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YUGOSLAVIA

Monsieur Gavrilovitch,
formerly Yugoslav Minister of Justice.

DEPARTMENT OF
CRIMINAL SCIENCE
IN THE UNIVERSITY
OF CAMBRIDGE

Professor P.H. Winfield,
Chairman of the Commission.

Mr J.W.C. Turner,
Secretary-General of the Commission.

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OBSERVERS

BELGIUM

Monsieur Delfosse,
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CHINA

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of the Chinese Embassy.

UNION OF SOVIET
SOCIALIST
REPUBLICS

Monsieur P. Teplov,
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ATTENDING BY INVITATION

Sir Arnold D. McNair,
Vice-Chancellor of the University of Liverpool.

Dr A.L. Goodhart,
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Professor Brierly,
Chichele Professor of International Law, University of Oxford.

Professor H. Lauterpacht,
Whewell Professor of International Law, University of Cambridge.

Professor H.A. Hollond,
Rouse Ball Professor of English Law, University of Cambridge.

Dr R.M. Jackson,

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INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

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INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Committee upon Rules and Procedure Relating to Punishment of
Crimes Committed in the Course of and Incidental
to the Present War.

CHAIRMAN: Sir Arnold D. McNair, C.B.E.,
Vice-Chancellor of the University of
Liverpool.

INTRODUCTORY NOTE

by the
Secretary-General.

At the first meeting of the International Commission for Penal Reconstruction and Development, held in Cambridge on 14 November, 1941, one of the items on the Agenda was: "Rules and Procedure to Govern the case of Crimes against International Public Order", and Professor Goodhart delivered an Address on this subject.* The Commission then adopted the following Resolution: "That this meeting hereby establishes a Committee to consider the Rules and Procedure to Govern the case of Crimes against International Public Order, in collaboration with other Bodies working on the same subject, and to report thereon to the International Commission for Penal Reconstruction and Development".

Sir Arnold McNair, Vice-Chancellor of the University of Liverpool was asked to act as Chairman of the Committee which was styled "Committee upon Rules and Procedure relating to Punishment of Crimes committed in the Course of and Incidental to the Present War." Sir Arnold framed a Questionnaire (W.2, 28 April, 1942) which was distributed to the members of the Committee for their observations.

A meeting of the Committee was held at the Czechoslovak Institute on 14 June, 1942, at which practically all the members of the Commission were present. The Questionnaire was discussed in all its aspects and the Chairman drafted a Note, embodying some principles which emerged from those deliberations (W.3, 14 June, 1942).

* See Proceedings of the Conference held in Cambridge on 14 November, 1941, between representatives of Nine Allied Countries and of the Department of Criminal Science in the University of Cambridge. Edited by L. Radzinowicz and J.W. Cecil Turner.

A mass of informative material has been collected relating to all the countries whose representatives replied to the Chairman's Questionnaire. These replies have been grouped together under each separate question, with one exception, that of Belgium, where, for reasons of clarity it has been thought advisable to separate the two replies. The whole document is known as "Answers to Questionnaire of 28 April, 1942". (D.1a and b).

The next meeting was held at the Polish Institute on 15 July, 1942. After a general discussion of the problems arising out of the Questionnaire, three sub-committees were set up (D.2): (1) Under the Chairmanship of Dr de Baer, with Monsieur Burnay, Professor Glaser and Professor Lauterpacht, with the following terms of reference: "To examine and state (a) The scope and meaning of the conception of War Crimes. (b) The extent to which the punishment of War Crimes can be achieved by means of application of national laws, including military law and by means of national jurisdictions both military and non-military. (c) What way crimes can be dealt with in one of these ways". (2) Under the Chairmanship of Dr de Moor, with Professor Goodhart and Professor Lauterpacht, to investigate the question of the Defence of Superior Orders. (3) Monsieur Vlitsch and Dr Benes, to report on the rules as to "Extradition".

A Memorandum was presented by Professor H. Lauterpacht on Punishment of War Crimes (D.3). A Draft Interim Report, framed by Sir Arnold McNair, was adopted at this meeting (D.4).

Dr de Baer's Sub-Committee. On 24 August, 1942, Dr de Baer framed a Note which was sent to the members of his sub-committee (W.5) relating to the first part of the terms of references assigned to his sub-committee (The scope and meaning of the conception of War Crimes, D.2) asking the members to comment thereon. Material has been sent in by Dr de Baer (D.5), Professor Glaser (D.6) and by Professor Lauterpacht (D.7). While the above-mentioned investigations refer specially to the first part of the reference assigned to Dr de Baer's Committee, another investigation has been undertaken with the view of obtaining additional information on the subject defined by (b) of the terms of reference assigned to Dr de Baer's Committee, i.e., "The extent to which the punishment of War Crimes can be achieved by means of application of national laws, including military law and by means of national jurisdiction both military and non-military" (D.2). Accordingly Dr de Baer framed a second Note (W.6, 22 October, 1942) which was distributed to members of the Commission, and replies

were received from: Dr de Baer (D.8), Monsieur Simon (D.9), Professor Lauterpacht (D.10), Dr Benes (D.11), Dr de Moor (D.12), Monsieur Bodson, (D.13), Professor Glaser (D.14), Mr Stabell, (D.15), and by Monsieur Stavropoulos (D.15a).

Dr de Moor's Sub-Committee. On 19 August, 1942, Dr de Moor framed a Note (W.4, 24 August, 1942) which was sent to the members of the Commission. The replies were received from: Dr de Baer (D.16) from Monsieur Tschoffen (D.17), Professor Goedhart (D.18), Professor Glaser (D.19), Mr Aulie (D.20), Monsieur Bodson (D.21), Dr Benes (D.22), Professor Lauterpacht (D.23), Monsieur Simon (D.24), Monsieur Stavropoulos (D.25) Dr de Moor (D.26).

Dr Benes' Report on the Extradition of War Criminals (F.1) will be found immediately after the material submitted by Dr de Moor's Sub-Committee.

The Chairman of the Committee, Sir Arnold McNair, co-ordinated the whole of the material and added a covering Note (D.27).

This Report was submitted to a full meeting of the Commission which was held in London on 29 July, 1943. At this meeting the Report was adopted, and it was unanimously resolved that it should be remitted to the appropriate authority of each of the Allied Governments.

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INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

REPORT

of

COMMITTEE CONCERNED WITH CRIMES AGAINST INTERNATIONAL PUBLIC ORDER

1. The Committee consists of the following:-

All the members of the Commission and certain co-opted members.

2. Its terms of reference are as follows:-

To investigate and report upon Rules and Procedure relating to Punishment of Crimes committed in the Course of and Incidental to the present War.

3. This Report consists of the following parts:-

- A. Note by the Chairman.
- B. Interim Resolutions adopted by the Committee on 15 July, 1942.
- C. Chairman's Questionnaire of 28 April, 1942 and answers thereto.
- D. Memorandum by Professor H. Lauterpacht to which particular attention is drawn.
- E. Dr de Baer's Sub-Committee:
 - (i) Questionnaire of 22 October, 1942 on National Law and Jurisdictions and Replies:
 - (ii) Questionnaire of 24 October, 1942, on the Meaning and Scope of War Crimes, etc., and Replies.
- F. Dr de Moor's Sub-Committee: the Defence of Superior Orders.
- G. Dr V. Benes and M. Vlatch: Extradition.
- H. Comments on the Chairman's Note by Dr de Baer, Dr de Moor, Monsieur Bodson, and Dr Glaser.

A. NOTE BY THE CHAIRMAN

(a) Introductory. My colleagues and I have found that since the appointment of the Committee we have become so immersed in various aspects of the war effort that it has not been possible for us to hold the number of meetings that would be required for the purpose of preparing and agreeing upon a comprehensive Report upon the whole scope of the matters remitted to us. Our work has, however, led to the production of certain materials which are, in my humble judgment, not without value in the solution of some of the difficult problems surrounding what is popularly known as the Punishment of War Crimes, and it seems to us worth while to make a selection of those materials and put it at the disposal of those whom it may concern. I must, however, make it clear that we are not collectively responsible for the documents attached, and that I alone am responsible for this Note.

(b) Alternative Bases of National Criminal Jurisdiction. Among the many alternative principles upon which different States base their criminal jurisdiction the principal are the following:

- (i) the locus of the crime, that is, the territorial principle;
- (ii) the nationality of the criminal;
- (iii) injury to the State;
- (iv) injury to a national of the State.

I wish to attempt an assessment of the extent to which the United Nations can by means of existing laws and jurisdictions deal with the crimes committed against them and their nationals, once they can lay hands upon the criminals.

(i) The territorial principle. All of the European United Nations and China and the United States of America accept the territorial principle and can try and punish acts committed on their territory which are made criminal by their respective legal systems. Most, if not all, of the aforesaid States include within the territorial principle crimes committed or taking effect upon their ships, public or private.

(ii) The nationality of the criminal. The following can try and punish acts committed abroad by their own nationals which are criminal by their respective legal systems.

Belgium

China (subject to unimportant qualifications)

Czechoslovakia

France

Great Britain

So far as relevant for present purposes,
only treason, murder, manslaughter, piracy
and offences under the Treachery Act, 1940.

Greece

Holland

Luxembourg

Norway

Poland

Russia As regards "socially-dangerous" acts.

Yugoslavia

United States of America

Extraterritorial treason is made
punishable by Federal legislation
and by the law of most of the States.

(iii) Injury to the State. The following can try and punish crimes committed abroad by foreigners against the security or integrity of the State exercising jurisdiction:-

Belgium

China

Czechoslovakia

France

Greece

Holland

Luxembourg

Norway

Poland

Yugoslavia

Great Britain and the United States of America stand almost alone in not claiming jurisdiction over foreigners in respect of acts committed abroad against their security or integrity.

(iv) Injury to Nationals. The following can try and punish crimes committed abroad by nationals or foreigners against nationals of the State exercising jurisdiction:-
Belgium, when the criminal is a Belgian national.
Poland, whether the criminal is a Polish or a foreign national.
Greco

In the light of the foregoing summary (in the compilation of which I am greatly indebted to the very valuable volume of the series entitled Research in International Law, published under the auspices of the Faculty of the Harvard Law School and dealing (*inter alia*) with "Jurisdiction with respect to Crime", also published as a Supplement to the American Journal of International Law, vol. 29 (1935), it is submitted that, subject to what follows as to the Defence of Superior Orders, the vast majority of the crimes committed by enemy officials and members of enemy armed forces within United Nations territory are within the jurisdiction of the courts of the United Nations - that is to say, are cognizable by existing courts and under existing law. Undoubtedly many atrocious acts have been committed by enemy nationals within enemy territory whose ordinary description does not appear in the criminal terminology of States, for instance, removal to concentration camps, mass deportations, measures of racial segregation, forcing the population to take part in military operations. But it is believed that most of these acts involve elements, e.g. murder, infliction of grievous bodily harm, wrongful imprisonment, robbery with violence, theft, etc., which bring them within the scope of crimes recognized by national laws. Moreover, there are other atrocious acts committed by members of enemy armed forces in connection with the conduct of hostilities, such as maltreatment or murder of prisoners of war, refusal of quarter, forcing civilians to take part in military operations, bombing or machine-gunning of civilian population for the sole purpose of terrorization (as in the case of Rotterdam), which International Law authorises the commanders of United Nations forces to punish as offences against the laws of war wherever they may be committed.

(c) The Question of Creating an International Criminal Court

In these circumstances, a primary question calling for decision by the United Nations is whether they should be content with the punishment of the vast majority of criminal acts perpetrated by enemy nationals by resorting to existing laws and tribunals, or whether for the sake of a somewhat theoretical universality they should create de novo for this an International Criminal Court and an International

Criminal Code. Conflicting opinions exist upon this question, and I am conscious that some of my colleagues for whose learning and opinions I have very great respect, do not share my view.

My personal submission is that there are powerful arguments against attempting to create an International Criminal Court and an International Criminal Code to be administered by it:

(i) that it is not practicable, having regard to the pre-occupation of the Governments of the United Nations with the prosecution of the war and to the importance of trial and punishment taking place with the utmost speed after the signing of the Armistice and before the conclusion of peace:

(ii) that such an International Criminal Court would in substance be an Inter-United Nations Court and could not be a truly international tribunal because the assent of the enemy Powers to its creation could only be obtained by coercion and it is almost inconceivable that they could be represented upon it, and because it is unlikely that the neutral Powers would be willing to become parties to its creation:

(iii) that the jurisdiction of such a Court would be exposed as regards some of the offences brought before it to the objection that they are being dealt with under an ex post facto code of law, for without the creation of a code of law serious gaps would be found to exist in the provisions of International Law relating to crimes committed in the course of and incidental to the conduct of war:

(iv) the practical difficulties as to the execution of punishments imposed are considerable.

(I am not dealing with the general question of the establishment of an International Criminal Court as a permanent international institution. Upon that problem there exists a considerable literature, which is referred to in Oppenheim, International Law, (6th ed.) vol.ii, p. 459, note 1.)

Nor does it seem practicable for the United Nations to delegate the existing national jurisdiction of their Courts to an Inter-United Nations Tribunal which would try each accused person according to the law of the United Nation against which he was alleged to have offended; the constitutional objections to such a course appear to be insuperable.

The difficulties arising in connection with the Defence of Superior Orders are referred to both in the Replies to the Questionnaire issued by Dr de Moor's Sub-Committee and in Professor Lauterpacht's Memorandum. Here, all that need be said is that they are no less serious in the case of an international tribunal than they are in the case of most national tribunals. If they are to be solved by frankly retroactive legislation, that can be done nationally more easily than it can be done internationally.

(d) War Crimes. The scope of this expression and the types of crime which the United Nations should attempt to punish are discussed in pp.5 - 11 of Professor Lauterpacht's Memorandum.

(e) Defence of Superior Orders. I draw attention to the discussion of this matter on pp. 39 - 46 of Professor Lauterpacht's Memorandum and to the Replies to the Questionnaire issued by Dr de Moor's Sub-Committee.

(f) Extradition from Neutral States. This matter is discussed in the Report by Dr V. Benes and on pp. 33-38 of Professor Lauterpacht's Memorandum.

At the end of the Report will be found comments on my Note which have been provided by four of my colleagues.

ARNOLD D. McNAIR.

B. Interim Resolutions adopted by the Committee on 15 July, 1942.

1. International Criminal Court

While most of us believe that the time is ripe for the establishment of a Permanent International Criminal Court, we all hold the provisional view that a very large percentage of the crimes which have been and will be committed incidental to and in the course of the present war (which for the present we shall merely refer to as "war crimes") can be punished by means of the jurisdiction of the municipal courts of the Allied Powers, both civil and military.

2. The Armistice

We recommend that:

(a) the Armistice should contain appropriate stipulations for the handing over for trial of persons accused of war crimes, or specified or to be specified by name or by categories, such as the members of such a unit operating in such a district at such a time; and

(b) the Allied Powers should intimate on the signing of the Armistice that, in addition to the application of any other measures, they will refuse to sign a Peace unless and until there has been substantial performance of this stipulation contained in the Armistice.

