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HUMAN RIGHTS REPORT: PRELIMINARY PAPERS.

HISTORICAL SURVEY
OF THE PROBLEM OF VIOLATIONS OF HUMAN RIGHTS
(War Crimes and Crimes against Humanity).

Rapporteur: Dr. J. LITAWSKI, Legal Officer.

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(in preparation).

Note.

As indicated, the present paper is a preliminary draft, and is circulated as such to Members for information only, and not for submission to the Commission or to the United Nations. It is the interim result of the studies as at present stage and is intended to serve as a basis for drafting of the final Report on Human Rights which is to be presented to the United Nations.

Any changes which a further examination of the relevant material and sources of information may require, as well as modifications which might be suggested by Committee III will be taken into account at a later stage.

The specific rules 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⁾ on the basis of which these Tribunals and other Courts had to determine the guilt or innocence of the war criminals, i.e. their responsibility, inter alia for violations of the fundamental rights of nations as well as for violations of fundamental human rights of peoples and of individual persons, comprise three types of crimes: a) crimes against peace, b) war crimes, and c) crimes against humanity.

It is the rules relating to the latter two categories of crimes which are of particular interest to, and have a bearing on, the question of the protection of human rights, because by their very nature they either constitute evidence of an already existing system or contain the nucleus of a system of provisions which, if properly developed, would lead to the protection of fundamental human rights and minimum human standards in time of war and in peace, including the protection of populations against the abuse of sovereignty by their own authorities, irrespective of whether or not, as these provisions say, such abuse of sovereignty and inhumane acts are committed in violation

(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.

of the domestic law of the country where perpetrated. It is especially this definition of the general character of the concept of crimes against humanity, irrespective of time and place and national sovereignty, which makes these rules so relevant for the promotion and encouragement of respect for human rights and for fundamental freedoms without distinction as to race, sex, language or religion.

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

In this way we come to the conclusion that every act or nearly every act coming under the terms of "war crimes" and "crimes against humanity" violates the corresponding human right. It may be added that crimes against peace, namely, planning, preparation, initiation and waging of a war of aggression, declared by the Nuremberg Tribunal as a supreme international crime, constitute also, in a general non-technical sense,

a crime against humanity, as they involve, in certain circumstances, violations of human rights,

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

1.

I. THE HAGUE CONVENTIONS OF 1907.

In the centuries long chain of developments and progress which tended to modify gradually the unsparing cruelty of the war practices and aimed through custom and treaties to transform the usages in war into legal rules of warfare in order to make wars more humane, the Second Peace Conference held at the Hague in 1907 marks the turning point. This Conference which had been convoked for the purpose of "giving a fresh development to the humanitarian principles" (1) drew up a number of Conventions which

(1) See the Preamble to the Final Act of the Second Peace Conference, The Hague, 1907.

represent the most important step in "evolving a lofty conception of the common welfare of humanity". (1)

The principle of humanity, which is one of the principles that underline all these enactments aims at establishing as firmly as possible that all such kinds and degrees of violence as are not necessary for the overpowering of the opponent should not be permitted to a belligerent, and that in contradistinction to the savage cruelty of former times, a certain amount of fairness and respect for human rights in no way hampers 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, recalls in the Preamble that the Contracting Parties "inspired by the desire to

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

- a) The Declaration of Paris of April 16th, 1856, respecting warfare on sea, which abolished privateering, 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.
- b) The Geneva Convention of August 22nd, 1864, for the amelioration of the conditions of wounded soldiers in armies in the field, followed by a Convention signed in Geneva on July 6, 1906.
- c) The Declaration of St. Petersburg of December 11th, 1868, respecting the prohibition of the use in war of projectiles under 400 grammes (14 ounces) which are either explosive or charged with inflammable substances.
- d) The Convention enacting regulations respecting the Laws of War on Land agreed upon at the First Peace Conference of 1899, which represented the first international endeavour to codify the laws of war. This Convention was revised in 1907 and its place is now taken by Convention IV of the Second Peace Conference.

diminish the evils of war, so far as military requirements permit", thought 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 their views, these provisions were intended to serve as a general rule of conduct for the 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".

However, in spite of these references to "humanity", "interests of humanity" and "laws of humanity", all these expressions are used in this Convention, as well as in all other documents and enactments of that period, in a non-technical sense and certainly not with the intention of indicating a set of norms different from the "laws and customs of war", the violations of which constitute war crimes within the meaning of the Documents of 1945 and 1946 enumerated at the outset. The Fourth Hague Convention is an instrument dealing, as it were, per definitionem with war crimes in the technical and narrower sense, and the "interest of humanity" are conceived here only as the object which the laws and customs of war serve, and the "laws of humanity" as one of the sources of the law of nations. (1)

(1) See E. Schwelb's article on "Crimes against Humanity", published in

To the other Hague Conventions of 1907 which are of relevance to the question of the protection of human rights and the provisions of which are of the same nature as those enacted in the Fourth Convention, belong the following:

Third Convention relative to the Opening of Hostilities.

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

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

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

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

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

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

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

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

Fourteenth Convention Prohibiting the Discharge of Projectiles and Explosives from Balloons. (1)

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

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

"Military operations are not governed solely by stipulations of international law. There are other factors. Conscience, good sense, and the sense of duty imposed by the principles of humanity will be the surest guides for the conduct of sailors, and will constitute the most effective guarantee against abuses. The officers of the German Navy, I loudly proclaim it, will always fulfill in the strictest fashion the duties which emanate from the unwritten law of humanity and civilisation". (1)

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

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

(1) Quoted in the Reports of the Commission of Responsibilities of 1919, referred to in full in the subsequent sections.

expressly reject the general participation clause or include it in a different and modified form.⁽¹⁾

Thus, as regards the latter practice, the Signatories of the Protocol of 1925 mentioned below have included therein 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."⁽²⁾

To other factors which are, or had until recently been, limiting the effectiveness of the rules of war belong also: (a) the institution of reprisals which, while 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 order.

These very important questions deserving the serious attention of Governments shall however be the subject of separate Sections of the Report.

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

(2) L. Oppenheim, International Law, Vol II., Sixth Edition, page 186.

In order to dispose with the particular subject of the developments of laws of war, the following may be mentioned here of the more important enactments subsequent to the First World War:

- a) The Protocol of 1925 concerning the use in war of asphyxiating, poisonous, and other gases, signed at a special Conference convened by the Council of the League of Nations.
- b) The Geneva Conventions of 1929 concerning the treatment of sick and wounded, and of prisoners of war.
- c) The London Protocol of 1936 relating to the use of submarine merchant vessels.

II. THE DEVELOPMENTS DURING THE FIRST WORLD WAR.

1) The massacres of the Armenians in Turkey.

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

"En présence de ces nouveaux crimes de la Turquie contre l'humanité et la civilisation, les Gouvernements alliés font savoir publiquement à la Sublime Porte qu'ils tiendront personnellement responsables desdits crimes tous les membres du Gouvernement ottoman ainsi que ceux de ces agents qui se trouveraient impliqués dans de pareils massacres." (1)

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

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

2) The 1919 Commission of Responsibilities.

In January, 1919, the Preliminary Peace Conference of Paris decided to create a Commission composed of fifteen members, for the purpose of "enquiring into the responsibilities relating to the war". The Commission was charged, inter alia, to enquire into and report upon "the facts as to breaches of the laws and customs of war committed by the forces of the German Empire and their Allies, on land, on sea, and in the air", during the 1914-1919 war. (1)

In its Report of 20th March, 1919 (2) the Commission had stated that the large number of documents it has 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 the explicit regulations, of established customs, and of the clear dictates of humanity, Germany and her allies have piled outrage upon outrage.

In particular, the Commission established that multiple violations of the rights of combatants, of the rights of civilians, and of the rights of both, have been committed which were the outcome of the "most cruel practices which primitive barbarism, aided

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

(2) Op. cit., Chapter II.

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

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

- 1) Murders and massacres; systematic terrorism.
- 2) Putting hostages to death.
- 3) Torture of civilians.
- 4) Deliberate starvation of civilians.
- 5) Rape.
- 6) Abduction of girls and women for the purpose of enforced prostitution.
- 7) Deportation of civilians.
- 8) Internment of civilians under inhuman conditions.
- 9) Forced labour of civilians in connection with the military operations of the enemy.
- 10) Usurpation of sovereignty during military occupation.
- 11) Compulsory enlistment of soldiers among the inhabitants of occupied territory.

- 12) Attempts to denationalise the inhabitants of occupied territory.
- 13) Pillage.
- 14) Confiscation of property
- 15) Exaction of illegitimate or of exorbitant contributions and requisitions.
- 16) Debasing 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.

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

The substantial number of examples (charges) of offences committed by the authorities and forces of the Central Empires and their Allies that had been collected by the Commission (1) can be divided into two categories. To the first category comprising the overwhelming majority of charges belong offences

(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.

committed in violation of the laws and customs of war, and which can be classified as war crimes sensu stricto. The second category constitutes offences that were committed on the territory of Germany and her Allies against their own nationals. In particular, the Commission had included into its findings information on various crimes violating the rights of civilians and committed by Turkish and German authorities against Turkish subjects, i.e. the Armenians and the Greek speaking population of Turkey, or by Austrian troops against the population of Gorizia, which at the material time (1915) was Austrian territory. It would appear that the latter set of offences had been qualified by the Commission as crimes coming under the notion of violations of the laws of humanity. As has already been shown in paragraph 1) supra the massacres of the Armenian population in Turkey were denounced as "crimes against humanity and civilisation".

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", and that "all persons belonging to enemy countries, however high their position may have been, without distinction of rank, including chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution".⁽¹⁾ Accordingly, the Commission recommended that in addition to the municipal courts, military

(1) Op. cit., Chapter III.

or civil, which every belligerent has, according to International Law, power to set up for the trial of such cases, an International Court ("High Tribunal") to be constituted for the trial of outrages falling under four special categories of charges of violations of the laws and customs of war and of the laws of humanity. (1)

The above conclusions and recommendations were the logical outcome of the opinion contained in a statement made 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

(1) The four categories of charges are the following:-

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

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

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

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

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

light that it is not permitted cynically to profess a disdain for the most sacred laws and the most formal undertakings".

From the foregoing, it appears that the two categories of offences with which the Commission of Fifteen concerned itself, namely, violations of the laws and customs of war on the one hand and offences against the laws of humanity on the other, correspond generally speaking to "war crimes" and "crimes against humanity" as they are distinguished in the two Charters of 1945 and 1946 and the Control Council Law No. 10. Here, we find for the first time the 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", particularly whether the Commission thought of crimes against "any civilian population" committed by the Central Powers during the First World War. It is common knowledge that to some extent also in the First World War persecutions of their own nationals had been conducted by the Central Powers on a considerable scale, though not on a scale comparable with what happened in Nazi dominated Europe between 1933 and 1945. Reference is made, e.g. to persecutions of political opposition groups and of Slavonic and Rumanian races in Austria and Hungary, and to 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 and references to the "laws and principles of humanity", to be found 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

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

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 circumstance, and accordingly, it may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity".

In connection with the work of the Commission of Fifteen it may also be of some interest to record here 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.

(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 of Responsibilities of 1919.

- 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.

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

3) The Peace Treaties of 1919-1923.

In the subsequent Peace Treaties with Germany, Austria, Hungary and Bulgaria (1), the view of the American members eventually prevailed, and the references to the "laws of humanity" do not appear in these treaties. All the relevant provisions in these treaties, with the exception of Article 227 of the Peace Treaty of Versailles, deal only with acts in violation of the laws and customs of war. Thus, for instance, in Article 228 of the Treaty of Versailles the German Government recognized the right of the Allied and Associated Powers to bring to justice persons accused of having committed acts in violation of the laws and customs of war, and it also subscribed to the obligation of handing over to these Powers all persons accused of having committed such acts.

As to the question of jurisdiction the treaty stipulated that persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power, while persons guilty of such

(1)

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

acts against the nationals of more than one of these Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned (Article 229).

