

III/92.
30th May, 1947.

UNITED NATIONS WAR CRIMES COMMISSION.

Collection and Publication of Information
concerning Human Rights.

Draft Report by Committee III.

(Compiled by the Secretary to Committee III on the basis of
Docs. III/89, III/90 and III/91, and the discussions in
Committee III held on 22nd May 1947, Minutes No. 7/47.)

- I. The Economic and Social Council of the United Nations adopted on 21st July 1946 a Resolution on the Commission on Human Rights.

Paragraph 4 of this Resolution, under the heading "Documentation ", reads as follows:

" The Secretary-General is requested to make arrangements for:

- (a) the compilation and publication of a year-book on law and usage relating to human rights, the first edition of which should include all declarations and bills on human rights now in force in the various countries;
- (b) the collection and publication of information on the activities concerning human rights of all organs of the United Nations;
- (c) the collection and publication of information concerning human rights arising from trials of war criminals, quislings and traitors, and in particular from the Nuremberg and Tokyo trials;
- (d) the preparation and publication of a survey of the development of human rights;
- (e) the collection and publication of plans and declarations on human rights by specialized agencies and non-governmental national and international organizations. "

(Journal of the Economic and Social Council, 1st Year, No.29, 13th July 1946, p.520).

- II. Pursuant to discussions between the Director of the Division of Human Rights of the United Nations and representatives of the United Nations War Crimes Commission held in April 1947 (Doc.Misc.No.89), the Director of the Division of Human Rights communicated to the Chairman of the U.N.W.C.C. on 15th May 1947 (Doc.A.45), that Monsieur Henri Laugier, the Assistant Secretary-General in charge of Social Affairs, agreed with him that the U.N.W.C.C. was in a better position to do the work outlined under (c) of the above quoted paragraph 4 of the Resolution of the Economic and Social Council, than was the United Nations Secretariat, and added that if the Secretariat of the U.N.W.C.C. was prepared to accept responsibility for this work, the

United Nations Secretariat would be very pleased to have it do it for them. The Director of the Division of Human Rights further wrote that, if this were possible, the Division would like to be able to submit the manuscript to the next meeting of the Commission on Human Rights, which is to meet on 25th August 1947 at Geneva. He did not want to press the U.N.W.C.C. in the matter, however, and would arrange to have the manuscript submitted at the following meeting of the Commission should it be impossible for the U.N.W.C.C. to complete the work for August. In any event, he would very much appreciate hearing from the Chairman of the U.N.W.C.C. and having his views at his earliest convenience.

- III. In its meeting held on 21st May 1947, the U.N.W.C.C. decided to accept responsibility for the work as requested as far as information concerning human rights arising from trials of war criminals was concerned, and postponed its decision on the question whether it will also be feasible for the Commission to collect information concerning human rights arising from trials of quislings and traitors.

Simultaneously the whole question was referred to Committee III. Committee III discussed the problems involved in its meetings held on 22nd May and 4th June 1947 (Committee III Minutes Nos. 7/47 and 8/47) on the basis of preparatory documents submitted by the Secretariat, viz. by the Secretary to Committee III (III/89), by Mr. Brand (III/90) and by Dr. Mayr-Harting (III/91).

- IV. On the preliminary question whether the U.N.W.C.C. has jurisdiction to collect information concerning human rights arising from the trials of quislings and traitors, Committee III is of the opinion that the question of jurisdiction does not arise. It is not suggested that the Commission should take any steps connected with the investigation of crimes committed by quislings and traitors leading up to their prosecution, trial and punishment. What the Commission is being asked to do is to examine the results of trials which have taken place without the Commission having any part in their preparation, and to collect information concerning human rights arising out of such trials. If the Commission undertakes this task it does not assume jurisdiction in connection with the prosecution and trial of quislings and traitors. It only uses its experience in collecting and sifting material which, though it has not directly arisen out of the Commission's work, is in many respects akin to the Commission's jurisdiction which comprises war crimes, including crimes against peace and crimes against humanity.

The terms of reference of the Commission, as stated in its inaugural meeting held on 20th October 1943 (Doc.C.229), can, in the opinion of Committee III, not be interpreted to the effect that they form an obstacle to the Commission's complying with the request made by the United Nations Secretariat for the following reasons:

- (a) The U.N.W.C.C. is an international organisation with the legal capacities of a body corporate. (cf. S.R. & O. 1945, No. 1211).
- (b) The question of the possible expansion of the scope of the Commission's investigations and functions was reserved for future consideration on 20th October 1943 (Doc.C.229).
- (c) The Commission has subsequently been charged with the task which, according to the original proposals, would have been vested in the technical committee on legal questions. (Doc. C.229).
- (d) The request from the United Nations Secretariat is a matter sui generis. It is made to the Commission by an organ of the United Nations which, in requesting the Commission's collaboration, acts on behalf of its 55 member States, among whom there are also all the members of the U.N.W.C.C.

- (e) As will be shown in the parts of this report dealing with the substance of the question, the information concerning human rights arising from trials of war criminals, and similar information arising from trials of quislings and traitors, is to such an extent inter-related, that a report based only on trials of war criminals proper, or a report based only on trials of quislings and traitors would not exhaust the matter and would not give an adequate picture.

In many international documents, including draft conventions prepared by the U.N.W.C.C. before the end of the war, so-called quislings and traitors have, to some extent, been dealt with together with war criminals. In its resolution on the question of refugees, the General Assembly of the United Nations decided on 12th February 1946, that "no action taken as a result of this resolution shall be of such a character as to interfere in any way with the surrender and punishment of war criminals, quislings and traitors". The constitution of the International Refugee Organisation, annexed to the Resolution of the General Assembly of 15th December 1946, in the part devoted to "definitions and general principles" provides that "war criminals, quislings and traitors will not be the concern of the organisation"; the same applies to persons who have assisted the enemy forces, which term is circumscribed in some detail.

The Treaties of Peace with Italy, Roumania, Bulgaria, Hungary and Finland, impose on the defeated former enemy States the duty to ensure the apprehension and surrender for trial not only of persons who are accused of having committed war crimes and crimes against peace or humanity, but also nationals of any Allied or Associated Power accused of having violated their national law by treason or collaboration with the enemy during the war.

- V. In addition, it may be pointed out that the Commission has repeatedly listed Allied nationals accused of violations of the laws and customs of war or crimes against humanity committed against Allied nationals.

Crimes against humanity of enemy nationals committed against enemy nationals or stateless persons on enemy territory were the subject of charges submitted to the Commission in exceptional cases only. It forms, however, part of the original functions of the Commission to collect evidence and to report from time to time to the Governments on certain classes of atrocities showing where possible the connection between the individual crimes of each type and the common policy which they expressed. It has been the view of the Commission from the beginning that this part of its functions includes the consideration of crimes against humanity of this type. (Cf. letter from the Lord Chancellor to Sir Cecil Hurst, dated 23rd August 1944, Document C.78 and Progress Report Document C.48(1).)

The juxtaposition of quislings, traitors and collaborators with war criminals in many international documents and in some recommendations of the U.N.W.C.C. does not, however, alter the fact that the Commission has not collected the material concerning quislings and traitors. If the Commission undertook the collection of information arising from the trials of quislings and traitors, it would be necessary to ask the member governments to make the respective information available to the Commission and to assist in the collection of material from such countries, for example, the former enemy countries, as are not members of the Commission.

The human rights usually referred to in everyday discussions, and indeed in the deliberations of the Human Rights Commission itself are such rights as those of free speech, free press, freedom of association, freedom of public meeting and free elections. The trials which will be most illustrative of the extent of the protection or vindication of such rights are clearly the trials of quislings and traitors and those of the major war criminals. Of the Nuremberg and Tokyo trials this fact will readily be granted, but it is urged that no study of the protection of the basic human rights of the individual can afford to ignore the trials of quislings and traitors. For instance, Marshal Antonescu and certain others were tried by a Roumanian Court, inter alia, for enslavement of the press and information services with the object of spreading Nazism in Roumania and corrupting public opinion.

Again, Bela Imredy, former Premier and Finance Minister, was found guilty in Hungary, inter alia, of the promulgation of anti-semitic legislation.

On the other hand, there will be many trials of "traitors" which have no bearing on human rights because they are restricted to the violation of duties which a person owes to a certain State. The trial of William Joyce, for instance, has only an indirect bearing on human rights. By his treasonable activities, William Joyce has certainly in a general way aided and abetted the major war criminals in their crimes violating human rights, but he himself was indicted and convicted only for the violation of duties flowing from his allegiance to the British Crown.

Committee III therefore recommends to the Commission that in the task to be done at the request of the United Nations Secretariat, there should be included the examination of records and reports of trials of quislings and traitors, but only to the extent to which these trials were concerned with such persons accused as quislings and traitors as had, in connection with or in addition to the violations of their duties of allegiance to a certain State, been accused of having committed war crimes in the wider sense, which includes crimes against humanity.

VI. Many relevant legal texts are already in the hands of the Secretariat and have been circulated as Miscellaneous documents; these set out the laws and decrees applicable. There may, however, be difficulties in securing material regarding the trials, especially from non-members of the Commission, (Italy, Bulgaria, Roumania and Hungary, and Finland). Full transcripts would seem necessary for a full examination of the way in which the rights of the accused are provided for during his trial. For an estimate of the protection of the rights of his victims, however, the essentials are a statement of the offence, the attitude of the Court to such pleas as superior orders or act of subordinate without the knowledge of the accused, and the decision of the Court.

If the work to be undertaken is to include information arising from trials of quislings and traitors accused of war crimes and crimes against humanity, it will be necessary to enlist the assistance of the member governments and perhaps of the United Nations Secretariat in securing such information from countries which are not members of the U.N.W.C.C.

As far as the trials of war criminals proper are concerned the material collected for the purpose of law reporting will form the main basis for this new work too.

VII. For technical reasons the division of the material appears necessary, into the analysis of:

- (a) the trial of the major German war criminals (Nuremberg),
- (b) the trial of the major Japanese war criminals, (Tokyo),
- (c) the trials of persons of enemy nationality or allegiance accused of war crimes, crimes against peace and crimes against humanity not falling within the categories (a) and (b),
- (d) the trials of quislings and traitors accused of war crimes or crimes against humanity, not falling within the categories (a), (b) and (c).

Work on the tasks mentioned under (a) and (c) could start forthwith, whereas (b) will have to wait until the Tokyo trial has ended and the transcripts of its latter part and the decision of the Tribunal are available.

The task enumerated under (d) cannot be undertaken before the material has been collected with the assistance of the member governments.

VIII. The collection and publication of information concerning human rights arising from the trials is not an end in itself but obviously serves a specific practical purpose. This purpose is to aid in the main task of the Commission on Human Rights, particularly the preparation of an international bill of rights, international declarations or conventions on civil liberties. It is, therefore, submitted that the work of collecting the respective material should be undertaken with this end in view.

The information to be collected will be of a two-fold character, the one aspect being how human rights have been violated, the other how they have been protected.

Every crime or nearly every crime violates a right and therewith a "human right" in a wider, non-technical sense. Every individual murder violates a human right. The same applies to almost all violations of the laws and customs of war and to all acts coming under the term "crime against humanity" as defined in the basic documents, e.g. in the Charter of the International Military Tribunal of 8th August 1945. It is obvious that the collection of material indiscriminately dealing with records of common law crimes, war crimes, and crimes against humanity, which have been committed and which were the subject of criminal proceedings in international tribunals, mixed courts and in national, military and occupation courts, would be almost worthless for the purpose for which the collection is needed by the United Nations.

To an even larger extent the same is true of an indiscriminate collection of information arising from trials of quislings and traitors.

It is therefore probable that only then the collection of material would meet the requirements if it were restricted to the recording of such incidents and reactions to them as throw a light on the sufficiency or otherwise of the laws and usages of war and other provisions of international law and of municipal legal orders which purport to afford protection against violations of human rights. Records of trials of persons responsible for such outrages as deportation of allied nationals into concentration camps, their ill-treatment and murder, the killing of prisoners of war, extermination of whole populations and so on, are of very great interest to the historian, the sociologist and the lawyer, but they are of no particular relevance to the task before the Human Rights Commission, because no catalogue of human rights is needed to place it beyond doubt that murder of innocent men, women and children is criminal.

IX. In the opinion of Committee III, the collection of material should, therefore, be restricted to records illustrative of the following questions:

(a) Cases, if there are any, where the existing provisions of international law did not furnish a sufficient basis for imposing a just penalty for activities violating human rights;

(b) cases where the competent tribunal has found that a sufficient basis exists in international or municipal law for the punishment of certain activities violating human rights, but where the legal position remains doubtful because the respective decision of the court is not binding on other courts. In international law and in municipal law of many countries, decisions delivered by courts have the effect of res iudicata only as far as the actual parties to the proceedings are concerned. It is therefore advisable in such cases to place the law beyond doubt as to future occurrences.

(c) Cases showing that more elaborate provisions of international law could have prevented violations of human rights from occurring. The question of the protection of civilian populations of occupied territory as distinguished from prisoners of war, is a case in point. The cases will certainly show that many crimes would have been prevented, if machinery similar to that established for the protection of prisoners of war had been in operation also for the protection of civilian members of

the population of occupied territory, and of persons who were deported from occupied territory. Article 6(c) of the Charter of the International Military Tribunal extends its protection to "any civilian population"; a close study of the cases will show, however, that greater elaboration of this principle and the establishment of proper machinery is necessary.

(d) Stress should be laid, in sifting, collecting and arranging the material, on the protection of human rights of persons who are not of the nationality of the victorious Powers. In the province of what is now called "crimes against humanity", the aspect of these provisions as a means of protecting human rights stands out most clearly. Here the report to be produced will have to show how certain flagrant violations of human rights have gone unpunished mainly for lack of jurisdiction of the respective tribunals.

Crimes committed before the 1st September 1939 in Germany against Germans are here in point, in view of the Berlin Protocol of 6th October 1945, by which the scope of Art. 6(c) of the Charter of the International Military Tribunal was restrictively defined. This necessarily led to the restrictive interpretation of the Charter by the Nuremberg Tribunal. A similar lacuna (from the point of view of the future protection of human rights) are the provisions of the basic documents under which many allied military tribunals were prevented from taking cognizance of acts such as the murders of tens of thousands of German "useless eaters" in institutions such as Hadamar, or the murder and ill-treatment of, say, Hungarian inmates of Belsen Concentration Camp. With this, provisions will have to be contrasted, e.g. the Control Council Law No. 10, which gives to the competent courts jurisdiction without the important qualifications of the Nuremberg Charter and the Berlin Protocol. The activities of the Tribunals applying Law No. 10 in the different Zones of Germany will be of particular interest for the report.

(e) It will be one of the main tasks of the report to examine the question of reprisals, legitimate and otherwise, in the light of the proceedings against persons who were charged with war crimes and have pleaded, with or without success, that they had acted in execution of legitimate reprisals. The exercise of a real or assumed right of reprisal is a very important source of violations of human rights of innocent persons in times of crises.

(f) Attention should also be paid in the report to the responsibility of military commanders and administrators for violations of human rights committed by their subordinates, which has been assumed in many of the important war crimes cases, such as in the American/Japanese case of Yamashita, in the Canadian/German case of Meyer and in the British/German case of Kesselring. The establishment of such responsibility is one of the links in an efficient machinery for the protection of human rights in time of war and occupation.

(g) It may be added that the whole problem of the defences of superior orders and duress can be regarded as one of balancing the conflicting claims of an accused and his victims. The Secretariat is now in possession of considerable information regarding the law and practice of the various allied countries on this matter.

(h) Much of this study will in practice amount in the first place to showing how the Hague and Geneva Conventions protect certain rights of certain types of people, e.g., prisoners of war, the sick and wounded and the civilians of occupied territories, and secondly to quoting as examples of such protection, trials in which the provisions of these Conventions have been applied. Such an account may seem elementary to the United Nations War Crimes Commission, but would not appear so to persons less acquainted with these questions.

- X. In general, it will be appropriate to illustrate on the basis of the immense material available, the development from the position where only allied interests and allied rights were considered to be protected, to a stage where the trend clearly was to extend the protection of minimum standards of humanity to human beings everywhere.

In connection with violations of human rights, committed e.g. in execution of a policy of persecution of political, racial and religious groups, the aspect of jurisdiction will be of greater importance than the gaps in substantive law.

- XI. It has already been stated supra (IX (a) and (b)) that it will be one of the most important tasks of the work to illustrate gaps in international law which have the effect that some activities violating human rights go at present unpunished.

It is, however, only a small fraction of information concerning such lacunae in international law, which can be discovered in the transcripts of trials and in judgments actually delivered. Although, as indicated under (d) supra, some of the trials will certainly be informative on this point, the question, for instance, to what extent reprisals are allowed can hardly be answered satisfactorily with the help of transcripts of trials only. In the great majority of cases in which the prosecuting authorities held the opinion that even flagrant violations of human rights were justified in positive international law as reprisals, no charge has been brought before a court. The transcripts of trials of war criminals, etc., will show, apart from rare exceptions, merely cases where the provisions of international law on reprisals did not stand in the way of the punishment of violations of human rights.

In addition to the files of the Commission, the files of the prosecuting authorities may be the richest source for the study of such gaps in international law.

It will, of course, not be possible to make use of the internal files of the prosecuting authorities to the same extent as of the transcripts of trials which were conducted in open court. On the other hand, enquiries with the competent authorities - for instance a request for a report on cases in which no charge was brought in view of the provisions of international law concerning reprisals - will no doubt furnish useful information.

- XII. As the crimes of enemy nationals committed against enemy nationals (and stateless persons) on enemy territory, fall mainly within the jurisdiction of the local courts of the respective territories, a full documentation of these aspects will have to take account also of trials conducted before courts of former enemy States, including German and Austrian courts, which at present act under the supervision and with the permission of the allied occupation authorities.

of the Control Commission for Germany
The Legal Division of the British Element expressed its willingness some time ago to send to the Commission returns of all the cases of crimes against humanity which were due for trial or have been tried by German courts. (Doc. M.114, 5). In important cases at least, it may be possible to procure the transcripts or copies of the official records of these trials, and copies of the judicial decisions.

- XIII. The collection will usefully have to include material from which not only the present state of international law can be gathered, but also the changes which have occurred in the laws and customs of war and in international law in general in the last three or four decades. Such modifications of the state of the law may have occurred both in the direction of a greater protection of human rights as, e.g. through the introduction of the notion of crimes against humanity. On the other hand, the examination of the cases may show that owing to technical developments in the art of war, the protection previously accorded, e.g. to non-combatants

in land, sea and air warfare, may be considered to have been considerably qualified. It will, therefore, be relevant to include in the survey not only trials conducted during and at the conclusion of the second world war, but also similar material relating to the first world war. The Minutes of the Responsibilities Commission of 1919 and its report might be a useful source if compared with the files of the U.N.W.C.C. and transcripts and records of trials held in connection with World War No.2.

XIV. Committee III submits, therefore, the following conclusions:

- (1) The work should be undertaken within the scope outlined in the present paper, namely including information arising from trials of quislings and traitors accused of war crimes and crimes against humanity, but excluding such trials as do not contain charges of this kind and are restricted to charges of high treason, treason and similar offences.
- (2) The work should be produced under the responsibility of Committee III. The Secretary-General should be asked to arrange that the whole legal staff devote part of their time to this work. The Secretary-General should, after consultation with Committee III, appoint individual members of the legal staff rapporteurs for parts of the work. The work will probably have to be divided on the lines indicated in para. VII of this report, under (a), (b), (c) and (d), it being understood that further sub-divisions are not to be excluded.
- (3) The report will have regard to the double aspect of the problem as indicated under VIII.

In collecting and sifting the material regard will be had to the points of relevance described supra under IX to XIII.

- (4) Representatives of member governments on the Commission, and through them the Governments themselves, will have to be asked for their assistance in procuring for the Commission that part of the material which is not yet available, i.e. information concerning trials of quislings and traitors accused of war crimes and crimes against humanity. Member governments will have to be asked to assist also in procuring material from countries which are not members of the Commission, such as former enemy States. It may even be necessary to enlist the assistance of the United Nations Secretariat, with a view to getting information which otherwise would not be accessible.
- (5) When preparing the document, the rapporteurs will have to be careful not to recommend statements which would appear to interfere with the sovereign rights of States and in general to restrict themselves to recording the present state of affairs, rather than suggesting alterations of the law.

