by the Polish National Office, which had, in the meantime, assumed responsibility for investigating and preparing such of the original Jewish Agency cases as arose out of atrocities in Poland.

As has been mentioned elsewhere,⁽¹⁾ Ethiopia petitioned the Commission for permission to submit cases arising out of the Italo-Ethiopian war of 1935-36. After much discussion as to whether or not the competence of the Commission extended to war crimes committed during that war, the Commission, at its meeting on 29th October, 1947, did finally agree to receive a limited number of Ethiopian cases. These cases, 10 in number, were examined by Committee I during the last month of its existence and the accused placed upon the Lists of the Commission. During the last year of the Commission's existence the Government of Albania tried unsuccessfully to secure the consent of the Commission to the filing of cases before Committee I, but here again the Commission returned to

(1) See Chapter VII, Section B (iv) 3.

its original idea that cases should be filed only by member Governments and in the case of Albania it was pointed out that this Government had initially been engaged in war against the United Nations. It cannot be too firmly emphasised that in the final analysis the value of the work of Committee I was almost wholly dependent upon the good faith of the member Governments in submitting *bona fide* cases based upon adequate evidence, and, without exception, the member Governments kept that faith.

Of the 8,178 cases examined by the Committee, in which nearly 37,000 persons were listed, the Committee was asked to reconsider only an insignificant number of cases and of these actually removed 3 names from the Commission's Lists. When evidence for the defence became available after an accused had been listed in a particular case, the Committee was always ready to review the case and decide, in the light of the evidence as a whole, whether or not the accused's name should remain on the List. The fact that so few cases had to be reconsidered was largely due to the Committee's practice of adjourning any incomplete or questionable case until such time as the National Office filing such case could provide evidence of a nature sufficient to satisfy the Committee that the accused should be listed.

In the early months of the Committee's work the cases submitted were, in many instances, based upon vague or incomplete evidence. This was naturally so, since most of the territories in which crimes had been committed were then under enemy occupation, but as the various countries were liberated and as Governments returned, and were able to collect evidence "on the spot", the evidence submitted to Committee I in substantiation of the various charges became increasingly more detailed and explicit. As it became easier to collect evidence against war criminals the Committee tightened its instructions for the submission of cases which, for more than two years, had largely consisted of statements of fact backed by information available from the various National Offices. Committee I successively required first that the National Offices submit the names of witnesses, next that they submit pertinent extracts from the testimony of witnesses and finally, during the last year of the Committee's work, that full statements of witnesses be made available to substantiate the individual charges of the National Offices. Some nations, Poland and Yugoslavia in particular, complained that the submission of documented cases to both the Commission and the extradition authorities was an unnecessary duplication of effort and that listing by Committee I should be sufficient to ensure the extradition of an alleged war criminal from the hands of the detaining authority to the authority requesting the alleged criminal for trial. However, as has been elsewhere observed⁽¹⁾ the Commission maintained that it had no authority or responsibility for the act of extradition and that its sole function was to advise the detaining authorities whether or not, in the opinion of the Commission, a *prima facie* case existed against a particular war criminal. It was for the Commanding Officer in the respective zones of occupation to determine, in the final analysis, whether or not an accused war criminal should be delivered up for trial. It may be pointed out that the detaining authorities in Germany,

(1) See Chapter XII, Section C (iv).

throughout the Commission's existence, maintained that listing of war criminals by the Commission was given great weight in determining whether or not that war criminals should be extradited for trial.

It has been previously noted that during the early months of the existence of Committee I some difficulty was experienced in determining just what listing should be given to individual accused war criminals with respect to the evidence presented against them at the Committee meetings. The Committee finally evolved four listings designated as "A", "S", "C" and "W". "A" listing was reserved for those war criminals against whom the Committee believed a clear *prima facie* case had been presented and whom the Committee believed should be delivered up for trial. "S" listing was made in the case of accused war criminals against whom the Committee found a *prima facie* case, but against whom the case was not so strong as to warrant "A" listing. As a practical matter this listing came to be assigned to those alleged war criminals who appeared to be guilty of war crimes but against whom the National Offices had been unable to collect a large amount of definite evidence. They were to be regarded as "suspects" rather than "accused". "C" listing, at first applied to adjourned cases, was eventually reserved by the Committee for alleged war criminals who could not be identified. Witnesses to war crimes were listed "W" by the Committee.

The total numbers of the various listings indicate that 24,453 persons were listed "A", 9,520 "S", and 2,556 "W", during the four years of the Committee's existence. Of the 8,178 individual or collective cases considered, 148 were classified as "C" cases and 306 were withdrawn or remained adjourned.⁽¹⁾ A special priority, or "AA", listing for those alleged war criminals accused of particularly shocking or heinous war crimes was for a short time attempted, but soon abandoned on the advice of Allied detention authorities who were already making every effort to locate those war criminals listed by the Commission.

C. SOME SIGNIFICANT WAR CRIMES CASES AND PROBLEMS CONSIDERED BY COMMITTEE I

While Allied courts and tribunals, in all areas of the world, were engaged in trying the war criminals of World War II, deciding difficult questions of international law and thereby creating legal precedents, Committee I of the United Nations War Crimes Commission was engaged, even before the first war crimes trials were held, in considering the many difficult questions of fact and law that were to arise before those courts and tribunals. Some of the questions considered were completely novel to international law; others involved the interpretation of recognised principles of international law in the light of modern warfare. All were carefully considered, whether by the Committee on Facts and Evidence (Committee I), the Legal Committee (Committee III), or by the Commission in plenary session. It would require a whole volume in itself to discuss adequately and describe even the more important of these thousands of cases and

(1) See Appendix III, *Statistical Report of the activities of Committee I*, Tables I, II and IX.

scores of legal problems arising therefrom. A few of the more interesting cases and questions are presented here as illustrative of the work done by Committee I during its four years' existence.

(i) THE FRENCH BLACK MARKET CASE

One of the most significant cases coming before Committee I, and which because of its novel legal implications involved a prolonged study by both that Committee and by Committee III was a French case (Commission No. 4695) against one Colonel Veltjens and 36 other Germans who were charged by the French with the war crime of economic pillage.⁽¹⁾ It was alleged that the accused were given the responsibility, under Goering's Four-Year Plan, of organising the black market in occupied territories in the West in order to enable the importation into Germany of the greatest possible quantities of French goods. A central administration was created for "using the black market to the greatest extent and in the best financial conditions for the Reich", according to a document signed by the accused Veltjens. Nine-tenths of the buying operations were financed from French payments of German occupation expenses. The French alleged that the operation enabled the Germans to drain the French economy and to cause a resultant inflation in France.

One of the questions in this case was whether it entailed pillage, which is expressly forbidden under Article 47 of the Hague Regulations of 1907. Committee III in its report⁽²⁾ pointed out that the Nuremberg Judgment had recognised "that the territories occupied by Germany were exploited by Germans in the most ruthless way, without consideration of the local economy, and in consequence of a deliberate design and policy". Committee III's report held that this case could not come within a precise definition of pillage in that the goods in question were not taken against the will of the legitimate owners but in the course of a business transaction, however illegal under French law or damaging to France's economy.

However, Committee III considered that the acts alleged in the French case were a violation of Article 49 of the Hague Regulations, which provides that if the occupant levies money contributions in the occupied territory, "this shall only be for the needs of the army or the administration of the territory in question". It was also agreed that the activities of the accused in this case amounted to a conspiracy to violate French municipal law, which the perpetrators were bound to respect.

When Committee III's report came before the Commission for approval on 18th June, 1947, Lord Wright stated that he considered it undesirable for such an attempt to be made to define precisely the term "pillage" as used in the Hague Convention. To do so, he said, was to disregard the wider and more modern and practical view of this offence as found in the Charter, Control Council Law No. 10, and in the Nuremberg Judgment. He believed that the French case should be considered as a composite war crime of stripping a nation of its goods without compensation and consequently a violation of international law. The substance of the transaction, Lord Wright indicated, was the important consideration.

(1) See III/80. 3.3.41. *The French cases Nos. 4695 and 4698, referred to Committee III.*

(2) See Document III/86. 4.2.47. *The French Case No. 4695.*

Therefore, the Commission agreeing, the definition of pillage in the case was omitted and the report otherwise approved.⁽¹⁾

When Committee I finally disposed of this case the accused were listed on two counts: (a) exaction of illegitimate and exorbitant contributions (Article 49 of the Hague Regulations), and (b) systematic violations of French municipal law (Article 43 of the Hague Regulations).

Another French case (Commission No. 4698) introduced a charge of economic pillage, in that two German accused set up a company in Paris in 1941 to import into France hides and tanning extracts for the French foot-wear and hides industry. It was alleged that the French manufacturers were forced to buy inferior products at exorbitant prices with a resultant drain on French economy.

Committee I adjourned this case for study, and Committee III in a report⁽²⁾ concluded that on the evidence submitted, a *prima facie* case of a war crime was not established under Article 47 of the Hague Regulations or under the term of "plunder of private or public property" in the Charter of the International Military Tribunal.

It was pointed out that the charge did not allege that the accused did not pay full value for their goods or that they re-sold the goods at a higher value by criminal means. And in view of the fact that the products of the French manufacturers, however inferior the materials, were sold in Germany, it could not matter that the French manufacturers were forced to buy the German raw materials from which the goods were made.

(ii) ACTS COMMITTED IN COURSE OF DUTIES AS ENEMY AGENTS

A Netherlands case (Commission No. 3476) presented another problem frequently arising before Committee I. In this case one Irma Seelig, a German Jewess living in Holland, was charged with complicity in murder in that she betrayed her former colleagues in the Dutch underground movement. It appeared that the accused had originally been a member of the Dutch underground, but had been arrested by the Nazis for her activities, and had then become a confidential agent for the German S.D. The Committee held that her activities could not be considered as war crimes. Similar rulings were made in other cases where it appeared that acts were committed in the course of the normal duties of an agent or spy, however treasonable and reprehensible such acts might appear to the nation against whom the agent or spy was operating.

While Committee I consistently held that traitors and quislings could not be listed *per se* as war criminals, it did not hesitate to list traitors or quislings as accused war criminals when it appeared that these persons had actually committed war crimes in the course of their activities, whether against their own nationals or those of other allied countries.

(1) See C.262. 9.6.47. *Exploitation of the Black Market as a war crime. French case No. 4695. Report by Committee III.*

(2) See C.253. 25.5.47. *French case No. 4698 (alleged pillage through economic activities; making French tanners and manufacturers of footwear work for the benefit of Germany).*

(iii) DENATIONALISATION AS A WAR CRIME

Under what circumstances attempts to denationalise the inhabitants of occupied territory should be considered a war crime was a question occasionally before Committee I. It is clearly the duty of belligerent occupants to respect, unless absolutely prevented, the laws in force in occupied territory. Article 43 of the Hague Regulations provides that family honour and rights and individual life must be respected, and under Article 56 the property of institutions dedicated to education is privileged. This would necessarily imply that the education conducted in those buildings is likewise protected.

Both the Nazi and Italian occupation authorities made concerted efforts in certain of the occupied territories, particularly in Greece, Poland and Yugoslavia, to uproot and destroy national cultural institutions and national feeling. This effort took various forms including a ban on the use of native language, supervision of the schools, forbidding the publication of native language newspapers, and various other devices and regulations.

The whole question was presented at an early period in a Yugoslav case (Commission No. 1434) charging several Italians with denationalisation activities in Yugoslavia.⁽¹⁾ In this case the Committee laid down the rule, thereafter followed, that only those individuals responsible on a high or policy level should be considered guilty of denationalisation. Thus, low-ranking military personnel or teachers acting under orders were not listed for the war crime of denationalisation. Each case was judged on its own merits in the light of this rule.⁽²⁾

(iv) MILITARY NECESSITY

Committee I had often to decide whether a given set of facts arising from the destruction of personal property, public property, or local monuments was a war crime, or whether such destruction was justified on the basis of military necessity in time of war. For example the Committee refused to list for war crimes those Germans responsible for the demolition of a French lighthouse at Pas-de-Calais in September, 1944 (Commission No. 3603). Generally, the test applied was whether military operations were in progress, or were imminent.

Another case of this nature (Commission No. 6582) involved a German officer who had completely destroyed a large Roman Catholic church when his unit left Horst-Melderslo in Holland. The Committee decided that, while military necessity may have existed for the destruction of the spire of the church to prevent its use as an allied observation tower, no necessity existed for the complete and utter destruction of the whole church. Accordingly the accused was listed on "A" for wanton destruction of religious buildings and monuments.

This same test—whether recognised military operations or a battle

(1) See C.149. 4.10.45. *Criminality of attempts to denationalise the inhabitants of occupied territory. Report by Committee III.*

(2) See also C.175. 14.2.46. *Denationalisation by dismissing employees.*

were in progress—had to be applied in large numbers of cases involving what the National Offices considered to be the murder of innocent civilians. In a war in which civilians, as well as those in uniform, became combatants on occasion, it was essential to determine whether a battle was actually in progress when an alleged war crime was committed, or whether an innocent-appearing civilian was in fact a member of an underground army killed in the course of executing a military mission.

(v) CONFISCATION OF PROPERTY BY NAZI-APPOINTED ADMINISTRATORS

It was a Nazi practice in occupied territories to appoint German administrators of certain private factories and places of business, usually those owned by persons of Jewish racial extraction. Many of those administrators were charged as war criminals for having taken these properties as their own. No difficulty was experienced in determining the existence of a war crime where the property was simply stolen without the payment of any compensation, but doubts occurred when the evidence indicated that transfer of such property arose under colour of sale, in some instances apparently *bona fide*, or where some compensation was indicated.

This question arose in a Netherlands Case (Commission No. 6247) in which one Walther Neine, a Reichdeutscher, who had been appointed "Verwalter" of a Jewish-owned factory in Amsterdam, was charged with the war crime of pillage in that it was alleged he used the firm's own money to "buy" it for himself. It appeared that he had the machinery sent to his address in Germany just prior to the time the Germans evacuated Amsterdam. The members of the Committee questioned whether or not a *bona fide* sale of the factory and its contents had been made to the accused. However, the Netherlands representative displayed a copy of the balance sheet for 1943 in which it appeared that the accused had actually taken the sum for the purchase of the factory from the firm's capital. Accordingly the accused was listed "A".⁽¹⁾

(vi) DISCRIMINATION IN ISSUING RATIONS

One of the United Kingdom cases (Commission No. 1643) involved the Commander-in-Chief of the German Army in the Channel Islands in April, 1943, and a Colonel serving under his command, who were charged with violation of Article 50 of the Hague Regulations of 1907. It was alleged that in April, 1943, the civil authorities in Jersey, received a written notice from the Colonel to the effect that the rations of certain foodstuffs were to be reduced at once for "English subjects". The Colonel made it clear that the measure was intended as a reprisal for the sinking of German supply ships by "English attacks" and that the order was directed purposely against British subjects. The Committee found itself unable to decide whether Article 50 of the Hague Regulations was a proper basis for the charge, but did decide that a war crime had been committed and placed the accused upon List "A".⁽²⁾

(1) See also III/65 of 4.11.46, III/68 of 6.11.46 and III/72 of 20.11.46, all of which concern Netherlands charges relating to seized property.

(2) See I/41, 20.10.45. *Notes on the United Kingdom case No 1643 (discriminatory measures in Jersey. Note by E. Schwelb.*

(vii) CONCENTRATION CAMP CASES

Among the most serious charges presented to Committee I were those involving the Nazi concentration camps in which millions of persons were sent to their deaths. The record of murder of millions of innocent persons in these camps, particularly in Poland, was almost unbelievable in its enormity of Nazi criminality. Hundreds of both the higher officers in the camps and the personnel of much lower degree, who actually committed atrocities and personally caused the deaths of inmates, were listed at various times by the Committee. Early in its proceedings the Committee recognised that other Nazis who had been engaged and responsible for filling these death camps were as guilty as those who actually managed and operated the camps. In a Czechoslovak case (Commission No. 952), for example, several hundred German Police officers operating in Czechoslovakia were charged with having arrested and sent to a concentration camp thousands of innocent people.⁽¹⁾ In this case not only the actual perpetrators of the atrocities were listed but also the intermediate authorities, namely, persons who exercised local police jurisdiction in the occupied territories of Czechoslovakia and who either gave orders for the arrest of Czechoslovak citizens or who carried out such orders.

(viii) THE SCUTTling OF ENEMY U-BOATS AFTER AN ARMISTICE

The United Kingdom (Commission Case No. 2429) charged one Gerhard Grumpelt, an officer of the German Navy, with a war crime in that he had violated Article 41 of the Hague Regulations of 1907 in scuttling two German U-Boats 36 hours after the Instrument of Surrender of the German Armed Forces came into operation. The scuttling was done in violation of the terms of surrender and after the accused had received from his superiors an order that no more U-boats were to be scuttled. The Committee held that by his violation of the terms of surrender the accused had clearly committed a war crime.⁽²⁾

(ix) IMPROPER WEARING OF UNIFORM AS A MEANS OF DECEPTION

This problem arose first in a Dutch case (Commission No. 3271) in which the Netherlands Government charged two members of the German armed forces with violating the "International Rules of Land Warfare" in that one of the accused, an officer, gave order to the second accused, a soldier, to disguise himself as a member of the Royal Mounted Police. The soldier, aided by four other German soldiers similarly clothed, was thereby able to take a Dutch railway bridge on the German-Dutch frontier on the day Germany invaded the Netherlands, by removing an explosive charge placed there to forestall a German crossing.⁽³⁾

This means of deception was clearly one of the ruses of war or stratagems recognised under Article 24 of the Hague Regulations. However, such deception, according to the view of the Committee, was improper when

(1) See C.140. 2.8.45. *Oswiecim (Auschwitz) and Birkenau concentration camps. Report of Committee I on a charge presented by Czechoslovakia.*

(2) See *Law Reports of Trials of War Criminals selected by the U.N.W.C.C.* Vol 1, pp. 55-69. H.M. Stationery Office 1947.

(3) See I/66. 1.7.46. *Note on Dutch case No. 3271 by Dr. Litawski, Legal Officer.*

used during the time of actual attack or defence, when, according to the unanimous opinion of authorities on international law, belligerent forces ought to be certain who is friend and who is foe. Therefore, the Dutch case and other similar cases later presented before Committee I, was a violation of Article 23(f) of the Hague Regulations which reads as follows:—

“in addition to the prohibition provided by special conventions, it is particularly forbidden . . . to make improper use of a flag of truce, of the national flag, or of the military insignia or uniform of the enemy, as well as of the distinctive signs of the Geneva Convention”.

In this particular case the Dutch uniform was used by the accused at a time when Dutch territory was being invaded and actual fighting was going on. Those improperly wearing the uniform could not be considered as spies in the circumstances and were therefore war criminals.

(X) USE OF CIVILIANS IN THE CONSTRUCTION OF FORTIFICATIONS

Various cases were presented to the Committee involving the question whether or not civilians in occupied territory could, under international law, be forced to engage in activities either of a military nature or assisting in some manner military operations. This question was raised in a French case (Commission No. 1616) in which a German accused was charged with having forced all the male inhabitants of the town of Merschweiler, between the ages of 15 and 60, to participate in the construction of fortifications during November, 1944. At that time the Committee took cognisance of the view held by some authorities on international law that it is not unlawful for an occupant to force the inhabitants to render assistance in the construction of fortifications behind the battle front or in any other works in preparation for military operations. This view is based upon Article 52 of the Hague Regulations which provides that services required from inhabitants of occupied territory must not be of such nature “as to involve the inhabitants in the obligation of taking part in military operations against their own country”. In this case, however, it appeared that the accused had impelled the inhabitants to do work at places or to construct fortifications at places where military operations were actually being conducted or were imminent, and the accused was put on list “A”.

The Committee in many similar cases made a distinction between military *operations* and military *preparations* and declined to list as accused war criminals those responsible for forcing civilians to render assistance in constructing military roads, fortifications and the like behind the lines of military operations.

A related question often arising involved the right of occupying authorities to confiscate means of transport. Under Article 53 of the Hague Regulations an army of occupation is allowed to take possession of means of transport. Appliances adopted for the transport of persons or goods 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. The Committee applied the factual test of whether or not there had been a formal requisition of privately owned means of

transport as evidenced by a requisition slip or other proof of good faith. Military necessity, including the question of there being a battle or retreat in progress, and the likelihood of conveyances being used against the occupying forces in later military operations, was likewise a factor to be considered by the Committee in deciding whether a *prima facie* case existed.

(xi) THE TAKING OF HOSTAGES

The question of whether or not the taking of hostages during war is *per se* a war crime, faced Committee I during the early stages of its existence and it decided that the taking of hostages is not as such a war crime, having in mind the confused state of international law upon this point. It was recognised that, although the practice was a harsh one which should be dispensed with, such practices for the purpose of maintaining lines of communication of a belligerent occupant might be justified from the standpoint of the occupant. During World War II, however, the Nazis in occupied territory resorted to the practice not only of taking hostages but of doing so in an indiscriminate manner and of freely executing hostages. Committee I consistently held that this practice was in fact a war crime.

The Commission had, at a meeting of 9th May, 1944, added the following to its provisional list of war crimes: "indiscriminate mass arrest for the purpose of terrorising the population, whether described as the taking of hostages or not". Most of the cases presented to Committee I fell well within this war crime so that the question really arose whether or not a practice of mass arrests and executions of hostages had occurred. If so, a war crime had been committed under the ruling of the Commission.