3. Surrender by Neutral States

We recommend that:

In the near future the Allied Powers should indicate, through the appropriate channels, to neutral Governments the desirability of exercising care to avoid the reception on their territory of persons likely to be accused of war crimes, particularly in view of the large number of crimes now being committed.

28 April, 1942.

CONFIDENTIALINTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENTCOMMITTEE CONCERNED WITH CRIMES AGAINST INTERNATIONAL PUBLIC ORDER.

COMMITTEE UPON RULES AND PROCEDURE RELATING
TO PUNISHMENT OF CRIMES COMMITTED IN THE COURSE
OF AND INCIDENTAL TO THE PRESENT WAR.

QUESTIONNAIRE.A. What crimes should the Committee deal with?

- (i) Crimes committed by members of Enemy Forces:
 - (a) upon the persons of members of Allied Forces anywhere:
 - (b) upon the persons of Civilians in Allied Countries or elsewhere:
 - (c) in relation to Allied State Property:
 - (d) in relation to the Private Property of members of Allied Forces or of Allied Civilians:
 - (e) at sea:
 - (f) from the air:
- (ii) Crimes committed by Enemy Police or other civilian authorities of the kinds (a) (b) (c) and (d) above-mentioned.
- (iii) Crimes committed by non-enemy nationals such as the nationals of countries occupied by the enemy who have supported the enemy.

Will members of the Committee please add to or
amend this classification?

- B. Shall we limit our enquiry to acts done since the invasion of Poland by Germany in August 1939, or shall we go further back? If so, how far back?
Upon what basis can jurisdiction over pre-war crimes be founded except that of the State upon whose territory or against whose integrity the crime was committed?

C. What system of law should be adopted in the case of each of the categories of crime above-mentioned?

To which classes of crime would the following systems of law be most appropriate?

- (i) the military law of the Allied State to which the victim or the property belongs;
- (ii) the ordinary criminal law of that Allied State;
- (iii) the provisions of the Regulations concerned with the laws and customs of war annexed to Hague Convention IV ("Hague Regulations") and other international instruments such as the Gas Protocol of 1925, the Geneva Conventions of 1929 concerning sick and wounded and prisoners of war, the London Protocol of 1926 relating to operations by submarines.

And (iv) what system of law should apply where the victims belong to two or more Allied States:

D. C being determined, what should be the tribunals and the procedure?

There appear to be two ways of dealing with this matter:

- (i) to resort to existing tribunals so far as they have jurisdiction; for instance, would the ordinary military courts and the ordinary municipal criminal courts of the Allied Powers have adequate jurisdiction to deal with the majority of crimes committed by enemy persons and their adherents?

Is it desirable to create a special court to deal with the residue of crimes over which the above-mentioned courts would not have jurisdiction?

- (ii) to create ad hoc an international criminal court to deal with all crimes except those committed by Allied nationals who are quislings, traitors, etc..

E. If an international criminal court is to be created, ought the judges to consist of:

- (i) Allied nationals only
- (ii) Allied and neutral nationals
- (iii) Allied, neutral and enemy nationals?
- (iv) Is there any prospect of such a court being constituted within a reasonable time after the cessation of hostilities?
- (v) Is there any prospect of neutral Governments allowing their nationals to act as judges?

F. What do you think of inviting neutral nationals to attend Allied courts as observers - Officers of the Navy, Army and Air Forces in the case of military courts and Judges in the case of civilian courts?

(There is an analogy for this in the case of Turkish Courts for a limited period after the abolition of the Consular Courts by the Treaty of Lausanne in 1924).

G. What State or authority should conduct the prosecution and produce the evidence?

H. What State or authority should be responsible for custody of the accused pending trial, and punishment of those convicted?

I. Should the Allied Powers be urged to stipulate in the Armistice terms for the handing over of alleged criminals?

J. What steps can and should be taken to procure the extradition of persons accused who may have found refuge in neutral countries?

Ought we to recommend the Allied Governments to warn neutral countries to take care not to admit any persons suspected of having committed any offences arising out of and incidental to the war, and to expel those who enter unlawfully.

K. What is your opinion of the following defences:-

- (i) defence of superior orders:
- (ii) immunity of the Head of a State and of other State officials.

L. Would it be useful if the Committee prepared a statement of the rights and duties of a military occupant in regard to the civilian inhabitants, showing the extent to which their obedience to his laws can be demanded?

M. Do you agree that we should confine our examination to criminal acts for which responsibility can be fixed upon individuals and not attempt to deal with illegal acts by States, such as the waging of aggressive war in breach of treaty?

N. Which Governments have already published during the present war documents relating to crimes committed by the enemy?

INTERNATIONAL COMMISSION
FOR
PENAL RECONSTRUCTION AND DEVELOPMENT

COMMITTEE CONCERNED WITH CRIMES AGAINST INTERNATIONAL PUBLIC ORDER

COMMITTEE UPON RULES AND PROCEDURE RELATING
TO PUNISHMENT OF CRIMES COMMITTED IN THE COURSE
OF AND INCIDENTAL TO THE PRESENT WAR.

Answers to Questionnaire of 28 April, 1942.

A.

BELGIUM

I doubt whether a classification such as is attempted is practical, at least at the outset. To start with I should rather favour a general and inclusive description, such as "All Crimes or offences committed in connection with or under the shield of war operations or of the occupation of foreign territory, by members of enemy forces or enemy police, or by enemy officials or enemy nationals, which the existing recognised laws of war or occupation do not justify".

The suggested description excludes crimes committed by non-enemy nationals. Each country has the necessary means in hand to deal with its own nationals. In the course of discussions, divisions and distinction will inevitably be suggested. They should in my opinion be taken note of, with a view to later determining not what Crimes our Committee should deal with, but what crimes are punishable under this or that law.

CZECHOSLOVAKIA

(i) The Committee should deal with war crimes of members of Enemy Forces against the persons of Allied Forces committed either on the territory of the occupied states or on the territory of the Axis (a).

In regard to the fact that war has ceased to be a conflict of armies - as it was in the past - but has become through its total conception a conflict of all inhabitants of one state against all those of another state very numerous crimes are being committed also against the Civilians in the Allied countries. Most of these crimes are ordinary crimes liable to punishment in accordance with the criminal law of the particular countries and only a comparatively small number of crimes can be considered solely in the light of the Hague Conventions. On the other hand the number of acts in respect of Civilians which must be considered as not in accordance with the civilized conduct of warfare has tremendously increased. Therefore it will be necessary to analyse all forms of criminal acts against the civilian population committed either on the territory of the occupied state (for instance denationalisation, concentration camps etc) or on the territory of the Enemy (deportations, forced labour etc.) (b)

Taking into account the serious encroachments upon the economic life of the occupied countries such as mass confiscation of state and private property, confiscation of all Jewish property - all in flagrant contradiction with the regulations of the Hague Convention - it will also be necessary to deal with crimes in relation to Allied state and private property (c,d,).

It will also be necessary to deal with crimes committed at sea and from the air; as far as the latter are concerned it will be necessary to supplement the present regulations which from the modern point of view are very incomplete and inadequate (e,f,).

(ii) It will be necessary to deal with crimes committed also by Enemy Police or other civil authorities (such as Enemy uniformed civil formations, for instance the German S.A., the Gestapo., etc.)

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(iii) One of the most important conditions of the success of any attempt to punish war criminals will be the greatest possible limitation of the scope of international criminal jurisdiction. For this reason - not to speak of other reasons of fundamental importance - one cannot recommend that crimes committed by non-enemy nationals should be the theme for the deliberations of the Committee. The question of the so-called Quislings - national traitors - cannot be put into connection with the question of the punishment of war criminals. Even if a very considerable limitation of State sovereignty were attained after this war (it can be expected that it will be limited first of all to economic questions, to a lesser degree to political and military ones), it can hardly be expected that any state would - in the realm of criminal law - give up its right to jurisdiction over its own citizens for crimes committed against their own legal government and their duties of loyal citizens.

Such procedure could not be justified from the material point of view either. The punishment of Quislings will be a question of a purely domestic character and international justice - if it were altogether possible - would hardly correspond to present needs which in various states occupied by the enemy will be entirely different.

But it may appear necessary - and this can be embodied in an international agreement - to conclude a special agreement of all Allied States concerning the extradition of Quislings which would enter into force along with the signing of the Armistice. Needless to say, a speedy solution of this problem will be necessary in the interest of the pacification of Europe. The protection and the sheltering of those who in the course of the war collaborated with the enemy of their legal Government would be - as a means of power politics - a source of unrest and new wars.

FRANCE

Nous proposons de répondre affirmativement aux questions sous A.

(1) - a - f - et A.(ii)

Quant à la question A. (iii), il nous semblerait utile, en effet, que les crimes visés sous ce point fissent l'objet d'une sanction uniforme dans tous les pays alliés. Chaque nation alliée devrait cependant conserver le droit et assumer le devoir de juger ses propres nationaux. Chaque nation alliée obtiendrait de tous les autres alliés, sur sa simple demande, l'extradition de ses ressortissants accusés d'avoir commis les crimes visés sous A.(iii).

Nous suggérons d'ajouter un nouveau paragraphe (iv) au titre A., qui serait ainsi libellé. - "Crimes committed by enemy authorities upon the persons of Civilians or of members of the Allied Forces, on account of their religion or so-called racial origin."

Les Allemands ont, en effet, l'habitude de justifier d'avance les crimes qu'ils se proposent de commettre, par la proclamation d'une "loi" les autorisant à accomplir certains actes.

Bien que les conventions de La Haye interdisent, d'une façon générale, à l'autorité occupante, d'imposer aux pays temporairement occupés la législation du vainqueur, les Allemandes ont introduit partout, soit directement, soit par le truchement de prétendus gouvernements à leur solde la législation dite "raciale" dont l'application les a conduits à commettre des crimes particulièrement odieux contre les ressortissants alliés de religion juive ou dont les ascendants jusqu'au troisième degré adhéraient à cette religion.

Sous l'empire de cette "législation", les Juifs, perdent leur nationalité et les droits et privilèges qui en résultent. Ils sont transformés en apatrides d'une nouvelle espèce. et les Allemands s'arrogent le droit de les persécuter d'une manière particulièrement brutale.

Il convient non seulement de punir les crimes commis sous le prétexte de cette prétendue législation, mais encore de flétrir le procédé qui consiste à légaliser d'avance l'acte criminel qu'on s'apprête à perpétrer par la proclamation d'une loi édictée à cet effet. Ce but nous semble pouvoir être atteint par l'adjonction à la liste du Professeur McNair de la clause proposée plus haut.

GREECE

The Committee should deal only with the crimes mentioned in paragraphs (I) and (II). Crimes of paragraph (III) might perhaps be left to the discretion of each country concerned.

HOLLAND

I quite agree with those mentioned under 1) and 2). These come all under our subject.

With those mentioned under 3), however, the problem is different; the national (non enemy) criminals, Quislings and traitors, will have to be punished, in principle, by their national judges.

National

A a. It seems advisable to make here already at the outset some other general remarks which have also a bearing on the following points:

In my opinion non-enemy nationals to whom in the Norwegian way must be reckoned Quislings and all non-enemy military and civil persons, who by any means, overtly or in a concealed way, gave economical, intellectual or other assistance to the enemy, as well as enemy-nationals who committed crimes or were made prisoner on the own territory of an Allied State (also here military as well as civil persons) will have to be brought for trial before the national judges of that territory. Military persons in general before the ordinary Courts Martial, and civilians, and military persons in more difficult cases, according to the direction of the Public Prosecutor, before a mixed civilian-military Court of that country, which will have the same competency as a Court Martial but with more juridical schooling and experience, and without appeal. This gives the advantage of a quick and speedy hearing; but at the same time the certainty of the conscientiousness and justice required and of the maintenance of the highest principles of a fair jurisdiction.

International

A b. There remain to be tried internationally:

1. enemy civilian and military persons who committed crimes on more than one national territory;
2. enemy civilian and military persons who have to be extradited.

As to the more normal and less complicated crimes of such military persons I suggest that mixed, i.e. inter-allied courts martial be competent, judging each case on the base of the law of the country where each respective crime has been committed. As to the more complicated crimes of such military persons, and the crimes of civilians, an Interallied High Court of Justice (at the same time for military and civilian cases) will have to be competent. The Public Prosecutor of that Court may judge which cases against military persons he wants to bring before that Court, and the competence of his Court will prevail on that of all other Courts. This Court will have to be composed of Allied Judges, and have a great many Chambers (Departments) with Vice-Presidents, having a complete command of the language of the country of the criminals who are being brought before him.

LUXEMBOURG

The Committee should deal with:

- i. Crimes committed by members of Enemy Forces:
 - (a) upon the persons of members of Allied Forces anywhere;
 - (b) upon the persons of Civilians in Allied Countries or elsewhere;
 - (c) in relation to Allied State Property;
 - (d) in relation to the Private Property of members of Allied Forces or of Allied Civilians;
 - (e) at sea;
 - (f) from the air;
- ii. Crimes committed by Enemy Police and other civilian authorities or individual enemy civilians in the cases a-d, above mentioned.

NORWAY

(i) (a) Yes.

(b) It is suggested that the Committee should deal with crimes committed by members of enemy forces upon the persons of civilians wherever they are committed, except when committed inside enemy territory upon the persons of enemy subjects.

(c) Yes.

(d) Crimes in relation to Private Property, except when this belongs to enemy subjects.

(e) Yes.

(f) Yes.

(ii) Yes

(iii) It is suggested that the Committee should discuss these cases, but it may be found expedient to have them treated in a special way. It is submitted that it might be desirable also to discuss the procedure to be adopted in cases of crimes committed by members of the Allied Forces.

POLAND

The Committee should deal with all the crimes enumerated i, ii, and iii, since all of them in fact fall into the category of crimes which concern our Committee.

JUGOSLAVIA

Ad.1. In my opinion the Committee should deal with the following war crimes.

As proposed in the questionnaire.

Ad.b. Upon the civilian persons of Allied nationality anywhere.

Ad.c. As proposed in the questionnaire.

Ad.d. In relation to the private property of members of the Allied forces and Allied civilians.

Ad.e. As proposed in the Questionnaire.

Ad.f. As proposed in the questionnaire.

Ad.11. Crimes committed both by the enemy police and other civilian authorities.

Ad.111. In my opinion such trial should be left to the exclusive competency of the respective countries.

B

BELGIUM

- (1) Technically war operations began with the invasion of Poland. It would however seem unjust not to recognize that, apart from the technical stamp, the German invasion and occupation of Czechoslovakia in excess of the terms agreed upon was analogous to a war operation and enemy occupation. There would I think be narrowness and injustice in excluding them on principle.
- (2) Is that not enough?

CZECHOSLOVAKIA

(See Memorandum already circulated)

We must start from the assumption that it is necessary to limit as far as possible the scope of international jurisdiction. Cases that can be prosecuted by domestic courts and according to domestic law should be excluded. Thus it can be assumed that the most important basis for jurisdiction over pre-war crimes is the criminal law of the country concerned.