Article 227 of the Treaty of Versailles provided that the Allied and Associated Powers publicly arraign Wilhelm II of Hohenzollern, formerly the German Emperor, "for a supreme offence against international morality and the sanctity of treaties". In its decision the special tribunal which was envisaged for the trial of Wilhelm II was to be guided "by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality".

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

The provision of Article 227 which was the precursor of Article 6 (a) of the Nuremberg Charter and of Article 5 (a) of the Tokyo Charter respecting crimes against peace, with this important distinction, that the crimes against peace under the two Charters are not merely contraventions of a moral code, but violations of legal provisions, does not, of course, concern the present problem of "war crimes" and "crimes against humanity". However, in connection with Article 227 it is to be recalled that during the Paris Peace Conference the Allied and Associated Powers had formally stated that in their view the war which began on August 1, 1914, was "the greatest crime against humanity and the freedom of peoples that any nation, calling itself civilised, has ever consciously committed".⁽¹⁾ Accordingly, Article 227 stipulated

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

that a special Tribunal shall be constituted to try the German Emperor, composed of five judges, one appointed by each of the following Powers: United States, Great Britain, France, Italy and Japan. When the German Delegation contended in connection with this and other stipulations referred to above that a trial of the accused by tribunals appointed by the Allied and Associated Powers would be a one-sided and inequitable proceeding, the Allied and Associated Powers replied that they "consider that it is impossible to entrust in any way the trial of those directly responsible for offences against humanity and international right to their accomplices in their crimes".⁽¹⁾

From the latter it would appear 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.

The first treaty with Turkey, however, 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), which correspond 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.

(1) Op. cit., Section II, "Penalties".

"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".

It appears that the provisions of Article 230 of the Peace Treaty of Sèvres was obviously intended to cover, in conformity with the Allied note of 1915, referred to in the preceding section, offences which had been committed on Turkish territory, against persons of Turkish citizenship though of Armenian or Greek race. This article constitutes therefore a precedent for the provision of Articles 6 (c) and 5 (c) of the Nuremberg and Tokyo Charters, and an example for 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.⁽¹⁾

III. THE PERIOD BETWEEN THE WORLD WARS.

1) The Italo-Abyssinian War of 1935-36.

During the Italo-Abyssinian conflict a number of protests, appeals and declarations had been issued by Haile Selassie, the

(1)

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

Emperor of Ethiopia, denouncing the various and many crimes committed by Italian forces and authorities against the Ethiopian population, both during the campaign and after the annexation of Ethiopia by Italy was proclaimed on the 9th May 1936.

One category of the crimes committed at the time became of special concern to the League of Nations and an ad hoc Committee of Thirteen was created to consider the use of poison gas by the Italian Army and Air Force. In one of the meetings of this Committee it was specifically pointed out that both parties signed the relevant Geneva Convention prohibiting the use of gases in any form or circumstances, and a reference was made to the fact that numerous cases of gas-poisoning were confirmed by impartial sources, all of which gave evidence that gas had been used. (1)

In his personal address to the Sixteenth Assembly of the League of Nations, the Emperor of Ethiopia, while describing the fate which had been suffered by Ethiopia, stated on 4th July, 1936, inter alia, that "It is not only upon warriors that the Italian Government has made war, it has above all attacked populations far removed from hostilities". First, "towards the end of 1935 Italian aircraft hurled upon my armies bombs of tear gas. The Italian aircraft then resorted to mustard gas". Describing further on how these operations and the technique applied for this purpose were spreading later over vast areas of Ethiopian territory, the Emperor said that "it was thus that as from the end of January, 1936, soldiers, women, children, cattle, rivers, lakes, and pastures were drenched continually with this deadly rain ... in order to kill systematically all living creatures ...

(1)

Statement by Mr. Eden on 8th April, 1936, see Keesing's "Contemporary Archives", Vol. II, 1934-1937, p.2066.

"That was the chief method of warfare,... the very refinement of barbarism which consisted of carrying ravage and terror into the most densely populated parts of the territory. The object was to scatter fear and death over a great part of the Ethiopian territory." (1)

In a letter sent to the Secretary-General of the League of Nations on March 17, 1937, the Emperor of Ethiopia requested the appointment of a Commission of Enquiry to investigate all the horrors committed in Ethiopia by the Italian Government. This letter constitutes a further indication that crimes coming under different notions had been committed on that territory. It denounces the execution of Ras Desta, a prisoner of war, in violation of the Hague Convention, and the alleged massacre of over 6,000 persons in Addis Ababa, which occurred in February, 1937. (2)

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

At the same time the Treaty contains a provision concerning Ethiopia, one of the Allied and Associated Powers to

(1) See Keesing, op. cit., p. 2173-4.

(2) Op. cit., p. 2499.

the Treaty, which has an important bearing on the question of Ethiopia's right to prosecute Italian nationals responsible for crimes committed in that country. The relevant Article 38 reads as follows:-

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

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

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

2) The Spanish Conflict.

A further example of the use between the two World Wars of the expression "dictates of humanity", in a non-technical sense, may be found in the International Agreement for Collective Measures against Piratical Attacks in the Mediterranean by Submarines signed at Nyon on September 14th, 1937, and three days later supplemented by similar agreement signed at Geneva in respect of similar acts by surface vessels and aircraft. It is said there of attacks arising out of the Spanish conflict and committed against merchant ships not belonging to either of the conflicting Spanish parties, that they are violations of the rules of international law, and "constitute acts contrary to the most elementary dictates of humanity, which should be justly treated as acts of piracy". (1)

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(1) Doc. cit., the Preamble.

UNITED NATIONS WAR CRIMES COMMISSION.

III/107,
(Covering Note).

30th September 1947.

HUMAN RIGHTS REPORT: PRELIMINARY PAPERS.

Attached is the first draft paper covering a Section of the Human Rights Report.

The following is the list of instalments which are envisaged to cover a) the History of the Problem of Violations of Human Rights, and b) Human Rights in the Nuremberg Trial (excepting crimes against Germans), i.e. those parts of the Report undertaken by Dr. J. Litawski.

I. HISTORY OF THE PROBLEM OF VIOLATIONS OF HUMAN RIGHTS.

1. Historical Survey, Part I, 1907-1939, (Draft circulated).
2. Historical Survey, Part II, 1939-1945, (In preparation).

II. HUMAN RIGHTS IN THE NUREMBERG TRIAL.

3. Legal basis and jurisdiction of the Tribunal - Interpretation of Article 6 of the Charter, and all related legal questions (Draft ready).
4. Rights of the Victims, (based on the Indictment and the Judgment.)
5. Rights of the accused.
6. Information contained in the transcript of the trial, relevant to the subjects as indicated under 3-5.
7. General analysis of Nazi criminality.
8. General conclusions.

III. DEVELOPMENTS SUBSEQUENT TO THE CHARTERS

9. of International Military Tribunals and Control Council (for Germany) Law No. 10.

UNITED NATIONS WAR CRIMES COMMISSION.

HUMAN RIGHTS REPORT.

Preliminary Papers relating to the Tokyo Trial.

Rapporteur: Dr. R. Zivković.

NOTES ON THE INSTALMENTS

1. Attached are the first two draft papers dealing with the information arising from the Tokyo Trial.

Subject to any modification required after completion of the whole Report, these papers are intended to fit mainly in the scheme suggested in Document III/96 and to cover the field under the following headings:

- I. Legal Basis of the Tokyo Trial and Jurisdiction of the Far Eastern Tribunal.
- II. Rights of the victims.
- III. Rights of the accused (in preparation).
- IV. Spheres in which rights of the victims and rights of the accused may have conflicted (in preparation).
- V. Conclusions.

Draft I. (Doc. III/108).

2. The draft dealing with the questions under I includes considerations on the fundamental issue of the substantive law under which the various crimes are prosecuted before the Far Eastern Tribunal.

It would appear that, apart from considering and citing the relevant rules of law throughout the various parts of the Report, a section giving a general account of the substantive law as it stands in regard to all trials taken into consideration in the Report might be required. It would be a chapter of its own dealing with the questions

of "Legal Basis" and "Jurisdiction" as a whole and to the extent to which general features relating to these questions cannot be inserted in any other part of the Report.

In this connection the following should be pointed out:

(a) In presenting the substantive law of the Far Eastern Charter (Art.5) the rapporteur has submitted reasons as he saw them for which substantive law is included as part of the information in the Report (cf. Doc. III/108, para.5, pp.4-6). In connection with the preceding remarks it will be noted that these considerations are at the same time of a general nature and that they are equally applicable to the law of any other trial.

Therefore the rapporteur submits them for what they are worth with the suggestion that they be ultimately considered for amalgamation with considerations submitted by other rapporteurs on subjects of the same nature.

(b) When presenting the law contained in the Far Eastern Charter it was thought unnecessary to enter into a detailed analysis of its Article 5 for the following reasons:

The passages relating to the Far Eastern Charter will most probably come as a further illustration of the law which was for the first time formulated in the Nuremberg Charter and soon upon that in the Allied Control Council Law No.10. In view of the additional fact that, insofar as the two principal war crimes trials are concerned, the Nuremberg Trial is completed, whereas the Tokyo Trial is not, the law in the Nuremberg Charter will naturally have precedence in the Report and will represent the appropriate framework for a full analysis of the law embodied on the same lines in the Far Eastern Charter.

For these reasons it appears off hand that all that will be required concerning the substantive law in the Far Eastern Charter, would be to stress the points of difference, technical and substantive, in comparison with the Nuremberg Charter.

(c) In view of the identical nature of the law contained in the two Charters it will also be noted that a number of considerations made with regard to the Far Eastern Charter, such as for instance those dealing with the bearing of "crimes against peace" upon violations of human rights, (cf. Doc. III/108, para. 7, pp. 7-9), apply as well to the Nuremberg Charter and to Allied Control Council Law No. 10. Accordingly, they should also be regarded as part of the considerations likely to be submitted by other rapporteurs on the same subject.

Draft II. (Doc. III/109).

3. The second paper attached deals with the "rights of the victims".

(a) This part as well as the others envisaged under III and IV, are for the time being based on the Indictment and the Charter, and will be supplemented in due course by the information arising from the Transcripts when their examination is completed and from the Judgment when it is pronounced.

The present drafts could, consequently, be forwarded to the United Nations as representing a preliminary or interim report on the Tokyo Trial which, though incomplete, contains a useful amount of information and shows in broad lines the general scope of the questions relevant for the purposes of the United Nations.

When all sources of information are available or when perusal of part of the remainder now in the archives of the United Nations War Crimes Commission is completed, it is proposed to draft other papers in which all the information would be consolidated in a single text. It might prove necessary to do this in one or two more stages before the final text can be concluded.

(b) Draft II (Doc. III/109) contains also certain considerations which, though exposed in regard to the Tokyo Trial, go as well for the Nuremberg or any other trial to the extent to which subjects of the same nature are concerned (cf. for instance para. 4, pp. 9-11 and para. 9(c) and (d), pp. 16-18). It is obvious that such considerations should be put in harmony with those dealing with other sources of information in the

final text of the Report or even in an interim or preliminary text as a whole. Moreover, it is likely that such parts will have to be entirely redrafted and some of them subordinated to drafts of other rapporteurs.

Meanwhile, overlappings on such subjects are unavoidable, and even, it is submitted, commendable in view of the fact that several minds can better grasp a given subject in all its various aspects than a single mind.

General Remarks.

4. The rapporteur has made extensive use of footnotes with a view to relieving as much as possible of the main text from technicalities, particularly quotations, or from controversial or tangled issues.

In addition to this, he thought it more appropriate to limit quotations to essential parts only and to make reference to the source for all detailed particulars which might be sought for by the reader.

5. The rapporteur has taken into account the guidance recommended in Doc. C.259(1), Section X, para.3, p.6, that the United Nations "does not expect a collection of material indiscriminately dealing with records of common law crimes, war crimes, and crimes against humanity", which is "of no particular relevance to the task before the Human Rights Commission."