(xii) DELIBERATE BOMBARDMENT OF UNDEFENDED PLACES

While the 1919 Commission on Responsibilities listed deliberate bombardment of undefended places as a war crime, Committee I during its existence did not rule whether or not bombardment from the air of undefended places in the course of military operations constituted a war crime. The 4th Hague Convention of 1907 forbade the bombardment of undefended places "by any means whatever". Clearly, it was not contemplated that this prohibition should cover military objectives. The whole question hinged upon what constituted an "undefended place". In this field of war crimes, Committee I did list, in some instances, Nazis and Italians charged with responsibility for bombing undefended villages in occupied territory, as reprisals. During the last two months of the Commission's existence a Polish charge was filed, in which various Nazi generals were charged with responsibility for the bombing of the civilian population in undefended places during the opening days of the invasion of Poland by Germany. The question of whether or not such bombing came within the notion of war crimes in the light of modern warfare was never decided, since the majority of the members of Committee I

(1) See, however, C.250, 10.3.47. *Deliberate bombardment of undefended places. Report by Committee III.*

considered the problem too complex to be resolved in the short time remaining of the Committee's existence. The question was, therefore, left undecided, as indeed it has been in the minds of authorities on international law.

(xiii) GIVING INFORMATION AS A WAR CRIME

The problem whether and to what extent giving information, or denunciation, is a war crime under international law became an important one during World War II in view of the activities of certain criminal organisations of the Axis powers, particularly the Gestapo and the S.D. The only relevant provision thereon in conventional international law is Article 44 of the 4th Hague Convention of 1907 which provides:—

“ a belligerent is forbidden to compel the inhabitants of territory occupied by it to furnish information about the army of the other belligerent or about its means of defence ”.

However, this provision does not deal with those persons actually giving the information, whether they be members of the occupying forces and authorities, or inhabitants of occupied territory. Committee I held, therefore, that the giving of information as such did not constitute a war crime under existing international law. However, the Committee adopted the principle that a person acting as an informer committed a war crime if by giving information he became a party to a war crime recognised as such in international law, e.g. murder and massacre, torture of civilians, internment of civilians under inhumane conditions, or forced labour of civilians, and other like crimes.

It was held by the Committee that where the giving of information led to the committing of a war crime, such act clearly fell within the notion of complicity in that crime, provided that all the other general conditions which normally constitute complicity were present. Therefore, it was usually considered that the informer must give the information voluntarily and not as a result of involuntary pressure such as duress or necessity, and that he could be presumed to be aware that his action would lead to the committing of a war crime. This rule would particularly apply where information was extracted by means of torture or grave threats.⁽¹⁾

(xiv) WAR CRIMES ARISING FROM ILLEGAL ACTS OF GERMAN COURTS AND TRIBUNALS

Many cases presented to Committee I arose from the conduct of German courts and Nazi special tribunals in occupied territories. The judgments of these courts and their procedure was frequently such as to be contrary to all civilised concepts of justice or international law.

Numerous cases charging various Nazi prosecutors and judges with war crimes arose in Luxembourg, Poland and Czechoslovakia, the “ annexed ” territories of the German Reich. In these areas special courts known as *Standgerichte* and *Sondergerichte* were set up to administer German justice. Such courts were characterised, according to the evidence

(1) See C.248. 6.3.47. *Giving information as a war crime. Statement adopted by the Commission on 5th March, 1947.*

presented to Committee I, by excessive penalties (the *Sondergerichte* was authorised to impose sentences even beyond the official maximum penalty if "sound public feeling" called for it), the fixing of the manner of the execution of the death penalty by administrative officers after sentences had been passed rather than by the court, and by a generally summary procedure which prevented an accused from presenting on his own behalf even a semblance of defence.⁽¹⁾

Committee I recognised that a belligerent occupant under international law had the responsibility of maintaining order in the occupied territory but the Committee never recognised the right of a belligerent occupant to alter and transform the judicial system of the occupied territory, nor the right of a belligerent occupant, as Germany did, to constrain the courts to pronounce their verdicts in the name of the occupant. However, the Committee declined to consider it a war crime in any instance where a German court, however illegal, sitting in occupied territory, had passed sentences not normally considered unjust for the type of offence committed and where it appeared that the accused had had a fair trial. It must be pointed out, however, that these instances, as exemplified by the Committee I cases, were rare. That the Committee took a correct view on this question of the German occupation courts was indicated when a United States military tribunal at Nuremberg passed various sentences on a number of accused occupying high positions in the Nazi judicial system in what was known as the "Justice" case.⁽²⁾

In a Yugoslav case (Commission No. 956) members of the Italian Military Court in Cetinje were charged with having passed death sentences on captured officers and men of the National Liberation Army of Yugoslavia.⁽³⁾ The evidence showed that these officers and men had fought in accordance with the provisions of the Hague Regulations and before the country was occupied, and that there was no justification for their being sentenced. Accordingly the Committee voted to list the accused on List "A".

Accused were also listed in another Yugoslav case (Commission No. 940) in which it was alleged that a Special Court in Sibenik had held persons guilty merely because they belonged to a certain political party before the war or were, at the time of trial, members of a national liberation organisation. The facts indicated that sentences were even passed because those before the court failed to give a Fascist salute during trial. Further evidence showed that young girls were condemned for belonging to a subversive organisation on the mere evidence that they all wore the same type of shoes.

Similar French cases arose out of the failure of the Nazis to recognise the existence of the French Army of Resistance (F.F.I.). In one of the earlier French cases (Commission No. 624) the Committee placed upon its list members of the German Courts Martial who were charged with sentencing to death members of the F.F.I. captured after "D" Day.

(1) See I/99. 2.12.47. *Information on the "Standgerichte" in occupied Poland. Letter from the Polish representative.*

(2) For a brief discussion of this case and others held before the "Subsequent Proceedings" Courts see Chapter XI Section D (i) 2.

(3) See III/32. 20.3.46. *Yugoslav cases Nos. 1323 and 1426 (Crimes of Italian Judges).*

Another problem, arising with respect to accused members of various German special courts, was that involving those courts which sentenced to death deserters from the German army, who as nationals of an occupied country were forced and impressed into the German armed services. These cases largely arose out of death sentences passed upon inhabitants of Alsace Lorraine and Luxembourg. In one of the early cases of this nature filed by Luxembourg (Commission No. 991) a German Summary Court Judge was charged with sentencing to death 21 Luxembourg inhabitants for protesting against the introduction of compulsory military service with the German army. The accused was placed on List "A" by the Committee.

In the Alsatian deserters case filed by France, it appeared that the Germans compulsorily enlisted the inhabitants of Alsace Lorraine into the German army under the theory that Alsace Lorraine had been, after its occupation in 1940, formally annexed to the German Reich. The Commission, after studying the matter, held that there existed no Reich law incorporating Alsace Lorraine in the German Reich nor any general conferment of German nationality on the inhabitants of this territory. Moreover, the annexation by one belligerent of territory belonging to another is illegal if it takes place while hostilities are still in progress. It had been argued that the German military judges in sentencing the Alsatian deserters had done so in properly conducted trials, but the Commission ruled that such death sentences were passed in the course of upholding a flagrant violation of international law. If the judges knew the Alsations to be of that nationality they had caused the alleged deserters to die without justification and were therefore *prima facie* guilty of committing a war crime. In any event it appeared that the judges had passed more severe sentences on Alsatian deserters than on deserters of German nationality, and that in itself constituted a war crime.⁽¹⁾

An interesting development arose in connection with the last Luxembourg case of this nature (Commission No. 6829) when one Backa, a German Wachtmeister of the Gendarmerie in Luxembourg, was charged with hunting down and killing five Luxembourg deserters from the German army. It appeared that these deserters were killed while resisting capture. It was the opinion of the Committee that compulsory enlistment being illegal, even those responsible for hunting down the alleged Luxembourg deserters could be listed for war crimes. It was decided, however, that in the case of the accused Backa, his responsibility was not great enough to warrant charging him as a war criminal for acts which he, as a low ranking member of the Police, committed in the normal course of his duties.

In another French case (Commission No. 1350) members of a German Supreme Military Tribunal were charged with illegally sentencing hundreds of Frenchmen to death. Evidence was presented to show that the accused Frenchmen were not permitted to call their own witnesses and that their defence counsel had informed the accused Frenchmen that they could

(1) See III/41 of 10.5.46. and C.202. 30.5.46. *Report on the question of the criminality of German officers who sentenced to death as alleged deserters French Nationals from Alsace Lorraine.*

not effectively assist them without running the gravest personal risk to themselves. This case depended not upon the question of whether or not the German court had the right to try the accused Frenchmen, but whether or not the accused were accorded a fair trial under normal civilised practices of justice. The Committee decided to list the members of the court as war criminals, and thus laid down a precedent followed in other cases of a similar nature in which it appeared to the Committee that elementary practices of justice had been ignored by German courts.

(xv) DESTRUCTION OF POLISH FORESTS AS A WAR CRIME

During the final months of its existence the Committee was asked in a Polish case (Commission No. 7150) to determine whether ten Germans, all of whom had been heads of various Departments in the Forestry Administration in Poland during the German occupation (1939-1944), could be listed as war criminals on a charge of pillaging Polish public property. It was alleged that the accused in their official capacities caused the wholesale cutting of Polish timber to an extent far in excess of what was necessary to preserve the timber resources of the country, with a loss to the Polish nation of the sum of 6,525,000,000 *zloty*. It was pointed out that the Germans, who had been among the first as a nation to foster scientific forestry, had entered Poland and wilfully felled the Polish forests without the least regard to the basic principles of forestry. The Polish representative presented a copy of a circular signed by Goering under date of 25th January, 1940, in which were laid down principles for a policy of ruthless exploitation of Polish forestry. It was decided by the Committee that *prima facie* existence of a war crime had been shown and nine of the officials charged were listed as accused war criminals.

(xvi) OTHER LEGAL PROBLEMS

Apart from those mentioned above, the following are examples of questions of substantive law which Committee I and the Commission had to examine and decide over and over again, when dealing with particular charges brought by the National Offices:

The treatment of quislings and traitors; the responsibility for certain legal enactments; questions as to forced labour of civilians; misuse of flags of truce; pecuniary reprisals imposed on the civilian population; acts of persecution committed during the war by Italian authorities against Italian nationals of Yugoslav race; the legal status of guerilla fighters and partisans; the responsibility of commanders for offences committed by their subordinates and of administrators of occupied territory; the responsibility of persons holding key positions; racial discrimination in food allocation by the occupation authorities; employment of prisoners of war on unauthorised work; the interpretation of the detailed provisions of the 1929 Prisoners of War Convention; the compulsory enlistment of the inhabitants of occupied territory in the armed forces of the occupant; the seizure of means of transport by an occupying force; responsibility for unjustified imprisonment; the responsibility of the commander of an Italian submarine who torpedoed a French merchant vessel on sight after the conclusion

of the French-Italian armistice of 1940; the implications of the war crime of "usurpation of sovereignty", and many other questions.

Committee I, like the United Nations War Crimes Commission itself, was frequently in its decisions and work engaged in an undeveloped branch of international law. Concepts of the laws of war undoubtedly have seen a period of the most intensive change during the Commission's existence. Whether the Commission made a significant contribution to the cause of international justice will, like the Allied trials of war criminals, depend upon the verdict of History.

APPENDIX I

PERSONNEL OF THE UNITED NATIONS WAR CRIMES COMMISSION.

CHAIRMEN

Sir Cecil J. B. HURST, G.C.M.G.

Entered Foreign Office as Assistant Legal Adviser, 1902. Legal Adviser to the Foreign Office, 1918-1929. Elected as Judge of the Permanent Court of International Justice, 1929 (President, 1934-1936). British Member of the Permanent Court of Arbitration, 1929. LL.D. Cambridge, Edinburgh. British representative on the U.N.W.C.C. October, 1943. Elected by the U.N.W.C.C. as its Chairman in January, 1944. Member of Committee I. Retired in January, 1945, on medical advice owing to ill health.

The Right Honourable Lord WRIGHT of Durley, G.C.M.G., P.C., LL.D.

B.A., 1896. M.A., 1900. Fellow of Trinity College, 1899-1905. Called to Bar, Inner Temple, 1900. K.C., 1917. Bencher of the Inner Temple, 1923. Treasurer 1946. A Judge of the High Court of Justice, King's Bench Division, 1925-1932. Master of the Rolls, 1935-1937. Chairman of the Law Revision Committee. Hon. LL.D. Cambridge, Birmingham, London and Toronto. A Lord of Appeal in Ordinary, 1932-1935; and since 1937. Deputy High Steward of Cambridge University. Hon. Fellow of Trinity College. G.C.M.G. 1948. Australian representative, 1944, on the U.N.W.C.C. and Chairman of the U.N.W.C.C. from January, 1945. *Publications*: Legal Essays and Addresses.

AUSTRALIA

The Right Honourable Lord ATKIN

Barrister, Grays Inn, 1891; K.C., 1906; Judge of the High Court, 1913; Justice of Appeal, 1919. Representative of Australia on the U.N.W.C.C., October 1943 until his death in 1944.

Flying Officer Geoffrey Stokes BRIDGLAND

Department of External Affairs, 1939. Assistant Official Secretary, Office of Australian High Commissioner in Canada, 1940-1943. Served in Royal Australian Air Force, 1944-1945. Assistant External Affairs Officer, London, 1945-1947. Deputy Australian representative with the U.N.W.C.C. 1945-1947. Member of Committees I, II, Finance and Far Eastern.

Peter R. HEYDON, B.A., LL.B.

Barrister, 1936. Appointed Department of External Affairs, 1936. Private Secretary to the Minister, 1936-1937. Second Secretary, Australian Legation Washington, 1940-1942; Moscow, 1943-1944. Department of External Affairs, Canberra (First Secretary, 1945-1947; Counsellor, 1947). External Affairs Officer, London from July, 1947. Deputy Australian representative on the U.N.W.C.C.

Honourable Alan James MANSFIELD

Justice of the Queensland Supreme Court, 1940. Deputy Australian representative with the U.N.W.C.C. from December, 1945, to January, 1946; member of Committee I. Appointed associate prosecutor at the International Military Tribunal for the trial of the Japanese Major War Criminals in Tokyo.

Major John Egerton OLDHAM, LL.B.

Admitted to practise as a solicitor, 1929. Department of External Affairs, Canberra, 1937. Assistant External Officer, London, 1939-1945. Deputy Australian representative with the U.N.W.C.C. 1944-October, 1945. Member of Committees I and II. Left on appointment as Counsellor. Australian Embassy, Washington.

Lord WRIGHT

See under CHAIRMEN.

BELGIUM

Dr. Marcel de BAER

Called to Antwerp Bar, 1921. Judge, Antwerp Bar, 1933-1935. Justice at the Court of Appeal, Brussels, 1939-1946. Chairman of the London International Assembly's Commissions concerned with the punishment of war criminals, and of the Cambridge International Commission's sub-committee dealing with crimes against international public order. Belgian representative on the U.N.W.C.C. from 1943. Chairman of Committee I, 1944-1947 and member of the Executive and Finance Committees.

Miss Elizabeth M. GOOLD-ADAMS, M.A.

Deputy representative of Belgium 1947-1948. Assistant to the editor of the History of the U.N.W.C.C. and finally editor.

CANADA

The Right Honourable Vincent MASSEY

Canadian Minister to the United States, 1926-1930. Privy Councillor, 1941. High Commissioner for Canada in the United Kingdom, 1935-1946. Canadian representative on the U.N.W.C.C., 1945. Member of the Far Eastern Committee.

Mr. Norman A. ROBERTSON

Under Secretary for State for External Affairs of Canada, 1941-1946. High Commissioner for Canada in the United Kingdom, 1946. Canadian representative on the U.N.W.C.C., 1947.

CHINA

His Excellency Dr. F. T. CHENG, LL.D.

Called to the Bar, Middle Temple, 1913. LL.D. (London), 1915. Judge of the Supreme Court; Vice-Minister of Justice and acting Minister of Justice, 1931-1934. Judge of the Permanent Court of International Justice, 1936-1945. Chinese Ambassador in London, 1946. Chinese representative on the U.N.W.C.C. 1946-1948.

Dr. Seymour C. Y. CHENG, B.A., M.A., Ph.D.

Senior member of the Treaty Commission, 1932-1935. Special Commissioner of Foreign Affairs for Kiangsi and Anhui provinces, 1935-1936. Member of the Treaty Commission, 1936-1937. Senior Technical Counsellor 1937-1945. Director of the War Crimes Translation and Compilation Department. Counsellor of the Embassy, London, 1947. Deputy representative on the U.N.W.C.C., 1947.

His Excellency Dr. Wellington Koo, M.A., Ph.D.

Minister for Foreign Affairs, Peking, 1922-1924. Prime Minister and Minister for Foreign Affairs, 1926-1927. Ambassador in London, 1941-1946. Principle Chinese Delegate to the San Francisco Conference and to the Preparatory Commission and First Assembly of the United Nations. Chinese representative on the U.N.W.C.C. 1943-1946. Member of Committees II, III, Far Eastern and Executive Committees.

Dr. Y. L. LIANG, LL.D.

Chinese legal expert on most international conferences. Deputy representative of China, 1944. Member of Committee III. Subsequently appointed Director of the Division of the Development and Codification of International Law of the United Nations Organisation.

CZECHOSLOVAKIA

General Dr. Bohuslav EČER, *Minister Extraordinary and Plenipotentiary*

Called to the Bar, in Brno. Deputy Lord Mayor of Brno, 1924. Escaped from Czechoslovakia, 1939. Legal expert in the Czechoslovak National Council in Paris. Served in the Czechoslovak Ministry of Justice in London, October, 1942. Czechoslovak representative on the U.N.W.C.C. 1943-1945. Czechoslovak delegate to the International Military Tribunal in Nuremberg, 1945. Member of Committees I, II, III, Finance and Executive.

Major Dr. Velen FANDERLIK

Doctor Juris. Deputy Czechoslovak representative on the U.N.W.C.C. May 1945-December, 1946. Member of Committees I and III.

Dr. H. Mayr-HARTING

Dr. Juris, Prague, 1930. Assistant to Czechoslovak War Crimes Commissioner, 1944-1945. Deputy War Crimes Commissioner, 1945-1946. Joined the Secretariat of the U.N.W.C.C. as a legal officer, March, 1947. Acting Chairman of Committee III.

Dr. L. NEUMANN

Solicitor in Bratislava and Prague. Employed during the war in the Czechoslovak Ministry of Social Welfare in London. Czechoslovak representative on the U.N.W.C.C. January to September, 1947. Member of Committees I and III.

Dr. E. ZEMAN

Doctor Juris, Prague, 1937. Representative of Czechoslovakia on the U.N.W.C.C. September, 1947. Member of Committee I.

DENMARK**Professor Stephan HURWITZ, Dr. jur., R.D.**

Barrister, 1929. Professor of the University of Copenhagen, 1935. Representative of Denmark on the U.N.W.C.C. 1945. Member of Committees I and III.

Dr. Erik SCHRAM-NIELSEN, Ph.D., R.D.

Cand. jur., 1935. Danish Foreign Service, 1936. Secretary of Danish Embassy in London. Deputy representative of Denmark on the U.N.W.C.C. 1945. Member of Committee III and Legal Publications Committee.

FRANCE**Professor René CASSIN**

Professor of the Faculty of Law at Paris. Chairman of the Commission on Legislation of the Advisory Assembly in Algiers, 1944; and of the Legal Committee of the French Provisional Government, 1943-1945. Member of the United Nations Commission on the Rights of Man, 1946-1947. French representative on the U.N.W.C.C., 1943-1945. Member of Committees II and III.

Professor André GROS

Assistant Law Faculty Paris. Seconded to the Ministry of Foreign Affairs, 1939. Legal Counsellor to the French Embassy in London, 1945. Legal Adviser to the French Delegation to the Council of Foreign Ministers and the Peace Conference, Paris, 1946. Legal Adviser to the Ministry of Foreign Affairs, 1947. French representative on the U.N.W.C.C., 1945. Member of Committee II and Far Eastern and Documents Committees.

M. Pierre MAILLARD

Ancien élève de l'Ecole Normale Supérieure. Agrégé to the University of Paris. Appointed to the Quai d'Orsay, 1942. Second Secretary to the French Embassy in London, 1946. Deputy French representative on the U.N.W.C.C., 1946-1948. Member of Committee III.

Mademoiselle Claude CAPIOMONT

Served with the French Red Cross, 1941-1944. Civil Affairs Headquarters, 1944-1945. "CROWCASS" 1945. Deputy for the French representative with Committee I, 1946-1948.

GREECE**Monsieur STAVROPOULOS**

Greek diplomat. Represented Greece at the constituent meeting of the U.N.W.C.C. on 20.10.43, and thereafter as Greek War Crimes Commissioner till 1946 when he left England to take up an appointment as a Legal Officer in the Secretariat of the United Nations Organisation. Member of Committee III.

Monsieur A. DIMITSAS

Doctor Juris. Bachelor of Political and Economic Science. Judge of the Supreme Court at Athens. Replaced Monsieur Stavropoulos on the U.N.W.C.C. in October, 1946. Member of Committee I.

INDIA**Sir Torrick AMEER ALI**

Called to the Bar, Inner Temple. Puisne Judge of the High Court, Calcutta, 1931. Acting Chief Justice, 1944. Adviser to Secretary of State for India. Represented India on the U.N.W.C.C. in 1945 and was a member of Committee III.

Sir David B. MEEK

Indian Trade Commissioner in London. Formerly Director General of Commercial Intelligence in India. Government of India delegate to International Economic Conference. Representative of India on the U.N.W.C.C. in 1944-1945.

Sir Samuel RUNGANADAHN

Vice-Chancellor Madras University, 1937-1940. High Commissioner for India, 1943. Represented India on the U.N.W.C.C. in 1944. Member of Committee II.

Mr. DUTT

Secretary to the High Commissioner for India. Deputy representative of India on the U.N.W.C.C., 1945-1948. Member of the Finance Committee.

LUXEMBOURG**M. René BLUM**

Doctor of Laws. Luxembourg Minister of Justice, 1937-1939. Represented Luxembourg on the U.N.W.C.C. 1944-1945.

M. Victor BODSON

Doctor of Laws. Luxembourg Minister of Justice, 1940-1946. Represented Luxembourg on the U.N.W.C.C. 1944.