As far as crimes which do not come under the national jurisdiction are concerned we must realise that the Hague convention - being only a codification of customary law - is very incomplete from the point of view of criminal law. *Stricto iure* it cannot be considered as a basis for the punishment of war criminals which would exclude objections based on the principle "*nullum crimen sine lege*". Consequently it is obvious that it will be necessary to accept retro-active provisions of a criminal character. On the other hand the basis for the prosecution of war criminals and the punishment of war crimes must be broader. This, in my opinion, again will have to be founded on international customary law and it will be the duty of the Committee to contribute by its work to a new codification of these principles which at present are recognized by all the civilized states of the world. To accept the Hague Convention as the sole basis for the punishment of war crimes would

be a very incomplete attempt at the solution of a problem which must be dealt with more thoroughly and with a certain amount of vision as to the future development of international law.

FRANCE

A notre avis l'enquête de la Commission ne devrait pas se borner aux crimes commis depuis l'invasion de la Pologne, mais ses investigations devraient commencer à partir de l'occupation de l'Autriche ou au moins de la Tchéco-Slovaquie.

Il serait souhaitable, à notre avis, que la Commission adoptât le principe que le Reich se trouve virtuellement en guerre contre le monde civilisé depuis l'avènement du national-socialisme. Les Allemands eux-mêmes ont d'ailleurs défini la situation consécutive à cet événement comme la période de la "guerre blanche". Il semble au surplus confirmé par l'expérience récente que l'emploi effectif de la violence n'est pas une condition essentielle pour qu'il y ait "guerre" au sens donné à ce mot par la littérature et la pratique allemande. Les armes ne sont, selon cette conception, que le dernier moyen utilisé, lorsque les autres - terreur, propagande, menaces, etc. - ne produisent pas l'effet souhaité. Ainsi l'occupation de l'Autriche, du pays sudète, de la Tchéco-Slovaquie, de l'Albanie, de Mémel, etc, sont de véritables actes de guerre, leur but évident étant, de permettre aux armées allemandes de partir à l'assaut des positions principales alliées d'un glacis avancé leur assurant une position stratégique favorable.

Que les Alliés aient sanctionné au moins tacitement et un apparence une partie de ces actes ne change rien à cet état de choses, car n'étant pas préparés pour la guerre par les armes, ils étaient justifiés à surseoir temporairement à l'exécution de leur devoir, résultant du droit des gens nouveau établi depuis 1918, et qui consiste à s'opposer à toute modification violente du statu quo et le cas échéant à le rétablir.

Considérée sous cet angle, l'occupation de l'Autriche, de la Tchéco-Slovaquie etc, doit être envisagée comme l'occupation

temporaire d'un pays en guerre par les forces ennemies. Les actes commis par la puissance occupante et par ses ressortissants devront donc être jugés selon les conventions internationales relatives à l'état de guerre et, le cas échéant, selon les règles nouvelles adoptées par les Alliés.

La répression des crimes commis avant le début de la guerre par les armes se justifie par la définition de la "guerre blanche" indiquée plus haut. Les Alliés ne pourront cependant pas juger les crimes commis par les autorités allemandes sur le territoire allemand, sauf si la victime est un ressortissant allié ou neutre.

GREECE

The inquiry of the Committee should be limited to acts committed since the invasion of Poland. It would be extremely difficult to apply any international or inter-allied jurisdiction to earlier acts.

HOLLAND

We have to go back in each case to the invasion of Austria. It may even be better to go still further back.

Jurisdiction then in each case can be based on the pre-war-law of the State on the territory or against the integrity of which the crime has been committed.

LUXEMBOURG

The enquiry should be limited to acts done since Munich (Sept.38). Jurisdiction can be based on the Hague and other international regulations and on Czechoslovakian law for everything which happened from Munich till the aggression on Poland.

NORWAY

It is suggested that the enquiry should be limited to acts committed since the invasion of Poland by Germany in August, 1939. The Norwegian authorities are considering a plan whereby most war crimes will have to be dealt with by the national courts of the country where the crimes were committed or whose nationals were victims of the crimes. Under this scheme only exceptional cases would have to be committed for trial by international courts.

It follows that it should not of necessity make a great deal of difference to the Czechs if the scope of the enquiry is limited as suggested. They would always be able to try crimes, committed prior to the outbreak of war, in their own national courts, where also the majority of the crimes committed after that date would have to be tried.

Furthermore, it seems natural to limit the scope of the enquiry to war crimes and this term cannot, in its technical sense, easily be construed as also covering crimes committed prior to the outbreak of hostilities.

POLAND

I would suggest the following point of view.

Considering that Hitler has provoked the outbreak of the war, and that this war was carefully prepared in Germany since he took over power, and that therefore from the very beginning Hitler's intention was to invade and conquer other States, and his whole policy was aimed at this, -- it seems right to start the enquiry from the time Hitler took over the leadership of Germany, i.e. from 1933.

JUGOSLAVIA

In my opinion the enquiries of the Committee should start with the occupation of Czechoslovakia, as I consider that in this case as well, the relevant facts are of such a nature that as here also the same rule should be taken as in the case of other occupied countries.

C

BELGIUM

This is one of the most important and complicated questions our Committee will have to enquire into. There is no hope of answering it satisfactorily in a reply to a questionnaire to be returned within a fortnight's time.

As provisional short answers to the questionnaire I think

1°) that the military law of the Allied States could only, by its nature, be of very limited application indeed to non-nationals. One may, however, draw attention to Art.13, 14 and 15 of the Belgian Statute of June 15th, 1899 comprising Title I of the Code of Military Penal procedure.

2°) that most of the ordinary criminal law of the Allied States within the territory of which offences have been committed could be applied whenever the acts incriminated are not covered by the laws of war, irrespective of whether the authors are soldiers, officials or civilians. There may be murder, manslaughter, robbery, theft, rape, etc...etc... committed by soldiers, police or other officials, or civilians, whenever a) the elements of these crimes or offences are present and b) no justification is given by the existing laws of war or of occupation.

Members of armed forces, insofar as they act in excess or in violation of the laws of war, and authorities insofar as they act in excess or in violation of the international rules of occupatio bellica, might thus be visited as ordinary offenders according to the laws in force in the territory where the offence is committed.

3°) that a number of offences may be deduced from the provisions of international conventions, but they mostly are not described with any precision as individual offences or are not made punishable by the said conventions. It might be an important part of the task to be assumed by this Committee to work out the data of international conventions and customs into a body of descriptive international penal law, and to see how far ordinary penal laws

could then supply the lack of penal sanction and how far it would be necessary to resort to new legislation or conventions to that effect. The principles of non-retroactivity and of nulla poena sine lege will have to be taken into account in this respect.

I should like to suggest as a practical method that expert members of our Committee who are not already overburdened with official work should be entrusted with the preparation of preliminary memoranda to serve as basis for discussions on the following subjects:

- 1) to what offences, (described under A) and under what conditions can the military laws of the Allied States be applied? N.B. This enquiry would in fact be one of comparative law.
- 2) to what offences (described under A) and under what conditions can the ordinary criminal law of the Allied States be applied?
- 3) what offences can be deduced from existing international law, as it is recognised by the Allied States and the enemy States? Is there any provision for their punishment? What provision could be made for their punishment?

(iv) Depends on the case.

CZECHOSLOVAKIA (i.ii.) In cases subjected to municipal jurisdiction municipal law will determine whether military or ordinary criminal law will be adopted. According to Czechoslovak law the Military Code can be applied only to members of the Czechoslovak army or such persons as are under its protection, such as for instance prisoners of war (§128 of the law for the Defence of the State). Only by a special act of the Government can certain crimes of civilians come under the jurisdiction of military courts. Thus, it can be assumed that in most cases ordinary criminal law will be applied. Taking into account the experience of the last peace settlement it will be necessary for all Allied Governments to find a common attitude to this problem.

(iii) There is no doubt that the Hague Convention IV and other international instruments such as the Gas Protocol of 1925 etc. will have to be the basis for the prosecution of those crimes which will be subjected to international jurisdiction. As it was pointed out, however, it will be necessary to supplement the provisions of the Hague Convention by sanctions and provisions concerning procedure.

(iv) Where the victims belong to two or more Allied states provisions of the newly created international criminal law will be applied.

FRANCE

Il est vraisemblable que les crimes dont la Commission étudie la répression ont été définis, soit par une des conventions internationales conclues avant et depuis 1914/18, et dont l'Allemagne fut co-signataire, soit par les principes régissant le droit pénal de tous les pays civilisés. -

Il nous semble souhaitable de prendre ces textes et ces principes comme point de départ pour la codification d'un droit pénal international, applicable aux crimes de guerre. Il s'agirait d'interpréter ces textes et principes, et, le cas échéant d'élargir leur portée par voie d'interprétation à la lumière de l'expérience de la guerre totale.

Au point de vue juridique ce procédé semble correct. Il ne viole pas le principe de la non rétroactivité des lois pénales, car le nouveau code serait basé sur des textes existants et des principes universellement admis, même en Allemagne avant, et en grande partie même après l'avènement de l'hitlérisme. Il permet d'autre part de donner aux juges des indications précises sur les faits constitutifs des infractions; il facilite l'unité de jurisprudence tant au point de vue de l'incrimination qu'au point de vue de la peine.

Ce procédé ne conférerait pas à l'action des alliés le caractère odieux qui s'attache aux actes unilatéraux, surtout lorsque

l'autorité dont ils émanent est à la fois juge et partie. Si la solution que nous préconisons était adoptée, les questions posées sous (i) - (iii) ne nécessiteraient pas une réponse spécifique. Tous les crimes visés par le questionnaire seraient, en effet, classés par le code international.

Dans le cas contraire, il nous semblerait opportun d'établir la classification suivante:

- a) Le code de justice militaire de l'Etat allié, duquel relève la victime ou les biens détruits ou endommagés, serait appliqué dans les cas prévus sous A. (i) a - f.
- b) Le droit commun serait appliqué pour les crimes de droit commun commis par l'ennemi.
- c) Le code de justice militaire serait appliqué pour les crimes prévus sous A. (ii), sauf s'il s'agit de crimes de droit commun.
- d) Les conventions internationales énumérées sous C. (iii) seraient appliquées là où il y a violation de ces conventions, sauf si le crime tombe sous le coup du code de justice militaire du pays de la victime. Dans ce cas ce dernier devrait être appliqué.

C.(iv). Au cas où la victime de l'infraction a plusieurs nationalités, la loi de l'Etat édictant la peine la plus légère devrait être appliquée.

GREECE

The military and/or the ordinary criminal law of the Allied State to which the victim or the property belongs should be adopted in each of the categories according to the case or to the desires of each Allied State.

A special penal code, to be drafted, should apply in cases where the victims belong to two or more Allied States or where the crime is not envisaged by the *lex loci delictus*. This Code should not only supplement the International Agreements such as the Hague Regulations etc., where these are deficient, but also provide for any war crime.

HOLLAND

- My exposition sub A a) helps to answer these questions.
To non-enemy-nationals belonging to a certain allied State, and to enemy military or civilian persons made prisoner on the territory of that state the laws, I, II and III apply according to the rulings of that State.

Ad IV a special regulation will be necessary on the basis of what has been said about it sub A-a. A solution might form the hearing before a mixed allied Court Martial or an international Court according to the laws of the State where or against which the crimes inflicted with the heaviest punishment, would have been committed.

LUXEMBOURG

i. Crimes committed by members of Enemy forces (a-f)

The provisions of the regulations concerned with the laws and customs of war annexed to the Hague Convention IV ("Hague Regulations") and the other international instruments such as the Gas Protocol of 1925, the Geneva Conventions of 1929 concerning sick and wounded and prisoners of war, the London Protocol of 1926 relating to operations by submarines etc. have to be considered only as laying down general principles of the signatory powers which thus drew up unmistakably the broad lines of the then lawful warfare and the cases enumerated by them are only instances and do in no way eliminate other more or less similar cases, which occurred subsequently and which had they been known would figure evidently in the enunciative enumeration.

The penalties of the military law of the allied nation concerned have to be applied. If no military law exists or does not provide a penalty for the crime, the ordinary penal law shall be applied.

ii. Crimes committed by Enemy Police and other civilian authorities or individual enemy civilians in the cases a-d above mentioned, shall be dealt with according to ordinary criminal law of the Allied State on whose territory the crime has been committed and by the German penal law, existing on January the 1st 1933, if the crime has been committed in Germany.

iii. If the victims belong to two or more allied states the "Parquet International" shall hand the case over to the nation on whose territory the most important crime has been committed and shall join the other cases, to be taken into account at the same trial.

If the crimes have all been committed in Germany the International Court shall try the case and apply German law as it was in force on the 1st of January 1933.

NORWAY

(i) Various crimes committed in the theatre of war, such as cruelty to prisoners of war, sick and wounded, bombing of hospitals and hospital ships, looting, wilful destruction, without necessity, of private or public property such as bombing of open towns, abuse of the flag of truce, abuse of the Geneva cross or similar signs, use of poison gas or other methods of warfare forbidden by international agreement, the murder of soldiers who have surrendered and are unable to defend themselves.

According to Norwegian law, even when such crimes have been committed by civilians, so long as they have been committed in the theatre of war they can be tried by military courts.

(ii) All crimes to which the military law of the state concerned cannot be applied.

Accepted principles of public international law will have to be taken into consideration in connection with offences under (i) and (ii) as exonerating persons for actions which are generally considered as permitted for members of an armed force in the course of operations of war.

(iii) These Regulations may be used on condition that they are already incorporated in a penal law which is applicable to the case concerned. Otherwise, their chief importance will be that of modifying the application of the ordinary criminal law as mentioned under (ii).

(iv) When nationals of more than one country are affected by crimes committed by one person, in the ordinary way he should be

tried by the courts of the various countries concerned in turn; their different systems of law being applied.

In such cases it might be expedient to bring the various judgments finally before an international criminal court in order that they may be consolidated in one sentence.

Certain crimes have taken effect in several countries as a result of a centralized plan relating to the conquest or occupation of Allied countries. It is suggested that crimes of this order should be prosecuted before an international criminal court.

An international authority would have to decide which cases are of a character to warrant their being committed for trial before an international criminal court and would also have to decide in which of the Allied countries concerned the trial should be held, the laws of that country then being applied. In some cases it might be expedient if the tribunal were able to divide a case and have different items tried in different countries.

POLAND

It seems to me that in principle the crimes committed in occupied countries should be considered from the standpoint of both the military and the ordinary criminal law of the respective country. The international rules /conventions etc./ should supply the answer to the question whether or not the illegality of the respective act is excluded. In other words, whether, according to these rules, the respective act, illegal by its nature, could be justified in view of the exceptional conditions or circumstances.

Where the victims belong to two or more Allied States, I should like to see the establishment of an international jurisdiction. Such a court would judge the particular crimes from the standpoint of the law of the respective country and then apply a punishment according to the system of accumulation or absorption.

JUGOSLAVIA

In my opinion regarding the importance of reaching a common view, the present stage of Committee work is not yet of such a nature that even now my statement on questions raised here should be recommendable.