Accordingly, the rapporteur has limited the information concerning such offences to a bare minimum, and attached more importance to cases showing either the development of international law in the field of war crimes in the wider sense, or posing problems for the future development of rules protecting human rights.

6. Comments are invited on these specific drafting points, in connection with the way in which other rapporteurs are drawing up their respective parts.

III/108.
1st October, 1947.

UNITED NATIONS WAR CRIMES COMMISSION.

HUMAN RIGHTS REPORT: PRELIMINARY PAPERS

THE TOKYO TRIAL.

Rapporteur: Dr. R. Zivković.

Draft I.

LEGAL BASIS OF THE TOKYO TRIAL.

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

A total of 28 persons were indicted for crimes against peace, war crimes and crimes against humanity, all of whom occupied at one time or another key positions in the conduct of Japanese political and military affairs. ⁽¹⁾

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- (1) The names of and last positions held by the 28 defendants are as follows: Sadao ARAKI, member of the Cabinet Advisory Council; Kenji DOHIMARA, Inspector General Military Training; Kingoro HASHIMOTO, Member of the Lower House of the Diet; Shunroku HATA, Inspector General Military Education; Kiichiro HIRANUMA, President Privy Council; Koki HIROTA, Member of the Cabinet Advisory Council; Naoki HOSHINO, Adviser to Finance Ministry; Soishiro ITAGAKI, Commander Japanese Army in Korea and 7th Area Army in Singapore; Okinori KAYA, Director I.R.A.P.S.; Koicki KIDO, Lord Keeper of the Privy Seal, chief confidential adviser to the Emperor; Keitaro KIMURA, Commander Japanese Army in Burma; Kuniaki KOISO, Prime Minister; Iwane MATSUI, President of the Greater East Asia Development Society; Yosuke MATSUOKA, Foreign Minister; Jiro MINAMI, Member of the Privy Council, President of the Political Association of Great Japan; Akira MUTO, Chief of Staff 14th Area Army, Philippines; Osami NAGANO, Supreme Naval Adviser to the Emperor; Takasumi OKA, Vice Navy Minister, Commander of the Naval Station at Chinkai (Korea); Shumei OKAWA, an organizer of the Mukden incident, Director General East Asia Research Institute of the South Manchurian Railway; Hiroshi OSHIMA, Ambassador to Germany; Kenryo SATO, Chief of Military Affairs Bureau, War Ministry; Mamoru SHIGEMITSU, Foreign Minister; Shigetane SHIMADA, Chief of Naval General Staff; Toshio SHIRATORI, Director, I.R.A.P.S.; Teiichi SUZUKI, Cabinet Adviser, Director of I.R.A.A.; Shigenori TOGO, Foreign Minister; Hideki TOJO, Prime Minister and War Minister; Yoshijiro UMEZU, Chief of General Staff.

The charges submitted against the 28 defendants include plans and preparations to wage aggressive wars as far back as in 1928, and the series of actual military aggressions that took place starting from the attack on Manchuria in 1931.

All violations of human rights involved are those planned and/or actually perpetrated in connection with or in the course of these aggressions by means of numerous offences representing "war crimes" and "crimes against humanity".

Proclamation of the Supreme Commander.

2. The Far Eastern 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.⁽¹⁾

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

- (a) The powers conferred upon him by the President of the United States of America as Commander in Chief of the Army and Navy;
- (b) The powers deriving from his designation by all the Powers allied in the Far-Eastern war as Supreme Commander for these Powers with the general task of carrying into effect the surrender of the Japanese armed forces;⁽²⁾
- (c) The powers vested in him by the Governments of the United States, Great Britain and the Soviet Union, at their conference held in Moscow on 26th December 1945, to issue all orders for the implementation of the Terms of Surrender of Japan. This was done in agreement with the Chinese Government.⁽³⁾

(1) For text of the Proclamation, cf. Appendix

(2) Cf. Proclamation, para.5.

(3) Cf. Proclamation, para.6.

In addition to this, and with special regard to the constitutional position created within Japanese territory after the capitulation, the Proclamation was based upon the express provision of the Instrument of Surrender that the authority of the Emperor and of the Japanese Government was made subject to the Supreme Commander for the Allied Powers, who was empowered to take all steps he saw proper to implement the terms of surrender.⁽¹⁾

Finally, the Proclamation was issued in execution of the specific term of surrender as laid down at Potsdam on 26th July, 1945, that "stern justice shall be meted out to all war criminals" and with reference to repeated statements made to the same effect by the Allied Nations during the war.⁽²⁾

The Far Eastern Tribunal was thus set up by an act of executive power, which distinguishes it from the establishment of the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis (so-called Nuremberg Tribunal), which was constituted by means of an international agreement signed for the purpose by the Powers concerned.⁽³⁾

The Charter.

3. The composition, jurisdiction, powers and rules of procedure of the Far Eastern Tribunal were regulated by a Charter, approved and enacted by the Supreme Commander in the said Proclamation.⁽⁴⁾

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

(1) Cf. para.10 of the Terms of Surrender, Department of State Bulletin, Vol.XIII, No.318, p.137-138. Also para.4 of the Proclamation.

(2) Cf. Proclamation, para.1 and 2.

(3) Cf. p. (Part drafted by Dr. Litawski).

(4) The Charter attached to the Proclamation of 19th January 1946 was subsequently amended by General Orders No.20 of 26th April 1946. The items amended are recorded in the appropriate parts of this Report. The text as amended appears in Appendix.

Composition of the Far Eastern Tribunal.

4. Under Art.2 of the Charter, the Far Eastern Tribunal is composed of not less than six, nor more than eleven members.⁽¹⁾ Members are appointed by the Supreme Commander from the names submitted by the Signatories to the Instrument of Surrender,⁽²⁾ and in addition to this by the Governments of India and of the Commonwealth of the Philippines.⁽³⁾

The trial opened with nine judges from the following countries: Australia, Canada, China, France, Netherlands, New Zealand, U.S.S.R., United Kingdom and United States.⁽⁴⁾

JURISDICTION OF THE FAR EASTERN TRIBUNAL.

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

The examination of these rules of law cannot, however, exhaust the answers sought in connection with this fundamental question. In the field of war crimes, as in many other branches, international law is still uncodified and most of its rules form a part of customary law. As a consequence a large number of these rules are being and can be

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

(2) The Signatories are: U.S.A., China, Great Britain, U.S.S.R., Australia, Canada, France, Netherlands, New Zealand.

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

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

uncovered only by the courts of law called for to implement them. In addition to this, a great many rules contained in international treaties and conventions do not expressly provide for the sanctions to be applied, so that it is again up to the courts to determine in each case the nature and the severity of the sanctions to be imposed upon the guilty party.

The Far Eastern Charter, jointly with the Nuremberg Charter, have accomplished a certain amount of codification in the field of war crimes and they have specified expressly the various punishments international courts of law are entitled to pronounce for the commission of these crimes. Yet, however important, this development represents a first attempt of the kind and comprehends a much wider field of criminal offences than the one generally understood prior to the Trials at Tokyo and Nuremberg held under the terms of the respective Charters.

As a consequence, the answers to our question cannot entirely or exclusively be obtained from the rules as they are formulated in the Far Eastern Charter. Much more important is the manner in which the Far Eastern Tribunal applied the relevant provisions of the Charter, namely, what effect it gave those provisions in the variety of cases brought before it for trial.

However, insofar as it would not be possible to grasp the jurisprudence of the Far Eastern Tribunal without knowing at the same time the rules of substantive law being at the root of its jurisdiction and proceedings, the texts contained in the Far Eastern Charter are of primary importance as stated above.

The very nature of the information provided by the Tokyo trial, as by any other war crimes trial, brings our question within the field of penal law. For, to the extent to which the commission of war crimes results in violations of human rights, the latter are covered and protected by way of the rules of international law which provide for the punishment of war crimes, and to the extent to which such rules entail penal retribution. The rules which were or are being applied in war crimes trials in general, and in the trials of major war criminals at Tokyo and Nuremberg in particular, place the

question more specifically within the scope of international penal law, which is still in the making, but which is rapidly developing precisely under the impact of the trials held as a result of war crimes perpetrated during the last war.

Thus, the information required to answer the main question in regard to the violation and legal protection of human rights, will on the whole deal with penal sanctions and provide thereby probably one of the most valuable contributions to the development and codification of rules intended to make the protection of human rights in the future more effective than hitherto.

6. In Art. 1 of the Far Eastern Charter it is declared that the Tribunal was "established for the just and prompt trial and punishment of the major war criminals in the Far East".

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

" Article 5: Jurisdiction over Persons and Offences.

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

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

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

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

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

Leaders, organizers, 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)

(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.

In spirit the afore-quoted rules are in harmony with and a replica of the corresponding provisions of the Nuremberg Charter (Article 6).⁽¹⁾ However, in words they differ to a certain extent from the latter, so that in this respect they require a number of answers of interest for the question of the unity and clarity of substantive international penal law.

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

On the one hand, the relationship between the two is one of cause to effect. Violations of human rights with which we are concerned in this Report are those which were perpetrated as a consequence of the aggressions constituting what has been agreed to call World War II. On the other hand, the crimes which were or are being prosecuted before the Tribunals at Tokyo and Nuremberg, were prosecuted on the ground that they were part of the planning or conspiracy to wage wars of aggression.⁽²⁾ Finally, "crimes against peace", taken in themselves are violations of the fundamental rights of States and Nations. Rights such as the right to independence or to territorial integrity which are recognised to all self-governing national communities and which are directly affected by "crimes against peace", are a pre-requisite for a full exercise of individual human rights within the borders of the State and accordingly form part of human rights in a wider, non-technical sense.

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

(1) Cf. p. (reference to part drafted by Dr. Litawski).

(2) For the Tokyo Trial, cf. Indictment, Counts 37-38 and 44. Cf. also p. for the ruling made by the Nuremberg Tribunal that a "plan or conspiracy" constitutes a separate criminal offence only in respect of "crimes against peace". (Reference to p.14, n.2., Doc. III/109).

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

Whereas the Nuremberg Charter incriminates, inter alia, the "waging of a war of aggression" without making reference to or drawing a distinction between wars launched with or without a proper "declaration" the Far Eastern Charter incriminates specifically the "waging of a declared or undeclared war of aggression". (Article 5(a).)

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

In this connection it is important to note that the difference between the two Charters is purely verbal in the sense that the Far Eastern Charter formulates an issue which is implied in the definition of the Nuremberg Charter.

While omitting to state that a "declared" war of aggression is in the same way criminal as an "undeclared" war, the Nuremberg Charter nevertheless equally imposes 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 irrelevant for the criminal nature of the aggressive war in itself. In other words, the element of "aggression" is made essential, but at the same time 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 made by express reference to it; 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,⁽¹⁾ no violation of international law could be claimed once a war was 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. Namely, in formulating rules of international law as they develop in an uncodified system with all that such a situation implies, particularly with the co-existence of Treaties which are or which might be regarded as conflicting, it is undoubtedly preferable to proceed by means of express terms rather than by way of implication. In this respect the definition of "crimes against peace" in the Far Eastern Charter is a good instance.

Before closing this paragraph, it can be remarked 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 declarations. The Tribunal contented itself by ascertaining this fact in each case⁽²⁾ and proceeded directly on the grounds of such concrete circumstances.

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

(2) Cf. Judgment of the Nuremberg Tribunal, H.M. Stationary Office, Cmd. 6964, London, p. 17 and the following, particularly pp. 36-38.

8. Similar verbal differences appear in the definition of "conventional war crimes" or "war crimes" in the narrower, technical sense. In Article 5(b) of the Far Eastern Charter this definition is limited to the general statement that "conventional war crimes" represent "violations of the laws or customs of war". In Article 6(b) of the Nuremberg Charter a similar statement ⁽¹⁾ is followed by an extensive enumeration of specific offences cited exempli causa as representing "war crimes" and "violations of the laws and customs of war".