M. Andrew Joseph CLASEN

Consul General and Chargé d'Affaires in Great Britain, 1941. Minister Plenipotentiary, 1944. Luxembourg representative on the U.N.W.C.C. 1945-1948.

NETHERLANDS**Dr. J. M. De MOOR**

Judge in the Court at Rotterdam. During the war was President of the Netherlands Maritime High Court in London and of the Netherlands Navigation Council. Netherlands representative on the U.N.W.C.C. October, 1943 until his death in May, 1945. Member of Committees I and II.

Commander Dr. M. W. MOUTON

Legal adviser to the Netherlands Prime Minister, 1942-1945. Netherlands representative on the U.N.W.C.C., 1945-1948. Member of Committees II, III and Far Eastern Committee. Appointed to Court of Cassation in Holland in 1947.

NEW ZEALAND**Mr. C. B. BURDEKIN, O.B.E., M.S.M.**

Entered New Zealand Government Service, 1902. Served in the New Zealand Army, 1914-1919. Appointed to Office of the High Commissioner for New Zealand in London, 1920. New Zealand representative on the U.N.W.C.C. from January, 1944 till June, 1947.

NORWAY

His Excellency Erik COLBAN

Graduated in Law, University of Oslo, 1899. Entered Foreign Service in Norway, 1903. Consul General at Rio de Janeiro, 1911-1916. Director in the League of Nations Secretariat 1919-1930. Norwegian Minister in Paris, 1930; in Brussels, 1930; in Luxembourg, 1931; in London, 1933 with rank of Ambassador. Ambassador in London, 1942-1946. Delegate to the Preparatory Commission of the United Nations, 1945. Norwegian representative on the U.N.W.C.C. from October, 1943-January, 1945. Member of Committees II and III.

Major Finn PALMSTRØM

Graduated in Law at Oslo University, 1921. Counsel for Defence with the Norwegian Military Court in London, 1942-1945. Head of the Norwegian National Office, 1944-1946. Deputy Norwegian representative on the U.N.W.C.C. March 1946-July, 1946, after M. Wold's return to Norway.

Mr. Jacob Aars RYNNING

Graduated in Law at Oslo University, 1931. Appointed Deputy Judge, 1933. Secretary to the Norwegian Ministry of Justice and Police, 1936-1945. Attached to the Norwegian delegation to the United Maritime Authority in London, 1945-1946. Attached to the Norwegian Shipping and Trade Mission since May, 1946. Appointed head of the Norwegian National Office and deputy representative on the U.N.W.C.C., September 1946. Member of Committees I and III and Legal Publications Committee.

His Excellency Terje WOLD

Graduated in Law at Oslo University, 1921. Judge of the Court of Appeal, 1936. Judge of the Supreme Court, 1945. Minister of Justice, 1939-1945. Chairman of the Foreign Affairs Committee. Norwegian representative on the U.N.W.C.C. from July 1945-1948. Member of Committee III.

POLAND

Dr. Tadeusz CYPRIAN

Judge of the Criminal Court of Appeal in Poznan, 1933. State Prosecutor of Supreme Court, 1938. Acting Chief Prosecutor for War Crimes, 1946. Polish representative at the Nuremberg Trials. Deputy representative of Poland on the U.N.W.C.C. October 1943. Representative April, 1944-1946. Member of Committee III.

Dr. Stephan GLASER

Professor of Criminal Law at University of Wilno. Professor of Criminal Law, Faculty of Polish Law, Oxford University, 1940-1945. Polish Minister in Brussels. Professor of International Criminal Law at Brussels and Liège Universities. Polish representative on the U.N.W.C.C. from October, 1943 to April, 1944. Member of Committee III.

Colonel Dr. Marian MUSZKAT

Called to the Bar, 1936. Military Judge, 1943. Vice-President of Supreme Military Court, 1944-1946. Chief of the Polish War Crimes Commission. Polish representative on the U.N.W.C.C. February, 1947. Member of Committee III.

Dr. Mieczyslaw SZERER

Doctor Juris of Cracow University. Member of Warsaw Bar. Judge of the Polish Supreme Court, 1946. Polish representative on the U.N.W.C.C. September, 1945 till December, 1946. Member of Committee III.

UNITED KINGDOM

The Rt. Honourable Sir Robert Leslie CRAIGIE, G.C.M.G., C.B., P.C.
Entered the Foreign Office, 1907. Acting High Commissioner in Sofia, 1920. Chargé d'Affaires in Washington, 1921. Assistant Under Secretary of State in the Foreign Office, 1934-1937. K.C.M.G., 1936. Ambassador to Japan, 1937. Privy Councillor 1937. G.C.M.G., 1941. Represented the United Kingdom on the U.N.W.C.C., in succession to the late Lord Finlay, September 1945-March 1948. Chairman of Finance Committee. Joint Chairman and afterwards Chairman of Committee I. Chairman of Committee III. Chairman of Committee for the Report to the United Nations on Human Rights.

Sir Cecil HURST
See under CHAIRMEN.

Viscount FINLAY of Nairne, G.B.E.
Appointed Judge of the High Court, 1942. Representative of the United Kingdom on the U.N.W.C.C., in succession to Sir Cecil Hurst, January 1945. Member of Committee I. Chairman of Finance Committee.

The Lord SCHUSTER of Cerne, G.C.B., K.C.B., C.V.O., K.C.
Called to the Bar, 1895. Clerk of the Crown in Chancery and Permanent Secretary to the Lord Chancellor, 1915-1941. Additional United Kingdom representative on the U.N.W.C.C., September to December, 1944. Member of Committee I.

UNITED STATES OF AMERICA

Colonel Joseph V. HODGSON
A.B., LL.B., Practising attorney. Admitted to bar of Hawaii, 1926. Attorney General, Hawaii, 1938-1942. Judge Advocate General's Department, Army of the United States, 1942. Deputy United States Commissioner on the U.N.W.C.C., July, 1944. Commissioner, 1945. Member of Committees I, II and III; and Finance and Far Eastern Committees. Resigned on return to the United States in May, 1946.

Mr. Earl W. KINTNER
A.B., J.D., Practising attorney. Admitted to bar of Indiana, 1938. Admitted to bar of U.S. Supreme Court, 1945. Municipal legal adviser, 1939-1942. Prosecuting attorney, 1943-1944. Re-elected, in absentia, 1945-1948. Entered U.S. Navy, 1944. Executive officer Navy division, U.S. War Crimes Office, 1945. Legal officer of Department of State, 1946. Deputy U.S. Commissioner on U.N.W.C.C., December, 1945-March, 1948. Member of Committee I and III. Chairman of Legal Publications Committee and joint Chairman, from September, 1947-January, 1948, of Committee I. Editor of the History of the Commission.

The Honourable Herbert C. PELL
Student at Harvard and Columbia Universities. Member of Congress, 1919-1921. Minister in Portugal, 1937. Appointed Minister in Hungary, 1941. United States representative on the U.N.W.C.C., 1943-1945. Member of Committees I, II, III, Far Eastern and Finance.

Dr. Lawrence PREUSS
Instructor University of Michigan. Legal Officer of Department of State. Member of Committee III in 1944. Assisted in drafting the Convention for an International War Crimes Court. Left the Commission on return to the United States in April, 1944.

Colonel Robert M. SPRINGER
B.S. (West Point), LL.B., LL.M. Admitted to the bar of California, 1934. Commissioned United States Army, 1918. Judge Advocate General's Department, 1935. Assistant Judge Advocate General. War Department, 1942. Deputy Judge Advocate, European Theatre, 1945. Legion of Merit, 1945. Appointed United States Commissioner on the U.N.W.C.C., July, 1946 till March, 1948. Member Committees I, III and Finance.

Captain John WOLFF

LL.M., J.D. (Heidelberg). Admitted to bar of New York, 1940. Attorney in U.S. Department of Justice, 1941-1942. Deputy United States Commissioner on the U.N.W.C.C., November, 1944. Member and co-deputy chairman of Committee I. Resigned on return to the United States in May, 1946.

YUGOSLAVIA

Mr. Vladimir MILANOVIC

Yugoslav Minister in Sofia till 1941. Came to England in 1941. Represented Yugoslavia on the U.N.W.C.C. 1944.

Dr. Veljko MILENKOVIC

Entered Yugoslav Ministry for Foreign Affairs, 1928. First Secretary and later Counsellor to the Yugoslav Embassy in London, 1938. Appointed Yugoslav representative on the U.N.W.C.C., May 1947.

M. Milivoje ZIMONJIC

Appointed Judge, 1938. Secretary to the Yugoslav Embassy in London, 1947. Assistant to the Yugoslav representative on the U.N.W.C.C., 1947. Member of Committee III.

Dr. Radomir ZIVKOVIC

Professor Agrégé of law in the University of Belgrade, 1940. Yugoslav representative on the U.N.W.C.C., September, 1944. Terminated this appointment in May, 1947, and joined the legal secretariat of the Commission as a legal adviser. Member of Committees II, III and Executive.

SECRETARIAT

Colonel G. A. LEDINGHAM, D.S.O., M.C. (British)

Secretary General, November, 1945-March, 1948.

Professor H. MCKINNON WOOD (British)

Former Director of the League of Nations Legal Section. Secretary General U.N.W.C.C., October, 1944-September, 1945.

G. A. BRAND, LL.B. London (British)

Appointed a legal officer of the U.N.W.C.C., June, 1946. Appointed Secretary to Legal Publications Committee, July, 1947. Editor and co-author of *Law Reports of Trials of War Criminals*.

Dr. J. LITAWSKI (Polish)

Dr. Juris, Cracow University, 1929. Director of the Polish War Crimes Office, 1943-1945. Appointed legal officer of the U.N.W.C.C., May, 1945. Secretary to Committee I. Succeeded Dr. Schwelb as senior legal officer to the Commission, July, 1947.

E. H. LYMAN (United States)

Chief Executive Officer of the U.N.W.C.C., June, 1945. Resigned in November, 1945 on return to the United States of America.

Dr. MAYR-HARTING

See under CZECHOSLOVAKIA.

Dr. Egon SCHWELB (Czechoslovak)

Dr. Juris, Prague University. Appointed senior legal officer to the U.N.W.C.C., March, 1945. Secretary to the Legal Committee and Legal Publications Committee. Resigned in July, 1947 in order to take up an appointment in the Secretariat of the United Nations as Assistant Director of the Division of Human Rights.

Lieutenant-Colonel H. H. WADE (British)

Late Royal Artillery and General Staff. Brevet Lieutenant-Colonel, 1918. Official of the League of Nations and World Court, 1920-1937. Appointed Research Officer of the U.N.W.C.C., May, 1944.

Dr. R. ZIVKOVIC

See under YUGOSLAVIA.

APPENDIX II

WAR CRIMES CONFERENCE HELD BY THE UNITED NATIONS WAR CRIMES COMMISSION IN CONJUNCTION WITH THE NATIONAL WAR CRIMES OFFICES

31st May, 1st and 2nd June, 1945

Chairman: The Rt. Hon. LORD WRIGHT OF DURLEY, P.C., LL.D.

	<i>Representing the Commission</i>	<i>Representing the National Offices</i>
UNITED STATES OF AMERICA	Col. J. V. HODGSON, JAGD., AUS. Capt. J. WOLFF, JAGD., AUS.	Capt. Frank B. GARY, USNR. Capt. James R. ROBIN- SON, USNR. Col. Howard A. BRUND- AGE, JAGD, AUS. Col. Abe McGregor GOFF, JAGD, AUS.
AUSTRALIA	Lt.-Col. J. OLDHAM	Lt.-Col. J. OLDHAM F/O. G. S. BRIDGLAND
BELGIUM	M. de BAER M. Rene GOLSTEIN	M. A. DELFOSSE M. A. C. WAUTERS
CANADA	M. Andrew BELL	Lt.-Col. B. J. S. MAC- DONALD
CHINA	H. E. Mr. WUNSZ KING Dr. D. Y. DAO	Dr. WANG Hua-Cheng Mr. YANG Yun-Chu
CZECHOSLOVAKIA	Dr. H. MAYR-HARTING	Dr. S. JANIS
FRANCE	Professor CASSIN Professor GROS	Professor PAOLI Ct. MALOY M. MONNERAY
UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND	The Rt. Hon. Viscount FINLAY, G.B.E.	Mr. P. H. B. KENT, O.B.E., M.C. Brigadier SHAPCOTT C.B.E., M.C.
GREECE	M. O. STAVROPOULOS	
INDIA	Sir Torick AMEER ALI	Sir Samuel RUNGAN- ADHAN Mr. S. N. DUTT
LUXEMBOURG	M. Andre CLASEN	Judge HAMMES
NETHERLANDS		Commander M. W. MOUTON Mr. J. VAN DEN BERGH
NEW ZEALAND	Mr. C. B. BURDEKIN	Mr. C. B. BURDEKIN

NORWAY		Major Finn PALMSTROM
POLAND	Dr. T. CYPRIAN	Dr. J. LITAWSKI Dr. M. LACHS
YUGOSLAVIA	Dr. Radomir ZIVKOVIC Dr. Lazar MARCOVITCH	Dr. Dusan NEDELJKOVIC Dr. Milan BARTOS

Also attending:

Brig.-Gen. Adam RICHMOND, Theatre Judge Advocate, Mediterranean Theatre, U.S. Army

Brig.-Gen. Ed. C. BETTS, Theatre Judge Advocate, European Theatre, U.S. Army.

Lt.-Col. Eberhard P. DEUTSCH, Fifteenth Army Group.

Colonel WOODALL, G.1 Division, S.H.A.E.F.

Major J. B. SMITH, Control Commission for Germany.

Mr. Dwight WHITNEY, representing Mr. Justice Jackson.

Major John MONIGAN, representing Mr. Justice Jackson.

APPENDIX III

STATISTICAL REPORT OF CASES LISTED BY COMMITTEE I

Table I

TOTAL NUMBER OF CASES (DOSSIERS) RECEIVED BY THE COMMISSION

The following figures show the total number of cases (dossiers) decided upon by the Commission, irrespective of the nationality of war criminals charged therein and the Governments (members of the Commission) by which they have been submitted.

<i>Year</i>	<i>Cases (Dossiers)</i>
1944	464
1945	1,726
1946	2,512
1947	2,817
1948 (to 31st March)	659
	<hr/>
	8,178

NOTE

1. First cases registered by the Commission were received on 1st February, 1944.
2. All cases fall under two categories: (a) individual cases and (b) collective cases, according to whether they include charges against one or more persons or units, and no distinction between these two categories has been made while arriving at the above figures.
3. The total number of *persons* and *units* actually charged and listed by the Commission (Tables II and VII) is considerably higher than that of *cases* (dossiers) submitted. The following figures show the total number of persons and units listed, irrespective of their nationality.

<i>Year</i>	<i>Persons and Units</i>
1944	762
1945	8,442
1946	12,236
1947	11,822
1948 (to 31st March)	3,548
	<hr/>
	36,810

Table II

TOTAL NUMBER OF PERSONS CHARGED BY THE GOVERNMENTS AND LISTED BY THE COMMISSION

	<i>War</i>		<i>Material</i>	<i>Total</i>
	<i>Criminals</i>	<i>Suspects</i>			Witnesses
Germans	22,409	9,339	2,522	34,270
Japanese*	363	60	17	440
Italians	1,204	69	13	1,286
Albanians	9	29	—	38
Bulgarians	402	20	—	422
Hungarians	62	3	4	69
Roumanians	4	—	—	4
	<u>24,453</u>	<u>9,520</u>	<u>2,556</u>	<u>36,529</u>

NOTE

1. Additional charges brought against persons once charged by the same Government and listed, are not included; these involved 2,156 persons.
2. Persons listed as unknown by name are included in the above figures.
3. In cases where the description of a person charged reads: "XY head of... or his successor or successors at the material time", each case has been counted as involving one person.
In cases where the description of a group of persons charged involves an unspecified number of persons unknown by name and holding similar official positions in a number of unspecified but different places of the same administrative district or region—each group has been counted as a unit (See TABLE VII).

*These figures do not include Japanese listed by the Sub-Commission nor the figures of Japanese listed independently by the American, Australian, British, Dutch and other military authorities in the Far East.

Table III

NUMBER OF PERSONS CHARGED BY THE GOVERNMENTS AND LISTED BY THE COMMISSION

GERMANS

	<i>Total</i>	<i>War</i>		<i>Material</i>
		<i>Criminals</i>	<i>Suspects</i>		Witnesses
Australia*		(See United Kingdom)		
Belgium	4,592	2,471	1,422	699
Canada*	30	22	1	7
China	1	1	—	—
Czechoslovakia	1,543	1,103	428	12
Denmark	159	148	11	—
France	12,546	7,483	4,291	772
Greece	339	310	22	7
India*		(See United Kingdom)		

Table III—continued.

Luxembourg	....	....	90	81	9	—
Netherlands	....	....	2,423	1,343	319	761
New Zealand*	....	....		(See United Kingdom)		
Norway	....	....	209	191	13	5
Poland	....	....	7,805	5,445	2,270	90
United Kingdom	....	....	1,709	1,598	60	51
United States	....	....	828	695	98	35
Yugoslavia	....	....	1,926	1,454	391	81
Commission†	....	....	70	64	4	2
			<u>34,270</u>	<u>22,409</u>	<u>9,339</u>	<u>2,522</u>

*Australian, Indian and New Zealand cases against German war criminals have been submitted through the United Kingdom National Office and have been included in the latter's figures. A number of Canadian cases other than those indicated above have also been submitted through the United Kingdom National Office, and are included in the latter's figures.

†These persons have been listed by the Commission on its own initiative.

Table IV

NUMBER OF PERSONS CHARGED BY THE GOVERNMENTS
AND LISTED BY THE COMMISSION

JAPANESE

	Total	War Criminals	Suspects	Material Witnesses
Australia	94	82	3	9
China*		See Nanking (Chungking) Lists: TABLE XI		
France	3	3	—	—
India		(See United Kingdom)		
New Zealand		(See United Kingdom)		
United Kingdom†	120	84	28	8
United States	223	194	29	—
	<u>440</u>	<u>363</u>	<u>60</u>	<u>17</u>

NOTE

These figures do not include Japanese listed independently by the American, Australian, British, Dutch or other military authorities in the Far East.

*Chinese cases were listed by the Sub-Commission in Nanking (Chungking).

†A number of these cases have been submitted by the United Kingdom on behalf of the Indian and New Zealand National Offices.

Table V

NUMBER OF PERSONS CHARGED BY THE GOVERNMENTS
AND LISTED BY THE COMMISSION

ITALIANS

	<i>Total</i>	<i>War Criminals</i>	<i>Suspects</i>	<i>Material Witnesses</i>
Australia		(See United Kingdom)		
Canada		(See United Kingdom)		
Ethiopia	10	8	2	—
France	85	80	5	—
Greece	191	179	11	1
India		(See United Kingdom)		
New Zealand		(See United Kingdom)		
United Kingdom*	188	170	9	9
United States	3	3	—	—
Yugoslavia	809	764	42	3
	<u>1,286</u>	<u>1,204</u>	<u>69</u>	<u>13</u>

*A number of these cases have been submitted by the United Kingdom on behalf of the Australian, Canadian, Indian and New Zealand National Offices.

Table VI

NUMBER OF PERSONS CHARGED BY THE GOVERNMENTS
AND LISTED BY THE COMMISSION

OTHER NATIONALS

	ALBANIANS			BULGARIANS			HUNGARIANS			ROUMANIANS		
	Total	War Criminals	Suspects Material Witnesses	Total	War Criminals	Suspects Material Witnesses	Total	War Criminals	Suspects Material Witnesses	Total	War Criminals	Suspects Material Witnesses
Czechoslovakia ..							14	14	-	-		
Greece	36	7	29 -	243	227	16 -						
United Kingdom										4	4	- -
Yugoslavia ..	2	2	- -	179	175	4 -	55	48	3	4		
	<u>38</u>	<u>9</u>	<u>29 -</u>	<u>422</u>	<u>402</u>	<u>20 -</u>	<u>69</u>	<u>62</u>	<u>3</u>	<u>4</u>	<u>4</u>	<u>- -</u>

Table VII

TOTAL NUMBER OF UNITS CHARGED BY THE
GOVERNMENTS AND LISTED BY THE COMMISSION

	<i>War Criminals</i>	<i>Suspects</i>	<i>Material Witnesses</i>	<i>Total</i>
Germans	70	184	2	256
Japanese	13	12	—	25
	83	196	2	281

NOTE

1. In cases where the description of a group of persons charged involves an unspecified number of persons unknown by name and holding similar official positions in a number of unspecified but different places of the same administrative district or region—each group has been counted as a unit.
2. The description "Unit" means not only military or para-military units, but also members of civil enemy bodies charged collectively in view of their official position. Thus, for instance, regiments or divisions of the Army would be charged collectively, as would groups or "Sonderkommandos" of the Gestapo and S.D.

Table VIII

NUMBER OF UNITS CHARGED BY THE GOVERNMENTS AND
LISTED BY THE COMMISSION

	GERMAN				JAPANESE			
	Total	War Criminals	Suspects	Material Witnesses	Total	War Criminals	Suspects	Material Witnesses
Australia	(Included Kingdom	in United figure(s)	22	11	11	—	—	—
Belgium	3	1	2	—	—	—	—	—
China	—	—	—	See Nanking Lists	(Chungking) Table XI	—	—	—
Czechoslovakia	224	58	166	—	—	—	—	—
France	23	5	16	2	—	—	—	—
India	(Included Kingdom	in United figure(s)	—	—	—	—	—	—
New Zealand	(Included Kingdom	in United figure(s)	—	—	—	—	—	—
United Kingdom	6	6	—	—	1	1	—	—
United States	—	—	—	—	2	1	1	—
	256	70	184	2	25	13	12	—

NOTE

For explanations see footnotes to TABLE VII.