3rd June, 1947.

UNITED NATIONS WAR CRIMES COMMISSION

Notes of a conference between the Secretary-General,
and the legal members of the Secretariat
held on June 2nd, 1947, 3. 30 p.m.

The meeting was held in order, first to allocate shares in the task of collecting and publishing information concerning human rights (See Doc. III/92); secondly to discuss a target date for this work; and thirdly to re-allocate shares in the task of drafting the History of the Commission.

I. Collection and Publication of Information Concerning
Human Rights

The work involved in performing the task set by the United Nations was divided as follows:

Dr. Litawski undertook to deal with the Nuremberg Trial and all trials reported to the Commission in the Polish language.

Dr. Mayr-Harting undertook to deal with trials by German and Austrian Courts and all trials reported to the Commission in the Czech and German languages; and also the historical aspect of the question (the practice during and immediately after the war of 1914 - 18).

Dr. Zivkovic undertook to deal with the Tokyo trial and all trials reported to the Commission in the French, Yugoslav and Bulgarian languages.

Mr. Brand undertook to deal with all trials reported to the Commission in the English language, excepting the Nuremberg and Tokyo trials.

It was pointed out that States invited to send trial reports might be advised that the Secretariat of the Commission is qualified to deal with material in any of the above-mentioned languages.

It was agreed that it would be necessary to send material to the United Nations in instalments; for instance, the work on the Tokyo trial could not be completed until the trial itself had ended.

The end of November, 1947, was envisaged as the date for dispatch to the United Nations of the first substantial instalment, and the end of October as the date before which the contributions of individual reporters towards this instalment should be ready for editing.

II. History of the Commission

Subject to the approval of M. de Baer, Dr. Mayr-Harting agreed to take over points 8 (c) (d) and (e). ((c) "Terms of Reference - the original functions of the Commission"; (d) "The Commission as an advisory body"; (e) "Practical and legal consequences of the work of the Commission".)

Dr. Zivkovic undertook to take over "official declarations and conferences" (6(a)) from Dr. Mayr-Harting and to deal with any parts of Dr. Schwelb's share still uncompleted on his departure.

III/94

June 9th, 1947.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

Collection and Publication of Information concerning
Human Rights.

Preparatory discussions in different organs of the
United Nations.

The following letter received by the Secretariat of the United Nations War Crimes Commission from the Chief of the Distribution Section of the Documents and Sales Division of the United Nations is, together with the summaries of discussions of the Nuclear Commission on Human Rights and of the Economic and Social Council attached to it, circulated for the information of members. It gives information on the discussions preceding the Resolution which is quoted in Docs. III/92 and C.257, section I, and which is the basis of the request from the United Nations Secretariat to the United Nations War Crimes Commission.

UNITED NATIONS,
Lake Success, New York.

26 May, 1947.

Ref: 306-3-5/MMB

Dear Mr. Schwelb,

In reply to your letter of 2nd May, all of the documents covering the subject of human rights arising from trials of war criminals which are presently available were despatched to you on 27 May, 1947.

Attached to this letter is additional material which the Secretary of the relevant Commission suggested that I should forward to you.

I trust this will be of some assistance to you and that you will not hesitate to communicate with me if I can be of any further help.

Yours sincerely,

Sgd. Mabel H. Butler,
Chief, Distribution Section
Documents and Sales Division.

"The collection and publication of information on the activities concerning human rights arising from the trials of war criminals, quislings and traitors and in particular from the Nuremberg and Tokyo trials".

1. Discussion in the Meetings of the Nuclear Commission on the above resolution

1. The Nuremberg and Tokyo trials of war criminals and their importance to the study of human rights are first mentioned in the meetings of the Nuclear Commission by Professor Cassin at a closed meeting of the Commission held on 6 May 1946, at 3.00 p.m. The members are discussing the drafting of an international bill of rights, whether the nuclear Commission itself is competent to draft such a bill at this session, what methods should be adopted, what subjects should be included in the Bill, and what provisions should be made for its implementation. Here Professor Cassin mentions the possibility of creating a control agency to consider the violations of the proposed declaration of the rights of man. The Security Council is empowered by the Charter to examine such violations as would constitute a threat to the peace. But we should distinguish between these problems and others. Governments might well object to the creation of a control agency and in many cases it is the respect for the authority of governments which will enable the Commission to achieve concrete results. However, there may be cases where the violations of human rights will be so serious that men's right to discuss them, and the right of the Security Council to examine them, cannot be ignored.

At this point Professor Cassin draws the attention of the Commission to the International Tribunal of Nuremberg.

Men are being judged there not only for having wanted and planned a war of aggression, not only for violating the rules of war, which is not the concern of the Human Rights Commission, but for crimes against humanity. These men may be condemned to death on this one count. A similar court is sitting in Tokyo and judging men also for crimes against humanity. The establishment of these tribunals represents a great advance in the protection of the rights of man. The principles governing these tribunals should be closely studied by the Commission.

2. At the next meeting held on 8 May 1946 at 10.30 a.m. the discussion on the drafting of an international bill of rights is continued. Members are agreed that further documentation will be necessary before an international bill of rights can be written. H. Cassin proposes that a year-book incorporating existing bills of rights in force in the various countries be drafted. Information on the work of all organs of the United Nations concerning human rights should be collected and this should include reports on the work of the international courts of Nuremberg and Tokyo. These are especially important in that, for the first time, without any existing laws as a precedent, an international community organized a tribunal to try men for crimes against humanity, and not merely for breaking existing treaties and international conventions. The achievements of the courts in trying and condemning violations of the rights of man must be noted. Mr. Hsia (Member for China and Chairman of the Far Eastern Division of the War Crimes Commission) states that the principles governing the Nuremberg court are contained in Justice Jackson's statement, on the basis of which an international agreement was made. Apart from this in Mr. Hsia's view there is not much material of interest to the Commission.

3. At the meeting of the Commission held on 10 May 1946 at 10.30 a.m. the members agree that a year-book should be compiled, whose first edition should contain the bills of rights in existence in the member nations of the United Nations and that information should be collected and

and published on the activities of all organs of the United Nations dealing with Human rights. This is "to include information on the Nuremberg and Tokyo trials which might be important in the field of human rights"

4. This wording is adopted finally in the text of the Commission's report to the Economic and Social Council (Document E/38/Rev.1).

II. Discussion of the above resolution in the meetings of the drafting committee of the Economic and Social Council.

After the presentation of the Report of the Human Rights Commission to the Economic and Social Council, it is referred for study to a special drafting committee of the Council.

At the third meeting of this Commission held on 12 June 1946 at 10.30 a.m. certain amendments to the paragraph concerning the trials of war criminals are made and adopted as follows: Mr. Dehousse proposes that other trials of war criminals besides Nuremberg and Tokyo might be useful and should be added. Mr. Bousquet suggested that the trials of quislings and traitors should also be studied.

The final text as adopted by this Committee then reads as follows: "The collection and publication of information concerning human rights arising from trials of war criminals, quislings and traitors, and in particular from the Nuremberg and Tokyo trials."

III. Adoption of the above resolution by the Economic and Social Council.

The text as quoted in the last paragraph above was adopted without comment by the Economic and Social Council on 21 June 1946.

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III/95.
10th June, 1947.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Agenda of the United Nations Committee
on the Progressive Development of
International Law and its Codification.

The following document contains the provisional agenda of the United Nations Committee on the Progressive Development of International Law and its Codification, which began its deliberations on 12th May 1947, and which was mentioned in M. de Baer's report to Committee III (Minutes No. 8/47.)

Only items 4 and 6 of the Agenda concern the United Nations War Crimes Commission.

The United Nations Document A/236 which is referred to in connection with item 4, has been circulated as U.N.W.C.C. Miscellaneous document No. 66.

The General Assembly Resolution on Genocide which is the basis for the discussions under item 6, has been reproduced in U.N.W.C.C. Miscellaneous Document No. 69.

The provisional agenda was circulated on 5th May 1947 as United Nations document A/AC.10/L.

UNRESTRICTED

A/AC.10/L*
5 May 1947

ORIGINAL: ENGLISH

COMMITTEE ON THE PROGRESSIVE DEVELOPMENT OF
INTERNATIONAL LAW AND ITS CODIFICATION

PROVISIONAL AGENDA

1. Adoption of the Agenda.
2. Organization of the work of the Committee.
3. (a) Study of the methods by which the General Assembly should encourage the progressive development of International Law and its eventual codification.
(b) Study of the methods of securing the co-operation of the several organs of the United Nations to this end.
(c) Study of the methods of enlisting the assistance of such national or international bodies as might aid in the attainment of the objective.

(Document A/222 - Journal No.58, Supplement A- A/PV/55, pp.470-473).

4. Plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.

(Document A/236 - Journal No.58, Supplement A - A/PV/55, p. 485.)

5. Draft declaration on the rights and duties of States.

(Document A/285 - Journal No.58, Supplement A - A/PV/55, pp.474-475).

6. Letter from the Secretary-General regarding the Resolution adopted by the Economic and Social Council, 28 March 1947, concerning the Crime of Genocide.

* This document formerly issued as A/AC.10/1 Restricted.

III/96.

June 30th, 1947.

UNITED NATIONS WAR CRIMES COMMISSION

HUMAN RIGHTS REPORT: PREPARATORY PAPERS

THE SCOPE OF A STUDY OF
INFORMATION CONCERNING HUMAN RIGHTS
DERIVED FROM WAR CRIME TRIALS
OTHER THAN THOSE CONDUCTED BY THE
INTERNATIONAL MILITARY TRIBUNALS

BY G. BRAND

Subject to any modifications which a more detailed examination of the material may suggest as necessary, it is proposed to arrange the material requested by the United Nations, in so far as it relates to war criminals other than those tried by the International Military Tribunals in Nuremberg and Tokyo, in the manner described in the following outline:

A. Introduction

A suggested draft for the introductory pages appears as an Annex to the present paper (see p. 3). It is not proposed that this should be regarded as a final text. Nor is the possibility of its being later amalgamated into a general introduction to the Human Rights Report as a whole ruled out by its circulation in the present form.

B. The Rights of the Victims of War Crimes

The material regarding the human rights of possible victims of war crimes can most conveniently be analysed in the manner envisaged by subparagraph (h) of paragraph IX of Document C. 259 which runs as follows:

"Much of this study will in practice amount in the first place to showing how the Hague and Geneva Conventions protect certain rights of certain types of people, e.g., prisoners of war, the sick and wounded and the civilians of occupied territories, and secondly to quoting as examples of such protection, trials in which the provisions of these Conventions have been applied."

This section, which will also deal with the lacunae in existing law, will be divided according to the categories of persons whose rights will be found to be touched upon by the material available, namely:

- (1) Inhabitants of occupied territories.
- (2) Other civilian populations.
- (3) Members of armed forces.
- (4) Prisoners of war.

- (5) The sick and wounded.
- (6) Medical personnel.
- (7) Captured spies.

These divisions will be sub-divided under various of the following headings which each represent a human right or group of rights:

- (i) Life.
- (ii) Health.
- (iii) Personal integrity.
- (iv) Freedom of movement.
- (v) Fair trial.
- (vi) Family rights.
- (vii) Religious rights.
- (viii) Property.
- (ix) Civic rights.

C. Spheres in which the Rights of the Accused and the Rights of the Victims may be said to have Conflicted at the Time of the Offence

In each sphere an attempt will be made to show how laws and judicial practice have struck the balance between conflicting claims to the Court's consideration.

- (1) The Extent of Responsibility of a Commander for Crimes Committed by his Troops. (See Doc. C. 259, paragraph IX (f)).
- (2) The Defence of Superior Orders, Duress and Coercion. (See as above, (g)).
- (3) The Related Defence of Legality under Municipal Law.
- (4) The Defence of Necessity.
- (5) The Defence of Legitimate Reprisals. (See as above, (e)).

D. The Rights of the Accused at the Time of Trial

Material relating to the rights of an accused to a fair trial will be derived from an analysis of the laws and rules of the different countries relating to the trial of war criminals and from a study of their application in practice.

The rules relating to evidence and procedure which are applied in trials by courts of the various countries, and by the International Military Tribunals in Nuremberg and Tokyo, when viewed as a whole are seen to represent an attempt to secure to the accused his right to a fair trial while ensuring that the guilty shall not escape punishment because of legal technicalities. Certain typical examples will be examined under the following headings, to which others will probably be added subsequently:

- 1. Right of Accused to know the Substance of the Charge.
- 2. Right of Accused to be Present at Trial and to give Evidence.
- 3. Right of Accused to have the Aid of Counsel.
- 4. The Right of the Accused to have the Proceedings made Intelligible to him by Interpretation.
- 5. Rules regarding Appeal and Confirmation.
- 6. The Stress Placed on Expeditious Procedure.
- 7. Rules of Evidence in General.
- 8. The Admissibility of Affidavits.
- 9. The Admissibility of Pre-Trial Statements by one Accused against Another.
- 10. The Admissibility of Hearsay Evidence.
- 11. Accused not Entitled to the Rights of a Prisoner of War as Regards Trial.

A N N E X

INTRODUCTION

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

(1) The extent to which the law of the land has left the individual free to exercise these rights. Thus, Dr. Ivor Jennings, in Chapter VIII (Fundamental Liberties) of The Law and the Constitution,⁽¹⁾ points out that, whereas nearly all written constitutions (such as that of the United States) lay down certain "fundamental rights" which can be limited or taken away only by constitutional amendment, in the United Kingdom there is no written constitution and no such fundamental rights are recognised. In the United Kingdom, he concludes, "the nature of the liberties can be found only by examining the restrictions imposed by the law", and, as examples, the learned writer proceeds to show the extent to which the exercise of the freedom of speech and publication and of the freedom of assembly is permitted under English Law.⁽²⁾

A certain amount of information which is to some extent relevant to this aspect can be derived from a study of war crime trials, in so far as an accused is sometimes found not guilty of a war crime because his acts, although they may seem to have violated the human rights of his victims, were held to be justified by the laws and usages of war. Thus, while an attempt to ensure a measure of personal liberty to prisoners of war is made by the final sentence of Article 13 of the Geneva Prisoners of War Convention: "...They shall have facilities for engaging in physical exercises and obtaining the benefit of being out of doors",⁽³⁾ nevertheless, should a prisoner of war attempt to escape, it has always been regarded as permissible under the laws and usages of war for his captors to shoot at him in order to prevent his escaping. For instance, in their trial before the Eidivating Lagmannsrett (Court of Criminal Appeal) in Norway in March, 1946, allegations of murder were made against ex-Kriminalsekretær Bruns and ex-Kriminaloberassistent Clemens, on the grounds, inter alia, that they shot and killed Norwegian prisoners, but the accused were found not guilty of these charges. The Court were satisfied that Bruns, in trying to stop a prisoner from escaping, had aimed at his legs but that, as the prisoner stooped at that moment, the shot hit him in the head. The Court came to the conclusion that, as the prisoner shot by Bruns had not stopped when ordered to do so, the defendant had acted within his rights in shooting at him. The victim was an important official in the illegal intelligence service whose capture was of great importance to the German authorities, and the only way to stop him from getting away was to shoot at him. The Court, therefore, did not consider the defendant guilty of his murder.

(1) On pp. 237 and 244 of the Second Edition.

(2) Op cit, pp. 247 - 260.

(3) To which, among other provisions, reference was made by the Prosecutor in the trial by a British Military Court at Hannover on January 24th - 26th, 1946, of Arno Heering. (Trial and Law Report Series, No. 31, pp. 26 - 27).

The Court also established that a prisoner shot by Clemens had been trying to escape, and found that the defendant had not exceeded his rights in trying to prevent him from escaping by shooting at him.⁽¹⁾ The Judge Advocate serving in the trial before a British Military Court of Karl Amberger for the shooting of prisoners of war even went so far as to advise the Court that: "If the accused, Karl Amberger, did see that his prisoners were trying to escape or had reasonable grounds for thinking that they were attempting to escape then that would not be a breach of the rules and customs of war, and therefore you would not be able to say a war crime had been committed."⁽²⁾

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

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

Professor Dicy, in his classic The Law of the Constitution, made the following remarks regarding the peculiar character of the British Constitution: "....the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts.... There is in the English constitution an absence of those declarations or definitions of rights so dear to foreign constitutionalists.... In many foreign countries the rights of individuals, e.g. to personal freedom, depend upon the constitution, whilst in England the law of the constitution is little else than a generalisation of the rights which the courts secure to individuals."⁽³⁾

(1) Trial and Law Report Series, No. 32, p. 4.

(2) The Dreierwalde Case, pp. 81-7 of Vol. I of War Crime Trial Law Reports, published for United Nations War Crimes Commission by H.M. Stationery Office. Italics inserted.

(3) Ninth Edition, pp. 195 - 200.

Writing in the same vein, Dr. E. C. S. Wade and Mr. G. G. Phillips, LL.M., have stated that: "It is then in the law of crimes and of torts, part of the Common Law of the land, the ordinary law and not the fundamental Constitutional Law, that the Englishman finds protection for his liberty against officials of the State as well as others."⁽¹⁾

The laws of war are not without instances of the assertion of the rights of certain specific categories of persons, and of principles of an even more general nature, which are in some ways analogous to declarations of fundamental rights and general moral principles. One provision which has often been quoted by Prosecuting Counsel in war crime trials,⁽²⁾ Article 46 of Section III (Military Authority over the Territory of the Hostile State) of the Hague Convention No. IV of 1907 (Concerning the Laws and Customs of War on Land), reads as follows:

"Art. 46. Family honour and rights, individual life, and private property, as well as religious convictions and worship, must be respected.

Private property may not be confiscated."

Again, the preamble to the same Convention states that the signatories are "animated also by the desire to serve, even in this extreme case,⁽³⁾ the interests of humanity and the ever-progressive needs of civilization", and the introductory sentences to the Convention include the following passage:

"Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience."⁽⁴⁾

Judge Skau, delivering a judgment which was supported by the majority opinion of the Supreme Court of Norway in the appeal of Karl-Hans Hermann Klinge, a German war criminal sentenced to death by the Eidsivating Lagmannsrett, stated that torture constituted a violation of those "laws of humanity" and "dictates of the public conscience" which were mentioned in the text just quoted. Judge Skau added, however, that acts of torture also constituted a breach, inter alia, of Articles 46 and 61 of the Geneva Convention, two specific provisions of International Law.⁽⁵⁾

Most provisions made by the Laws and Customs of War, which protect certain human rights, are not, however, of such a general nature, as the analysis to be attempted presently⁽⁶⁾ will show. Many of these provisions require the performance or the avoidance of acts of a well-defined nature, and it is in this connection that the maxim ubi remedium ibi ius, to which

(1) Constitutional Law, Second Edition, p. 354.

(2) For instance, in the Belsen and other concentration camp trials.

(3) That is to say, on the event of an outbreak of war.

(4) Italics inserted.

(5) See Trial and Law Report Series No. 30, p.3.

(6) i.e. in Section B of the report (Rights of the Victims of War Crimes).

Dicey made specific reference,⁽¹⁾ acquires significance for the purposes of the present study. The human rights protected and the extent of such protection can only be found through an analytical study of the judicial application of a number of legal provisions of a restricted scope.

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

Certain municipal legal texts, for instance the Civil Criminal Code of Norway,⁽²⁾ make some attempt to arrange their provisions according to the rights of the individual which will be violated by breach thereof. The laws and usages of war, however, are not arranged on any such systematic basis.

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

United States Charge Sheets have not shown quite the same uniformity of drafting and may allege a "violation of the laws of war" or a "violation of International Law." In the Jaluit Atoll Trial,⁽³⁾ held before a United States Military Commission in the Pacific, the charge was one of murder, and the specification, setting out the alleged elements of the offence, ended with the words: "...all in violation of the dignity of the United States of America, the International rules of warfare and the moral standards of civilised society." An objection made by the accused on the grounds that the inclusion in the charge of the words "moral standards of civilised society" was improper and non-legal was over-ruled by the Commission.

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

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

(1) Loc cit, p. 199.