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

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

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

(a) In the Far Eastern Charter, it is not expressly stated that "crimes against humanity" are crimes committed "against any civilian population", which terms were inserted in the Nuremberg Charter chiefly with a view to including criminal violations of human rights perpetrated by the Nazi régime against their own citizens. However, in the context of the provision taken as a whole, there is little doubt that the same field is covered by the Far Eastern Charter. ⁽²⁾

(b) In the Far Eastern Charter there is no statement on "persecutions on religious grounds", possibly because such violations by the Japanese major war criminals were in-existent, so that their being mentioned in the

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

(2) For more detailed consideration on this point, cf. p.17, Doc.III/109.

Charter would have had no practical purpose. 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 can be taken that, insofar as persecutions on religious grounds are 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.

(c) Finally, the text of the Far Eastern Charter did not give rise to any differences of opinion as to the effect and meaning of the definition of "crimes against humanity" in Article 5(c) when such crimes are committed before the outbreak of war. As reported in another connection, in the case of the Nuremberg Charter the original text made it necessary to replace a semi-colon by a comma between the two main types of offences defined as representing "crimes against humanity", to the effect of which a special Protocol had to be signed between the Powers concerned.⁽¹⁾

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

(1) Cf. p.10, n.2, Doc.III/109.

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

However, it would appear that such differences, in texts of law dealing with subjects of the same nature and enacted separately only for reasons of geographical and executive convenience, are liable to cause a certain amount of imprecisions and even confusion in regard to the state of international law in the spheres concerned. Whenever possible this should be avoided in the future.

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

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

In line with the Nuremberg Charter, the Far Eastern Charter contains in the first place the provision already cited, that the Tribunal has "the power to try and punish Far Eastern war criminals, who as individuals or as members of organisations are charged with offences which include Crimes against Peace". The scope of the individuals comprised is defined in the last provision of Article 5 which declares the responsibility of "leaders, organisers, instigators and accomplices" in addition to the physical perpetrators of these crimes.⁽¹⁾

(1) Cf. para. 6, p. 6.

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

(Article 6)

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

This provision corresponds to Art.7 and 8 of the Nuremberg Charter, which have been analysed in another part of this Report. (1)

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

They declare equal responsibility of all individuals involved irrespective of:

- (a) The official position held by the offenders. (The Nuremberg Charter specifically includes heads of States and responsible officials of the Governments);
- (b) The fact that the offender may have acted upon superior orders.

The difference between the two Charters lies in that the Far Eastern Charter includes among circumstances permitting a mitigation of punishment the official position of the accused, whereas the Nuremberg Charter excludes it and leaves only the fact of having acted upon superior orders. (2)

As far as rules of law are concerned, the provision declaring the irrelevance of the official position of the defendants cuts across a question for which there were no rules in international law

(1) Cf. p. (Reference to part drafted by Dr. Litawski).

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

until the trials in Nuremberg or Tokyo, but only attempts to introduce the principle after the first world war.⁽¹⁾ The provision itself is a logical consequence of the rule that aggressive wars are crimes curtailing individual penal responsibility, rule which the Nuremberg Tribunal qualified as declaratory of the state existing at any rate since the Kellog-Briand Pact.⁽²⁾

The rule concerning offences committed upon superior orders decides upon a question for which rules of international law were not precise enough and which consequently required to be made certain one way or another.⁽³⁾

(1) The attempts referred to concern the case of the Kaiser. In its Report of 1919, the Commission on Responsibilities expressed the view that penal liability for violations of the laws and customs of war should include all persons "however high their position may have been, including Chiefs of States". Cf. Doc.III/107, p.14. In this connection the Allied Powers inserted in the Versailles Treaty express provisions declaring the responsibility of the Kaiser for violations of international law and provided for a penal court to try him. (See Art.227 of the Versailles Treaty). As is known these measures never materialised and no jurisprudence has ever been formed on the subject.

(2) Cf. p.9, footnote 1.

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

From the viewpoint of the human rights of the individuals involved in war crimes trials, both rules fall within the sphere where the rights of the victims of war crimes and those of the persons accused for their commission can conflict with regard to the sentence which the courts have to pronounce.

This aspect is considered in a separate chapter, which deals with the question of the extent to which the restricted right of an accused to plead Not Guilty on the basis of his official position or his having committed violations of human rights under superior orders, leads or can lead to the result of exculpation or reduction of the penalty of an accused person in spite of such a violation.

ERRATUM.

III/108.

UNITED NATIONS WAR CRIMES COMMISSION.

Document III/108, p.14, 3rd line, last word.

Please substitute the word "entailing" for
the word "curtailing" which appears at present.

UNITED NATIONS WAR CRIMES COMMISSION

HUMAN RIGHTS REPORT: PRELIMINARY PAPERS

THE TOKIO TRIAL

Rapporteur: Dr. R. Zivković

Additional Paragraph in Draft I

to come after para. 12, p. 15.

13. Finally, it is to be noted that the Far Eastern Charter does not contain a special provision empowering the Tribunal to declare that a group or organisation is criminal, as in the case with Article 9 of the Nuremberg Charter. (1) The Far Eastern Charter follows the latter only in enunciating the general principle that the Tribunal is competent to try and punish war criminals "who as individuals or as members of organisations" are charged with crimes against peace, war crimes or crimes against humanity. (2) The similarity between the two Charters in this respect does not go beyond this point.

As a logical outcome, there is also no provision such as Article 10 of the Nuremberg Charter. The latter prescribes that when an organisation is declared criminal by the Tribunal, its members can be tried by national, military or occupation courts for membership in such organisations, and that in such cases the criminal nature of the organisations involved is considered proved and cannot be questioned by the other courts. (3)

(1) cf. Doc. III/113, p. 25 and 31-32.

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

(3) For text of Article 10 of the Nuremberg Charter cf. p. (Doc. III/113, p. 25).

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

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

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

III/109.
1st October, 1947.

UNITED NATIONS WAR CRIMES COMMISSION.

HUMAN RIGHTS REPORT: PRELIMINARY PAPERS

Rapporteur: Dr. R. Zivković

Draft II

THE RIGHTS OF THE VICTIMS.

At the time of the writing of this Report the Trial of Major Japanese War Criminals at the International Military Tribunal for the Far East in Tokyo, hereinafter called Far Eastern Tribunal, is still in progress.

Without the possession of the Transcripts covering the whole trial and before having at hand the Judgment of the Far Eastern Tribunal, it is impossible to give an account of the extent to which the rights of the victims of the Japanese war criminals were or failed to be protected as a result of the Trial. Until such a time, all that can be done is to establish the field covered in regard to these rights by the prosecuting body in its Indictment and by all parties concerned during the proceedings conducted so far before the Far Eastern Tribunal.

However, even in this incomplete form, the sources of information at hand show, as will be seen in the subsequent pages, some features which are particular to the Tokyo Trial and which distinguish it from all other trials held up to date. Their importance cannot be underestimated as far as the development or at least the trends displayed in the development of international law are concerned in the field of protecting human rights.

The following is an account based upon the Indictment submitted to the Far Eastern Tribunal.

HUMAN RIGHTS VIOLATED BY "WAR CRIMES".

1. The Indictment covers first of all the worst and most brutal types of violations of human rights, i.e. violations against the life, health and bodily integrity of the victims. These violations represent clear "war crimes" in the traditional sense of the term and cover a series of atrocities and other offences of an undisputed criminal character, which have enjoyed judicial protection since time immemorial amongst civilised nations. They cover the rights of the three most important categories of victims as recognised by the laws and customs of war: the rights of the combatants, those of the prisoners of war and those of the civilian population.

The charges brought against 19 of the 28 defendants by the prosecuting body in its Indictment, were formulated in a statement of a general nature, and laid down in the following terms:

" (The defendants) participated as leaders, organisers, instigators or accomplices in the formulation or execution of a common plan or conspiracy, and are responsible for all acts performed by themselves or by any person in execution of such plan.

The object of such plan or conspiracy was to order, authorise and permit ... subordinates frequently and habitually to commit the breaches of the Laws and Customs of War ... against the armed forces ... and against many thousands of prisoners of war and civilians ..." (1)

The defendants concerned were accordingly charged with having carried out such a plan or conspiracy, by actually ordering, authorising or permitting breaches of the laws and customs of war. (2) In addition to that, they were charged with having "deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches" of the laws and customs of war, (3)

(1) Cf. Count 53.

(2) Cf. Count 54.

(3) Cf. Count 55.

as carried out by their subordinates.⁽¹⁾

Some concrete instances of such violations of human rights of the victims of war crimes were briefly mentioned in connection with the various stages of the aggression against China, such as, for example, the "deliberate killing" or "slaughtering" of "large numbers" and "many thousands" of civilians on the occasion of the capture of Nanking and Canton in 1937, and of other towns and inhabited places in 1938 and 1944.⁽²⁾

On the other hand, the prosecutors summed up in general terms a series of other war crimes perpetrated over the whole period of aggressive wars waged by Japan against the various countries involved. Express reference was made to the "ruthless submarine warfare" conducted by the Japanese Navy and to the "destruction of crews of ships sunk or captured" pursuant to such a warfare.⁽³⁾ Many types of criminals offences actually committed were enumerated in connection with the breaches of existing conventions and assurances: the killing and ill-treatment of prisoners of war and civilian inmates of concentration camps; the illegal use of prisoner of war labour; the use of poison gas; the killing of combatants having laid down their arms; the destruction of property without military justification or necessity; pillage; the failure to respect family honour and rights, individual life, private property and religious convictions and worship in occupied territories; the deportation and enslavement of the inhabitants of occupied territories; the failure to respect military hospital ships,⁽⁴⁾ and the like.

(1) The question to what extent these acts represent separate substantive crimes, distinct from actual war crimes committed as a result of a "plan or conspiracy", or of the orders, authority and permission to perpetrate them, or finally as a consequence of the failure to prevent them from occurring, is considered later, p. 14, n.1.

(2) Cf. Appendix A, Section 2.

(3) Cf. Indictment, Appendix A, Section 7.

(4) Cf. Indictment, Appendix D, Sections 1 - 15.

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ATTEMPT TO INTRODUCE NEW TYPE OF INTERNATIONAL CRIME.

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

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

(1) So, for instance, in the first Count of this particular section of the Indictment, the prosecutors charged the defendants for 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". Cf. Indictment, Count 37. The Treaty Article referred to is Article I of the Hague Convention relative to the Opening of Hostilities.

(2) Cf. Count 39.

the attack on Kota Bahru, Hong Kong and Shanghai on 8th December 1941⁽¹⁾; the killing of the servicemen of the Philippines whilst invading the Philippines territory on 8th December 1941⁽²⁾; 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.⁽³⁾

Jointly with these cases were submitted charges for atrocities against the civilian population and the prisoners of war ("disarmed soldiers")⁽⁴⁾ 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".⁽⁵⁾

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⁽⁶⁾ rather than in the section headed "Murder", the prosecuting of the loss of lives of combatants during military operations is undoubtedly a novel attempt to develop to all its logical legal consequences 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.

(1) Cf. Counts 40, 41 and 42.

(2) Cf. Count 43.

(3) Cf. Counts 51 and 52.

(4) Cf. Counts 45 - 50.

(5) Cf. Group Two, Introductory paragraph and Counts 37 - 52.

(6) Cf. Group Three, Counts 53 - 55.

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

This attempt is so much the more significant 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 charge made in Tokyo will be accepted by the Far Eastern Tribunal. If so, this would represent a further development of the laws of war. At this stage of the Tokyo Trial it is still difficult to see clearly all the elements which would compose the development. However, they could tentatively be described as follows:

The loss of lives inflicted upon military personnel of a nation attacked without a declaration of war would be a crime in itself presumably on account of the fact that such members of the forces were unprepared to meet a military attack from the adversary. The reason for admitting the element of unpreparedness as relevant would lie in that without a warning members of the attacked armed forces had no chance to fight and did not lose their lives in a fair contest of force. To deprive them of their lives under such circumstances would be tantamount to sheer murder and therefore criminal. The course which could then be taken is an alternative one. One could lay down as a legal presumption that without a declaration the armed forces of the attacked nation are to be deemed unprepared in all cases. On the other hand one could judge each case upon its own merits, i.e. on whether the attacked armed forces were 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 in either case would be restricted only to the period of the opening of hostilities, i.e. to the period during which it is justified to consider that the armed forces of the attacked nation were taken unaware and could not therefore undertake operations required to engage regular combats with the aggressor. The killing of combatants of the

attacked nation after the period of surprise and unpreparedness has elapsed would not represent a crime.