Table IX

CASES NOT ACCEPTED, ADJOURNED OR WITHDRAWN

	NOT ACCEPTED	ADJOURNED OR WITHDRAWN
Australia	8	—
Belgium	8	11
Czechoslovakia	1	7
Denmark	—	5
France	32	78
Greece	—	24
Luxembourg	2	19
Netherlands	7	22
Poland	2	26
United Kingdom	76	19
United States	5	—
Yugoslavia	7	95
	<hr/> 148	<hr/> 306

NOTE

1. The above figures do not include cases which have been rejected or adjourned only in part, i.e. cases where only charges against some persons or units charged collectively in a case have been for some reason considered as not sufficiently substantiated.
2. Cases indicated as "Not Accepted" have been rejected because Committee I was not satisfied that there was sufficient evidence to justify a prosecution of persons or units charged therein. To this category belong also cases which, in the opinion of Committee I, did not constitute a *prima facie* case of a war crime, or even a war crime at all.

Table X

LISTS OF
GERMAN WAR CRIMINALS HOLDING KEY POSITIONS

	<i>Number of persons listed</i>
List No. 7	353
List No. 9	209
	<hr/> 562

NOTE

Persons included in the above Lists were listed by the Commission on its own initiative. About 250 of these have subsequently been charged by individual Governments.

Table XI

**NANKING (CHUNGKING) SUB-COMMISSION'S LISTS
OF JAPANESE WAR CRIMINALS**

Total number of War Criminals and Material Witnesses (Sub-Commission's Lists Nos. 1, 2, 5-26)	3,028
Total number of War Criminals holding Key Positions (Sub-Commission's Lists Nos. 3 and 4)	130
	3,158

NOTE

These Lists have been prepared and adopted by the Far Eastern and Pacific Sub-Commission in Nanking (Chungking), and reproduced by the Commission as its Lists Nos. 17-23, 33-37, 46-49, and 68-77.

Table XII

LISTS OF WAR CRIMINALS ISSUED BY THE COMMISSION

<i>Year</i>	<i>Number of Lists Issued</i>
1944 (December)	2
1945....	14
1946....	35
1947....	14
1948 (31st March)	15
	80

NOTE

These figures include 26 Lists prepared by the Sub-Commission (see TABLE XI).

APPENDIX IV

STATISTICS OF WAR CRIMES TRIALS

OFFICIAL RETURNS BY NATIONAL OFFICES

FOR information as to the number of cases tried and the results of trials, the Commission was dependent on the reports furnished to it by the National Offices. At first, regular monthly returns were received only from the United Kingdom and United States offices. Subsequently, these were supplemented, at different times, by reports from other Allied nations.

Data regarding the trials were supplied in various forms by the different Allied Governments. In some cases the returns did not distinguish between Axis war criminals and "collaborators" or "quislings", so that no use could be made of them for comparison. In many of the returns it was not stated whether the judgments had been confirmed or executed; complete information on this point is not yet obtainable. No statistics are available regarding war crimes trials in Russia, the Soviet zone of Germany, or in Hungary, Roumania and Bulgaria.

The information derived from the official returns was circulated to the Governments by the Commission in a monthly progress report, a specimen of which appears hereafter and gives the final position, as far as known, before the winding up of the Commission on 31st March, 1948.

War Crimes Trials in Europe

European war crimes trials may be said to have begun in the summer of 1945; one of the first trials was that of the Italian General Bellomo, who was arraigned before a British court in Italy (28th July, 1945). Six months later, in February, 1946, the returns from Europe showed approximately 93 cases tried, involving 282 accused, and 214 convictions. By October, 1946, these figures had risen to approximately 256 cases, 1,108 accused and 898 convictions.

These results may seem disproportionately small in comparison with the numbers of war criminals listed by the Commission. Swifter progress could not, however, be achieved consistently with the principle of fair trial, according to civilised standards. With respect to the British zone, where two to eight military courts were then functioning concurrently under Army Order No. 81, a debate took place in the House of Lords on 15th October, 1946. Lord Pakenham, Minister in charge of German Affairs, said that, up to that date, the British Military Courts had tried 495 persons; cases were in preparation against 3,913 others, but only 1,000 of the latter were actually in custody. Lord Maugham, who spoke in the same debate, would have wished the trials to be ended in two years, but feared that at this rate they might go on for five years; but—as he admitted—"one cannot hurry a man who wishes to call witnesses or graduate the speeches of defence counsel." Lord Maugham gave his opinion that the system of trials evolved in Germany was admirable and "will be absolutely just so far as human justice can be just."

It will be recalled in this connection that Lord Wright, in his speech in the House of Lords on 20th March, 1945, had indicated that if 10 per cent. of the war criminals were tried, this would be a satisfactory result.

In the British zone war crimes trials were, at first, held at the place where the crimes were committed (Essen, Wupperthal, etc.). Subsequently, the main activity was centred at Hamburg where there were three courts, and at Brunswick where another court was established. Similarly, in the U.S. zone, war crimes trials were at first held at Wiesbaden and other places. In the summer of 1946, a permanent court was established at Dachau where most of the trials (apart from those of higher officials at Nuremberg) were afterwards held. Figures semi-officially released as at 31st March, 1947, showed that up to that date 1,000 persons had been tried at Dachau, of whom 800 were convicted. Shortly before the closing of this court at the end of 1947, the number of defendants up to date

was announced as 1,500. Of these 28 per cent. had been sentenced to death, 57 per cent. to imprisonment, while 15 per cent. were acquitted.

In the French zone, Rastatt was the chief centre for war crimes trials in Germany. Although trials were also held in Strasbourg and other places in French territory.

By March, 1948, the figures for Europe—so far as reported—had risen to approximately 967 cases involving 3,470 accused and resulting in 2,857 convictions.

War Crimes Trials Statistics in the Far East

Regular returns were not at first received from the wide area covered by war crimes trials in the Far East. During his visit to the United States and Japan in the summer of 1946⁽¹⁾ the Chairman was able to do much to ensure the careful tabulation and analysis of trial results in the Pacific.

No regular reports were received from the Chinese Government, but the Far Eastern and Pacific Sub-Commission reported in September, 1947,⁽²⁾ that, up to the end of February, 1947, 36 Japanese war criminals had been sentenced to death, 13 to life imprisonment, 38 to various terms of imprisonment, 45 were acquitted, and 1,128 were still under investigation. The Chinese war crimes courts sat at such places as Nanking, Hangkow, Canton, Mukden, Taiyuan, Peiping, Hsueh, Tsinan, Shanghai, and Formosa.

The Australian Government's returns, forwarded regularly by the Department of External Affairs, kept the Commission informed on trials conducted by that Government in the Pacific areas.

These returns were supplemented from time to time by partial statistics relating to particular areas; thus, on 25th August, 1946, it was stated that, at Singapore, up to that date, 110 cases had been tried involving 317 Japanese defendants; 130 of these had been sentenced to death and 83 executed.

On 7th December, 1946, the Australian Army Minister announced that the War Crimes Court at Rabaul had, by that date, sentenced 214 Japanese to death or imprisonment.

On 29th January, 1947, Mr. Bellenger, British War Minister, stated in the House of Commons that trials were proceeding under British jurisdiction in Singapore, Hongkong, Burma and Borneo. So far, 598 Japanese and Koreans had been tried by these courts. Of this number 221 had received the death sentence, 305 had been sentenced to different terms of imprisonment, and 72 had been acquitted. Of the sentences to imprisonment 41 were for life, nine were for 20 years or more, 99 for ten years or more, 78 for five years or more, and 78 for less than five years.

On 24th March, 1947, *The Times* special correspondent reported the following figures as having been officially released at Tokyo:

Australia: Tried, 788; sentenced to death, 157; acquitted, 223; imprisoned, 408.

Britain: Tried, 701; sentenced to death, 181; acquitted, 70; imprisoned, 450.

Netherlands: Tried, 91; sentenced to death, 45; acquitted, 7; imprisoned, 39.

France: Tried, 45; sentenced to death, 12; acquitted, 4; imprisoned, 29.

United States: Tried, 276; sentenced to death, 86; acquitted, 10; imprisoned, 180.

In reply to a question in Parliament on 21st May, 1947, Mr. Bellenger (War Minister) stated that the progress of war crimes trials by British Military Courts in Singapore, Hongkong, Malaya, Burma and Borneo was being satisfactorily maintained. Up to April 25th, 1947, 688 Japanese and Koreans had been tried. Of these 53 were sentenced to life imprisonment and 235 to death. The latter figure included sentences not yet confirmed but at least 166 death sentences had so far been carried out; 141 accused were now either on trial or were awaiting trial with the cases against them complete, and 1,605 were in custody whose cases

(1) C.211: Letter from Lord Wright to General Green, JAG., Washington, dated 8th July, 1946.

(2) Misc. 109: *Final Report of the Far Eastern and Pacific Sub-Commission of the U.N.W.C.C.*, dated 17th September, 1947.

were under investigation or who were suspects held pending investigation. The latest figures received from the Australian authorities indicated that 769 Japanese had been tried by Australian Military Courts in Singapore, Fort Darwin and Rabaul. Of these 397 had been sentenced to varying terms of imprisonment and 138 to death. In Singapore at the end of April there were five accused still awaiting trial by Australian courts. Forty-one accused had also been tried by United States courts in Japan in cases involving British victims; seven had been sentenced to death and 34 to terms of imprisonment.

UNITED NATIONS WAR CRIMES COMMISSION

PROGRESS REPORT OF WAR CRIMES TRIALS FROM DATA AVAILABLE ON MARCH 1st, 1948

EUROPE: Countries whose reports comprise war criminals only	Cases tried	Accused involved	Death	Imprisonment	Acquitted	Remarks
United States: USFET }	489	1,672	426	990	256	as at 1.3.48.
USMET }						
Britain: BAOR }	274	909	214	437	258	as at 1.3.48.
France: CMF & BTA }	117	427	151	234	42	as at 1.2.48.
Greece:	6	11	3	7	1	as at 1.6.47.
Netherlands:	2	2	2	—	—	as at 1.3.48.
Norway:	74	74	18	48	8	as at 1.3.48.
Poland:	—	296	75	173	48	as at 1.1.48.
Yugoslavia:	5	79	63	16	—	as at 1.5.47.
TOTAL:	969	3,470	952	1,905	613	
EUROPE: Country whose report shows war criminals and collabora- tors combined:						
Czechoslovakia:	—	18,496	362	13,969	4,165	as at 1.11.46.
FAR EAST:						
United States:	202	574	140	380	54	as at 2.5.47.
Britain:	388	1,143	305	718	120	as at 1.3.48.
Australia:	259	769	138	397	234	as at 1.3.48.
Netherlands East Indies:	175	308	102	199	7	as at 1.3.48.
TOTAL:	1,024	2,794	685	1,694	415	

APPENDIX V

SOME NOTEWORTHY WAR CRIMINALS

It is a fact that only a small percentage of the persons listed as war criminals could be put on trial. Nevertheless, the cases enumerated below show that an appreciable number of persons in responsible positions, in different spheres, were brought to justice. The data are taken from official returns or, where none have been forwarded, from Government Controlled radio or Press announcements in the respective countries. In many cases information is not available as to the confirmation or execution of sentences. Judgments of Soviet courts are taken from the Moscow radio; the U.S.S.R. not being a member of the Commission.

The names are grouped under the following headings:

EUROPE

- I. The Major German War Criminals (Nuremberg Trial)
- II. Gauleiters, Governors, Protectors and Leading Officials.
- III. Generals and Senior Officers.
- IV. Industrialists and Financiers.
- V. SS and Gestapo Officials.
- VI. Medical War Criminals.
- VII. Commandants of Concentration Camps; and Concentration Camp Trials.

FAR EAST

- I. Major War Criminals (Tokyo Trial still in progress).
- II. Higher Japanese Officers convicted.

EUROPE

I. THE MAJOR GERMAN WAR CRIMINALS

Tried by the International Military Tribunal, Nuremberg

Herman GÖRING:

Successor-designate to Hitler; President of the Reichstag; Commander of the Air Force; President of the Council of Ministers for Defence of the Reich; Head of Hermann Göring Combine; General of SS.

Tried before I.M.T., Nuremberg, 1945-46. Sentenced to death 1.10.46. Committed suicide 16.10.46.

Joachim RIBBENTROP:

Reich Minister for Foreign Affairs. Member of Secret Cabinet Council; General of SS.

Tried before I.M.T., Nuremberg, 1945-46; sentenced to death 1.10.46. Hanged 16.10.46.

Rudolf HESS:

Deputy to Hitler, and successor designate after Göring. Member of Secret Cabinet Council. General of SS.

Tried before I.M.T., Nuremberg, 1945-46. Sentenced to life imprisonment 1.10.46.

Ernst KALTENBRUNNER:

General of Police; Head of Reich Main Security Office (RSHA); Chief of Security Police and Security Service.

Tried before I.M.T., Nuremberg, 1945-46; sentenced to death 1.10.46; hanged 17.10.46.

Alfred ROSENBERG:

Reich Minister for Occupied Eastern Territories; Commissioner for ideological education; organiser of Einsatzstab Rosenberg (Looting Organisation); Reichsleiter.

Tried before I.M.T., Nuremberg, 1945-46. Sentenced to death 1.10.46. Hanged 16.10.46.

Hans FRANK:

Former Bavarian Minister of Justice; Governor General of Poland; General of SS.

Tried before I.M.T., Nuremberg, 1945-46. Sentenced to death 1.10.46. Hanged 16.10.46.

Martin BORMANN:

Chief of Chancery of the Nazi Party; Member of the War Cabinet; General of SS.

Tried before I.M.T., Nuremberg, 1945-46 *in absentia*; sentenced to death 1.10.46. (Believed dead.)

Wilhelm FRICK:

Reich "Protector" of Bohemia and Moravia; Minister of the Interior; Reichsleiter of the Nazi Party.

Tried before I.M.T., Nuremberg, 1945-46; sentenced to death 1.10.46. Hanged 16.10.46.

Fritz SAUCKEL:

Gauleiter of Thuringia. Plenipotentiary for Man-Power in Germany and Occupied Territories. General of SS.

Tried before I.M.T., Nuremberg, 1945-46. Sentenced to death 1.10.46. Hanged 17.10.46.

Albert SPEER:

Minister for Armaments; Head of Todt organisation; Reichsleiter of Nazi Party.

Tried before I.M.T., Nuremberg, 1945-46. Sentenced to 20 years' imprisonment.

Walter FUNK:

Reich Minister for Economics; President of Reich Bank; member of the War Cabinet.

Tried before I.M.T., Nuremberg, 1945-46. Sentenced to life imprisonment 1.10.46.

Constantin von NEURATH:

Professional diplomat; Reich "Protector" of Bohemia and Moravia; General of SS.

Tried before I.M.T., Nuremberg, 1945-46. Sentenced to 15 years' imprisonment.

Baldur von SCHIRACH:

Reichsleiter of Nazi Party; Youth Leader; Gauleiter of Vienna.

Tried before I.M.T., Nuremberg, 1945-46. Sentenced to 20 years' imprisonment 1.10.46.

- (ii) Diplomatic officials arraigned in Case No. 11 in the "Subsequent Proceedings" which opened at Nuremberg on 6th January, 1948. (Judgment not yet delivered at time of writing).

Ernst von WEIZSAEKER:

Permanent Secretary of the Foreign Office.

Gustav Steengracht von MOYLAND:

Permanent Secretary of the Foreign Office.

Wilhelm KEPPLER:

State Secretary in the Foreign Office.

Ernst BOHLE:

Head of the Ausland Organisation.

Ernst WOERMANN:

Head of Political division of Foreign Office.

Karl RITTER:

Liaison between Foreign Office and High Command.

Edm. VEESMAYER:

German plenipotentiary in Hungary.

Walter SCHELLENBERG:

SS. General; Chief of Intelligence in Himmler's Main Office.

Gottlob BERGER:

SS. General. Liaison officer with occupied East.

Ernil PUHL:

Director of Reichsbank.

Karl RASCHE:

Director of the Dresdner Bank.

Paul PLEIGER:

Coal and Iron magnate.

Hans LAMMERS:

Head of Reich Chancellery.

Wilhelm STUCKART:

State Secretary in Ministry of Interior.

Richard DARRÉ:

Minister for Food and Agriculture.

Otto MEISSNER:

Chief of Presidential Chancellery.

Otto DIETRICH:

State Secretary in Propaganda Ministry.

Lutz SCHWERIN VON KROSIGK:

Minister of Finance.

Paul KOERNER:

Göring's deputy in the Four Years' Plan.

Hans KEHRL:

Chief of Planning Office in the Armaments Ministry.

Otto VON ERDMANNSDORFF:

Deputy to Chief of the Political Division of Foreign Office.

Herbert BACKE:

Former Reich Minister for Agriculture.

Committed suicide while awaiting trial at Nuremberg, 6.7.47.

Kurt DALUEGE:

Oberstgruppenführer SS; Acting Reich Protector of Bohemia 1942-1943.

Tried by the Czechoslovak People's Court at Prague in October, 1946; sentenced to death; hanged 23.10.46.

August EIGRÜBER:

Gauleiter and Reichstatthalter Upper Danube; SS. Gruppenführer.

Tried by a U.S. War Crimes court at Dachau March-May, 1946, for atrocities in Mauthausen camp.

Sentenced to death 11.5.46; hanged 27.5.47.

Karl Hermann FRANK

SS. Obergruppenführer; Senior SS and Police Leader in the Protectorate; virtual ruler of the Protectorate from 1943.

Tried by the Czechoslovak Extraordinary People's Court at Prague in April, 1946; sentenced to death; hanged 22.5.46.

Artur GREISER:

SS. Obergruppenführer; Gauleiter of Wartheland; former President of Danzig Senate.

Tried by the Polish Supreme National Court at Poznan; sentenced to death; hanged at Poznan, 20.7.46.

Otto HELLMUTH:

Former Gauleiter of Main-Franken.

Tried by U.S. court at Dachau for complicity in murders of Allied pilots; sentenced to be hanged.

Friedrich HILDEBRANDT:

Gauleiter in Mecklenburg. SS. Obergruppenführer.

Tried by a United States War Crimes court at Dachau in March-April, 1947, for complicity in murders of U.S. airmen. Sentenced to be hanged 2.4.47.

Siegfried KASCHE:

S.A. Obergruppenführer. Ex-Minister in Croatia.

Tried by a Yugoslav court for complicity in deportations and murders; executed in June, 1947.

Hans Elard LUDIN:

German Minister in Slovakia.

Tried by a Slovak court in December, 1946, and sentenced to be hanged.

Franz NEUHAUSEN:

Former Chief of Administration South East.

Tried by a Yugoslav court and sentenced to 20 years' imprisonment 31.10.47.

Heinrich RAINER:

Gauleiter and Reichstatthalter in Carinthia; Obergruppenführer; Chief of Civil Administration in North-West Yugoslavia. Supreme Commissioner Adriatic Coast.

Tried by a Yugoslav military tribunal at Ljubljana for atrocities and deportations; sentenced to death 20.7.47. and hanged.

Hermann ROEHN:

Deputy Gauleiter for Alsace.

Tried by the French Permanent Military Tribunal at Strasbourg, together with Robert WAGNER (qv.). Sentenced to death 5.5.46. Shot at Strasbourg 14.10.46.

Gustav SIMON:

Gauleiter of Mosel land; Chief of civil administration in Luxembourg.

Charged as a war criminal by Luxembourg; arrested in 1945; committed suicide to avoid trial and punishment.

Josef TERBOVEN:

Gauleiter of Essen; SS. Gruppenführer; Reich Kommissar for occupied Norway.

Charged as a war criminal by Norway. Committed suicide 8.5.45 after the capitulation of Germany to avoid arrest and trial.

Dr. Harald TURNER:

SS. Gruppenführer; chief of the Military Administration in occupied Serbia.

Tried by a Yugoslav war crimes court at Belgrade for atrocities, deportations, mass executions. Sentenced to death; shot 9.3.47.

Robert WAGNER:

Gauleiter and Reichstatthalter of Baden; head of civil administration in Alsace.

Tried by a French war crimes court at Strasbourg 23.4.46. for complicity in murders, conscription of French nationals and other war crimes. Sentenced to death 5.5.46; shot at Strasbourg 14.10.46.

III. GENERALS AND SENIOR OFFICERS**(i) Generals convicted in Case No. 7 (Balkan Generals) in the "Subsequent Proceedings," which closed at Nuremberg on 19th February, 1948.**

General Wilhelm LIST:	..	..	..	..	Life imprisonment
General Lothar RENDULIC:	..	..	..	..	20 years imprisonment
Lt.-General Walter KUNTZE:	..	..	..	..	Life imprisonment
Lt.-General Helmuth FELMY:	..	..	..	..	15 years imprisonment
Lt.-General Hubert LANZ:	..	..	..	..	7 years imprisonment
Lt. General ERNST DEHNER					
Lt.-General Ernst von LEYSER:	..	..	..	..	10 years imprisonment
Lt.-General Wilhelm SPEIDEL:	..	..	..	..	20 years imprisonment

Field Marshal von WEICHS, a defendant, was withdrawn from the trial on account of illness. Lt.-General Franz BOEHME, another defendant, committed suicide 30.5.47.

(ii) Generals arraigned in Case No. 12 (the 13 Generals' trial) in the "Subsequent Proceedings," which opened at Nuremberg on 5th February, 1948. (Still proceeding at time of writing.)

General Wilhelm von LEEB:

General Hugo SPERRLE:

General Georg von KUECHLER:

General Johannes BLASKOWITZ: Committed suicide 5th February, 1948.

General Hermann HOTH:

General Hans REINHARDT:

General Hans von SALMUTH:

General Karl HOLLIDT:

General Karl von ROQUES:

General Hermann REINECKE:

General Walter WARLIMONT:

General Otto WOEHLER:

General Rudolf LEHMANN:

Admiral SCHNIEWIND.

General ANDRAE:

Former Commander-in-Chief in Crete.

Tried by a Greek court at Athens and sentenced to life imprisonment.

General Nicola BELLOMO :

Italian Army.