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

(3) War Crime Trial Law Reports, Volume I, pp. 71 - 80.

of the powers and duties of the Judge Advocate are made by Rule of Procedure 103, (e) and (f), which run as follows:(1)

- "(e) At the conclusion of the case he will, unless both he and the court consider it unnecessary, sum up the evidence and advise the court upon the law relating to the case before the court proceed to deliberate upon their finding;
- "(f) Upon any point of law or procedure which arised upon the trial which he attends, the court should be guided by his opinion, and not disregard it, except for very weighty reasons. The court are responsible for the legality of their decisions, but they must consider the grave consequences which may result from their disregard of the advice of the judge-advocate on any legal point. The court, in following the opinion of the judge-advocate on a legal point, may record that they have decided in consequence of that opinion."(2)

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

It is not possible, therefore, in most cases, to divine the view of the Court regarding the precise human rights protected or vindicated by trials of war criminals. This would probably remain the case even if the reasons of the courts were always recorded, since these courts, following the traditions of civilised justice and observing the maxim nulla poena sine lege, naturally try alleged criminals for breach of specific legal provisions rather than for offences against more general principles.(3)

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

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- (1) The Royal Warrant under which trials of war criminals by British Military Courts are held provides, in Regulation 3, that, except in so far as therein otherwise provided, the Rules of Procedure applicable in a Field General Court Martial of the British Army shall be applied so far as applicable to the Military Courts for the trial of war criminals. These rules are contained in the British Army Act and the Rules of Procedure made under the Act by an Order in Council, the latter being a piece of delegated legislation enacted by the Executive in 1926 (S.R. & O. 989/1926).
- (2) Italics inserted.
- (3) An example of the worst possibilities involved in taking the latter course is provided by the trials by the Nazi People's Courts of alleged offences against so-called "sound public opinion" (Volksgesundheit).

Advocate said:

"The laws and usages of war have developed out of the following principles. The first is that the belligerent is justified in applying any amount and any kind of force necessary for the purposes of war, and of course that must always be so. By that I mean force necessary for the complete submission of the enemy at the earliest possible moment with the least possible expenditure of men and money. The second principle is the maintenance of humanity; that covers the exclusion of all kinds and degrees of violence not necessary for the purposes of war, and which therefore are not permitted under these customs and usages of war to the belligerent. Thirdly, there is the aim that chivalry shall still remain, chivalry which demands a certain amount of fairness in offence and in defence, and a mutual respect between the opposing forces. That, Gentlemen, is what the observance of the laws and usages of war seeks to attain, a high standard.

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

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

The literature dealing with questions concerning human rights is vast and cannot be said to provide any agreed catalogue of rights which can be accepted for the purpose of showing whether and how far they have been protected or vindicated in war crime trials. Lawyers, philosophers, sociologists and psychologists are not agreed among themselves as to what rights there are and in what sense they may be said to exist. These topics have been the subject of lively discussion ever since the rise among the Ancient Greeks of the Stoic school of philosophy, which held that legislators should attempt to promote the freedom and equality of all men, to avoid discriminations on account of race or sex and to discourage any oppression of men by other men.⁽¹⁾

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

"The right to personal freedom is a liberty to so much personal freedom as is not taken away by law. It asserts the principle of legality, that everything is legal that is not illegal. It includes, therefore, the "rights" of free speech, of association, and of assembly. For they assert only that a man may not be deprived of his personal freedom for doing certain kinds of acts - expressing opinion, associating, and meeting together - unless in so doing he offends against the law. The "right of personal freedom" asserts that a man may not be deprived of his freedom for doing any act unless in so doing he offends against the law. The last is the genus of which the others are species."⁽²⁾

A possible procedure open to the investigator would be to list the human rights commonly protected by the municipal laws of civilized states, and to find how far these same rights have been protected by the trials of

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

(2) Op cit, pp. 243 - 4.

war criminals. This approach would be made the easier by the fact that in many countries, as has already been seen, the fundamental rights of the individual have been set out in a basic written Constitution. In an article on The Rights of Man and International Law,⁽¹⁾ by Dr. Edward Benes, the following paragraph appears which seems relevant in this connection:

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

Yet in so far as the method suggested would involve the examination of formal constitutional texts, and the extraction therefrom of certain fundamental rights, it would not be without its difficulties. There are for instance numerous provisions of international law which aim at securing the right to a fair trial of persons under the temporary jurisdiction of a belligerent. Article 30 of the Hague Convention provides that: "A spy taken in the act shall not be punished without previous trial"; and the right to fair trial may be thought to be protected on behalf of the inhabitants of occupied territory by Article 43: "The authority of the power of the State having passed de facto into the hands of the occupant, the latter shall do all in his power to restore, and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country." Again, Chapter 3 (Penal Sanctions) of the Geneva Prisoners of War Convention of 1929 makes detailed provision for ensuring that prisoners of war charged with offences against the "laws, regulations, and orders in force in the armed forces of the detaining Power" shall be treated in a judicious manner (see later). Furthermore, a considerable section of this paper⁽²⁾ is to be devoted to the right of an alleged war criminal to a fair trial. Yet it is arguable that access to a fair trial is not a right, but a means of safeguarding other rights. Thus the United States Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law" (Fifth Amendment), "...nor shall any State deprive any person of life, liberty, or property, without due process of law;" (Fourteenth Amendment). The phrase "due process of law" includes within its scope the idea of fair trial, but it is debatable, on the face of the text, whether "due process of law" is regarded as constituting a right in itself or whether it is regarded as a means of protecting "life, liberty, or property."

The United Kingdom Draft of an International Bill of Human Rights,⁽³⁾ prepared for the consideration of the Drafting Committee of the Commission on Human Rights of the United Nations, though not a legal text, provides an interesting parallel. The preamble to the suggested Bill includes the words: "Whereas the just claims of the State, which all men are under a duty to accept, must not prejudice the respect of man's right to freedom and equality before the law"⁽⁴⁾ and the safeguard of human rights, which are primary and abiding conditions of all just government." Article 12 of the proposed Bill provides that: "No person shall be held guilty of any offence on account of acts or omissions which did not constitute such an offence at the time when they were committed." Yet the clearest and most direct

(1) Czechoslovak Yearbook of International Law, London, 1942, p.3.

(2) Section D (The Rights of the Accused at the Time of the Trial).

(3) London, H.M. Stationery Office, 1947.

(4) Italics inserted.

reference to the right of fair trial appears as part of a draft resolution which, according to the proposal of the United Kingdom, might be passed by the General Assembly when adopting an International Bill of Rights. This text suggests that fair trial is classified as a means of safeguarding rights rather than as a right itself: "The General Assembly expresses the opinion that human rights and fundamental freedoms can only be completely assured by the application of the rule of law and by the maintenance in every land of a judiciary, fully independent and safeguarded against all pressure, and that the provisions of an International Bill of Rights cannot be fulfilled unless the sanctity of the home and the privacy of correspondence are generally respected and unless at all trials the rights of the defence are scrupulously respected, including the principle that trials shall be held in public and that every man is presumed innocent until he is proved guilty."

Whether a "right" is recognised as such or is regarded as a means of safeguarding other rights is of no significance as long as it is maintained in practice, but it must be clear from the foregoing pages that anyone making an investigation of war crime trials from the point of view of the protection or vindication of human rights, while deriving valuable guidance from provisions of municipal law, must be left to some extent free to segregate and define for himself the relevant rights in the manner which he finds most convenient for the purpose of arranging and analysing the material with which he is confronted.

- III. While it is true that the vast majority of war crimes with which the courts have been called upon to deal have constituted violations of human rights, this has not invariably been so. Thus, in the Scuttled U-Boats Case⁽¹⁾ held before a British Military Court at Hamburg, on February 12th and 13th, 1946, a former German naval officer was condemned as a war criminal and sentenced to imprisonment for a term of years for sinking two German submarines in violation of the terms of the Instrument of Surrender of May 4th, 1945. It could hardly be claimed that his acts infringed the rights of any individual person. Similarly, Kapitänleutnant Ehrenrich Stever of the German navy was held guilty of having committed a war crime by a British Military Court at Hamburg, on July 18th, 1946, because he scuttled the U-Boat, of which he was commander, after the German Command had surrendered all naval ships to the Allied Forces.

A different type of war crime which certainly does not violate the human rights of the living is that for which two Japanese, Jutaro Kikuchi and Masaaki Mabuchi, were sentenced respectively to imprisonment for twenty-five years and death by hanging, by a United States Military Commission at Yokohama on April 5th, 1946. They were held guilty of wilfully and unlawfully committing "wanton and inhuman atrocities against the dead body of a civilian American Prisoner of War in violation of the Laws and Customs of War". The sentences were confirmed by superior military authority. An Australian Military Court sitting at Wewak on November 30th, 1945, found Takehiko Tazaki guilty of mutilating the dead and of cannibalism and sentenced him to be hanged; the evidence showed that he had cut the body of a dead Australian soldier and eaten the flesh. The sentence, however, was mitigated to one of five years' imprisonment with hard labour by superior military authority.

(1) See War Crime Trial Law Reports, published for the United Nations War Crimes Commission by H.M. Stationery Office, Volume I, pp. 55 - 70.

2nd July, 1947.

UNITED NATIONS WAR CRIMES COMMISSION

CORRIGENDUM TO DOC. III/96

Replace footnote 3 on p. 7 by the following:

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

III/97

2nd July, 1947.

UNITED NATIONS WAR CRIMES COMMISSION

Committee III

Exploitation of the Black Market as a War Crime

(The French Case No. 4695)

Proposals concerning the partial re-drafting of Doc. C. 260

By Egon Schwelb, Legal Officer

I.

In its meeting held on 18th June, 1947, (M. 129) the Commission considered the Report submitted by Committee III (Doc. C. 260). In his observations on the Report, Lord Wright said, inter alia, that "although he agreed with its substantial and relevant conclusions, he could not help feeling that questions of precise construction might well be left out. His feeling was, that it was very undesirable, for instance, to pin down the word "pillage" in the Hague Convention, and in doing so to disregard the wider and more modern and practical view of the particular offence which would be found in the Charter, in Law No. 10 and in the Nuremberg Judgement. He was in sympathy with the statement which was set out in the French case, which treated the offence as a composite offence with two facets, one of which was the illegal or undue requisition or confiscation, and the other the use of the proceeds of confiscation for the purpose of getting the goods in the black market. It was all only machinery for the purpose of stripping the country of its wealth and paying for it in the money which had been unlawfully requisitioned. He knew it was said that on the black market the man who was concerned was quite free to sell and get full value but he did not think that really met the view of international law; it might do very well in an ordinary court where matters were regulated by ordinary rules of contract, but the French case concluded that the Veltjens organisation enabled the German war economy completely to drain the internal markets of the occupied countries without prejudicing the German finances. In his view, that conclusion showed, if it was made out, an offence under the Charter and he thought also an offence within the meaning of the Nuremberg Judgment and within Law No. 10. He thought it was unnecessary that the Commission should commit itself to a precise or definite definition of the word "pillage", which was used without definition in the Hague Convention. It was a very wide term and he was against any narrow or precise definition of the word in the Hague Convention. He agreed that the French case set out a composite charge of a war crime. How far the case showed a prima facie charge against any individual was for Committee I to decide on the facts stated." The Chairman further said that the Commission could only deal with International Law and he thought an international offence was quite

properly stated in the French case. He could say that he agreed with the general conclusion of the report but he was not ready to accept all its language or definitions. Very few alterations would meet all his difficulties.

After a debate in which M. Maillard, Sir Robert Craigie and M. de Baer took part, ^{the} conclusions of the Report Doc. C. 260 were agreed to by the Commission, but the Report was referred back to Committee III with a view that it should be re-drafted on the lines indicated by Lord Wright.

II.

The Secretary to Committee III herewith submits as a basis for discussion in Committee III tentative proposals suggesting some alterations in the text of Doc. C. 260.

Proposed new text of Paragraph VII

From what was stated in paragraphs IV, V and VI of this Report it appears that in recent years the notions of "pillage" and "plunder of public and private property" have been extended beyond the scope the term "pillage" was probably considered to cover at the time of the making of the Hague Regulations. In modern international law, particularly as applied in the judgment of the International Military Tribunal, "pillage" or "plunder" probably comprise facts which do not come under the notion of pillage in French municipal law, to which the French charge itself refers. The relevant French municipal provisions read as follows:

Article 440 of the French Criminal Code: "Every act of pillage or destruction of commodities, effects or any movable property, committed by a group or band and by open violence, shall be punished by penal servitude for a term of years; each of the persons responsible shall also be fined between 2,400 and 60,000 francs." Article 441: "Nevertheless, those who are shown to have been caused by provocation or solicitation to take part in these acts of violence may only be punished by imprisonment." Article 442: "If the commodities pillaged or destroyed are grains, grain refuse or flour, mealy substances, bread, wine or other liquor, the penalty inflicted on the leaders, instigators or inciters shall be the maximum period of penal servitude and the maximum fine laid down in Article 440."

The Decree of 1st September 1939, which is also referred to by the French National Office, respecting the prevention of pillage in time of war provides in Article 1: "In time of war, the criminal acts of pillage set out in Articles 440, 441 and 442 of the Penal Code shall be punished by death. The same penalty shall be awarded for all acts of theft committed in a dwelling house or in a building evacuated by its occupants as a result of operations of war."

From the quoted texts of the French Criminal Code, it appears that in French municipal law the application of violence is necessary to constitute the crime of pillage. From the decree of 1st September, 1939, imposing the death penalty for pillage in time of war, it appears that the legislator, when dealing with pillage, conceived it as a violent crime deserving of the supreme penalty.

In view of the fact that in the course of the activities complained of the goods were not taken against the will of the legitimate owners and adequate compensation (even high prices) was given for purchased goods. Committee III does not express an opinion on the questions whether the

purchasing of goods on the black market constitutes pillage either in the traditional sense of this word or as extended by the leading writer on the subject or whether these black market operations come under the wider notion of plunder as applied at Nuremberg.

Proposed new text of Paragraph VIII

Committee III prefers to base its conclusions concerning the criminality of the activities with which the accused individuals are charged on other provisions of international law than those dealing with pillage and plunder. In the Committee's opinion the "plunder" aspect of the black market purchases consists primarily in the way in which the money for the operations complained of was raised.

The illegal and criminal character of the scheme consists, in the Committee's opinion, primarily in the fact that nine-tenths of the money for these operations were taken from occupation expenses paid by France. This is evidence of the fact that the contributions which were extorted from the French economy by the German occupying authorities were far in excess of the needs of the army of occupation or of the administration of occupied French territory. If it had been otherwise, no money would have been available for financing the enemy's black market purchases destined for Germany. The exaction of the exorbitant contributions constitutes therefore, a violation of Article 49 of the Hague Regulations, which provides that if the occupant levies money contributions in the occupied territory, "this shall only be for the needs of the army or the administration of the territory in question". This has already been established in the Nuremberg Judgment.

Item 15 of the 1919 list (Doc. C. 1) reads: "Exaction of illegitimate or of exorbitant contributions and requisitions".

Committee III is therefore of the opinion that those persons who were responsible for the policy of exacting exorbitant contributions by the German authorities from the French authorities, or^(*) knowingly used the money thus extorted for the purchases in connection with the black market operations outlined in the French charge, are guilty of having committed a war crime and can be listed for this war crime where a prima facie case of their implication is established.

(*) The extension of the scope of this statement, as compared with the text suggested in Doc. III/87, viz. the replacement of the word "and" by the word "or" was decided by Committee III in its meeting held on 4th June, 1947. (Committee III Minutes No. 8/47).

III/98

3rd July, 1947.

UNITED NATIONS WAR CRIMES COMMISSION

HUMAN RIGHTS REPORT: PREPARATORY PAPERS

(Papers appearing under the above heading are to be circulated from time to time by the Secretariat of Committee III and will include both working papers exploring the scope of the task discussed in Doc. C. 259 and proposed draft sections of the report on human rights to be compiled for the United Nations Secretariat).

Note on the Definition of Human Rights

for the purpose of drafting the

United Nations Report

Notes by Dr. Mayr-Harting

Introduction

I. Human Rights in the relations between a State and its subjects

- (a) Human Rights in the United Kingdom draft of an International Bill of Rights.
- (b) Human Rights in the Panama Draft.

II. Human Rights protected by the Laws and Customs of War

- (a) Human Rights of the inhabitants of occupied territory.
- (b) Human Rights of members of the armed forces and civilians other than inhabitants of occupied territory.

III. Conclusions

The collection and publication of information concerning human rights arising from trials of war criminals, etc., as has been mentioned in section VIII of Document C. 259, is intended to assist the Commission on Human Rights in the preparation of their proposals, recommendations and reports regarding an International Bill of Rights, international declarations or conventions on civil liberties, the protection of minorities, the prevention of discrimination on grounds of race, sex, language or religion and similar matters.

A definition of the human rights which are placed or ought to be placed under the protection of International Law can only be the outcome of the work to which the United Nations War Crimes Commission has been asked to

contribute. On the other hand, a selection of the material to be found in the war crimes trials and its treatment along the lines indicated in section IX of Document C. 259 is hardly possible without some preliminary survey of the human rights which should be taken into account.

An examination of the White Paper on the United Kingdom draft of an International Bill of Human Rights (published in June, 1947) may contribute to such a working list of human rights.

- I. The United Kingdom draft (draft of resolution of General Assembly when adopting the International Bill of Rights, Appendix II, and draft of International Bill of Human Rights, Annex I) deals exclusively with those rights which have to be ensured by every State to persons under their jurisdiction.

(a) The Preamble to the draft International Bill of Human Rights speaks first of the "faith" (of the United Nations) "in fundamental human rights and in the dignity and worth of the human person"; secondly, of the purpose of the United Nations to promote and encourage "respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion"; thirdly, of the duty of all men "to respect the rights of their fellow-men equally with their own"; fourthly, of the claims of the State which "must not prejudice the respect of man's right to freedom and equality before the law and the safeguard of human rights"; fifthly, of the necessity for the enjoyment of human rights and fundamental freedoms by all persons to be secured by international law and protected by the organised community of States.

The rights mentioned in the Preamble are defined more exactly in Parts I and II of the Bill (cf. section 6 of the Preamble). The Preamble contributes to some extent to their interpretation.

(b) Article 2 of the Bill places the States parties to the Bill under an obligation to ensure by their respective municipal laws the enjoyment of the human rights and fundamental freedoms defined in Articles 8 to 16 (Article 2 a), and to provide the machinery indispensable for their protection (Article 2 b to d).

This obligation is reduced in time of war or other national emergency only "to the extent strictly limited by the exigencies of the situation" (Article 4). Non-fulfilment of this obligation is "an injury to the community of States and a matter of concern to the United Nations as the community of States organised under the rule of law" (Article 5); it may put into effect the procedure provided for in Article 6 and lead in cases of persistent violations of the provisions of the Bill of Rights to expulsion from the Organisation of the United Nations (Article 7).

(c) The human rights and fundamental freedoms covered by Article 2 are:

1. The integrity of life (Article 8).
2. Right of personal liberty (Articles 9 to 11).
(Prohibition of slavery - Article 9; freedom from arbitrary detention - Article 10; and the right of residence as far as it includes the right to emigrate - Article 11).
3. The corollary of the principle that no person shall be deprived arbitrarily of his life or liberty - the rule nullum crimen sine lege (Article 12).

4. The freedom of religious belief, religious worship and observance, religious teaching and of access to such teaching (Article 13).
5. Freedom of information and freedom of opinion (Article 14).
6. Freedom of assembly (Article 15).
7. Freedom of association (Article 16).

(d) The United Kingdom draft "is put forward as a basis of discussion and not as representing the final views of His Majesty's Government in the United Kingdom either as regards the provisions outlined in the draft or as regards any matters which are not contained in the draft" (cf. Chapter 6 of the White Paper).

It follows that the list of human rights contained in Articles 8 to 16 of the draft Bill does not purport to be complete. In order to avoid prejudicing the reports of the sub-committee on discrimination and minorities, the United Kingdom draft dispensed for the time being with dealing exhaustively with specific minority rights. It has, however, been expressly stated that the Bill is to be completed by the insertion of provisions prohibiting distinctions based on race, sex, language and religion (cf. comment on Part II of the International Bill of Human Rights).

(e) A number of rights usually counted among the human rights have not been dealt with in the draft Bill but in the draft Assembly resolution.

Article III of this resolution mentions the right of all persons to work, to education, to social security and similar social and economic rights. They have not been incorporated into the Bill as, in the opinion of the authors of the draft "they cannot by their nature be defined in the form of legal obligations for States in an instrument such as the International Bill of Rights." The draft resolution moreover declares that "it is through international co-operation..... that the United Nations can most effectively assist.... in solving international problems of an economic and social character and achieve social progress and better standards of life in larger freedom" (Article III of the draft resolution).