D

BELGIUM

Offences committed within the territory of a State might of course be tried by the municipal criminal courts of that State, in so far as this would result 1) from the application of their national law and 2) from the lack of justification by existing international law. The appreciation of 2) should not, however, be lightly left to national judges little conversant with the arcana of international law.

In fact though the jurisdiction of municipal courts appears to possess many practical advantages at first sight, I am strongly inclined to look upon them as "pis-aller". I am very much afraid that divergent appreciations of the international standard, diversity in measuring punishment and differences of procedure, would soon lead to a state of things which might easily be abused as chaos and injustice. Against abuse rooted in feelings legal principles and technicalities will appear unconvincing. It will always be easy to oppose one decision to another and to suggest injustice, or complacency, or revengefulness or other dark motives whenever technical differences, for which the public have no understanding, lead to strikingly different results. Nor can one overlook the fact that the trend of political thought in different countries may well lead to very divergent attitudes.

For all that depends wholly or in part on appreciation of international law, I am definitely in favour of international courts. The tragedy of international law has been its dependence on national opinions.

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For all that depends wholly or in part on appreciation of international law, I am definitely in favour of international courts. The tragedy of international law has been its dependence on national exponents.

We must I think be very clear about this: it is indeed worth our while striving for an organisation of international penal justice that would deter from the repetition of numberless cruelties and illegalities in future conflicts but it is worse than worthless to lend the name of justice to what might amount to ad hoc revenge, or again complacency. For that could become a precedent and later lead to even greater barbarity and lawlessness.

I should count it a great gain to create a permanent organisation of international penal justice, even if it were not available in time for repressing many crimes which have been committed, while I should count it a grievous loss if the present punishment of so many crimes were secured only by foregoing a permanent organization based on sound principles of justice. Our aim must not be to canalize impulses of revenge along patterns of legality, but to co-operate for the organisation of a better world.

That is why I am less afraid of the practical difficulties of organizing international courts than of the difficulty of ensuring international right and justice by resorting to national courts, - courts, it must be remembered which in several countries are not composed only of judges, but of juries.

CZECHOSLOVAKIA

(1) According to what has been said above it would be necessary to resort to existing tribunals as far as they have jurisdiction. As far as Czechoslovakia is concerned the jurisdiction of ordinary criminal Courts would be excluded in cases concerning crimes committed by foreigners against Czechoslovak citizens on foreign territory - (See annex B). Thus it would be possible to deal with the majority of crimes committed by enemy persons and their adherents.

The residue of crimes over which the above-mentioned courts would not have jurisdiction would be dealt with by the international court, which would be competent for:

1. Cases where victims belong to two or more Allied States;
2. Crimes of an international character which exceed the limits of the individual states;
3. Cases which do not come under national jurisdiction.

(ii) The jurisdiction of an international criminal court should be limited as far as possible.

FRANCE.

Il paraît certain que les tribunaux de droit commun ou les tribunaux militaires des alliés seront compétents pour juger la plupart des crimes commis par l'ennemi sur leurs territoires respectifs, sauf la question de l'exterritorialité des armées.

Il nous semble cependant préférable d'établir une juridiction internationale, compétente pour juger tous les crimes envisagés, sauf les crimes de droit commun. Il s'agit en effet de crimes politiques ou de crimes commis dans l'intérêt d'une politique déterminée.

Si on laisse le soin exclusif de juger ces crimes aux tribunaux de droit commun ou militaires de chaque Etat allié, leur répression perdra aux yeux des ressortissants ennemis le caractère de sérénité et d'équité indispensable.

Un tribunal international, ayant des Chambres siégeant dans chaque pays allié, composés de juristes réputés pour leur indépendance et leur intégrité aurait plus d'autorité que les tribunaux de droit commun des Alliés. -

Une telle solution éviterait aussi la question de la compétence des divers tribunaux alliés souvent difficile à résoudre.

Pour assurer une procédure assez rapide, il conviendra de prévoir un nombre suffisant de ces tribunaux pour chaque pays allié.

Il semble souhaitable de prévoir une Cour Suprême qui jugerait en appel et dernier ressort, dans des cas spécifiquement déterminés.

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GREECE

The Tribunals and the procedure should be as follows:

I. The existing ordinary military and/or municipal Courts of each individual Allied State should deal with all cases over which they would ordinarily have jurisdiction.

II. A special Inter-Allied Court, should be created, to have jurisdiction over cases in which the Courts of the Allied States would have no competence and over cases where the accused might have committed crimes on territories of two or more Allied States.

The procedure of this Inter-Allied Court should be determined by an Inter-Allied Agreement. The Court should have as many sections sitting as circumstances may require.

The setting-up of the Inter-Allied Court, its procedure and the Penal Code to be applied should be made known universally with the minimum of delay.

This system, although a composite one, presents the following advantages:

a). Through the exercising of the competence of the Courts of each of the Allied States deviation from the canon of law "nullum crimen nulla poena sine lege" is limited to a minimum, while at the same time the swiftest possible meting out of justice is ensured through a distribution of the work among a large number of Courts.

b). The setting-up of an Inter-Allied Court ensures the punishment of such crimes also as do not come within the competence of the courts of the Allied States. Thus one of the indispensable elements of Justice, the element of equality, is not lost.

The setting-up of an International Penal Court does not appear to be possible. For the Court to be substantially international it would have to be composed of Judges not only of Allied, but of neutral and even of enemy nationality.

Even if other difficulties were not encountered, the mere convening of such a court would involve the loss of much time, and would thus cause the total failure of the work of Justice.

HOLLAND

This question has already been answered sub A a).

LUXEMBOURG

i. We shall resort to existing tribunals so far as they have jurisdiction.

ii. We shall create a special International Court to deal with the residue of crimes over which the above-mentioned courts would not have jurisdiction.

This International Court would consist of two branches:

1. A "Parquet Général" to whom shall be referred all cases called "residue of crimes".

This "Parquet Général" shall decide:

- (a) whether the crimes are important enough to be tried (de minimis non curst praetor).
- (b) to trace and arrest all persons charged with war crimes, wherever they may be, whether in enemy or in allied territories, with the help of the allied countries and the allied occupying forces.
- (c) to collect the different charges against each individual.
- (d) to refer the accused to the competent tribunal either national or international.

2. An International Court which sets up the international tribunals in Germany or wherever an international tribunal is required.

NORWAY

(1) As far as Norwegian law is concerned, the military courts and the ordinary municipal courts would have adequate jurisdiction to deal with the majority of crimes committed by enemy persons and their adherents.

As suggested previously, it may be expedient to create an international criminal court to deal with special kinds of graver crimes, but the jurisdiction of an international court would also be limited by the penal provisions available.

(ii) See B, C (iv) and D (i).

POLAND

With regard to the tribunals, it seems to me that it would be advisable to adopt as a principle *n a t i o n a l* jurisdiction. Perhaps it would also be advisable to establish special courts with a full guarantee of conscientiousness and impartiality. I see no objections to observers from neutral countries at such courts.

International jurisdiction should be established for special cases where justified by exceptional circumstances.

E.g. for persons responsible for the behaviour of the occupying forces, authoritative bodies or their members, crimes committed by the same person in different countries, when extradition is needed /from a neutral country/, etc.

Such a court should be composed of Allied and neutral nationals.

JUGOSLAVIA

In my opinion regarding the importance of reaching a common view, the present stage of Committee work is not yet of such a nature that even now my statement on questions raised here should be recommendable.

E

BELGIUM

International courts should, in my opinion, consist as far as possible of Allied, neutral and enemy judges.

The prospect of constitution within a reasonable time depends a) on the quality and speed of expert work, such as ours, b) on the will of the Allied Governments.

I must repeat here what I have written above under D: "I should count it a great gain to create a permanent organization of international penal justice, even if it were not available in time for repressing many crimes which have been committed, while I should count it a grievous loss if the present punishment of so many crimes were secured only by foregoing a permanent organization based on sound principles of justice".

In fact, it depends on our Governments and ourselves that there should be no such dilemma.

Cannot say now. Will surely largely depend on the quality of the scheme.

CZECHOSLOVAKIA

(i,ii,iii,iv) An international criminal court should consist of Allied and neutral nationals, but the number of the representatives of the neutral countries should be strictly limited. If an international agreement concerning the creation of an international criminal court were concluded already now or at least before the Armistice and if this court were limited to a small number of crimes there would be a fair prospect of its being constituted within a reasonable time after the cessation of hostilities.

(v) The question of the participation of neutral Governments in the international criminal court is primarily of a political character and depends upon the political situation at the end of the war.

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FRANCE

La solution idéale serait de composer ces tribunaux de membres alliés ou neutres et ennemis; mais il est probable que les neutres s'il en existe, ne permettront pas à leurs nationaux de siéger à un tel tribunal et que les sujets ennemis s'y refuseront.

Il faudra donc constituer ces tribunaux avec des ressortissants alliés, en prenant soin de choisir des magistrats réputés pour leur grand savoir et leur impartialité. Il serait bon de constituer dès maintenant au moins un de ces tribunaux pour chaque pays allié.

GREECE

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HOLLAND

The tribunal must be composed of Allies only, as the value of so-called neutrality has become minimal.

The view given by your sub F however can be an excellent corrective. Moreover the Vice-Presidents, and, if possible, also all other Judges, must have a complete command of the language of the persons to be tried. The proceedings must be in the latter's language, and he must have a Counsel, at his free option, from his own or another country.

LUXEMBOURG

The judges of each International Court shall consist of a President, allied but not of the nationality of the criminal and of the victims - a judge of the nationality of the victim and a judge of the nationality of the criminal. If no judge of the nationality of the criminal is available a neutral or another allied judge shall be chosen.

The court shall be created now on the broad outlines and shall be working now

Its creation and functions have to be recognized in the armistice terms by the vanquished.

NORWAY

- (i) No.
- (ii) Yes.
- (iii) Yes, if possible.
- (iv) Should not be impossible.
- (v) After victory it should not be difficult for neutral governments to allow their nationals to take part.

POLAND

YUGOSLAVIA

In my opinion for the authority of the International Court which is mentioned here, it would be enough if such a court is composed exclusively of the Allied nationals. I would not be against admitting into this Court neutral nationals as well, but there is the danger that the neutral Governments would not allow their nationals to take part in such a Court within a reasonable time after the cessation of hostilities, and for the validity of the trials of war-crimes, the promptness of the proceedings is of a vital nature.

F

BELGIUM

I think it would be most dangerous, especially in the case of municipal courts. Neutral observers would not be conversant with the national laws and procedure and would not have studied the files. Besides, who could choose them? and probe their neutrality?

To be at the mercy of reporters is bad enough.

CZECHOSLOVAKIA

In my opinion it would be advisable to invite neutral nationals to attend Allied courts as observers.

FRANCE

Nous recommandons l'adoption de cette solution, sous réserve du problème général de la neutralité.

GREECE

There is no objection to inviting neutrals to attend Allied Courts as observers.

HOLLAND

- - -

LUXEMBOURG

As the neutrals remained outside the struggle, they should now not be admitted as observers. Naturally an opportunity should be given to the representatives of the world press and full publicity should be given of all the trials.

NORWAY

If it is not possible to obtain neutral nationals as judges, this procedure might be the next best.

POLAND

As I have already mentioned, I see no difficulties in inviting neutral nationals as observers in Allied courts.

JUGOSLAVIA

In my opinion the Allies have no particular reason not to widen the publicity of the proceedings by inviting neutral nationals to attend Allied Courts as observers.

G

BELGIUM

The prosecution should in my opinion be conducted by an international agency. Reasons analogous to those mentioned under D.

CZECHOSLOVAKIA

The prosecution should be conducted through the office of the General Prosecutor of the international criminal court. The nomination of more prosecutors could be taken into consideration so that in individual cases the Prosecutor would be a national of the state against whom or against whose subjects the war crime has been committed.

FRANCE

L'autorité judiciaire de l'Etat sur le territoire duquel le crime a été commis, ou, en cas d'impossibilité d'action ou de carence de ce dernier, du l'Etat contre les ressortissants duquel le crime a été commis. La compétence concurrente n'est pas exclue, si un organisme international approprié, peut régler les conflits positifs ou négatifs de compétence.

GREECE

In the case of proceedings instituted by Allied Courts the prosecution should be conducted and the evidence produced by the authorised prosecutor of each individual State. The same authority should be responsible for the custody of the accused pending trial and for their punishment on conviction.

In the case of proceedings instituted before the Inter-Allied Court the prosecution should be conducted and the evidence produced by a special prosecuting authority to be instituted by the Court.

The State in whose territory the trial takes place should be responsible for the custody of the accused pending trial and for their punishment on conviction.

HOLLAND

If the special allied State deals with the case, the Prosecutor of the Court which was declared competent by that State.

If an inter-allied Court Martial deals with the case, the Prosecutor of that Court Martial; in this case the authorities of the country where this Court Martial operates and of the criminal's country of origin have to give him every collaboration possible directly, and have to obey his orders.

LUXEMBOURG

An inter-allied authority should conduct the prosecution and produce evidence, with the assistance of the countries concerned. This would be the "Parquet Général International" for all crimes called residue of crimes.

NORWAY

When a case is tried before a national court of one of the Allies, the accused would be prosecuted by the officers who normally act and it would rest with them to produce the evidence.

When a case is tried before an international court an international authority must conduct the prosecution and produce the evidence. The organization of this authority would be a vitally important matter.

POLAND

In cases where national courts are competent, which I suggest should be the rule, national authorities should conduct the prosecution and produce the evidence. Only where international court is competent, should there be an international authority for these purposes.

JUGOSLAVIA

In my opinion this should be the State to which the injured person or property belongs.

H

BELGIUM

Does not that amount to asking where the court will sit?

CZECHOSLOVAKIA

This question can be solved only in connection with the problem of the future organization of peace. If there is an institution - similar to the League of Nations - which has its own territory the custody of the accused pending trial, and the punishment of those convicted should belong to its duties. Otherwise, the states against whom or against whose nationals war crimes had been committed would have to provide for custody of the accused pending trial, and the punishment of those convicted. In this case it would be necessary to provide for international control of the individual states.

FRANCE

L'Etat sur le territoire duquel l'accusé aura été appréhendé, sauf s'il s'agit de l'Allemagne et de ses alliés ou associés. Dans ce cas l'accusé serait livré à l'Etat allié sur le territoire duquel le prétendu crime a été commis. L'exécution de la peine infligée aux accusés sera confiée au pays où siège le tribunal ayant prononcé la condamnation.

GREECE

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The State in whose territory the trial takes place should be responsible for the custody of the accused pending trial and for their punishment on conviction.

HOLLAND

The special allied state, c.q. the combined allied States.

LUXEMBOURG

The State whose national has been the victim of the crime or against whose national the most important crime has been committed. International supervision shall operate for the benefit of those condemned to terms of imprisonment.

NORWAY

The proper authorities of the country where the accused is arrested or to which he has been handed over should be responsible for him pending trial.

In the ordinary way the punishment of the convicted person should be executed in the country where the sentence is passed. The serving of a sentence or execution should take place in accordance with the law of that country.