Tried by a British court at Bari in Italy, for killing escaped British officers, prisoners of war, after recapture; sentenced to death 28.7.45; shot on 11.9.45.

Lieut.-General Friedrich BERNHARDT:

Ex-Commander of the German Second Tank Army.

Sentenced to death by a U.S.S.R. tribunal at Bryansk on 29.12.45, for atrocities in the Bryansk area, and hanged on that day.

General Bruno BRAUER:

Former Governor of Crete.

Tried by a Greek military court at Athens. Accused of being responsible for the deaths of some 3,000 persons in Crete during the German occupation, also for murders and massacres; systematic terrorism, deportations, pillage, wanton destruction and torture and ill-treatment of civilians. Sentenced to death 9.12.46; shot on 20.5.47.

Lieut.-General Karl BURCKHARDT:

Ex-Commander of the Rear of Sixth Army.

Sentenced to death in January, 1946, by a U.S.S.R. tribunal for atrocities committed in the Ukraine, and hanged on the same day.

Major General Peter CRISEMANN:

Former Commander of 26 Panzer Division in Italy.

Tried in April, 1947, by a British War Crimes court at Padua for mass executions of Italian inhabitants; sentenced to ten years' imprisonment.

General DANCKELMANN:

Former Commander-in-chief in Serbia.

Tried by a Yugoslav court at Belgrade, 31.10.47, and sentenced to death.

Major General Karl von DEWITZ KREBS:

Tried by a Russian court at Kishinev in December, 1947, and sentenced to 25 years' imprisonment.

General "Sepp" DIETRICH:

Waffen SS.

Tried by United States court at Dachau May-July, 1946, for murders of civilians and prisoners of war, in the battle of the Ardennes, winter of 1944-45 (the Malmédy massacre), and sentenced to life imprisonment 11.7.46.

Lieut.-General van DITFURT:

Ex-Commandant of Kursk.

Sentenced to death on 3.2.46 by a U.S.S.R. tribunal at Riga for atrocities committed in that district, and hanged on the same day.

General Anton DOSTLER:

Former Commander of the 75th German Army Corps.

Charged with ordering the summary execution of two officers and 13 enlisted men of the U.S. Forces captured by his troops during a military operation.

Tried by a U.S. military court at Caserta, Italy. Found guilty and sentenced to death 12.10.45. Sentence confirmed. Executed 1.12.45.

Kapitanleutnant Heinz ECK, of the German Navy:

Ex-Commander of U-Boat 852.

Tried by a mixed British and Greek war crimes court at Hamburg 17-20.10.45 for killing survivors of the crew of the steamship "Peleus." Found guilty and sentenced to death 20.10.45; sentence confirmed. Executed 23.11.45.

Major General ERMANNSDORF (? ERDMANNSDORF):

Sentenced to death in January, 1946, by a U.S.S.R. tribunal for atrocities committed in Byelorussia; hanged on 6.2.46.

General Nikolaus von FALKENHORST:

Former Commander-in-Chief in Norway.

Tried by Mixed British-Norwegian court at Brunswick for handing over captured members of Commandos to the SS. for execution; sentenced to death 2.8.46 (sentence commuted to 20 years' imprisonment 3.12.46).

General FOEKETHALMY-ZEIDNER:

Former Commander of Fifth Hungarian Army.

Tried by a Yugoslav military court for the Novisad massacres. Sentenced to death 31.10.46; executed 5.11.46.

General Hans FORTNER:

Former Commander of 718th Division.

Tried by a Yugoslav military court at Belgrade as responsible for murders of Yugoslav civilians. Sentenced to death on 16.2.47; hanged on 27.2.47.

General Kurt GALLENKAMP:

Tried by British military court at Wuppertal in March, 1947, for murders of British parachutists (the "Poitiers" case); sentenced to be hanged 25.3.47. Sentence commuted to life imprisonment.

Major General Hans GRAVENSTEIN:

Commander of the 373rd (Tiger) Division. Sentenced to death by a Yugoslav court at Belgrade, 1.4.47.

General Adolf HAMANN (? AMANN):

Ex-Governor of Orel area.

Sentenced to death by a U.S.S.R. tribunal at Bryansk 26.12.46 for atrocities in the Bryansk area; hanged the same day.

General Kurt HERZOG:

Tried by a Russian court at Novgorod in December, 1947, and sentenced to 25 years' imprisonment.

Lieut.-General Hans von HESSLIN:

Sentenced to death by a Yugoslav war crimes court at Ljubljana on 27.7.47.

General JAENECKE:

Tried by a Russian court at Sevastopol 25.11.47 and sentenced to 25 years' imprisonment.

Ex-Marshal Albert KESSELRING:

Tried by a British court at Venice for being concerned in the massacre of 335 Italians in the Ardeatine caves and other war crimes; sentenced to death on 7.5.47. Sentence commuted to life imprisonment 4.7.47.

General Josef KNEBLER:

Former Commander of 118th Division.

Tried by a Yugoslav military court at Belgrade for atrocities against civilian population; sentenced to death on 16.2.47; hanged on 27.2.47.

General Herbert KOESTLIN:

Former Chief of Staff 80th Corps.

Tried by a British military court at Wuppertal, together with General Gallenkamp (q.v.) for murders of British parachutists (the "Poitiers" case); sentenced to life imprisonment 25.3.47 (confirmed 14.5.47).

Brig.-General Fritz KRAEMER:

Waffen SS; Chief of Staff of Sixth Panzer Army; former acting Commander of 12th SS. Division.

Tried by a U.S. war crimes court at Dachau, together with General Sepp DIETRICH (q.v.), for murders of U.S. prisoners of war and civil inhabitants (the Malmédy massacre) in the winter of 1944-45, and sentenced 11.7.46.

General Ludwig KUEBLER:

Tried by a Yugoslav court at Ljubljana, 27.7.47, and sentenced to death.

General KUEPPER:

Ex-Commandant of Saldas.

Sentenced to death on 3.2.46 by a U.S.S.R. tribunal at Riga for atrocities committed in that district; hanged on the same day.

General Alexander von LOEHR:

Former Commander of 12th Army in the Balkans; Commander-in-Chief South-East.

Tried by a Yugoslav military court at Belgrade in February, 1947, as responsible for mass murders of Yugoslav civil inhabitants; sentenced to death 16.2.47; shot 27.2.47.

General Albert LONCAR:

Former Military Governor of Belgrade.

Tried, together with General von Loehr (q.v.) by a Yugoslav military court at Belgrade in February, 1947, for atrocities against the Yugoslav civil population. Sentenced to death on 16.2.47; hanged on 27.2.47.

Lieut.-General Hartwig LUDWIGER:

Ex-commander of the 104th Jaeger Regiment. Sentenced to death by a Yugoslav court at Belgrade, on 1.4.47.

General Eberhard von MACKENSEN:

Tried by British war crimes court in Rome, as responsible for the massacre, by way of reprisals, of over 300 Italian civilians in the Ardeatine Caves, near Rome. Sentenced to death by shooting on 30.11.46. (Sentence commuted to life imprisonment 4.7.47.)

General Kurt MAELZER:

Tried by a U.S. military court at Florence, Italy, and sentenced to 10 years' imprisonment on 14.9.46 (7 years remitted), for parading U.S. prisoners of war through the streets of Rome.

General MAELZER was also tried by a British court and sentenced to death on 30.11.46, together with General von Mackensen (q.v.), for complicity in the Ardeatine Caves massacre. Sentence confirmed, but death penalty commuted to life imprisonment (4.7.47).

Brigadier-General Kurt MEYER:

Former Commander of the 12th SS. Panzer Division.

Tried by a Canadian military court at Aurich for inciting his troops to refuse quarter to Canadian soldiers captured in battle. Sentenced to death 28.12.45 (commuted to life imprisonment 15.1.46.)

Air Marshal Erhard MILCH:

Tried by the U.S. No. II Court at Nuremberg, January-April, 1947, for deportations, enslavements and criminal medical experiments on human beings (Crimes against Humanity); sentenced to life imprisonment 17.4.47.

Karl MOEHLE:

Former Commander of 5th U-Boat Flotilla.

Tried by a British court at Hamburg in October, 1946, accused of ordering U-Boat commanders to kill survivors of torpedoed ships; sentenced to five years' imprisonment 16.10.46.

Lieut.-General DEJON von MOTETON:

Ex-Commandant of Liepaja.

Sentenced to death on 3.2.46 by a U.S.S.R. war crimes tribunal at Riga for atrocities committed in that district; hanged on the same day.

General Friedrich MUELLER:

Former Military Governor of Crete.

Tried by a Greek military court at Athens for massacres of hostages by way of reprisals in Crete; sentenced to death 9.12.46; shot on 20.5.47.

General NEIDHOLT:

Former Commander of 369th Division in the Balkans.

Tried by a Yugoslav military court at Belgrade, together with General Lohr (q.v.), for massacres of Yugoslav civil inhabitants and other atrocities; sentenced to death 16.2.47; hanged 27.2.47.

Major-General Karl von OBERKAMP:

Former Commander of Prinz Eugen Division.

Tried by a Yugoslav military court at Belgrade on 27.3.47 for massacres of civilians. Sentenced to death and executed 1.4.47.

Lieut.-General OCHSNER:

Tried by a Russian court at Bobrinsk, 3.11.47 and sentenced to 25 years' imprisonment.

Major-General PAUL:

Chief of the Rear of the 4th German Army.

Sentenced to death on 3.2.46 by a U.S.S.R. tribunal at Riga for atrocities committed in that district; hanged on the same day.

General Hermann PRIESS:

Commanding 1st Panzer Corps.

Tried by a U.S. war crimes court at Dachau, May-July, 1946, together with General Sepp Dietrich (q.v.), for murders of Belgian civilians and U.S. prisoners of war in the winter of 1944-45 (massacre of Malmédy). Sentenced 11.7.46.

General von RAPPARD:

Ex-Commandant of Veliki Luki.

Sentenced to death on 31.1.46 by a U.S.S.R. tribunal of the Leningrad Area for atrocities committed in the Veliki Luki region; hanged on the same day.

Major-General Heinrich REMLINGER:

Ex-Commandant at Pskov.

Sentenced to death by a U.S.S.R. tribunal at Leningrad for atrocities in that province. Hanged 5.1.46.

Lieut.-General RICHERT:

Tried in January, 1946, by a U.S.S.R. tribunal at Minsk for atrocities committed in Byelorussia; sentenced to death; hanged on 6.2.46.

Hellmuth von RUCKTESCHELL:

Commander of raider "Schiff 21."

Sentenced to 10 years imprisonment (commuted to 7 years) by a British war crimes court in Germany, 21.5.47.

Lieut.-General RUFF:

Ex-Commandant of Riga.

Tried by a U.S.S.R. tribunal at Riga for atrocities committed in that district; sentenced to death on 3.2.46, and hanged on the same day.

Major-General Josef RUPPRECHT:

Tried by a Russian court at Novgorod in December, 1947, and sentenced to 25 years' imprisonment.

General SCHATOW (? SCHATOW):

Tried by a Russian court at Poltava and sentenced to 25 years' imprisonment, 25.11.47.

General August SCHMIDT:

Former Commander of the Waffen SS. Prinz Eugen Division No. 7.

Tried in February, 1947, together with General LOEHR (q.v.) by a Yugoslav military court at Belgrade, for atrocities against the Yugoslav civil population; sentenced to death on 16.2.47, and hanged on 27.2.47.

General August SCHMIDT:

Ex-commandant of Luftgau VI.

Sentenced to life imprisonment by a British military court in November, 1947, in connection with the transmission of orders for the killing of Allied airmen.

General SEEGERS:

Former Commander-in-Chief of Alsace.

Tried by a British military court at Wuppertal in connection with murders of British and French parachutists; sentenced to three years' imprisonment on 11.7.46. Sentence confirmed 4.1.47.

Lieut.-General Max SIMON:

Former Commander of 16 SS Division in Italy.

Tried by a British military court at Padua on six charges of massacres of Italian civilians; sentenced to death 26.6.47.

General Otto von STULPNAGEL:

Ex-Governor of Greater Paris.

Committed suicide in prison in Paris, 6th February, 1948, to avoid trial.

General Ferenc SZOMBATHELY:

Former Hungarian Chief of Staff.

Tried by a Yugoslav military court for the Novi Sad massacres. Sentenced to death 31.10.46; executed 5.11.46.

Major-General von TSCHAMMER und OSTEN:

Sentenced to death in January, 1946, by a U.S.S.R. tribunal at Kiev for atrocities committed in the Ukraine; hanged on the same day.

Major-General WERTHER:

Ex-Commander of the Coastal district.

Sentenced to death on 3.2.46 by a U.S.S.R. tribunal at Riga for atrocities committed in that district; hanged on the same day.

Lieut.-General Hermann WINKLER:

Ex-Commandant of Nikolayev.

Sentenced to death on 17.1.46 by a U.S.S.R. tribunal at Nikolayev for atrocities committed in that region; hanged on the same day.

Major-General K. WOLF.

Tried in March, 1947, by a British military court at Brunswick ("the Blechammer case") for exposing British prisoners of war to air raids; sentenced on 25.3.47 to seven years' imprisonment. (Sentence confirmed 24.5.47.)

IV. LEADING INDUSTRIALISTS AND FINANCIERS

(i) Leading industrialists convicted in Case No. 5 of the "Subsequent Proceedings," held at Nuremberg from 18th March, 1947, to 22nd December, 1947.

Friedrich FLICK, steel magnate: 7 years imprisonment.

Otto STEINBRINCK, steel magnate: 5 years imprisonment.

Bernhard WEISS, steel magnate: 2½ years imprisonment.

(ii) Industrialists arraigned in Case No. 6 (I.G. Farben) in the "Subsequent Proceedings" which opened at Nuremberg on 8th August, 1947. (Still proceeding at time of writing.)

Carl KRAUCH; Hermann SCHMITZ; Georg von SCHNITZLER; Fritz GAJEWSKI; Heinrich HOERLEIN; August von KNIERIEM; Fritz ter MEER; Christian SCHNEIDER; Otto AMBROS; Max BRUEGGEMANN; Ernst BUERGIN; Heinrich BUETEFISCH; Paul HAEBLIGER; Max ILGNER; Friedrich JAEHNE; Hans KUEHNE; Carl LAUTENSCHLAEGER; Wilhelm MANN; Heinrich OSTER; Karl WURSTER, Walter DUERRFELD; Heinrich GATTINEAU; Erich von der HEYDE; Hans KUGLER.

(iii) Industrialists arraigned in Case No. 10 (trial of Krupp Directors) in the "Subsequent Proceedings" which opened at Nuremberg on 8th December, 1947. (Still proceeding at time of writing.)

Alfred KRUPP von BOHLEN und HALBACH; Ewald LOESER; Eduard HOUDREMONT; Erich MUELLER; Friedrich JANSSEN; Karl PFIRSCH; Max IHN; Karl EBERHARDT; Heinrich KORSCHAN; Friedrich von BUELOW; Heinrich LEHMANN; Hans KUPKE.

Bruno TESCH:

Director of Tesch and Stabenow.

Sentenced to death by a British military court at Hamburg, 8.3.46, for supplying poison gas for the murder of internees.

V.SS AND GESTAPO OFFICIALS

(i) High SS officials convicted in Case No. 4 ("W.V.H.A." trial) in the "Subsequent Proceedings" which was concluded at Nuremberg on 3rd November, 1947.

Oswald POHL .. .. .	.. death.
Georg LOERNER .. .. .	.. death.
Franz EIRENSCHMALZ .. .. .	.. death.
Karl SOMER .. .. .	.. death.
August FRANK .. .. .	.. life imprisonment.
Max KIEFER .. .. .	.. life imprisonment.
Hermann POOK .. .. .	.. life imprisonment.
Karl MUMMENTHEY .. .. .	.. life imprisonment.
Heinz FANSLAU .. .. .	.. 25 years imprisonment.
Hans BOBERMIN .. .. .	.. 20 years imprisonment.
Hans LOERNER .. .. .	.. 10 years imprisonment.
Erwin TSCHENTSCHER .. .. .	.. 10 years imprisonment.
Hans HOHBERG .. .. .	.. 10 years imprisonment.
Hans BAIER .. .. .	.. 10 years imprisonment.
Leo VOLK .. .. .	.. 10 years imprisonment.

(ii) SS officials convicted in the Stalag Luft III trial held before a British Military Court at Hamburg, 1st July to 3rd September, 1947.

Emil SCHULZ .. .. .	.. death.
Alfred SCHIMMEL .. .. .	.. death.
Josef GMEINER .. .. .	.. death.
Walter HERBERG .. .. .	.. death.
Otto PREISS .. .. .	.. death.
Heinrich BOSCHERT .. .. .	.. death.
Emil WEIL .. .. .	.. death.
Eduard GEITH .. .. .	.. death.
Hans KAHLER .. .. .	.. death.
Oskar SCHMIDT .. .. .	.. death.
Johann SCHNEIDER .. .. .	.. death.
Johannes POST .. .. .	.. death.
Walter JACOBS .. .. .	.. death.
Erich ZACHARIAS .. .. .	.. death.
Maz WIELEN .. .. .	.. life imprisonment.
Walter BREITHAUPT .. .. .	.. life imprisonment.
Artur DENKMANN .. .. .	.. 10 years imprisonment.
Wilhelm STRUVE .. .. .	.. 10 years imprisonment.

The death sentences, except that on Boschert which was commuted to life imprisonment, were executed in February, 1948.

(iii) Higher SS officials arraigned in Case No. 8 (Resettlement trial) in the "Subsequent Proceedings" which opened at Nuremberg on 1st July, 1947. (Still proceeding at time of writing.)

Ulrich GREIFELT; Rudolf CREUTZ; Konrad MEYER-HEILING; Otto SCHWARZENBERGER; Herbert HUEBNER; Werner LORENZ; Heinz BRUECKNER; Otto HOFMANN; Richard HILDEBRANDT; Fritz SCHWALM; Max SOLLMANN; Gregor EBNER; Guenther TESCH; Inge VIERMETZ.

(iv) Higher SS officials arraigned in Case No. 9 (Einsatzgruppen trial) in the "Subsequent Proceedings" which opened at Nuremberg on 3rd July, 1947. (Still proceeding at time of writing.)

Otto OHLENDORF; Heinz JOST; Erich NAUMANN; Otto RASCH; Erwin SCHULZ; Franz SIX; Paul BLOBEL; Walter BLUME; Martin SANDBERGER; Willy SEIBERT; Ernst BIBERSTEIN; Gustav NOSSKE; Adolf OTT; Emil HAUSSMAN; Lothar FENDLER; Felix RUEHL; Heinz SCHUBERT; Mathias GRAF; Eugen STEIMLE; Werner BRAUNE; Walter HAENSCH; Edvard STRAUCH; Waldemar KLINGELHOEFER. Emil HAUSSMAN committed suicide after being arraigned.

Richard BRUNS, (Kriminal Sekretar) and two others:

Tried by a Norwegian court (Lagmannsraett) for murders and torture, on 20.3.46.

All the defendants were found guilty and sentenced to death by shooting. The sentence was upheld by the Supreme Court of Norway.

DAUME, Police Chief in Warsaw:

Sentenced to death by the Supreme Polish Court, together with Ludwig FISCHER (q.v.) on 3.3.47; hanged at Warsaw 8.3.47.

ECKELEN, Police General SS:

Former SS Chief in the Baltic territory.

Sentenced to death by a U.S.S.R. military court at Riga; hanged 3.2.46.

August FLASCHE:

Police President at Aachen. Oberfuhrer, SS.

Sentenced to 10 years' imprisonment by a British war crimes court in Germany, 16.9.46.

Siegfried FEHMER:

Leading official of Security Police in occupied Norway.

Tried by a Norwegian tribunal at Oslo in June, 1947, for torturing Norwegians under interrogation. Sentenced to death 28.6.47.

FUCHS:

SS General. Gestapo official in Serbia.

Tried with General MEYSSNER (q.v.) by a Yugoslav military court at Belgrade; sentenced to death 22.12.46; executed 24.1.47.

Reinhard GERLACH:

Gestapo Chief of Litija in Slovenia.

Tried in July, 1947, by a Yugoslav military court at Ljubljana, together with RAINER (q.v.) for atrocities against civil inhabitants. Sentenced to death 21.7.47. Hanged.

Richard GLUECKS:

Gruppenfuhrer SS. Head of Amtsgruppe D. in W.V.H.A. Inspector General of concentration camps.

Charged as a war criminal. (Committed suicide after the capitulation of Germany to avoid trial.)

Kurt HANS:

Head of the Criminal Police at Wursburg.

Tried by a U.S. war crimes court at Dachau for complicity in the murders of Allied pilots. Sentenced to be hanged 10.5.47.

HEREF:

Police General SS.

Sentenced to death by a U.S.S.R. military court at Minsk; hanged on 6.2.46.

Friedrich HOLBORN:

Kriminal Kommissar. Chief of Gestapo at Hagen.

Sentenced to death by a British war crimes court in Germany, 17.9.46.

Franz Otto HOLSTEIN, (and 23 members of the SD and the Gestapo of Dijon):

Tried by a Permanent Military French Tribunal at Dijon for complicity in murders and pillage; 22 of the defendants were found guilty; some of them, including HOLSTEIN, were sentenced to death.

Erich ISSELHORST:

Police Chief; Gestapo Chief in Alsace.

Sentenced to death by a British military court at Wuppertal on 11.7.46, handed over to the French for trial on other counts; sentenced to death by a French military court on 17.5.47. (Sentence confirmed 4.1.47)

Karl Hans KLINGE:

Tried by a Norwegian court for torturing Norwegian citizens; sentenced to death 27.2.46.

Helmut KNOCHEN:

Head of the Security Police in France under Carl Oberg.

Tried at Wuppertal on 7.3.47 by a British military court for murders of British parachutists. Sentenced to death by hanging 12.3.47. (Sentence confirmed 13.4.47.)

(KNOCHEN was handed over to the French, after sentence, for trial on other charges; has not yet been put on trial in France (1.7.47).)