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

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

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

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

(a) One of these offences affects the right to health and to life. It concerns the illicit traffic with narcotics, and more particularly with 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."⁽¹⁾

Then the prosecutors went on to say how the Japanese Government secretly provided large sums of money to this effect, how it used the proceeds of the traffic with the narcotics to finance aggressive wars, and how it conducted these illegal affairs through governmental channels and organisations.⁽²⁾

The main legal point made by the prosecutors in this respect was the fact that the harm inflicted upon the civilian populations concerned was in violation of the existing Treaties, which were all referred to expressly.⁽³⁾ This case could be regarded as representing one of the "inhuman acts" falling within the notion of "crimes against humanity", as defined in Article 5(c) of the Far Eastern Charter.

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

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

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

...Government agencies ... stamped out free speech and writing by opponents of this policy...Opposition to this policy was also crushed by assassinations of leading politicians... The

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- (1) Cf. Indictment, Appendix A, Section 4. Italics are introduced.
(2) Cf. Indictment, Appendix A, Section 4.
(3) Cf. Indictment, Appendix B, under 10, 16, 32 and 35.

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 to breaches of the then binding Treaties thereby committed was made, such as the reference to Article 22 of the Covenant of the League of Nations.⁽²⁾

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

4. For most of the rights included in the parts of the Indictment quoted above under (a), (b) and (c), one major question remains to be elucidated by the Tribunal in its Judgment. It is the question whether violations of human rights caused by offences such as the illicit traffic of narcotics, liquor or arms are to be recognised as being criminal in themselves and consequently as entailing definite penal retribution, or whether they are to be treated as remaining only

(1) Cf. Indictment, Appendix A, Section 6. Italics are introduced.

(2) Cf. Indictment, Appendix B, under 15.

(3) Cf. Indictment, Appendix B, under 15. Italics are introduced.

within the limits of violations of international obligations, allowing or calling for certain sanctions but not for those provided by penal law.

Mutatis mutandis, the same question applies to violations of human rights committed by the suppression of political or civic rights on the part of a State (Government) towards its own citizens. Here the question is amplified by the issue of whether such doings within the borders of a State call for international penal justice, or merely for a concerted international action of a different nature. By the provisions of Art.5(c) and 6(c) of the Tokyo and Nuremberg Charters, respectively, which introduced the legal concept of "crimes against humanity",⁽¹⁾ a right for 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",⁽²⁾ particularly in execution of or in

(1) Prior to the two Charters it is difficult to see to what extent the notion of "crimes against humanity" was used and recognised as a legal term. It seems safe to assume that until that time it was rather used in a moral or philosophical sense. In this connection, cf. p. of this Report regarding the attitude taken by members of the 1919 Commission on Responsibilities on whether reference should be made to violations of the "laws and principles of humanity" in connection with war crimes. The American members objected to making such a reference on the ground that "laws and principles of humanity" were not a universally recognised standard in international law. (Above reference to Doc.III/107 p.16.)

(2) For the full text of Article 5(c) of the Far Eastern Charter, cf. p.6 of Doc.III/108. For text of Art.6(c) of the Nuremberg Charter, cf. p. (Ref. to In its Judgment the Nuremberg Tribunal expressly stated that "to part constitute crimes against humanity, the acts relied on before the out-Drafted break of war must have been in execution of, or in connection with, any by Dr. crime within the jurisdiction of the Tribunal". Cf. Judgment, English (Litawski.) text, H.M. Stationery Office, London, p.65, para.5. This statement clears authoritatively a point raised by an amendment introduced in the text of Art.6(c) of the Nuremberg Charter by a special Protocol signed in Berlin on 6th October 1945, between the four Powers signatories of the Charter, i.e. nearly two months after the signing of the Charter in London on 8th August 1945. The said Protocol was signed in order to remove from the English and French texts a semi-colon which stood between the two main parts of the text defining "crimes against humanity" in Art.6(c), namely between the words "...before or during the war", and the words "or persecutions on political ...etc." in the English text. The semi-colon was replaced by a comma, as this was the case in the Russian text, and the wording of the provision itself was left unaltered. The French text had to be re-drafted in order to make clear the issue at stake with the deletion of the semi-colon. The result of this amendment was to make both types of "crimes against humanity", namely "murder, extermination, enslavement, deportation and other inhumane acts" on the one hand, and "persecutions on political, racial or religious grounds" on the other hand, punishable under the terms of the Charter only if either of them were committed "in execution of or in connection with, any crime within the jurisdiction of the Tribunal", i.e. in execution of, or in connection with, "crimes against peace" or "war crimes". With the semi-colon between the said two parts, and particularly in the original wording used in the French text, the impression left was that this condition applied only to the part coming after the semi-colon, i.e. to "persecutions on political, racial or religious grounds."

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. (1)

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

In contrast with this, no answer is as yet at hand whether similar international penal proceedings could be warranted in time of peace for violations of an identical nature committed in no connection with a planning, preparation or initiation of aggressive wars.

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

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

This case concerns territories belonging to Portugal and to the Soviet Union. In this respect the important point is that Portugal

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

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.

6. In their charge for war crimes, a part of which was cited above⁽²⁾ the prosecutors 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 ..."⁽³⁾ 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.⁽⁴⁾

The period of time indicated as relevant for the charges is the period between 7th December 1941, and 2nd September 1945.⁽⁵⁾

7. The Indictment does not provide a clear answer as to whether the defendants of the Tokyo Trial were charged in connection with crimes

(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, cf. Department of State Bulletin, Vol. XIII, 1945, No. 320, p. 205, and No. 321, p. 255.

(2) Cf. page 2.

(3) Cf. Indictment, Counts 53 and 55.

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

(5) Cf. Indictment, Counts 53 and 55.

which were actually committed in Soviet and Portuguese territory, or merely for having taken part in the preparation of these crimes.

The defendants were charged for a threefold criminal activity.

- (a) For having "participated as leaders, organisers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy", the object of which "was to order, authorise and permit" the commission of "the breaches of the Laws and Customs of War ... against the armed forces ... prisoners of war and civilians."⁽¹⁾
- (b) For having actually "ordered, authorised and permitted" the commission of these offences⁽²⁾ as a result of the said plan or conspiracy.
- (c) And finally, for having "disregarded their legal duty to take adequate steps to secure the observance and prevent breaches" of the laws and customs of war⁽³⁾, "being by virtue of their respective offices responsible for securing the observance" of the laws and customs of war.⁽⁴⁾

Whereas it is questionable whether the fact to "plan or conspire" to commit breaches of the laws and customs of war can be prosecuted as a separate criminal offence under the terms of the Charter, the defendants were accused of acts before the facts which are criminal under Article 5 irrespective of whether these acts (giving orders, authorising or permitting the commission of war crimes; failure to comply with legal duty to prevent war crimes from occurring) materialised in actual

(1) Cf. Indictment, Count 53, italics are introduced.

(2) Cf. Indictment, Count 54, italics are introduced.

(3) Here the Indictment specifies breaches of "Conventions and assurances and the Laws and Customs of War". Cf. Count 55. Italics are introduced.

(4) Cf. Indictment, Count 55.

war crimes committed in the field or not.⁽¹⁾

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 the Portuguese portion of the island of Timor on 19th February 1942.⁽²⁾ As to the Soviet Union, reference was made to two military aggressions which both took place before the relevant period of crimes started. One reference concerns the attack at Lake Hassan in Soviet territory proper, which took place in 1938. The other concerns the attack made on the territory of the Mongolian People's Republic in 1939 at the Halkin- Gol River, which lies outside the territory of the Soviet Union, but where members of

(1) The Far Eastern Charter mentions "a plan or conspiracy" as criminal in itself only in regard to "crimes against peace", and not in regard to "war crimes" or "crimes against humanity". The position is the same in the Nuremberg Charter (Art.6). In its Judgment, the Nuremberg Tribunal made reference to the final provision of Art.6, according to which "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 execution of such plan". The Tribunal declared that this provision did not add any other new or separate crime to the three categories specifically defined in Art.6, but was designed only to establish the individual responsibility of persons participating in a criminal plan or conspiracy. Consequently it discarded the charge for a "plan or conspiracy" to commit "war crimes" or "crimes against humanity". (Cf. Judgment, H.M. Stationery Office, Cmd. 6964, London, p.44). According to this pronouncement, individual criminal liability for a "plan or conspiracy" to commit crimes exists only inasmuch as such plan or conspiracy is criminal in itself under the respective Articles of the two Charters, which means only with regard to "crimes against peace". This issue was recently confirmed in one of the subsequent trials held by U.S. Military Tribunals in Nuremberg; cf. pronouncement made by U.S. Military Tribunal No.1 of 14th July 1947, in Re. U.S.A. versus Karl Brandt et al., U.N.W.C.C. Research Office, Document No. R7/US/9D. As to the individual responsibility for having "ordered, authorised, or permitted" the commission of "war crimes" or "crimes against humanity" or for having failed to prevent them from occurring by virtue of the legal duty incumbent upon the individuals concerned, it is covered by the above quoted final disposition of Article 5 of the Far Eastern Charter (Art.6 of the Nuremberg Charter) establishing the liability of "leaders, organisers, instigators and accomplices."

(2) Cf. Appendix A, Section 10.

the Red Army were involved in combats as Allies of the Mongolian Republic.⁽¹⁾

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

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

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

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

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

(a) Breaches of Laws and Customs of War accomplished by the commission of war crimes or by acts before the facts constituting, as a

(1) Cf. Appendix A, Section 8.

whole, war crimes, imply that a state of war had been created between two countries. This very situation confers upon the illegal acts involved the nature of war crimes. In the absence of a state of war the same illegal acts are as a rule of an equally criminal nature, but in law they cannot be qualified as "war" crimes in the technical sense.

Yet, the prosecutors in Tokyo have expressly embraced such acts under the same legal qualification with acts representing "war crimes" in the technical sense in regard to the countries at war with Japan at the relevant time. The significance of such a method to proceed will be considered later. ⁽¹⁾

(b) No legal problem arises in this respect insofar as members of the armed forces (combatants or prisoners of war) of the countries at war with Japan are concerned. For breaches of Laws and Customs of War committed against them are war crimes regardless of the territory in which they were committed, including territories of neutral States. Neither is there for the same reason a legal point in regard to civilians, nationals of belligerent powers, located and victimised in territory belonging to a neutral Power, particularly when such territory is invaded and occupied by the aggressive Power.

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

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

(1) Cf. para. 10, pp 18-22.

An analysis on this last point has been made previously⁽¹⁾ and the following can be added to it:-

"Crimes against humanity" comprise crimes committed against any civilian population, not only in time of war but equally before the war. The fact that they comprise victims belonging to "any civilian population", i.e. to the civilian population of any country, is expressly stated in the Nuremberg Charter, (Art.6(c)); and the fact that they relate to both the time of war and the time preceding war is stressed in both the Nuremberg and the Far Eastern Charter. It has been pointed out that the omission of the terms "against any civilian population" in the Far Eastern Charter is only verbal and that it does not affect the substance of its Article 5(c), which covers the same field as Article 6(c) of the Nuremberg Charter.⁽²⁾ This follows from the logical context of Article 5(c) of the Far Eastern Charter. The main issue in declaring as "crimes against humanity" acts perpetrated "before or during the war" is to make it irrelevant which territory and which population de facto victimised in connection with the preparation or the waging of a war of aggression are involved. According to the meaning given the corresponding provision in the Nuremberg Charter, this includes acts committed against the nationals of the aggressive State itself in its own territory.⁽³⁾ From this it follows that if the terms "before or during the war" in the Far Eastern Charter have any meaning, they at any rate cover the population of any foreign country whom Japan happened or intended to victimise in connection with its war or wars of aggression. And there is little doubt, if any, that they also cover "crimes against humanity" committed against Japanese nationals in the homeland itself.