Article IV of the draft resolution speaks first of the application of the rule of law; secondly of the independence of the judiciary (with which Article 2.(c) of the draft Bill is concerned as well); thirdly, of the sanctity of the home; fourthly, of the privacy of correspondence; fifthly, of the rights of the defence which in all trials are to be scrupulously respected, including the principle that trials shall be held in public and that every man is presumed innocent until he is proved guilty.

Contrary to the usual terminology, all these rights are not called human rights, but pre-requisites for the safeguarding of human rights ("human rights and fundamental freedoms can only be completely assured..." and their fulfilment respectively ("the provisions of an International Bill of Rights cannot be fulfilled...").

As they were not incorporated in the Bill of Rights they are not covered by Article 2; their violation is not in itself to be considered as "injury to the community of States" within the meaning of Article 5 of the Bill, which may result in the procedure provided for in Articles 6 and 7 (cf. above I (b)).

(f) The draft declaration concerning fundamental human rights

submitted by the Delegation of Panama⁽¹⁾ to the San Francisco Conference forms with the United Kingdom Draft part of the documentation for the work of the drafting committee which was charged by the Economic and Social Council at its fourth session (March, 1947) to prepare a preliminary draft of the International Bill of Rights.⁽²⁾ The Panama draft is a mere declaration of rights limiting itself "to an expression of the freedoms to which every human being is entitled." It does not contain provisions for the protection of these freedoms (similar to those of Articles 6 and 7 of the United Kingdom draft Bill, for instance (cf. above I (b))), and no distinction can therefore be drawn like that between the rights dealt with in Articles III and IV of the United Kingdom draft resolution, on the one hand, and those incorporated in the draft Bill, on the other (cf. above I (e), last paragraph). Neither does the Panama draft provide for the restriction of human rights in time of war nor other national emergency (cf. above I (b)).

The Panama draft covers essentially the same rights as the United Kingdom draft; added to this are (1) the right to own property (Article 10); (2) the provisions concerning fair trial (Article 7) deal accordingly with civil liabilities as well as criminal (cf. Article IV of the United Kingdom draft resolution - see above I (e)); (3) the Panama draft incorporates both the rule nulha crimen sine lege (cf. above I (c) - 3) and the rule nulha poena sine lege (Article (9)); (4) economic and social rights (cf. section III of the United Kingdom draft resolution (above I (e)) are enumerated as right to education (Article 11), right to work (Article 12), right to reasonable conditions of work (Article 13) right to adequate food and housing (Article 14), and the right to social security (Article 15)); (5) the Panama draft finally deals with minority rights (in the United Kingdom draft their formulation has been reserved (cf. above I (d), last paragraph). To those belong in a sense the right to take part in the Government of one's State (Article 16) and the limitations on exercise of rights (Article 18). Specific minority rights are covered by Article 17 of the Panama draft: the right to protection against arbitrary discrimination in the provisions and application of the law because of race, religion, sex or any other reason.

It may be noted that the Panama draft does not include any provisions concerning the right of residence (cf. above I (c) - 2).

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- (1) The Panama draft is identical with the "Statement of essential Human Rights" drafted by a committee appointed by the American Law Institute. A footnote to the text of this statement published in "The Annals of the American Academy of Political and Social Science", January 1946 (pp. 18 et seq); says that the members of the Drafting Committee are: William Draper LEWIS, Chairman; Ricardo J. ALFARO, George M. BARAKAT, Percy E. CORBETT, Julio A. del VAYO, Noel T. DOWLING, Kenneth DURANT, John R. ELLINGSTON, HU SHIH, Manley O. HUDSON, C. Wilfred JENKS, Charles E. KENWORTHY, Henri LAUGIER, Karl LOWENSTEIN, K. C. MAHINDRA, Roland S. MORRIS, John E. MULDER, Ernst RABEL, Ludwik RAJCHMAN, David RIESMAN, Jr., Warren A. SEAVEY, Angelo P. SERENI, Paul WEILL, Quincy WRIGHT, and George M. WUNDERLICH. Judge HUDSON is doubtful about the phrasing in some places, and Professor SEAVEY is not in agreement with the essential character of the rights stated in Articles 11 to 15, relating to social rights.
 - (2) The draft of the Delegation of Cuba submitted with the Panama draft to the San Francisco Conference, which is also at present before the Drafting Committee mentioned above, is not at the disposal of the Secretariat.

II. The rights discussed above are those of every man towards the State under whose jurisdiction he falls.

(a) The rights of the inhabitants of a territory occupied in the cause of war are outside the scope of the United Kingdom draft.

There can be little doubt that the limited jurisdiction of an occupying Power does not permit an interference with individual rights to which not even the legitimate sovereign is entitled. Thus, the Hague Regulations (Article 46) state expressly that the occupying Power has to respect "family honour and rights, individual life and private property, as well as religious convictions and worship", and is not permitted to confiscate private property. Moreover, the occupant shall do all in his power to restore and ensure as far as possible public order and safety (Hague Regulations, Article 43) - (cf. Article 2 (d) of the United Kingdom draft Bill above I (b), and Article 6 of the Panama draft concerning "Freedom from Wrongful Interference").

In this connection, the provisions of the Articles 23 (h) and 43 of the Hague Regulations may further be mentioned, which protect to a certain extent the independence of the judiciary towards the occupying Power (cf. Article III of the United Kingdom draft resolution above I (e) - 2).

It is, however, necessary to contrast the obligation of an occupying Power to respect the human rights and fundamental freedoms of the inhabitants of occupied territory with the occupant's right to do everything necessary in the interest of warfare and the safety of his army.

The inhabitants of occupied territory continue to owe allegiance to the State whose authority has de facto passed into the hands of the occupant (cf. Article 45 of the Hague Regulations). Occupied territory may often be within the zone of war. For this and similar reasons the restrictions of individual rights to which an occupying Power appears to be entitled may go further than those which a sovereign Power is justified in imposing (cf. Article 4 of the United Kingdom draft Bill above I (b)).

(b) The human rights of subjects of belligerents other than the inhabitants of occupied territory fall into a category of their own: the human rights of the members of the armed forces and civilians, which have to be respected by the enemy Power. They are the rights of persons towards a State which has no jurisdiction over them.

The conception of war as a contention of States through their armed forces includes the protection of the life and liberty of such private subjects of belligerents as do not directly or indirectly belong to their armed forces. Developments of the last decades - the mechanisation of modern warfare and connected with it, the growth of the numbers of non-combatant men and women engaged in the manufacture of munitions and implements of war, and, generally, in the rendering of services connected with military, naval and air operations, the increased importance of economic measures as a means of warfare and especially the advent of the so-called totalitarian régime under which the life and property of the individual are entirely dominated by the State both in time of peace and in war and utilised in a rigidly regimented fashion for the purpose of war economy - have blurred the distinction between combatants and non-combatants in many respects. The fundamental rule that non-combatants must not be made the object of direct attack by the armed forces of the enemy, has, however, been left intact (cf. Oppenheim, Volume II, Sixth Edition, paragraphs 57 and 57 a).

Considerations of a humanitarian nature have further brought about the general acceptance of the principle which says that only those kinds and degrees of violence should be permitted to a belligerent as are necessary

for the overpowering of the opponent. Thus, it is said in the Preamble to the Declaration of St. Petersburg of the year 1868 "... that the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy - that for this purpose it is sufficient to disable the greatest possible number of men - that this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men or render their death inevitable - that the employment of such arms would therefore be contrary to the laws of humanity."

These and similar considerations underlie the laws of war which aim, to use the words of the St. Petersburg Declaration, "at fixing the limits at which the interests of war ought to yield to the requirements of humanity".

To enumerate a few examples only of the rules of land warfare, protecting the rights of the individual, the following may be mentioned:

(a) The rule that combatants may only be killed or wounded if they are able and willing to fight or to resist capture (Article 23(c) of the Hague Regulations).

(b) Belligerents are prohibited from declaring that no quarter will be given (Article 23(d) of the Hague Regulations).

(c) The provisions of the Declaration of St. Petersburg of 1868 and the Declaration of the first Hague Conference of 1899, which exclude the use of certain types of ammunition and - belonging into this context - the general rule of Article 23 (e) of the Hague Regulations prohibiting the employment of arms and projectiles or material calculated to cause unnecessary suffering.

(d) Various provisions prohibiting the use of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare.

(e) The rules of the Geneva Conventions of 1906 and 1929, respectively, concerning the treatment of sick or wounded persons.

(f) The provisions of the Hague Conventions of 1899 and 1907 and of the Geneva Convention of 1929 concerning the treatment of prisoners of war.

To these similar rules applying to sea and air warfare could be added.

III. (a) The rights to be included in the proposed Bill of Rights were discussed in the meetings of the so-called Nuclear Commission on 6th, 8th and 10th May, 1946, by the Human Rights Commission at its first session in January and February 1947, and by the Economic and Social Council at its fourth session in February and March, 1947.

Professor Cassin's reference in one of these meetings to the International Courts of Nuremberg and Tokyo, "trying men for crimes against humanity and not merely for breaking existing treaties and international conventions" (cf. Doc. III/94, section I, paragraph 2) seems rather to suggest a certain machinery for the protection of human rights. At one of the meetings of the Economic and Social Council, the French representative, Pierre Mendes, pointed out that no convention existed for the protection of the civilian population in war time. He proposed that this omission might be studied by the Committee entrusted with the task of formulating a preliminary draft International Bill of Rights. This proposal obviously assumes that the Bill of Rights will not merely deal with the rights of subjects with which the State must not interfere. (cf. above, I).

As far as the United Kingdom draft allows any conclusion to be drawn as to the final Bill of Rights, it seems that the human rights of members of the

armed forces and civilian subjects of one belligerent, which have to be respected by the other, will not be covered by this Bill.

(b) The United Kingdom draft leaves it in the first instance to the contracting parties to protect the human rights of persons within their jurisdiction (Article 2 of the Draft International Bill of Human Rights); and fulfilment of this international obligation is supervised by the United Nations (Articles 3 and 4 of the Draft Bill), which may apply the sanctions of Articles 6 and 7 of the Draft Bill.

The Resolution on Genocide which deals with the most excessive violations of human rights, particularly with those of minorities rights, goes one step further. The Member States are invited to enact the legislation necessary for the prevention of the violations of human rights relevant in this connection. A State complies with this resolution, however, only if violations of human rights falling under the heading of Genocide, are punishable under its criminal law.

Machinery such as that proposed by the United Kingdom Draft and the resolution on Genocide ought to be an advance in the protection of the individual against the misuse of power by his own national authorities. If intended as a protection against the excesses of a belligerent - compared with the Agreement and the Charter of the Nuremberg Tribunal - it would appear a retrograde step. (cf. Doc. III/85, page 7).

(c) The collection of information on the Nuremberg, Tokyo and other trials of war criminals and quislings, was suggested in the discussions of the Nuclear Commission on the International Bill of Rights. The Resolution of the Economic and Social Council (quoted in Doc. III/92, section I), which forms the basis of the work requested from the United Nations War Crimes Commission considers this collection not merely as documentation for the task to be performed by the Commission on Human Rights in connection with the International Bill of Rights, but as documentation for the entire work of the Commission. It is obvious, therefore, that the collection has to take into account both groups of human rights, those mentioned under I and those dealt with under II of this paper. In both groups of rights, the same values are involved. They are, however, asserted in different directions. It will hardly be relevant for the work of the United Nations War Crimes Commission whether all these rights are treated in an International Bill of Rights or a part of them (those mentioned under II) in conventions supplementing the laws of war.

III/99

3rd July, 1947.

UNITED NATIONS WAR CRIMES COMMISSION

HUMAN RIGHTS REPORT: PREPARATORY PAPERS

COLLECTION AND PUBLICATION
OF INFORMATION CONCERNING HUMAN RIGHTS
ARISING FROM TRIALS OF WAR CRIMINALS ETC.

Notes by Dr. R. Zivković

This paper is intended to discuss only certain points in regard to the Report to be prepared on the Violation of Human Rights. Some of them have already been treated by other members of the Legal Staff or else discussed at their meetings. Some seem to be self-evident and to be a matter of common agreement between all those concerned. However, they are exposed here in a particular context which might contribute to enhance their importance.

THE METHOD

1. The Report to be submitted to the Human Rights Commission of the United Nations is to show the extent to which Human Rights violated during the last war were protected in contemporary international and municipal law. This is to include information on the existing lacunae, which is of particular interest to the Human Rights Commission in view of its task to draw up a Bill of Human Rights for the future, and will be of interest as well to the Division of the Development and Codification of International Law and to the Committee on the Progressive Development of International Law and its Codification, in view of their general task to advise on steps required to secure a progressive development of international law.

The Commission's Report is therefore to be an account of both aspects of the problem: which Human Rights are clearly protected in the existing legal systems and which are not.

2. To do this the primary requirement is to delimitate Human Rights which enjoyed protection through judicial action from those which did not.

This analysis will thus result in a dual "catalogue" of Human Rights.

Strictly speaking, the only correct method in achieving such a result would be to perform research through inductive study. However, in view of the size of the relevant material and of the comparatively limited time at the Commission's disposal to submit its Report, it is clear that had the

inductive method to be applied exclusively it would require years and not months or weeks of research.

Therefore, inductive method is bound to be combined with deductive method, so that both will have to be applied concurrently and alternatively.

3. In this connection the starting point for the research work to be done is to draw up a list of Human Rights known to enjoy recognition and protection in the legal systems of the world and in International Law in particular.

A valuable help in doing so will be found, inter alia, in the articles published in the Annals of the American Academy of Political and Social Science, January 1946, and in Professor H. Lauterpacht's study An International Bill of the Rights of Man, New York, 1945.

On the other hand, guides at present available as to the intentions of and scope envisaged by the Governments in the drafting of an International Bill of Rights is provided by the United Kingdom Draft of an International Bill of Human Rights (H.M. Stationery Office, June 1947) submitted to the Drafting Committee of the Commission on Human Rights; and by the Draft Outline of a Bill of Rights, a 408 page document prepared by the Secretariat of the United Nations for the Drafting Committee on the International Bill of Rights and in process of discussion by the Committee since June 9th, 1947. (For general information and Text of the Draft Outline, see United Nations Weekly Bulletin, Vol. 2, No. 23, June 17th, 1947).

A classification of Human Rights for the purpose of the Report is submitted below, paragraph 7.

4. The next step is to establish in the light of the jurisprudence so far developed in connection with the trials of war criminals, traitors and quislings, which Rights contained in the above list were involved, and what action was, or failed to be, undertaken in dealing with them.

The research work in this particular respect will be greatly facilitated by the initial criteria acquired with the drawing up of the list suggested in paragraph 3.

THE SUBSTANCE

5. The question of the violations and protection of Human Rights in time of war being the very substance of the Commission's Report, it appears that for a large number of Human Rights it will be shown that they enjoyed only a restricted protection as compared with Human Rights in time of peace. The proposed provision in Article 4 of the United Kingdom Draft of an International Bill of Human Rights is, in this connection, a recognition of an existing state of affairs, and not only a new rule recommended for the future body of International Law. Here the position, legally speaking, is in every respect similar to the one relating to the Habeas Corpus Suspension Acts in times of emergency, which have always been a matter of difficulty both from the political and legal points of view.

To establish correctly the degree to which each of such Human Rights enjoyed only restricted protection as compared with the same Rights in time of peace, is one of the most delicate and responsible questions in our undertaking, and constant care will have to be exercised in this respect.

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To establish correctly the degree to which each of such Human Rights enjoyed only restricted protection as compared with the same Rights in time of peace, is one of the most delicate and responsible questions in our undertaking, and constant care will have to be exercised in this respect.

Finally, one will have to take into account restrictions recognised in time of peace in special matters or circumstances, such as those mentioned in Article 4 (3), of the United Kingdom Draft. Here the restrictions will appear to be normal and not exceptional, as those in time of war. They will appear as a part of the practice of most civilised and advanced nations, and as illustrative of modern standards where there is no freedom in the absolute sense, however firm and wide be the scope of individual freedoms.

6. With the latest development of International Law in the field of the punishment of war criminals, the most conspicuous feature is the definite recognition of the criminal nature of aggressive war, as expressed in the Charter and in the Judgment of the International Military Tribunal in Nuremberg.

In view of this development it could be argued that any policy aiming at maintaining the hitherto existing provisions concerning violations of customs and laws of war within the general framework of International Law, and consequently any efforts furnished with a view to perfecting the rules regarding the conduct of war once it has started, would be inconsistent with the principle that from now on war itself is a crime, so that all acts committed by the aggressor in time of war are criminal in se. Under this argument to continue providing for the punishment of such violations, it would mean regulating legally a situation which has become utterly illegal and which entails penal retribution for the aggression as such with all its component elements.

Such an argument could be used with particular reference to the indictment presented to the Far Eastern International Military Tribunal. Unlike the indictment submitted to the Nuremberg Tribunal, the Far Eastern indictment contains express counts (exposed in Group Two, Counts 37 to 52) charging the accused individually for the "Murder" of every Allied soldier in the field during the war in the Far East, and of every civilian killed in connection with the military operations of the aggressors (see Count 37 paragraph 3). This charge is expressly and directly based upon the initial criminality of the aggressions undertaken by Japan. Should the Far Eastern International Military Tribunal admit this charge and pronounce sentences upon it, this could provide a good ground for the argument, which could in turn shatter the logical structure of International Law insofar as it retains rules regarding the conduct of war.

Consequently, it could also be argued that a Report on the violations of Human Rights by means of the commission of war crimes and crimes against humanity would be of no real value, and that the work of the departments concerned of the Secretariat of the United Nations would be a waste of time.

However, the contradiction which could be raised by the above argument is only apparent, at least for the time being.

First of all, the Far Eastern Tribunal has not yet pronounced its judgment and it is not at all certain that it will admit the relevant part of the indictment submitted to it.

Secondly, so far-reaching a course did not take place before the Nuremberg Tribunal. There is no trace of such consequences either in the Charter or in the Indictment or in the Judgment.

Thirdly, from the viewpoint of legal logic and methodology, there would be no inconsistency in resuming to regulate the conduct of war in spite of the fact that the criminal nature of aggressive war as such is definitely acquired in International Law. It is common place to recognise that to outlaw war is one thing, and to prevent it from occurring is another. Therefore, once war has broken out there is bound to be a

further, more detailed development of the master rule that it is criminal altogether. The series of acts which form an integral part of warlike activity, taken as a whole, will have still to be treated individually; for instance, in regard to the personal penal liability of its perpetrators as distinct from the individuals guilty of launching the aggression itself, or with respect to the rules to be self-imposed by the parties waging defensive war.

Nevertheless, this very broad aspect of the question is important, and it should be accounted for in the Commission's Report.

7. The Report will deal with Human Rights insofar as they were violated by the commission of war crimes and crimes against humanity.

In this connection it can be said that, in the light of the proceedings of this Commission and of the jurisprudence so far developed, all Crimes against Humanity, particularly as defined in Article 6(c) of the Nuremberg Charter, are violations of Human Rights, but not all violations of these Rights are crimes against humanity. This was rightly hinted at in Doc. C. 259, page 4, paragraph 4, where it is said that "restrictions of freedom of expression, freedom of the press and freedom of information... are in time of war neither prohibited nor punishable."

On the other hand, it is not controversial that all war crimes represent at the same time violations of essential Human Rights, and it will not be contested that all violations of Human Rights are not necessarily war crimes.

Therefore, in the process of classifying Human Rights falling within the scope of the Commission's Report, it will be necessary to make a threefold classification:

- (1) Human Rights violated and effectively protected in the existing legal systems of Municipal and International Law.
- (2) Human Rights violated and not clearly, adequately or in any way protected in the said systems. (Compare with Section IX, paragraph (a), (b) and (c), Doc. C. 259).
- (3) Violations of Human Rights not representing war crimes or crimes against humanity.

Within each of these groups there will be needed a sub-classification under a single standard to be agreed upon and developed by the authors of the Report.

8. Finally, there is the question of terminology.

It is of the utmost importance that a unified technical terminology should be adopted and observed by all concerned throughout the Report.

Confusion or doubts arising out of a diversified terminology, using different terms to describe the same concepts, are known to all theorists not only in the field of law, but also in other fields of human thought (philosophy, sociology, economics, etc.).