Josef MEISINGER:

SS Gestapo Chief in Poland.

Sentenced to death on 3.3.47 by the Supreme Court at Warsaw, together with Ludwig FISCHER; hanged on 8.3.47.

MEYSSNER (MEISSNER):

SS General; Gestapo Chief in Serbia.

Sentenced to death by a Yugoslav military court at Belgrade on 22.12.46; executed 24.1.47.

Bruno MULLER:

Chief of Gestapo, Wilhelmshaven.

Sentenced to 20 years' imprisonment by a British war crimes court in Germany, 9.12.47.

Karl NUSSBERGER:

Chief of Security Police, Gaggenau.

Sentenced to death by a British war crimes court at Wuppertal for the murders of prisoners of war, 10.5.46.

Carl A. OBERG:

Police General; SS Leader and head of the Gestapo in occupied France. Sentenced to death by a British court at Wuppertal on 11.7.46 for murders of British parachutists in the Vosges.

(OBERG was then handed over to the French for trial, but has not yet been tried.) Sentence confirmed 4.1.47.

Wilhelm REDISS:

SS. Obergruppenführer. Chief SS and Police Leader in occupied Norway. Charged as a war criminal by Norway.

(Committed suicide after the capitulation of Germany to avoid trial and punishment.)

Erwin ROESNER:

Police General. SS and Police Leader in Wehrkreis XVIII and in Slovenia. Sentenced to death by a Yugoslav court; hanged on 4.9.46.

SANDNER:

Obersturmführer SS. Chief of Security Police in the Nikolayev region.

Sentenced to death by the U.S.S.R. Military Court in the Odessa district; hanged on 17.1.46.

SCHEER:

Police General SS. Police Chief in the Kiev region.

Sentenced to death by a U.S.S.R. military court at Kiev; hanged in January, 1946.

Walter SCHMITT:

Obergruppenführer SS.

Tried by the People's Court, Prague, for crimes committed in concentration camps, Mauthausen, Schlossenburg, Ravensbrück, Sachsenhausen and other places; sentenced to be hanged 18.9.45.

Karl SCHONGARTH:

SS Oberbrigadeführer; Police General.

Sentenced to death by a British war crimes court in Germany (Enschede case) 11.2.46.

Richard SCHULZ:

Former high official in the Berlin Police Department.

Tried by a U.S. war crimes court at Dachau for complicity in the murders of Allied pilots. Sentenced to be hanged 10.5.47.

Jürgen STROOP:

Police General. Former SS Leader in Greece and Poland.

Sentenced to death by a U.S. military court at Dachau on 22.3.47.

Reserved for trial in Poland for the massacre in the Warsaw Ghetto and on other counts.

Wilhelm Arthur WAGNER:

Head of Section IV (b) of the Security Police in Norway.

Tried by a Norwegian (Lagmannsret) court in October, 1946, for the deportation and inhumane treatment of Jews.

Sentenced to death; sentence commuted to life imprisonment by the Norwegian Supreme Court, 30.4.47.

Prince Josias WALDECK-PRYMONT:

Police General.

Sentenced to life imprisonment by a U.S. military court at Dachau, 13.8.47, for atrocities in Buchenwald camp.

WITZLER:

Police General SS. Chief of Security Police.

Sentenced to death by a U.S.S.R. military court at Nikolayev; hanged on 17.1.46.

VI. MEDICAL WAR CRIMINALS

(i) Doctors and officials convicted in Case No. 1 (The 23 Doctors and Scientists) in the "Subsequent Proceedings" which opened in Nuremberg in December, 1946.

Hermann BECKER-FREYSING:

Chief of Aviation Medicine Department.

Sentenced to life imprisonment.

Wilhelm BEIGELBACK:

Consulting Physician to Luftwaffe.

Sentenced to 15 years' imprisonment.

Victor BRACK:

Senior official in the Führer's Chancery.

Sentenced to death by hanging.

Karl BRANDT:

Reich Commissioner for Health.

Sentenced to death by hanging.

Fritz FISCHER:

Medical officer at Hohenlucken.

Sentenced to life imprisonment.

Karl GERHARDT:

Personal physician to HIMMLER.

Sentenced to death by hanging.

- Karl GENZKEN:
Chief of Waffen SS Medical Service.
Sentenced to life imprisonment.
- Siegfried HANDLOSER:
Chief of Army Medical Service.
Sentenced to life imprisonment.
- Waldemar HOVEN:
Chief doctor at Buchenwald concentration camp.
Sentenced to death by hanging.
- Joachim MRUGOWSKY:
Chief of Hygienic Institute Waffen SS.
Sentenced to death by hanging.
- Herta OBERHAUSER:
Female physician at Ravensbrück camp.
Sentenced to 20 years' imprisonment.
- Helmut POPPENDICK:
Senior medical official of SS.
Sentenced to 10 years' imprisonment.
- Gerhard ROSE:
Chief of Tropical Medicine Department.
Sentenced to life imprisonment.
- Oskar SCHROEDER:
Chief Inspector of Luftwaffe Medical Service.
Sentenced to life imprisonment.
- Wolfram SIEVERS:
Manager of the Ahnerbe, racial investigation society.
Sentenced to death by hanging.
- Heinz BAUMKETTER:
Camp physician in Sachsenhausen concentration camp.
Tried by a Russian court in November, 1947, and sentenced to life imprisonment.
- Dr. BESSIN:
Sentenced to imprisonment by a Military Government Court at Hamburg, under Law No. 10, for sterilisation of hospital inmates 7.12.46.
- Dr. Helmuth BOCK:
Doctor at the Luneberg hospital.
Tried and sentenced to death by a Yugoslav court at Belgrade 5.11.46.
- Dr. Leonardo CONTI:
Reich Health Leader. Responsible for medical experiments on internees.
Committed suicide at Nuremberg after arrest to avert trial, October, 1945.
- Dr. Richard DEMMERICH:
Medical officer to the Velpke baby farm.
Tried by a British military court at Brunswick for killing Polish children by wilful neglect; found guilty 3.4.46, and sentenced to 10 years' imprisonment.
Sentence confirmed.
- Dr. GUNTHER:
Sentenced to imprisonment by a Military Government Court at Hamburg, under Law 10, for sterilisation of hospital inmates, 7.12.46.
- Dr. L. HARDT:
Tried by a German court at Dresden for the murder of inmates of a mental home at Sonnenstein, and sentenced to be hanged 10.7.47. (Committed suicide.)

Dr. HELLINGER:

Camp dentist in Ravensbrück Women's camp.
Sentenced to 10 years' imprisonment by a British military court at Hamburg 3.2.47.

Dr. Professor HINSELMANN:

Sentenced to imprisonment by a Military Government Court at Hamburg, under Law No. 10, for sterilisation of hospital inmates 7.12.46.

Dr. HINTERMAYER:

Concerned in medical experiments for the Luftwaffe upon inmates of the Dachau concentration camp.

Sentenced to death by a U.S. court at Dachau 12.12.45.

KATZENELLENBOGEN:

Physician in Buchenwald camp.

Sentenced to life imprisonment by a U.S. military court at Dachau 13.8.47, for atrocities in Buchenwald camp.

Dr. KLEIN:

Belsen concentration camp physician.

Sentenced to death by a British court at Luneburg 17.11.45. Hanged at Hamelin 13.12.46.

Alphons KLEIN, SS:

Administrator of the Hadamar Mental Asylum.

Tried by a U.S. war crimes court at Wiesbaden, October, 1945, for killing Russian and Polish inmates by injections. Sentenced to be hanged 15.10.46. Sentence commuted to death by shooting.

Dr. Hans KORBEL:

Sentenced to death by a British military court 24.6.46 for killing, by neglect, children of foreign slave workers. Executed 7.3.47.

Dr. KREBSBACH:

Mauthausen concentration camp physician.

Tried by a U.S. military court at Dachau for atrocities against internees in March-April, 1946; hanged 27.5.47.

Dr. LOLLING:

Head of Medical Services of the "WVHA" (Administrative service of the concentration camps). Responsible for authorising medical experiments on internees.

(Committed suicide to avoid trial, 1945.)

Dr. Paul NITSCHKE:

Tried by a German court at Dresden for the murder of inmates of the mental home at Sonnenstein. Sentenced to be hanged 10.7.47.

Dr. Siegbert RASMAUER:

Camp doctor of Loibl Pass camp (sub-camp of Mauthausen).

Sentenced to life imprisonment by a British war crimes court at Klagenfurt, Austria. 10.10.47.

Werner ROHDE:

Camp doctor at Natzweiler camp.

Tried by a British military court at Wuppertal for killing by injections Allied nationals interned in the camp; hanged 11.10.46.

Dr. ROSENTHAL:

SS doctor in Ravensbrück Women's camp.

Sentenced to death by a British court at Hamburg on 3.2.47, and hanged 3.5.47.

Dr. SCHIDLANSKI:

Camp doctor in Ravensbrück Women's camp.

Sentenced to death by hanging by British war crimes court at Hamburg on 3.2.47. Executed 3.5.47.

Dr. SCHILLING:

Malaria expert. Camp physician at Dachau.
Tried by a U.S. military court at Dachau and sentenced to death 13.12.45.
Hanged 29.5.46.

Dr. Heinrich SCHMITZ:

Camp doctor in Flossenburg camp.
Tried by a U.S. court at Dachau on 16th December, 1947, and sentenced to death.

Ulrich SCHNAPPAUF:

Prison doctor, Fuhlsbittel prison.
Sentenced to 12 years' imprisonment by a British war crimes court at Hamburg, 24.9.47.

Dr. Gunther SCHULZ:

Doctor at the Luneburg hospital.
Tried and sentenced to death by a Yugoslav court at Belgrade 5.11.46.

Dr. Percy TREITE:

Camp doctor at Ravensbrück Women's Camp, charged with medical experiments on inmates.
Sentenced to death by a British court at Hamburg 3.2.47. (Committed suicide after conviction.)

VII. COMMANDANTS OF CONCENTRATION CAMPS ; AND CONCENTRATION CAMP TRIALS

ALMEIER:

Former deputy commandant of the Auschwitz concentration camp.
Tried, with other members of the Auschwitz camp staff, by the Polish Supreme Court at Cracow, in November, 1947, and sentenced to death.
Executed 28.1.48.

Johannes BALZER:

Deputy commandant of prisoner of war camp at Allendorf. Sentenced to 20 years' imprisonment by a Yugoslav court at Belgrade, 1.4.47.

Hans BIEBOW:

Former commandant of the Lodz Ghetto.
Sentenced to death by a Polish court at Lodz on 24.4.74 and hanged.

Colonel Ernst BLUMMEL:

Ex-commandant of Osnabrück camp.
Tried and sentenced to death by a Yugoslav court at Belgrade on 5.11.46.

Anton BRUNNER:

Former commandant of Drancy concentration camp for Jews in France.
Tried by an Austrian court at Vienna for deporting Jews to the death camps for extermination. Sentenced to death 11.5.46; hanged 24.5.46.

Karl BUCK (SS), Hauptsturmführer:

In charge of the concentration camp at Schiermeck in Alsace, and Lagerkommandant of Gaggenau camp.
Tried by a British military court at Wuppertal in May, 1946, as concerned in the killing of British and French prisoners of war. Sentenced to death by shooting 10.5.46. (Sentence confirmed 4.7.46.) Handed over to the French 3.8.46.

Waldemar DEHM:

Ex-commandant of the Ravensbrück camp.
Tried and sentenced to death by a Yugoslav court at Belgrade on 5.11.46.

Heinz DETMERS:

Deputy commandant of Dachau camp.
Sentenced to be hanged by an American Military Tribunal 18.1.47.

Friedrich EBSEN:

Commandant of Schandelah labour camp.

Sentenced to death by a British war crimes court in Germany, 3.2.47.

Colonel Friedrich EVCKE:

Ex-commandant of Osnabrück camp.

Tried and sentenced to death by a Yugoslav court at Belgrade on 5.11.46.

Willy FRIEDRICH:

Gestapo official; ex-commandant of the Banjica concentration camp near Belgrade.

Tried by a Yugoslav military court at Belgrade on 27.3.47 and sentenced to death.

Karl GALLASCH:

Former commandant of Gross Rosen concentration camp.

Sentenced to death by a Polish court; hanged himself in his cell at Wroclaw 22.5.47.

Heinrich GERICKE:

Official in charge of Velpke baby farm.

Sentenced to death by a British war crimes court in Germany, 20.3.46.

Richard GLUECKS:

Lieut.-General of Waffen SS. Inspector General of all concentration camps. Chief of Amtsgruppe D in the WHVA.

Committed suicide after the capitulation to avoid trial.

Aman GOETH:

Ex-commandant of the Cracow Ghetto and Tarnow camp.

Tried by the Polish Supreme Court, and sentenced to death 5.9.46. Executed.

Max GRABNER:

Former political officer at the Auschwitz concentration camp.

Tried with other members of the Auschwitz camp staff by the Polish Supreme Court at Cracow in November, 1947, and sentenced to death.

Rudolf GUENTHER:

Second camp commandant of Banterweg camp.

Sentenced to 15 years' imprisonment by a British war crimes court in Germany, 6.3.47.

Otto HARDER:

Lager führer of the Aussenkommando Hanover-Ahlen camp.

Sentenced to 15 years' imprisonment by a British war crimes court in Germany, 6.5.47.

Fritz HARTJENSTEIN (SS):

Ex-commandant of Natzweiler concentration camp.

Tried by a British court at Wuppertal and sentenced to death 5.6.46. Was handed over to the French after sentence for eventual trial.

Karl HESSE:

Ex-commandant of Korgen concentration camp in Norway, where Yugoslav citizens were interned.

Tried and sentenced to death by a Yugoslav court at Belgrade 23.10.46.

Rudolf HOESS:

Former commandant of Auschwitz; guilty of the systematised killing of millions of internees.

Sentenced to death by the Polish Supreme Court on 2.4.47; hanged at Auschwitz on 16.4.47.

Paul HOFFMAN;

Supervisor of the crematorium at the death camp of Maidanek.

Tried by a Polish special criminal court at Lublin, 13-14th November, 1945, for mass murder of camp inmates at Maidanek; sentenced to death 23.12.45.

HOSSLER:

Former commandant at Auschwitz. Subsequently at Belsen.

Tried at Luneburg by a British war crimes court, and sentenced to death. Hanged 13.12.45.

Heinrich JOECKL:

Ex-commandant of Terezin concentration camp.

Sentenced to death by a Czechoslovak court; hanged in Litmerice prison on 25.10.46.

KAINDL:

Ex-commandant of Sachsenhausen concentration camp; handed over by the British to the U.S.S.R. war crimes authorities for trial in July, 1946.

Tried by a Russian court 1.11.47 and sentenced to life imprisonment.

Walter KEUS:

SS Leader. Ex-official of Neuengamme concentration camp.

Sentenced to death by a British military court at Hamburg on 3.2.47. Executed 26.6.47.

Fritz KIEFER:

Ex-commandant of internment camp for Yugoslav prisoners at Rognan in Norway.

Tried by a Yugoslav military court at Belgrade on 27.3.47, and sentenced to death.

Josef KISCH:

SS. Gruppenführer. Former official of Mauthausen camp.

Sentenced to death 15.9.47 by a U.S. war crimes court at Dachau for murders of Allied paratroops.

Kurt KLEBECK:

District chief of camps in Hanover area.

Sentenced to 10 years' imprisonment by a British war crimes court in Germany, 6.5.47.

Wilhelm KLIEM:

Commandant of Neugraben and Tiefstak camps.

Sentenced to 15 years' imprisonment by a British war crimes court at Hamburg, 3.7.46.

Max KOEGL:

Lieutenant-Colonel Waffen SS. Adjutant of Dachau concentration camp.

Hanged himself while in custody awaiting trial 26.6.46.

Josef KRAMER:

Ex-commandant of Belsen and Natzweiler concentration camps.

Tried by a British court at Luneburg on 17.11.45, and sentenced to death. Hanged on 13.12.45.

Arthur LIEBEHENSCHEL:

Former SS Commandant of the Auschwitz concentration camp.

Tried, with other members of the Auschwitz camp staff, by the Polish Supreme Court at Cracow in November, 1947, and sentenced to death. Executed 28.1.48.

LUETKE-MEYER:

SS Leader. Ex-official of Neuengamme concentration camp.

Sentenced to death by a British military court at Hamburg on 3.2.47. Executed 26.6.47.

LORITZ:

Ex-commandant of Sachsenhausen concentration camp; charged as a war criminal.

Committed suicide after arrest (February, 1946).

Kurt MATHESIUS:

Former commandant of Nordhausen. Hanged himself while awaiting trial by a U.S. court at Dachau, May, 1947.

Theodore MEYER:

Commandant of Stutthof camp.

Tried by a Polish court on 10th October, 1947, and sentenced to death.

Hans MOESER:

Former commandant of Nordhausen concentration camp.

Tried by a U.S. court at Dachau on 30th December, 1947, and sentenced to death.

Max PAULY:

Ex-commandant of Neuengamme.

Tried at Hamburg by a British court, and sentenced to death, together with 11 of his staff, on 3.5.46; hanged on 8.10.46.

Alex. PIKOWSKI:

Ex-commandant of Dachau camp.

Sentenced to be hanged by an American military tribunal 18.1.47.

Karl RAHM:

Ex-SS commandant of Terezin concentration camp. Sentenced to death by a Czechoslovak court on 30.4.47.

Alfred ROSENTHAL:

Ex-commandant of a concentration camp in the Ukraine.

Sentenced to death by a Yugoslav court in Subotica about 23.11.47.

Wilhelm SCHMIDT:

Deputy-commandant of Terezin concentration camp.

Sentenced to death by a Czechoslovak court on 12.11.46; hanged the same day.

Heinrich SCHULTE:

Ex-commandant of the concentration camp at Korgen, Norway, where Yugoslav citizens were confined.

Sentenced to death by a Yugoslav court at Belgrade 25.10.46, for murders of internees.

Johann SCHWARTZHUBER:

Deputy-commandant of Ravensbrück Women's camp.

Sentenced to death by a British court at Hamburg on 3.7.47, and hanged 3.5.47.

(Note: SUHREN, ex-commandant of the camp, escaped before the trial, and has not been recaptured.)

Siegfried SEIDL:

Ex-commandant of Theresienstadt (Terezin) concentration camp.

Sentenced to death by an Austrian court 4.10.46 under the Austrian war criminals legislation.

Kurt SIEBER:

Colonel. Ex-commandant of a camp at Strasbourg.

Tried and sentenced to death by a Yugoslav court at Belgrade on 5.11.46.

Johannes STEENBOCK:

Commandant of Draegerwerke Wandsbek camp.

Sentenced to 20 years' imprisonment by a British war crimes court in Germany, 13.6.47.

Willi TESSMANN:

Ex-Governor of Fühlsbüttel prison.

Tried by a British war crimes court at Hamburg for ill-treatment of Allied prisoners. Sentenced to death by hanging 25.9.47.

Otto THUEMEL:

Senior camp commandant at Banterweg camp.

Sentenced to 5 years imprisonment by a British war crimes court in Germany, 6.3.47.

Herman VOGEL:

Leading official of the Maidanek camp.

Tried by Polish Special Criminal Court in Lublin. Sentenced to be hanged 2.12.44.

Johannes WALTZER:

Ex-commandant of camp for Yugoslav prisoners of war at Allendorf.

Tried by a Yugoslav military court at Belgrade on 27.3.47 and sentenced to death.

Jacob WINKLER:

Commandant of Loibl Pass, sub-camp of Mauthausen.

Sentenced to death by a British war crimes court at Klagenfurth, Austria, 10.10.47.

Karl WINKLER:

Ex-commandant of Lahde-Weser labour camp.

Sentenced to death by a British military court at Wuppertal 14.2.47 for murders of Allied prisoners of war. Sentence commuted to 20 years' imprisonment in October, 1947.

Gottfried WEISS:

Ex-commandant of Dachau concentration camp.

Tried by a U.S. Military Government court at Dachau. Sentenced to death 13.12.45; hanged 29.5.46.

ZIEREIS:

Commandant of Mauthausen concentration camp.

Died, after capture, of wounds received while trying to escape, April, 1945.

Viktor ZOLLER:

Ex-commander of the guards at Mauthausen concentration camp.

Sentenced to death by a U.S. military court at Dachau in April, 1946; hanged 27.5.47.

CONCENTRATION CAMP TRIALS

The reports show that very large numbers of the officials and guards of the Concentration Camps were guilty of atrocities. Exemplary trials for groups of as many as sixty persons accused of the worst crimes were held in regard to most of the main concentration camps in Germany.

Auschwitz Concentration Camp Trial

This trial, held at Cracow, ended on 22nd December, 1947, when the 23 defendants, including LIEBEHENSCHER, ex-commandant, and Maria MANDL, head of the women's camp, were sentenced to death. They were hanged on 28th January, 1948.

Beendorf Concentration Camp Trial

A group of officials of this camp were tried by a British war crimes court at Hamburg. 1 was sentenced to death and 2 to imprisonment on 13.8.46.

Belsen Concentration Camp

The commandant, Josef KRAMER, and 44 others were tried by a British war crimes court at Luneburg, 17.9.45-17.11.45; 30 of the accused were found guilty; of these, 11 were sentenced to death and hanged; 19 to various terms of imprisonment. The death sentences were carried out on 13.12.47.

A second group of officials of the Belsen camp were tried by a British court at Celle, 16-30 May, 1946; three defendants were sentenced to be hanged and five to imprisonment.

Buchenwald Camp Trial

In this trial, before a United States military tribunal at Dachau, April, August, 1947, 31 members of the staff of the Buchenwald camp were found guilty of atrocities and 22 were sentenced to death; the rest to imprisonment.

Dachau Camp Trials

Forty officials were tried by a U.S. military court at Dachau; 36 of the defendants were sentenced to death (13.12.45), of whom 23 were hanged on 28-29.5.46, including the commandant (WEISS) and the camp doctor (SCHILLING).