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

(1) cf. pp. 9 - 11, para. 4.

(2) Cf. p.10, para.9(a) of Doc.III/108.

(3) Cf. Nuremberg Judgment, H.M. Stationery Office, London, Cmd.6964, p.65.

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

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

This may be regarded as a decisive step forward in widening the basis of both the substantive law and the judicial machinery required or at any rate lending itself to the protection of human rights on an international level.

Yet, however important this development may be, it has, as has been previously stressed, a general limitation in international law as it stands at the present time. It is limited to violations of human rights which, even though committed outside the scope of belligerency between the countries directly involved, were committed in execution of or in connection with a war of aggression. This is the limitation not only for implementing the rules entailing punishment but for instituting or setting in motion international penal justice itself.⁽¹⁾

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

(1) Cf. p.11.

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

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

The way in which the prosecutors at the Tokyo Trial legally proceeded in connection with the case concerning Portugal and the Soviet Union as considered in the preceding pages, is in this respect a case in point.

It has already been mentioned that the prosecutors have presented the case concerning Portugal and the Soviet Union under the same legal qualification which they applied for offences concerning nationals of the countries at war with Japan at the relevant time.⁽¹⁾ They did so in the counts headed "Conventional war crimes and crimes against humanity"⁽²⁾. Yet, when qualifying their charges under this heading, they made no more reference to "crimes against humanity". All offences, including those concerning Portugal and the Soviet Union, were uniformly qualified as representing "breaches of the Laws and Customs of War" or

(1) Cf. p. 15-16, para. 9(a).

(2) Cf. Indictment, Group Three, Counts 53-55.

"violations of the Laws of War", (1) i.e., as representing only "war crimes" in the technical sense under the express definition of Article 5(b) of the Far Eastern Charter.

An explanation for such a way of proceeding can be found in the "Summary" which accompanied the text of the Indictment supplied to the United Nations War Crimes Commission. From this text it appears that the prosecutors took the view that paragraph (b) of Article 5 of the Charter, providing for "war crimes" in the technical sense, was adequate to cover also charges coming under paragraph (c) dealing with "crimes against humanity". (2)

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

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

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

Italics are introduced.

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

Italics are introduced.

It is difficult to see how such a way of implementing Article 5 of the Charter can be reconciled with the fact that at the relevant period of time Portugal and the Soviet Union were not at war with Japan. As already pointed out⁽¹⁾ it is the very existence of a state of war which confers upon the offences involved the nature of "war crimes" as distinct from other types or categories of crimes. Consequently, in the absence of a state of war, the offences committed cannot have in law the nature of "breaches of the laws and customs of war". Under the terms of the Charter the answer is that they represent "crimes against humanity".

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

However, at the same time the Nuremberg Tribunal stated that, insofar as the inhumane acts committed after the beginning of the war "did not constitute war crimes", they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity".⁽²⁾

Thus, the Nuremberg Tribunal established the following distinctions:

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

The Tribunal does not say in what cases and under what conditions or circumstances "crimes against humanity" are at the same time "war crimes" and in which cases they are not. Nevertheless, it ascertained on the one hand the fact or the possibility of having situations where the two categories overlap and intermingle, and on the other, situations where they remain apart one from the other.

(1) Cf. p. 15 - 16, para.9(a).

(2) Cf. Judgment, H.M. Stationery Office, Cmd.6964, p.65.

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

On the other hand, there also remains the fact 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 one by the other.

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

III/110.
13th October, 1947.

UNITED NATIONS WAR CRIMES COMMISSION.

HUMAN RIGHTS REPORT: PRELIMINARY PAPERS.

THE TOKYO TRIAL.

Rapporteur: Dr. R. Zivković.

Draft III.

THE RIGHTS OF THE ACCUSED.

1. An important aspect of the protection of human rights in existing rules of international law concerns the rights guaranteed to the accused persons in war crimes trials.

This aspect is so much the more important that such rights were and are being secured in contrast with the complete disregard for rules of fair trial displayed in many instances on the part of individuals tried by the allied courts as war criminals. In numerous cases war crimes during the last war were perpetrated by denying the victims fair trial altogether or fundamental rights in the course of judicial proceedings, to such an extent that the proceedings in question represented a sheer travesty of justice.

2. The Japanese major war criminals were given a guarantee for fair trial in elaborate provisions of the Far Eastern Charter.

The rights granted were provided for on the basis of general principles of penal law with a certain amount of restrictions universally recognised in the criminal procedure of all civilised nations. The Far Eastern Charter combines these principles and rights with the particular nature of the Far Eastern Tribunal as a military court, and sets forth an original amalgamation of common law principles with those proper to military law.

3. The rights given the Japanese major war criminals can be classified as follows:

Before the Trial:

(a) Right to submit applications and motions.

Article 10 of the Charter provides:

"All motions, applications, or other requests addressed to the Tribunal prior to the commencement of trial shall be made in writing and filed with the General Secretary of the Tribunal for action by the Tribunal. "

During the Trial:

(b) Right to know the indictment and the law of trial.

Article 9(a) of the Charter provides:

"The indictment shall consist of a plain, concise and adequate statement of each offense charged. Each accused shall be furnished in adequate time for defence, a copy of the indictment, including any amendment, and of the charter, in a language understood by the accused. "

(c) Right to hear proceedings in the language of the accused.

Article 9(b) of the Charter provides:

"The trial and related proceedings shall be conducted in English and in the language of the accused. Translations of documents and other papers shall be provided as needed and requested. "

(d) Right to have assistance of Counsel.

Article 9(c) of the Charter provides:

"Each accused shall have the right to be represented by counsel of his own selection, subject to the disapproval of such counsel at any time by the Tribunal. The accused shall file with the General Secretary of the Tribunal the name of his counsel. If an accused is not represented by counsel and in open court requests the appointment of counsel, the Tribunal shall designate counsel for him. In the absence of such request the Tribunal may appoint counsel for an accused if in its judgment such appointment is necessary to provide for a fair trial. "

The right of the Tribunal to disapprove at any time of a given defence counsel is connected with the right of the accused to choose counsel amongst Japanese nationals. The above provisions furnish a natural safeguard against the possibility of having a counsel who is himself a war criminal or is on any other reasonable ground, objectionable.

(e) Right to conduct one's own defence.

Article 9(d) of the Charter provides:

"An accused shall have the right, through himself or through his counsel (but not through both), to conduct his defence, including the right to examine any witness, subject to such reasonable restrictions as the Tribunal may determine. "

The restrictions referred to are those generally recognised and normally applied before courts of law of civilised nations. They are a safeguard against abusive exercise of the right to conduct one's own defence.

(f) Right to produce evidence in defence.

Article 9(c) of the Charter provides:

"An accused may apply in writing to the Tribunal for the production of witnesses or of documents. The application shall state where the witness or document is thought to be located, it shall also state the facts proposed to be proved by the witness or the document and the relevancy of such facts for the defence. If the Tribunal grants the application the Tribunal shall be given such aid in obtaining production of the evidence as the circumstances require. "

The discretionary power left to the Tribunal in admitting or rejecting a proposal concerning evidence to be produced in defence of the accused represents the main safeguard against attempts at taking abusive advantage of this right in order unduly to prolong the trial or to divert it from its correct course.

(g) As previously reported, the original text of the Far Eastern Charter, dated January 16th, 1946, has been amended on 26th April 1946, a few days before the opening of the trial.⁽¹⁾

The amendments substantially affected one of the provisions concerning the rights of the accused. In the original text there was a provision (Art. 9(b)) which read:

"Hearing. During the trial or any preliminary proceedings the accused shall have the right to give any explanation relevant to the charges made against him. "

In the amended text this provision was deleted altogether and was not replaced by any other to the same effect. It is not clear why this was done, particularly in view of the fact that the Nuremberg Charter contained and retained an identical provision. (Art.16(b)).

(1) Cf. Doc. III/108, p.3, n.4.)

4. It is worth noting that some of these rights are repeated in the provision setting forth the course of the proceedings. (Art. 15) Such is the case with the right of the accused to make a concise opening statement (Art.15.c); to examine witnesses and other accused persons giving testimony (Art. 15.e); and generally to address the Tribunal. (Art.15.f).

5. The above rights, with their specific restrictions as we saw them in the preceding paragraph, are, in addition, subject to general limitations, which affect not only the rights of the accused, but equally those of the prosecutors.

They are the general limitations deriving from the powers of the Tribunal, and from the rules concerning the conduct of the trial and the admissibility and relevance of the evidence.

These powers and rules are the following:

(i) The Tribunal has the power to summon any witness it finds necessary to hear on the case of the accused. (Art. 11.a).

(ii) The Tribunal has the right to interrogate each accused and to permit comment on his refusal to answer questions. (Art. 11.b).

(iii) The Tribunal can require the production of any document and other evidentiary material. (Art. 11.c).

(iv) The Tribunal has the duty to confine the trial strictly to an expeditious hearing of the issues raised by the charges. (Art.12.a).

(v) The Tribunal must take strict measures to prevent any action which would cause any unreasonable delay and to rule out irrelevant issues and statements of any kind whatsoever. (Art.12.b)

(vi) The Tribunal is to provide for the maintenance of order at the trial, including exclusion of the accused or his counsel from some or all further proceedings. (Art. 12.c).

(vii) The Tribunal has to determine the mental and physical capacity of the accused to proceed to trial. (Art. 12.d).

(viii) The Tribunal is not bound by technical rules of evidence, and is enabled to admit any evidence which it deems to have probative value, including any purported admission or statement made by the accused. (Art.13(a)).

(ix) The Tribunal has discretionary power in ruling upon the relevance of the evidence offered. (Art. 13.b).

(x) The Tribunal is provided in particular with wide powers in deciding upon the admissibility of the following documentary evidence:

(a) Documents, without proof of their origin, issuance or signature, which appear to the Tribunal to have been signed or issued by any officer, department, agency or member of the armed forces of any government. (Art. 13.c(1)).

(b) Reports which appear to the Tribunal to have been signed or issued by the International Red Cross or by a member thereof, or by a doctor of medicine or any medical service personnel, or by an investigator or intelligence officer, or by any other person who appears to the Tribunal to have personal knowledge of the matters contained in the report concerned. (Art. 13.c(2)).

(c) Affidavits, depositions or other signed documents, (Art. 13.c(3)).

(d) Diaries, letters or other documents including sworn or unsworn statements, which appear to the Tribunal to contain information relating to the charge. (Art. 13.c(4)).

(e) Copies of documents or other secondary evidence of their contents, if the originals are not immediately available. (Art. 13.c(5)).

(xi) And finally, the Tribunal is not to require proof of facts of common knowledge or of the authenticity of official government documents and reports of any nation, or of the proceedings, records and findings of military or other agencies of any of the United Nations.

6. The above rules are similar to those which were laid down for the trial of the German major war criminals at Nuremberg.⁽¹⁾

Together and separately as well they furnish a clear body of rules in the nuclear international penal law which is taking shape through the jurisprudence created by war crimes tribunals and courts.

(1) Cf. pp

(Ref. report by Dr. Litawski.)

They are of great value in the sphere of codification of international law, and can at any rate serve as a convenient basis for further developments in this sphere.

7. This part of the Report will, in due time, be supplemented with the information showing in what manner and in which cases the Far Eastern Tribunal implemented these rules in the course of the proceedings which are still in progress at the present time.

III/111.
14th October, 1947.

UNITED NATIONS WAR CRIMES COMMISSION.

HUMAN RIGHTS REPORT: PRELIMINARY PAPERS.

THE TOKYO TRIAL.

Rapporteur: Dr. R. Zivković.

Apart from data referring to the Tokyo Trial, this paper contains considerations of a general nature on the subject under review, as well as references to antecedents which are relevant to any trial taken into account in this Report and not only to the Tokyo Trial. Such considerations and references are suited for amalgamation with drafts prepared by other rapporteurs.