In the field of Human Rights there has already appeared an undesirable flux of terms. So, for instance, terms such as "freedom of expression" and "freedom of speech" on the one hand, and "freedom of opinion" and "freedom of information" on the other, are used one for the other in a number of documents (See for instance, Statement of Essential Human Rights, Articles 2 and 3, in Annals of the American Academy of Political and Social Science, p. 19). Such a course should be avoided in the Commission's Report.

III/100.

9th July, 1947.

UNITED NATIONS WAR CRIMES COMMISSION

HUMAN RIGHTS REPORT: PREPARATORY PAPERS

Notes on the draft outline of an International Bill of Human Rights prepared by the Secretariat of the United Nations for the Commission on Human Rights with an account on the activities of the United Nations on the subject of Human Rights.

By Dr. R. Zivković

INTRODUCTION

On June 9th, 1947, the Drafting Committee on the International Bill of Rights, which is an organ of the Commission on Human Rights of the Economic and Social Council of the United Nations, was convened at Lake Success to examine a preliminary draft of a Bill on human rights.

The text of the draft is to be found in the United Nations Weekly Bulletin, Vol. 2, No. 23, 17th June, 1947, p. 642 - 643.

The examination of the draft by the Drafting Committee represents the first stage in the elaborate procedure set forth by the General Assembly and the Economic and Social Council with a view to having a Bill of Rights submitted for adoption to the United Nations at the third regular session of the General Assembly (1948).⁽¹⁾

With regard to the Report to be presented by the United Nations War Crimes Commission to the Commission on Human Rights on the subject of information concerning human rights arising from trials of war criminals, quislings and traitors, and in particular from the Nuremberg and Tokyo trials, and with special reference to the scheme suggested in the Report submitted by Committee III to the Commission regarding the scope and the method to be applied in the drafting of the Report to be lodged with the Commission on Human Rights (Doc. C. 259(1), 18th June, 1947), the draft prepared by the United Nations Secretariat is of particular interest to this Commission.

A short analysis of the draft is therefore submitted to the members for information, preceded by an account of the activities of the United Nations which led to the present stage. This account is in part additional to the information already circulated by the Secretariat (See documents Misc. Nos. 46, 69, 88 and 89;; Docs. III/85, III/88 and III/94), and it is presented in some detail in order to convey a clearer picture of the general framework in which the Commission's Report is to be drawn up and considered by the United Nations.

(1) Originally it was intended to submit a Draft Bill to the second regular session (1947), but this has proved to be impracticable.

ACTIVITIES OF THE UNITED NATIONS
ON THE SUBJECT OF HUMAN RIGHTS

I. Initial Stages

The Nuclear Commission

1. Pursuant to the provisions of the Charter of the United Nations, particularly of Articles 1 (3) and 68,⁽¹⁾ the Economic and Social Council resolved on 16th February, 1946, to establish a Nuclear Commission on Human Rights.

The Nuclear Commission met in New York from 29th April to 20th May, 1946, and was composed of representatives of 9 nations: Belgium, China, France, India, Norway, Peru, United States, Union of Soviet Socialist Republics and Yugoslavia. It discussed the questions of organisation and action to be undertaken for the implementation of the relevant provisions of the Charter, and on 21st May it submitted a report to the Economic and Social Council. (A Summary account on the Meetings of the Nuclear Commission has been circulated as Document III/94).

The Permanent Commission

2. This Report was considered by the Council at its second session, held in New York in June - July, 1946.

On 21st June, 1946, the Council passed a Resolution defining the functions and composition of the permanent Commission on Human Rights and deciding upon other related matters. It decided that the permanent Commission was to be composed of 18 members, each representing one of the Member Nations.

Documentation

3. A further decision was taken in regard to the sources of information required for the carrying out of the tasks of the Commission on Human Rights. The Economic and Social Council resolved:

"The Secretary-General is requested to make arrangements for:

- (a) the compilation and publication of a year-book on law and usage relating to human rights, the first edition of which should include all declarations and bills on human rights now in force in the various countries;
- (b) the collection and publication of information on the activities concerning human rights of all organs of the United Nations;
- (c) the collection and publication of information concerning human rights arising from trials of war criminals, quislings, and traitors, and in particular from the Nuremberg and Tokyo trials;
- (d) the preparation and publication of a survey of the development of human rights;

(1) The other relevant provisions are in Articles 35, 56, 62 and 76 of the Charter.

- (e) the collection and publication of plans and declarations on human rights by specialized agencies and non-governmental national and international organizations."

It is in regard to item (c) of this part of the Resolution that this Commission has undertaken to provide the information required by the Economic and Social Council and to submit the Report referred to above to the Commission on Human Rights. (For information on the relevant correspondence between the United Nations War Crimes Commission and the Secretariat of the United Nations, see document Misc. No. 88).

Information Groups

4. In the same Resolution, and with a view to perfecting the general machinery for dealing with human rights as a subject of permanent concern of the United Nations, the Economic and Social Council recommended the following:

"Members of the United Nations are invited to consider the desirability of establishing information groups or local human rights committees within their respective countries to collaborate with them in furthering the work of the Commission on Human Rights."

This invitation was forwarded to the Member Nations by the Secretary-General on 30th September, 1946.

Principle for transitional period

5. Still in the same Resolution, the Economic and Social Council dealt with the important question of the treatment to be applied to human rights in international treaties concluded between the Member Governments in their mutual relations before an International Bill of Rights was adopted by the United Nations itself.

To fill this gap the Resolution laid down the following ruling:

"Pending the adoption of an international bill of rights, the general principle shall be accepted that international treaties involving basic human rights, including to the fullest extent practicable treaties of peace, shall conform to the fundamental standards relative to such rights set forth in the Charter."

This part of the Resolution was communicated to the Member Governments on 12th July, 1946, by the Acting Secretary-General of the United Nations, who expressed the hope that, when "negotiating the conclusion of treaties involving human rights.... the principle adopted by the Council.... would be borne in mind" by the Governments concerned.

The Resolution was observed and its principle implemented in the Peace Treaties concluded with Italy (Art. 15), Roumania (Art. 3), Bulgaria (Art. 2), Hungary (Art. 2), and Finland (Art. 6). The ex-enemy States undertook the obligation "to secure to all persons under their jurisdiction, without distinction as to race, sex, language or religion, the enjoyment of human rights and of the fundamental freedoms..." An additional provision was inserted in the Treaties with Roumania and Hungary regarding the protection of the rights of the minorities existing in these two countries.

Enforcement

6. Aware of the necessity to make the provisions on human rights effective, the Economic and Social Council charged the Commission on Human Rights with the special task of studying and submitting suggestions on the question of enforcement.

This part of the Resolution was as follows:

"Considering that the purpose of the United Nations with regard to the promotion and observance of human rights, as defined in the Charter of the United Nations, can only be fulfilled if provisions are made for the implementation of human rights and of an international bill of rights, the Council requests the Commission on Human Rights to submit at an early date suggestions regarding the ways and means for the effective implementation of human rights and fundamental freedoms, with a view to assisting the Economic and Social Council in working out arrangements for such implementation with other appropriate organs of the United Nations."

Specialized Machinery

7. Finally, the Economic and Social Council empowered the Commission on Human Rights to establish three sub-commissions on specific human rights and defined their terms of reference.

The three Sub-Commissions are:

- (a) The Sub-Commission on Freedom of Information and of the Press.
- (b) The Sub-Commission on Protection of Minorities.
- (c) The Sub-Commission on the Prevention of Discrimination on the grounds of race, sex, language or religion.

The constitution of these three bodies was envisaged in addition to the previously formed Sub-Commission on the Status of Women, which is an organ of the Economic and Social Council and which has subsequently been given the rank of a Commission.

Of these, the Sub-Commission on the Freedom of Information and of the Press, and the Commission on the Status of Women have had several meetings, and the other two were eventually merged into a single "Sub-Commission on Prevention of Discrimination and Protection of Minorities." Its members were recently nominated by the Economic and Social Council.

II. Development

1. Resolutions of the General Assembly

Human Rights in general

8. During the first part of the first session of the General Assembly, held in London in January - February, 1946, the Delegation of Panama had taken the initiative regarding the formulation of a Bill of Human Rights. It submitted a Draft Declaration on Fundamental Human Rights and Freedoms, which it had previously presented to the San Francisco Conference on the occasion of the signing of the Charter of the United Nations. The Panamanian Draft is identical to a "Statement of Essential Human Rights" prepared by the American Law Institute, and published in The Annals of the American Academy of Political and Social Science, January 1946, p. 18 - 26. This issue of The Annals etc. is entirely dedicated to the question of human rights. In addition to that, it submitted a Draft Declaration on the Rights and Duties of States.

The General Assembly having referred both drafts to the Economic and Social Council the Panamanian Government placed them once more on the agenda of the second part of the first session with a view to effecting immediate action upon them. In connection with this the General Assembly passed unanimously a Resolution on 11th December, 1946, deciding:

(a) Definitely to transfer the Panamanian draft on human rights to the Economic and Social Council for reference to the Commission on Human Rights with a view to the Commission considering it in its preparation of an international bill of rights. In doing so the General Assembly expressed the hope that the question would be referred back to it for inclusion in the agenda of its second regular session (1947).

This action was taken in accord with the recommendation previously made by the Nuclear Commission on Human Rights to the Economic and Social Council that a detailed examination of the Panamanian draft should be undertaken by the full Human Rights Commission.

(b) To transfer the Panamanian Draft Declaration on the Rights and Duties of States to the Committee on the Progressive Development of International Law and its Codification. This Committee decided recently to recommend to the General Assembly to refer the draft for further studies to the International Law Commission (Regarding this Commission see document Misc. No. 98).

Specific Human Rights

9. Apart from setting in motion the machinery for dealing with human rights in general, the General Assembly adopted on the same day (11th December, 1946), a number of other Resolutions concerning more specific aspects of certain types or categories of human rights.

Rights of Women: It recommended "that all Member States, which have not already done so, adopt measures necessary to fulfil the purposes and aims of the Charter by granting to women the same political rights as to men."

This Resolution was introduced by Denmark.

Subsequent to this intense activity in regard to the rights of women has been and is being shown by the Economic and Social Council and its Commission on the Status of Women, and terms of reference have been set forth for the participation of the latter in the working out of the International Bill of Human Rights.

Genocide: As reported in document III/85, p. 5 - 7, the General Assembly dealt also with the Crime of Genocide and undertook action for the prevention and retribution of the violations of human rights involved in the commission of this crime:

- (a) It affirmed "that genocide was a crime under international law... for the commission of which principals and accomplices ... are punishable."
- (b) It invited "the Member States to enact the necessary legislation for the prevention and punishment of this crime."
- (c) It recommended "that international co-operation be organized between States with a view to facilitating the speedy prevention and punishment" of genocide.

- (d) And finally, it requested "the Economic and Social Council to undertake the necessary studies with a view to drawing up a draft convention on the crime of genocide" to be submitted to the second regular session of the General Assembly.

This Resolution was introduced by the Governments of Cuba, India and Panama.

As a consequence of this step, the Economic and Social Council, upon decision taken at its fourth session held in New York in February - March, 1947, requested the Secretary-General to submit a draft convention on the crime of genocide to its next session, due to start on 19th July, 1947.

Freedom of Information

The General Assembly took action on the specific human "rights to freedom of information".

In a Resolution adopted on 14th December, 1946, it declared that "freedom of information was a fundamental human right and was a touchstone of all the freedoms to which the United Nations is consecrated."

It authorized the holding of a Conference of all Members of the United Nations on Freedom of Information and instructed the Economic and Social Council to convene the Conference before the end of 1947.

This Resolution was introduced by the Government of the Philippines.

A draft provisional agenda for the Conference is to be submitted by the Sub-Commission on Freedom of Information and of the Press to the Economic and Social Council in July and to the Commission on Human Rights in August.

Treatment of Indians in South Africa

Finally, the General Assembly had to deal with a concrete case - the first one of this kind - which arose out of a dispute between the Indian community in the Union of South Africa and the South African Government.

Upon an application made by the Indian Government on behalf of the South-African Indians, the General Assembly adopted a Resolution on 8th December, 1946, whereby it ruled that:

"The treatment of Indians in the Union should be in conformity with the internal obligations under the agreements concluded between the two Governments and the relevant provisions of the Charter."

It requested the Indian and South-African Governments to report at the second regular session the measures adopted.

The importance of this Resolution lies in that it set a precedent in regard to the direct jurisdiction of the General Assembly in such matters. In his speech delivered on the first day of the first session of the Human Rights Commission the Assistant Secretary-General for Social Affairs, M. Henri Laugier said, in this connection:

"By a two-thirds majority the General Assembly took jurisdiction in this case; it voted not to refer the question of jurisdiction to the International Court of Justice. The importance of that decision cannot be over-estimated it is a precedent of fundamental significance in the field of international action."

2. Activities of the Commission on Human Rights
and of its Drafting Committee

10. After completion of the Nuclear Commission's task, the full and permanent Commission on Human Rights was convened for its first session at Lake Success between 27th January and 10th February, 1947, (see Note in Doc. III/85, p. 2).

The meetings were attended by 17 representatives of the following countries: Australia, Belgium, Byelorussian S.S.R., Chile, China, Egypt, France, India, Iran, Lebanon, Panama, Philippines, United Kingdom, United States of America, Union of Soviet Socialist Republics, Uruguay and Yugoslavia.

There were present as observers representatives of the International Labour Organization, the United Nations Educational Scientific and Cultural Organization, the American Federation of Labour, the World Federation of Trade Unions and the International Co-operative Alliance.

Mrs. E. Roosevelt (U.S.A) presided as Chairman. The Vice-Chairman was Mr. P. C. Chang (China) and the Rapporteur, Mr. C. Malik (Lebanon).

One of the major items on the agenda was the consideration of the procedure to be followed in the drafting of a Bill of Human Rights. In this respect the Commission discussed the rights to be included in the proposed Bill and the instructions to be given to the Drafting Committee. It decided that the Bill should be prepared as a Resolution to be submitted to the General Assembly.

As a result of these considerations the Commission presented a Report to the Economic and Social Council, and recommended the method of drafting the Bill. The Report was considered by the Economic and Social Council at its fourth session, in March 1947. The Council appointed a "temporary sub-commission" for the preparation of a preliminary Draft, subsequently known as the "Drafting Committee" of the Human Rights Commission.

On the same occasion the Economic and Social Council decided upon the procedure for handling communications submitted to the United Nations concerning violations of human rights.

11. The Drafting Committee of the Human Rights Commission, as reported in the beginning of this document, was convened on 9th June, 1947, and started considering a draft outline prepared by the Secretariat of the United Nations upon its instructions and under its supervision.

At the time of the writing of this document the Committee is still in session and final results of its deliberations will be communicated as soon as the information is available.

III. The United Nations Secretariat's
"Draft Outline of a Bill of Rights"

A. General Information

12. The draft prepared for the Human Rights Commission by the Secretariat of the United Nations was drawn up with a view to enabling the Commission to prepare a "preliminary" draft under its terms of reference. Therefore, as its title indicates, the present draft is only a first "outline" which is to serve as a starting point in the Commission's work.

In regard to the instructions of the Economic and Social Council that the preliminary draft which is now to be written by the Human Rights Commission be prepared on the basis of documentation supplied by the United Nations Secretariat (see above p.12, paragraph 3), the Draft Outline is supported by a working paper filling a 408 page volume which is described as "perhaps the most exhaustive documentation on the subject of human rights ever assembled" (United Nations Weekly Bulletin, Vol. 2, No. 23, 17th June, 1947, p. 639).

Although this volume has not yet been made available to this Commission, a summary account of its contents is provided in the above-quoted Weekly Bulletin.

The documentation assembled includes the observations on what the Bill should contain, made by members of the Human Rights Commission at its first session; five draft declarations and proposals submitted by the Governments of Chile, Cuba, India, Panama and the United States to the Commission; the principal provisions from the constitutions and other laws of a majority of 55 Member Nations; and a draft declaration submitted by the American Federation of Labour.

The Draft Outline was written bearing in mind the necessity that the Bill should be acceptable to all Member Nations and that it should be a reaffirmation of the most elementary rights.

On the other hand, the Secretariat anticipates that the views of Governments will probably differ on some of the provisions of its Outline, and even that some articles, which were included only in order to cover the whole field of human rights, will not be adopted, and that others will probably be combined when agreement is reached on their substance.

Finally, the Draft Outline makes no proposals whatever on the merits or desirability of any of the articles, and does not include rules of procedure such as those existing in the various national constitutions. It has limited itself to general principles.

The Preamble

13. While the Draft Outline does not contain a preamble to the Bill, this being left to the Drafting Committee to decide upon, the United Nations Secretariat makes suggestions on the content of the preamble. It suggests that reference be made to the "four freedoms" (apparently as formulated by the late President Roosevelt), to the provisions of the Charter relating to human rights, and that it should set forth the following principles:

1. There can be no peace unless human rights and freedoms are respected.
2. Man does not have rights only; he owes duties to the society of which he forms a part.
3. Man is a citizen both of his state and of the world.
4. There can be no human freedoms or dignity unless war, and the threat of war, is abolished.

These suggested four principles are noticeably infused into the various provisions of the Draft Outline.

The Division of the Draft Outline

14. The United Nations Secretariat did not attempt to divide its Draft Outline into component parts "because it wished to avoid suggesting any philosophical concept". Therefore, there are no chapters or sections, and no headings preceding groups of articles.

However, from the discussions that took place between Members of the Human Rights Commission, it appears that unanimous agreement was reached as to the following distinction or grouping of human rights:

- (1) Rights relating to personal freedom.
- (2) Rights relating to social security.
- (3) Rights relating to equality.

Accordingly, these were the general categories within which the various articles were grouped, and, apart from two preliminary articles and two final dispositions of a general character, the articles were arranged in the following order (though not named in the Outline):

- (1) "Liberties" (Art. 3 to 34).
- (2) "Social Rights" (Art. 35 to 44).
- (3) "Equality" (Art. 45 and 46).

B. The Content of the "Draft Outline"

Main characteristics

15. One of the main features of the Outline is that in a number of cases it provides for "duties" as a corollary to the "rights" and "freedoms" which represent its main body.

Another feature is that in addition to the rights and duties of the individual it introduces a number of rights and duties of the State, insofar as they have a bearing on the rights and duties of the individual. The rights and duties of States in their mutual relations to each other, i.e. as subjects of international relations and International Law, are left out and, as referred to above page 15, paragraph 8, are to be considered separately by the International Law Commission in connection with the Draft Declaration on Rights and Duties of States submitted by the Government of Panama.

15. The Outline is constructed with a view to making the Bill an exhaustive instrument, providing expressly for and covering all the essential human rights. On the other hand, it stands for the protection of the individual in his dual capacity as member of a nation (State) and as member of the international community (United Nations). And finally, its focus is centered at the protection of human rights within a process of peaceful development of mankind, undisturbed by the occurrence of war.

Consequently, the following characteristics in the Outline can be pointed out:

- (a) It reaffirms certain rights which, though enjoying recognition in the constitutional systems of a great number of nations, often do not form part of written law. Such is, for instance, the case with the right to life (Art. 3), the right to possess a legal personality (Art. 12) and the right to contract marriage (Art. 13).

- (b) Certain rights which have no place in national systems have been included, such as the right to possess a nationality (Art. 32).
- (c) There is no reference to the state of war, and consequently to the fate of human rights in time of war, and no information is as yet at hand as to whether and how this question is to be treated by the United Nations.

The Rights and Duties

16. No attempt is made here to give a full analysis of the provisions dealing with the various human rights included in the Outline, since this would serve no useful purpose for the United Nations War Crimes Commission. The analysis is limited to a brief review of the human rights concerned, set in the same order as they are arranged in the Outline. Headings and terms indicating human rights under particular names are inserted only for the convenience of the reader, and do not represent in any way a systematic classification of the human rights considered.

Two preliminary provisions (Articles 1 and 2)

17. The Outline opens with two Articles of a general nature, one dealing with the questions of "loyalty" or allegiance (Art. 1) and the other with that of the general limitations of human rights (Art. 2).

Dual loyalty or allegiance

Article 1 provides that every individual "owes a duty of loyalty to his State and to the (international society) United Nations." This is an entirely novel rule which infringes the traditional concept of national sovereignty and the principle of undivided allegiance to one State.