Smaller groups of Dachau camp officials and guards were included in several subsequent trials by the U.S. court at Dachau. On 21.11.46 it was announced that, up to that date, 116 defendants of this category had been convicted and sentenced to terms of imprisonment.

Dora-Nordhausen Camp Trial

Twenty-two ex-officials of this camp were placed on trial before a U.S. war crimes court at Dachau on 31.7.47.

Flossenburg Camp Trial

Fifty-two officials and guards of this camp were tried by a U.S. military court at Dachau 12.6.46-19.1.47. Forty of the defendants were found guilty; 15 of these were sentenced to be hanged, and 25 to terms of imprisonment.

The Fuhrsbuettel Prison.

Two groups of officials of this prison were tried by a British war crimes court in Germany in September and November, 1947. 3 were sentenced to death and 14 to imprisonment.

Gaggenhau Camp

11 officials of this camp were tried at Wuppertal by a British war crimes court, for murders of prisoners of war. 5 were sentenced to death and 5 to imprisonment.

Hamburg-Sasel Camp

A group of 22 officials were tried by a British war crimes court at Hamburg. 17 were sentenced to varying terms of imprisonment.

Kiel-Hasse Internment Camp

A group of 9 officials of this camp were tried by a British war crimes court in Germany. 2 were sentenced to death and 6 to imprisonment.

Lahde-Weser Concentration Camp

A group of the camp staff were tried by a British war crimes court at Wuppertal on 14.2.47. 4 were sentenced to terms of imprisonment. One other official was sentenced to death on 16.12.47.

Loibl Pass Concentration Camp

A group of the staff of this camp were tried by a British war crimes court at Klagenfurth, Austria. 2 were sentenced to death and 8 to imprisonment on 10.10.47.

Maidanek Concentration Camp (Poland)

A group of six officials of the Maidanek concentration camp were arraigned before a Polish Special Criminal Court in Lublin, 27.11.44-2.12.44. All were found guilty and sentenced to death. They were hanged on 3.12.44.

Mauthausen Camp Trial

Sixty-one officials of this camp were tried by a U.S. military court at Dachau in March/April, 1946; 58 defendants were sentenced to death (11.5.46) and were executed, including the commandant of the Todtenkopf guard.

Muehldorf Concentration Camp Trial

5 officials of this camp were sentenced to death by a U.S. war crimes court at Dachau on 13.5.47 and 7 others to imprisonment.

Natzweiler Concentration Camp

A group of officials of this camp were tried by a French military court at Rastatt in January, 1947. Twenty-one of the defendants were sentenced to death 3.2.47.

Neubrenne Concentration Camp

Thirty-three officials of this camp were tried by a French military court at Rastatt on 6.6.46; 15 defendants were sentenced to death and executed; 20 to terms of imprisonment.

Neugraben-Tiefstack Camp

14 officials of this camp were tried by a British war crimes court at Hamburg; 10 of them were sentenced to varying terms of imprisonment.

Neuengamme Camp Trial

The commandant, PAULY, and 13 other members of the camp staff were tried by a British war crimes court at Hamburg, 18.3.46-13.5.46; eleven defendants, including the commandant, were sentenced to death by hanging; the remainder to various terms of imprisonment. A second group of officials of this camp were tried in July, 1946, and sentenced, 1 to death and 5 to imprisonment; a third group of 3 were sentenced in August, 1946, 2 to death and 1 to imprisonment.

Ravensbruck Women's Camp Trial

Sixteen members of the staff of this camp were tried by a mixed inter-allied court in the British zone. All were found guilty, 3.2.47, except one, who died during the trial. Eleven were sentenced to death by hanging and the remainder to imprisonment.

Sachsenhausen (Oranienburg) Concentration Camp Trial

The trial of the commandant (KAINDL) and a number of officials and guards of this camp was prepared in the British zone, but was handed over, by agreement, together with the defendants, to the U.S.S.R. war crimes authorities in June, 1946. 15 defendants were tried by a Russian court in November, 1947, and sentenced to 25 years' hard labour.

Schandelah Concentration Camp

A group of the camp staff were tried by a British war crimes court in Germany, on 3.2.47. 2 were sentenced to death and 5 to imprisonment.

Stocken-Ahlen Concentration Camp

2 officials of this camp were tried by a British war crimes court at Brunswick; 1 was sentenced to death and the other to life imprisonment, 25.6.46.

Struthof-Natzweiler Camp

A first group of officials were tried by a British war crimes court at Wuppertal. 1 was sentenced to death and 5 to varying terms of imprisonment. A second group were tried, on other counts, immediately after; 3 of the accused, including the commandant, were sentenced to death and 1 to imprisonment.

Stutthof Concentration Camp Trial

A group of officials and guards of this camp were tried by a Polish court in May-June, 1946. Eleven of the defendants were found guilty and sentenced to death in May, 1946.

Velke "Baby Farm"

Officials of this institution were tried by a British war crimes court in Germany, March-April, 1946. 2 were condemned to death and 2 to imprisonment.

Wolfsberg-Ruehen "Baby Farm"

Ten officials of this institution were tried by a British war crimes court at Helmstedt. 1 was sentenced to death and 2 to imprisonment on 24.6.46.

THE FAR EAST.

I. MAJOR WAR CRIMINALS TRIED BEFORE THE INTERNATIONAL
MILITARY TRIBUNAL, TOKYO.

(Trial still in progress)

ARAKI:

Minister of War and member of the Cabinet Advisory Council in China.

General DOHIMARA:

Former Commander of Japanese 5th Army in Manchuria; Commander-in-Chief Eastern Army in Japan (1943) and 7th Army Area, Singapore (1944-45).

HASHIMOTO:

Ex-Army officer; publicist; promoter of aggressive war.

Field Marshal HATA:

Former Commander-in-Chief in Central China; member of the Board of Marshals.

HIROTA:

Former Prime Minister and Foreign Minister; member of Cabinet Advisory Council.

HOSHINO:

Chief Secretary and Minister of State under TOJO; adviser to Finance Ministry.

ITAGAKI:

Former Chief of Staff of Japanese Army in China (1939); in Korea (1941-45); Commanding 7th Army Area, Singapore (1945).

KAYA:

Former Finance Minister under Togo (1941-44).

KIDO:

Former Lord Keeper of the Privy Seal (1940-45); Chief Confidential Adviser to the Emperor.

General KIMURA:

Vice War Minister under KONOYE and TOJO (1941-44); member of Supreme War Council (1943); Commander-in-Chief in Burma (1944).

General KOISO:

Commander Japanese Army, Korea (1935-36); Governor General, Korea (1942); Prime Minister (1944-45).

Rear-Admiral Nisuke MASUDA:

Indicted before a U.S. Military court in the Marshall Islands in December, 1945; for executing prisoners of war without trial.
(Committed suicide before the trial.)

MATSUI:

Commander-in-Chief in Central China (1937-38); member of Cabinet Advisory Council (1938-40); President of Greater East Asia Development Society.

MATSUOKA:

Member of Cabinet Advisory Council (1940); Foreign Minister under KONOYE (1940-41); advocate of aggressive war.

General MINAMI:

Commander-in-Chief, Kwantung (1934-36); Governor General of Korea (1936-42); Member of Privy Council (1932-45).

General MUTO:

Chief of Military Affairs Bureau (1939-42); commanded Second Guards Division in Sumatra (1943); Chief of Staff in Philippines under General Yamashita (1944).

Admiral NAGANO:

Commander-in-Chief of Combined Fleet (1937); member of Supreme War Council (1940); Supreme Naval Adviser to the Emperor (1944).

Admiral OKA:

Vice Navy Minister (1944); Commander-in-Chief Korean Station (1944-45).

OKAWA:

Organiser of the Mukden incident (1931); advocate of aggressive war.

OSHIMA:

Ambassador to Germany (1938-39); (1941-45).

General (Lieut.-General) SATO:

Chief of Section in War Ministry (1941-42); and of Military Affairs Bureau (1942-44).

SHIGEMITSU:

Ambassador in Moscow (1936-38); Ambassador in London (1938-41); Foreign Minister under Tojo and Koiso (1943-45).

Admiral SHIMADA:

Commander of Second Fleet (1937); of China Fleet (1940); Supreme War Council (1944).

SHIRATORI:

Ambassador to Italy (1939); adviser to Japanese Foreign Office (1940); Director of I.R.A.P.S. (1943).

SUZUKI:

President of Cabinet Planning Board under KONOYE and Tojo (1941-43); Cabinet adviser 1943-44; Director of I.R.A.A.

TOGO:

Ambassador to Germany (1937); Moscow (1938); Foreign Minister (1942-45).

General TOJO:

War Minister under KONOYE (1940-41); Prime Minister (1941-44).

UMEZU:

Commander of Japanese Forces in China (1934); Vice War Minister (1936-38); Chief of General Staff (1934-35).

The indictment charged the defendants with three categories of crimes; crimes against peace; conventional war crimes; and crimes against humanity.

One of the defendants, OKAWA, became insane during the trial and was withdrawn. Another, MATSUOKA, died of illness.

(The trial was still proceeding in January, 1948.)

II. HIGHER JAPANESE OFFICERS

(Tried and convicted)

Vice-Admiral Kose ABE:

Tried by a U.S. war crimes court at Guam for murdering American prisoners of war, and sentenced to be hanged (15.5.46).

General ADACHI:

G.O.C. 18th Army, sentenced to life imprisonment by an Australian court at Rabaul for atrocities in the Pacific.

Lieut.-General Masao BABA:

Tried by an Australian war crimes court at Rabaul for ordering the "death march" in North Borneo, and sentenced to be hanged (4.3.47).

Admiral HAMANAKA:

Tried and sentenced to death by an Australian war crimes court at Morotai (14.1.46) for atrocities against prisoners of war and natives.

Admiral Teczo HARA:

Tried by a British war crimes court at Singapore for killing natives of the Andaman Islands, and sentenced to be hanged (3.4.46).

General HARADA:

Ex-Commander in Java; sentenced to death at Singapore (25.10.46).

Major-General HIDAKA:

Tried by a British war crimes court at Singapore for ill-treating prisoners of war and internees; sentenced to death (10.10.46).

Major General Okira HIROTA:

sentenced to 7 years' imprisonment by an Australian war crimes court at Rabaul, 3.4.47.

General HISAOTANI:

G.O.C. 6th Division, sentenced to death by a Chinese court for massacres at Nanking (26.4.47).

Lieut.-General Takeo ITO:

Tried at Rabaul for murder of Chinese civilians and sentenced to death by an Australian war crimes court at Rabaul (24.5.46).

Lieut.-General KAWAMURI:

Tried by a British war crimes court at Singapore and sentenced to be hanged for massacres of Chinese in Singapore; executed (26.7.47).

General KNICHI:

"No. 1 War Criminal" in China. G.O.C. 23rd Army, sentenced to death by a Chinese court at Canton (17.10.46).

Lieut.-General Shiyokou KOU:

Tried by a U.S. war crimes court at Manila for sanctioning ill-treatment of prisoners of war, and sentenced to be hanged (14.3.46).
(Confirmed.)

Vice-Admiral Kunizo MORI:

Tried and sentenced to life imprisonment by a U.S. war crimes court at Guam (15.8.46) for murders and atrocities. (Confirmed.)

Rear Admiral Tametsugu OKADA:

Sentenced to death by an Australian war crimes court at Rabaul (24.6.47); executed.

Major-General OTSUKA:

Tried for ill-treating prisoners of war and internees; sentenced to death by a British war crimes court, at Singapore (10.10.46).

General RYOSABURO:

Tried by a British war crimes court and sentenced to 20 years' imprisonment for mass murders of British prisoners of war at Hongkong.

Yamara SABUROH:

Sentenced to death by a Netherlands court-martial at Balikpapan (N.E.I.) for ill-treating civilians and prisoners of war at Sanga-Sanga.

Rear-Admiral SAKABARA:

Tried for murders by a U.S. war crimes court in the Marshall Islands and sentenced to be hanged (21.12.45).

General Takashi SAKAI ("Conqueror of Hongkong"):

Tried and sentenced to death by a Chinese war crimes court at Nanking (27.8.46) for instigating a war of aggression, and responsibility for massacres and ill-treatment of prisoners of war and civilians.

Lieut.-General Fufuye SHIMPEI:

Tried by a British war crimes court at Singapore for killing and ill-treating prisoners of war, and sentenced to death (28.2.46). Sentence confirmed.

Vice-Admiral Yoshio TACHIBANA:

Tried by a U.S. war crimes court at Guam for murders and atrocities, and sentenced to be hanged (15.8.46).

Major-General Sato TAMENORI:

Tried by a British war crimes court at Singapore for killing and ill-treating Burmese civilians, and sentenced to be hanged (5.3.46).

Major-General TOSHIO:

Tried by a British war crimes court at Singapore for killing and torturing civilians at Car Nicobar and sentenced to be hanged (26.3.46).

General Tokoyuki YAMASHITA:

Tried by a U.S. Military commission at Manila (7.12.45) for permitting his troops to commit atrocities in the Philippines, and sentenced to be hanged. (Confirmed.)

APPENDIX VI

WAR CRIMES UNDER INTERNATIONAL LAW⁽¹⁾

In April last I wrote an essay entitled "Natural Law and International Law", for publication in a volume of legal essays, which has not yet, however, been published. In concluding the essay I observed that I had not been able then to examine "a larger question, that is the criminality of an unjust war purely aggressive and acquisitive, designed to be carried on and, in fact, carried on with all the atrocities adverted to in this essay".

My thesis here is that such a war is a crime under International Law and that those responsible for it are liable to be prosecuted and punished under that law.

It is important for those who approach the consideration of this topic to consider what are the nature, the sources and the sanctions of International Law. They must not expect to find that they are the same as exist in the case of systems of Municipal Law, whether the particular law is of the Anglo-American or Common Law type, or is of the Civil Law or the codified class. Either type has the feature that it is law enacted by a central law-making authority such as a Legislature or a Court, and the further feature that there is a standing judicial authority to expound it and a standing executive to give effect to it.

International Law differs from these national systems because there is no central law-making authority. It may thus be described as the law of the international community. That community, however, consists of a number of independent sovereign nations, each with its own system of National or Municipal Law.

The sources of International Law must, therefore, be sought elsewhere than in the acts of a national law-making authority. In my earlier essay I pleaded to have it recognised that International Law was the product, however imperfect, of that sense of right and wrong, of the instincts of justice and humanity which are the common heritage of all civilised nations. This has been called for many ages "Natural Law"; perhaps in modern days it is simpler and truer merely to refer to it as flowing from the instinctive sense of right and wrong possessed by all decent men, or to describe it as derived from the principles common to all civilised nations. This is, or ought to be, the ultimate basis of all law.

Just as civilised men (or perhaps any men) living together in society under the most complete system of individual freedom must necessarily suffer the restrictions inevitably imposed on each by the similar freedom enjoyed by their neighbours, so, in the community of nations, the sovereignty (i.e., the freedom and independence of each nation) must be conditioned by regard for the like freedom and independence of the neighbouring nations. Modern conditions have made increasingly apparent the mutual interdependence of nations and have led to the concept of the community of nations. Some day there may be a central law-making and law-enforcing body charged with settling the relations between the members of what would then become the community of nations in the full sense. But that time is not yet. International Law represents the imperfect endeavour to develop a body of rules and principles which will go towards establishing a rule of law among the nations, not dissimilar in character from the rule of law which is established in greater or lesser degree inside each separate sovereign nation.

The lawyer familiar with a municipal system of law will question how this is possible. The idea of law for him will be something to be precisely ascertained from Codes or Acts of the Legislature or decisions of competent Courts, something fixed, precise, coercive, something which corresponds to the ideal of analytical

(1) This article by Lord Wright appeared in the LAW QUARTERLY REVIEW, Jan., 1946 (pp.40-52). It is reprinted here because it concisely explains the legal philosophy upon which is based the rapid development of war crimes concepts in international law since the beginning of World War II. It was considered by the prosecution and courts both at Nuremberg and Tokyo to be a significant pronouncement. The article naturally could not fully anticipate some of the exact developments which emerged in the judgment of the first Nuremberg Tribunal and the various military and other courts which have followed.

—Editor.

jurisprudence. But that concept does not exhaust the idea of what law is. Law consists of rules for determining conduct. There may be such rules without legislation, without Courts and without executives to give effect to them. There may be the customary or traditional rules which are so familiar that men obey them or act in accordance with them as a matter of ordinary course. The common lawyer is familiar with the idea of customs which develop into law and may eventually receive recognition from competent Courts and authorities. But the Court does not make the law, it merely declares it or decides that it exists, after hearing the rival contentions of those who assert and those who deny the law.

All I am here concerned with is a limited area of International Law, that relating to the trial and punishment of war criminals in the full sense of that term, as adopted in the Agreement of 8th August, 1945, made in London between the Governments of the United Kingdom, of the United States, of the French Republic and of the Union of Soviet Socialist Republics, which established a Tribunal for the trial and punishment of the major war criminals of the European Axis countries. The Agreement includes as falling within the jurisdiction of the Tribunal persons who committed the following crimes: (a) crimes against peace, which means in effect planning, preparation, initiation or waging of a war of aggression; (b) war crimes, by which term is meant mainly violation of the laws and customs of war; (c) crimes against humanity, in particular murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population.

The Tribunal so established is described in the Agreement as an International Military Tribunal. Such an International Tribunal is intended to act under International Law. It is clearly to be a judicial tribunal constituted to apply and enforce the appropriate rules in International Law. I understand the Agreement to import that the three classes of persons which it specifies are war criminals, that the acts mentioned in classes (a), (b) and (c) are crimes for which there is properly individual responsibility; that they are not crimes because of the agreement of the four Governments, but that the Governments have scheduled them as coming under the jurisdiction of the Tribunal because they are already crimes by existing law. On any other assumption the Court would not be a Court of law but a manifestation of power. The principles which are declared in the Agreement are not laid down as an arbitrary direction to the Court but are intended to define and do, in my opinion, accurately define what is the existing International Law on these matters.

Let me first deal with class (b), namely, war crimes of the type named, war crimes, as it is sometimes said, *stricto sensu*. That there is a system of laws of war will not, I think, be contested by any international lawyer and, ancillary to that system, is the recognised right of military commanders to create military Courts to enforce that branch of International Law.

A code of such laws is to be found in various International Conventions, in particular, the Hague Convention of 1907, of which No. IV deals with the usages of law on land, and there have been similar Conventions with regard to naval war and to air war, and with regard to the treatment of prisoners of war, to sick and wounded and other objects of humanity. These are instances of what I have already adverted to, namely, a law or laws, not enacted by any sovereign law-making body, but depending for its creation on the voluntary assent of the civilised nations of the world, and on the humane feelings of civilised mankind enforceable, if need arise, by military Courts. The animating motive of these Conventions is admirably expressed in a sentence from Article 1 of the Preamble to the Hague Convention, No. IV, which recognised that these rules must be subject to development and revision as new necessities are realised or operate, as well as stating the governing principle of the rules in the following words, "the inhabitants and the belligerents remain under the protection of the principles of the law of nations, derived from the usages established among civilised peoples, from the laws of humanity and from the dictates of the public conscience". In the annex to the Convention there are fifty-six articles which enumerate and define the specific laws, rights and duties of war. Various lists of such crimes have been drawn up. The main heads are enumerated by the Agreement of the four nations of 8th August, 1945.

Before the era of Conventions of this character, writers on International Law had attempted to regulate and mitigate to some extent the inevitable cruelties of war. Hall, a most accurate and precise writer, in Part III, Chapter II of his work

gives a useful summary of what had been done when he wrote. I quote from the fourth edition, 1885, the last edition which he revised. There had been the Geneva Conventions in the sixties of the last century, but otherwise the matter was left to the informal or implicit agreement of the nations. It had, however, been fully established that a belligerent could punish those who had broken the laws of war. Thus Hall, p. 135, writes: "a belligerent, besides having the rights over his enemy which flow directly from the right to attack, possesses also the right of punishing persons who have violated the laws of war, if they afterwards fall into his hands". Hall thus makes the test of jurisdiction to punish for the violation of the law, the fact that the offender has fallen into the belligerent's hands. The test is not territorial or temporal. It is simply the test of custody. But the right only continues while the war continues, and ceases with the conclusion of the peace unless, by the peace treaty, the period is extended.

For the purpose of dealing judicially with most of such cases it has long been established in International Law that the most generally used and most appropriate Court is a military tribunal. This may be the Court of one belligerent alone or it may be a mixed Tribunal constituted by Allied belligerents as in the Agreement of 8th August, 1945, to which I have referred. There is thus under International Law a complete system of law and an appropriate Tribunal. The whole position is very fully explored by Chief Justice Stone in the judgment of the Supreme Court of the United States which he delivered in the case of *Saboteurs, Ex p., Quirin* U.S. Rep. The prisoners there were charged with landing during the war in the United States for the purpose of spying and sabotage. The President, in his capacity as such and also as Commander-in-Chief of the armed forces of the nation, appointed a Military Commission and directed it to try the accused men for offences against the law of war. The Supreme Court upheld the validity of that appointment and the jurisdiction of the Court. The case raised some important questions of the Constitutional and Statutory Law of the United States which I need not here discuss. What is relevant now is that the Supreme Court, while distinguishing Military Courts from Courts Martial, affirms the jurisdiction of Military Courts to try offences that by the law of war are triable by military tribunals. The Chief Justice says: "From the very beginning of its history this 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". He refers to the jurisdiction of Military Commission to try persons for offences which according to the rules and precepts of the law of nations, and particularly the laws of war, are cognisable by such tribunals. The Chief Justice gave a long list of cases in which such Courts had tried such offences, such as spying and the like. He points out that International Law, as enforced by these Courts, has established a defined penalty, death for heinous offences and for lesser offences such more lenient penalty as the Court may deem just. He quoted with approval as a statement of the law the passage from the Preamble to the Hague Convention which I have already cited. These and other passages from the Chief Justice will, I am confident, be regarded as classical and authoritative statements that there is a law of nations which includes the laws of war and which defines the functions of military tribunals, and also the punishments assigned by that law and those Courts to violators of the law of war.