Exceptions would have to be made when sentences have been imposed by an international court. In such cases the ordinary rules relating to reprieves and pardons will not be applicable.

POLAND

The State in which the case is tried /granting that the wrongdoer has been handed over to the authorities of this State before trial./

JUGOSLAVIA

In my opinion this should be the State, mentioned above under G.

I

BELGIUM

Undoubtedly, provided the organization for prosecution and trying is ready.

CZECHOSLOVAKIA

The Allied Powers should be urged to stipulate already in the Armistice terms for the handing over of alleged criminals.

FRANCE

Nous répondrons affirmativement à cette question, et nous suggérons de stipuler dans la convention d'armistice le droit pour les forces de police alliées de rechercher et d'arrêter sur le territoire ennemi les personnes incriminées et de requérir à cet effet la collaboration des autorités locales, collaboration qui ne pourra être refusée sous aucun prétexte. Toutes les archives publiques ou privées doivent être ouvertes aux magistrats enquêteurs sur le territoire de l'Allemagne et de ses associés ainsi, peut-être, que dans les ambassades, légations et consulats de ces pays.

GREECE

The Allied Powers should be urged to stipulate in the terms of the Armistice:

- 1) For the handing over of alleged criminals.
- 2) For the recognition of the exclusion or limitation of the defence of superior orders.
- 3) For the recognition of the jurisdiction of the Inter-Allied Court, to be created, and its procedure.
- 4) For the recognition of the Penal Code to be applied by the Inter-Allied Court.

HOLLAND

Yes.

LUXEMBOURG

No. The Allied Powers shall make it a condition in the Armistice Terms that they have the right to arrest the alleged criminals through their own power, and they shall ask in this connection for the assistance of the vanquished Germans (for what it is worth).

NORWAY

Yes.

POLAND

Yes, I consider such a stipulation an essential condition of the administration of justice for the crimes in question.

JUGOSLAVIA

In my opinion the Allied Powers should be urged as proposed.

J

BELGIUM

The Allied Governments should be recommended to warn neutral countries to take care not to admit persons suspected of having committed offences arising out or incidental to the war and to expel those who enter unlawfully. This will be in the interest of the neutral countries which will otherwise incur much wrath and resentment.

The question of extradition would, in my opinion, be a fit subject for a preliminary study by an expert, to serve as a basis for our discussions.

CZECHOSLOVAKIA

The Allied Governments should warn neutral countries to take care not to admit any persons suspected of having committed any offences arising out of and incidental to the war, and to expel those who enter unlawfully.

FRANCE

Les Alliés devraient faire aux neutres la recommandation esquisée. Au cas où le neutre refuserait d'accéder à la demande d'extradition, aucune sanction ne semble possible, le droit d'asile devant être respecté. On devrait cependant prévoir une "période suspecte". L'Etat neutre de refuge ne pourrait plus se prévaloir de son droit de donner asile aux coupables de guerre qui se seraient réfugiés sur son territoire à la dernière minute ou même pendant la période où l'ennemi aura continué de combattre alors qu'il était déjà visiblement battu.

Les Puissances alliées pourraient le moment venu annoncer leur intention, et inviter les neutres dans les termes appropriés sinon à livrer les réfugiés du moins à les refouler. Au cas où un neutre refuserait obstinément, une fois l'armistice intervenue, soit de refouler soit de livrer un réfugié prévenue d'avoir commis un crime de guerre, les nations unies seraient fondées à lui appliquer des sanctions économiques ou financières décidées au cours d'une conférence réunie à cet effet.

On pourrait envisager de faire remonter la "periode suspects" à trois mois avant la date de l'armistice.

GREECE

The Allied Governments should warn neutral countries both to be careful not to admit persons suspected of having committed offences arising out of, and incidental to the war and also to expel those who enter their territories illegally. It is to be expected that at the end of this war the few countries which will have remained out of the war will be well aware that this fact is attributable neither to the value of the principle of neutrality nor to the sanctity of treaties, nor even to sentimental feelings on the part of the enemy, but to strategical considerations alone. They should therefore, be willing to be helpful in forwarding the cause of justice which aims at the purposes set out above.

HOLLAND

The means indicated forms a good solution.

LUXEMBOURG

We shall recommend the Allied Governments to warn neutral countries to take care not to admit any persons suspected of having committed any offences arising out of and incidental to the war and to expel those who enter unlawfully. We shall even oblige them by agreements or compel them to do so, by taking appropriate economic measures, should the recommendation have no success.

NORWAY

It is considered highly desirable that neutral countries should be warned not to admit such persons and to expel those who enter unlawfully.

POLAND

Two steps would be advisable for this aim.

1. To recommend the Allied Governments to warn neutral countries to take care not to admit any persons suspected of having committed any offences arising out of and incidental to the war, and to expel those who enter unlawfully.

2. Common statement of the Allied Powers that such crimes will not be considered as those excluded from extradition, therefore that the refusal of extradition for such crimes will be considered and treated as an "unfriendly" act.

JUGOSLAVIA

In my opinion it would be necessary to make the proposed recommendation to the Allied Governments.

K

BELGIUM

Two subjects too intricate for a short and general answer. There are cases in which the giving of the order will be the very crime, others in which the manner of carrying it out will alone be criminal. An expert criminalist should in my opinion be entrusted with a preliminary study of the first subject, and an internationalist with a preliminary study of the second, with a view to procuring a basis for discussion.

CZECHOSLOVAKIA

(i) In dealing with the problem of the "defence of superior orders" the extraordinary character of crimes committed during the present war, changes in the legal and moral conception of war, and the provisions of the Military Codes of the individual states must be taken into consideration. There is no doubt that all those who participated directly or indirectly in committing war crimes bear full responsibility; yet, the punishment must be in relation to the position of the person accused.

(ii) In my opinion it will be necessary in the interest of international justice and peace to subject to international criminal jurisdiction also Heads of States and other high State officials.

FRANCE

(i) L'exception de l'ordre donné semble devoir donner lieu tout au plus à des circonstances atténuantes. Il est, en effet, politiquement souhaitable de juger le plus grand nombre possible de criminels pour faire comprendre au peuple allemand la gravité des actes commis en son nom et auquel il a volontairement et sciemment participé.

(ii) L'immunité du Chef de l'Etat est une institution démocratique destinée à protéger le chef suprême de l'exécutif contre les conséquences des actes de l'administration sur laquelle il n'a pas de contrôle direct.

Dans les Etats totalitaires, où le Chef de l'Etat revendique

la responsabilité suprême et se réserve toutes les décisions importantes, où les trois pouvoirs sont réunis entre ses mains, l'immunité n'a plus de raison d'être et ne se justifie plus.

L'immunité diplomatique devra être maintenue, si, de son côté, le bénéficiaire n'en a pas violé les conditions.

GREECE

1. The plea of superior orders ought to be excluded or limited by the Armistice terms otherwise, in the majority of cases the Courts may find this plea a conclusive one, more especially where the accused are soldiers or civil servants of a low rank.

11. Immunity of the Head of a State and even more of other State Officials cannot be held a good defence,

This immunity does not exist in time of war since as is established Heads of States and Officials can be made prisoners and detained as such. (Napoleon IV, Napoleon III, King Leopold, Hess).

Moreover such immunity ceases to exist as soon as the persons concerned no longer legally hold their position.

HOLLAND

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LUXEMBOURG

1. The defence of superior order shall only be taken into account in as far as noncommissioned officers are concerned, but only to decrease their responsibility, not to avoid it.

For the commissioned officers and all civilians the superior order is no excuse for committing crimes.

11. There can be no immunity whatever for the Head of a State and for other State officials, who committed war crimes.

NORWAY

(i) A provision of the Norwegian Military Code specifies that:-

"Orders given by a superior in military matters shall exonerate the subordinate, provided that he does not exceed the order and that it has not been or ought to have been evident to him that in carrying out the order he was committing an unlawful act."

This principle is supplemented by another which can be expressed as follows:-

"An act which normally would be considered a crime may be legal when it is performed with the intention of saving a person or property which could not otherwise be saved and when the danger was such that the damage or harm it involved was far greater than that which could result from the act in question".

The above mentioned principles express a generally accepted opinion of justice in Norway.

The court will have to decide each case on its merits. It will have to ascertain whether because of his subordinate position the accused could not possibly be expected to have realized the illegality of his action, or was acting under duress or in order to avert a danger in the manner outlined in the latter of the foregoing provisions.

(ii) In peacetime immunity of heads of states and other state officials is an accepted principle of international law. However, this principle is based on considerations of expediency and courtesy vital to peaceful intercourse between nations. It is considered that the basis of this principle ceases to exist during hostilities and that it cannot be maintained during wartime for the benefit of the aggressor.

POLAND

I am in principle against the admission of such defences. Defence of superior orders could be admitted only as an exception, and if "state of necessity" is adequately proved.

JUGOSLAVIA

1. In my opinion we should find here a compromised solution, which should take into consideration the committed war-crimes, the rank of the responsible persons in the respective hierarchy, the kind of superior order.

2. In my opinion there are no reasons for a recognition of any immunity which is mentioned here.

L

BELGIUM

Yes, I think the attempt should be made, unofficially.

CZECHOSLOVAKIA

In regard to the present situation on the Continent it would be very useful if the Committee prepared a statement of the rights and duties of a military occupant in relation to the civilian inhabitants, showing the extent to which their obedience to his laws can be demanded.

FRANCE

Oui, mais étant entendu que cette étude aurait pour objet de préciser les règles du droit de l'occupation, en vigueur au moment où la guerre a commencé : et la mesure dans laquelle celles-ci ont été violées par les puissances de l'Axe.

GREECE

A statement of the rights and duties of a military occupant in regard to the civilian population would be very useful.

HOLLAND

Yes, very useful.

LUXEMBOURG

Yes, on the broad outlines.

NORWAY

It is suggested that it would be inadvisable to prepare a statement that could commit interested parties to a fixed definition of the rights of a military occupant.

POLAND

I think, yes. Such a statement would facilitate the work of the courts.

JUGOSLAVIA

In my opinion the proposed statement would be particularly helpful, and that it should be made as soon as possible.

M

BELGIUM

I agree to confine the examination to criminal acts for which responsibility can be fixed upon individuals.

CZECHOSLOVAKIA

The purpose of the Committee is to investigate the possibilities of a just punishment of war crimes. Therefore it should not deal with illegal acts by States, such as the waging of aggressive war in breach of treaty

FRANCE

Bien que cela soit délicat, il paraît essentiel qu'une Commission instituée pour étudier la répression des crimes contre l'ordre public international, examine sinon tous les actes illégaux des Etats du moins ceux qui ont constitué le déclenchement d'une guerre d'agression en violation soit d'un Pacte universel, comme le Pacte Briand-Kellogg (27 août 1928), soit de traités plurilatéraux ou bilatéraux.

GREECE

The Committee should have as its main task the investigation of criminal acts for which responsibility can be fixed upon individuals. In the second place it also should examine the question of illegal acts committed by States.

HOLLAND

For the moment yes, in a further stage no.

LUXEMBOURG

It is difficult to conceive that a State can commit an illegal act. The individuals who are directing the State are always to be held responsible for illegal Acts by the State.

NORWAY

It is considered that the examination should be confined to criminal acts for which responsibility can be fixed upon individuals.

POLAND

Yes. I am for the proposed limitation of our work.

JUGOSLAVIA

In my opinion it would be in principle advisable to deal with the illegal acts by the States, but I am afraid that the theoretical and practical discussions which are in connection with this problem, would impede the urgency of the Committee's work.

N

BELGIUM

The Belgian Government has not yet published such documents,

CZECHOSLOVAKIA

The Czechoslovak Government has published a number of books relating to crimes committed by the enemy:

Nazi Barbarism in Czechoslovakia,

German Cultural Oppression in Czechoslovakia,

Two Years of German Oppression in Czechoslovakia,

A publication relating to crimes committed during the terror régime of Heidrich will be published in the near future.

FRANCE

La France Libre réunit en ce qui concerne la France, la documentation dont il est question.

GREECE

The Greek Government has published a white Book relating to crimes committed by the enemy, and a copy is enclosed herewith.

HOLLAND

- - -

LUXEMBOURG

LUXEMBOURG has not yet done so, but is collecting evidences.

NORWAY

The Norwegian Government has not, as yet, published any document relating to crimes committed by the enemy.

POLAND

Recently there appeared a book entitled:

"The German New-Order in Poland",

which on pages 17 - 127 enumerates crimes committed by the enemy during the present war in Poland.

JUGOSLAVIA

The Yugoslav Government has published a series of documents relating to the crimes committed by the enemy. A general survey is being prepared.

C O P Y

Czechoslovak Criminal Code of 1852

Sec.36 For crimes committed abroad a Czechoslovak subject, if arrested in the act will not be extradited, but will be dealt with according to the provisions of this Code and without regard to the laws of the country in which the crime has been committed.

If however, he has already been punished abroad for the same act, the sentence imposed upon him according to the provisions of this Code should take due regard of his previous punishment.

Sentences of foreign criminal authorities are in no case to be executed in the country in question.

Crimes of Foreign Subjects Committed:

(a) Inland:

Sec. 37 For crimes committed on Czechoslovak territory sentences can be passed on foreign subjects according to the provisions of this Code.

(b) Abroad:

Sec.38 If a foreigner commits high treason in relation to the Czechoslovak state or the crime of forging securities or counterfeiting coins (Secs.106-121) he will be dealt with according to the provisions of this Code just as if he were a Czechoslovak subject.

Sec. 39 If, however, a foreign subject commits abroad other crimes than those mentioned in the above section, he will be imprisoned if arrested in the act inland; but negotiations concerning his extradition are to be entered into with the State where the crime has been committed.

INTERNATIONAL COMMISSION
FOR
PENAL RECONSTRUCTION AND DEVELOPMENT

COMMITTEE CONCERNED WITH CRIMES AGAINST INTERNATIONAL PUBLIC ORDER

COMMITTEE UPON RULES AND PROCEDURE RELATING
TO PUNISHMENT OF CRIMES COMMITTED IN THE COURSE OF
AND INCIDENTAL TO THE PRESENT WAR.

Answers to Questionnaire of 28 April, 1942

General M. de Baer, Belgium

A.

Before answering this question I would like to make a general observation: I feel that the Committee should deal with crimes committed not only by members of Enemy Forces, but by any person of whatever nation. I feel that our legal basis will be lacking in prestige and authority if it is not founded upon a high ethical standard of justice for all concerned: if we are bold enough to lay down laws we must be prepared to obey them ourselves and to see that they are obeyed by our own people as well as by the enemy. I feel moreover that by proposing legislation which is applicable only to certain categories of people (enemies) we would be adopting measures similar to those adopted in the totalitarian States. Therefore, I feel that the war crimes which we are to study should not be restricted to those committed by the enemy.

Under the benefit of this observation I am of the opinion that the crimes committed by members of Enemy Forces (litt.(i) (a) to (f)) should all be included in our study.