The rule is developed by the pronouncement of everybody's duty "to accept his just share of responsibility for the performance of such social duties and his share of such common sacrifices as may contribute to the common good." In the context the "common good" is to be understood as representing concurrently or alternatively the national and the international interest.

Limitations of rights

Article 2 sets out the principle of a threefold limitation of the exercise of human rights. The exercise of everyone's right is limited by:

- (1) The rights of others.
- (2) The just requirements of the State.
- (3) The just requirements of the United Nations.

The first two are an affirmation of the already existing state of affairs, and the last one is the logical development of the principle of dual loyalty.

Rights relating to personal freedom ("Liberties") (Art. 3-34)

18. These are as follows:

- (1) The right to life (Art. 3), which can be denied only to persons lawfully convicted of some crime to which the death penalty is attached.
- (2) The right to physical integrity (Art. 4), whereby no one shall be subjected to torture or to any unusual punishment or indignity.

(3) The right to personal liberty (Art. 5), which is developed in the following specific aspects:

- (a) The right to freedom from arbitrary detention (Art. 6) save as a consequence of a fair trial or pending trial.
- (b) The right to freedom from arbitrary arrest (Art. 7), comprising the rule of Habeas Corpus.
- (c) The right to freedom from slavery and compulsory work (Art. 8). The exceptions are: the performance of a public service equally incumbent upon all (such as the military service); and the servitude imposed as part of a judicial sentence.

This Article contains the general principle that the "right to a livelihood is conditioned by the duty to work".

- (d) The right to liberty of movement and free choice of residence (Art. 9), is limited only by the restrictions concerning the "interest of national welfare or security."
- (e) The right of emigration and expatriation (Art. 10), is protected insofar as it must not "be denied", which in connection with the preceding Article leaves freedom to the States to impose conditions for its exercise.
- (f) The right to freedom from wrongful interference (Art. 11) covers the field of arbitrary searches or seizures; of unreasonable interference with (one's) person, home, family relations, reputation, privacy, activities or personal property; and of the secrecy of correspondence.

(The United Nations Secretariat indicates that the human rights enumerated in this sub-para (3) are related to the "liberty of the individual").

- (4) The right to a legal personality (Art. 12), the exercise of which can be limited only for reasons based on age or mental condition, or as a punishment for a criminal offence.
- (5) The right to contract marriage (Art. 13).
- (6) The right to freedom of conscience and belief (Art. 14), comprising religious worship.
- (7) The right to freedom of opinion (Art. 15), which is defined as the right to "form, hold, receive and impart opinions".
- (8) The right to freedom of information (Art. 16), implying "free and equal access to information, both within and beyond the borders of States."
- (9) The right to freedom of speech and of expression (Art. 17), is subject only to the laws governing slander and libel, and gives the right to "reasonable access to all channels of communication". Censorship is treated as prohibited altogether.
- (10) The duty to present information (Art. 18) and news "in a fair and impartial manner", is introduced as a corollary to the right in the preceding paragraph.

- (11) The right to freedom of assembly (Art. 19), is limited to "peaceful" assemblies.
- (12) The right to form associations (Art. 20) is recognized for purposes not inconsistent with the International Bill of Rights.
- (13) The right to establish educational institutions (Art. 20) in conformity with conditions laid down by the law

(For the rights enumerated from (6) to (13) the United Nations Secretariat indicates that they comprise so-called "Public liberties").

- (14) The right to own personal property (Art. 22), This Article is probably the most illustrative of considerations that had to be given to changes in the structure of human rights in the past decades.

The Article is meant to meet the rise of States where there is limited or no right to own means of production. Therefore, the accent is put on "personal" property, this form of ownership being the only undisputed one in the various existing systems.

The right to own "private" property in general is left to national legislation, as well as the regulation of the acquisition and use of that property.

However, the principle is set out for a "just compensation" for any deprivation of private property.

- (15) The right to freedom from arbitrary taxation (Art. 23) is defined as the right to be free from paying taxes or be subjected to public charges, "which have not been imposed by law."
- (16) The right to private vocations and professions (Art. 24) consists in the right to possess "equal opportunity of access" to any profession not having a public character.
- (17) The right to do everything that is not prohibited by law (Art. 25) is introduced as a general principle.
- (18) The right to fair trial (Art. 26). This right comprises the classical principle of the non-retroactivity of penal law, both as regards crime and punishment (Nullum crimen, nulla poene sine lege); and the right to full public hearing before a court of law, in conformity with the law.
- (19) The right to petition independent and impartial tribunals (Art. 27, paragraph 1) for the determination of rights and duties existing under the law.
- (20) The right to be represented by Counsel (Art. 27, paragraph 2)
- (21) The right to petition the State or the United Nations (Art. 28) either individually or in association with others, for redress of grievances.

The right to submit such petitions to the United Nations is of the utmost importance first as it implies the right of the individual to seek protection against acts of his own

State, and secondly as it subjects the sovereignty of the individual States to the authority of the United Nations. As reported above, page 14, paragraph 6, the Human Rights Commission has been charged with submitting suggestions regarding the procedure and the machinery to deal with such petitions in the future.

- (22) The right to resist oppression and tyranny (Art. 29) either individually or with others.

This Article consecrates by implication the famous "right to revolution" advocated by political philosophers of the 18th century.

The United Nations Secretariat indicates that the rights enumerated from (19) to (21) are related to "remedies".

- (23) The right to take effective part in the government of the State (Art. 30), where the accent is on "effective". In addition to this the Article imposes a duty upon the State to "conform to the wishes of the people as manifested by democratic elections" and to hold "periodic, free and fair" elections.
- (24) The right to public functions in the State (Art. 31) which is defined as the right to "equal opportunity of access" to all public functions. This right is guaranteed by the duty imposed upon the State to make appointments by "competitive examination".
- (25) The right to nationality (Art. 32). The main subject of this Article is to make it impossible for an individual to become stateless. To this effect the Article:
- (1) Sets out the territorial principle, whereby the nationality of the State of birth is acquired, and gives right to option for the nationality by descent (personal status) on attaining majority.
 - (2) Does not recognise the loss of nationality if new nationality is not concurrently acquired.
 - (3) Gives the right to renunciation of nationality upon acquisition of new nationality.
- (26) The right to freedom from arbitrary expulsion (Art. 33), whereby no alien legally admitted by a State may be expelled otherwise than by judicial act "as a punishment for offenses laid down by law as warranting expulsion".
- (27) The right to grant asylum (Art. 34) to political refugees is given to the State.

Rights relating to social security ("Social Rights") (Arts. 35-44)

19. The field covered is the following:

- (28) The right to medical care (Art. 35) entails the duty upon the State to "promote public health and safety".

- (29) The right to education (Art. 36) entails likewise a number of duties upon the State: the duty to assume primary education; the duty to promote facilities for higher education; and the duty to apply equal treatment "without distinction as to the race, sex, language, religion, class or wealth" to persons entitled to benefit from higher education.
- (30) The right to perform socially useful work (Art. 37) is treated at the same time as a duty of every individual.
- (31) The right to good working conditions (Art. 38) covers the field of working hours, sanitary conditions, technical safety, etc.
- (32) The right to equitable share of national income (Art. 39) is defined as the right of the individual to "such equitable share as the need for his work and the increment it makes to the common welfare may justify". This Article covers the field of minimum wages.
- (33) The right to public help (Art. 40) "as may be necessary to make it possible" for the individual "to support his family".
- (34) The right to social security (Art. 41) is envisaged in the widest sense, and is guaranteed by imposing the duty upon the State to "maintain effective arrangements for the prevention of unemployment and for insurance against unemployment, accident, disability, sickness, old age, and other involuntary or undeserved loss of livelihood".
- (35) The right to good food and housing (Art. 42) and to live in pleasant and healthy surroundings.
- (36) The right to fair rest and leisure (Art. 43).
- (37) The right to participate in the cultural life (Art. 44) of the community, to enjoy the arts and to share in the benefits of science.

Rights relating to equality (Art. 45 - 46)

- 20. (38) The right to equality (Art. 45) is treated in two main aspects: there shall be no discrimination whatsoever because of race, sex, language, religion or political creed; there shall be full equality before the law in the enjoyment of the rights covered by the International Bill of Rights.
- (39) The rights of minorities (Art. 46). This Article covers equally ethnic, linguistic and religious minorities and provides for their right to establish and maintain their schools, cultural and religious institutions, and to use their own language before the courts, all the authorities and organs of the State, and in the press and public assemblies.

Final dispositions (Art. 47 - 48)

- 21. In the final Articles, the outline deals with the question of observance and enforcement of the future Bill of Rights.

Observance and Enforcement

Article 47 provides that "it is the duty of each Member State to respect and protect the rights enunciated in the Bill of Rights" and that "the State shall, when necessary, co-operate with other States to that end".

Article 48 lays down the principle that "the provisions of the international Bill of Rights shall be deemed fundamental principles of international law and of the national law of each of the member States of the United Nations. Their observance is therefore a matter of international concern and it shall be within the jurisdiction of the United Nations to discuss any violation thereof".

Thus, under the combined terms of Art. 47, first sentence, and of Article 48, first sentence, there is to be introduced a definite subjection of national to international law:

- (a) The duty of each Member State to "respect and protect" rights contained in the Bill is to derive from the Bill itself.
- (b) The provisions are to be deemed fundamental principles of the national law again in virtue of the Bill itself.

This is to create a relationship between national and international law in this field similar to the one existing between constitutional and ordinary laws within the borders of every State.

On the other hand, under the terms of the last parts of both Articles, there is to be introduced a twofold international action for the observance and protection of human rights:

- (a) A "horizontal" action undertaken by the States as equal partners (Art. 47).
- (b) A "vertical" action on the part of the United Nations as the supreme authority in cases of violation of human rights by any State. (Art. 48.)

The latter is envisaged only in the form of a "discussion" by the United Nations, but this clearly opens the door to any further action under the general terms of the Charter.

IV. CONCLUDING NOTES

22. When opening its present session, the Drafting Committee of the Human Rights Commission decided to consider simultaneously a Draft submitted by the United Kingdom. An analysis of this Draft is to be found in Doc. III/98 prepared by Dr. Mayr-Harting.

Two differences should be noted, inter alia, between the United Nations Secretariat's Draft Outline and the United Kingdom Draft:

- (a) The United Kingdom Draft does not provide for "social rights". The United Kingdom Government are of the opinion that these rights "cannot by their nature be defined in the form of legal obligations for States in an instrument such as the International Bill of Rights", and they have suggested "international co-operation" as the proper course in protecting social rights.

For this reason, the United Kingdom Government have included their proposal concerning social rights in a separate draft Resolution

to be adopted by the General Assembly (Art. III), which is intended to serve as a covering instrument for the adoption of the Bill.

- (b) The United Nations Draft Outline does not provide for a restricted protection of human rights in time of war and in certain cases in time of peace, as proposed in Art. 4 of the United Kingdom Draft.

23. Up to 24th June, 1947, the Drafting Committee made a preliminary review of Articles to be included in the Bill, and considered a report on the preamble. It discussed a draft submitted by France and decided to prepare a shortened Draft Bill and to select for insertion in a Draft Convention those Articles on which general agreement of Governments might be reached; it also decided that the United Kingdom draft covering the implementation of human rights should, as amended during the debates, form the subject of an additional and separate Annex to its report to the Human Rights Commission. Finally, it began discussion on that report.

The Committee is composed of representatives of eight countries: Australia, Chile, China, France, Lebanon, Union of Soviet Socialist Republics, United Kingdom and United States of America. Its Chairman is Mrs. E. Roosevelt.

24. When the Committee's draft is ready, it will first be submitted to the next session of the Human Rights Commission, due to start on 25th August, 1947 in Geneva. It will then be presented to all Member States for their observations and proposals, which will in turn serve as a basis for a re-draft, if necessary, by the Drafting Committee. The re-draft will be referred back to the Human Rights Commission for final consideration.

It is only then that the Economic and Social Council will consider to undertake the final steps, i.e. to recommend to the General Assembly the adoption of an International Bill of Human Rights.

Corrigenda,
III/100.

UNITED NATIONS WAR CRIMES COMMISSION.

HUMAN RIGHTS REPORT: PREPARATORY PAPERS.

1. On page 4, paragraph 8, the last sentence should read:

"in addition to that, the delegation of Panama submitted a Draft Declaration on the Rights and Duties of States".

2. On page 9, paragraph 15, second sub-paragraph, the reference made in the sixth line should read:

"... as referred to above page 5, paragraph 8(b)..."

3. On page 9, Section B., the third paragraph indicated under number 15 should bear number 16. All subsequent numbered paragraphs should be corrected accordingly.

July 18th, 1947.

UNITED NATIONS WAR CRIMES COMMISSION

HUMAN RIGHTS REPORT: PREPARATORY PAPERS.

Draft Report of the Drafting Committee of the
Commission on Human Rights.

As a result of the recommendations made by the Commission on Human Rights, the Economic and Social Council decided at its First Session in March 1947 that a Drafting Committee should meet prior to the Second Session of the Commission in order to prepare a preliminary draft of the International Bill of Rights.

The Drafting Committee held its first session during the period of 9th - 24th June 1947. The Draft Report of this Committee to the Commission on Human Rights has now been distributed. It gives information on the present state of the work concerning the preparation of an International Bill of Rights.

The Draft Report is circulated for the information of members of Committee III. The figures in the text refer to quotations of the relevant Commission documents shown at the end of this paper.

I. Introduction.

This chapter gives a list of the representatives present, the specialised agencies represented and the consultants taking part in the meeting of the Drafting Committee, as well as of the officers of the Drafting Committee, etc.

CHAPTER II

Preliminary Draft of an International Bill of Human Rights.

11. The Drafting Committee reviewed its terms of reference as contained in the letter of the Chairman of the Commission on Human Rights of 24 March 1947 (document E/383) to the President of the Economic and Social Council, and approved by decision of the Council of 28 March 1947 (document E/325). It noted in particular that its function in this session was to prepare, on the basis of documentation supplied by the Secretariat, a preliminary draft of an International Bill of Human Rights.

12. In this preparation, the Drafting Committee started with two basic documents, (a) a Draft Outline of an International Bill of Rights prepared by the Secretariat (documents E/CN.4/AC.1/3 and E/CN.4/AC.1/3Add.1), (1) constituting Annex A of this Report, and (b) a draft Bill of Rights proposed by the United Kingdom (document E/CN.4/AC.1/4), (2) constituting Annex B of this Report. These two documents were carefully gone over and compared, together with certain United States proposals for the rewording of some items appearing in the Secretariat outline (document E/CN.4/AC.1/8 and Revs. 1 and 2), constituting Annex C of this Report.

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- (1) The Secretariat's draft outline of a Bill of Rights has been analysed in Doc. III/100, section III.
 - (2) The United Kingdom Draft has been commented upon in Doc. III/98, Section I.

13. Concerning the form which the preliminary draft might take, two views were put forward. In the opinion of some Representatives it was necessary that the Draft, in the first instance, should take the form of a Declaration or Manifesto; in the opinion of others there should also be a Convention in addition to the Manifesto or Declaration. (3) The Drafting Committee therefore decided to attempt to prepare two documents, one a working paper outlining a Declaration or Manifesto setting forth general principles, and the second a working paper containing suggestions as to the contents of one or more Conventions flowing from these principles to which Member Nations might adhere.

14. The Committee established a temporary working group, composed of the Representatives of France, Lebanon, and the United Kingdom, with the Chairman of the Committee as an ex officio member. It requested this working group:

- (a) to suggest a logical rearrangement of the articles of the Draft Outline supplied by the Secretariat;
- (b) to suggest a redraft of the various articles in the light of the discussions of the Drafting Committee; and
- (c) to suggest to the Drafting Committee the division of the substance of the articles between a Declaration and a Convention.

15. The temporary working group had three meetings, and after a general discussion decided to request Professor Cassin to undertake the writing of a draft Declaration based on those Articles in the Secretariat outline which he considered should go into such a Declaration. It was the consensus of opinion that such a document would have greater unity if drawn up by one person. The Representatives of the United Kingdom and Lebanon, together with the Chairman, were asked independently to go over the Secretariat outline and the United Kingdom draft with a view to determining which Articles could readily lend themselves to a Convention.

Professor Cassin produced a draft containing a Preamble and forty-four suggested Articles. The working group revised the Preamble and the first six Articles before submitting them to the Drafting Committee (document E/CN.4/AC.1/W.1). The remaining Articles were submitted to the Drafting Committee in the form proposed by Professor Cassin (document E/CN.4/AC.1/W.2/Rev.1), constituting part of Annex D of this Report.

The Chairman, the Representative of Lebanon and the Representative of the United Kingdom agreed that the Articles contained in the Convention part (Annex I of document E/CN.4/AC.1/4) of the United Kingdom draft could be submitted to the Commission on Human Rights as possibly forming the basis of a draft Convention and that the following three subjects should be added to this draft:

- (a) torture, physical integrity and cruel punishments;
- (b) the right to a legal personality; and
- (c) the right of asylum. (4)

-
- (3) The Panama Draft which forms part of the documentation before the Drafting Committee envisages a declaration limiting itself "to an expression of the freedoms to which every human being is entitled". (cf. Doc. III/98, section 1(f)). The United Kingdom draft, on the other hand, contains proposals as to the implementation which may have to be embodied in a convention (cf. III/98, section 1(b) and section 1(f).)
 - (4) The subjects which it is proposed to add to the United Kingdom draft are to be found in the Secretariat's draft outline, as follows: torture, physical integrity and cruel punishment, (Art. 4 of the Secretariat's draft), the right to a legal personality (Art. 12 of the Secretariat's outline) and the right of asylum (Art. 34 of the Secretariat's outline), (cf. Doc. III/100, section III(18).)

16. The Drafting Committee read the draft Preamble, but recognized that its final wording could not be determined until later.

17. The Drafting Committee considered in detail each of the six draft Articles submitted by the working group, then considered in like detail the remaining draft Articles submitted by Professor Cassin. Members made comments on the form and substance of the various articles. These comments are found in the verbatim and summary records. All members of the Drafting Committee understood that no action taken by them during the session was to be considered binding upon their Governments. Professor Koretsky's remarks were confined in the main to procedural matters, and for all issues he specifically reserved the right to present the comments, observations, and proposals of his Government at a later time.

18. The Drafting Committee accepted Professor Cassin's offer to prepare, on the basis of the discussion of his draft, a revised Draft Declaration. This revised Draft (document E/CN.4/AC.1/W.2/Rev.2) was gone over carefully by the Drafting Committee and the result of this examination is embodied in Annex E of this Report. The Drafting Committee therefore submits to the Human Rights Commission this Annex as a working paper for a preliminary draft of an International Manifesto or Declaration on Human Rights.

19. The Drafting Committee used the proposal of the United Kingdom (document E/CN.4/AC.1/4) as a basis for its general discussion relating to the possible substantive contents of a Draft Convention. While it did not go over this matter as thoroughly as it did the Drafts of Professor Cassin, it nevertheless suggests that the United Kingdom proposal may form a basis for a draft Convention which the Commission on Human Rights may wish to elaborate.

CHAPTER III

The Question of Implementation of an International Bill of Human Rights.

20. The United Kingdom Draft embodied many proposals bearing on implementation. Consequently, in the discussion of that Draft, the question of implementation in general came up.

Annex F of this Report consists of a paper prepared by the Secretariat embodying documentation on the question of implementation. The following is a brief summary of the comments made on this subject in the session of the Drafting Committee:

- (a) It was the consensus of opinion of the Members of the Drafting Committee that the international community must ensure the observance of the rights to be included in an International Bill of Human Rights.
- (b) The view was expressed that implementation might take two forms:
 - (1) some form of punishment of an offending State, the proposals for such punishment ranging from a public request for information concerning the alleged violation to trial before an International Tribunal; (2) action on the part of the United Nations and the Member States to educate the peoples of the world with regard to human rights and to create conditions under which respect for and promotion of human rights would be secured.
- (c) The view was expressed that the only practicable compulsory form of implementation would be an international Convention ratified or adhered to by Member Governments.
- (d) The view was expressed that the possibility might be studied of creating, within the framework of the United Nations, an organization to receive, sift, examine, and deal with communications alleging the violation of human rights.

(e) The suggestion was made that the terms of reference of the Commission on Human Rights be re-examined by the Economic and Social Council with a view to granting greater responsibility in this field to the Commission.