The passages I have cited and the instances quoted by the Chief Justice show conclusively that the offences covered by the laws of war involve the personal responsibility of individuals. The fate of the unfortunate Major André in 1780 will occur to many persons' thoughts. To skip nearly a century, there is the case of the Confederate Captain Wirz in 1865 who was sentenced to death for killing, during the Civil War, Federal prisoners without justification by the laws of war. The Conventions do not in general expressly impose responsibility on individuals, whereas they do impose on the enemy Governments a liability to make compensation for damage due to violations of the laws of war. But the Conventions must be construed in the light of the long-established practice of imposing individual punishment. Indeed, the efficacy of this part of the law of nations would be hamstrung by any other construction. The liability of Governments is additional to and coexistent with the responsibility of individual criminals.

The Chief Justice accepts as established law that Military Courts have power to inflict punishments on individuals, and that they have jurisdiction to give effect

to offences specified in the Hague Convention and similar offences so as to give full scope to the governing purposes.

I do not find anything contrary to natural justice in thus giving effect to what the Chief Justice calls the common law of war. The rules of war are law in the fullest sense. The crimes and the punishments are established. There must always be left to the Military Court, or to any National or International Court of a belligerent which may have jurisdiction to try such offences, the decision not only whether the offence is proved against the particular accused, but whether the facts bring it within the proper construction and operation of the law.

I have, I am afraid, at undue length developed what seem to me to be almost obvious platitudes. But so many objections have been strenuously raised in various quarters that I must deal at least briefly with them.

Thus, it is said that the idea of punishing individual violators of the laws and customs of war is unjust because the law relied on is retrospective, or because it is uncertain or not sufficiently specified, so that the violators of it cannot be taken to have known that they were doing wrong. But all these objections fail if the "laws and customs of war are a standard certain to be found in books of authority and in the practice of nations". I quote this description, with which I fully agree, from the Minority Report by the American jurists, Scott and Lansing, which forms part of the Report of the Commission on Responsibilities (Conference of Paris, 1919), which I shall refer to as the 1919 Report. The opponents of this view can only support their thesis by denying that the laws and customs of war are law and, so far as I can see, they can only do so on the footing that there can be no law save the municipal law of a Sovereign State, which, as I have explained, not only denies the possibility of any International Law at all, but is contrary to modern conceptions of law. The actual law with its specified offences and penalties may not be familiar to a cheesemonger in the City of London, but must be taken to be known to all those who have to act in the matter to which it relates, for instance, to statesmen, to military, naval and air officers and even to soldiers of lower ranks.

A criminal cannot exculpate himself on the grounds that he was ignorant of the law which affects him. Nor is it an answer to the law that it is being enforced by the victorious belligerents against the vanquished. Someone must act as policeman if law is violated. The policeman must belong to the stronger side. So it is in ordinary national life. The policeman represents the force of law and order; his action involves an exercise of power; so does the action of the victorious belligerent which seeks to punish violators of the laws of war, but it also seeks to vindicate the law for the benefit of humanity. That the stronger may sometimes in fact be substituting power for justice is no doubt a calamity when it happens, but this possibility is not relevant to the argument when what is being sought is justice, not revenge.

Nor can a criminal complain that he is entitled to be tried by an impartial and neutral Court and not by a Court constituted by the enemy. All he is entitled to is a trial on fact and law conducted on the principles of elementary justice. A burglar cannot complain that he is being tried by a jury of honest citizens. Trials of international criminals are watched by the world and the Court knows that it is also itself on trial. Not only is the practice of trials of war offences by Military Courts of the other belligerents established by International Law, but it is obviously the only practicable course, certainly in such circumstances as those now existing.

There are two other more limited arguments which are often advanced by those (by no means negligible in number) who oppose the punishment of war criminals. They are closely inter-connected and if logically applied would defeat, for all practical purposes, any attempt to punish war criminals. One is called the defence of superior orders, the other the defence of the immunity of heads of State.

Under the former, any man, except a mere wanton evildoer, accused of a war crime, would plead that what he did was done in obedience to orders of superiors. One might start with the common soldier and proceed upwards through one grade after another until one reaches the head of the State; then the accused would claim to be immune from any superior control except that of his own nation, which would, generally, not condemn his acts. The futility of the trial of war criminals by their own Courts was shown by the Leipzig trials at the end of the last war. This mounting scale of responsibility would be the normal case, though

there might be cases in which the sequence of responsibility would stop at some intermediate authority, such as a general or a gauleiter.

Both these pleas are in my opinion ill-founded. As to superior orders as a defence, the true view is, in my opinion, that if what is ordered is a crime, which is or ought to be a crime manifest to the subordinate soldier or Government agent, he cannot justify his obedience. It might be different if the criminality of the order is not reasonably obvious to the man; the order, for instance, might appear to him justifiable on the grounds of reprisals, or the nature and effects of the order might not be apparent. But, even then, the plea would not be a defence though it might go to extenuation. But, an order, such as an order to burn the women and children of a village in the village church, or to machine-gun a crowd of innocent hostages, or to murder a number of airmen who had attempted to escape and been recaptured, or to inflict hideous tortures to extract information, are all instances of manifest criminality.

As for the defence of the immunity of heads of States, that is, in my opinion, based on one or both of two obsolete and exploded fallacies. One of these is the idea that heads of States are entitled to claim immunity from the processes of law not only of their own nation but of all other nations, and not only in peace but also in war and in regard to war. They are, it is said, above every law. It is true that, by the courtesy of nations, immunity is granted to the Sovereign, as also to Ambassadors and the like, in the Courts of the other States, but that immunity only exists by a reciprocal courtesy on the footing of peaceful relations existing between the States. That, however, no longer continues in war conditions. Both the sovereign State and its head or Sovereign are then responsible and are subject to penal measures at the hands of the victorious State for war crimes. Even extreme supporters of the doctrine of sovereign immunity admit that it does not apply to heads of State who are captured, or who surrender, or who have abdicated. These exceptions show that the imagined rule of immunity is illogical. Indeed, in the last resort it can only be supported on the lines of a personal immunity, like the divine right of kings eloquently claimed by certain royal personages in Shakespeare. The Agreement of the four Governments of 8th August, 1945, explicitly rejects this defence of personal immunity and explicitly limits the defence of superior orders to a mitigation of punishment by the Court if it decides that justice so requires.

I have discussed at some length the question of responsibility for violations of the law of war, because it is of great importance that particular violators of the law, that is the actual perpetrators, should be made to realize that they also are personally responsible. I should be sorry to think that the fiendish torturers, the guards, and administrators of concentration camps with all their horrors, the men who carried out forced deportations and all the atrocities committed in the occupied countries, should not realise that they are responsible and liable to personal punishment as well as their superiors.

War crimes are generally of a mass or multiple character. At one end are the devisers, organisers, originators, who would in many cases constitute a criminal conspiracy; at the bottom end are the actual perpetrators; in between these extremes are the intermediate links in the chain of crime.

Professor Trainin, in his work on *Hitlerite Responsibility under the Criminal Law* (at p. 82 of the English translation) observes that all members of the Hitlerite clique were not only participants in an international band of criminals, but also organisers of a countless number of criminal acts (murders, robberies, destructions, etc.) performed by the Hitlerite invaders. He also says that full responsibility must also be borne by those guilty of individual crimes—the actual murderers, incendiaries, violators, exploiters of slave labour and purchasers of goods known to be stolen. He concludes that all the Hitlerite criminals are liable, without exception, “from the lance-corporal in the army to the lance-corporal on the throne”. Thus it is seen that the more highly placed the Nazi criminal the greater his responsibility. However high his rank in the hierarchy, he is still only a murderer, robber, torturer, debaucher of women, liar and so on. He is still only a common criminal though his murders and the like crimes are multiplied by the million. They do not cease to be crimes because planned and organised on an unparalleled magnitude, nor because they are done in pursuance of a criminal conspiracy by those whom the professor calls the “band” or clique. Nor do they

cease to be crimes because they were aimed at world domination which some would call a political purpose, as I suppose some would call the organised scheme for the extermination of races like the Jews. A "political" purpose does not change murder into something which is not murder. Nor do they cease to be crimes against the law of war because they are also crimes against the moral law or the elementary principles of right and wrong. Law and morality do not necessarily coincide, though in an ideal world they ought to. But a crime does not cease to be a crime because it is also an offence against the moral code.

It is with that thought in my mind that I approach the question whether the initiation of war, the crime against peace, which the Agreement of the four Governments pillories, is a crime calling for the punishment of individual criminals. The question may be approached in two ways. One which I shall call the concrete method is to start from the actual violations of the laws of war and trace the responsibility, on the lines which I have explained, up to the originators of the whole scheme, so that thus the responsibility of Hitler and his Government as conspirators for all the "terrorism" and atrocities of war can be established.

The war just ended is what has been called totalititarian war and has the peculiar feature that it was ushered in by the most brutal and blatant announcements, not only that it aimed at aggression and world domination, but would be conducted with every possible atrocity in order to strike terror, and would include both national degradation of the vanquished and racial extermination of the Jews and others. The war was to be not only aggressive and unjust, but was to be merciless. Such were the preliminary announcements. What was actually done by the Nazi Government and forces carried out the policy. It early became apparent to those who had to study the tale of Nazi atrocities that they were not the casual crimes of separate evildoers, but were committed according to a set plan or scheme. This was clear from the uniform pattern of what was done at different places and times—a pattern which could not have occurred except under the direction of the higher governmental powers, the band or clique. Besides these general grounds of inference, it has also been possible, by captured orders and other evidence, to trace the responsibility for the whole complex tissue of infamy to its authors and originators, that is to Hitler and his Government. They are thus seen, in accordance with elementary principles of criminal law, to be the criminals guilty of the crimes against peace, in that they initiated this particular war in the form in which it was in fact carried out, that is, as a vast series of separate crimes, all traceable back to Hitler and his gang.

Thus the totalitarian crime against peace is established.

But that these men were guilty of the crimes against peace can be shown on another line of argument, which would not depend, as does the argument which I have explained, on the war being not only unjust but so planned and organised that it was to be conducted on the particular lines of terrorism to which it actually conformed. The more abstract argument would rest upon the very nature of war as a thing evil in itself, though in special cases it might be justified, for instance, on the ground that the war was forced on the Power which declared it because it was necessary for the defence or liberation of that Power. Every nation has the inalienable right to self defence. But a war of aggression falls outside that justification. War is an evil thing. It is no hyperbole to describe the war of 1939 to be one of the greatest calamities that ever befell the human race. To initiate a war of aggression is thus not only a crime, but the chief of war crimes. It differs in its universal scope from the specific offences which are included in the breaches of the particular laws of war. It is the accumulated evil of the whole. If it were possible to conceive of a war conducted on the most chivalrous and humane methods possible, the initiation of the war, if it were an unjust war, would still be a crime. It would be a crime against peace.

I have already referred to the concept of the community of nations. That is, it is true, an ideal, but, though it may seem to have merely an inchoate and imperfect realisation, the concept itself is vital and has a definite reality. Hence I adopt Professor Trainin's definition (*loc. cit.*, p. 37), "International crime", he says, "is the punishable infringement of the foundations of international communion. . . . The basic prescriptions of any international communion is the existence of peaceful relations between States. . . . Peace may be directly broken by various forms of criminal activity. . . . The direct and most dangerous form of

offence against peace is the attack of one State on another—aggression—which directly breaks the peace and forces war on the peoples. Aggression is therefore the most dangerous international crime". Professor Trainin is, of course, referring to unjust aggression. He proceeds also to detail what may be described as preparatory or ancillary aggression, such as treacherous underground assaults on the intended victim.

Granted the premises that peace among nations is a desirable thing, that war is an evil of unique enormity and that there is a criminal International Law affecting individuals, it is not easy at first sight to understand why an unjust war is not a crime under International Law and, as such, involving criminal responsibility on the part of the men who planned, prepared, started and waged it. In the Minority Report of Scott and Lansing at the 1919 Conference, they were prepared to say that any nation going to war assumes a grave responsibility and that a nation engaged on a war of aggression commits a crime. But they hesitated about the feasibility of framing penal sanctions, it seems because of the difficulty of finding whether the act was in reality one of aggression or defence and of the difficulty of framing penal sanctions. They were also of the opinion that offences against humanity were too vague to admit of legal definition or to be held to involve the criminality in law.

The two United States delegates who signed the Minority Report were willing to concede that mixed Military Courts drawn from the different Allies would be competent to try charges against persons belonging to enemy countries who committed outrages against a number of civilians and soldiers of several allied nations, such as outrages in concentration camps or forced labour in mines or charges against persons in 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 towards several of the Allied Armies. But they objected, on two main grounds, to the Majority Report. One was that the Report treated as grounds of liability not only violations of the laws and customs of war but also of the laws of humanity. They said there was no fixed and universal standard of humanity, but that it varied with time, place and circumstance, and, it may be the conscience of the individual judge. They referred to the place of equity in the Anglo-American legal system and to John Selden's definition of equity as a roguish thing. But, if I may also take the parallel from Anglo-American law, equity has established itself as a regular branch of that legal system. Equally it might be said that negligence is too indeterminate to constitute a legal head of liability, but we all know that in the Anglo-American law of tort it has become one of the widest and most comprehensive and most important categories of liability.

If these elastic standards are of as wide utility as they have proved to be there is no reason why the doctrine of crimes against humanity should not be equally valid and valuable in International Law. That law deals with large concepts and not with the meticulous distinctions of Municipal Law.

In one sense, whenever an innocent French woman was tortured by the Gestapo, there was a crime against humanity. But what is meant by the term as used in the indictment against the major war criminals is conduct directed against a large section of humanity, such as the crime of racial or religious extermination, as that for instance directed against the Polish nation or the Jewish people in the course of which millions of mankind were deliberately destroyed.

There is a close parallel between such crimes and crimes against peace. But the plan of exterminating the Jews, though in one sense a war crime, was rather secondary and ancillary to the actual war. I cannot agree that crimes against humanity are too vague to be the subject of penal action. International Law does not deal with border-line cases or with subtle distinctions. What is meant in this context by crime against humanity is sufficiently clear. An International Court would have no difficulty in deciding whether or not such a crime is made out.

The Majority Report of 1919 included both offences against the laws and customs of war and the laws of humanity as falling within the category of offences rendering those guilty of them responsible to criminal prosecution. I cannot find that this conclusion is refuted by the objections set out in the Minority Report in 1919 either of the American or Japanese delegates. I have already stated why I dissent from the view that heads of States are immune from legal liability except at the hands of their own people, which was one of the objections taken.

But the category of crimes against peace which is one of the counts in the Indictment of 1945 and includes the planning, preparation and initiation of aggressive or unjust war, requires a short further discussion. It does raise one of the most debated questions of International Law. I have stated why I think it is an international crime and indeed the master crime. It is the source and origin of all the evils of war—modern war, even without the calculated system of terrorism exhibited by the Germans and their Allies in the war just ended, is about the greatest calamity which can be inflicted upon mankind. No one can doubt that to bring this about with cold, calculated villainy, for the purpose of spoliation and aggrandisement, is a moral crime of the foulest character. But legal writers are fond of distinguishing moral from legal crime. There is, however, no logical distinction in the character of the act or its criminality; the only question is whether the crime can be punished on legal grounds, that is whether the offence has achieved the status of being forbidden by law. To punish without law is to exercise an act of power divorced from law. Every act of punishment involves an exercise of power, but if it is not based on law it may be morally just, but it is not a manifestation of justice according to law, though some seem to think that if the justice and morality of the decision are incontrovertible, it may serve as a precedent for similar acts in the future and thus establish a rule of International Law. Thus the banishment of Napoleon I to St. Helena by the executive action of the Allies may, according to that way of thinking, be taken in some sort to create a precedent for the similar executive action for the punishment of deposed or of abdicated sovereigns. But the idea of an International Law between different members of the community of nations would not be thus developed.

However, the punishment of heads or other members of Governments or national leaders for complicity in the planning and initiating of aggressive or unjust war has not yet been enforced by a Court as a matter of International Law.

The 1919 Commission did not recommend that the act which brought about the war should be charged against their authors, though the charge was not the same as that now brought against the members of the Nazi Government. But, between then and the commencement of the war just ended, civilised nations, appalled by reviewing the destruction and suffering caused by the first great war and appalled by the thought of the immeasurable calamities which would flow from a second world war, gave much thought to the possibility of preventing the second war. The Covenant of the League of Nations did contain certain machinery for that end. Certain conventions were summoned to declare that unjust or aggressive war was to be prohibited; one of these actually declared that it was a crime.

In 1928 the Pact of Paris or the Kellogg-Briand Pact was signed or adhered to by over sixty nations. It was a solemn treaty. Its central operative clause was brief, unusually brief for an international document, but its terms were plain, clear, and categorical. The nations who signed or adhered to it unconditionally renounced war for the future as an instrument of policy. There would seem to be no doubt or obscurity about the meaning of this. In English law it is often said that the doubtful interpretation of an Act of Parliament may be elucidated by considering what was the mischief which the Act was intended to cure; this might be shown by considering the previous law and its deficiencies. In the same way, if there were any ambiguity about the effect of the Pact, it might be solved by considering the eager desire of the nations to avert any danger of war in the future by a clear declaration of International Law. But there seems to be no room for doubt that the Pact was, as is clear by its very terms, intended to declare war to be an illegal thing. This which is plain enough on its face has been declared to be the fact by the most eminent statesmen of the world. It is true that no sanctions are provided by the Pact and no specific machinery is set up for the settlement of differences between nations, nor does the treaty provide for what would seem to be the natural corollary for disarmament. But efforts to secure that end soon followed.

The concert of the nations evidenced by the Pact had the sanction of being embodied in a Treaty, the most formal testimony to its binding force. As a treaty or agreement it only bound the nations which were parties to it. But it may be regarded from a different aspect. It is evidence of the acceptance by the civilised nations of the principle that war is an illegal thing. This principle so accepted and evidenced, is entitled to rank as a rule of International Law. It may be that before

the Pact the principle was simply a rule of morality, a rule of natural as contrasted with positive law. The Pact, which is clear and specific, converts the moral rule into a positive rule comparable to the laws and customs of war, and like these laws and customs binding on individuals since the principle that individuals may be penally liable for particular breaches of International Law is now generally accepted. Thus violation of the principle that war, if unjust, is illegal and is not only a breach of treaty on the part of the nation which violates it, carrying with it all the consequences which attend a treaty-breaking, but is also a crime on the part of the individuals who are guilty as conspirators, principals or accessories of actively bringing it about, as much as a violation of the customary laws of war. Nations can only act by responsible instruments, that is by persons. If a nation, in breach of a treaty, initiates aggressive war the guilt of the responsible agents of the nation who bring this about, being able to do so by reason of their high position in the State, is a separate, independent and different liability, both in its nature and penal consequences. This is merely an illustration of the thesis that international crimes are of a multiple character; even violations of the laws of war will, unless the case is one of purely individual wrong-doing, generally involve multiple penal liability. Here the nation breaks the treaty, but the heads of the State who bring about the war are by their acts personally guilty of doing what the Pact declares to be illegal. That is a crime on their part like the crime of violating the laws of war. The nation is liable as a treaty-breaker, the statesmen are liable as violating a rule of International Law, namely the rule that unjust or aggressive war is an international crime. The Pact of Paris is not a scrap of paper. This, in my opinion, is the position when the Pact of Paris is violated. It is on this principle, as I apprehend, that crimes against peace may be charged personally against the leading members of the Nazi Government. How far it is established in fact against each of the accused will depend on what is proved at the trial.

It may be said that for ages it has been assumed, or at least taken for granted in practice, among the nations that any State has the right to bring aggressive war as much as to wage war in self defence and that the thesis here maintained is revolutionary. In fact, the evil or crime of war has been a topic of moralists for centuries. It has been said that "one murder makes a felon, millions a hero". The worship of the great man, or perhaps the idea of sovereignty, paralyses the moral sense of humanity. But International Law is progressive. The period of growth generally coincides with the period of world upheavals. The pressure of necessity stimulates the impact of natural law and of moral ideas and converts them into rules of law deliberately and overtly recognised by the consensus of civilised mankind. The experience of two great world wars within a quarter of a century cannot fail to have deep repercussions on the senses of the peoples and their demand for an International Law which reflects international justice. I am convinced that International Law has progressed, as it is bound to progress if it is to be a living and operative force in these days of widening sense of humanity. An International Court, faced with the duty of deciding if the bringing of aggressive war is an international crime, is, I think, entitled and bound to hold that it is, for the reasons which I have briefly and imperfectly here sought to advance. I may add to what I have said, that the comparatively minor but still serious outrages against the Pact, such as the rape of Manchuria in 1931 and the conquest of Abyssinia in 1935, were strongly reprobated as violations of the Pact of Paris; indeed, though the Pact did not provide for sanctions, the latter outrage provoked certain sanctions on the part of some nations. In addition there is a strong weight of legal opinion in favour of the view here suggested.

An International Court, faced with the duty of deciding the question, would do so somewhat on the same principles as a municipal Court would decide the question whether a disputed custom has been proved to exist. It would do so on the materials before it. These materials are of course, different in character where the dispute is whether the existence of a rule of International Law has been established as part of the customary law between the nations. I have indicated my view as to what such materials are. A Court would also seek to harmonise the customary rule with the principles of logic of morality and of the conscience of civilised mankind. The law merchant (to compare small things with great) existed as law enforceable by its proper Courts before it was accepted as part of

the national legal system. The Court would bear in mind that time and experience bring enlightenment and that obsolete ideas and prejudices become outworn.

In less than a month from the day when I write these words the International Tribunal will begin the trial in which it will be decided what is the International Law which is material to the grave issues raised.

WRIGHT.

APPENDIX VII

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