Draft IV.

SPHERES IN WHICH THE RIGHTS OF THE VICTIMS AND
THE RIGHTS OF THE ACCUSED MAY HAVE CONFLICTED.

1. In two previous papers (Doc. III/109 and III/110), information has been compiled regarding the rights of the victims of war crimes and those of the accused persons for the same crimes as it arises from the law contained in the Far Eastern Charter and from the indictment submitted to the Far Eastern Tribunal.

Various aspects of the rights of each of the two categories have been considered separately. There remains one more aspect to be examined in the mutual relationship of these two categories in certain specific cases.

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

Persons who violate human rights by committing war crimes or crimes against humanity may act, as experience has abundantly proved it to be so, in such circumstances or situations that their personal guilt or liability may be questioned. One instance is provided in

cases where the perpetrator has acted upon orders of his government or of any of his superiors whose instructions he is legally bound to obey. Another instance is illustrated in cases where the perpetrator has committed violations of human rights within the scope of so-called "acts of states", that is to say in performing a function or duty in the state hierarchy relegating his private personality behind acts undertaken on behalf of the state. Yet another instance, which in a number of cases can represent only a variety of the first group (violations committed upon superior orders), concerns cases where human rights were violated as a result of reprisals conducted by one belligerent power against another.

In such cases there is a need for determining to what extent the perpetrators can be held personally responsible in the circumstances.

As an illustration of the complexity of the situations involved it is convenient to quote passages from an analysis by Professor H. Lauterpacht on the subject of superior orders in the armed forces.

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

is to relieve French nationals of responsibility when tried before foreign tribunals... For it is, by necessary implication, a rule applicable only to the State's own nationals and only in respect of its own municipal law. In fact, no country has more emphatically than France, rejected the plea of superior orders when put forward by enemy soldiers and officers accused of war crimes... There is no international judicial authority on the subject, but writers on international law have almost universally rejected the doctrine of superior orders as an absolute justification for war crimes."⁽¹⁾

In spite of the practices and opinions tending at confining the plea of superior orders to a definite limit, there nevertheless remains that the above quoted passages show at the same time that rules on the subject are far from providing clear-cut answers on the subject.

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

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

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

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

(1) Cf. H. Lauterpacht, The Law of Nations and the Punishment of War Crimes, British Year Book of International Law, 1944, pp. 71-73.

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

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

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

"... the Commission desire to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to Heads of States. "

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

"... this privilege, where it is recognised, is one of practical expedience in municipal law and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country, the position from an international point of view is quite different. "(1)

Accordingly, the Commission came to the general conclusion that:

" All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity are liable to criminal prosecution. "(2)

The principle expressed in the above conclusion was implemented in the Treaty of Versailles, and in particular in Art.227 which proclaimed the criminal responsibility of the Kaiser and provided for a

(1) Cf. Violations of the Laws and Customs of War, Report of Majority and Dissenting Reports of American & Japanese members of the Commission on Responsibilities, Oxford, Humphrey Milford, 1919, p.19.

(2) The American members disagreed with this conclusion and the Japanese members made a general reservation. Cf. op.cit., pp.65-66 and 79-80.

special tribunal to try him.⁽¹⁾

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

"We desire to say that civil and military authorities cannot be relieved from responsibility by the mere fact that a higher authority might have been convicted of the same offence. It will be for the Court to decide whether a plea of superior orders is sufficient to acquit the person charged, from responsibility."⁽²⁾

The Commission thus opened the way for the subsequent development which materialised in the Far Eastern Charter, the Nuremberg Charter and the Control Council Law No.10, and which brought about a general rule solving the question of the relationship between any superior and his subordinates, at whatever level of hierarchy.⁽³⁾

5. The text of the afore-quoted Art.6 of the Far Eastern Charter shows certain differences with the corresponding provisions of the Nuremberg Charter and of the Control Council Law No.10.

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

Under the terms of the Nuremberg Charter and of the Control Council Law No.10, this power is restricted only to the plea of superior orders, whereas it is expressly stated that the position of

(1) In this connection see also p.14, n.1, Doc.III/108.

(2) Cf. Op.Cit., p.20.

(3) For the changes which recently occurred in the British Military Manual and the U.S. Rules of Land Warfare, cf. p. of Mr.B. and's paper and pp.14-15 of Doc.III/108. In 1944, both texts were amended to insert a rule similar to the one appearing in the Far Eastern Charter. Until then the rule was constructed on the opposite principle that individuals committing violations of the laws and customs of war upon superior orders were not war criminals.

the accused cannot be considered in mitigation of punishment. (1)

It is difficult to see the reason for which the authors of the Far Eastern Charter have departed from the rule as laid down in the two texts referred to, both of which preceded the enactment of the Far Eastern Charter. (2)

6. The conclusions which can be drawn from the above analysis are the following:

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

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

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

(2) For cases in which the rule has been applied by the Nuremberg Tribunal, cf. p. (Ref. to part drafted by Dr. Litawski.)

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

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

This may be due to the fact that such cases can be considered as being covered by the two previous types of cases. In any reprisals an order has to be issued to the effect and this instantly brings into the picture the individual who issued the order and the individual who carried out the order. Thus in all instances a solution could be found on the basis of the rules regulating the effect of the plea of superior orders and the one regarding the position of the individual occupying superior authority.

However, this type of case is complicated by the fact that international law recognises, under certain conditions, the right to have recourse to reprisals as a counter-measure for breaches committed by the other party who then appears as being guilty of such breaches in the first place.⁽¹⁾

The solution of such cases is still awaiting a precise answer in international law.

(1) Cf. H. Lauterpacht, Op.cit., pp.75-77.

III/112

20th October, 1947.

UNITED NATIONS WAR CRIMES COMMISSION

HUMAN RIGHTS REPORT: PREPARATORY PAPERS

DRAFT OF THREE PARTS OF THE REPORT IN SO
FAR AS IT RELATES TO WAR CRIME TRIALS OTHER
THAN THOSE CONDUCTED IN NUREMBERG AND TOKYO

BY G. BRAND, LL.B., LEGAL OFFICER

The present paper is a preliminary draft, and is circulated as such to Members for information only, and not for submission to the Commission or to the United Nations. It is the interim result of the studies as at present stage and is intended to serve as a basis for drafting of the final Report on Human Rights which is to be presented to the United Nations.

Any changes which a further examination of the relevant material and sources of information may require, as well as modifications which might be suggested by Committee III will be taken into account at a later stage.

Two of the three parts of which this paper forms a draft fall under the general heading:

Spheres in which the Rights of the Victims and the Rights
of the Accused may be said to have Conflicted at the Time
of the Offence, (see Document III/96, pp. 1 - 2) and are

headed as follows:

- (1) Responsibility of Commanders for Offences Committed
by their Troops (see p. 1).
- (2) The Defence of Superior Orders, Duress and Coercion
(see p. 35).

The third part is a draft of the material falling under the main heading Rights of the Accused at the Time of Trial (see p. 57).

Responsibility of Commanders for Offences

Committed by their Troops

There have been many trials in which an officer who ordered the commission of an offence has been held guilty of its perpetration.

(Some examples may be briefly mentioned here).

While the principle of the responsibility of such officers is not in doubt, it is nevertheless interesting to note that it has even been specifically laid down in certain texts which have been used as authorities in war crime trials. For instance, Change No. 1, dealing with the admissibility of the defence of Superior Orders, to the United States Basic Field Manual F.M. 27-10 ends with the words: "....The person giving such orders may also be punished."

A more interesting question, however, is the extent to which a commander of troops can be held liable for offences committed by troops under his command which he did not order, on the ground that he knew, or ought to have or must have known, of their perpetration and/or ought to have used his authority to prevent them from being committed. The extent to which such liability can be admitted is not easy to lay down.

(Some little expansion of the problem may be inserted here).

Some relevant legal provisions exist. Thus, Article 4 of the French Ordinance of 28th August, 1944, provides that:

"Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have organised or tolerated the criminal acts of their subordinates."

Article IX of the Chinese Law of October 24th, 1946, Governing the Trial of War Criminals states that:

"Persons who occupy a supervisory or commanding position in relation to war criminals and in their capacity as such have not fulfilled their

duty to prevent crimes from being committed by their subordinates shall be treated as the accomplices of such war criminals."

Again the following interesting provisions are made in the Canadian War Crimes Act of 31st August, 1946:

"Art. 10 (4). Where there is evidence that more than one war crime has been committed by members of a formation, unit, body, or group while under the command of a single commander, the court may receive that evidence as prima facie evidence of the responsibility of the commander for those crimes.

"Art. 10. (5). Where there is evidence that a war crime has been committed by members of a formation, unit, body or group and that an officer or non-commissioned officer was present at or immediately before the time when such offence was committed, the court may receive that evidence as prima facie evidence of the responsibility of such officer or non-commissioned officer, and of the commander of such formation, unit, body, or group, for that crime."

It will be seen that the Canadian text does not purport to lay down substantive law; it merely states that, if certain circumstances have been proved, the burden of proof as regards the guilt of the officer concerned is shifted to the Defence. The Chinese provision creates a liability in cases where breach of a duty to prevent crimes can be proved. The French Ordinance makes the officer liable if he is shown to have organised or tolerated the criminal acts of his subordinates.

An important application of the Canadian provisions was made in the Trial of Brigadeführer Kurt Meyer by a Canadian Military Court at Aurich, Germany on December 10th - 28th, 1945.

Kurt Meyer was accused of having, as Commander of the 25th S.S. Panzer Grenadier Regiment of the 12th S.S. Panzer Division, incited and counselled his men to deny quarter to allied troops; ordered

(or alternatively been responsible for) the shooting of prisoners of war at his headquarters; and been responsible for other such shootings both at his headquarters and during the fighting nearby. He pleaded not guilty. In connection with the last set of charges and with the alternative charge, the Prosecution referred to the presumptions contained in Regulations 10 (3),⁽¹⁾ (4) and (5) of the War Crimes Regulations (Canada).⁽²⁾ The accused was found guilty of the incitement and counselling, and was held responsible for the shootings at his headquarters, though not guilty of ordering them, and was found not to be responsible for the shootings outside his headquarters. A charge contained in a second Charge Sheet was abandoned. The sentence of death passed against him was commuted by the Convening Authority to one of life imprisonment, on the grounds that Meyer's degree of responsibility did not warrant the extreme penalty.

In his summing up the Judge Advocate said that, if an officer, though not a participant in or present at the commission of a war crime, incited, counselled, instigated or procured the commission of a war crime, and a fortiori, if he ordered its commission, he might be punished as a war criminal. The first and third charges fell within this category of offences. In the second, fourth and fifth charges, however, Meyer was alleged to have been "responsible for" the crimes set out therein. In this connection, the Judge Advocate pointed out that Regulations 10 (3), (4) and (5) of the War Crimes Regulations (Canada) stated that when certain evidence was adduced, that evidence might be received by the Court as prima facie evidence of responsibility. By virtue of these Regulations, it was unnecessary, as far as the second, fourth and fifth charges were concerned, for the Prosecution to establish by evidence that the accused ordered the commission of a war crime, or verbally or tacitly acquiesced in its commission, or knowingly failed to

(1) Regulation 10(3) includes the words: "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....."

(2) Later re-enacted in the Act of 31st August, 1946 referred to on p. 2.

prevent its commission. The facts proved by the Prosecution must, however, be such as to establish the responsibility of the accused for the crime in question or to justify the Court in inferring such responsibility. The secondary onus, the burden of adducing evidence to show that he was not in fact responsible for any particular war crime then shifted to the accused. All the facts and circumstances must then be considered to determine whether the accused was in fact responsible for the killing of prisoners referred to in the various charges. The rank of the accused, the duties and responsibilities of the accused by virtue of the command he held, the training of the men under his command, their age and experience, anything relating to the question whether the accused either ordered, encouraged or verbally or tacitly acquiesced in the killing of prisoners, or wilfully failed in his duty as a military commander to prevent, or to take such action as the circumstances required to endeavour to prevent, the killing of prisoners, were matters affecting the question of the accused's responsibility."