(f) The Australian proposal for the creation of an International Court of Human Rights, which was submitted in the first session of the Commission on Human Rights, was again referred to by the Representative of Australia and discussed in general by the Drafting Committee.

III/102.

18th July, 1947.

UNITED NATIONS WAR CRIMES COMMISSION

HUMAN RIGHTS REPORT: PREPARATORY PAPERS

HUMAN RIGHTS IN THE NUREMBERG TRIAL

(EXCEPTING CRIMES AGAINST GERMANS)

General Outline of the Report

By Dr. J. Litawski

In Doc. C. 259 (1), general guidance has been given by the Commission as to the main features which will have to characterise the presentation of the material concerning Human Rights as they arise from the war crimes trials in general. Along the lines indicated in that Document, and inasmuch as the particular points set forth therein are applicable to this part of the Report, it is intended to treat the material which is to be found in the Nuremberg Trial. This material consists of:

- (a) The Agreement of 8th August, 1945, for the Prosecution and Punishment of the Major War Criminals of the European Axis, together with the Charter of the International Military Tribunal;
- (b) The Indictment presented to the International Military Tribunal on 18th October, 1945;
- (c) The transcript of the proceedings, containing about 17,000 pages;
- (d) The Judgment of the Tribunal delivered on 30th September and 1st October, 1946.

Apart from the necessary introduction, and subject to any modification which a detailed examination of the above material may require, it is proposed to present the information requested by the United Nations, insofar as it relates to the major war criminals tried at Nuremberg and excepting that part of the material dealing with charges of crimes against Germans, in the manner outlined in the following paragraphs.

In view, however, of the comparatively limited time which has been allotted for the preparatory work and the drafting of the Report, it is not certain to what extent it will be possible to examine the voluminous transcript of the proceedings. If it proves to be technically impossible to digest and make full use of the transcript, the report will have to be based primarily on the Charter, the Indictment and the Judgment of the Tribunal, references to or quotations from the transcript being made to illustrate problems of particular interest.

I.

(1) Part II of the Charter which sets forth the jurisdiction and general principles to be followed in the conduct of the trial of the major war criminals of the European Axis countries, and in particular, its Article 6, is, technically speaking, the law which the Charter required the Tribunal to administer, and by which the Tribunal was bound. The specific rules of Article 6, on the basis of which the Tribunal had to determine the guilt or innocence of the defendants, have laid down some novel principles of law, under which individuals are responsible to the community of nations for violations of rules of international criminal law, and according to which attacks on the fundamental rights of nations, as well as attacks on the fundamental liberties and constitutional rights of peoples and of individual persons, constitute, in certain circumstances, inhuman acts, and consequently, international crimes.

(2) It will therefore be the purpose of the report to give an analysis of the law as it is stated in Article 6 of the Charter, of the meaning of the three main categories of war crimes in the general sense of the term, of the inter-relation, juxtaposition and overlapping of the concepts they represent, as well as of the novel principles of law which can be derived from its provisions in relation to the involved question of human rights.

II.

(3) In Doc. C. 259 (1) it has been pointed out that "every crime or nearly every crime violates a right and therewith a 'human right' in a wider, non-technical sense". This applies to almost all violations of the laws and customs of war and to all acts coming under the term "crime against humanity" as defined in the Charter. It may be added that the planning, preparation, initiation and waging of a war of aggression, declared by the Nuremberg Tribunal as a supreme international crime, constitutes also, in a general non-technical sense, a crime against humanity, which involves violations of human rights.

(4) It will be observed that, without exception, all the crimes specifically enumerated in Article 6 of the Charter as constituting war crimes and crimes against humanity, in their technical sense, are crimes which constitute attacks on the integrity of the physical being of individuals or groups of people, and of property, thus violating inherent human rights. But, from the law as it is stated in that article, and in particular from the words: "Such violations (of the laws or customs of war) shall include but not be limited to...", it is clear that these attacks on human rights are not the only ones which the authors of the Charter had in mind and with which the Tribunal was intended to be concerned in the Trial.

(5) For this reason, and also because the Tribunal in laying down which inhuman acts had been committed after the beginning of the war, or in connection with the war, referred in its decision directly to the Indictment, it will be necessary to examine this document more closely since it throws considerable light on the way in which Article 6 of the Charter was interpreted by the Prosecution.

III.

(6) In order to give a comprehensive picture of what human rights have been violated, in connection with specific crimes committed, and how they have been violated, it is proposed to bring under review and examination

the following groups of crimes:

- (a) Murder and ill-treatment of civilian populations of, or in, occupied territories, and on the high seas;
- (b) Deportation for slave labour and for other purposes of the civilian populations of, and in, occupied territories;
- (c) Murder and ill-treatment of prisoners of war and of other members of the armed forces of the countries with whom Germany was at war and of persons on the high seas;
- (d) Killing of hostages;
- (e) Plunder of public and private property;
- (f) The exaction of collective penalties, pecuniary or otherwise;
- (g) Wanton destruction of cities, towns and villages and devastation not justified by military necessity;
- (h) Conscription of civilian labour;
- (i) Forcing civilians of occupied territories to swear allegiance to a hostile power;
- (j) Germanisation of occupied territories;
- (k) Murder, extermination, enslavement, deportation and other inhuman acts committed against civilian populations before and during the war;
- (l) Persecution on political, racial and religious grounds.

The groups of crimes indicated under (a) to (j) constitute war crimes in the technical sense of Article 6 (b) of the Charter, and the remaining two crimes against humanity, but those enumerated in the first category ((a) to (j)) are also to be regarded as constituting crimes against humanity.

(7) In its Judgment, the Tribunal stated that the evidence relating to war crimes and crimes against humanity has been overwhelming in its volume and its detail, to such an extent that it was impossible for the Judgment adequately to review it or to record the mass of documentary and oral evidence that has been presented. The Tribunal decided, therefore, to deal in its Judgment only quite generally with these crimes.

For this reason, it would appear of some considerable importance for the proper fulfilment of the task undertaken, not to rely only on the facts as they have been summarised in the Judgment, but to make the fullest possible use of the material produced before the Tribunal during its 403 open sessions.

(8) As it is quite obvious that the collection of material to be presented to the United Nations could not indiscriminately deal with all common crimes and outrages such as murder, ill-treatment and the like, committed against innocent people, without any justification or necessity, it is proposed to limit the investigation mainly to such crimes or groups of crimes of the above list as are of primary importance to the question of insufficiency of, or lacunae, in the existing laws and usages of war and other provisions of international law which purport to afford protection against violations of human rights.

(9) While dealing with the different groups of crimes indicated above and various categories of persons whose rights will be found to be touched upon, it is of course understood that the material will at the same time be arranged and examined in such a way as to bring into the foreground the various aspects of human rights or groups of rights such as: life, health, personal integrity, freedom of movement, family rights, religious rights, property, etc., in accordance with the working list of the possible human rights which might in the meantime be established for the purpose by the Secretariat.

IV.

(10) In the part of the report dealing with the Judgment, it will furthermore be necessary to examine and analyse the reactions of the Tribunal to the various violations of human rights, as well as the attitude of the Tribunal to the many legal problems which had arisen during the Trial, and its decisions in regard to them. Here, general legal questions will necessarily come under consideration, such as:

- (a) the attitude of the Tribunal to the law of the Charter;
- (b) the crime against peace as the supreme crime against humanity;
- (c) refusal of the Tribunal to consider conspiracy to commit war crimes and crimes against humanity as a separate crime;
- (d) the pre-Charter international law as it has been applied by the Tribunal to the various crimes violating human rights;
- (e) the restrictive interpretation of the Charter in regard to the violations of human rights of persons who are not of the nationality of the victorious Powers;
- (f) the defence of superior orders and other subjects relative to the various spheres in which the rights of the accused and the rights of the victims may be said to have conflicted at the time of the offence (see Doc. III/96, p. 2, section C).

V.

(11) One of the tasks of the report will also be to show how far the human rights of the accused perpetrators of war crimes themselves have been respected in the course of the Nuremberg Trial.

From this point of view, for instance, it will be necessary to examine in the first place whether the rules of procedure and evidence as laid down by the Charter and which the Tribunal was bound to apply followed those recognised in the courts of all civilised countries, and consequently whether the defendants had in fact been given the right to have the assistance of counsel, to be furnished with a copy of all documents, to present evidence in their own defence, and to cross-examine any witnesses called by the Prosecution.

(12) Further, it will be interesting to set out the arguments contained in the Judgment on the question of the legality of the Tribunal and of the problems relating to ex post facto legislation and the principles of nullum crimen, nulla poena sine lege.

(13) In the last instance, it will be the aim of this part of the Report to consider the instances in which fairness to the accused found its expression in the attitude of the Tribunal to the various problems of substantive law which arose during the Trial. Here, as the most illustrative

example of such an attitude, the restrictive interpretation of the sweeping provisions of the Charter concerning the criminality of the accused organisations by which the Tribunal excluded from its statement, inter alia, persons who had no knowledge of the criminal purposes of the organisations, will have to be elaborated. The analysis of the individual sentences and acquittals in regard to the individual defendants will also have some bearing on this particular question.

(14) In conclusion, a word will be said concerning the view that the defendants at Nuremberg might well have been proceeded against by summary executive action and not by a court of law. Stress will be laid on the fact that preference had been given to adjudge their guilt according to law, rather than on any moral or ethical basis alone.

VI.

(15) It would also be of some interest, it is thought, if one of the sections of the Report could be devoted to the presentation and examination of the Nazi principles which became the source and the basis of the policy of criminality which led finally to the unprecedented violations of human rights.

In the Judgment of the Tribunal it is stated that war crimes and crimes against humanity were committed on a vast scale, never before seen in the history of war, and were attended by every conceivable circumstance of cruelty and horror. The Tribunal says:

"There can be no doubt that the majority of them arose from the Nazi conception of 'total war' with which the aggressive wars were waged. For in this conception of 'total war', the moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity. Everything is made subordinate to the overmastering dictates of war. Rules, regulations, assurances and treaties all alike are of no moment; and so, freed from the restraining influence of international law, the aggressive war is conducted by the Nazi leaders in the most barbaric way".

The ideas of Nazi Germany, that is to say, the immoral ones, which were contrary to the established principles of all civilised nations, spring directly from what one of the prosecutors called a crime against the spirit, by which he meant a doctrine which, "denying all spiritual, rational and moral values by which the nations have tried, for thousands of years, to improve human conditions, aims to plunge humanity back into barbarism, no longer the natural and spontaneous barbarism of primitive nations, but a diabolical barbarism, conscious of itself and utilising for its ends all material means put at the disposal of mankind by contemporary science".

Finally some elaboration of the inhuman ideas underlying the conception of a total war will be the subject of this particular section.

There is no
document
103.

18th July 1947.

UNITED NATIONS WAR CRIMES COMMISSION.

HUMAN RIGHTS REPORT: PREPARATORY PAPERS.

Results

of the activities of the Drafting Committee
on an International Bill of Rights.

Notes by Dr. R. Zivković.

The following account is based upon the information published in the United Nations Weekly Bulletin, Vol. III, No. 2, July 8th, 1947. It is a sequel to the information circulated in Document III/100.

1. The Drafting Committee of the Human Rights Commission concluded its first session on 25th June.

As reported in Document III/100 it considered a draft Bill of human rights and to this end had before it as a working paper a Draft Outline prepared by the United Nations Secretariat.

As a result of its deliberations it decided to submit to the Human Rights Commission, due to convene on 25th August, 1947, a Report on the question accompanied with several working papers, with a view to enable the Commission to make an judicious choice between the various ways in which it appeared to the Committee that the proposed international Bill of Rights could be adopted by the United Nations and its member-governments.

This outcome is described and explained in the following words by the United Nations Secretariat (Weekly Bulletin, Vol. III, No. 2, p. 55-56):

2. "The Committee did not attempt to draw up a draft Bill. The working papers which it forwarded to the Commission are in part a consensus of opinion on the substance of the proposed Bill, but they are not in any way agreed texts, nor are they binding. The documented draft outline of a Bill, which had been prepared by the Secretariat for the use of the Drafting Committee as a working paper, is included in the series which the Commission will receive, as are the proposals of various delegations on specific aspects of the project.

"SUGGESTED DRAFT ARTICLES.

Of this series of papers, the two most important are those in which the Committee suggests actual draft articles for inclusion in the Bill. One of these sets forth articles suggested for a Declaration to be made by the General Assembly, while the other contains proposed provisions for an International Convention.

"The working paper which suggests articles that might be included in a Declaration sets forth the general principles that all men are free and equal, living in a society in which their rights and freedoms are limited only by those of others. Among the rights mentioned in this paper are: the right to life; to equality; to a juridical personality; to asylum; to a nationality; and to personal property. Rights in law (including the right of habeas corpus), political rights, the rights to take an effective part in government, and the right to privacy are defined in several articles. The "fundamental freedoms" include: freedom of expression, and of assembly; freedom from slavery; religious freedom; freedom of movement, and of association.

"Social and economic rights account for the final eight of the thirty-six articles. Among these are: "the right to perform socially useful work," and rights to social security, education, and leisure.

"The second working paper, submitted as the basis for a preliminary draft of an International Convention, had its origin in a United Kingdom proposal, which was used by the Committee as a basis for discussing the possible contents of a Convention.

"In eleven articles, this document sets forth the right to life; freedom from torture and slavery; the right to liberty, and to trial; the right to travel; the right to a juridical personality; freedom of religion, expression, assembly and association.

"DECLARATION OR CONVENTION?.

The Committee had been charged by the Economic and Social Council with the task of preparing, on the basis of documentation supplied by the Secretariat, a preliminary draft of the proposed Bill. It was unable to do this, chiefly because there was a difference in interpretation of the meaning of the word "Bill." Some delegates thought it meant an International Convention, while others interpreted it as meaning a Manifesto or Declaration.

"A Declaration or Manifesto would be a recommendation by the General Assembly to Member states, and, as such, would have moral weight but no legal compulsion on Member countries. On the other hand, a Convention would be legally binding on Member states which accept it. Its application, however, would be limited to the signatories.

"Regardless of which form the proposed Bill of Rights would ultimately take, those members of the Committee who favored the Declaration form agreed that it should be accompanied by a Convention, or by Conventions on specific groups of rights. Similarly, those who favored the Convention form agreed that the General Assembly, in recommending a Convention to Member nations, might make a Declaration which would be wider in content and more general in expression.

"IMPLEMENTATION OF A BILL OF RIGHTS.

In its report to the Human Rights Commission, the Drafting Committee states that it was necessary to take into account, in the course of its meetings, possible methods of enforcement, particularly when considering the draft Convention. The Committee agreed that the international community must ensure the observance of the rights to be included in the proposed Bill of Rights. But discussion of how this objective was to be achieved brought to light a wide range of views, together with strong objections to many of the suggestions made. As transmitted to the Commission, the principal observations made by individual members (none of them approved by the Drafting Committee as such) were:

- "1. A Declaration of Human Rights and Fundamental Freedoms in a resolution of the General Assembly would in itself have considerable moral weight.
- "2. A more effective method for establishing human rights would be to embody them in a Convention, in which the signatories would recognise them as international law.
- "3. The signatories to such a Convention should also accept the obligation to ensure that these rights be enforceable by domestic laws in domestic courts. (Discussion on this point showed that the position of federal states, of states without written constitutions, and of states where law has not yet been codified would require special study.)
- "4. A possible deterrent against violation of a Convention is publicity. Among others is international censure, which might be achieved by: petitions to the United Nations by individuals and groups; extension of the powers of the Human Rights Commission, or creation of new machinery within the framework of the United Nations, to receive, sift, examine, and deal with communications alleging the violation of human rights; requests by the Secretary-General to Member nations for reports on their observance of human rights; discussion in the General Assembly.
- "5. An International Court of Human Rights would be established to adjudicate cases of alleged violations of human rights.
- "6. Any state persistently violating human rights should be expelled from the United Nations.

"In addition to enforcement measures, the Drafting Committee considered that the United Nations should promote the widest possible respect for human rights through education. Several members of the Committee suggested that a special international organ might be required for this purpose.

"Finally, the Drafting Committee recognised that "the observance of human rights could not be completely ensured unless conditions of social progress and better standards of life were established in larger freedom".

"DRAFTS OF A PREAMBLE.

"The Committee agreed that all the articles of the Bill of Rights should be drafted before an attempt is made to draft the preamble, which should be the last step. However, several suggestions for a draft preamble were made in the course of the session, and these are included in an annex to the report.

"The Secretariat in its original draft outline had suggested the general principles which might be incorporated in the preamble, without attempting to suggest a form or wording.

"A working group of the Committee prepared a draft citing the provisions of the Charter relating to human rights, and referring to the four freedoms. Its draft, which was drawn up as the preface to a Declaration, suggested that the purpose of the Declaration was to constantly remind men of their rights and duties, and to inspire the United Nations and Member states to translate the principles in the Declaration into reality.

"To this draft the Chilean representative suggested additions defining freedom and dignity as inalienable attributes of the individual and calling for protection against social insecurity.

"The United States also suggest articles for inclusion in the draft preamble of a Declaration, based on the human rights provisions of the Charter.

"The French representative on the Committee (who had done the original drafting for the Committee, in an effort to achieve a unity in the document by having only one man do the work) also drafted a preamble for a Declaration. By this draft, the United Nations and the specialized agencies would undertake to recommend all International Conventions on human rights, and would take all necessary measures for their implementation.

"The draft of a preamble for an International Convention was suggested by the United Kingdom citing the Charters human rights provisions".

3. The text of the two principal working papers mentioned above, namely the Draft International Declaration of Human Rights, and the Draft Convention on Human Rights, is to be found in the quoted Weekly Bulletin, p. 57-60.

4. It thus appears that the text of the Draft Outline prepared by the Secretariat and analysed in Document III/100 has not been consolidated in, but supplemented by two other drafts. It also appears that apart from these three drafts the Human Rights Commission will as well take into account other working papers, apparently those mentioned in Document III/100, para. 12, p. 8, sub-para. 3.

UNITED NATIONS WAR CRIMES COMMISSION.

HUMAN RIGHTS REPORT: PREPARATORY PAPERS.

Notes on a Progress Report to be dispatched to the

United Nations Secretariat.

By Dr. H. Mayr-Harting.

- I. In the letter from the Director of the Division of Human Rights, Professor John P. Humphrey, to Lord Wright, dated 6th May 1947, (Doc. A.45), it was mentioned that if it were possible, the Division would like to be able to submit a manuscript of the report prepared by the United Nations War Crimes Commission to the next meeting of the Commission on Human Rights, which begins on the 25th August 1947 at Geneva.

During the initial discussion of the report in Committee III and in the Commission, it was felt generally that our work could hardly be collected in so short a period; it was suggested, however, that a Progress Report could be drafted in time for the meeting of the Commission on Human Rights on the 25th August 1947.

- II. The Progress Report could be limited to a survey of the material of which use will be made, showing its intended arrangement; as annexes to such a report it would be possible to reproduce the documents in which the various parts of the final report have been outlined, (The Human Rights Report: Preparatory Papers). Alternatively, it would be possible to produce a fuller report not only setting out the material to be used and its intended arrangement but also summarising in one paper the work carried out so far.

The only argument favouring the first course would seem to be the shortness of time at the disposal of the Secretariat of the United Nations War Crimes Commission. A Progress Report summarising in one paper the work carried out so far would be more convenient for the Secretariat of the United Nations, and it must be borne in mind also that all preparatory papers circulated up to date were intended for internal purposes. In many respects, their preliminary character makes it advisable not to forward them for submission to the meeting of the Commission on Human Rights.

- III. A Progress Report of the second type would begin by showing the proposed arrangement of the material. The division of the final report into the following parts would be suggested:

- (1) information on the human rights of persons in relation to their own governments, and
- (2) information on human rights protected by the laws and customs of war.

The sources could then be set out. With regard to the first part of the report, use would be made of the following:

- (a) the Nuremberg trial, as far as it deals with violations of the human rights and fundamental freedoms of German subjects and Stateless persons,
- (b) the subsequent proceedings to the same extent,

- (c) trials before German or Austrian courts of persons accused of crimes against humanity and membership in organisations declared criminal by the Nuremberg tribunal,

(The part of the report dealing with these first three sources has been outlined in Doc. III/101.)