Concerning litt.(a) in particular, the situation will be different according to whether the crimes have been committed upon the territory of

an Allied Nation, or whether such crimes have been committed elsewhere. In the first case the *lex loci delictus* will be applicable, and will provide a satisfactory solution, in the second case there may be some difficulty, for instance if the crime has been committed upon German soil.

I foresee that benefiting by the experience of what happened after the last war (Leipzig trials) the Germans will, before their final collapse, organise their national laws in such a way that an escape will be provided for any German war criminal who has committed a war crime upon German soil. We have had a foretaste of Hitler's contempt of law in his speech of April 26th. But the end in view may be obtained even by legal methods, (e.g. by proclaiming an amnesty for war crimes) so that even German courts who would be willing to punish would have no means of punishing such criminals.

The same difficulty will exist in the cases under litt. (b).

In the cases under litt. (c) to (f) I am of the opinion that the Committee should deal with these crimes.

I also feel that, with respect to litt. (ii) crimes committed by Enemy Police or other civilian authorities should be treated in the same way, i.e. the national law (*lex loci delictus*) should be applied whenever possible. When it is not possible to apply this law, either because it is insufficient or for any other reason, I am of the opinion that the only way to ensure retribution is by means of international penal rules agreed upon by the Allied Nations, and based upon international regulations (Hague and Geneva) (see appendix on: Questions: will adequate punishment of all war criminals be procurable by the application of the penal laws of each nation?).

As to (iii) crimes committed by non-enemy nationals (such as the nationals of countries occupied by the enemy who have supported the enemy) I feel that this matter should be dealt with exclusively by the national law of the State concerned; it is up to each nation to punish its own quislings in the way it sees fit and I do not think this question should form the subject of international discussions. There are, in each national law,

sufficient provisions to deal with these traitors, and if there is not, each nation should, as soon as possible, enact the necessary laws in order to provide an adequate punishment for these people.

I have in art.5 of the Draft Convention for the Prevention and Punishment of Crimes against International Public Order, given a list of specific crimes which should be included in our study.

B

1. The first part of the question is shall we limit our enquiry to actions committed since August 1939, or shall we go further back.

I feel that although there is no legal reason to adopt the date of August 1939 it would be impractical to go further back than that date, and therefore I propose that, for all practical purposes, we limit our enquiry to the crimes committed since that date.

2. The second part of the question is the legal basis upon which jurisdiction can be founded over pre-war crimes, but for the reason which I have just given I feel it is unnecessary to examine this question.

3. Another question which is connected with this one and which is very important in my opinion is: upon what legal basis can jurisdiction over WAR CRIMES be founded except that of the State upon whose territory or against whose integrity the crime was committed.

By application of the principle nulla poena sine lege it will be necessary that such jurisdiction be based upon some legal instrument.

This instrument should be an internationally accepted convention, which should, as soon as possible, be agreed upon by the united nations, and for which the adhesion of neutrals should be sought; moreover, upon the signing of the armistice the Axis Powers should be made to accept it.

But, even so, there would always be the difficulty that a penal law does not operate retroactively. In order to overcome this difficulty, some sound pre-existing legal basis should be found.

Two legal bases could usefully be considered:

The first basis is that war crimes are in fact already included in Conventions which have been previously admitted by most countries (such as the Geneva and Hague Conventions and also the Versailles Treaty). In my opinion war crimes are not actions which were hitherto allowed and which we are now going to turn into criminal offences, but actions which have, long before this war, already been recognised as crimes by virtue of international agreements or conventions. The only element which was lacking in these conventions was the punishment. Therefore I feel that these International Conventions are legal bases upon which jurisdiction can be founded. Nevertheless although Germany is one of the signatories of these agreements it will be necessary: first to draft a precise list of the crimes which we consider as included in the provisions of the said Conventions; secondly it will be necessary, upon the signing of the armistice, that the Axis Powers should be made to admit that this list of crimes refers to crimes which have been previously recognised as such by virtue of pre-existent international agreements and that therefore punishment for these crimes will not constitute a retrospective application of penal law.

The second basis is perhaps somewhat more fragile: in all democratic countries the principle of non-retrospectivity of penal laws is recognised, but the same does not apply to some of the Axis Powers. Germany has openly repudiated this principle. According to an official document (Note addressed by the Polish Government to the Governments of Allied and Neutral Powers on May 3, 1941) the Polish Government is in possession of a large number of reports concerning retrospective application of German law on citizens of Poland: Polish citizens who, before the war, had defended the cause of their country in a sense contrary to the interests of Germany were sentenced to death. So that it seems that, if the German law and the German courts recognise this principle of retrospectivity as in harmony with their way of thinking, there is no reason why it should not be applied against them.

It would also be interesting to examine to what extent Japanese law recognises the same principle

C

I feel that wherever it is possible to apply the *lex loci delictus* this should be done, but there will be cases in which this will not be possible, and in these cases some new internationally agreed rules should be found.

In answer to the sub-sections (i) and (ii) of this question, I feel that the penal law of each State being territorial it will not be possible to apply the law of the Allied State to which the victims or the property belongs, without infringing upon the principle that a penal law is only applicable within the boundaries of its State and that the nationality of the victim is irrelevant.

As to paragraph (iii) I have already stated that, as no punishment is provided by these Regulations, they would not constitute an appropriate system of law.

As to paragraph (iv) I see no reason why, where the victims belong to two or more Allied States, the law of the country where the crime was committed should not be applied when this is possible; when this is not possible an international regulation should take the place of the national law.

As to paragraph (iv) another question arises when crimes have been committed by one person in several countries. In this case each one of the laws of the countries in which the crimes have been committed could of course be applied, but this system would be difficult to put into practice, as the accused person would have to be tried successively by courts of several countries, and in this case also I feel that international rules should take the place of the *lex loci delictus*.

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D

In answer to the first part of this question I feel that whenever the ordinary national courts (military or municipal) have adequate jurisdiction to deal with war crimes, this jurisdiction should not be interfered with. This is not because I feel that the national courts are the ideal courts to judge war crimes, but because I fear that by interfering with the jurisdiction of these courts too great opposition will be aroused. It would be difficult to obtain from the national courts that they renounce their jurisdiction in respect of crimes which have been committed upon their territory.

In my opinion however it is highly desirable to create a special court to deal with the residue of crimes over which the above mentioned courts would not have jurisdiction.

In answer to the second part of this question I would prefer, if this were possible, to create ad hoc international criminal courts to deal with all war crimes, including those committed by Allied Nationals, but excepting those committed by quislings, traitors, etc... I feel that it would be preferable if criminals against international law were dealt with by international courts: The sooner we realise the existence of an international public order, as distinct from national public order, the nearer we will be to world peace. It will be to our advantage to see that, in the future, international public order is maintained in time of peace as well as in time of war, and by acting in time against those who threaten international peace the world may be saved from another war.

I do not entertain great hopes that we will be able to obtain such agreement in the near future: in spite of the tragic experiences which the people have suffered, the world does not seem to have reached sufficient maturity to realise that concerted action, involving the curtailment of national sovereignty has become necessary in all fields, including the judicial field.

International law is still in its infancy and sadly lacks development, and although the fact that so many governments are residing in a small area and have daily contacts with each other provides us with a unique opportunity for tackling these problems by common agreement, other aims are so much more urgent that much valuable time is being lost.

Therefore I very much fear that our work will not bear fruit in the near future: it may, however, if we persevere in our efforts, exercise a preventive action in the more distant future. Prevention of war can be obtained by the adequate punishment of men who are responsible for war crimes, and of men who are responsible for the waging of war, and this will need a complete system of international justice.

In order to be able to take action, special laws (which should include punishments), special courts, a special procedure, and adequate means of executing orders of these courts should be agreed upon and instituted.

I know however, how difficult it will be to obtain the agreement of the nations to this idea because, as I have already said, national courts will not willingly consent to curtail their own jurisdiction.

But, if courts cannot be compelled to curtail their jurisdiction, a possibility must be given to them to curtail it voluntarily. In other words, in some cases, a court may not desire to judge specified criminals either for fear of political repercussion within its own country or else because it feels that the sentence might be biased. In those cases the faculty (but not the obligation) should be given to these courts to commit for trial before the international court any war criminal (or even any other criminal) in respect of which they consider such procedure advisable. This at least will be a step forward towards recognition of international criminal law. (cfr. Draft Convention for the Creation of an International Criminal Court - art.1 and 2).

E

In respect of the composition of an international criminal court I think that in the beginning the court should, if possible, consist of judges who are Allied and Neutral nationals. If this is not possible, the Court should consist of Allied nationals only.

This situation should last, in my opinion, as long as peace has not been signed. During the whole transition period between the armistice and the peace I feel that no ex-enemy nationals should be allowed to sit in these courts. On the other hand, judges of the international courts should abstain from sitting in cases in which their own nation, or a subject of their own nation is the victim, the plaintiff, or the prosecuting party.

As to the moment upon which such a court should be constituted I feel that the moment to constitute such a court is now, and as soon as possible, in order that it could begin work immediately after the signing of the armistice.

Moreover the institution of such a court should be made known to the population of the enemy and occupied countries, so that they know that justice and not revenge shall be dealt out.

As to the last part of this question I cannot say if there is any prospect of neutral governments allowing their nationals to act as judges. I do not think that countries such as Switzerland or Sweden which are immediately under the German threat, would be ready to co-operate in this line, but it is possible that this co-operation could be secured from neutral countries such as Argentina, Chili, etc....

Personally I do not think this question is very important, because it is doubtful whether at the end of this war there will be any neutrals left.

F

I have no fundamental objection against this, but I do not think it will be necessary to invite neutral nationals to attend Allied courts as observers. If the sittings of these courts are public, as I strongly feel they should be, and if justice is dealt out impartially, it is quite enough that the public and the press attend the courts.

G

1. In the case of trial before the national courts the national rules of procedure concerning prosecution and evidence should be followed, there is no reason to depart from these rules.

2. In the case of a prosecution before an international court the prosecution should be conducted as follows:

(a) where the national court had jurisdiction and has voluntarily committed the criminal for trial before the international court, the prosecution should be conducted by the State to which the national court belongs;

(b) where no national court had jurisdiction the prosecution before the international court should be conducted by an international prosecutor, comparable to the "Procureur Général" to the mixed Court of Egypt. I have expressed my idea on the duties of this officer in art. 20, 29 et s. of the Draft Convention for the Creation of an International Criminal Court. Concerning the procedure before an International Court, special rules should be adopted. I have endeavoured to draft such rules in the Draft Convention for the Creation of an International Criminal Court.

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H

Custody of the accused pending trial and punishment of those convicted should be the business:

1. of the State concerned in a case of a trial before the national courts;
2. of an international body, controlled by the international court in case of a trial before the international court.

The execution of sentences could also be entrusted to the State upon request of which the prosecution was started, but in this case some international supervision would be necessary. (see art. 23, and 48 to 50 of the Draft Convention for the creation of an International Criminal Court.)

I

There is no doubt that the Allied Powers should be urged to stipulate in the Armistice terms for the handing over of alleged criminals, but in order to avoid any exercise of reprisals or any injustice these criminals should only be handed over to an international court and not to national courts. Any measure which bears the stigma of revenge and injustice should most carefully be avoided.

J

In order to procure the extradition of persons accused who have sought refuge in neutral countries, we ought to recommend the Allied Governments to warn neutral countries to take care not to admit any persons suspected of having committed any offences arising out of and incidental to the war, and to expel those who enter unlawfully. Some sort of agreement should be reached with the neutral Governments as soon as possible as to the interpretation of what is a political offence. (cfr. my Memorandum on Retribution for War Criminals, page 4.)

K

(1) Defence of superior orders: (cfr. my Memorandum on retribution for War Criminals, page 10: commentary on art.6 of Draft Convention.)

(ii) Immunity of the Head of a State and of other State officials.

Notwithstanding the important precedent of the Netherlands refusal to surrender the Kaiser, I feel we should do all we can in order to have the principle recognised that the immunity of the Head of the State, although it is essential in internal matters, should not be maintained in external matters.

L

This statement would certainly be useful, but I feel that this war is already too far advanced to give such statement any practical effect.

M

The answer is affirmative.

N

List of Governments which have to my knowledge already published documents relating to war crimes:

Poland: "The German Occupation of Poland"

U.S.S.R.: 3 Notes have been handed over to the Allied and Neutral Governments.

Furthermore I have submitted to the Commission notes which were sent to me by the following Governments:

Norway	(11th December 1941)
Luxemburg	(23rd February 1942)
Czechoslovakia	(30th December 1941)
Free France	(16th December 1941)
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COMMITTEE ON CRIMES

AGAINST

INTERNATIONAL PUBLIC ORDER

PUNISHMENT OF WAR CRIMES

MEMORANDUM

by

PROFESSOR H. LAUTERPACHT

MEMORANDUM

by

Professor H. Lauterpacht

I.

This memorandum is primarily in the nature of introductory observations on the matters covered by the Questionnaire sent out by the Chairman of the Committee on Crimes against International Public Order. The memorandum is concerned, as far as possible, exclusively with the legal aspect of the question of the punishment of war crimes at the close of the second World War. Admittedly, the subject matter of the enquiry is such that it is not always easy to keep apart the political and the legal sides of the issue. On the whole, we shall find no difficulty in drawing a satisfactory line of demarcation if we take care to preserve the distinction between the following two questions: Is the punishment of war criminals desirable, expedient and practicable? To what extent does international law authorize the effective punishment of war crimes?

The first question is, to a large extent, one of political resolve in the same sense in which, within the State, the decision whether a prosecution ought to be instituted partakes occasionally of the character of the exercise of political discretion. The question of the expediency of applying the law and of making it prevail at successive stages before and after judgment has been passed is a matter of politics. The relative merits and disadvantages of providing a deterrent against criminal violations of the law of war; of the prospective effectiveness of such deterrent; of taking into account a widespread and not inherently reprehensible desire for retribution; of the consequences of impunity upon national and international law and morality; of the desirability, partly in the interest of the culprits, of containing a bitter and ruthlessly suppressed craving for revenge within the channels of a regularised legal procedure; the effects of a policy of punishing war crimes upon the prospects of reconciliation or, at least, of a return to

a minimum degree of normalcy in international relations — all these factors are within the category of political considerations. They must be left here out of account.

There is, however, one series of considerations which lie in what may be described as the realm of legal policy and which the international lawyer and those who have at heart the future of international law may find it difficult to leave on one side. There is ample room for the view that the punishment of war criminals is required for the sake of the restoration and of the maintenance of the authority of international law. War crimes are crimes against international law. Punishment of these crimes, however distasteful it may be in its concrete application, is a by no means belated measure of enforcement of international law. The restored law of nations must abandon the view that it is a system of law whose instrumentalities and modes of enforcement are confined to pressure of public opinion and pecuniary compensation, and that as it is a law between, but not above sovereign States, the very idea of punishment is repugnant to its fundamental notions. The reconstituted law of nations must reject the idea that it is, in this matter, doubly impotent for two contradictory reasons usually adduced in support of this view: (1) for the alleged reason that it is legally inadmissible to punish the State as such on the ground that the corporate entity of the State cannot properly be deemed to possess a criminal intent and be the object of criminal punishment in the persons of its organs; and (2) for the alleged reason that it is legally improper to visit punishment upon individuals on the ground that the precepts and the injunctions of international law are not addressed to individuals but to the corporate entity of the State. These views were expressed with particular reference to the question of war crimes in reckless disregard of the fact that the potentialities for infinite and often irretrievable mischief inherent in the modern State call for an intensification rather than a relaxation of the repressive, deterrent and punitive consequences of criminal conduct.