Dealing with the third charge,⁽¹⁾ the Judge Advocate said: "There is no evidence that anyone heard any particular words uttered by the accused which would constitute an order, but it is not essential that such evidence be adduced. The giving of the order may be proved circumstantially; that is to say, you may consider the facts you find to be proved bearing upon the question whether the alleged order was given, and if you find that the only reasonable inference is that an order that the prisoners be killed was given by the accused at the time and place alleged, and that the prisoners were killed as a result of that order, you may properly find the accused guilty of the third charge." He drew attention, however to paragraph 42 of Chapter VI of the Manual of Military Law regarding circumstantial evidence, which states: ".....before the Court finds an accused person guilty on circumstantial evidence, it must be satisfied not only that the circumstances are consistent with the accused having committed

(1) This charge alleged a direct order on the part of the accused. The paragraph to which this footnote is attached is included here because it throws light on the kind of circumstantial evidence which the Judge Advocate would no doubt consider admissible to prove any degree of responsibility on the part of Meyer.

the act (that is, said the Judge Advocate, that he gave the order) but that they are inconsistent with any other rational conclusion than that the accused was the guilty person".

In addition to the view of the Judge Advocate in the case of these provisions, it would not be out of place, to set out the remarks of Counsel on these interesting paragraphs. In his opening address, prosecuting Counsel said that the vicarious responsibility of a high-ranking officer for atrocities committed by troops under his command, in the absence of a direct order was based, "firstly, on a known course of conduct and expressed attitude of mind on the part of the accused; secondly, upon his failure to exercise that measure of disciplinary control over his officers and men which it is the duty of officers commanding troops to exercise; and, thirdly, on a rule of evidence applicable in these cases, which in effect says that, upon proof of certain facts, the accused may be convicted, if he does not offer an explanation to the court sufficient to raise in their minds a reasonable doubt of his guilt".

Paragraphs (4) and (5) were important to the present case because evidence would be submitted to show that the accused was prima facie guilty for war crimes under both provisions, quite apart from positive evidence of guilt. The Prosecution would produce evidence to show, in charges 1, 3 and 4, that an officer or N.C.O. or both were present at the time when these offences were committed, and that this was probably also the case with respect to charges 2 and 5. Furthermore, the offences proved would be such as to constitute "more than one war crime" within the meaning of paragraph (4). Discussing further the presumptions laid down in paragraphs (3), (4) and (5), Counsel expressed the opinion that: "Technically it could be said that an Army Commander might be held responsible for the unlawful acts of a private soldier hundreds of miles away, simply because an N.C.O. happens to be present at the time the offence was committed..... It is only pedantic nonsense, to suggest

that any such meaning is intended. A reasonable line must be drawn in each case, depending on its circumstances. The effect of the provision is simply that, upon proof of the facts there set out, the burden shifts to the accused to make an explanation or answer, and the court may convict but is not obliged to do so, in the absence of such explanation or answer. The section does not say that the court must receive such evidence as prima facie evidence of responsibility, but merely that it may".

Counsel for the Defence did not touch upon the provisions in question.

From the fact that Meyer was found guilty on the fourth and fifth charges but not on the third, it seems clear that the Court made an express application of the presumptions contained in Regulation 10, and considered that it was justifiable thereupon to pass the death sentence on the accused.

The Convening Authority, however, was of the opinion that "Meyer's degree of responsibility was not such as to warrant the extreme penalty".

On February 18th, 1946, a British Military Court at Wuppertal, Germany, tried several officers formally attached to the aerodrome at Dreierwalde, Germany for being "concerned in" the killing, contrary to the laws and usages of war, of Allied prisoners of war on one or more of three occasions on March, 22nd, 24th and 25th, 1945, respectively. Of particular interest in the present connection is the outcome of the trial of Karl Rauer, formerly a Major and Kommandant of the camp, and Wilhelm Scharschmidt, formerly Hauptmann and Rauer's Adjutant.⁽¹⁾

It was shown that on March 21st the aerodrome was heavily bombed and five Allied airmen were captured by the Germans. Rauer, the Kommandant of the camp, claimed that he issued no specific orders regarding these prisoners, but expected that they would be sent to a prisoner of war camp in the usual way. Scharschmidt, his Adjutant,

(1) The other accused were as follows: Otto Bopf, Bruno Botcher, Hermann Lommes, Ludwig Lang, and Emil Gunther.

after questioning them, detailed Oberfeldwebel Karl Amberger to lead the escort, despite the warnings of Chief Clerk Lauter that Amberger was unsuitable for the task in view of his open hostility to Allied prisoners of war; the Adjutant did make some attempt to find a substitute. On the night of the 22nd four of the party of prisoners were shot dead on the way to the station.

Rauer admitted that he was primarily responsible for prisoners of war, but added that the administration of questions relating to them was a matter for Scharschmidt, the Adjutant. Both he and Scharschmidt accepted a report that the prisoners had been shot while trying to escape and Rauer passed this report on to higher authority. Rauer pleaded that he had no time to make a personal investigation, and Scharschmidt pleaded that he had no orders to do so.

On March 24th, a further party of prisoners, captured after a second serious air raid, were sent at night to help in filling in bombholes on the runways of the aerodrome. This was done under Rauer's orders, transmitted through Scharschmidt, though there was some evidence that the immediate order came from Bopf. In Court, Gunther claimed that Lang had told him that Bopf had ordered the shooting of the prisoners. The latter was taken out by Gunther, Lommes, Lang (all of whom came under Bopf's orders) and one other, not before the Court. Seven or eight prisoners were shot, and there was evidence implicating Gunther, Lommes and Lang in the shooting. Bottcher, who was in charge of repairs, claimed to have reported the matter to Scharschmidt, but the latter denied this. Lommes claimed that Scharschmidt said to the N.C.O.s involved: "You must make a report that they were shot whilst trying to escape, so that I can pass it on." Lang told Bopf that the shooting had been committed, but Bopf took no action and jumped to the conclusion that Scharschmidt must have ordered it. Bottcher was also inactive,

and Scharschmidt took no action because Rauer had intended to interrogate the escort. The Commandant, however, could not find the time to do so. An unchecked report stating that the prisoners had been shot while trying to escape was thereupon sent to higher command. Lommes claimed in Court that Bottcher said that the killing was justified in view of the German deaths caused by bombing.

Finally, on March 25th, a wounded prisoner was taken out of the aerodrome in a motor cycle side-car by Lang and Lommes and shot by Lang. Rauer and Scharschmidt stated in Court that they knew nothing of this incident until long afterwards. Bottcher admitted lending his motor cycle to Lommes, and claimed that he had the impression that the victim was being taken to hospital. Lommes claimed that both Bottcher and Bopf had said that the remaining prisoner must disappear like the others; the two officers denied this.

There was evidence that both Rauer and Scharschmidt expressed hostile opinions towards captured enemy air crews, in the presence of N.C.O.s. Rauer, however, denied issuing any orders for the shooting of prisoners of war, and explained that he was prevented from making personal investigations into the shootings by his other duties; the Allied armies were near, air-raids were severe and necessitated expensive repairs by hundreds of prisoners of war, internees and civilians, which he had to supervise, and his task was made worse by ill-feeling among the officers on the aerodrome. No witness claimed that the killings were carried out on the specific orders of either Rauer or Scharschmidt.

Subject to confirmation by higher military authority, the following findings were pronounced.

Rauer and Scharschmidt were found not guilty of the first charge, which concerned the events of March 22nd, but guilty of the other two charges.

The remaining accused except Gunther, were found guilty of the second and third charges, not having been accused of the first charge. Gunther was found guilty of the second charge, concerning the events of March 24th, there being no other charge against him.

All of the accused were sentenced to death by being hanged. The sentence on Rauer was commuted to one of life imprisonment by higher military authority, and the other sentences confirmed.

The names of two of the accused, ex-Major Rauer and ex-Hauptmann Wilhelm Scharschmidt, the Kommandant of the aerodrome and his adjutant, appeared on all three charges, these accused being thereby charged with being "concerned in the killing" of twelve Allied Prisoners of War on three different dates in March, 1945. It was agreed that there was no direct proof that either had given any specific orders for the offences to be committed. Yet both were found guilty on the second and third charges, and sentenced to death by hanging. They were found not guilty on the first charge, and the sentence on Rauer was commuted by higher military authority to one of life imprisonment.

Counsel for Rauer submitted that this accused "must be proved to have been a party to a crime or to have acted in consort with others in committing that crime or to have been guilty of criminal negligence of the highest order or to have been an accessory after the killings". He could not be convicted merely because he was the commander of people who were responsible for killings. In his closing address, Counsel claimed that Rauer should not be convicted of being concerned in a crime merely because he was the commander of the responsible parties. He must be proved to have participated in the crime, either by issuing orders in connection with the killing or by allowing the perpetrators to believe that they could kill airmen with impunity. Above all it must be proved that the accused Rauer had the necessary mens rea or guilty mind.

In his closing speech, Counsel for Scharschmidt submitted that utterances by the latter hostile to British pilots, made after heavy air raids, were not sufficient to prove him guilty of possessing that guilty mind which was an essential ingredient of the charges. Counsel's submission regarding the first charge was that there was no evidence that Scharschmidt instigated this crime or, realising that a crime had been committed, condoned it. If the Court considered that he was negligent in any of his duties, Counsel submitted that negligence was not enough on this charge. As to the charges as a whole he claimed that there was no evidence that Scharschmidt instigated any killing or condoned any killing. In every case he made an immediate report to his Kommandant, who must bear the responsibility for any neglect of duty that occurred. It was never Scharschmidt's duty to carry out any interrogations himself.

In closing his case, the Prosecutor pointed out that a man is deemed to intend the natural consequences of his acts. He contended that the murder in these charges came about if not on direct orders then because the Kommandatur in the form of Rauer and Scharschmidt let their hostile views towards prisoners of war be known to their subordinates, who thereupon took action against the prisoners. He considered that the offence of incitement to murder came properly within the scope of the words "were concerned in the killing". In Section 4 of the Offences Against the Person Act (1861), incitement was defined as to solicit, encourage, persuade, endeavour to persuade, or propose to any person to murder any other person. The Court might well think that this wording included in its scope exactly a situation where there existed a chain of command. If the Court were not satisfied that the evidence of the activities of any of the officers was enough to show that he was an accessory before the fact, then it was submitted there was evidence on which the Court might find that the accused officers were guilty of inciting to murder.

Scharschmidt, continued the Prosecutor, could have delayed sending the prisoners until a more reliable escort became available. After the killings, untested reports were accepted by Rauer or Scharschmidt from the escorts, to the effect that the prisoners were shot while trying to escape, and were automatically forwarded to higher command. Was it not strange that the prisoners involved in the second incident were not sent out by Rauer to mend the runways till midnight, whereas the work had been begun at 8 o'clock, and that Rauer claimed not to know that his action was wrong? Rauer ought to have anticipated further trouble in view of the deaths on the 22nd.

Summing up on a submission on behalf of Rauer of no case to answer, the Judge Advocate said: "In my view the charge does not envisage anything in the nature of negligence. The words: 'When concerned in the killing', to my mind, are a complete and direct allegation that Rauer was either instigating murder or condoning it. In my view that is the real basis of the charge which is before you, and I do not propose to embark upon any questions as to whether Rauer was negligent either at the time or afterwards in not making a proper investigation."

The Judge Advocate in his final summing up, dealing with the first charge, said that there seemed no direct evidence that Karl Rauer or Scharschmidt deliberately gave orders to Amberger and his companions to shoot the captives. Neither did he see any direct evidence upon which the Court could properly arrive at a finding that, though they were not giving direct orders they were passing on to these N.C.O.s the impression that the killing was what they wanted to happen, and that if the latter killed the prisoners nothing would be said about it and they would not be punished. He reminded the Court, however, that the Prosecution maintained that none of the killings alleged in the three charges could have occurred on the aerodrome without the connivance, without the direction and without the complicity of the Commanding