- (d) the Tokyo trial as far as it deals with internal measures of the Japanese militarist clique; (For outline of this part of the report, see Doc. III/106).
- (e) certain trials of quislings accused of war crimes and crimes against humanity and trials of former enemy nationals (other than Germans) accused of crimes against humanity committed against their co-nationals. (An outline of this part of the report is being prepared.)

The sources of the second part of the report would be:

- (a) the Nuremberg trial, except insofar as it deals with crimes against German nationals or Stateless persons; (an outline of this part of the report is given in Doc. III/102).
- (b) the Tokyo trial, except where it deals with the internal measures of the accused carried out in Japan before and during the war, (cf. III/106),
- (c) war crimes trials, other than those conducted by the International Military Tribunals.

In connection with the treatment of the material collected in the Nuremberg trial, the question arises whether the final report should be based in the first instance on the indictment and judgment, making use of the transcripts only in exceptional cases, or whether the fullest possible use should be made of the transcripts. Reference is made in this connection to Doc. III/102, page 1, last paragraph.

In the arrangement of the second section and, to some extent, of the first section of the report, the outline contained on pages 1 - 2 of Doc. III/96 would be used as a guide.

Having thus set out the material to be used and the proposed arrangement of the final report, the Progress Report would then briefly state the work already carried out. This consists of:

(i) Preliminary exploration and delimitation of the field of work and clarification of the relationship between human rights and war crime trials.

(ii) The first draft of some passages of the actual report.

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HUMAN RIGHTS : PREPARATORY PAPERS.

A revised text of page 3 of this document is circulated in connection with the re-wording of paragraphs 2 and 3 made by the author.

This text is to replace page 3 of the original document.

UNITED NATIONS WAR CRIMES COMMISSION.

HUMAN RIGHTS REPORT: PREPARATORY PAPERS.

Human Rights in the Tokyo Trial.

General Outline of the Report to
be submitted to the United Nations.

By Dr. R. Zivković

According to the arrangements made at the meeting held with the Legal Staff on 2 June, 1947, (Document III/93), I have been charged with drafting the part of the Human Rights Report dealing with the Trial of Japanese Major War Criminals.

A general outline of this part of the said Report is submitted for consideration and for use in the Progress Report which it is proposed to present to the United Nations Secretariat.

The Sources of Information.

1. The part of the Human Rights Report which is to deal with the information arising from the Tokyo Trial will be drafted on the basis of the following documentary sources of information:

- (a) The Charter of the International Military Tribunal for the Far East as amended by General Orders No.20 of 26 April 1946, the text of which was circulated as Document C.198.
- (b) The indictment submitted to the Tribunal on 29 April 1946, the text of which has been circulated as Document C.197.
- (c) The Transcripts of the proceedings conducted by the Tribunal, made available to the United Nations War Crimes Commission by instalments.
- (d) As far as necessary the evidence in support of the Indictment and of the Defence, presented to the Tribunal in the form of "Exhibits", also made available to the United Nations War Crimes Commission from time to time.
- (e) Any other documentary source originating from the Tribunal if necessary (rulings, pronouncements, etc.).

Use of the Relevant Material.

2. The above five sources contain all the material relevant to this part of the Report, so that the research is to be entirely confined to them.

However, there arises a main difficulty in making effective use of all the five sources in the Report. This difficulty lies in the fact that the proceedings of the Far Eastern Tribunal are not completed and that they will not be brought to an end for an undetermined period. This may take anything up to another year or even more.

Transcripts and Exhibits.

3. This makes it impossible to conclude the research based upon the Transcripts and the Exhibits before the Trial itself has ended, and to include the information

/which...

which they can provide in the Report if it is to be submitted to the United Nations before the end of the Trial.

Yet, should this be the case, it might be possible to convey to the United Nations whatever amount of information, if any, contained in the Transcripts and Exhibits by the time of the sending out of the Report. This could be done in a separate Interim Report as far as these two sources of information are concerned, or else in the main Report, should this appear to be preferable at the appropriate time.

On 20th July, 1947, the United Nations War Crimes Commission was in possession of 23,615 pages of the Transcripts, and of about 2,500 Exhibits submitted either by the prosecution or the defence. They are being examined and screened for the Report.

The Charter and Indictment.

4. The position is, naturally, different in respect of the Charter and Indictment, these two sources possessing a definitive character since the very beginning of the Trial.

As will be seen in more detail below they contain information which can be disposed of at this stage and conveyed to the United Nations with the other parts of the Report.

Outline of the Report. concerning information contained in the Charter and Indictment

1 - Classification of information according to the sources

The Charter

5. The Charter contains three groups of information relevant for the Report.

- (a) One is the information regarding the definition of the crimes falling within the jurisdiction of the Tribunal and having a direct bearing upon the scope within which the criminal nature of violations of human rights of the victims is to be ascertained by the Tribunal for its judgment.

This information is contained in Art.5(b) and (c) of the Charter, which give definitions of "conventional war crimes" and "crimes against humanity" and cover all criminal violations of human rights of the victims. These provisions will furnish information as regards the state of the law under which facts concerning violations of the rights of victims perpetrated by the Japanese had been or are to be considered by the Tribunal.

In this respect one of the points to be considered concerns the differences appearing in the definitions of war crimes and crimes against humanity as formulated in Art.5. of the Far Eastern Charter and in Art.6 of the Nuremberg Charter. So, for instance, in the former the notion of war crimes is not developed as it is in the latter by an enumeration of the various types of war crimes. On the other hand, in the Far Eastern Charter there is no express reference that crimes against humanity are crimes committed against "any civilian population". It will have to be shown in the Report whether these technical differences had any bearing upon the substance of the law declared in the Far Eastern Charter as compared to the Nuremberg Charter, and upon the Judgment of the Far Eastern Tribunal when it is pronounced.

However, the above provisions will not give a direct and precise answer to the question what are or were all the specific human rights covered by them. The definitions contained in these provisions deal with "war crimes" and "crimes against humanity" as general categories including a series of violations of human rights, which are not defined as such.

Therefore, this part of the Report will have to be restricted to a brief analysis showing only the state of law declared in the Charter and its bearing upon the violations of human rights as prosecuted before the Far Eastern Tribunal and judged by it. As far as specific human rights themselves are concerned, and the question of the extent to which they were or were not covered by Article 5 as a result of the proceedings of the Far Eastern Tribunal, this will have to be referred partly to the analysis of the Judgment when it is pronounced, and partly to the analysis of other aspects of the question to be dealt with in connection with the Tokyo Trial.

Finally, Art.5 of the Far Eastern Charter contains also a definition of "crimes against peace" which is similar to the one appearing in Art.6(a) of the Nuremberg Charter. "Crimes against peace" do not effect human rights in the technical sense, i.e. in the sense that human rights represent rights of the individual human being as such. However, as pointed out in document C.259/(1), para X, p.6, they effect them in a non-technical sense, insofar as "every crime... violates a right and therewith a 'human right' in a wider sense". Crimes against peace, technically speaking, are violations of the rights of States or Nations and not of the individual. But to the extent to which every individual is at the same time a member of a State or a Nation, crimes against peace violate human rights of every individual by repercussion.

This position of crimes against peace as a comparatively novel category in international law, and their relationship as violations of the rights of States or Nations, with the rights of the individual members of States and Nations, should be analysed in the Report.

- (b) Another group of information in the Charter is supplied by the provisions concerning the rights secured to the accused persons tried by the Tribunal.

This part will provide a direct and full answer as to the state of law declared in the Charter, and as to the specific human rights protected within the category of "fair trial rights".

The information is contained in Art.9 and 10 and partly in Art.15 of the Charter.

With regard to the classification submitted in Document III/96, these Articles cover the following rights of the accused:

- (a) The right to know the substance of the indictment (Art.9,a).
- (b) The right to have the proceedings made intelligible by interpretation and translation (Art.9,a. and b.).
- (c) The right to be present at the trial, and apply for production of evidence (Art. 9,c. and e.).
- (d) The right to be represented by Counsel and to conduct defence either in person or through Counsel (Art.9,o. and d.).
- (e) The right to make motions, applications and requests prior to the commencement of the trial (Art.10).

Article 15 covers a number of secondary rights deriving from the fundamental rights enumerated in Art.9, such as the right to make a concise opening statement (Art.15,o); the right to examine the witnesses including the accused giving testimony (Art.15,e.); and the right to address the Tribunal (Art.15,d.).

Apart from the above Articles, provisions having a bearing upon the exercise of the rights of the accused are contained in Articles regulating the powers of the Tribunal, particularly those dealing with the rule of ~~expeditions~~ trial (Art.12); the admissibility and relevance of the evidence (Art.13); and the rules regarding appeal and confirmation of the Judgment (Art.17).

- (c) Finally, the Charter gives information as to the various spheres in which it is recognised under the terms of the provisions that the rights of the victims and of the accused may have conflicted at the time of the criminal offence.

This particular aspect of the information to be inserted in the Report is rightly proposed to fill a separate chapter or section in it (see Doc. III/96, p.2).

The relevant information as far as the Charter is concerned is contained in its Article 6. It deals with the plea of superior orders and the official position held by the accused at the time of the criminal offence, and with their respective effect upon the penal responsibility of each of the individuals accused...

Here again, the Charter gives an answer only insofar as the State of Law is concerned, under which this question is to be decided upon by the Tribunal. The information concerning the actual application of this rule of law by the Tribunal to each of the individual defendants is to be obtained from the proceedings when they are completed and from the judgment when it is pronounced.

The Indictment.

6. The information provided by the Indictment shows certain particular features and discloses certain shortcomings which deserve special attention.

7. The most striking feature is that one of the two criminal categories, covering the field of violations of human rights, namely, "crimes against humanity", has been confined to a very narrow margin and practically set aside as unnecessary for the purposes of the prosecution.

As stressed in the "Summary" of the Indictment, Document C.197, p.2. last paragraph and p.3. first paragraph, the prosecutors took the view that paragraph (b) of Article 5 providing for the "conventional war crimes", i.e. war crimes in the narrower sense, was "adequate to cover" also charges coming under paragraph (c), dealing with "crimes against humanity". Consequently they have laid all their charges coming under this grouping, as representing "breaches of the laws and customs of war", contained in or proved by the practise of civilised nations and the various Conventions governing the conduct of hostilities, the treatment of prisoners of war, and of persons and property in occupied territories".

This course has been followed all through the relevant Counts of the Indictment, namely in Counts 53 and 55. These Counts come under Group Three of the charges, which is headed: "Conventional War Crimes ~~and crimes against humanity~~ yet in the text itself there is no more reference to "crimes against humanity". In Count 53 the accused are charged with a plan or conspiracy, the object of which was "to commit....breaches of the laws and customs of war...against the armed forces... many thousands of prisoners of war and civilians...". In Count 55 they are charged with having "disregarded their legal duty to take steps to secure the observance and prevent breaches" of the existing "Conventions and assurances and the laws and customs of war" whereby they have "violated the laws of war".

8. The question which arises in this connection is whether by proceeding as described above the prosecutors had in fact neglected and discarded the notion of "crimes against humanity" altogether, or whether they have absorbed it one way or another under the notion of war crimes in a wider sense.

The apparent intention was to proceed by way of "covering" the field of "crimes against humanity" by using only the notion of "war crimes" as defined in Article 5(b). This may indeed have been a convenient course for the prosecution, but what remains to be seen and explained in the Report is the legal consequences of such a course, namely, whether and how both paragraphs (b) and (c) of Article 5 were treated and made applicable in the Indictment in their mutual relationship.

The position is as follows:-

- (a) If the intention of the prosecutors was to apply Article 5(b) as it stands in the Charter, because they have found in it a sufficient legal basis for bringing about a conviction of the accused for all the crimes for which they are being prosecuted, it is to be assumed that the Indictment had discarded paragraph (c) altogether as being superfluous in achieving this end. The Indictment is then to be understood as being entirely and exclusively confined to "war crimes" in the narrower sense, in spite of the heading given to Group Three.

/(b)..

(b) If, on the other hand, the intention of the prosecution was to cover paragraph (c) of Article 5 by paragraph (b) on the ground that "crimes against humanity" were also "violations of the laws and customs of war", then they have proceeded by way of interpretation of the law and extended the concept of "war crimes" beyond the limits of their narrower technical meaning as recognised and applied before other Tribunals, and particularly as distinguished by the Nuremberg Tribunal. In its Judgment the latter admitted that "from the beginning of 1939 war crimes were committed on a vast scale, which were also crimes against humanity." But, it stated at the same time, without ambiguity, that insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity". (Judgment, H.M. Stationery Office, Cmd. 6964, p.65).

The Nuremberg Tribunal has thus expressly underlined the fact that "war crimes" in the narrower sense can never exhaustively cover "crimes against humanity", and that inasmuch as this is the case "crimes against humanity" represent a separate type of criminal offence, and consequently a separate type of violation of human rights. This distinction leaves open the questions put above under (a) and (b).

A precise answer to these questions cannot be found before the entire proceedings of the Far Eastern Tribunal are terminated and the Judgment pronounced, and they may even then remain without a clear answer.

Be this as it may, this aspect should be brought forward in the Report as concerning the question of the clarity of the law relevant for the protection of human rights in the light of the attitude taken by the prosecuting body before the Far Eastern Tribunal.

9. The Indictment contains certain elements which show that its authors were not legally consistent with either of the possible views they have taken in relegating Article 5(c) to a subordinate and negligible position.

These elements are the following:

In Count 53 the accused are charged with having planned or conspired to order, authorise or permit the commission of "breaches of the laws and customs of war" against, inter alia, the civilian population "belonging to the Republic of Portugal and the Union of Soviet Socialist Republics" in the period between 7th December 1941, and 2nd September 1945. In Count 55 they are charged with having failed to prevent such breaches against the same population and during the same period of time.

The fact is that the state of war between the U.S.S.R. and Japan started only on 8th August 1945, and that Portugal remained neutral throughout the war.

It follows that the only legal basis for bringing such charges forward is not Article 5(b), but para. (c) of the same Article. The reasons need not be developed; in the absence of a state of war legally recognised or recognisable, no "war crimes" could be perpetrated against the Portuguese and Soviet population in the respective periods of time. Atrocities and all other violations of human rights committed by the Japanese against the population of these two countries represent and can represent under the circumstances only "crimes against humanity".

As mentioned above, paragraph 5(a), the definition of "crimes against humanity" in Article 5(c) of the Far Eastern Charter does not go so far in words as the definition of Article 6(c) of the Nuremberg Charter. Namely, there is no express reference in it to "any civilian population" as the object of crimes against humanity. Nevertheless, this has not prevented the prosecution from interpreting it in the same sense as it is formulated in the Nuremberg Charter by bringing charges for crimes perpetrated against the Portuguese and Soviet population.

Such a course, however commendable for the practical purpose of including in the Indictment crimes committed against all the nationalities involved, is legally inconsistent with the view that Article 5(b) was adequate to cover Article 5(c) of the Far Eastern Charter.

10. Finally, there is another technical feature in the Far Eastern Indictment which contrasts with the Nuremberg Indictment.

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The Far Eastern Indictment does not furnish in any ^{appreciable} amount particulars concerning actual war crimes or crimes against humanity committed by the Japanese. The charges in the Indictment are described in general terms only, so that insofar as full particulars are needed for the collection of information regarding the actual violations of human rights by the Japanese and the way in which they were considered and disposed of by the Far Eastern Tribunal, full information will be obtainable only when the Trial has ended. However, insofar as information is provided by the proceedings hitherto held before the Tribunal, it will be included in the Report if it is sent to the United Nations before the end of the Trial.

This information will be compiled from the Transcripts and Exhibits in the archives of the United Nations War Crimes Commission.

2 - Tentative grouping of information for the Report.

II. Subject to any modification which might be required after completion of the research, it is proposed to split the information arising from the Tokyo Trial and group it under the general scheme suggested in document III/96.

Into the Introduction would go all outstanding features of the Tokyo Trial, particularly features having a bearing upon higher principles of law relevant as a precedent of a general importance in International Law.

The rest of the information would fit into the three main chapters dealing with the violations and protection of the rights of the victims and of the accused, and with the spheres within which rights of both categories had conflicted.

However, it remains to be seen whether the material, once compiled and selected, would better be presented in a separate chapter of its own. This might prove so for the Nuremberg Trial too, so that the possibility of a different grouping should not be precluded. In that case, one could group the total bulk of the information into three main chapters: the first dealing with the Nuremberg Trial, the second with the Tokyo Trial and the last with all other trials. Each of these three chapters could then be sub-divided as suggested in Document III/96, and a general Introduction and final Conclusion added to the Report as a whole. This may have the inconvenience of repetitions of similar analysis and conclusions in the various chapters, but the alternative scheme may show other inconveniences, namely, the difficulty to fit part of the information into any of the proposed divisions.

Final decision upon this should therefore be left open, and the course suggested in the beginning of this paragraph followed for the time being as much as this is feasible.

III/106 (1)

HUMAN RIGHTS : PREPARATORY PAPERS.

A revised text of page 3 of this document is circulated in connection with the re-wording of paragraphs 2 and 3 made by the author.

This text is to replace page 3 of the original document.

Therefore, this part of the Report will have to be restricted to a brief analysis showing only the state of law declared in the Charter and its bearing upon the violations of human rights as prosecuted before the Far Eastern Tribunal and judged by it. As far as specific human rights themselves are concerned, and the question of the extent to which they were or were not covered by Article 5 as a result of the proceedings of the Far Eastern Tribunal, this will have to be referred partly to the analysis of the Judgment when it is pronounced, and partly to the analysis of other aspects of the question to be dealt with in connection with the Tokyo Trial.

Finally, Article 5 of the Far Eastern Charter contains also a definition of "crimes against peace" which is similar to the one appearing in Article 6 (a) of the Nuremberg Charter. It is submitted that crimes against peace are not violations of human rights in the technical sense, i.e. in the sense that human rights are rights of the individual human being as such. Taken in themselves they are violations of the rights of States or Nations as specific subjects in International Law. However, they affect and violate human rights in a non-technical sense, insofar as "every crime or nearly every crime violates a right and therewith a 'human right' in a wider sense" (Cf. Doc. C. 259 (1), para. X, p. 6). On the other hand, to the extent to which every individual is at the same time a member of a State or Nation, crimes against peace violate human rights of the individual by repercussion in a given causal relationship.

This position of crimes against peace as a comparatively novel category in International Law, and their relationship as violations of the rights of States and Nations with violations of the rights of the individual members of States and Nations, should be shown in the Report as they derive from the relevant trials.

- (b) Another group of information in the Charter is supplied by the provisions concerning the rights secured to the accused persons tried by the Tribunal.

This part will provide a direct and full answer as to the state of law declared in the Charter, and as to the specific human rights protected within the category of "fair trial rights".

The information is contained in Art. 9 and 10 and partly in Art. 15 of the Charter.

With regard to the classification submitted in Document III/96, these Articles cover the following rights of the accused:

- (a) The right to know the substance of the indictment (Art. 9, a).
- (b) The right to have the proceedings made intelligible by interpretation and translation (Art. 9, a. and b.).
- (c) The right to be present at the trial, and apply for production of evidence (Art. 9, c. and e).
- (d) The right to be represented by Counsel and to conduct defence either in person or through Counsel (Art. 9, c. and d.).
- (e) The right to make motions, applications and requests prior to the commencement of the trial (Art. 10).

Article 15 covers a number of secondary rights deriving from the fundamental rights enumerated in Art. 9, such as the right to make a concise opening statement (Art. 15, c); the right to examine the witnesses including the accused giving testimony (Art. 15, e.); and the right to address the Tribunal (Art. 15, d.).

Apart from the above articles, provisions having a bearing upon the exercise of the rights of the accused are contained in Articles regulating the powers of the Tribunal, particularly those dealing with the rule of expeditious trial (Art. 12); the admissibility and relevance of the evidence (Art. 13); and the rules regarding appeal and confirmation of the Judgment (Art. 17).

- (c) Finally, the Charter gives information as to the various spheres in which it is recognised under the terms of the provisions that the rights of the victims and of the accused may have conflicted at the time of the criminal offence.

III/107.
30th September 1947.

UNITED NATIONS WAR CRIMES COMMISSION.
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.

C O N T E N T S

PART I.

Introductory.

I. The Hague Convention of 1907.

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PART II.

(The Developments during the Second World War).

(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. Schwebel'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.