It is believed to be within the province of a body of lawyers engaged in a judicial enquiry of the kind undertaken by the Committee on Crimes against Public International Order to dissociate themselves and their findings from views of this nature.

Once we have dissociated ourselves from a trend of thought which is juridically unsound and retrogressive, we shall be justified in giving full weight to any possible legal limitations upon the right of the victor to punish enemy nationals accused of war crimes. The task of a conscientious juridical enquiry is to ascertain to what extent, having regard to existing rules of international law and to fundamental legal principles, the punishment of war criminals must be kept within confines less wide than those indicated by the apparent enormity of the acts which call for the application of the full rigour of the law. These limits are determined:

- (1) by the scope of acts to be designated as war crimes;
- (2) by the necessity of providing safeguards of impartiality and of a minimum standard of mutuality;
- (3) by the fact that war criminals may take refuge in neutral States;
- (4) by the objection, which the practice of totalitarian States has not rendered obsolete, to the retroactive application of the law both in the substantive and procedural spheres;
- (5) by the absence or the varying degrees of criminal mens rea as the result:

- (i) of the obedience to superior orders;
- (ii) of the uncertainties of rules of warfare;
- (iii) of the operation of reprisals.

The object of this memorandum is to consider these factors in some detail. In doing this we must bear in mind that it is essential that the punishment of war crimes should take place on the basis of and within the limits of international law. Circumstances accompanying the defeat of Germany and of her allies, the confusion surrounding the transfer of

authority in the occupied countries in Europe and elsewhere, and the release of suppressed passions may result in acts of summary retribution which no amount of foresight and magnanimity may be able to prevent. But in so far as the punishment of war crimes is intended to take place within the framework of a legal process, it will enhance both its effectiveness and the authority of international law if such limitations as the law of nations imposes are rigidly adhered to. Moreover, there must not only be in fact just punishment. That punishment must also appear to be just and in accordance with the law as the result of the effective provision of practicable measures of impartiality and mutuality. Finally, care must be taken to avoid that source of frustration which is the inevitable result of confusing war crimes proper with other conduct of a criminal nature and of attempting to cope with both in the course of the same procedure and with the help of the same machinery. It is convenient to discuss this last question first.

II

The Scope of Prosecution of War Crimes.

War crimes are not the only crimes of an international character perpetrated by the Government of Germany and the German authorities generally since the advent to power of the Nazi regime. Before and after the war which broke out in 1939, the Nazi regime has become responsible, as against large sections of German nationals, for a policy of suppression and extermination of a kind and on a scale which have shocked civilized mankind, which have imposed burdens upon other States, and which because of their magnitude and barbarity were well calculated to supply a legal basis for humanitarian intervention. It is not believed that a political decision of a legislative nature to exact, with respect to such acts, retroactive punishment and compensation for the victims would be contrary to justice or repugnant to the spirit of the principles which must underlie any progressive international order. Probably it would be proper for the Committee to put on record its views in the above sense. But such acts are not war crimes and ought not to be confused with them.

The same considerations apply to the crime of war, as distinguished from war crimes, for which the German Government made itself responsible by resorting to war in violation of its voluntarily undertaken and repeatedly re-affirmed international obligations. In this matter the position is different from that which obtained in 1914 and which prompted the Commission on Responsibilities set up in 1919 by the Paris Conference to declare that "by reason of the purely optional character of the Institutions at The Hague for the maintenance of peace (International Commissions of Enquiry, Mediation and Arbitration) a war of aggression may not be considered as an act directly contrary to positive law". The law of any international society worthy of that name must reject with repro-

bation the view that between nations there can be no aggression calling for punishment, and it must consider the responsibility for the premeditated violation of the General Treaty for the Renunciation of War as lying within the sphere of criminal law. That responsibility embraces such clearly warlike acts as that perpetrated in the form of the invasion and proclaimed annexation of Czechoslovakia in March, 1939. Here, once more, it would be within the province of the Committee to dispel doubts by stating that its preoccupation with the task allotted to it is in no way expressive of the view that the crime of war, in violation of existing law, is not a proper object of international criminal proceedings against its principal authors. But, as stated, the crimes of war are not war crimes and their punishment must be subject to a different legal procedure.

If we take these precautions, we shall be in a position to disregard the objection that the result of the undue emphasis placed on the punishment of war crimes may well be to distract attention from equally heinous manifestations of criminality on the part of the German Government in the past.

Any juridical consideration of the question of the punishment of war crimes must, if it is to avoid confusion and dispersion of effort, be limited to war crimes proper, i.e., crimes committed during the war and arising out of violations of the laws of war. However, that process of elimination does not solve the principal difficulty so long as we are not clear as to what is a war crime. Does every violation of a rule of warfare constitute a war crime? Is there a definition of war crimes? It appears that, in this matter, textbook writers and, occasionally, military manuals and official pronouncements, have erred on the side of comprehensiveness. They make no attempt to distinguish between violations of rules of warfare and war crimes. And yet some such distinction must be attempted if the prosecution for criminal acts, the retribution for which, in the words of the statement of the British Prime Minister

of October 25, 1941, "must henceforth take its place among the major purposes of the war", is not to assume dimensions which will render it unwieldy to the point of ineffectiveness. The Commission on Responsibilities set up by the Paris Conference in 1919, included under the list of charges of war crimes such acts as "usurpation of sovereignty during military occupation", "attempts to denationalise the inhabitants of occupied territory", "confiscation of property", "exaction of illegitimate or exorbitant contributions and requisitions", "debasement of the currency and issue of spurious currency", "imposition of collective penalties", and "wanton destruction of religious, charitable, educational, and historic buildings and monuments". In view of the comprehensiveness of this list it is in the nature of an anti-climax to learn that the number of persons whose delivery the Allied States eventually demanded was only eight hundred and ninety-seven. It is probable that one of the reasons for the failure to give effect to the decision to prosecute war criminals after the first World War was the extent of the list of offences as adopted by the Conference and the absence of a distinction between violations of international law and war crimes in the more restricted sense of the term.

In drawing up, in an exhaustive fashion, the list of war crimes the Paris Commission followed the somewhat academic treatment of the subject in some of the manuals of military law. The British Manual, following closely the section on "Punishment of War Crimes" in Oppenheim's International Law (vol. II, §§ 251 and 252), opens with a vague and somewhat tautologous definition of "war crime" as "the technical expression for such an act of enemy soldiers and enemy civilians as may be visited by punishment or capture [sic] of the offenders" (Chapter XIV, s. 441). These war crimes may be divided, according to the Manual, into four categories:

(1) violations of the recognised rules of warfare by members of the armed forces;

- (2) illegitimate hostilities in arms committed by individuals who are not members of the armed forces;
- (3) espionage and war treason;
- (4) marauding.

We are concerned only with the first group. Within this the Manual enumerates as "the more important violations" the following: making use of poisoned and otherwise forbidden arms and ammunition; killing of the wounded; refusal of quarter; treacherous request of quarter; maltreatment of dead bodies on the battlefield; ill-treatment of prisoners of war; firing on undefended localities; abuse of the flag of truce; firing on the flag of truce; abuse of Red Cross flag and badge, and other violations of the Geneva Convention; use of civilian clothing by troops to conceal their military character during battle; bombardment of hospitals and other privileged buildings; improper use of privileged buildings for military purposes; poisoning of wells and streams; pillage and purposeless destruction; ill-treatment of inhabitants of occupied territory.

The above enumeration is admittedly by way of example. In that order of thought, a more detailed list might include such violations of the rules of warfare as capturing enemy vessels employed in coast fisheries, or vessels charged with scientific or philanthropic missions; interference with mail boats or mailbags in breach of Hague Convention No. XI; unjustified destruction of enemy prizes; laying mines in breach of Hague Convention No. VIII; violation of such accepted rules of international law as exist in the matter of contraband and blockade; or the breach of any of the numerous and detailed provisions of the Geneva Convention of 1929 on the treatment of the sick and wounded and of prisoners of war.

It must be a matter for serious study and discussion to what extent an attempt to penalise by criminal sanction all and sundry breaches of the law of war under the head of punishment of war crimes in pursuance of the terms of the armistice would blunt the edge of the major purpose and tend

to blur the emphasis which must be placed on the punishment of war crimes proper in the limited sense of the term. These may be defined as such offences against the law of war as are criminal in the ordinary and accepted sense of fundamental rules of warfare and of general principles of criminal law by reason of their heinousness, their brutality, their ruthless disregard of the sanctity of human life and personality, or their wanton interference with rights of property unrelated to reasonably conceived requirements of military necessity. There is room for the view that the punishment of war crimes by the victorious belligerent or by an international agency ought to be limited to offences of this nature - offences which, on any reasonable assumption, must be regarded as condemned by the common conscience of humanity. Suggestions for some such limitation will occasionally be found in textbooks. Hall, in his weighty and precise manner, expressed an opinion to this effect. Referring to the right of the belligerent of "punishing persons who have violated the laws of war, if they afterwards fall into his hands", he points out that no objection can be felt to the exercise of this right "so long as the belligerent confines himself to punishing breaches of universally acknowledged laws" (International Law, 3rd ed., 1883. s. 135). More recently, an able Italian writer, in a careful examination of the question, has suggested some such limitation (Balladore Pallieri, La Guerra, 1935, p. 385).

The task of defining, from this point of view, the scope of violations of the laws of war which ought to fall within the purview of punishment of war crimes by allied tribunals is one of considerable difficulty. A seemingly administrative act of a political nature, like deportation or segregation of large sections of the population of the occupied territory, may, in its effects upon human life and in the cruelty of its execution, be indistinguishable from the common crime of deliberate murder. But the task ought, it is believed, to be attempted. (The result of the differentiation thus established between the ^{two} categories of violations of the law of war would not necessarily be to render immune from punishment or from the duty of compensation the less heinous manifestations of lawlessness. But

these would be governed by a different procedure; in particular they would not be covered by the demand for immediate surrender as part of the armistice stipulations.) It is not possible to accept the view that the punishment of war crimes must be left to the courts of the United Nations and that any attempt to link up the joint demand for the surrender of war criminals with a detailed enumeration of war crimes included in the demand ought to be deprecated. Any common policy of the United Nations in the matter will be to some extent devoid of substance unless, in addition to jointly guaranteed safeguards of impartiality, it is accompanied by an understanding as to the scope of offences in respect of which surrender of war criminals is to be sought and effected. Such an understanding may have to be the result of prolonged study and discussion. It probably constitutes the principal aspect of the question as to "What crimes should the Committee deal with?" - a question which means, in effect: "Which violations of the law of war shall be included as part of the armistice stipulations in the demand for the delivery of war criminals and their trial by the courts of the United Nations?"

Other aspects of this problem appear, in comparison, to give rise to little or no difficulty. War crimes to be prosecuted must properly be those arising out of defined violations of rules of international law or of criminal law generally, wherever committed in connection with the war by the German Government, or its armed forces, or its civil authorities, or other persons acting either by authority of the German Government or without such authority since August 31, 1939 - in the case of Czechoslovakia possibly since March 1939 - and affecting injuriously the United Nations or their nationals. Probably no material assistance will be found in an attempt to distinguish between the acts of the German State as such and acts attributable directly to individuals. All acts of the State are attributable to individual persons. There are none which cannot be traced to a decision of an individual or of a plurality of individuals. Neither is it helpful to establish a distinction between offences against life and limb and those against property. Pillage, plunder and arbitrary destruction of private and

public property may, in their effects, be no less cruel and deserving of punishment than acts of personal violence. There may, in effect, be little difference between executing a person and condemning him to a slow death of starvation and exposure by depriving him of shelter and means of sustenance. Finally, no just or working test of distinction can be found in the possibility of establishing a direct connection between the criminal act and any individual victim or victims. The person who issues general orders for the killing of hostages is no less guilty than the person to whom we may be able to bring home a specific order for shooting a particular hostage or group of hostages. A commander who issues a general order calculated to prevent the saving of life after the sinking of merchant vessels is no less guilty than an officer or soldier who is found to have committed on his own initiative a crime of this kind. Assuming that indiscriminate bombardment of towns for the purpose of terrorizing the civilian population and the deliberate machine-gunning of civilian refugees are to be treated as war crimes irrespective of the plea of superior orders, the mere fact that an individual formed part of a bombing squadron responsible for such acts may be sufficient to stamp him as a war criminal although it is impossible to prove a direct connection between his conduct and the death of any individual person. Some legal systems recognise that when a group of persons, such as a gang of robbers, commit a crime, each and every member of the group may be convicted without proving that any particular member committed the criminal act.

III

The Legal Basis of Prosecution for War Crimes.

What is the legal basis of any armistice terms providing for the delivery to the United Nations, prior to the conclusion of the Peace Treaty, of nationals of Germany and of her Allies accused of having committed violations of the law of war and for the trial of these persons by the courts of the United Nations? Is it the mere right of the victor exacting vindictive retribution from the defeated State and challenging accepted notions of equality before the law by the underlying assumption that his — the victor's — forces or authorities have been free of any imputation of war crimes? Or is it a right which is firmly grounded in the principles and in the practice of international law and in the municipal legislation of most States? It is of the greatest importance both for the eventual effectiveness of the punishment of war criminals and for the authority of international law that the Governments of the United Nations should, in approaching and executing the task of punishing war criminals, be fully conscious of the unimpeachable legal basis of their action. It is equally important that public opinion in the United Nations and in the world at large should be made cognisant, in language as devoid of technicalities as possible, of the legal grounds of that action. It is a legitimate function of jurists to assist in this matter both the Governments of the United Nations and the cause of international justice.

There will be many who will urge that the war crimes committed by Germany in the second World War have been so unprecedented in their premeditation and ruthlessness as to warrant a departure from accepted forms and procedures of international law. However, it is unwise to jettison rashly the aid which existing law is in a position to offer. It is doubly unwise to do so at the close of a war the essential purpose of which is to vindicate and to restore the law of nations. For a considerable period after the first World War German writers gave emphatic

and repeated expression to the accusation that the demand of the Allies for the delivery of war criminals was in flagrant contradiction both with international law and general principles of law. They were supported by writers in other countries. It may be of interest, as showing the strength of the feelings of German jurists on the subject, to quote a passage from the Opinion of Professor Meurer, a German Privy Councillor and an international lawyer of repute, delivered in the course of the work of the Commission on War Crimes appointed by the German Reichstag after the first World War. Referring to Articles 228 - 230 of the Treaty of Versailles, he said: "The Allies thus imposed upon Germany a breach of most elementary legal principles and a forced departure from entire German legal history. Already in 1356 the Golden Bull prohibited 'for all times' the delivery of Germans for punishment by a foreign State. It declared that this prohibition was merely a confirmation of an immemorial right and custom. The German Government could not, it is true, prevent Articles 228 - 230 of the Treaty of Versailles from becoming law, but when it came to giving effect to their provisions, the torn German people rediscovered its unity and resisted like one man a demand which constituted a cultural outrage" (*Völkerrecht im Weltkrieg*, vol. III (1), p. 57). It is of importance, so far as this lies with the United Nations, to put beyond doubt the inaccuracy of any similar accusation.

The first relevant fact in the situation is that the practice and the doctrine of international law as well as the municipal law of a considerable number of States recognise that a belligerent is entitled to punish for war crimes those members of the armed forces of the opponent who fall into his hands. There is hardly a dissenting voice in the general approval of that rule. Neither is it a new doctrine in international law. Francisco de Vitoria, writing in 1532, stated the underlying principle in *De Jure Belli*: "..... etiam parva victoria, recuperatis rebus, pace etiam securitate habita, licet vindicare injuriam ab hostibus acceptam, & animadvertere in hostes, & punire illos pro injuriis illatis..." He elaborated the wider reasons of the validity of this principle:

" nec pax, nec tranquillitas, quae est finis belli, aliter haberi potest, nisi hostes malis & damnis afficiantur, quibus deterreantur, ne iterum aliquid tale committant" (V. Prop., 19). Grotius, while pleading for prisoners of war who have surrendered or desire to do so, says: "in order to warrant their execution it is necessary that a crime shall have been previously committed, such a crime, moreover, as a just judge would hold punishable by death" (Book III, XVI. I.). Christian Wolff, the German philosopher and lawyer, writing in 1764, reproduces, almost literally, the same view (Jus Gentium Methodo Scientifica Pertractatum, § 798). Johann Jakob Moser, a leading German positivist writer of the same period, is even more emphatic: "Enemy combatants who act contrary to international law need not, when they fall into the hands of the belligerent, be treated as prisoners of war, but may be treated as robbers, murderers, and so on" (Grundsätze des Völkerrechtes in Kriegszeiten, 1752, § 18). The Institute of International Law expressed the same view in 1882 (Annuaire, V (1881-1882), p. 174). Holland, writing in 1908, was very definite on the subject: "Individuals offending against the laws of war are liable to such punishment as is prescribed by the military code of the belligerent into whose hands they fall, or in default of such code, then to such punishment as may be ordered, in accordance with the laws and usages of war, by a military court. . . . When a whole corps systematically disregards the laws of war, e.g., by refusal of quarter, any individuals belonging to it who are taken prisoners may be treated as implicated in the offence" (The Laws of War on Land, §§ 117, 118). It is unnecessary to add to these citations of authorities.

As will be submitted presently, this generally acknowledged right of the belligerent to punish enemies guilty of war crimes, far from being irrelevant to the question of the legal propriety of demanding the handing over of criminals to the victorious belligerent, is closely related to it. In the meantime it is sufficient to note that the general recognition of that right supplies a conclusive answer to those who regard as legally abhorrent the idea of the belligerent, favoured by the accident of being able to possess himself of the person of the enemy, acting as judge in his

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own cause. In the absence of a reasonable prospect of war crimes being punished by the offender's own State, there may be justification, subject to practicable judicial safeguards, in risking the taint of partiality associated with the application of the law by the injured State.

However, the generally acknowledged right of the belligerents to penalise the infractions of the law of war by the nationals of his opponent is grounded in legal considerations more persuasive than the mere fact of the general recognition of that right. What are these considerations? In so far as war crimes have been committed in the territory of the belligerent who is in the position to inflict punishment, they may be deemed to be covered by the ordinary territorial principle of criminal law. A State is entitled to punish crimes committed on its territory. (In relation to the other belligerent there is, of course, no question of the operation of the principle of immunity of armed forces on foreign soil. The ordinary rules of extraterritoriality, based on international comity and consent implied from the mutual respect for the rights of sovereignty in time of peace, do not obtain in time of war. Even in time of peace the operation of the principle of extraterritoriality of foreign armed forces stops short of an immunity for acts directed against the safety of the State). The application of the territorial principle covers, in the first instance, all violations of international law in the territory under military occupation of the enemy — the main source of war crimes in the second World War. For it is fundamental that the territory occupied by the enemy remains under the sovereignty of the belligerent temporarily divested of his jurisdictional rights. The same territorial principle includes crimes committed in and from the air over the territory of the State assuming jurisdiction. The question of the extent to which acts committed in the course of air warfare may properly come within the purview of punishment of war criminals is discussed below, but there ought to be little doubt that, in so far as they have taken place over the territory of the State which is in the position to claim jurisdiction, they are covered by the territorial principle. This is so particularly in view of the almost universal acceptance of the principle of the sovereignty of the States in the superincumbent air. The same applies, finally, to

acts committed on the high seas by naval or air forces of the enemy — acts whose effect takes place on the vessels of the belligerent claiming the right to punish war crimes. This extension of the territorial principle received the approval of the Permanent Court of International Justice in The Lotus case; prior to that case it had substantial authority behind it. Thus interpreted, the territorial principle covers effectively any war crimes committed against vessels — and their passengers and crews — of the United Nations by enemy ships or enemy aircraft.

The territorial principle — the principle that a State is entitled to punish unlawful acts committed within its territory by nationals and aliens alike — supplies a substantial explanation of the existing rule authorising a belligerent to punish war crimes committed by the enemy. In the circumstances of the second World War where the military operations have so far taken place mostly in the territory of the opponents of Germany and of her allies, it embraces the by far greater part of war crimes. There still remain acts committed in the territory of the adversary. These include, for instance, maltreatment of prisoners of war and of enemy aliens. With regard to such acts the belligerent may, in applying his municipal law to war criminals, be deemed to rely on the rule, which many States apply and which general international law has not stigmatised as illegal, that a State may punish criminal acts committed by foreigners abroad against its own safety or against its nationals.

There would, accordingly, appear to exist a broader basis, in addition to an uncontroverted custom of warfare, for the rule of international law which concedes to belligerents the right to punish such war criminals as may fall into his hands. That basis is the generally recognised right of the State to punish crimes committed within its territory as well as the right claimed by some States and not denied by international law to punish crimes wherever committed against the safety of the State and its nationals. However, this explanation of the established rule lacks the persuasive force which is indicated in the circumstances unless we realise that the belligerent is, in essence, enforcing not only his municipal law,

but also the law of nations. The war criminals are punished, fundamentally, for breaches of international law. When we say that the belligerent inflicts punishment upon war criminals for the violation of his municipal law, we are making a statement which is partly incorrect and partly only technically correct: in the sense that the relevant rules of international law are being applied, by adoption or otherwise, as the municipal law of the belligerent. Primarily, punishment is inflicted for the violation of international law. When the British Military Manual authorises punishment for the violation of "recognised rules of warfare" it is referring to violations of international law, and not of British municipal law. The rules of warfare, like any other rules of international law, are binding not upon impersonal entities, but upon human beings. The rules of war are binding not upon an abstract notion of Germany, but upon members of the German Government, upon German individuals exercising governmental functions in occupied territory, upon German officers, upon German soldiers. When we say that a belligerent has the right to punish members of the enemy forces for violations of the Hague Convention, we do not intend to say that he has the right to punish them for the infraction of his municipal law. For the Hague Conventions have not, in the case of most States, become part of their municipal law by any express act of incorporation.⁽¹⁾ In no other sphere does the view that international law is binding only upon States but not upon individuals lead to more absurd consequences and nowhere has it in practice been rejected more

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(1) In Great Britain the Hague Conventions ratified by this country are probably binding upon Courts independently of special legislation (see McNair, *The Law of Treaties*, (1938), p. 17). In Germany, Convention No. IV was appended in 1911 as Annex II to the Army Regulations. This was only loosely in accordance with Article I of the Convention which laid down that "the Contracting Powers shall issue instructions to their armed forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention." In March 1914 the German military authorities issued regulations covering collective punishment which the Reichstag Commission on War Crimes designated as clearly contrary to the Hague Regulations. When in 1901 Major Friederich was instructed to prepare for the use of the army a manual entitled "Customs of War on Land" (*Kriegsbrauch im Landkriege*), he did not refer to the Hague Regulations. He testified on oath before the Commission that he had no detailed knowledge of the Hague Regulations at that time (*Völkerrecht im Weltkrieg*, I. p. 27). The comprehensive Italian Code of the Laws of War and Neutrality of July 8, 1938, does not refer to the Hague Conventions.

omphatically than in the domain of the laws of war. The direct subjection of individuals to the rules of warfare entails, in the very nature of things, a responsibility of a criminal character.

Some confusion has been caused, without good reason, by such provisions as Article 3 of the Hague Convention No. IV which lays down that "a belligerent party which violates the provisions of the Regulations shall be liable to pay compensation", and Article 24 of the unratified Hague Rules of Air Warfare according to which a belligerent State is liable to pay compensation for injuries to persons or property caused by the violation by any of its officers or forces of the provisions relating to aerial warfare. (1) From these and similar rules the conclusion was drawn that the responsibility for the violation of rules of warfare is limited to pecuniary compensation. There ought to be no doubt that these provisions refer to the responsibility of the State as a whole, and that they were not intended to exclude the responsibility of individuals or the customary right of States to punish enemy individuals for the violation of rules of war.

There is a weighty additional reason why the Hague Conventions must be considered to be binding upon individuals irrespective of the question whether they have been expressly incorporated as part of municipal law. This is so for the reason that they formulate and are largely declaratory of the fundamental rules of warfare as dictated by generally recognised principles of humanity. The same applies to the main aspects of the provisions of the Geneva Conventions on the treatment of prisoners of war or of sick and wounded or of the London Naval Treaty of 1930 and of the London Protocol of 1936 in respect of the elementary duty of safeguarding the lives of civilians in submarine warfare. In their broad purpose as distinguished from specific regulations, these international conventions

(1) The Commission which drafted the Rules decided not to include a provision for the punishment of persons guilty of breaches of the crucial articles of the Rules. But, it added, "its absence will not in any way prejudice the imposition of punishment on persons who are guilty of breaches of the laws of aerial warfare". (Cmd. 2201, p. 59).

are expressive, in the words of the preamble to the Hague Convention No. IV, "of the principles of the law of nations, derived from usages established among civilised peoples, from the laws of humanity, and from the dictates of public conscience." Similarly, the relevant provisions of the London Naval Treaty of 1930 are expressly prefaced by the significant statement: "The following are accepted as established rules of international law." When the German Supreme Court, on July 16, 1921, in the case of the Llandovery Castle, found the accused guilty of killing defenceless persons in life-boats, it did so on the ground that they acted against a clear and uncontested principle of international law as against which even the plea of superior order offered no defence.

The above considerations supply also a corrective to any undue preoccupation with the question as to what law shall be applied in connection with the prosecution and the punishment of war criminals. That law must be, primarily, the law of nations. The fact that it may be regarded as forming part of the municipal law of the belligerents in question is a convenient but in no way essential addition to the strength of the jurisdictional claim of the belligerent proceeding to punish persons guilty of war crimes. This being so, it is proper for the United Nations to lay stress, not on any exceptional or summary character of the jurisdiction, military or otherwise, to be set up for the purpose, but on its essential conformity with the law of nations. Neither is there an adequate reason for a dispersion of effort which may result from an attempt to formulate the applicable rules of law in the matter of belligerent occupation or otherwise.

Once it is realised that the offenders are being prosecuted, in substance, for breaches of international law, then any doubts due to inadequacy of the municipal law recede into the background. In view of repeated assertions to the contrary, the United Nations ought to avail themselves of every legitimate occasion for stressing the fact that there is in this matter no question of any vindictive retroactivity arising out of the creation of crimes of which the accused could not possibly be cognisant. There is even no question of procedural retroactivity by

subjecting him to a foreign jurisdiction in defiance of established law and principles. The only problem that may call for municipal legislation is the necessity of detailed regulations and rules for the organisation and procedure of military courts or any special tribunals of a mixed military and civil character.

It has been shown that there is no novelty about the principle that a belligerent is entitled to punish such perpetrators of war crimes as fall into his hand; that that principle, far from being a mere assertion of power, grudgingly assented to by international law, on the part of the fortunate belligerent is, in turn, grounded in the fact of recognition by international law of the criminal competence of States based on the territorial and cognate principles as well as in the fact that in punishing war criminals the belligerent applies and enforces, in essence, the rules of the law of nations which are binding upon the individual members of the armed forces of all belligerents; that there is thus no question of any retroactive application of the law either from the substantive or the jurisdictional point of view; and that it is of the utmost importance that this aspect of the legal position should be made abundantly clear at every relevant stage.

There is, however, a further difficulty to be met. Admitting that the belligerent is entitled to punish enemy war criminals who happen to fall into his hands, where is the warrant, in addition to the undoubted right of the victor to lay down the conditions of the armistice, for the claim that the defeated State should hand over war criminals to the victorious belligerent? It is open to the United Nations to declare that in view of the unprecedented character of criminality which characterised the conduct of Germany and her treatment of the population of the territories occupied by her, they feel justified in assuming the responsibility for repeating the innovation introduced by the Peace Treaty of Versailles regardless of any other pre-existing precedent. There will be many who will urge that a declaration of this nature is preferable to any attempt to adduce legal argument in support of the action taken.

The view taken in the present memorandum is that it would be wrong,

in this matter as in others, to disdain any assistance which established law may offer. International law permits the punishment of war criminals regardless of the manner in which they happen to fall into the power of the belligerent. The war criminal may fall into the hands of the enemy as a prisoner of war in the course of military operations. Or this may be the result of the occupation before or after the armistice or even after the peace treaty - of the territory of the enemy. Such occupation may be actual or, in the case of the total defeat of the enemy, it may be constructive. When the enemy has been totally defeated, the adversary may proceed to the occupation of the entire enemy territory - a course which, with regard to German territory, was advocated by some at the end of the first World War and which is likely to be urged at the conclusion of the present war. In that case he is legitimately in the position to lay his hands on the offenders. If, while abstaining voluntarily from occupying the territory of the defeated belligerent, he stipulates for the handing over of the criminals, what he is in fact doing is to exact from the authorities of the defeated State the performance of a function which he would be in the position to fulfil but for the self-denying decision to refrain from occupation. The entire territory of the defeated opponent is at the mercy and within the reach of the victor. The war criminals are, constructively, in his hands. The defeated and disarmed army of the adversary, as well as its government and administration are, in a real sense, in the hands of the victorious belligerent. If the second World War ends with the occupation of the entire German territory by the armed forces of the United Nations, the war criminals will be seized, either by the occupying Powers or by the German authorities acting under their direction, and the conditions for the application of the established rule will be fully and literally realised. But the situation will not be different if for political reasons counselling restraint the victorious States will refrain from fully occupying the territory of the defeated belligerent. The rule of international law which authorises the belligerent to mete out punishment to war criminals who fall into his hands thus covers fully the case of his right to punish those who are, at his